

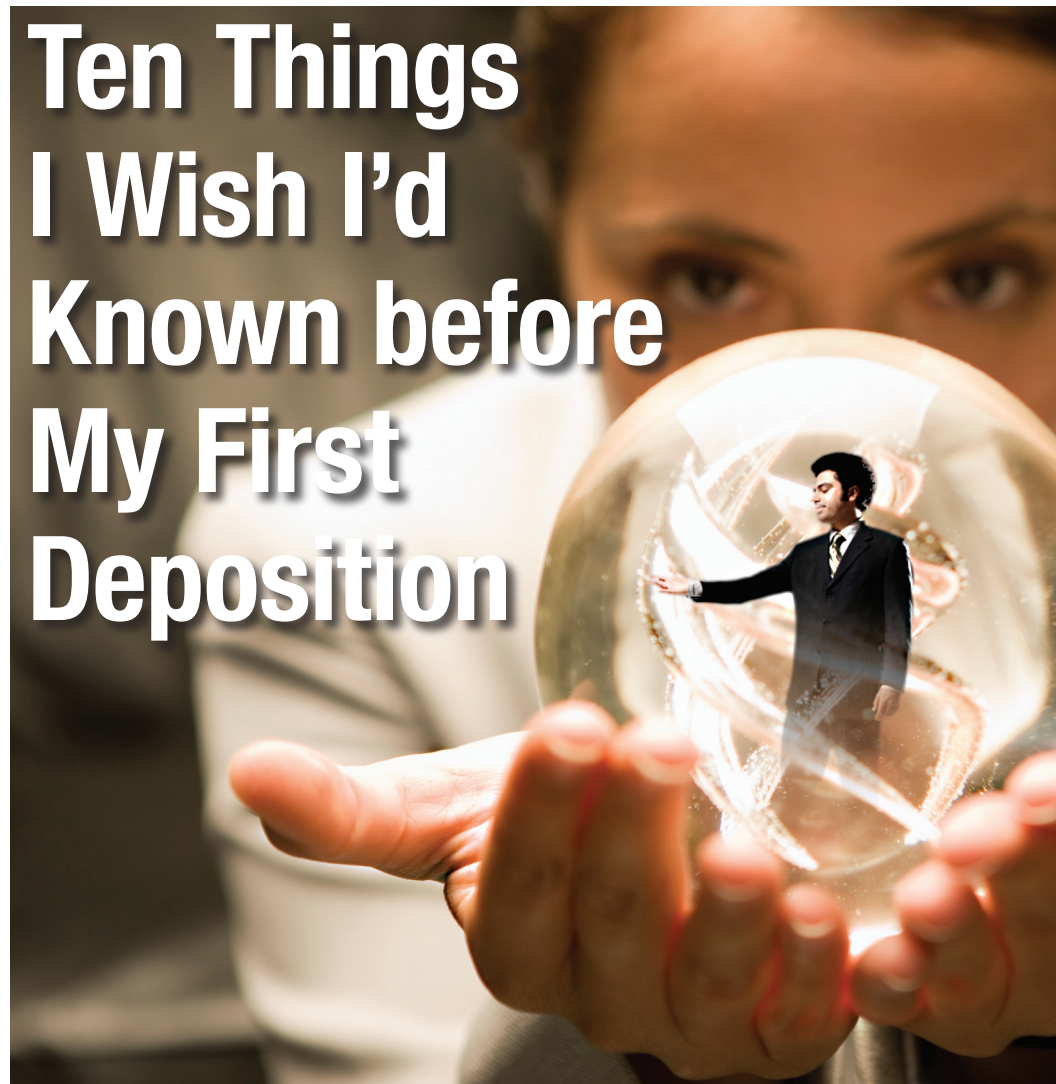


Now You Don't Need
a Crystal Ball

By Lana Alcorn Olson

Advice to make
you seem like a pro
from the start.

Ten Things I Wish I'd Known before My First Deposition



You've probably read plenty of articles about how to prepare for a deposition: know the claims in the case, know the law and what you have to prove/defend against, be organized and have extra copies of your pre-marked

deposition exhibits. Those are all excellent things to do. Any good lawyer will tell you that preparation is key, regardless of whether you are taking or defending a deposition. But aside from the basic preparation aspects of a deposition, there are hosts of other things

that can make a big difference in the effectiveness of a deposition. It's the little things that can make or break it for you—things that your senior partner may have never thought to tell you before she sent you out to take your first solo deposition.



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Thinking back, I certainly have a list of things that I wish I'd known before I took my first deposition. Although most people's first solo deposition is something they'd like to forget quickly, there are many things you can do aside from general preparation work that can make you seem like a pro, even if you're not one quite yet. So, here it goes... the top ten things I wish I'd known before my first deposition:

I wish I'd known more about the lawyer on the other side. Do some research on the lawyer who will be taking or defending the deposition. Look him up on the Internet. Ask around your office. Talk to people who have worked with him before and find out what his deposition style is. Is he easy-going? Is he the kind of lawyer who objects after every question regardless of whether

or not the question is objectionable? Does he tend to make "speaking" objections to try and coach his witness? Or does he just read the newspaper while his client answers your questions during the deposition? Knowing in advance what to expect can help you plan your strategy and can help you anticipate (and prepare for) problems that might arise.

I wish I'd known to videotape certain depositions. You should always consider whether or not to videotape a deposition. Even if the other side doesn't notice it as such, you can file a cross-notice informing them of your intent to videotape. There are times when videotaping can be invaluable. Difficult lawyer on the other side? Videotaping can often help control this kind of lawyer because he knows he's on video (at least his voice is). If you have a really difficult witness, you may want to consider videotaping the deposition using a split screen that will show both the witness and the other side's lawyer. You just need to provide notice of your intent to do this. Have a witness who you believe may be combative or may not make a good witness for the other side visually? Videotaping him can be a powerful tool, especially if the witness is not a party or is outside the trial court's subpoena power. There is a huge difference between having someone read a transcript to the jury and allowing the jury to see and hear the witness on videotape. It can sometimes make or break your case. Having videotaped depositions can also be very helpful if you plan to do any type of jury research in your case. Getting feedback from the mock jurors on the actual witnesses is always preferable to having actors play the roles.

I wish I'd really known all of the rules of the game. And there are rules; several very important ones. First, know what "usual stipulations" mean in your jurisdiction. And don't just memorize the list—make sure you really *understand* them and know if there are particular things that courts in your jurisdiction consider waived if a form objection is not made. If you are outside your home jurisdiction, make sure that you know which state's rules you are operating under and say so on the record. You should also know what to do if the lawyer on the other side *doesn't* agree to the usual stip-

ulations—that actually happens on occasion and you need to be prepared to adjust accordingly! For your first few depositions, make a little "cheat sheet" that you can keep in your deposition notebook for easy reference that lists the form objections (leading, argumentative, compound, ambiguous, assumes facts not yet established, calls for speculation, improper characterization of earlier testimony, cumulative/repetitive), so you can look at it quickly if you are asked the basis of your objection by opposing counsel. Second, know what the time limit is for depositions in your case (whether you are operating under a case management order or applicable procedural rules). If you know that you are going to need more than the standard time allotted, get an agreement from the opposing lawyer or permission from the judge ahead of time if you can.

I wish I'd known when to call the trial judge. Take your trial judge's number with you and don't be afraid to use it... if you really need to. But before you do, make sure you *really* need to use it and make sure you've made a good record as to your particular issue(s) before you make that call. Judges hate dealing with deposition problems and you don't want to bug a busy trial judge with trivial issues. You also don't want to have to call the judge numerous times during a deposition if you don't have to. To the extent you can, if there is an issue that you are going to have to call the judge about, make a good record and inform opposing counsel that you believe that this is an issue that you will need to raise with the judge, but move on to another topic and finish everything else before you make the phone call. Often, if you have one issue, you'll have more than one. And it's better to make *one* phone call to the judge at the end of the deposition and say that there are three specific things to discuss than to have to call the judge three different times during the day. And remember, the judge most likely is not going to know anything about your case when you call, so be prepared to give him a very short overview of the case to put the issue at hand in context. In 10 years of practice, I've only had to call a judge one time. All the other times, by the time I got to the end of the deposition and gave the opposing lawyer time to think about it, he agreed to let the witness answer the ques-



tion rather than have to explain to the judge why he wouldn't.

I wish I'd known how important it is to really listen to the witness and make sure he answers the question. I'm constantly amazed at the number of lawyers, young and not-so-young, who ask a scripted question and don't listen to what the witness

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says in response. Sometimes a witness can give you a golden nugget that you never expected. But you have to be listening for it. If you spend the deposition looking at your next question or fiddling with documents, you can miss some great stuff. Put down your pen and look at the witness when he is answering and don't look down again at your notes until you have heard everything that witness has said in response to your question. And then follow up on the things you heard him say. Along these same lines, make sure that your witness actually answers the question you asked. Some witnesses, either intentionally or unintentionally, dance around the issue and talk about things other than what you asked. Insist on an answer to the question you posed. A firm, but polite: "Mr. X, I appreciate what you said, but that's not the question I asked. The question I asked was..." is a good way to let the witness know that he's not going to get out of answering your question.

I wish I'd known the kinds of problems that bad deposition transcription can cause. Make sure you get a good court reporter. Ask around. If the deposition is out of town, get the name of a lawyer who practices there and ask who he uses. Bad written transcripts can be disastrous later on. I once had a wit-

ness who had to send in nearly 20 pages of errata sheets because the transcript was so messed up. The witness was very unhappy and it made a mess of the record. If you have concerns about the quality of the transcript, immediately call the court reporter and ask her to keep the audiotape she made during the deposition so that you can use it if need be later on if there is a disagreement about what the witness said. Also, make sure that you confirm the day before that the reporter is coming and knows when and where the deposition will be.

I wish I'd realized that I was in charge of the deposition. As Janet Jackson once sang, "It's all about control." If you are taking the deposition, remember that regardless of whether it is your first or your fifty-first, you are in control and you set the pace for what happens. Don't be a pushover, even if you feel like you are completely out of your league. I can't tell you how many depositions I went to as a brand new lawyer where I was the youngest person in the room by 20 years. It can be intimidating if you let it. There is a tendency for a young lawyer to assume that just because someone has gray hair, he knows more than you do. He may, but you have a job to do and it's your responsibility to make sure that you ask the questions you need to ask on behalf of your client. If you go slowly, that's fine. It's better to take your time, follow up on things and make sure you get what you need than to rush through it because the lawyer on the other side keeps sighing, looking at his watch, and asking how much longer you are going to be. It's an old trick and one that can make you feel rushed and pressured to finish if you let it. Don't.

I wish I'd been better about using exhibits. Say the exhibit number and identify the document by name and bates number before you use it. Regardless of whether you identify the document or have the witness do it, you need to make sure that you go through the requisite series of questions to lay your evidentiary foundation. Particularly with 30(b)(6) or company witnesses, you will need to lay the foundation for things like the business records exception. If you need to, list the elements of the foundation you need to cover on a sticky note and put the sticky note on your copy

of the exhibit so you can remind yourself of the requirements without having to flip around in your notes or outline.

I wish I'd talked to the witness like I talk to anyone else. Don't use "lawyer talk" when questioning a witness. Speak plain English. Asking someone "where you currently reside," "what is your current state of employment" or "did you take any action immediately prior to the event in question" can lead to blank stares from the witness, particularly if you are deposing a blue-collar worker who didn't get past eighth grade. But it really holds true for anyone you depose. Just talk to them and don't morph into "legalspeak" just because a court reporter is there. Just ask the witness where they live, what they do for a living, and if they did anything right before the accident. Remember, the ultimate goal is to get the best record you can for trial and that means a record that both the witness and the jury can easily understand.

I wish I'd gotten "soundbites." What do I mean by "soundbites"? They are the stand-alone questions and answers that you can easily quote in a brief or read in to the record at trial. Many times, it will take lots of questions and dozens of pages of written transcript to get answers to points that you need. It may take you thirty minutes of questioning about job history and job duties to find out that the witness was only exposed to a chemical in certain jobs during certain years. Rather than having to cite or read ten pages of the transcript into the record, it's much better to have one or two summary question and answer snippets to refer to. For example: Q: "Mr. Smith, let me make sure I have this right. During the 30 years you worked for Company X, the only time that you worked with chemical Y was when you were a technician from 1991-92 and when you were a mechanics assistant from 1997-99, is that correct?" A: "Yes." Q: "Is there any other time when you were working at Company X other than those two jobs that you believe you worked with chemical Y?" A: "No."

Taking a good deposition is an art. It takes practice and hard work, but if you put in the effort and remember these ten things that I wish I'd known, you'll be a pro (or will at least look like one) from the very beginning. 