

Representing the Non-Party Deponent Who Cares

by Philip J. Katauskas

There is a wealth of literature for a civil litigator to consult on how to represent a witness at a deposition. Two of my favorites are Malone and Hoffman, *The Effective Deposition: Techniques and Strategies That Work* (NITA 2d ed. 1996), and Suplee and Donaldson, *The Deposition Handbook: Strategies, Tactics and Mechanics* (PESI 1988). A more recent and usefully concise piece is by Handler and Hirsch, “Defending the Deposition: A Primer,” in *PP&D* (Fall 2005), a newsletter published by the Pre-trial Practice and Discovery Committee of the ABA Section of Litigation.

Those authorities advance general principles and rules that I would characterize as the minimalist approach to representing deponents; that is, they counsel a “don’t volunteer” and “just answer the question” approach. One adherent to the approach and one of my mentors, Dennis Suplee, used to liken the deponent to a hockey goalie, whose job is not to score any points, but rather to prevent points from being scored. I often tell a client-deponent that, as a defender, I will consider his deposition successful if I come out of it with my case in no worse shape than when we went in.

But, like all general rules or principles in the practice of law, this one has its exceptions. In representing the non-party deponent who has a real stake in the litigation, the minimalist approach is not the one to use. Though it involves many of the same tactics, it differs in significant ways because the goal is now two-fold: to defend against harm *and* to present the deponent’s case.

Consider this situation. You arrive at your office on a Monday morning and find a voice message from one of your firm’s corporate partners:

Good morning, this is Pete. I got a call over the weekend from Ross Parrot, the president of our corporate client,

Philip J. Katauskas practices with Semanoff Ormsby Greenberg & Torchia, LLC, in Huntingdon Valley, Pennsylvania.

Parrot Duplicating Services; we helped him restructure his company’s working capital line of credit last month. It seems that an employee in his Accounting Department, a young fellow named Ernest Cash, got subpoenaed by a big firm in Center City to testify at a deposition. Don’t know what case or which court. Ross said Ernie’s a good kid—smart, hard-working, goes to night school—and he recommended our firm to represent him. Ross’s company isn’t involved in the case in any way. It has something to do with Cash’s former employer. Can you take it from here? Thanks.

You immediately call Cash at work. It is a necessarily brief conversation, because he tells you that he is under a deadline to finish a project by the end of the day. He promises to fax you the subpoena as soon as possible, and you ask a few background questions about who subpoenaed him and why. You learn that the subpoena was issued by an insurance company of his former employer, Marginal Finance Company, a local branch of an out-of-state financial institution that now claims Cash caused financial losses during his tenure as that branch’s Chief Information Officer (CIO). He voluntarily resigned a year ago after working there for about seven years. Suit was filed after he left Marginal Finance, and he did not know about the suit until he was served with the subpoena. “I know I made some mistakes, but I didn’t mean to, and I worked nights and weekends to correct them. If they lost any money, it wasn’t my fault. I never trusted my boss; Mr. Flintley would compliment me one week and back-stab me the next. I just hope they don’t sue me. I’m worried; I can’t afford that; I will have to take out loans to pay you as it is. And I’ve never testified anywhere before.”

Like any experienced trial lawyer, you form a preliminary assessment of your client as a deponent. Cash’s tone of voice and telephone demeanor were polite; he was candid about his

worries; he readily admitted that he made some mistakes; and he sounded young, but then, most of your clients do these days.

Cash faxes you the subpoena served by the defendant insurance company. It asks for Cash's testimony as well as documents about his employment with Marginal Finance. Although the subpoena is issued out of the local federal district court, the case is actually pending in a federal district court in a neighboring state, more than 100 miles away. After a conflict check comes up clean, and you hear from your accounts receivable clerk that Cash has paid the retainer, you are ready to dig into this engagement.

From the federal court docket, you access the pleadings and the current Case Management Order and learn some basic facts about the case. Plaintiff Marginal Finance, your client's ex-employer, is seeking a declaratory judgment against its fidelity bond insurer, Arduous Assurance Company. Marginal Finance claims that its fidelity bond, which covers losses caused by an employee's lack of faithful performance or dishonesty, applies to losses allegedly caused by Cash while he was employed as the local branch's CIO. The insurance company's principal defense is that any losses were the result of Cash's negligence or other negligence by Marginal Finance, not by any dishonesty or lack of faithful performance. You also learn that, under the Case Management Order, the discovery deadline is only six weeks away, with dispositive motions due shortly thereafter. Your client's deposition is noticed for a week from today.

With this information, you telephone Cash again, inform him of what you have learned, and schedule a meeting for later in the week. Cash asks several intelligent questions about the procedural posture of the case and the implications of his testimony, questions that convince you that he is pretty smart and well-spoken. You learn that before he worked for Marginal Finance, he had earned an associate degree in information technology, and now he is going to night school to become a Certified Public Accountant.

You ask Cash to send you in advance all the documents he has that are responsive to the subpoena; to be safe, you ask that he send you all documents that have anything at all to do with his employment by Marginal Finance. And you tell Cash that he should include in his search any documents he has in electronic format on a laptop or PC (e.g., e-mails, Word files, or PDF documents) and that he should take care not to delete them. You also warn him not to discuss what his deposition testimony might be with anyone, and you counsel him not to do any independent preparation other than locate all of his responsive documents. You assure him that you will make certain that he is prepared to testify accurately and truthfully.

After speaking with Cash, you call the insurance company's local litigation counsel and leave a voice message introducing yourself as Cash's counsel and asking him to provide you copies of any deposition exhibits in advance of the deposition. That is a reasonable request, one you have agreed to, on occasion, as it can expedite a deposition. There is no obligation for counsel to provide copies of exhibits in advance, and there are often tactical reasons for not doing so. But there is no harm in asking.

The next day you arrive at your office to find that Cash had personally delivered his documents to the lobby of

your building early that morning on his way to work. Your new client, you conclude, is responsive and understands the importance of this deposition. Luckily, there are only a few hundred documents. After reviewing the pleadings again, you begin a careful review of your client's documents.

After completing those reviews, you sit back and think through the strategic and tactical issues presented by your new engagement. In doing so, you muse about how your clients would react to a timesheet entry for X hours with the description: "Thinking about the client's case." You are accustomed to using—and clients are accustomed to seeing—timesheet descriptions such as "reviewing," "conferring," "outlining," "drafting," or other words suggesting something like a physical activity. But the truth is that those activities simply generate the grist for the

Although some non-party deponents are innocent bystanders, most have some interest in the litigation.

mill that is the lawyer's brain. The real value that a lawyer brings to his client's problem is thinking about what he has reviewed, outlined, conferred about, or drafted. Your thinking about Cash's matter starts with the question, "What is the goal?" The goal should be to prevent, minimize, or, at best, reverse and repair any damage to Cash's professional reputation. If that is the correct goal, the next question is obvious: How to achieve that goal? And the following question is obvious, too: To intervene or not to intervene?

Although there are some non-party deponents who are truly just innocent bystanders to an incident, transaction, or other events at issue, most non-party deponents have some interest in the litigation, such as the retired corporate vice president who conceived of the business deal that has now gone sour, or the former shop foreman who personally disliked the environmental manager of a corporation whose waste disposal practices are now in question. But although the former corporate vice president's business judgment may be in question for selecting a contract partner that turned out to be unreliable, there is plenty of blame there to go around, and he is not alleged to have acted dishonestly. Nor does the shop foreman's workplace vendetta rise to anything that needs legal protection. That is, those non-party deponents do not have a sufficient stake in the underlying litigation to warrant even an attempt to intervene. And in fact, it is unlikely that even the liberal standards of permissive intervention under Federal Rule of Civil Procedure 24(b) would allow intervention in those instances.

Cash's position is markedly different. In addition to Marginal Finance's complaint, which pins responsibility for its losses directly on Cash, a number of the documents he produced provide some support for Marginal Finance's allegations, although there is no "smoking gun." You

know from prior experience with fidelity bond matters that if Cash is not able to clear his reputation, he might not be able to be bonded in the future as an employee of a financial institution. Financial institutions would not be likely to hire him. So his professional reputation and, therefore, his future employability are directly at stake here.

You look at Federal Rule of Civil Procedure 24. Some preliminary legal research indicates that Cash would likely be permitted under Rule 24(a) to intervene on the side of the defendant-insurer. See *Nunley v. Pioneer Pleasant Valley Sch. Dist.*, 149 F. Supp. 2d 1283, 2001 U.S. Dist. LEXIS 10478 (W.D. Okla. 2001) (In a suit against a school district where the complaint alleged rape and sexual abuse by a non-party teacher, the teacher was granted leave to intervene as of right as a defendant.). The next question is, given that as an option, what are the pros and cons of intervention?

One benefit of being a party is that Cash can file an answer and affirmative defenses, putting on record his denials of Marginal Finance's allegations against him; he would not have to rely solely on Arduous Assurance's defenses, one of which is that Cash was at least negligent, something you hope Cash can disprove.

As a party, Cash could serve discovery requests on plaintiff and defendant and thereby obtain the complete documentary record, not just the fragments he now has from his personal files. He could also participate fully in his own defense at trial and appeal any adverse trial court judgment. And if the case settles, Cash will have the opportunity to use the settlement agreement to deny liability.

These benefits, however, have a price. As a party, Cash would be subjected to additional discovery in the form of interrogatories, requests for admission, and, perhaps, another deposition session. He will also likely need to have his counsel participate in all additional depositions to protect his interests. After discovery is complete, Cash's counsel will need to prepare for trial, with a pre-trial brief, perhaps motions in limine, voir dire questions, and more. If the case goes to trial, Cash will be bound by adjudications of issues that were actually litigated or could have been litigated.

Thus, if Cash successfully intervenes, there will be good news and bad news. The good news is that he will have the full arsenal of weapons available to any party-litigant. The bad news is that he will have to pay the price in legal fees—usually a steep one—in order to have you wield those weapons effectively.

You are sure that Cash will ask if there is another option, one that is not as costly but still gives him a chance to attempt to clear his reputation without becoming a party-litigant. You will, of course, tell him that the most effective way to protect his interests is to become a party-litigant, but that it is a very expensive course of action. The only other option is to use his deposition to attempt to clear his professional reputation. That is, you will need to use Cash's deposition offensively, as a sword. Using his deposition for that purpose, however, will require an approach to preparation that is different from the minimalist approach to defending depositions. So you consider the rationales that underpin the minimalist, "just-answer-the-question" approach.

One of the most commonly stated minimalist rationales is: "Now is not the time to volunteer your complete version of the facts. You'll have that opportunity at trial." That rationale may work, of course, for the party-deponent or the party-related deponent whose testimony will almost surely be required at trial. Cash's situation, however, is different. First, if he is not a party, he might never be called to testify at trial. Second, because he resides outside the subpoena power of the court where the case is pending, under Rule 32(a)(3)(B), his deposition testimony can be read into evidence at trial without his being present to testify. Finally—and this applies to party-deponents as well—given the small percentage of cases that actually go to trial, even if Cash were a party, the odds are that he would never get to testify in full to clear his name.

Another minimalist rationale for not volunteering testimony, actually just a corollary of the rationale above, is that "every word [other than a terse answer] is another target for the other interrogating lawyer." Suplee and Donaldson, at 168. That is correct, but if you are going to use Cash's deposition as a sword, that cannot be avoided. The challenge will be to prepare Cash so that his answers do not provide any targets where a bull's-eye will be fatal to the goals of protecting him from further damage and rehabilitating his professional reputation. Preparing Cash for his deposition with the goal of using the deposition as an offensive weapon to clear his reputation will be akin to preparing a party-client who will be called at trial as an adverse witness in your opponent's case-in-chief, one of the most challenging of trial preparation tasks.

Preparing any deponent—especially a first-time one—is usually a two-phase process. The first phase instructs the witness on the mechanics or logistics of the deposition. The purpose of this phase is to acquaint the witness with the basics of depositions, something experienced litigators take for granted but the novice witness, no matter how intelligent, might not know anything about. In fact, it is best to assume he knows nothing about depositions, no matter how many degrees he might have. The second phase of preparation is the substantive phase. This is the real heart of the preparation session because its goal is to familiarize the deponent with the documents and subject matters he is likely to be asked about. The overall goal of both phases is to reduce anxiety and instill confidence in the witness.

With certain important exceptions that will be discussed below, the preparation on the mechanics of the deposition is no different for the deponent who cares than for the disinterested deponent. You must explain the setting, the cast of characters, and the process.

Start by telling him that depositions are usually taken in reasonably comfortable conference rooms, without a judge or jury. You will tell Cash that he should view this informal setting with caution, as it can make him feel comfortable, when he really should not be. Despite its informality and the sometimes good-natured banter by counsel, you will underscore that the deposition is an adversary proceeding. Although Cash seems sufficiently concerned about the case that he may not be lulled into complacency by this informality, it does not hurt to warn him anyway. Tell him who will be present: you, Cash, Arduous Assurance's counsel, who will initiate the questioning, Marginal Finance's counsel, a court reporter, and

possibly—but not usually—a nonlawyer representative of the plaintiff or the defendant. You should discuss the possibility that his former boss may be sitting across the table and help him work through any discomfort this is likely to cause.

You will tell Cash that he will testify under oath and explain what that means. You will also explain the role of the court reporter to administer the oath and to transcribe verbatim every question, every answer, and any comments, objections, or other statements made by anyone present, unless the deposition has gone “off the record.” Explain that only counsel, by agreement, can go “off the record,” so that Cash knows that transcription does not stop on the basis of a request from him. It will ease Cash’s mind some to know that, as his counsel, you will be sitting right next to him and that you are entitled to make objections to questions and even, in appropriate circumstances, instruct him not to answer certain questions.

You also need to explain the order of questioning. In Cash’s deposition, the lead-off interrogator will be counsel for Arduous Assurance, the defendant-insurer. Next, coun-

Despite its informality, the deposition is an adversary proceeding.

sel for the plaintiff, Marginal Finance, will be entitled to ask questions. Finally, you will tell Cash that you too will be able to ask him questions. Explain that this round-robin approach may continue, within reason, until all counsel have completed their lines of questioning. This might seem to Cash like a potentially interminable procedure. Because the case is in federal court, it helps to tell him that federal court rules (Fed. R. Civ. P. 30(d)(2)) limit the duration of depositions to one day of seven hours of actual questioning, i.e., the seven-hour limit excludes time spent on reasonable breaks.

You will explain the role of objections and make sure that he understands what to do when an objection is made. Tell him that if he hears an objection before he begins his answer, he should hold off answering until you tell him to answer. If he has already begun to answer, he should stop immediately and await your instruction. Explain that all objections are made “for the record,” i.e., for the transcript, and the court will not rule on them until that deposition testimony is offered into evidence. You should also explain the two general categories of objections: first, those objecting to the form of the question; second, those objecting on the grounds that the question calls for the disclosure of privileged information or other information that has been ruled off limits by the court (or by agreement of the parties).

The form of a question may be objectionable, for example, because it is vague, ambiguous, compound, argumentative, repetitious, or without foundation. Give him examples of such questions so he is prepared to recognize them. Instruct him to listen to the grounds stated for any objection based on the form of the question, especially if you are the attorney making the objection. If you object to a question, he should consider whether he understands it fully before answering and choose his words carefully. Although with objections to form, you

will almost always instruct Cash to answer the question, if he can, Cash is the last line of defense. Suppose, for example, you have objected because the question is compound—it has three questions in one. After you have stated your objection and the grounds for it, and instructed Cash to answer anyway, it is perfectly appropriate for Cash to say to the interrogating attorney: “Actually, Mr. Quizzard, that question is difficult to answer because of its multiple parts. Could you please break it down?” Of course, the interrogator might elect to be rude and ask Cash to answer it anyway, but in that event Cash and you have made a solid record for having the objection sustained.

Explain that the key difference between objections to form and objections based on privilege is that after a privilege objection you will instruct him not to answer the question because the question seeks information the interrogating attorney is not entitled to have. You use as an example the attorney-client privilege that protects from disclosure communications Cash, as the client, has with you, his counsel. And you will tell Cash that he should follow your instruction not to answer a question because his failure to follow your instruction could cause him to lose the protection of the privilege.

Advise Cash that once you receive the transcript, he will have 30 days to submit written corrections. Contrary to what many litigators believe, corrections can be made to the substance of the transcribed testimony as well as for typographical transcription errors (e.g., the reporter just got it wrong). Malone and Hoffman, at 202. Of course, if there are significant substantive corrections, the interrogating counsel may attempt to re-open the deposition to ask about those substantive changes in testimony.

By the time you get this far into preparation, most deponents have become curious about how depositions can be used. You should explain that there are at least eight uses for deposition testimony:

- To discover basic facts about the case.
- To avoid being surprised by a witness’s testimony.
- To pin down helpful testimony.
- To mitigate, if possible, adverse testimony.
- To assess the witness’s demeanor and credibility.
- To use in pretrial motions.
- To be read into evidence at trial if the witness is unavailable.
- To impeach the witness whose testimony changes at trial by showing the witness (and the judge and jury) the deposition testimony.

Whether you were preparing Cash using the minimalist, defensive approach, or, as you plan to here, preparing him to use the deposition offensively, one common goal is to have a witness who is not likely to be surprised by a line of questioning. Although even the best and most experienced trial lawyer cannot possibly anticipate every single question that might be posed to his witness, with careful preparation, a deponent can be exposed to all material areas of inquiry before the deposition.

With Cash, a non-exhaustive list would include: his educational background; his employment history before Marginal Finance; his employment responsibilities with Marginal Finance; the resources he had available to carry out those responsibilities; his working relationship with Mr. Flintley, his supervisor; the causes of the alleged monetary losses.

Aside from reviewing the facts to which he will testify,

Cash needs training on how to answer questions. Suplee and Donaldson's six Basic Rules for answering deposition questions provide one of the best frameworks for preparing the witness using the minimalist, defensive approach. The beauty of those Basic Rules is their simplicity. For the unsophisticated novice, they provide a manageable structure for answering questions. For the articulate, intelligent witness, they can provide a check on unwanted volubility. For all deponents, they serve as a reminder that a deposition is not a casual dialogue or conversation but an adversary proceeding that requires concentration and discipline. You will begin with Cash using these Basic Rules:

1. Listen to the question.
2. Be sure you hear the question.
3. Be sure you understand the question (take your time).
4. Answer the question.
5. Tell the truth.
6. Stick to truthful answers.

Suplee and Donaldson, at 167-69.

Under the minimalist approach, Rules three and four mean that the shortest correct answer to each question should be given and that nothing is volunteered. Here, however, because you intend to use the deposition as a sword, Cash must be prepared to volunteer, in some fashion, his side of the story. To do that you have to develop the key themes that are the bases of Cash's defense. Although you will certainly refine, modify, add to, or even eliminate some themes when you meet with Cash at the first preparation session, your review of his documents has already presented the following possible themes:

1. Cash's job at the local Marginal Finance branch was that of CIO, not the Chief Financial Officer (CFO).
2. Marginal Finance went through a computer system conversion during the time period that the losses were sustained.
3. Cash spent countless hours of uncompensated overtime attempting to correct accounting errors resulting from the conversion.
4. Cash's supervisor, Mr. Flintley, ignored Cash's pleas for help and attempted to keep the losses a secret.

These four themes can be further distilled into "talking points" based on documents you have reviewed:

Theme 1

- Cash's job as branch CIO principally involved maintaining the computer system of the local branch where he worked.
- Cash was not directly responsible for the branch's accounting functions.
- The branch had no CFO or head of its accounting staff.
- The entire accounting function was put under Cash's supervision, but he was assigned only one part-time employee.

Theme 2

- The computer system conversion was directed by Marginal Finance's out-of-state home office.
- Cash had no involvement in selecting the new computer system, which turned out to be a nightmare.
- Although he was responsible for converting his branch office system, the losses were due to home office errors and system failures.

Theme 3

- Cash needed to manually re-enter or re-key hundreds of accounting entries to correct for home office system errors.
- Cash's self-evaluations reflect that he spent many nights, weekends, and even some vacation time attempting to correct those errors.

Theme 4

- Cash repeatedly told his supervisor, Mr. Flintley, that he could not keep up with the accounting errors without more staff.
- After the losses were discovered, Mr. Flintley directed Cash not to have any communications with members of Marginal Finance's Board of Directors.
- After the losses were discovered, Mr. Flintley directed Cash not to communicate with Marginal Finance's outside auditors.

With the foregoing tentative themes and talking points for Cash, you face a tactical question. When should Cash tell his side of the story? There are two choices. The first is to prepare Cash to take a minimalist, "don't volunteer" approach when being questioned by opposing counsel, following which you can question Cash and elicit the more detailed testimony that buttresses the themes of Cash's case. This is safest because it is more likely to prevent damage during Cash's questioning by opposing counsel, and it puts you in control of eliciting the testimony Cash wants on the record. The downside to that approach is one that goes to Cash's credibility. Cash could easily come off looking like a Jekyll and Hyde witness. That is, during opposing counsel's questioning, he gives pithy testimony, not responding beyond the precise question asked. But during your questioning, Cash will seem to have had an epiphany of memory and responsiveness, providing expansive—and helpful to him—answers.

The more credible approach would be to prepare Cash to use appropriate questions by opposing counsel as springboards to volunteer testimony that develops one or more of the themes of Cash's defense. For example, Cash might be asked if he ever worked in a financial institution's accounting department before working at Marginal Finance. If he has, the minimalist answer would be a simple, "Yes." That answers the question and volunteers nothing more. But using the springboard approach, Cash might be able to answer honestly: "Yes, but I never worked at one with so few employees assigned to the accounting department." Or, if true, Cash could answer: "Yes, but at Marginal Finance, I was the CIO, in charge of information technology, not accounting. I never understood why accounting functions were assigned to me."

This springboard approach requires an amendment to the third Basic Rule (Be sure you understand the question.) and the fourth Basic Rule (Answer [only] the question.). The amended third Basic Rule is: Once you are sure you understand the question, ask yourself whether it presents within its fair scope a chance to give an answer that will develop one of your themes. If it does, then the amended fourth Basic Rule is: Answer the precise question posed and then volunteer the additional testimony that advances your case. To be credible, Cash will be prepared always to answer the question posed and not to augment his answer beyond its fair scope. In the above example, Cash answered the precise question

posed, and his enhancement stayed within the fair scope or subject matter of the question posed, i.e., Cash's past experience working in an accounting department. You will caution him not to overdo the springboard approach. After answering the precise question posed, he should make one or two, never more, points within its fair scope. To do more could look like speechifying.

You should also prepare Cash for the possibility that interrogating counsel may interrupt him, or even chastise him for answering more than the question asked. Assure him that he has a right to give a complete answer and need not be intimidated into silence. Let him know that he may respond to an interruption by stating (politely) that he is not finished with his answer. And, if counsel tries to bully him into a short yes or no answer or criticizes him for going beyond the question, he can simply state that his explanation was necessary to make the answer completely accurate by putting the facts in an appropriate context.

Finally, you will turn to what is one of the toughest challenges in preparing a witness for a deposition: how to deal with exhibits. That can be one of the most difficult tasks because of something I have come to call The Myth of the Written Word. This myth engenders the belief that if someone actually took the time to write something down, to memorialize something in a written document, the document must be accurate and correct. The written word is and always has been revered in American culture and many other cultures. Reading and writing have high value in our world. Along with crawling, walking, and talking, learning to read and write are very important landmarks in any child's life. Few airports or train stations are without one or more newsstands. On any plane or train trip of any real duration, well over half of the passengers spend all or at least part of their trip reading something. As an attorney, your own stock in trade is reading and writing. Along with this salutary reverence for the written word, however, comes The Myth of the Written Word. You have seen it trap witnesses who have not been sensitized to its potentially magnetic power. In fact, you will tell Cash, as you tell all your deponents, that when he sees interrogating counsel hand the court reporter a document to mark as an exhibit, he should view that event as a red warning flag, a warning that he will need to exercise special care. That is because you have seen The Myth captivate witnesses (other lawyers' witnesses, of course, not your witnesses) into testifying by presuming, assuming, guessing, and speculating that what is recorded in writing is true.

To protect against the notion that because something is in writing it must be true, tell Cash that before testifying he must read the entire exhibit, and assure him that you will do the same. Does the document appear to be complete? Is it dated? Who is the author? Are there any recipients/addressees shown? Are there any other indicia of authenticity? Second, he should determine his relationship to the document by asking the following questions: (a) Does the document on its face show Cash as the author? (b) If not, does the document on its face show Cash as a recipient/addressee, either a direct recipient/addressee or a copy recipient/addressee? (c) If the answers to (a) and (b) are both in the negative, does Cash remember ever seeing this document before (except possibly during the preparation session with you)?

If the answer to each of the questions (a) through (c) is "no," there is a good chance that Cash will not know

enough to say much about the document other than assumptions and speculation. Interrogating counsel can, of course, use a document with which Cash has no "relationship" to refresh Cash's memory. Or such a document might recount an event, meeting, or conversation, and counsel can ask Cash whether in his recollection the document presents an accurate description of those occurrences. But using the "relationship" test with deposition exhibits forces the witness to think hard about what he knows—and does not know—about the document and its subject matter. This reduces the risk that the witness will become a victim of The Myth of the Written Word and, therefore, assume, speculate, or guess about an exhibit and its subject matter.

Even after the interrogating attorney has finished questioning about one or more exhibits, exhibits can still exert a magnetic attraction on some witnesses. For example, a witness who has been asked a question without reference to any exhibit may actually begin to shuffle through previously marked exhibits searching them for an answer to the question. That is why you will tell Cash that when the interrogating attorney finishes asking questions about an exhibit, you will move the exhibit away from Cash and place it along with other exhibits next to the court reporter. You will not allow the stack of previously marked exhibits to sit in front

As an attorney, your own stock in trade is reading and writing.

of Cash, lest he have the urge to paw through them looking for an answer to a question that is not about an exhibit. You will tell Cash that it is not his job to go on a scavenger hunt through the exhibits searching for answers to the interrogating attorney's questions. If the interrogating attorney wants to direct Cash's attention to an exhibit that the interrogating attorney thinks might help Cash answer a question, Cash can attempt to answer by applying the rules you have taught him.

In a perfect world, you would hope to be able to show Cash during preparation every document that might be used at his deposition. That is, however, seldom possible. In cases with hundreds of thousands or even millions of documents, achieving that goal is clearly impossible. In Cash's case, even though you have requested that counsel for Arduous Assurance provide you with deposition exhibits in advance, he has not yet agreed to do so and is not required to do so. You will advise Cash that diligently using the six Basic Rules, as amended, and the "relationship" test will provide the framework for answering questions about exhibits.

Using deposition exhibits offensively, i.e., as springboards for giving testimony that helps clear Cash's reputation, takes the same tactical approach as using a question as a springboard for helpful testimony. Your advice to Cash is to make sure that he answers the question posed about the exhibit, weaving into his answer any helpful testimony that is fairly within the scope of the question. An exhibit can often provide enhanced opportunities for adding helpful testimony. For example, from your review of Cash's documents, you know

that there is a file memorandum authored by Mr. Flintley that chastises Cash for failing to back up certain accounting data on the computer system. You also know that in one of his self-evaluations Cash explained that supposed failure: He did back up the data, but someone in Marginal Finance's home office accessed the backup and somehow deleted it. If Cash is shown Mr. Flintley's file memorandum and asked if Mr. Flintley's account is correct, Cash can answer "no" and use that question as a springboard to testify that he, Cash, did in fact back up the data and explain how the data was lost. Cash could also fairly refer to his self-evaluation, which you can then introduce into the record when it is your turn to question him.

Not all exhibits will necessarily give Cash that bouncy a springboard. For example, there is another file memorandum by Mr. Flintley that purports to summarize a weekly status meeting. At the end of the memorandum, Flintley noted five "action items," each assigned to a different employee. One of the "action items" assigned to Cash was to supervise the reconciliation of the accounts of 20 of Marginal Finance's depositors. But Cash's day-timer for the date of that meeting has his handwritten notes of those "action items" showing that the reconciliation was to be supervised by Flintley himself, not by Cash. At this point, you do not know the explanation for this discrepancy. It could be an honest mistake, by Cash or by Flintley. But there is also the possibility that Flintley intentionally misrepresented that task as being assigned to Cash. If Cash is asked about Flintley's file memorandum, he might have a springboard to testify that he was not assigned that reconciliation task, contrary to Flintley's file memorandum, and refer to his day-timer to corroborate his testimony.

You will caution Cash that if he goes beyond the fair scope of the question, with or without an exhibit, he can lose credibility and look like the politician on a Sunday morning news talk show, who always gets his talking points in, whether or not those points are at all germane to the host's question. And if Cash routinely volunteers helpful testimony beyond the fair scope of the question, interrogating counsel himself can object on the ground that Cash's answer was not responsive. Of course, that objection does not erase the testimony, but such an objection

might keep that testimony out of evidence. At the very least, the objection will highlight Cash's over-reaching and undermine his credibility.

The best tactic when using a deposition as a sword is to keep the client's volunteering of helpful testimony within the fair scope of the question posed. If there is more helpful or clarifying testimony that Cash needs to present that was beyond the fair scope of the questions posed by interrogating counsel, you can elicit such testimony when it is your turn to ask questions. If Cash has given responsive testimony to interrogating counsel, albeit sometimes beyond the precise question asked, Cash will not look like a Jekyll and Hyde witness when you question him.

At this point, you are comfortable that you are ready to meet Cash to prepare for his deposition. You have pre-

An exhibit can often provide enhanced opportunities for adding helpful testimony.

pared for that session based on the assumption that you and Cash will use his deposition offensively to clear his professional reputation. You have also presumptively decided to use the springboard approach rather than an approach that risks making Cash look like a Jekyll and Hyde witness. You have developed tentative themes and talking points. What you do not yet know, because you have not met Cash, is whether he will be up to the task of using the springboard approach credibly. One of your partners, another seasoned trial lawyer, feels that the springboard approach can be an effective way to protect a client-deponent's interests affirmatively but also can be risky, unless you have the right witness. That will be your next challenge. Is Cash the right witness? You cannot answer that today. But if he is, you are ready. □