

The top 10 killer deposition questions

By David B. Newdorf

One of the prime reasons to spend the time and money to depose an adverse witness should be to gather impeachment material. Other than hiring a private investigator to delve into the witness's past, the deposition is the most effective tool in the lawyer's arsenal for uncovering dirt and chipping away at credibility. That includes attacking an eyewitness account, challenging an unfavorable opinion, exposing bias, and undermining believability.

Yet at the deposition, most lawyers don't ask all of the basic, open-ended questions that could help achieve their impeachment goals. In every deposition, there are questions tailored to the facts of the case, whether it is a business dispute or a personal injury claim. But many (if not most) of these "killer" questions should be asked of adverse witnesses in every type of case. Litigators should seek ways to assail the credibility of an adverse witness, whether the case involves personal in-

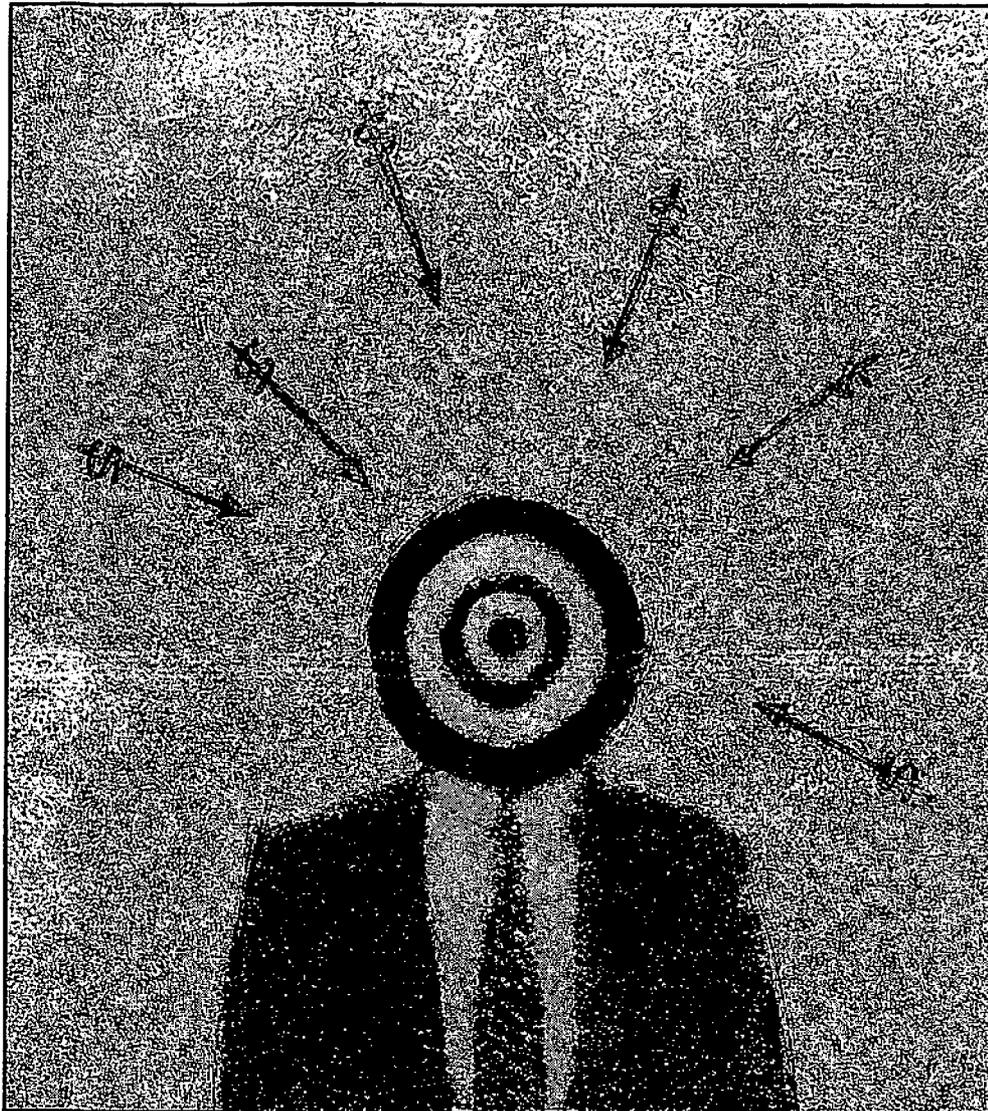
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juries or a business deal gone south. Especially when representing defendants, often the best defense is a good offense.

Some of these questions ruffle feathers (both the witness's and opposing counsel's). That's OK. Many times, these questions will strike out. But on those occasions when you do connect with one of these questions, the result is likely to be a solid base hit — and occasionally a grand slam. The answers to these basic questions can be so damaging to the opponent's case that the litigation will end on terms favorable to your client. And isn't that the goal?

I can't claim authorship of any of these questions. They've been asked by lawyers long before my time. But this is a useful checklist to add to your basic depo outline. (You do use an outline, right? But that's a different topic.) When defending your client's depo, don't forget to prepare the witness on these subjects.

Any top-10 list is necessarily arbitrary. These questions are designed to get deposition takers to broaden their horizons when thinking about the deposition. So here they are — the Top 10 Killer Deposition Questions:



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1. “Have you ever been arrested?”

(And the follow-up: “Have you ever been convicted?”) Opposing counsel may go ballistic on this one. I believe it is a proper question, though court decisions directly approving this question are few. Remember, felony convictions and any convictions for fraud, dishonesty or moral turpitude are generally admissible for impeachment. In some cases (such as suits against law enforcement agencies or officials), this question goes directly to bias. Even CEOs get arrested, so don’t discriminate based on who you think is or isn’t law-abiding. Will the answers be admissible at trial? Naturally, that depends on the case. The scope of permissible discovery is broad and encompasses questions designed to obtain admissible evidence, to identify witnesses, or to uncover bias or motives. Of course some witnesses will lie — even under oath — about their past brushes with the law. But since arrests and convictions are matters of public record, the witness who covers up his DUI or domestic violence charge risks even greater damage to his credibility.

2. “Have you ever been deposed before?”

I ask this near the beginning of the deposition, as part of the standard admonition — the lawyer’s spiel covering the ground rules for the deposition. At this stage, it sounds like an innocent inquiry. But if the answer is “yes,” I always follow up later with questions about the prior deposition(s). I also ask the related questions, “Have you ever testified in court?” and “Have you ever been a plaintiff or a defendant in another lawsuit?” Prior testimony and lawsuits can be a treasure trove of accusations and impeachment.

3. “Have you ever seen the [plaintiff/defendant/employee] before the events related to this lawsuit?”

This question may uncover connections between a supposedly independent witness and the other side. When the witness is known to associate with a party, ask about any other connections: investments, loans, board memberships, civic or religious organizations in common, kids in school together, etc.

4. “Did you meet with the other side’s counsel before this deposition?”

Pin down the number of meetings, where they occurred and how long they lasted. This information can help dismantle the claim of independence. On related topics, delve into what they know about the litigation and from whom or where they learned it. When witnesses are from out of town, ask who paid for travel to the deposition, picked them up at the airport or hotel, or drove them to the deposition.

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5. **“Have you signed any written statements/made any recorded statements/spoken to any reporters about the events related to this lawsuit?”**

To this list, you might add: “Have you posted any statements about these events on any Web site?” Of course, before the depo, you should consult a search engine and, perhaps, a subscription database as part of your preparation, so you’ll know if he or she is lying.

6. **“Did you read any witness statements or depositions, listen to any recorded statements, look at any diagrams or photographs, or did somebody else read you any statements before the deposition?”**

OK, this is more than one question, but I had to combine them here to meet the 10-question quota imposed by the title of this article.

7. **“Tell me everything you did to get ready for this deposition.”**

The answer can lead you to what the witness or opponent perceives as his or her weak spots, including areas of which you were unaware. After all, it is only natural to prepare for the hardest questions or topics. Remember to find out the specific documents reviewed, places visited and persons met with by the witness.

8. **“Was anyone else present when you met with your lawyer?”**

If a third-party was present during the meeting, the witness may have waived the attorney-client privilege.

9. **“How did you find your attorney [doctor/chiropractor/therapist/expert]?”**

The answers to these questions can lead you to past legal disputes or lawsuits involving the witness. It can also point you to self-interest or improper involvement on the part of opposing counsel.

10. **“Do you have your driver’s license with you?”**

If so, ask to see it. Take down the personal information and, if appropriate, read it into the record. The information on the driver’s license is a fast check on past/current addresses, date of birth, and physical description that may lead to additional tidbits about

the witness. Some lawyers will object to this question unless you included a request for production of documents with the deposition notice.

That’s my “Top 10” — or so — general questions designed to uncover dirt. Remember, there’s more to taking a deposition than impeachment. For honing overall deposition

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skills, I recommend two courses: the National Institute for Trial Advocacy “Deposition Skills” Training (17+ hours) and Robert Musante’s “Take A Killer Deposition” (full-day course). I’ve taken both courses and received nothing in return for these recommendations.

And remember, as the saying goes, “It doesn’t hurt to ask.”

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