



FULL COURT PRESS

MONTHLY NEWSLETTER OF THE WASHINGTON COUNTY BAR ASSOCIATION

VOL. 22, No. 3

MAR 2017

Next Bar Meeting:

Monday, Mar. 6, 2017

Venue:

Mermaids Restaurant
2217 N College Ave
Fayetteville, AR

Speaker:

Geoff Hamby will speak about "The Deposition Game Plan." (See attachment for details.)

GEOFF HAMBY TO ADDRESS THE BAR IN MARCH

Geoff Hamby is named after his father, Jeff Hamby, but was given the British spelling of the name to avoid the stereotypical Arkansas nickname, "Junior." He grew up in Van Buren, Arkansas as the oldest of 5 children and a lifelong Razorback fan. He knew he wanted to be a lawyer since he was 12 years old and sat in on a Howard Brill Civil Procedure class that his mom was taking while working her own way through law school. His lifelong love for the law is only matched by his love for his wife Moriah, a 7th grade teacher in Bentonville, and his love for the game of golf.



Geoff is a trial lawyer with the Bailey & Oliver Law Firm where he works as a member of the

catastrophic injury team. He works primarily on tractor-trailer, construction worksite, and medical malpractice cases. Bailey & Oliver handles trials in a team format with Geoff's primary responsibilities being deposition taking and trial presentation. He also enjoys public speaking and presenting at CLE programs.

Geoff believes wholeheartedly in giving back. He and his wife volunteer with their local church in numerous ways and are part of the small group leadership team. Geoff also works with the First Tee of Northwest Arkansas helping to instill core values like honesty, respect, and kindness in the children of his community.

FEBRUARY BAR MINUTES

January minutes were approved.

Treasurer's Report: Balance of \$8,475.08

- Dues still coming in
- Will formulate a budget for the year after dues are received

Jon Comstock announcements

- Volunteers needed for U of A Criminal Justice Questionnaire - 1 hr commitment
- Volunteers needed for parolee legal interviews re: housing - 1 hr commitment
- Please contact him to sign up

Sam Edelman announcement re: Seven Hills Homeless Shelter

- Volunteers needed every other Friday to help point clients in right direction on legal issues. One pro bono attorney needed for uncontested divorce.

Niki Cung appointed to Legal Aid Board as Wash. Co. Bar Representative

Niki announced 50th Anniversary Legal Aid celebrations, how to support Legal Aid

Award for Zoe Naylor for her service as Secretary/Treasurer last year

Award for Amy Martin for her service as President last year

Speaker was Sgt. Craig Stout with Fayetteville Police Department speaking about new technology and storage system, new body cam system procured through federal grant to be approved hopefully this year. Potential legal issues. Keep an eye out. Will be a public comment period. Expect some growing pains with new data systems.

Respectfully Submitted,
Leslie Copeland, Secretary/Treasurer

 Find us
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Bar Association,
Fayetteville, AR

 Follow us
@AR_WCBA

Email the Bar at
ar.washingtoncountybar@gmail.com

Find us online at:
http://www.washingtoncountybar.com

**DEADLINE FOR
THE APRIL
NEWSLETTER IS
MARCH 20TH**

ON THE ROW: A STAGED READING

The members of the Washington County Bar Association are invited to the encore performance of a staged reading of On The Row. This event is scheduled for March 31 from 7:30 – 8:30 p.m. with a pre-show reception at 7 p.m. at the 21C Museum Hotel. To learn more about this project go to <http://www.nwaprisonstories.com> All content comes from 10 men on Arkansas' Death Row through creative writing guidance provided in-person and via the U.S. Mail during 2016.



ATTACHMENTS

- The Deposition Game Plan - Speaker info.
- On The Row flyer



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UPCOMING ARKANSAS BAR ASSOCIATION CLE'S

Need a CLE? The Arkansas Bar has an extensive list of upcoming CLE's to consider. Please go to <http://www.arkbar.com/cle/clelisting.aspx> for more information and registration.

Wed, Mar 1 - 12:00 PM - 1:00 PM - WEBINAR: Trusts & Distributions: All About Non-Pro-Rata Distributions

Thu, Mar 2 - 12:00 PM - 1:00 PM - WEBINAR: Management & Information Control Issues in Closely Held Companies: Strategies, Conflicts and Drafting Considera

Tue, Mar 7 - 12:00 PM - 1:00 PM - WEBINAR: Negotiating & Drafting Real Estate Loan Documentation, Part 1r

Wed, Mar 8 - 12:00 PM - 1:00 PM - WEBINAR: Negotiating & Drafting Real Estate Loan Documentation, Part 2

Thu, Mar 9 - 12:00 PM - 1:00 PM - WEBINAR: LIVE REPLAY: Estate Planning for Religious and Philosophical Beliefs of Clients

Thu, Mar 9 - 8:30 AM - 3:45 PM - Mixing It Up: WC & SSD - A Day of Disability - Arkansas Bar Center

Fri, Mar 10 - 8:30 AM - 4:15 PM - 40th Annual Labor & Employment Law Conference - The Capital Hotel

Tue, Mar 14 - 12:00 PM - 1:00 PM - WEBINAR: Planning to Prevent Trust, Estate and Will Contests

Wed, Mar 15 - 12:00 PM - 1:00 PM - WEBINAR: Lawyer Ethics and Investigations for and of Clients

Thu, Mar 16 - 12:00 PM - 1:00 PM - WEBINAR: LIVE REPLAY: Drafting Sales Agents' Agreements

Fri, Mar 17 - 12:00 PM - 1:00 PM - WEBINAR: LIVE REPLAY: Ethics and Keeping Secrets or Telling Tales in Joint Representations

Tue, Mar 21 - 12:00 PM - 1:00 PM - WEBINAR: Incentive Compensation in Businesses, Part 1

Wed, Mar 22 - 12:00 PM - 1:00 PM - WEBINAR: Incentive Compensation in Businesses, Part 2

Thu, Mar 23 - 12:00 PM - 1:00 PM - WEBINAR: Drafting Demand Letters

Fri, Mar 24 - 12:00 PM - 1:00 PM - WEBINAR: LIVE REPLAY: Ethics and Cloud Computing

Mon, Mar 27 - 12:00 PM - 1:00 PM - WEBINAR: LIVE REPLAY: Planning with Single Member LLCs, Part 1

Tue, Mar 28 - 12:00 PM - 1:00 PM - WEBINAR: LIVE REPLAY: Planning with Single Member LLCs, Part 2

Wed, Mar 29 - 12:00 PM - 1:00 PM - WEBINAR: BDITs: Beneficiary Defective Inheritor's Trusts - Reducing Taxes, Retaining Control

Thu, Mar 30 thru Fri, Mar 31 - 21st Annual Debtor/Creditor Law Institute

DUES ARE NOW DUE!

Dues for each attorney are \$30, or \$10/year if licensed less than two years. Please mail your dues in to Washington County Bar Assn., P.O. Box 3316, Fayetteville 72702-3316 or give to Leslie Copeland as soon as possible. WCBA will be sending a paper invoice as well as an email on the list serv.

JUDGES' CALENDARS

Judge Barry

Hot Springs – Mar 2
Fayetteville – Mar 8
Fort Smith – Mar 16
Little Rock – Mar 22

Judge Beaumont

Defaults – Mar 3, 10, 17, 24, 31 at 9:00 a.m.
Madison County - Mar 15

Judge Brooks

The Judge will be in Fayetteville all month.

Judge Bryan

Defaults – Mar 3, 10, 17, 31
Madison County – Mar 29

Judge Lindsay – (479)444-1548

Washington County only.

Judge Martin – (479)444-1552

Madison County - Mar 13
Out of the Office - Mar 20-24.

Judge Threet

Defaults – Mar 1, 8, 15, 29 at 9:00 a.m.
(No defaults Mar 22)
Madison County – Mar 27

Judge Taylor

Defaults – Mar 6, 13, 20, 27
Interpreter - Mar 21
Madison County – Mar 17

Judge Zimmerman

Delinquency Cases – Monday
Delinquency/FINS Cases – Tuesday
Dependent-Neglect Cases – Wednesday
Delinquency/FINS/
Dependent-Neglect Cases – Thursday
Delinq./Dependent-Neglect Cases – Friday
Madison County – Mar 3, 24

THE DEPOSITION GAME PLAN

By:

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Washington County Bar Association

March 6, 2017

I. Introduction

As a trial lawyer, preparing for and taking depositions is one of the largest parts of my job. However, depositions are not just important for personal injury cases; they're important for anyone who represents people, companies, or other organizations within our adversarial system. Depositions can play a key role in everything from contract disputes to contested divorce proceedings to felony criminal prosecution and defense. Depositions can be the most powerful tool in our arsenal as attorneys, but we have to know how to use them. Through implementing this simple, three-step, deposition game plan, anyone can achieve great outcomes for their clients through the use of depositions.

II. Depositions are Swords, not Shovels



The first problem that most attorneys have with regard to depositions is their overall mindset. Historically, depositions have been looked at as just “fact



finding” tools where the parties get together and tell each other their side of the story. In my

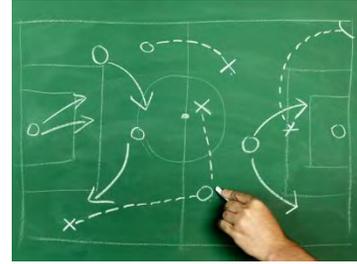
professional opinion, this is a waste of time and a waste of your client's money. Through complete use of pleadings and initial written discovery, an attorney should be able to fairly easily determine what the other side is going to claim and say happened with regard to the case. Our goal with depositions should be to prove our side of the case and get admissions and pull out facts that help our clients win. Depositions should be used as swords to attack and fight for your client, not as shovels to dig through whatever mess the other side wants to bring up.

As plaintiff's lawyers, we use this "sword" strategy to prove our case through the defendant's witnesses. We strive for admissions of negligence and recklessness if they apply, and even though we don't always get those, we always come out of a deposition having moved our case forward towards trial. This same strategy can be applied to any area of law. A "sword" deposition in a contested divorce may be getting the opposing spouse to admit an infidelity or in a criminal defense case it may be getting the arresting officer to admit some sort of code violation. If we don't have these goals for our depositions, how can we expect to ever accomplish what we need to accomplish to best represent our clients?

Now, before going into the actual game plan itself, people may be wondering how this can apply to civil and criminal defense work and other areas where you do not have the burden of proof. But while *legally* these practices do not carry the burden, *realistically* if no reasonable alternative is offered, the opponent will win. Even in cases that seem fairly simple, each side must be able to put forth evidence that supports their position, and depositions are an excellent way to establish the validity of that evidence.

III. The “Game Plan”

So how can a deposition be taken and used as a sword to attack rather than a shovel to dig? It’s through a simple process that I like to call the deposition “game plan.” While this game plan



is simple, it is far from quick. Fully and correctly implementing the game plan takes weeks, and potentially months, worth of work. But when it is executed properly, the results are unparalleled.

a. Deposition Prep

Figuring out what you need: Step one of preparing for a deposition is to know what you need. I don’t mean a general idea of, “I need to win for my client.” This step is talking about a detailed approach of figuring out exactly what you need to prove in your case as well as how you want to prove it. You need to know your case so well that you know all the facts you need to present in order to prove the case and the best person or people to give you those facts. Almost every case will involve some sort of list of elements, figure out what evidence you need to fulfill, or shoot down, those elements. Write these needs down in a list. If you were to get everything on your need list, that alone should be enough to win the case for your client. If it isn’t, you need a longer or better list.

Figuring out what you want: Once you get beyond what you *need*, you also have to know what you *want*. What would be the best possible thing that the other side could say or admit to help your case? Who on the other side would be the best person to say that? Is it realistic to get them to say it? Then, what’s the second best thing the other side could say or admit to help your case? Keep following this pattern until you have a list of statements that you want to get from your opponent. If you were to get everything on your “want” list, that should be enough to win the case on summary judgment.

Make a deposition box: One of the things we do at Bailey & Oliver is create a deposition box that goes with us to all the depositions in a particular case. This box contains binders full of discovery, work product memos, applicable case law, and anything else we think we may possibly need. Sometimes it can be several boxes. Make one of these for your own cases. It can come in very handy.

Using prior discovery: The aspect of preparing for depositions that takes the most time is effectively using prior discovery. At Bailey & Oliver we go through each of the defendant's policies and procedures to look for things that will help our case. These policies and procedures are then condensed down into memos and organized in a way that allows us to quickly and easily reference them during the deposition. The discovery and the memos are put in binders and put in the deposition box that I mentioned earlier. The same thing can be done with any type of discovery you get in any type of case.

Focus groups: Finally, before you go into a deposition, you need to listen to some sort of outside voice. Focus groups are the best place to find out what an ordinary person would want to know about your case. If this case may eventually find its way in front of a jury, it will be extraordinarily important to know what these ordinary people think and feel. Focus groups can help you finalize your "need" and "want" list as well as tell you which things you found in the prior discovery really make an impact for them.

If your case is not one that will ever end up in front of a jury, having an outside sounding board can still be very useful. At Bailey & Oliver we regularly hire outside defense counsel to come and point out the weak parts of our case so we know what we need to strengthen. If we have an issue that will be decided by a judge, we've also worked with retired judges and asked how they would interpret the facts of a particular case and what else they would need to know to

make a determination. When finding out what you need to prove to win for your client, the only limit to the sources you use is your own imagination (and budget of course). So, be creative!

b. During the deposition.

Keep it simple: The main theme of our deposition questioning is simplicity. We try our best to make it one fact, one question. Not only one fact, one question, but we shoot for each question to only take up one line on our outline as well. If questions start getting too long or complex, it can be difficult for the witness to understand and make it hard on you to achieve your goals.

Playing by the rules: In a deposition, as with any part of trial, it is imperative that everyone involved plays by the rules. When any party is defending a deposition, they must only make objections “concisely and in a non-argumentative and non-suggestive manner.”¹ Then, the only reasons that attorneys are permitted to order their client to not answer a question are; 1) to preserve a privilege, 2) to enforce a court imposed limitation, or 3) to present a bad faith motion.² This “non-suggestive” manner of objections means that the attorney cannot object in a way which would lead the witness to give a particular answer. For example, “Objection, answer if you know” is a very common objection made in Arkansas depositions and an inappropriate way of coaching the witness that would tell the witness to answer, “I don’t know.”³ Similarly, “Objection, form, that question is hard to understand” coaches the witness to say, “I don’t understand.” The Arkansas Rules and case law all say that these types of objections are inappropriate since deposition testimony is to be taken “as permitted at the trial” and those objections would not be allowed in open trial.⁴

¹ Arkansas Rule of Civil Procedure 30

² Arkansas Rule of Civil Procedure 30

³ Security National Bank of Sioux City Iowa v. Abbott Laboratories 2014 WL 3704277

⁴ Federal Rule of Civil Procedure & Arkansas Rule of Civil Procedure 30(c)

If your opponent is violating these rules, there are a few steps you can take to try and make it stop. First, simply point out to opposing counsel the fact that these objections are improper and that you know they're improper. Your opposing counsel might just be doing what they've seen and not realize that they are behaving improperly. Second, if the objections persist, pull out the rules and the case law that supports your argument, attach them to the deposition and make an official record of what rules your opponent is violating. Finally, if your opponent continues to violate these rules, you may have to enact the nuclear option. Have the phone number of the judge's office who is presiding over the case ready to go, and as a last resort call the judge to get a telephone order on the record for the improper objections to stop.



Videotape: Videotape all of your depositions. We have already established that depositions are swords and not shovels. You have to go into a deposition knowing what you want to get out of it. If what you want to get out of a deposition is not worth the cost of videotaping it, then the deposition isn't worth taking.

If money is a severe obstacle and you have a somewhat cooperative opponent, the Arkansas Rules allow you to record depositions with personal equipment as long as the video is made available to the other side and both sides agree for the deposition to be recorded. You can try to get an informal agreement to allow this or a more formal joint motion to permit personal recording of the depositions.

cheap
...but good! ✓

Keep it cheap: Finally, there are ways to keep depositions cheap without having to lower the quality of the deposition. Almost inevitably, you will have a case that is either pending in another state or with a deponent who can only appear in another state. Travel expenses can mean hundreds or even thousands of dollars out of your client's pocket to go take this deposition. But, with a little bit of planning ahead and the use of modern technology these costs can be essentially eliminated.

Videoconferencing services are the best way to take a remote deposition. This can be either a professional service or something simple like Facetime or Skype. Just remember to have hard line internet access for these conferences as even the most reliable Wi-Fi will sometimes cause buffering during a video conference. Another option is to take the deposition over the phone and simply have a videographer set up on the other end to send you the video later. With either of these options, you can send any documents you plan to use to the court reporter ahead of time and they will label them and hand them to the witness as you go along.

c. After the deposition.

Make an initial reaction memo: Within 48 hours of taking a deposition, you need to make a work-product memo for your file of what happened in that deposition. Did you get the information that you needed? Did you get the information that you wanted? Did anything unexpected come up? Did you learn about any new people? Are there any written discovery requests that you need to send? Make a template with all of these questions and as many others as you can think of, and then answer them based on your memory. You can go back and edit the memo when you get the transcript, but if you wait for the transcript before doing anything, the case will get delayed and something will end up getting forgotten.

Read the transcript: After you do get the transcript of the deposition, go back through it and read it. Is everything in your memo correct? What did you miss? Look for things that jump out at you and then go through and read it again looking specifically at wording. Ask yourself questions like, “when I ask this question in cross-examination, is there any way they can wiggle out of this answer?” Think of any clarifications you may need or any other written discovery you may have forgotten and get it sent out.

Watch the video: After you read the transcript, watch the video. Pay attention to the deponent’s body language. What topics made them uncomfortable? That may be something you need to send more written discovery on. Watch yourself. Do you have any nervous habits or ticks that could potentially mess up the video clips if you want to use them at trial? How was the flow of your questions? What would you do differently next time?

Use what you got: After you take a great deposition and get the admissions or statements that you need to prove your client’s case, the last thing you need to do in order to complete the deposition game plan is to use the good work you’ve done and keep the ball rolling. Once something has been admitted in one deposition, you can use it in subsequent depositions as well as any other type of pleading or discovery you wish. Use deposition admissions in motions for summary judgment, in motions *in limine*, in amending your complaint or response, or in any other way you can think of.

V. Conclusion

Depositions are no longer something that we can just walk in to with a legal pad and a pen and listen to what the witness has to say. With the way the modern system works, all sides need to use every tool at their disposal, or risk being beaten. If you take the approach that your

depositions will be swords and follow the deposition game plan as laid out in this paper and in the presentation, you can achieve much better results for your client than was otherwise possible.