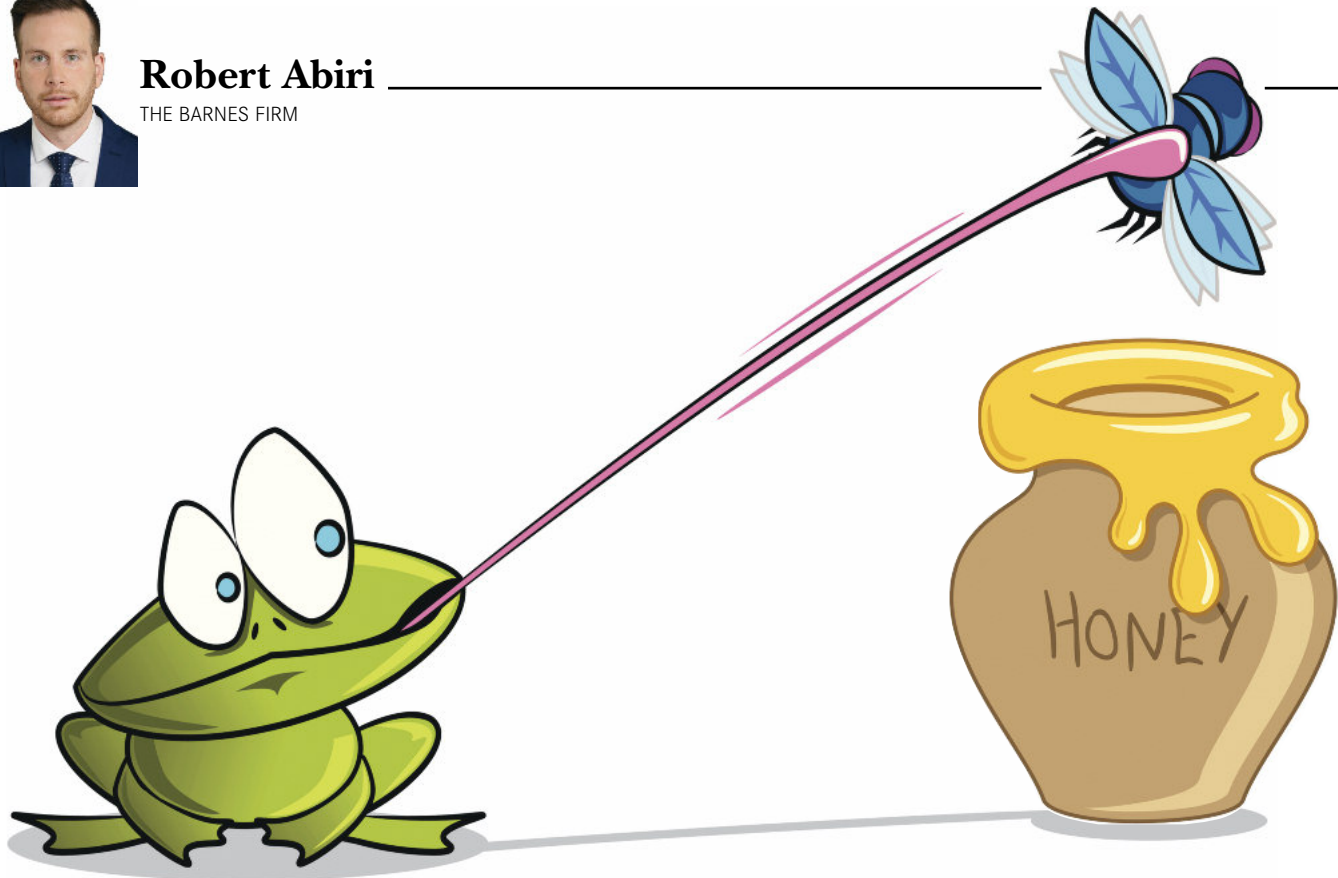




Robert Abiri

THE BARNES FIRM



Depositions: Use honey, not vinegar

EXPERIENCE DICTATES THE KINDER APPROACH USUALLY WINS WITH MOST DEONENTS

In the town of Anso, a brewmaster named George lived a somewhat modest life. From when he could first remember, his father had grown and brewed a variety of teas for the residents of the town and his own family. George had shadowed him as a child growing up – akin to methods of an apprentice – and when his father passed on, George assumed his father's responsibilities in running the business. George thus became one of the town's several brewmasters.

His father was a generous and benevolent man. He would often formulate various teas for the town's inhabitants to sip and enjoy, but also tailored specific teas for an individual's ailments. Most formulations were effective. He would only charge a modest sum for his teas, enough to cover his costs and with a little on top to be able to provide the basics for his family.

George did not see the virtues of operating a business in the same fashion

his father had. After taking over, George noticed early on that he could charge higher prices for certain specialty teas to those who could afford it. He began concocting teas that would provide benefits for energy, for strength, and other enhancements to daily life. Although it would not cost him much to brew these specific teas, he priced these teas out of reach for the average town resident. George became quite rich engaging in these practices with the few who could afford it. He also became quite unpopular with the many who could not.

Approximately ten years into his tenure as the town's brewmaster, an epidemic fell upon the town of Anso. The epidemic caused its residents to experience severe nausea, and while not life-threatening, it caused people to miss significant time from their jobs and duties, which led to a lot of problems within the town. Drawing from his experience as a child, George was able to brew a tea that

immediately halted the effects of the epidemic on anyone who was suffering. Unfortunately, greed got the better of George again and he priced it so high that only the richest of residents could afford it. The other brewmasters and even the residents themselves tried to duplicate teas that would have the same alleviating effects, but no one could figure out what was in George's special brew that worked so well.

The townspeople grew angry and many of them went to George and asked him for the recipe. George would not budge. Finally, the town sent its sheriff, Jack, to speak to George. Jack immediately took an aggressive attitude with George. He yelled at him, demanded the tea recipe, mocked him, and as a whole, was quite combative with George. Jack started questioning the use of specific ingredients one by one in a violent tone. "It's chamomile isn't it?!" Jack would

See Abiri, Next Page

exclaim, for example. George simply smirked and kept quiet. Under no legal pressure to disclose his recipe, George brushed Jack off and returned to his shop.

The epidemic continued. Several months later, one of the town's residents, Richard, had invited his friend, Juliet, over from the neighboring town. He explained to Juliet the entire history of the epidemic, of George and his actions, even dating back to George's father and how different he was than George, and how he wished it was George's father still running the business. Juliet was intrigued and asked Richard for some more details about George and his childhood, and whatever else Richard may know about George. She then asked for directions to George's shop and said she would come visit Richard again in a few weeks.

Juliet left Richard's place and walked through town to George's shop. When she walked in, she went to the counter and stood next to George and started chatting innocuously. She did not ask about the epidemic, she did not ask about his recipes, and she did not even ask about his tea. Instead, Juliet asked him where he was from and about his family. She started relaying details of her own childhood to George. Juliet's friendly demeanor put George in a relaxed state and they quickly started conversing like old friends. George began to open up and started explaining to Juliet what his family was like growing up, and how he learned the trade from his father. George mentioned he loved growing up on a rural farm alongside home-grown crops and herbs that his family would use often in their cooking. Juliet stated that her family would also grow and use their own crops.

About an hour into the conversation George recounted a time when his sister fell ill with stomach problems during their childhood. George relayed the story of how his mother picked fresh spearmint from their garden and made a soup that immediately made his sister feel better. George then quickly went back to discussing his financial achievements, how he grew his business and had made a lot of money in the past several years

catering to the aristocrats and wealthy of the town. After a few hours, Juliet thanked George for providing her with some friendly conversation to pass the time and left his shop.

About fifty feet down from George's shop was another tea shop owned by a man named Jacob. Juliet walked in and asked him if he could brew a tea with spearmint as the main ingredient and give that tea to some of the ill residents. Jacob agreed. Juliet walked a few hundred feet more down the road to Rose's tea shop and asked her to do the same before heading home to her town that evening. Rose also agreed.

The next morning, Juliet returned to Jacob and Rose and inquired about the results of her suggested experiment. With equal surprise and happiness, both exclaimed to Juliet that the teas had worked and all the residents who tried the spearmint-based tea were feeling better. Word quickly spread around the town and in a few short weeks the epidemic was all but gone. When Richard found out, he profusely thanked Juliet. For months, the townsfolk had harassed and yelled at George and nobody in town was able to get him to disclose that spearmint was the key ingredient. Yet by taking a friendly, inviting approach and engaging in calm conversation, Juliet was able to elicit this key piece of information from George.

The preferred means of taking a deposition

The point of the above parable, besides entertaining the readers of this magazine, is to illustrate how simple aspects such as one's demeanor and approach towards certain situations can have large impacts on the results. While my years of experience as an attorney may be dwarfed by those practicing in excess of thirty or forty years, since I started in 2005, I have seen a variety of deposition techniques.

I have seen attorneys threaten witnesses (and myself) when they have become frustrated. I have also seen attorneys on the brink of falling asleep due to their lack of interest in the case, or the

witness, or both. And I have seen what to me seems the most effective method of conducting a deposition – that being the creation of a *comfortable* environment where the deponent and attorney are engaging in a friendly conversation similar to how friends or acquaintances would speak.

This is not meant to be a blanket approach. I do realize that there are certain individuals and circumstances that require a more aggressive, perhaps even borderline confrontational technique. Each deponent requires its own analysis and psychological evaluation as to what may be the most effective approach for that individual. A colloquialism that we often hear is that nice guys finish last, and some deponents may very well require a more hard-nosed approach to elicit the information necessary for your case.

As a general rule however, even though we warn deponents not to engage in the bad habits of daily conversation by interrupting each other or using nonverbal responses, we actually want them to *substantively* speak as if we were engaged in day-to-day conversation, as this leads to a result where more information is disclosed. It is human nature to want to speak about yourself and even more so when it is in a comfortable, presumably friendly environment.

And this is the general theory the article's title is based on, the age-old proverb that you can catch more flies with honey than with vinegar. Although open to many interpretations, a common one is that it is easier to persuade people or get what you want if you are polite, friendly and kind rather than if you are confrontational, rude or ill-tempered. Applied to the deposition setting, experience dictates the kinder approach usually wins. This generally holds true across witness types, from the unsophisticated person to the slimy con man to the arrogant expert witness. When all is said and done people tend to open up to those they are at comfort with more often than those they perceive as enemies. It also provides the additional benefit of putting opposing counsel in a less guarded position,

See Abiri, Next Page

which in turn may lessen the number of objections you may receive.

The Bar and trial guides suggest civility

This strategy is not by any means new or groundbreaking. The State Bar of California's Civility Guidelines suggest similar demeanor during a deposition. Specifically, under Section 9's Discovery points, the Guide states that "An attorney should treat other counsel and participants with courtesy and civility, and should not engage in conduct that would be inappropriate in the presence of a judicial officer. An attorney should remember that vigorous advocacy can be consistent with professional courtesy, and that arguments or conflicts with other counsel should not be personal."

The Rutter Guide also touches upon the benefits of having a comfortable climate, stating that going through the introductory explanations on the nature of the proceedings with the witness may "put the deponent at ease and establish a climate for more responsive answers." ([8:701.1] Conduct of Deposition:, Cal. Prac. Guide Civ. Pro. Before Trial Ch. 8E-12.)

Most seasoned attorneys know that aside from the benefits of implementing a kind attitude, on the opposite end of the spectrum, the consequences of an aggressive approach can be painful. Opposing counsel can suspend the deposition under Code of Civil Procedure section 2025.470 and seek a protective order claiming "the examination is being conducted in 'bad faith,' or in a manner that 'unreasonably annoys, embarrasses or oppresses' the deponent or party seeking the protective order." Counsel can further request monetary sanctions for having to do so, opening up exposure for both yourself and your client. (*Id.* at § 2025.420(h).)

Not that a reader of this magazine would need examples of how *not* to conduct a deposition, but case law is bursting with instances of attorney conduct that is sanctionable in this regard [see e.g., *Horton v. Maersk Line, Ltd.*, 294 F.R.D. 690, 691 (S.D. Ga. 2013)]; of course, there are also countless deposition videos you can find on YouTube to entertain yourself during a lunch break.

Your client attending the deposition

On a related note, I almost exclusively push back on a client's request to attend the deposition. Under Code of Civil Procedure section 2025.420, subdivision (b)(12), a party to an action does have the right to attend the deposition and a court has no power to exclude the party even if a motion for a protective order is filed. (See e.g., *Willoughby v. Sup.Ct. (Lui)* (1985) 172 Cal.App.3d 890, 892.) The reason for pushing back on this client right is that it almost always intimidates the deponent. In most cases, the deponent is adverse to your client either directly if he or she is a party, or indirectly as a witness. You do not want to create the exact type of atmosphere that you are seeking to avoid. On the rare occasion the *deponent* wants someone to sit in on the deposition with him or her, I approach the request cautiously and generally still decline (politely). While at first thought it may seem that having a deponent's friend or family member present may bring more comfort to the proceeding, it is not uncommon for people to sometimes hesitate on being forthcoming when those close to them will hear what they have to say. It is better to err on the side of caution and not risk such a situation arising.

She's not your friend

Attorneys should also be wary of having their own clients subjected to this technique. When preparing my client or witness for a deposition, I go into some detail about potential tactics attorneys may use to elicit additional information. This includes overly pleasant attorneys. I explain that such tactics are meant to disarm him or her, and to be wary of an attorney who engages in a lot of small talk during breaks or continually reminds the witness of his friendly attitude.

Finding benign, common ground

So, what are some actual examples of engaging this method during a deposition? Oftentimes, it helps if you can do some homework on the person you are deposing and to try to find something benign you can chat about before the

deposition begins. Go through your case documents and find some common ground or other topics you can discuss with the deponent. If there is not much in terms of information you can review on the deponent beforehand (such as what oftentimes is the case with a tangential witness), then even without doing any homework, the first few minutes of introductory conversation before the deposition begins can be key. Points of conversation can span quite a large spectrum, so be creative. It can include topics such as:

- Mundane matters – e.g., traffic or weather;
- Sharing an affinity for the same sports teams or the same hobbies;
- Commentary on recent news events or sports games;
- Growing up in the same state or attending a common school;
- Family and children.

And so on. A quick conversation on any of these topics can have a large effect on the witness and his or her level of comfort with you for the remainder of the day.

It also helps to take your time with the admonitions in the beginning of the deposition. One of the most common occurrences with individuals being deposed – especially for those who have never been deposed before – is to be very nervous at the *beginning* of the deposition. Going through each admonition slowly and with a gentle character can provide the deponent with that extra time he or she may need to calm down and relax. By the time you reach any question of substance, the deponent will have had several minutes of testimony take place which should be sufficient time to calm one's nerves. Ideally you want your deponent to forget he or she will be in a conference room for the next few hours.

Carry this demeanor throughout the deposition and you are more likely than not to end up with some additional and more relevant information than if you had taken a neutral or aggressive approach. It may not always work,

See Abiri, Next Page

but at least you provide yourself with the best opportunity to discover whatever information your case's brewmaster may not be so eager to disclose.

Robert Abiri is a Senior Trial Attorney at The Barnes Firm in Los Angeles. He graduated cum laude from UCLA and went on to

complete his legal studies at UCLA School of Law. Robert has served as an update author and editor for the Continuing Education of the Bar tort treatises since 2011, has previously authored an article for the Daily Journal and has been named by Super Lawyers to its Southern California Rising Stars list for the past eight consecutive years. Robert can be reached at robert.abiri@thebarnesfirm.com.