

Preparing Clients (And Yourself) For Depositions

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“Experience is not what happens to a man. It is what a man does with what happens to him.”
— **Aldous Huxley**

PREPARING AND PRESENTING a client for a deposition can be a humbling experience. Doing these things successfully takes time, practice, experience and a good deal of patience. No article can teach an attorney everything he or she needs to know about preparing and presenting a person for a deposition. But, hopefully, after reviewing this article, you will find yourself equipped with a great deal of knowledge and a number of the skills you will need to handle what can often be the most challenging aspect of civil defense litigation.

The key to effectively preparing and presenting a client for a deposition is to know the case. You must review the pleadings, the discovery responses of all parties, all records relevant to the claim or defense the deponent is expected to testify about, and the relevant case law. Know what you plan to do with the case once discovery is over (file a motion for summary judgment, try to obtain a favorable settlement, etc.) and make sure that the deponent is prepared to testify accordingly.

Before the deposition, you should also learn all you can about the other side’s case. Review records the deponent may be asked to testify about to ascertain possible problems the examining attorney will be asking about. If possible, discuss the case with your expert witness. Learn

all you can from the expert regarding the strengths and weaknesses of the other side's position. In addition, if possible, read reports from the other side's experts; find out what they say your client did wrong.

If a case involves a location, for example, the scene of an accident or the scene of a physical assault, I always meet with my client at the scene of the occurrence. This meeting should take place several weeks or months before the deposition. Meeting at the scene allows you an opportunity to meet with the client (and develop a rapport with the defendant), allows you an opportunity to learn the client's version of events, and allows you to see the actual scene of the occurrence. I find that in most cases the attorney for the other side has not visited the scene before the commencement of depositions and your visit will provide you with a strategic advantage over the opposing attorney — you will know what the scene looks like in terms of layout, traffic signals, shrubbery, turn lanes, and so on.

During this initial meeting, you should explain to the client what she can expect regarding the course of the litigation. Explain that she will have to give a deposition and explain what the deposition will entail. Have the client tell you, in her own words, what happened on the day of the accident, what went into manufacturing the product in question, how long she owned the building where the crime occurred, or whatever the case may be. You should use this opportunity to learn all you can about what the witness knows and remembers about the case. Reassure the client that you are on the case and that you will be vigorously representing the client's interests.

Once a date has been set for your client's deposition, you need to communicate the date to the client. You should instruct the client to show up at the office at least four hours prior to the deposition start time (more time should be allowed if the client is foreign, has a hard time communicating, is

exceptionally young or old, or is of limited mental ability). Use this time to really prepare the client to testify under oath and to reinforce those things discussed during the initial meeting.

At the beginning of the preparation session, explain to the client what the deposition will entail. Explain where it will take place, who will be present, the functions of each person in the deposition room, and the fact that the client will be under oath. Explain what role you will play: taking notes, making objections, marking exhibits, and so on. Explain that all the testimony will be transcribed and that it can be used later to support or defeat motions for summary judgment, for impeachment, and the like.

I always use this preparation session to depose my own client. I actually ask my client every question I think the opposing attorney will ask. I want to know, before the real deposition, just what my client is going to say. Ask the client everything, including questions about crimes and misdemeanors, use of alcohol, and other areas of potential embarrassment. If there is going to be problem testimony, you want to know about it before the deposition so that you can figure out a way to deal with it. Make sure you go over particularly troublesome areas of testimony two, three, or four times. Make sure the client knows what he needs to testify about and why the answers he gives are so important. Repeatedly emphasize that the deponent needs to tell the truth, but also remind the deponent that she does not need to guess, speculate, or make up answers. Also remind the deponent that she does not need to answer more than is asked of her.

You must make sure that you go over problem areas with the deponent and figure out a way to minimize or neutralize the problems. Discuss inconsistencies in the records or prior statements and try to resolve them. Figure out how to put any alleged inconsistencies in the best possible light for the defense.

Review any documents authored or approved by the deponent with the deponent. Discuss and review documents that you think the witness will be questioned about. Caveat: if you are preparing a witness who is not your client to testify at deposition, do not allow the witness to review privileged documents, since doing so will likely waive the privilege.

Finally, you should explain to the deponent how different ways of saying the same thing can either help or hurt a case. For example, “The light

turned green and I proceeded into the intersection” sounds so much better than “The light turned green and I took off...” Likewise, “The patient’s weight problem was a serious health concern, so I recommended a weight reduction program and explained the health risks involved” sounds much better than “The woman was incredibly fat so I put her on a diet.”

In preparing the deponent for the deposition, you should provide the deponent with the following advice and helpful suggestions.

Some Tips For The Deponent

1. Tell the truth. This is a rule of self-preservation for witnesses. The witness will be under oath and perjury will subject the witness to criminal sanctions. Assume that the examining attorney is supporting himself on his professional ability and that this includes the ability to make a witness who is playing fast and loose with the truth very uncomfortable. Remind the witness that no lawsuit is worth risking his or her personal integrity. Also remind the witness that ultimately, the opposing side will find out about a lie, and that lie will inevitably come back to haunt the witness.

2. Be your natural self. Look straight at the examining attorney, don’t cross your arms, keep your hands down and away from your mouth, and be as quietly positive as you can.

3. Answer the question after allowing two full seconds to pass. That gives me an opportunity to object. It also gives you time to make sure the answer is correct. In addition, a silent pause may prompt the questioner to explain the question, making your job easier. You are in control of what you are saying and you should relax and take the time to respond correctly to the question asked.

4. Answer the question asked and only the question asked. Resist the urge to anticipate the next question and do not volunteer any more information than necessary to respond to the question posed. If the question can be answered with a simple yes or no, answer it that way and stop. Make the questioner ask follow-up questions.

5. A deposition is not the time to tell your story and explain everything. Answers should be as short as possible and to the point. You are not there to educate the examining attorney if she is not asking the right questions or is not following up on questions.

6. Be sure the question is fully completed before beginning the answer. A question may take a surprising turn before it is finished.

7. Do not answer a question you do not understand. Ask the examiner to repeat the question. Answer it only if you fully understand it. It is up to the questioner to frame questions in an intelligent manner; if he cannot do so, do not help him. Do not explain to the examiner that the question is incomprehensible because he has misunderstood the terms used in your business, trade or science. Do not help the examiner by saying, “Do you mean X?” or “Do you mean Y?” You will then be asked both of those questions.

8. Talk in full, complete sentences. Speak slowly and clearly for the record. The court reporter cannot take down gestures. Be wary of questions and answers with double negatives in them.

9. If you are finished with an answer and the answer is complete and truthful, remain quiet. Do not expand upon the answer. Do not add to the answer simply because the examiner looks at you expectantly. If the examiner asks you if that is all you recollect, say yes if that is the case. A pause in the questioning will make you feel the need to keep talking. Be aware of this. It is a standard trick. You can remain in control by waiting for the next question.

10. You should only answer what you presently remember. Be as specific as your memory allows. If you remember exact dates and times, provide them. If you do not remember such information, say so.

11. DO NOT GUESS! If you do not know or cannot recall something, say so. Do not be afraid to say you do not know something. Witnesses are not expected to know or remember every aspect of a particular transaction, circumstance or event. Do not “fill in” details you do not clearly remember. Never make things up—it will be impossible to escape the full impact of fabricated testimony later in the case.

12. Leave the door open to honestly recall something after the deposition that you did not recall during the deposition. If the lawyer asking you questions says things like, “Is that it?” or “Were there any others?” respond by saying, “To the best of my recollection.”

13. Stay out of arguments between the attorneys.

14. Be particularly cautious if the attorney asks you to estimate something. If asked to do so, make sure your answer is so qualified or tell the examiner you are unable to estimate.

15. Remain calm and polite at all times, regardless of any provocation by the examiner. Never show anger or argue with the examiner. The opposing attorney is judging not only the substance of your testimony, but also your ability to give it in a formal setting. Also, answers given in anger are rarely good answers.

16. Watch for “tricky” questions that assume something that isn’t true. Examples are, “When did you stop beating your wife?” or “Did you know you were speeding?” Correct the false assumption in the question before answering.

17. Do not adopt an examiner’s summary of your testimony if she makes one.

18. Do not excuse your lack of memory by complaining about how long ago the events occurred. This complaint always causes the attorney to attempt to get you to admit that your memory is flawed.

19. Do not volunteer your thought processes as to how you reached an answer. If your answer depends on your recollection of facts not called for by the question, do not tell the examiner about those other facts.

20. In testifying about conversations, make it clear whether you are paraphrasing or quoting directly.

21. In answering questions regarding complicated events or extensive conversations, summarize when possible. The examiner, if she is doing her job, will ask for all the details. If the examiner accepts your summary, so much the better.

22. Do not answer a compound question unless you are certain that you have all parts of it in your mind. If it is too complex to be held in your mind, it is too complex and ambiguous to answer. If there is any doubt, decline to answer it.

23. Never characterize your own testimony with phrases such as “In all candor,” “honestly,” or “I’m doing the best I can.”

24. Avoid adjectives and superlatives. “I never” or “I always” have a way of coming back to haunt you.

25. Do not testify about what other people know unless you are specifically asked to do so. Never guess as to what other people may or may not know.

26. Do not volunteer your state of mind. If the examiner asks, “Did you read the document?” the answer should be “Yes,” not “Yes, and I believe every word of it.”

27. Avoid any attempt at levity or sarcasm. Sarcasm is often misunderstood to be the truth when your testimony is later read aloud.

28. Avoid even the mildest obscenity, and absolutely avoid any racial or ethnic slurs or references. If you do not follow this rule, you can bet that someone on the jury will be offended when they hear your testimony.

29. There is no such thing as “off the record” for you as a deponent. If you have a conversation with anybody in the deposition room, be prepared to answer questions about the conversation.

30. If the examiner appears to be confused, do not help him. In all likelihood, the examiner is acting that way to trap you or confuse you.

31. Don't be drawn in by the examiner's nods of the head or shrugs of the shoulder. Ignore the examiner's body language.

32. If you are caught in an inconsistency, do not collapse. State the reason for the inconsistency only if you are asked. Rehabilitation is done at trial or later in the deposition by the presenting attorney.

33. Every witness makes mistakes. Do not become upset if you realize that you made one. If you realize that you made a mistake in your testimony, and you can correct the mistake easily, correct the mistake. Simply state that you made a mistake earlier about x and would like to correct the answer to the question.

34. If information is in a document which has been marked as an exhibit, ask to see the document. Do not say what the document says without first carefully reading it at the deposition. Do not make comments about the document except in answer to a specific question about it.

35. If information is in a document which is not an exhibit at the deposition, answer the question if you recall the information requested. Do not tip off the examiner as to the existence of documents he does not know about. If you cannot answer the question without looking at a document which is not an exhibit, simply answer the question by stating you do not recall.

36. Do not let the examiner put words in your mouth. Do not accept his characterization of time, distance, personalities, events, etc.

37. Pay particular attention to the introductory clauses preceding the "guts" of the question. Leading questions are often preceded by statements which are either half-true or contain facts which you do not know to be true. Do not have the examiner put you in the position of adopting his half-truths or unknown facts on which he will base further questions.

38. You may take a break any time you please. You should certainly ask for a break if you think you have made a mistake in your testimony and you want to discuss it with me or if you have a question you need clarified by me.

39. If you are interrupted, let the lawyer finish his interruption and then firmly but courteously state that you were interrupted. Finish your answer to the first question and then wait for the interrupting question to be asked again.

40. Do not agree to supply any information or documents requested by the examiner. If reference is made to documents or information not present, the request for that information or those docu-

ments should be made to me. I will either answer the request or will take it under advisement. If you are forced to comment simply say, “I will look for it. If I find it, I will furnish it to my lawyer.”

41. Listen to the comments or objections I make. If I object, I may be giving you a clue as to the dangers hidden in the question. If I interrupt you to say something, STOP TALKING! Do not finish your answer.

42. Your private conversations with me, including our pre-deposition meeting, are protected by the attorney-client privilege. The privilege also attaches to letters sent to and from me. Do not waive the privilege by discussing these conversations or letters with anyone else, including the examining attorney.

43. You may be asked what documents you reviewed for the deposition and who you spoke with in preparation for the deposition. Tell the examiner what documents you reviewed, if you remember. Don’t deny that you met with me. Our meeting is perfectly legal.

Some Tips For The Lawyer

It is a very rare deposition indeed when no objections are made. As the lawyer presenting a client for a deposition, you must carefully listen to the questions asked and immediately interpose an objection if one should be made. The purpose of making objections is three-fold: to preserve the record, to alert the witness to possibly confusing or improper questions, and to prevent the disclosure of information protected by the attorney-client or work product privileges. Objections should be stated clearly and succinctly. Also remember that you should not object to trivial questions unless you need to gain control of the deposition and rein in a runaway witness. Excessive objections tend to prolong the deposition and may make the deponent nervous.

There are a number of objections that can be made during the course of a deposition. Some of the more frequent objections include:

- Vague and/or ambiguous. This is a very important objection since ambiguous questions can come back to haunt you later. Listen for the examiner to make assumptions during the course of asking the question and object appropriately;
- Asked and answered;
- Mischaracterizes the deponent’s prior testimony;
- Argumentative;
- Lacks foundation;
- Calls for speculation or guess on the part of the witness;
- Incomplete hypothetical;
- Calls for the witness to interpret the state of mind of another;
- Irrelevant;
- Asks for opinions outside the deponent’s expertise;
- Privileged: attorney-client, work product, medical studies, etc.

When objecting, state the objection clearly for the record. Hold your hand up to the deponent in order to remind her not to answer the question until the objection is noted for the record. If the deponent can answer the question over the objection (she should be able to answer over all objections except those based on privilege) so indicate to the witness. If the deponent is not to answer the question over the objection, tell the witness to not answer the question.

One other issue deserves mention at this point. It is not uncommon for an examining attorney to ask the deponent to mark on a photograph or to draw a diagram of the scene. If an attorney asks a deponent you are presenting for a deposition to do that, object and instruct the deponent not to mark anything. Deponents should be instructed during pre-deposition preparation that they will not be allowed to mark on anything or draw anything. If the questioning attorney asks why you will not allow the deponent to draw or mark on anything, you calmly explain to the attorney that the rules require the deponent to answer questions under oath — they do not require a deponent to draw pictures or mark on documents.

It is perfectly appropriate for you, as the defending attorney, to attempt to reign in a deponent if he starts to volunteer too much information. Remind the deponent that he has answered the question or that he is to listen to the question and answer only the question asked of him. Do not hesitate to cut the deponent off if he is rambling. If the deponent is volunteering too much information or gets into trouble, tell the examiner that you would like to take a break. During the break, talk to the deponent and instruct him on the rules he has forgotten. Remind him of the testimony you discussed in preparation for the deposition. Encourage, review, repeat, emphasize.

When the deposition concludes, the examiner will generally ask if the deponent would like to waive signature or reserve signature. If you are presenting a client for a deposition, you should always reserve signature. Arrange to have the transcript, signature pages and errata sheets sent to you for forwarding to the deponent.

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