

Preparation of the Witness for Depositions

By Thomas P. Cunningham

The most critical part of a case prior to trial is the deposition of the parties. A case can be won or lost based on both the content and presentation of the testimony. It would be foolish to believe that you could make someone into a great witness. A party to an action is not generally a person who has had any experience testifying. It is not a natural setting, and is difficult to reproduce with the same stress that will be experienced during questioning at a deposition. Does this mean that witnesses should not be prepared before testifying? Of course not. The key to preparation is setting your goals for the deposition for the particular witness. With correct goals, the deposition preparation will lead to a successful deposition. The common goals for all depositions should be to provide testimony that is truthful, complete, accurate, and well thought out. Witnesses should be prepared so that they are not thinking about certain facts or issues for the first time during the questioning. They should be prepared so that they are comfortable with the facts and issues. This will lead to them providing the most accurate and complete account of the facts of the case.

A. Preparation by the Attorney

Preparation of a witness begins with preparation by the attorney. An attorney cannot begin to prepare for the deposition of the witness without first having a complete understanding of both the facts and the law of the particular case. You must know the facts of the case so that you know what the witness may need to testify to at the deposition. You need to be familiar with any accident reports, statements, photographs, contracts, etc. The attorney will also need to understand the prima facie case and the burdens of proof. You must know what is significant in the case, so that you know the potential topics for questioning and the critical components that the client will need to understand about the case. The witness will also see that you are prepared. This will give the witness confidence in you and make him or her more relaxed.

B. The Purpose of Preparing the Witness

Preparing a witness does not mean telling him or her everything he or she will need to say to establish the case. This has both ethical and practical problems. Ethically, we cannot tell a witness what he or she should say at a deposition—we cannot suborn perjury. Practically, a witness cannot remember everything he or she is told and say it the way it would need to be said to be both factually correct and credible. Why prepare? The function of the preparation is to make sure that a witness is not being asked to consider an issue or fact for the first time at the deposition. The witness should have an opportunity to think through his or her responses so that he or she can be both complete and accurate. The witness does not

need to know every specific question that will be asked, but you should have had a discussion before the deposition of each of the critical facts and issues in the case. For example, if a witness needs to think at the deposition about the color of the light, the speed of the car, the distance to certain landmarks, then you have not done your job. Again, the purpose is not for you to provide the answers. The purpose of the preparation is to assist the witness with recall so that the testimony he or she provides is an accurate account of what he or she observed.

C. The Mechanics of Testifying

Timing

It is generally not ideal in a complex case to meet with a client the morning of the deposition to prepare for testimony. You should provide the witness with time to think about the issues you discussed. This may lead to additional questions by the witness or recall of events that he or she was unable to remember at your meeting. The meeting should take place a couple of days before the testimony so that the issues you have discussed are fresh in his or her mind. It should not be too long before so that the witness has forgotten your preparation.

General Information

The witness should be told the purpose of depositions. It has both a fact finding component and to lock in testimony if the case were to proceed to trial. The witness should be told that he or she will be taking the same oath that will be taken at trial. The proceedings are informal, but this does not mean that it should not be taken seriously. The witness should not let the informal nature of the proceeding lull him or her into a sense of false security. The witness should be told not to make the deposition a conversation. The testimony he or she provides cannot be easily undone if it is incorrect or only partially complete. You should discuss the following:

- Your role in the process
- The role of the other attorneys
- The role of the court reporter
- Where the deposition will be conducted and who will be present
- The type of questioner and personality of the attorney
- Attorney-client privilege—tell you everything
- Use of objections
- Opportunity to take breaks during questioning
- Possible length of the deposition
- The order of the proceedings

A witness who knows what to expect is generally less nervous about the process and will be more relaxed when he or she testifies.

General Advice

These are things to discuss with your witness about testifying in general. These are things that are not specific to the case.

- Dress appropriately
- Be likeable and keep your cool
- Always tell the truth
- Listen carefully to the *entire* question before answering
- Understand the question before answering
- Think about your answer before speaking
- Do not volunteer information
- Be accurate and complete in your responses
- Provide reasonable estimates
- Do not guess, speculate, or assume
- Correct inaccurate answers immediately
- Do not adopt the testimony of other witnesses who testified before you
- Do not accept the statements of counsel as facts
- It is okay to say you don't know or don't remember
- It is proper for you to have met with your attorney
- This is not the time to tell your side of the story
- Do not be intimidated by a bully
- Read the entire document before answering
- Do not try to provide the response you think your lawyer may want
- There is no "best" answer

D. To Review or Not to Review—That Is the Question

Some attorneys will tell you to have your client review nothing. The less he or she knows the better. I believe that this is the wrong approach. You should have every document or photograph that the witness may be asked to review at the time of the deposition present for the witness to review. These are documents that have been previously disclosed by the parties. There should not be any issues relating to confidentiality or disclosure. Do not show the witness documents that you do not intend to produce to other parties because they are not subject to disclosure. This would include the statement of a witness to an accident. A witness should not be reviewing a document for the first time at the deposition. This will often lead to incomplete or not well thought out testimony. It could be the downfall of your case if the witness testifies incorrectly concerning this evidence.

For example, the witness may be shown a photograph of the area where a fall down occurred. He or she has not been in the area in three years and had not reviewed any photographs. At the deposition, the witness is asked to show where he or she fell. He or she may be nervous and not take his or her time in examining the photograph. This could result in the witness marking the incorrect area because the photograph was not taken from a perspective that he or she had at the time of the accident. It would take the witness time and possibly an explanation of the perspective or other photographs to show the entire area. Preparation would be the key.

The witness should also review all statements that he or she has given that have been produced and any pleadings that he or she has verified. He or she should be consistent with what he or she has said previously or be prepared to testify as to why something was incorrect or inaccurate.

E. Review Background

Review the background of your witness. Tell him or her that he or she will be required to answer personal questions about his or her background. Some people are reluctant to discuss personal information. This may start the deposition on a bad note. The witness may become immediately agitated and not respond thoughtfully. Counsel may also take an immediate dislike to the witness. This will not help the case during questioning or after the deposition. Do not make your client's case a crusade for your opposing counsel.

You should review your client's education, criminal history, marital status, military service or any other aspect of his or her background that may be significant to the particular case. This part of the deposition should proceed smoothly.

F. Discuss Your Client's Recollection

- Review all of the facts in a chronological order
- Take notes of the your client's recollection
- Review in more detail the events and circumstances
- Discuss any potential exaggeration
- Review any documents that may assist his or her recollection
- Question whether the information is from his or her own knowledge or was obtained from another source

G. Refreshing Your Client's Recollection

This is a difficult decision to make during preparation. As discussed briefly above, there are dangers in not having your client review any documents. The primary concern is that the witness will not be prepared to respond with the best and most accurate answer at the time of the deposition. You must weigh the pluses and minus-

es of showing your client documents or photographs that may refresh his or her recollection of certain facts.

Pros

- Facts may be needed to satisfy your burden of proof at trial
- Failure to recall the fact may hurt your client's credibility
- The witness may be shown a document or photograph at deposition and recall the fact at that time
- His or her recollection may conflict with evidence in the case

Cons

- Documents used to refresh recollection are discoverable
- The witness may adopt the information as his or her own recollection
- Educate the witness on topics that he or she may not recall

H. Preparation for Questioning of the Witness

Advise your client that your purpose in preparing him or her for a deposition is not to ask every question he or she can expect to be asked at a deposition. Tell the witness that you hope to cover almost everything that he or she can expect to be questioned on. The witness may become nervous the first time they are asked a different question or in a different way. He or she should anticipate different questions. This also prevents the witness from attempting to prepare what he or she believes to be the perfect response to the question. Tell the witness that the only correct answer is the accurate, complete, and truthful answer. Tell him or her that a good lawyer will eventually be able to uncover and expose a lie. The entire case will fall on the lie. Don't lie.

You should ask the witness the questions that he or she can expect to be asked. Listen for incomplete responses and things that the witness is misunderstanding. You should ask your client questions to determine whether he or she is prone to guessing. Counsel the witness against guessing. This is the time for you to get a good feel as to how he or she will testify, his or her weaknesses as a witness, and whether his or her nerves will override the ability to think. The purpose is to make sure that your witness is able to present the facts in an accurate and complete manner. The testimony should not be clouded by the inability to present the case. For example, if your client saw the car cross over into his or her lane 10 feet from him or her, then he or she should be able to provide the same information at the deposition when asked the questions. This may be easier said than done with some witnesses.

A complete preparation will include discussing your client's responses to the questions you prepared. It is

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proper for you to discuss how he or she responded to the questions, whether the responses were complete, what he or she may be misunderstanding in the question, why the response may be misconstrued, etc. For example, a common question of a plaintiff is: "What activities are you unable to do as a result of the injuries you claim to have sustained in this accident?" The witness may answer in preparation: "I can't golf or bowl." You know from prior discussions that your client told you that she can no longer cut the lawn, clean the house, garden, and shovel the driveway. When you follow up on this issue with your client, she advises that she thought the question meant "recreational activities." You cannot assume that the client understands or appreciates the impact of an incomplete response. This simple example will show the client that she must be thinking broader when asked questions. She also should not assume that she knows what the questioner was looking for and limit the response. This question called for a very broad response.

The key is not to over-coach the witness. You are asking questions he or she can expect to hear at the deposition, but not providing him or her with the best answer. This is both an ethical and practical problem. Lawyers cannot tell a witness to perjure himself or herself. Even if the answer is truthful, the practical problem is that a witness will have difficulty saying something the way you may want it said. He or she is not a professional witness and will have a difficult time remembering exactly how something should be said. This will be more difficult if the question is not asked the exact way it had been asked during the preparation.

I. Remember Your Goals

The strategy for your case should be incorporated into the deposition. The deposition, like every other part of your case, should follow a strategy. List your goals prior to preparation. Your goal may be summary judgment, to establish the value of the injuries, solidify a defense, etc. You should consider:

- Burdens of proof
- Critical facts of your case
- Weakness in proof
- Presentation of the witness and testimony
- Theory of the case

The witness may not be testifying on all parts of your case; however, you must understand the role of the particular witness and how he or she fits into your case. A well thought out strategy and defined goals will assist in preparing the particular witness for the types of questions he or she will be expected to answer. It will also assist the witness in understanding his or her role in the process.

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