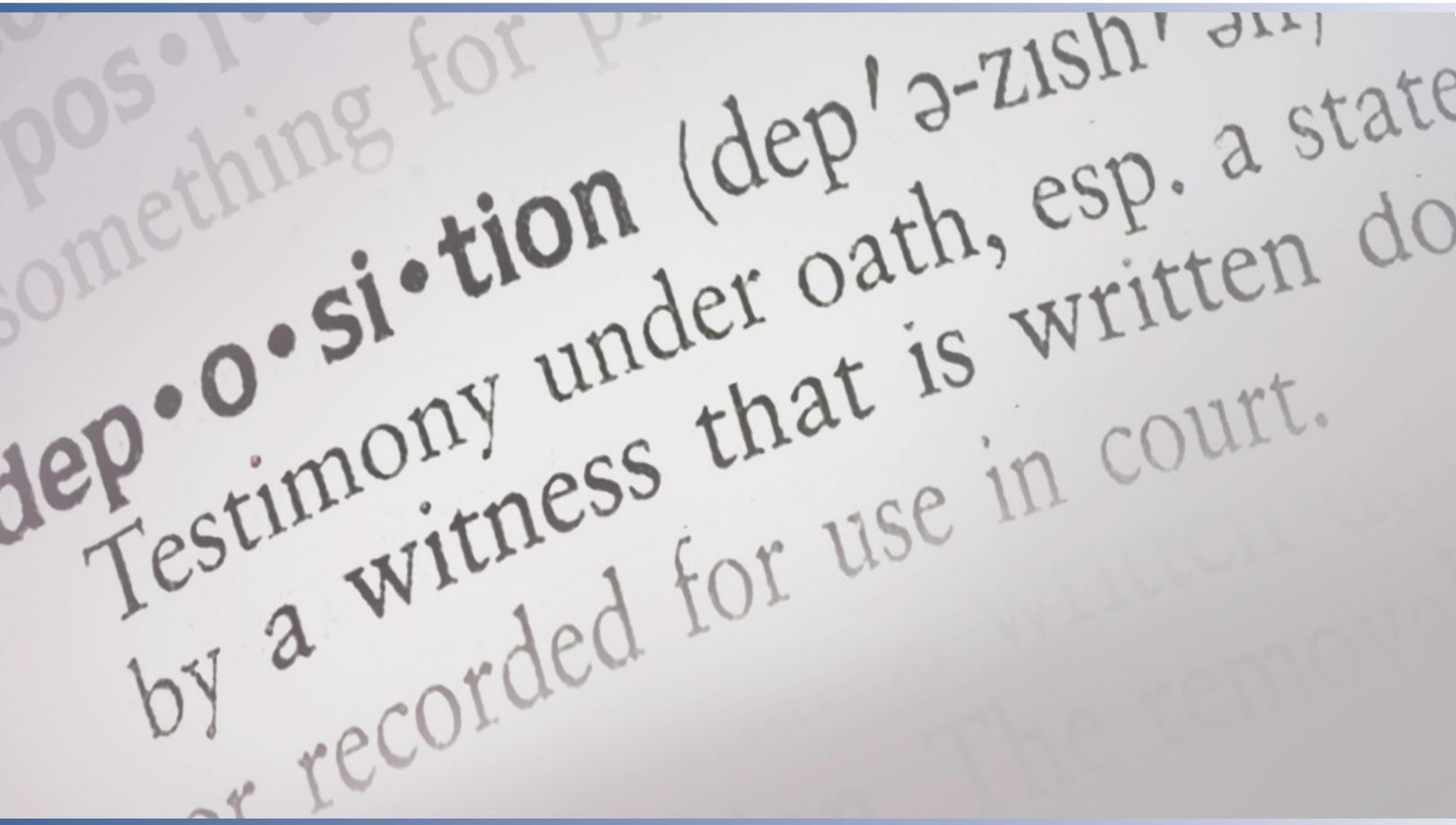


*Preparing Your Witness for a Deposition:
Best Practices*



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Preparing Your Witness for a Deposition: Best Practices

By Craig C. Martin and Anthony B. Borich

This article offers a concise “best practices” guide designed to focus your attention on the most important elements of witness preparation for an adversary’s deposition.

Truthfulness

Counsel owe a duty of candor toward the court in all judicial processes.¹ Thus, above all else, counsel must conduct witness preparation and deposition defense honestly. Witnesses’ testimony must conform to facts that counsel knows to be true.² And where counsel knows that witnesses’ testimony is untruthful or where counsel knows that a witness intends to offer untruthful testimony, counsel must take remedial measures—these measures can even include disclosure of untruthfulness to the court.³

Purpose of the Deposition

Adversaries depose witnesses for specific reasons. Depositions may be used to compel witnesses to admit decisive facts or to admit facts for impeachment purposes. Depositions are used to preclude witnesses from changing their testimony in later stages of litigation. Adversaries may also use depositions to exhaustively discover deponents’ areas of knowledge.

Counsel for deponents promote different objectives in the course of witness preparation and in the deposition itself. It is worthwhile to observe what your witness’ objectives should not include. Witnesses should not try to use a deposition as an opportunity to tell their “story” for the record. Likewise, witnesses should not use a deposition to try to persuade the opposing counsel of their version of the facts. Rather, counsel should prepare each witness to:

- a. establish a record consistent with the core theory of the case; and
- b. avoid admissions inconsistent with that core theory.

If a witness is not expected to be available to testify later, counsel should ensure that a complete record of the witness’ favorable knowledge is established.

1. MODEL RULES OF PROFESSIONAL CONDUCT R. 3.3 (1983) (“Candor Toward The Tribunal”).

2. *Id.*

3. *Id.*

Confirm the Witness' Knowledge and Explain Your Core Theory

Counsel should communicate the core theory of the case to the witness. However, if counsel is not certain of the witness' view of the facts of the case, counsel may consider debriefing the witness before explaining counsel's theory of the case. Witnesses trying to be helpful may conform their conception of the facts to counsel's theory, a tactic that can lead to ethical problems and backfire if contradictory facts are later established by an adversary. Depending on the circumstances, counsel may find it useful to separate fact gathering from witness preparation entirely.

In explaining counsel's core theory, counsel should first describe the basic legal principles at issue in the case. Counsel and deponents should also evaluate the role, if any, the deponent is expected to play at trial or the purpose, if any, for the deposition in connection with dispositive or other motions. For example, witnesses may be relied upon to deliver direct knowledge of key facts in a case, or a witness' testimony may be important only to lay a foundation for the admission of other evidence. If well prepared, witnesses will learn how their testimony can emphasize the points or themes of the core theory that counsel believe that their testimony supports. In addition, witnesses will learn how the communication of these points or themes can be further facilitated and extended by cross-examination.

Preparing the Witness on the Opponent's Case

Counsel should discuss the key elements of the opponent's case and explain how opposing attorneys are likely to use the deposition to their advantage. The opponent's case and attorney should be discussed in a professional manner so that the witness is not predisposed to unconstructive hostility while in the deposition. Topics for discussion include:

- a. the opponent's basic factual theory;
- b. the opponent's likely attempts to distort facts;
- c. discussion of known contradictions in the evidence;
- d. the opponent's likely attempts to use loaded terminology; and
- e. the opponent's basic style and demeanor.

Context of the Deposition

Counsel should understand and assess the logistical characteristics of each deposition. Depositions are attended by an array of persons, each of which plays a different role:

- » Counsel for the witness (you)
- » Deposing attorney
- » Witness
- » Court reporter
- » Video reporter

Witnesses should remember that judges will not attend. The location and seating of those present will vary. The record of testimony at a deposition can be produced by stenography, audio recording and/or audiovisual recording.⁴ Locations of depositions will differ; depositions may even be conducted remotely.⁵ Each deposition will usually include time for breaks in testimony; these breaks are usually set in advance but can also occur at the request of the witness.⁶ Last, after the conclusion of each deposition, the record of testimony must, upon request, be made available for review by the deposed party.⁷

The Art of Questioning

Deponents should know how questioning will take place in the deposition—“examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence.”⁸ The concepts of direct examination and cross-examination should be distinguished and explained,

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4. Fed. R. Civ. P. 30(b)(3) (2009). (“With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.”)
 5. Fed. R. Civ. P. 30(b)(4) (2009).
 6. *In re Stratosphere Corp. Secs. Litig.*, 182 F.R.D. 614, 617 (D. Nev. 1998). “None of the Federal Rules of Civil Procedure require a specific schedule nor provide for an inflexible protocol mandating the timing or length of breaks.” *Id.*
 7. Fed. R. Civ. P. 30(e)(1) (2009) (“On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which . . . to review the transcript or recording.”). The deposed party may then sign a statement describing any changes in the record along with the reasons for each change. *Id.*
 8. Fed. R. Civ. P. 30(c)(1) (2009).

Tricky Question Forms

- ✓ Compound questions
- ✓ Questions that assume facts
- ✓ Questions that include a prefatory statement
- ✓ Questions that call for speculation
- ✓ Questions that paraphrase answers

especially the use of leading questions on cross-examination. The implications of the witness' status as an adverse witness should also be described. In order to improve witnesses' familiarity with the types of questions they will encounter, certain frequently used forms of questions should be described and explained. [See Sidebar] Additionally, counsel should explain and provide examples of questions with loaded words or absolutes, including "always," "never," "would," and "should," that witnesses should avoid.

Counsel should ensure that witnesses are ready for the content likely to be sought in the deposition. The opponent's attorney will probably seek information regarding the witness' personal and professional background. The deponent may also be asked a series of questions designed to exhaust his or her recollection. Certain questions may focus on the

witness' preparation for the deposition itself. Such questions can be designed to reveal your theory of the case or strategy. Questions may address documents relevant to the issues involved in the deposition; witnesses should, where possible, answer such questions generally. Questions may also focus on conversations the witness may have had regarding the case; deponents should, where possible, similarly answer such questions in a general manner and state, where accurate, that they have no specific recollection of a referenced conversation. Since issues of privilege are often involved when a witness is asked about preparation for a deposition or conversations about the case, the witness should learn the basic parameters of the attorney-client privilege.

The Art of Answering

Witnesses' ability answer questions effectively can be aided if they are advised of helpful principles to guide the content and delivery of their answers. Witnesses must always be truthful. Deponents, however, should not volunteer information that is not necessary to respond to the exact question asked, unless, of course, answering only the opponents' question would convey a misleading impression inconsistent with the core theory. For example, a witness that is asked: "Isn't it true you shot Sister Mary

Margaret with a .45 magnum?” should probably not answer affirmatively with no explanation if Sister Mary Margaret had in fact pulled a bazooka on the witness first. But, generally, lawyers are trained to chase down every lead they are provided. Thus, witnesses should listen carefully to the question and precisely answer only what is asked. Witnesses should stop talking when their answer is complete; opposing attorneys will sometimes allow a “pregnant pause” as a tactic to elicit further information. Precise answers are conveyed in the shortest, simplest language possible. [See Sidebar] Therefore, witnesses should not guess, embellish, exaggerate or “sell the case.” Witnesses should also be instructed to avoid impermissibly engaging with the opponent’s counsel by objecting or arguing. Witnesses should be themselves, but avoid acting cute, responding sarcastically or making jokes. And, finally, witnesses should not be provided, nor should they deliver, scripted answers; answers should, however, be heard and reviewed before the deposition.

Whenever possible, formal question and answer practice sessions can be used to properly familiarize a witness with the deposition format and ensure that they will be comfortable.

The Art of Objecting

Counsel should describe the sequence of the objection process to the witness. After the opponent’s attorney asks a question, the witness should pause to afford an opportunity for counsel to record an objection to the question. The witness should therefore answer only after a pause has passed without an objection or after an objection has actually been entered into the record. Witnesses may not offer objections. On the other hand, witnesses should be instructed to pay attention to objections that are made by counsel because the objections may offer the deponent clues on the most effective manner to present a responsive answer. Objections should be delivered by counsel in the form of “objection”; “compound.” In advance of a deposition, counsel should review the applicable procedural rules and commit to memory a “Making & Meeting Objections” list.

Effective, Concise Answers

“Two o’clock”

“In my office”

“Yes”

“No”

“I don’t understand”

“I don’t know”

“I don’t remember”

Rules of Conduct

Counsel should discuss how the rules of depositions permit counsel to interrupt or interfere with depositions in surprisingly limited circumstances, especially since witnesses' familiarity with lawyers' ordinary conduct may rest only on unrealistic trials on television or in movies. Counsel may be subject to sanctions and ethical inquiries for improper conduct.⁹ Thus, witnesses should not expect active, unjustified intervention; rather, witnesses should be familiar with the parameters of counsel's role, outlined as follows.

Counsel "may instruct a deponent not to answer [a question] only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion" to terminate the deposition as provided under Rule 30(d)(3) of the Federal Rules of Civil Procedure.¹⁰ Questions that elicit answers lying within the attorney-privilege are not uncommon; counsel should instruct a witness not to answer in such circumstances where necessary to preserve the privilege. In other instances, however, even when an adversary is engaged in improper conduct such as witness harassment,¹¹ counsel "may not instruct the witness to remain silent . . ." ¹² Instead, "[c]ounsel for the witness may halt the deposition and apply for a protective order [under Rule 26(c)]." ¹³ Counsel cannot immediately run to the court. In advance of a motion for a protective order, counsel must certify that he or she has "conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." ¹⁴

Other rules limit how counsel may make objections. Counsel must avoid "coaching" objections that attempt to telegraph a substantive response to the witness, not only because such coaching is expressly disallowed by the rules,¹⁵ but also because you may be coaching too late and your indications may prove confusing and unhelpful. In addition, though counsel is permitted to record objections immediately after a question is posed, it is improper to interrupt

9. "The court may impose an appropriate sanction — including the reasonable expenses and attorney's fees incurred by any party — on a person who impedes, delays, or frustrates the fair examination of the deponent." Fed. R. Civ. P. 30(d)(2) (2009).

10. *In re Stratosphere Corp. Secs. Litig.*, 182 F.R.D. 614, 618 (D. Nev. 1998).

11. Improper conduct can include a deposition "being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party." Fed. R. Civ. P. 30(d)(3).

12. *Redwood v. Dobson*, 476 F.3d 462, 467-68 (7th Cir. 2007); Fed. R. Civ. P. 26(c)(1) (2009).

13. *Redwood v. Dobson*, 476 F.3d 462, 467-68 (7th Cir. 2007); Fed. R. Civ. P. 26(c)(1) (2009).

14. Fed. R. Civ. P. 26(c)(1) (2009).

15. Fed. R. Civ. P. 30(c)(2) (2009) ("An objection must be stated concisely in a nonargumentative and nonsuggestive manner.")

the question sequence by conferencing with a witness prior to the delivery of a responsive answer.¹⁶ Occasionally, courts have sanctioned attorneys for improper objections that affect witness' answers. In one case, the court sanctioned an attorney that had engaged in "repeated, unnecessary objections that slowed the progress of the examination, impeded the flow of information from the witness, and unnecessarily prolonged the proceedings."¹⁷

Rules of Evidence

Counsel should provide witnesses with a basic overview of the rules of evidence and the purposes those rules serve. Rules of evidence are intended to control whether, how, and what for purpose proof of facts may be presented before a court.

In illustration of the evidentiary purposes just described, counsel may find it helpful to discuss the following fundamental evidentiary concepts:

- » Competence
- » Qualifications — lay and expert opinions
- » Relevance — "reasonably calculated to lead to discovery of admissible evidence"
- » Best Evidence Rule
- » Authentication of documents
- » Hearsay

Witnesses should be especially familiar with rules that are of particular relevance to the content likely to be sought in a deposition. These rules can include, for

16. *BNSF Railway Co. v. San Joaquin Valley Railroad Co.*, 1:08-cv-01086-AWI-SMS, 2009 U.S. Dist. LEXIS 111569, at *9 (E.D. Cal. Nov. 17, 2009) ("[C]ounsel has no right to confer [with a witness] during the deposition except to determine if a privilege should be claimed."); *In re Stratosphere Corp. Secs. Litig.*, 182 F.R.D. at 617 ("If [breaks] are requested by the deponent or deponent's counsel, and the interrogating attorney is in the middle of a question, or is following a line of questions which should be completed, the break should be delayed until a question is answered or a line of questions has been given a reasonable time to be pursued.").

17. *In re Stratosphere Corp. Secs. Litig.*, 182 F.R.D. at 621.

example, the foundation requirements for admission of various forms of physical evidence, such as the requirements applicable for letters, telephone calls, copies, and business records. Witnesses should also acquire a working knowledge of the potentially applicable privileges that may arise in the deposition and comprehend the distinction between past recollection recorded and refreshing recollection.

Documents

Counsel should devote special attention to explaining the connection between the rules of evidence and the role of documents in the law and in depositions. Documents are universally used because evidentiary rules often limit whether and how witnesses are themselves allowed to testify to certain facts, or it may be difficult to ensure that witnesses will be available to testify or even testify faithfully to the truth. In this way, documentary evidence is often used to fill breaks in evidence or influence fact finders' perception of witnesses' credibility; these efforts can prove to be the difference between the advancement of a credible theory of the case and one that fails to persuade.

Lawyers use witnesses to authenticate documents, including by asking witnesses who sent, received or reviewed a document. Thus, a witness' connection to a document may be determinative of whether it will be admitted and witnesses should not automatically accept the validity of a document at face value. If an opposing attorney asks a witness if a document refreshes the witness' recollection, the witness should not answer "yes" unless that is so. Additionally, witnesses should avoid parroting the language of written documents produced by an opposing attorney. In preparation for a deposition, a witness should be made familiar with the documents requested by the adversary's lawyer in the notice of deposition and any other documents that are likely to be presented to the witness at the deposition. Last, counsel should remember that all documents should be marked, even if they are only used to refresh recollection.

Video Depositions

Depositions may be recorded by audiovisual means at the election of counsel for the witness even if the adverse party provides that the deposition is to be recorded by other means. When a defensive election of video transcription is made, witnesses should be prepared by rehearsing with a video camera. In particular, counsel should ensure that deponents avoid looking to counsel for answers, looking at the camera operator while answering, or engaging in distracting habits, such as pen spinning. Witnesses should dress for the deposition as they would for trial. Finally, counsel must be prepared to make true objections.

An offensive election may be made when counsel is confident that the witness will be particularly effective and will establish a record consistent with the core theory of the case, especially when such a witness may be unavailable for trial.

Other Issues

Depositions sometimes raise unique issues that pose special challenges. Thorny issues that sometimes arise prior to or in the deposition include:

- a. criminal problems;
- b. significant problems unrelated to the litigation;
- c. issues in the litigation that far exceed the significance of the litigation itself;
- d. witnesses that have too little time or desire to prepare;
- e. cases with multiple witnesses;
- f. witnesses' anxiety or lack of confidence; and
- g. privilege issues arising in the course of deposition preparation.

In all cases, the resolution of these issues should be discussed in advance of the deposition. For example, where a witness experiences excessive anxiety in advance of the deposition, counsel may find it necessary to invest a significant effort in attending to the witnesses' emotional preparation; the witness' performance may depend on it no matter how exhaustively counsel mechanically instructs the witness on deposition preparation. In addition, counsel should consider at the outset of deposition preparation whether the witness is covered by the attorney-client privilege. If the witness is not covered by the attorney-client privilege, counsel should advise the witness that conversations occurring in the preparation process may be discoverable.

If you would like to know more, please give us a call.

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