Preparing Fact Witnesses For Deposition

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The more the witness knows about the process, the more effective he or she will be at deposition.

“OH GREAT. Another deposition to defend. Four hours down a rat hole while I sit there twiddling my thumbs.” Some version of this thought (perhaps more colorfully expressed) has sprung into the mind of more than one litigator upon learning that the other side in a case wants to depose a fact witness friendly to the client. While it is true that the defending attorney’s role is very limited, this does not mean that it is unimportant. Cases can be won or lost at depositions. Depositions can neutralize witnesses, affect settlement, alter strategy, uncover critical facts not previously known, and otherwise steer the course of the case. As a result, the defense of a deposition should never be taken lightly, especially when it involves one of your client’s witnesses.
To do a really effective job of defending a deposition, adequate and meaningful preparation is critical. With this in mind, we offer these tips for preparing your fact witness effectively for his or her deposition.

GETTING THE WITNESS READY • Much of deposition preparation is about answering the “just the facts” questions for the witness: who, what, when, where, why, and how. Each part of preparation will answer at least one of these questions, and in some cases, there will be overlap. In any event, the better acquainted the witness is with the process, the more comfortable he or she will be when the time comes.

1. Notify The Witness And Arrange A Preparatory Meeting
One of the first things to do after finding out that the opposing attorney wants to take a deposition of one of “your” witnesses is to get in touch with the witness to schedule a preparation session. Tell the witness that the purpose of the preparation is to explain and answer questions about the deposition process; the purpose isn’t to quiz the witness about the case.

2. Tell The Witness Not To Discuss The Matter With Others
When a witness first learns that his or her deposition is to be taken, the natural reaction is to try to “study up” on the case—reviewing documents, discussing depositions with others who may already have been deposed in the matter, and so on. (This is especially likely in business litigation, since there are apt to be several witnesses who are in the same building or down the hall from each other.) Impress on the witness that such discussions should be avoided since they will affect the witness’s “knowledge” of various matters and are discoverable.

3. Tell The Witness Not To Review Documents Or To Prepare New Documents
Similarly, a witness should not review any documents or prepare new documents such as timelines, sequences of events, and the like, in preparation for the deposition unless specifically instructed by the attorney to do so. Documents reviewed or generated by the witness in preparation for a deposition likely are discoverable by the other side.

4. Decide Whether Any Documents Should Be Reviewed In Preparation
However, if during the preparation meeting, the witness is instructed to review or prepare certain documents, another meeting is likely to be appropriate before the deposition to discuss the documents and avoid any surprises during the deposition.

5. Explain The Deposition Process
Tell the witness that a deposition is a formal legal proceeding in which a lawyer from the other side will try to find out what the witness knows about the controversy and to find areas of vulnerability. The basic purposes are discovery, preservation of testimony, and “locking in” the witness’s version of events. The questions and answers will be recorded by a stenographer (who often will audiotape the deposition as well) and possibly also a videographer, and can be used at trial if there are inconsistencies between what the witness testifies to at the deposition and at trial. At the start of the deposition, the witness will take an oath to tell the truth, and could be subjected to fines or imprisonment for lying under oath.

6. Explain Where The Deposition Will Be Held
Tell the witness that usually a deposition is held in a conference room at a lawyer’s office, but depositions are also held in hotel rooms,
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Company offices, at the stenographer’s offices, and so on. Although it may be convenient for the witness to have the deposition at the company’s offices, this is usually undesirable because of possible interruptions. It also provides opposing counsel with access to the company’s facility and offers the ready availability of additional documents identified during the deposition. Also, having the deposition at a lawyer’s office rather than at the company’s facilities will reinforce the seriousness of the proceeding and help to keep the witness from becoming too comfortable and too much at ease.

7. Explain Who Will Be At The Deposition And Why
At the deposition there will be at least:
• The witness;
• The opposing attorney taking the deposition;
• The attorney representing the witness and defending the deposition; and
• The court reporter or stenographer.
Others at the deposition may include a videographer, additional attorneys from either side, and attorneys for other parties if there are multiple plaintiffs or defendants. In addition, any of the parties may generally attend, or in the case of a party that is an entity, a party representative.

At the deposition, the attorney taking the deposition asks questions and the witness must answer the questions under oath. The attorney representing the witness objects when an improper or unfair question is asked and prevents the witness from being harassed or intimidated.

8. Explain The Importance Of The Deposition
The answers given by the witness may lead to settlement, or may affect the outcome of the trial. The answers may lead to additional discovery or adverse rulings. The testimony may also be used in the event that the witness is unavailable to testify at trial. If the witness gives dishonest or thoughtless answers, the deposition may significantly harm both the company and the witness.

9. Explain The Attorney-Client Privilege
Assuming the witness is a client, he or she should understand that confidential communications between him or her and you, the attorney, concerning legal advice are generally protected from discovery by the other side. Thus, the witness must take care to avoid discussing privileged conversations with others since such action may lead to a waiver of the privilege. The witness should understand, however, that the opposing lawyer may generally inquire about whether he or she prepared, met with counsel, and so on without getting into the substance of the communication.

10. Explain The Do’s And Don’ts Of Answering Questions
Unless there is an objection for privilege or an instruction by the attorney defending the witness not to answer the question, the witness must answer, and do so truthfully and accurately to the best of his or her ability. Usually, the deposition begins with a series of questions about the witness’s background and education. This also gives the questioner a chance to appear friendly with the witness and try to make the witness relaxed and hopefully off guard. Caution the witness to remember that the friendly adversary is only trying to get the witness to volunteer information and that the witness must remain on guard at all times.

Don’t Volunteer
Remind the witness to answer only the question that was asked and not to volunteer additional information. Volunteering information is common. During normal conversation, we all try to answer the question we think should