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# Preparing the Client for Deposition

By Suzanne L. Davis, Andrew DeSimone,  
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**A**lthough cases are not typically won by clients in their depositions, they can be lost, and lost badly. Plaintiff’s attorneys want to score a quick hit with the client deposition as it is often one of the biggest drivers to an early settlement. Therefore, effective preparation is key for an effective deposition. However, preparing clients for deposition can be a daunting task. Not only must you get clients up to speed on relevant documents and case issues, but you must help them to become effective communicators.

In addition, given the heavy use of video depositions at trial, it has become more important for clients to present at deposition as they would at trial, and as a result depositions require much more preparation today than they did in the past. It is imperative that deposition testimony be engaging and viewed as obviously relevant to jurors’ decision-making.

While most counsel have their own style and methods for deposition preparation, there are some “tried and true” methods that we have found to be effective across most preparation sessions. In this chapter, we outline these methods and best practices of effective deposition preparation.

## **Scheduling and Structuring the Preparation Sessions**

Prep sessions should occur at your offices, where the deposition will take place. This will allow your client to get a better “feel” for the location of the

deposition. In larger, high exposure cases, there should be two meetings at a minimum. The meetings should last no longer than four hours, as the attention span of your client will require a break.

Schedule the deposition far enough after the Plaintiff's deposition so that your client can review the transcript prior to his/her deposition. Your client should attend the plaintiff's deposition. This is important in several respects. First, it allows your client to experience a deposition. He or she will learn the roles of the various parties to the case. Second, it will allow your client to meet the opposing counsel and get a feel for that attorney before his/her deposition. Finally, your client can aid you in the Plaintiff's deposition. The client can help with questioning; keep the Plaintiff honest; and use their skill set to your advantage.

Also, consider retaining a jury consultant to help with the preparation. Doing so offers many advantages. First, it provides another perspective to the case, which might help identify weak points. Second, it shows the client how serious the matter is and will help with effective presentation. Finally, the consultant will help the client deliver his or her messages during the deposition.

## **Setting Expectations and Goals with the Client**

As a first step, it is important to give clients an idea of what to expect during the preparation session. The goal is to get clients invested in the process and make them active participants. "Active" is key because it can be easy for clients to settle into a more passive—and less productive—role during the session. Many clients don't know what to expect, and in fact they may assume that the process is geared chiefly toward you telling them what they should do and say, when in fact the process is largely about building their self-efficacy for giving deposition testimony and getting them to take ownership of their testimony.

### ***What the Prep Session Is and Isn't About***

A good place to start is by explaining to clients what the prep session is *not* about. That is, it is not about charm school, changing who they are, getting them to say things they don't want to say, or telling them what they should

and should not say. Rather, the session is mostly about (a) building knowledge/familiarity with relevant documents and testimony, (b) building communication skills—both verbal and nonverbal, (c) developing messages, and (d) practicing their testimony.

### ***Defining the Audience***

It is also useful to help clients appreciate that while they may be answering questions from opposing counsel, their true audience is the judge or jury (or both). Share with your clients what jurors want: Confident, consistent, and straightforward witnesses who appear to be well-prepared and natural. The key is for clients to be “themselves” while communicating strategically with their audience.

### ***Addressing Client Concerns***

Finally, it is important to ask clients about their own concerns with their testimony. What questions do they think they will have the most difficulty answering? Which case facts trouble them the most? Are there things other witnesses have done that concern them? Are there any things they may have to say that are not helpful or even harmful to the defense case? Listen carefully to the responses to these questions; they can give insight on where clients need the most work. And importantly, these questions give clients the opportunity to get their concerns off their chest. This is a critical step because unaddressed concerns can undermine the client’s testimony. Sometimes simply vocalizing concerns puts clients more at ease.

## **The Basics of Depositions and Document Review**

It is important to inform the client, especially if this is his/her first lawsuit, about the basic procedures of depositions. Explain generally what happens in a deposition, why a deposition is important, and what to expect in a deposition. Most importantly, tell your client the elements of the Plaintiff’s case, so your client understands potential deposition pitfalls; your client needs a stake in the game. You must inform your client not to talk to anyone about

the lawsuit, unless it is protected from discovery by a privilege: attorney–client; spousal privilege; work product privilege.

Instruct your client about objections, and how he/she should respond if an objection is made. Inform the client that if a question is asked, the client will likely have to answer the question without assistance of counsel and without taking a break for the attorney and client to confer.

The next step is to share information with your client obtained during the written discovery phase. This is very important. It keeps the client up-to-date with the case and what information has been uncovered. If you are having the case reviewed by an expert, share the results of that review with the client. The attorney–client and work product privilege will protect this information from discovery.

In professional cases, you must have the matter reviewed by an expert prior to your client’s deposition. Again, the expert will be able to highlight areas of concern that must be addressed prior to your client’s deposition. One of the hallmarks of good deposition preparation is the phrase “No surprises.” At the end of the deposition, you and your client should be able to say, “We covered all of these issues prior to the deposition.” Unfortunately, when issues are not covered in the preparation session, the deposition can quickly go bad.

Therefore, it is imperative to review any documents with your client prior to the deposition. Opposing counsel will have studied the documents prior to the deposition, so you and your client must as well. How do you handle the question that is always asked: “What did you review to prepare for your deposition?” There is a strong argument that this question is protected by the work product privilege, as it necessarily encroaches upon the mental impressions of the attorney, *i.e.*, what documents the attorney thought were so important to discuss with the client. If this privilege does not work, your client should answer broadly, *i.e.*, the medical records of Dr. Smith, etc.

In document intensive cases, such as medical malpractice, instruct your client not to answer a question without first looking into the records. Otherwise, the client would be speculating on the answer.

## Building Verbal Communication Skills

### *The #1 Rule for Depositions*

When it comes to effective verbal communication, the #1 rule for depositions is to *listen carefully to the question and truthfully answer the question asked*. While this concept sounds easy, for most clients it is anything but. *Many witnesses don't answer the question asked because they simply do not focus on the question*. In fact, most witnesses need substantial practice time to actually identify the question being asked. A good beginning exercise is to have your client listen to a series of deposition questions (ranging from simple to the most compound questions) and repeat back the question asked. This exercise is a critical first step in getting clients used to attending to the question asked as the first step in the “answering” process.

It is also important to instruct clients to not only answer the question asked, but to stop talking after answering. It helps to share with clients why “filling the pauses” and continuing to talk is so problematic in depositions. First, clients run the risk of providing ammunition to the other side. Second, they run the risk of losing credibility by appearing evasive (e.g., that they are “hedging”). Third, they virtually guarantee that they will get more questions—something neither you nor they want.

### *Normal Conversations vs. Depositions*

It is also important to share with clients the critical differences between normal conversation and deposition testimony. While these points may seem obvious to you, clients really need to understand that virtually all of their basic instincts when it comes to conversing with others do not apply in depositions.

*Normal conversations:* When the other person pauses, you should talk.

*Depositions:* When the other person pauses, it means nothing

*Normal conversations:* You try to anticipate where the other person is going.

*Depositions:* You think only about the question in front of you.

*Normal conversations:* You volunteer information about yourself.

*Depositions:* You answer the question and then stop.

*Normal conversations:* You match the other person's pace and tone.

*Depositions:* You answer slowly and calmly.

*Normal conversations:* You are thinking about how you will respond even before the other person stops talking.

*Depositions:* You listen to the question carefully and then think about how you will respond.

*Normal conversations:* You sometimes argue to prove your point.

*Depositions:* You never argue. You just answer the question.

### ***The Remaining Rules***

After laying out the differences between normal conversations and depositions, put these concepts into more formal guidelines for the client.

- **Stay calm and neutral.** It is essential that clients don't engage in escalation or interrupt opposing counsel. An angry witness is at best distracting for the jury and at worst detrimental for the defense. As one juror put it in response to a witness who escalated during deposition, "I could tell at times he was getting irritated and I figured it was because he was caught." On the other hand, sometimes witnesses forget that opposing counsel is on the other side, especially if counsel is taking a "let's be friends" approach. It is important for clients to not be too friendly with opposing counsel, as this is when it can become easy for clients to "help" opposing counsel and over-talk.
- **Answer the question asked, not the question you think is coming.** One of the most frustrating experiences for a jury is when a witness does not answer the question asked. It is critical for clients to "stay in the moment" and focus on the question in front of them, as opposed to anticipating where opposing counsel is going with his or her line of questioning. We have seen witnesses actually answer an anticipated question rather than the question at hand, and the effect on the jury can be very harmful for the defense because it appears that the



witness is afraid of the question in front of him or her. As one juror put it, “*He must have something to hide. What other explanation is there for refusing to answer such a simple question?*”

- **Stay engaged and avoid withdrawal.** During long depositions in particular, even the best witnesses can become tired and start withdrawing from the process and appear passive and unknowledgeable. Typically, this comes in the form of an increasingly quiet voice, or a string of “I don’t know” or “I don’t remember” responses. Share with clients that “I don’t know” or “I don’t remember” are fine answers, but not to adopt them as a coping mechanism. Withdrawal can manifest in other ways as well. For example, in one deposition, a witness began stating that “*the emails speak for themselves*” instead of actively explaining what he had meant in those emails. Clients should be encouraged to stay aware of how they are feeling and ask for breaks when they feel fatigued, so they can recharge and come back ready to deliver their testimony with confidence.
- **Keep it simple and avoid jargon or highly technical speech.** Advise clients against trying to prove they are smarter than opposing counsel. This typically occurs when opposing counsel is being argumentative and combative with the witness. Again, remind clients why sparring with opposing counsel is so damaging—because it doesn’t help the judge or jury understand anything. In fact, at the time jurors are watching deposition clips, they are likely still trying to sort out the case and what the client’s testimony means, and any sparring about technical definitions or details will be meaningless to them.
- **Feel free to ask for, look at, and rely on documents.** Clients sometimes assume that to be an effective witness they must know or immediately recognize any document put before them. Give clients permission to carefully read any documents given to them and encourage them to ask for, look at, and rely on documents rather than their memory when answering questions related to those documents. That said, clients should avoid “talking to the document” when answering questions about that document. A good strategy is

for the client to study the document, put the document down, and then politely ask opposing counsel to repeat the question.

### ***Strategies to Expect from Opposing Counsel***

Part of effective verbal communication preparation includes (a) a discussion of the various techniques typically used by opposing counsel, some of which we have mentioned already, and (b) considerable practice using the techniques in situations that mimic the “heat of battle” between client and opposing counsel. The following strategies sound simple, but they are not, and everything needs to be practiced so that clients can feel the different approaches and learn to identify the type of question strategy being used.

*Technique:* Opposing counsel asks a confusing question or the actual question being asked is unclear.

*Witness strategy:* Politely ask counsel to repeat the question; do not attempt to answer a question that you do not fully understand.

*Technique:* Opposing counsel is intimidating, aggressive, or uses verbal/physical feedback or humiliation tactics.

*Witness strategy:* Stay calm and neutral and just answer the question asked.

*Technique:* Opposing counsel says nothing after the witness finishes answering a question.

*Witness strategy:* Don’t say anything and wait for the next question.

*Technique:* Opposing counsel is overly friendly and tries to engage the witness into “helping” him or her.

*Witness strategy:* Stay calm and neutral and just answer the question asked.

## **Behavior and Attire**

### ***Demeanor During the Deposition***

Depositions are formal situations that deserve reverence and respect from a witness, no matter how opposing counsel is behaving. Witnesses should

always remember that they are speaking to the judge and jury and should never assume they are off camera. We have seen witnesses spend over thirty seconds taking a drink of water, apply lip balm, and fuss with their hair-style on camera during important segments of their testimony. While such actions won't turn jurors against the entire defense case, they are distracting to jurors, and you want jurors to be fully engaged and attending only to the content of the witness' testimony.

As we discussed at the outset, jurors' expect witnesses to be confident, consistent, straightforward, well-prepared, and natural. So what does this mean for a client's demeanor? Most clients are comfortable and appear poised when sitting upright leaning slightly forward, looking attentive, and turned slightly toward opposing counsel.

### ***Attire***

When it comes to the appropriate attire for your client in the deposition, the real question is what would jurors reasonably expect from a witness in the same or similar position as your client? For business executives and middle managers, jurors expect a suit and (for men) a tie. For blue-collar workers, a work uniform is acceptable.

### **Message Development**

One of the biggest reasons why witnesses fail is because they are not sure what they want to say. In fact, among the witnesses we have worked with, their #1 fear is not knowing in advance what all the questions will be. The #1 myth? Believing they need to know what all the questions will be in advance in order to succeed.

The best way to help clients manage the reality that they will not know what every question will be is to give them strategies to deal with whatever questions come their way. We have discussed many of these strategies previously, but there is one more that is a critical component of effective communication with the judge and/or jury: Knowing one's area of testimony, and in particular identifying "home base" messages.

A home base message is a simple phrase or sentence that represents a core theme of a witness' testimony. It is the idea that the audience must hear, remember, and use. Home base messages help a witness to gain control, meet the audience's expectations by communicating information the audience needs to hear, and helps the witness recognize what he or she knows and doesn't know.

We recommend that you and your clients spend time together mapping out their main messages and areas of testimony to help clients understand when it is appropriate to say "I don't know" or that a question is outside the scope of their knowledge.

## **Mock Depositions**

Practice is a key component of witness preparation. Clients must have the opportunity to put the techniques they have learned into action while under attack well before their actual deposition. Every witness will give bad answers as they are learning to become an effective witness; the key is to let those failures happen in a supportive environment and be learning experiences.

That said, it is important that during mock depositions that you resist the urge to jump in and over-correct your client. The most productive practice sessions consist of videotaped 5–10 minute bursts of cross-examination on the key issues clients will face during their depositions. You might consider having another experienced member of your firm—someone unknown to the client—play the role of opposing counsel during these sessions and use tactics such as silence, intimidation, or a "let's be friends" approach to give the client an opportunity to practice handling these types of situations. It is imperative that the client repeatedly practice using their new skills in the "heat of battle." Scout your opponent beforehand as well. If you have never had cases against opposing counsel, call fellow attorneys and see how they present themselves at depositions. For instance, if opposing counsel is a devotee to the reptile theory, you must prepare your client on how to respond to that line of questioning.

After each 5–10 minute segment, stop the tape, rewind, and review it with clients, pointing out not only what they could have done better but how

they could have done better. It is key to be supportive of the client while at the same time encouraging them to take ownership of their testimony and helping them to realize that if they are going to deliver effective testimony, it is up to them to handle whatever situation opposing counsel puts them in during the deposition.

## After the Deposition

The deposition is over. Instruct your client to be cordial with the good-byes, especially if the Plaintiff was present for the deposition. However, the client should be aware not to discuss anything of substance until the other parties have left.

After the deposition is over, be sure to debrief with your client. This allows appropriate communication on strategic issues while those issues are still fresh following the deposition.

In some jurisdictions, the witness always waives the requirement to “read and sign” the deposition. However, in larger exposure cases, it is better to have your client read and sign the deposition. First, it keeps your client focused on the litigation. After his/her deposition, there will be a natural tendency for the client to lose focus. Having the client read and sign keeps the client engaged in the process.

Second, it allows the client to correct any potential transcription errors. Under Federal Rule of Civil Procedure 30(e)(1), the witness can make changes to “form or substance” in the deposition. There is a split in the Circuits on how in-depth the changes can go. *See, e.g., Poole v. Gorthon Lines, AB*, 908 F. Supp. 2d 778, 787 (W.D. La. 2012) (majority liberal changes view); *but see Burns v. Board of County Comm’rs*, 330 F.3d 1275, 1282 (10th Cir. 2003). Regardless, your client must list the reason the change is being made.

With the conclusion of your client’s deposition, the attorney must now focus on other fact and expert discovery to have the case ready for trial.

## Conclusion

A considerable amount of work goes into deposition preparation. From the initial meetings with clients to mock depositions/practice sessions, an immense amount of time and effort are spent, but in the end the efforts are well worth it. What you ultimately have is an attorney–client team that is ready and confident in the client’s ability to perform successfully during the deposition. By following the best practices outlined in this chapter, you can develop client witnesses who are poised under pressure and able to handle the various strategies and “attacks” they are subjected to by opposing counsel. A final word of advice: Do not underestimate the importance of practice sessions with your clients, and always err on the side of more, as opposed to less, practice time.

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