

PRACTICAL TIPS

Defending the Deposition: A Primer

By Jonathan I. Handler and Jillian B. Hirsch

One of the most important, yet often overlooked, tasks that every trial lawyer must undertake is the defense of a fact witness at deposition. No matter how many times you have defended a deposition and no matter how experienced or sophisticated your witness, you cannot ignore the importance of the preparation session. It is often said, “There are no poor witnesses, only poorly prepared ones.” While many of us have seen witnesses who simply would not take instruction and violated every rule of the good witness at deposition, it is exceedingly rare that a comprehensive, well-thought-out preparation session will not be of immense benefit. You simply cannot rely solely on your witness’s common sense or good judgment. You must insist that the witness sit down with you in advance to listen to you and understand what you expect at deposition.

The purpose of this article is to explain, in a short, to-the-point fashion, how to approach the preparation session to give you (and your witness) the greatest chance of success.

Getting Started: Putting the Witness at Ease

- Make sure that your witness blocks off ample time to meet with you in a place where there will be no interruptions or distractions by other obligations. The witness must be able to give you complete attention for as long as you need (and for a case of any complexity, preparing an important witness will easily occupy several hours).
- Educate your witness to the extent necessary about the case. In some cases, you may need to show your witness documents; in others, you may not.
- Explain that depositions are almost always “holding actions” or defensive exercises. Most of us will never live to see the deposition in which our witness is so impressive that the other side packs up and goes home. This concept is especially important to emphasize to high-ranking corporate executives who are accustomed to winning arguments and negotiations through the force of their personality and will. This will put the witness at ease because she now knows that it is not necessary for her to score points in order to do well.
- Tell your witness that, despite what he may think, the deposition is fundamentally about listening, not talking. The listening starts during the preparation session and continues through the close of the deposition.

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- Explain the mechanics. Never lose sight of the fact that, for many witnesses, even those who are quite sophisticated, the deposition will be their first encounter with the legal system and, accordingly, they will be very nervous. One of your primary responsibilities during the preparation session is to get the witness to relax. An essential part of that process is explaining in basic terms what a deposition is, including who will be present, where people will sit, the court reporter’s role, and the like. Lawyers take these details for granted, but, for the deponent, they are part of the great unknown.
- Make sure your witness understands that the rules of conduct at a deposition bear no resemblance to normal human conversation. Once the witness is sworn in, she must largely abandon the norms that govern her behavior in responding to questions in the real world and follow those you provide instead.

Some Basic Principles

Once you have explained the basics, you might want to have a checklist of fundamental principles to go through with the witness. These should be short, punchy concepts that, combined with meaningful examples, will stay with the witness throughout the deposition. Here are some examples you might offer to your witness:

Give the shortest honest answer. If you remember only one thing from the preparation session, remember this: You *must* tell the truth—because it is the right thing to do and because not doing so always leads to trouble. But the “shortest honest answer” means just that. Think about this example:

Q. Mr. Smith, do you know what time it is?

A. Yes, it is about 10 minutes of 3.

This is the wrong way to answer the question. The question is, “Do you know what time it is?” Period. The correct answer is, “Yes” if you wear a wristwatch and know how to tell time or “No” if you do not. End of story. That is the level of perfection to which you must aspire in answering every question.

Understand the question. If you do not understand the question, say, “I do not understand the question.” Too many witnesses have stumbled into disasters that could have been avoided by making sure they understood the question before they launched into an answer. Remember, it is not your responsibility to help the examiner.

Think before you speak. After every question, count to five in your head. This will ensure that I have an opportunity to object and, more importantly, that you can think about the question carefully and consider the answer before blurting out something that you will come to regret.

Don't be in a hurry. Pretend you have the rest of your life to sit in that conference room. Whatever opportunities you may think you have to short-circuit the deposition, ignore them. Nearly every attempt to cut corners in a deposition by "making it simple" or explaining something will end badly for you.

Answer only the question asked. Don't answer the one you think the questioner meant to ask. Do not volunteer information either to be helpful or because you thought this was what the questioner really wanted. The classic (bad) example:

Q. "Do you keep a correspondence file relating to the XYZ transaction?"

A. "No, but Joe down the hall from me keeps a big one in the drawer next to his desk."

This is a "yes" or "no" question. If the questioner wants to ask a follow-up, let her. But do not do her work for her.

Do not guess the answer. If you know the answer to a question, give the shortest honest answer. But do not surmise,

Check your ego at the door. Your job is not to know all the answers.

assume, presume, or imagine. Likewise, do not admit to recognizing a document or to writing a document unless you really do remember it. Just because your name is on something does not mean you remember putting it there.

Do not guess where the examiner is going. If you start thinking one question ahead, you will be surprised when the examiner goes off in an entirely different direction. Surprise is bad and often will lead you to give a poor answer.

Don't explain. You are not the teacher, and the examiner is not your friend or your pupil. It is not your responsibility to educate or inform, only to answer the question asked.

Don't be afraid to say, "I don't know." No matter your level of experience or degree of familiarity with a particular deposition topic, you are not going to know the answer to every question asked. The examiner may feign surprise at your lack of knowledge and may ask, for example, "Do you mean to tell me that you are the president of your company and you don't know x?" Don't let this question or the examiner's tone influence your response. There is nothing wrong with not knowing.

Use conditionals liberally. We all forget things. If you have any doubt about your memory on a particular subject matter, make that clear. Phrases like "Those are all the examples I can remember right now" are entirely appropriate.

Always avoid absolutes. Be careful about making blanket statements like "I would never write a memo like that." You can

be sure that two minutes later the examining lawyer will produce an example of your doing just that.

Don't explain your thought process. As noted earlier, once a question is asked, sit quietly and think about your answer before speaking. Don't explain how you reached your answer or express uncertainty as you consider your response. If you do, you will have opened the door for the examiner to ask you a host of additional questions.

Don't accept the examiner's characterization. If you disagree with the examiner's characterization of something, say so. For example, the examiner may ask, "You were the boss of your department, right?" If you think this is inaccurate because you were one of three people in charge of your department, answer, "No." Just because the examiner says it is so doesn't mean it is.

Don't mindlessly adopt summaries. During the course of your deposition, an examiner may ask, "You testified earlier that x, y, and z, correct?" Don't allow the examiner to put words in your mouth. If you don't agree with her summary, say so.

Don't be pinned down. When you can't recall the date on which an event occurred or how many times you did something, you can be sure the examiner will try to convince you otherwise. For example, if you've testified that you don't remember how many vacation days you took last year, the examiner will ask, "Was it more than 5?" "Was it more than 10?" or "Was it less than 20?" Don't let this tactic sway you. If you can't recall, simply say so.

Don't pretend to know what someone else was thinking. You can speak only for yourself. The examiner may ask, "What did Mr. Smith think about x?" Don't speculate or presume to know what Mr. Smith thought. Unless Mr. Smith told you what he thought, you must answer, "I don't know."

Watch compound questions. Listen carefully for compound questions (i.e., a single question that combines two or more separate inquiries) and be careful how you answer them. For example, the examiner might ask, "Did you know Mr. Jones, and is he the president of your company?" You have two options: Ask the examiner to rephrase the question, or answer the question in two parts. The former is invariably better. Failing to recognize and properly answer a compound question will, at best, create confusion and an ambiguous record.

Read documents carefully. When the examiner asks you a question about a document, take your time and read it carefully before answering. Don't assume that you are the author or recipient of a document simply because your name is on it. Don't assume a document's contents are accurate unless you know that for a fact.

Don't fill space. Once you have finished your answer, stop talking. Don't be tempted to keep talking simply to fill space. The examiner may pause between questions in the hopes that the silence will prompt you to say more. Don't. Once the examiner realizes you do not plan to add to your answer, he or she will move on.

Be the humble person. Check your ego at the door. Your job is not to know all the answers. You can testify only about what you know and no more.

Understand the difference between not knowing and not recalling. The examiner asks you about something that happened at an event you attended 10 years ago. If you never knew the answer to the question, say, "I don't know." If you knew the answer 10 years ago but have since forgotten it, say, "I don't recall." The distinction between the two answers may seem slight but can be significant.

Remember that I am your lawyer (if appropriate). If the examiner asks whether you are represented at the deposition, the answer is "yes." I am your lawyer and will represent your interests during the deposition.

Listen carefully to my objections. I will make two types of objections. On some occasions, I will object on grounds that the question asked seeks information protected by the attorney-client privilege and will instruct you not to answer. If the examiner asks you whether you plan to follow my instructions, say, "Yes." On other occasions, I will simply state "Objection," usually because the question's form is problematic (i.e., the question is compound or mischaracterizes your previous testimony). Although, as I will instruct you, you may answer these questions despite my objection, listen carefully to what I say. My objection will indicate to you that something is wrong with the question's form and, therefore, that you must be especially careful about your answer.

If you need a break . . . Ask for one. And if I ask you if you would like to take a break, say, "Yes." That is my way of telling you that we need to talk or that I think a rest would do you good. [Editor's note: See the PP&D Committee survey on variations between jurisdictions on whether lawyers may discuss deposition testimony with witnesses during breaks.]

Where to go/what to bring/how to dress. On the day of the deposition, follow a few simple rules. First, unless there is good reason not to, meet me at my office, regardless of whether the deposition is to take place there or elsewhere. It is always best for us to meet again briefly before the deposition begins to go over some ground rules and put you at ease. Second, don't bring anything related to the case with you. If you do, it will be fair game for questioning. Finally, dress appropriately. That doesn't necessarily mean wear your best suit. It simply means dress as you would if you were appearing in court or at an important meeting.

When it comes to depositions, one thing is certain: Expect the unexpected. Without doubt, whether you have prepared your witness for five minutes or five hours, the examiner will throw some curve balls that neither you nor your witness had anticipated. For an unprepared witness, these questions may spell disaster. A well-prepared witness who follows the rules of thumb described above, however, will be armed with the skills necessary to tackle any unforeseen questions that come his or her way. ♦