

PODCAST

PREPARING YOUR CLIENT TO BE DEPOSED

Opposing counsel is going to take your client's deposition. You need your client to be ready. What can you do to increase the likelihood that the deposition will go smoothly, so that you can get a better settlement, or avoid problems that will come back to haunt you if the case actually goes to trial? Let me give you some tips that you might find helpful, whether your client is experienced in the deposition process or not.

Overall, the goal of deposition preparation is to make your client comfortable with the process and confident that he or she will be able to handle whatever comes up. The first step is to put the deposition in context. Bring your client up to date on the status of the litigation. Let him or her know why the opposing counsel is taking the deposition, and what the opposing counsel is trying to get from the deposition. Review with your client the key issues in the case and the types of information that can be helpful and harmful to the case, so that your client can understand the significance of certain questions and his or her answers. The client needs to understand that the deposition is a key part of the litigation process, with potential impacts on settlement and/or trial. Of course, you need to make sure the client understands the importance of the deposition without putting too much weight on his or her shoulders.

Next, describe the deposition process itself. Let the client know that the deposition can and will be somewhat stressful. Because of this, as mundane as it sounds, remind your client to get a good night's rest prior to the deposition.

Give the client an idea of what to expect in terms of surroundings: where the deposition will be taken, how long it is likely to last, who will attend (including stenographer, opposing counsel, possibly the opposing party); where people will sit (including that you will be by your client's side throughout the proceeding). Having this type of what seems to you like routine, obvious information gives your client a reference point that will make him or her more comfortable from the moment he or she walks into the deposition room.

Then give your client an overview as to how a deposition is conducted. Make sure he or she understands that, even though conducted in the informal surroundings of a conference room, the deposition is a formal question-and-answer session, conducted under oath, just as happens in court in front of a judge or jury. Describe -- or show the client a sample of -- the transcript that gets prepared. Explain that it can be corrected after the deposition, but at the potential cost of credibility. Also, let the client know the different styles that attorneys use in depositions (straightforward questions, belligerent, argumentative, condescending, etc.), and give the client your best prediction as to how this particular opposing counsel will handle the deposition.

After the client is comfortable with all of this background information, talk specifically about how to approach the question-and-answer process of the deposition.

1. For one thing, talk with your client about control. People feel more helpless when they believe they can't control what is happening to

them. Therefore, help your client understand that he or she can “take control” of the deposition. There are various ways your client can do this during the course of the proceedings:

a. Have the client take time before answering a question. This does not mean sit back and contemplate the question for an extended period. But it does mean refraining from the sort of quick back and forth common to most conversations. If your client makes sure to wait for the entire question to be finished, and then considers a response before actually starting to speak, the client can gain control over the tempo of the deposition.

b. Remind your client that this is not a marathon. Your client can request a recess if he or she becomes tired, loses concentration, or needs to use the restroom. As the attorney, you also should be on the lookout for signs of fatigue or loss of concentration and call a break where appropriate. But your client should understand that he or she can take a break on his or her own initiative.

c. Another way for your client to maintain control of the deposition is to not let opposing counsel “get to you.” The client must understand the importance of staying calm and rational throughout the deposition. Warn the client that opposing counsel may try to antagonize him or her, ask accusatory questions, and/or make it seem like the client was at fault or made mistakes. The client must

understand the importance of ignoring these tricks and not arguing with the opposing attorney, or allow the opposing attorney to get your client angry or excited or "play games" with opposing counsel. Your client must stay calm and polite throughout. That sends a message of strength and control to the other side.

2. Beyond the control issues, help your client with the answering process itself. First and foremost, although it should be obvious, remind your client to answer accurately and truthfully. Your client needs to understand that, in addition to this being the legal and right thing to do, false answers almost always come back to haunt your client. It is better to deal head-on with a fact or answer that is harmful to your case, rather than later having to deal both with the harmful answer and with the fact that the original answer was a lie.
3. If the client is unsure of an answer, he or she should not guess. There is nothing wrong with saying "I don't know" or "I don't remember." Of course, the client also needs to understand that a judge and jurors will expect the client to know and remember many things: "I don't know" can be perceived as a way to hide information. Also, "I don't know" can leave an opening for the other side to have its own story believed. For example, if your client is asked about a conversation with the opposing party and says "I don't remember what was said," that will leave the opposing party the opportunity to

describe the conversation without contradiction. The client can't make up answers if he or she truly has no recall, but he or she also should not blithely say "I don't know" just to get through the deposition.

4. Your client needs to pay careful attention to the questions. It is not uncommon for the first part of a question to seem to lead in one direction, but then have the question end up in a different direction. The client needs to consider the question in its entirety. Concentrating on only one portion may cause your client to misunderstand the actual significance of the question.
5. Let the client know that if he or she does not hear or understand a question, the client can ask to have the question repeated or rephrased.
6. The client needs to be reminded that the court reporter is transcribing everything that is said. In order to get a better record, and also as a way of controlling the tempo, the client should speak slowly and clearly. And all answers must be audible, since the stenographer cannot record nonverbal responses, such as a nod of the head.
7. Remind the client that a deposition is not the time to "tell the whole story." Rather, it's the time to answer the specific questions that opposing counsel decides to ask. Each question should be answered

as directly and concisely as possible. The client should not offer any additional information not truly responsive to the question, or attempt to justify his or her answers. However, if the client believes that it is necessary to provide some explanation for a particular answer, the explanation should be limited and to the point.

8. Encourage your client to think about each question before giving an answer. This will give him or her time to formulate an accurate, articulate response. In addition, let your client know that a brief pause will give you time to decide whether an objection is appropriate. Explain the objection process to your client, and your general approach to making objections at a deposition. Let your client know the meaning of the various legal objections you are likely to make (such as “ambiguous”, “overbroad,” “calls for speculation”). Your client should not mimic your objections in his or her answer, nor should he or she frame an answer in order to meet or overcome your objection. But your client should understand what you are saying, and consider your objection in determining how, or whether, to answer. Remind the client that if you begin to object or say anything, he or she should immediately stop talking, even in mid-sentence. The client should not proceed to speak further unless and until you specifically direct him or her to do so (such as by saying “you may answer the question if you understand it,” or “go ahead and

finish your answer”). Let the client know that if you give an instruction not to answer the question, the client should simply wait until another question is asked of him or her before speaking again. Explain that if the opposing attorney asks the client whether he or she is accepting your instruction not to answer, the client should just say "yes."

9. Encourage the client not to use abbreviated terms of art common in his or her business or profession. Remind the client that the testimony likely will be heard or read by a judge or juror unfamiliar with such terms of art, which will make the answers incomprehensible.
10. Some clients want to “rehearse” the deposition or do a “practice run.” This can be a valuable exercise in certain situations. At the very least, it is a good idea to take some time during the course of the preparation session to have some formal questions and answers, so that your client understands the difference between the formalities of the deposition and the normal give-and-take that occurs during a preparation session.
11. If you do have a more formal practice or rehearsal, emphasize the importance of your client not attempting to memorize answers to questions that you or your client expect. Questions almost never are asked in precisely the way you expect, so a “canned” answer is likely

to appear contrived and may very well not even answer the actual question.

12. As you know, but the client may not, documents are frequently used in depositions. Review key documents with your client before the deposition. But even if the client has seen the document in the preparation session, remind the client to at least briefly review the document before he or she answers any questions about the document at the deposition. Let the client know that, in addition, he or she can and should review the document more carefully in order to answer any specific question. Remind your client to bring glasses to the deposition if he or she needs them to read.
13. Let the client know not to bring any documents or papers to the deposition. Also, the client should not turn to you or to anyone else during the deposition to ask for information or documents, nor promise to obtain any information or documents (such as, "I don't know that phone number but I can get it for you"). The deposition is seeking the client's knowledge while sitting there, not your knowledge or what can be obtained back at the office.
14. Although the client should not ask you for information, let your client know that if he or she needs to speak to you for some reason, he or she should ask the opposing attorney to take a break. This should be done between questions, not while a question is pending, unless there

is a critical issue that must be discussed before giving the answer.

Of course, the client should try to keep conversations with you to a minimum, but it is important for the client to know that you are there for him or her should the need arise.

15. Sometimes clients are tempted to “chit-chat” with opposing counsel or the opposing party, if present. However, other than exchanging normal pleasantries, the client should be encouraged not to speak to the opposing parties or their attorneys before or after the deposition, or at any breaks. They should not say anything thinking they are “off the record,” because anything the client says can be put on the record by the opposing attorney when the deposition resumes.

Naturally, as part of the preparation process you need to review with your client the key areas of questioning that you expect. Make sure the client knows how to answer the difficult questions that directly impact on the strengths and weaknesses of the case. Also review with the client the key documents in the case. This includes documents that are helpful to your client’s case, but obviously you must focus on how to handle the documents that create problems for your client’s case.

Depositions often are recorded by videotape. This implicates a number of additional preparation issues. I will give tips for handling videotaped depositions in a subsequent podcast.

Another area that requires special attention is conducting depositions through interpreters. I will devote another podcast to the vagaries of interpreted depositions.

In sum, the goal of any deposition preparation session is make your client comfortable with the process and put him or her in a position to most effectively help his or her case. This takes time and effort, by both the attorney and the client. Frankly, this is one of the areas where a litigation consultant can be of particular service, providing important feedback as to how a mediator, judge or jury will view the client's testimony, and how to most effectively deal with difficult questions. I would welcome the opportunity to assist in this process.