



How to effectively prepare your client for deposition

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No matter what type of case you are handling, and regardless of whether you are representing a plaintiff or a defendant, one of the most significant events in any case is a client's deposition. A client deposition can affect a case in many different ways. If your client performs poorly, this may impede your ability to prove your case, and you may face an uphill battle through the remainder of your case, including at the time of trial. In some instances, your client's deposition can be the demise of your case. Yet, many of us view deposition preparation as a low priority exercise and are content if we can simply get our client to give testimony that does not harm our case. This, for obvious reasons, is not the best approach.

If you want to get it right – that is, if you want your client to be an effective witness – you must exercise great care, skill and thought in preparing your client for a deposition. You must prepare your client as if you are preparing her for trial and with the assumption that everything your client says during the deposition will be read to the jury. Remember, under the Federal Rules of Civil Procedure and the California Code of Civil Procedure, a party's deposition may be used at trial "for any purpose." (See Fed. Rules Civ. Proc. 32(a)(3); Cal. Code Civ. Proc., § 2025.620(b).) It does not matter whether

the party testifies at trial. The adverse party can simply read relevant and admissible testimony directly into evidence.

The following is a basic outline to consider in preparing a client for a deposition. This outline is not meant to be a comprehensive list; rather, it is a compilation of guidelines that I have learned to use in my career as a lawyer.

Prepare yourself

In order to prepare your client for a deposition, you have to know the key issues of your case. You cannot effectively prepare your client and your client cannot be an effective witness unless you have an understanding of what both you and your opponent are trying to prove. Therefore, you must be thoroughly familiar with the key legal and factual issues of your case, the strengths and weaknesses of your case, and the key documents before you meet with your client.

Prepare your client on substantive issues of the case

Begin the deposition preparation session by reviewing the key facts of the case with your client. Have your client recite the key facts of the case to you in chronological order. Focus your client on the facts and issues that you know are important. You do not need to be too detailed or technical. Your purpose is simply to give your client a basic under-

standing of the legal and factual issues that are at the heart of the case. Review key documents your client authored, sent, received or relied upon. If your client has no knowledge of a document, a truthful "I do not know" answer at the time of the deposition will not hurt your case. Do not use documents that are irrelevant or that do not involve your client. Remember, under California Evidence Code section 771, all documents your client relies upon in refreshing her recollection are subject to disclosure.

Review all prior statements of your client. Deposition testimony that is inconsistent with prior statements can lead to uncomfortable cross-examination at the time of trial, not to mention hurting your client's credibility and your ability to prove your case. You should also review relevant discovery responses with your client for the same reason.

Ask your client the key questions you anticipate will be asked by opposing counsel and listen to how your client responds. Simply discussing questions without engaging in a mock question and answer session often is not enough.

Prepare your client on procedural matters

After reviewing key facts and legal issues of your case, prepare your client on the procedural guidelines for depositions. The more your client is familiar with the



procedure, the more effective she will be at her deposition.

• **Start with the basics.** Go over where and when the deposition will take place, who will be present and why, and the role of the court reporter and the videographer (if the deposition will be videotaped). Also, explain the oath.

• **Explain what a deposition is.** Describe what a deposition is so that your client is familiar with the basic process. This is critically important for clients who have never given a deposition. For example, you may want to describe it as the act of taking testimony from a witness outside of court whereby litigants try to obtain information and find out areas of vulnerability in preparation for trial.

• **Explain admonitions.** Go over admonitions with your client so that she is familiar with the ground rules and is not caught off guard by hearing them for the first time from opposing counsel. When your client hears the same standard admonitions from opposing counsel during the deposition, she will feel prepared.

• **Review requests for production of documents.** If the deposition notice included requests for production of documents, you must go over the requests in advance of the deposition and make sure your client searches for and produces responsive non-privileged documents. Failure to do so may result in the continuance of the deposition. In most circumstances, the last thing you want to do is bring your client for a second day of deposition. In addition to the legal consequences, your client will be uncomfortable if she feels she failed to satisfy an obligation.

• **Don't try to win the case.** Explain to your client that the deposition is a defensive exercise. It is not an opportunity for your client to tell her side of the story. It is not a forum for your client to try to convince the opposing side or charm the opposing side or win the case. Explain that deposition is simply an opportunity for the opposing side to learn about your case. The time for winning the case is at the time of trial. Emphasize that less is best.

• **Exception to the "don't try to win the case" rule.** There is at least one exception to the previous point. For strategic reasons, you may want your client to elaborate on certain key events or core issues to demonstrate the strength of your case. Under this limited circumstance, you may want your client to tell his story and volunteer information she otherwise should or would not.

• **Tell the truth.** Explain to your client that she has a duty to tell the truth and that you as an officer of the court have an obligation to make sure that she testifies truthfully.

• **Listen to the questions carefully.** Instruct your client to listen carefully to the questions that are being asked so that she understands the question before answering.

Inform your client that if the question is unclear, she should ask counsel to rephrase or clarify it.

• **Pause before responding.** Instruct your client to pause ever so slightly before responding to give her an opportunity to consider the question before answering and you an opportunity to object if an objection is appropriate.

• **Avoid traps.** Instruct your client to make sure she agrees with every statement in the question and every characterization before answering. Sometimes a question will be prefaced with characterizations and summaries that may be inaccurate. Caution your client to understand every part of the question before answering and explain the legal implications for answering the entire question.

• **Do not guess or speculate.** Instruct your client not to guess or speculate but to testify only from personal knowledge. Explain the difference between a guess and an estimate. Make sure your client knows that a deposition is not a memory test and that "I do not know" or "I do not recall" are perfectly acceptable answers.

• **Embrace the five preferred answers when truthful.** Tell your client that if truthful, they should answer with (1) Yes; (2) No; (3) I don't know; (4) I do not recall; or (5) I do not understand the question. The key is to not volunteer any information when not

asked. However, caution your client about overusing these answers and explain how a mistake can come back to haunt her at trial if her memory is all of a sudden restored.

• **The difference between "I don't know" and "I don't recall" answers.** Explain to your client that there is a difference between "I do not know" and "I do not recall". If she does not recall something at the time of her deposition, she may remember by the time of trial.

• **Respond to the question asked.** Instruct your client to only answer the question that is asked in a direct and straightforward manner and resist gratuitous explanations or facts which are not called for.

• **Keep answers short.** Emphasize again and again that less is best and that your client should not offer any information or documents that are not responsive to the questions that are being asked. Best answers are the ones that answer the question directly and succinctly. If a question asks, did you eat dinner last night, the answer is either "Yes" or "No" but not "hamburger and fries and chocolate cake for dessert." Why? Because the latter answer volunteered information that was not asked for. If an explanation needs to be given, it should be kept as short as possible.

• **Watch out for "when" questions.** Tell your client that when questions refer to time, not to sequence, she should avoid volunteering contextual associations when answering and avoid volunteering information when not necessary. If a question asks when did you eat dinner last night, the answer is the time she ate dinner whether it is 6:00 p.m. or 7:00 p.m. or some other time, but not "6:00 p.m. with Bob and Mary at Bob's house right after work." Why? Again, because the latter answer volunteered information that was not asked for.

• **Be consistent.** Explain to your client that opposing counsel may not be happy with the answers she gives and try to ask the same question in several different ways. Emphasize to your client that it is imperative for her to be consistent in her answers.



- **Review any exhibits or documents.** Tell your client that she should be comfortable with any tangible items, such as documents or photographs before she answers questions about that item. Caution your client to watch out for questions that cherry pick points from a document without giving her an opportunity to review the entire document.
- **Avoid off the record conversations.** Explain to your client that she is there to respond to questions and give testimony. She should avoid conversations with opposing counsel because even the most innocent conversations off the record can be used by opposing counsel during the deposition and come back to haunt her.
- **Don't be pushed around.** Explain to your client that she is in control of the pace of the deposition, she can ask for a clarification on questions, and can ask for breaks. Also, tell your client that she is entitled to finish her answers and should not let the opposing counsel testify on her behalf or bully her into giving an untruthful answer.
- **Explain objections.** Explain to your client that under California's liberal discovery rules, opposing counsel can ask questions that cover a very broad range of subjects which at times may seem irrelevant to the case, and although you will be making objections from time to time, for the most part you cannot preclude the opposing counsel from asking these types of questions. However, inform your client that she can learn by paying attention to those objections during the deposition. Also tell her that if you instruct her not to answer a question, she should not answer. Remember, the only basis upon which you can instruct a witness not to answer is

on the basis of privilege or privacy. (*Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006.)

- **The attorney-client privilege.** Explain to your client that confidential communications between you and her concerning legal advice are protected from discovery and that she should avoid disclosing privileged conversations during the deposition. However, make sure you explain to your client that foundational facts (such as whether she met with counsel in preparation of the deposition, how many times, for how long, and so on) are discoverable by the opposing attorney without getting into the substance of the communication.
- **Explain how breaks work.** Explain to your client that a deposition is not a marathon. She can ask for a break when she is tired, hungry, thirsty or simply when she needs a break. Typically, opposing counsel will object to taking a break in the middle of a question. However, you should instruct your client to always ask for a break if a question may cause her to reveal privileged or confidential information so that she can discuss the issue with you before answering.
- **Act polite and professional at all times.** Instruct your client to act polite, courteous and in a professional manner at all times. Instruct her to avoid engaging in arguments or colloquy with opposing counsel under all circumstances, even when the opposing counsel gets argumentative. Explain that it is your job to respond to arguments by opposing counsel, not your client's.
- **Dress appropriately.** Instruct your client to dress appropriately. My practice is to tell my clients to dress conservatively. You

should advise your client to dress as if she is going to work or to a business meeting.

- **Videotaped depositions.** If the deposition is videotaped, it is even more critical for your client to pay attention to how she dresses. Furthermore, remind your client to avoid facial expressions or mannerisms, such as raising eyebrows, making hand gestures, chewing gum, wearing flashy jewelry or engaging in other similar behavior that she would regret if the videotape is shown to a judge or jury.

Conclusion

Your client's deposition is critical to your case. The answers given by your client can affect strategy, lead to adverse rulings, or affect the outcome of trial. Some cases can be lost at depositions. To do a really effective job of defending a deposition, adequate and meaningful preparation is a must. These guidelines will hopefully be helpful in getting you there.

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