



# She who prepares, wins

*Here are several suggestions when and how to prepare for your next deposition to put you in the best position for either settlement or trial.*



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It is axiomatic to say that cases rarely go to trial. Rather, they are won and lost in the deposition. Moreover, depositions are won or lost months, weeks and days before the witness is even sworn in. Although it is difficult to decide how to allocate your pre-trial time, energy and resources, here are several suggestions when and how to prepare for your next deposition to put you in the best position for either settlement or trial.

## **Months before the case**

- **Know your issues**

Review the issues raised by the complaint, and answer any cross-complaints. Also, review the applicable case law and statutes, especially relating to any immunities raised by a governmental entity in their answer. The best way to figure out exactly what elements you will have to prove at trial is by looking at the applicable California Civil Jury Instructions (CACI) for your cause of action and the defendant's affirmative defenses. These are the actual instructions that the jury will hear, so to the extent you can work the exact language of the instruction into the deposition testimony, the witness's exact words can be used as a powerful way to prove each element.

With these elements in mind, making a plan about how to obtain the necessary facts in advance of a deposition will allow you to get the most out of each witness. For example, even a witness required merely to lay the foundation for a document can be a wealth of information for other facts such as notice, control, organizational structure, pattern and practice or intended consumer.

- **Conduct pre-deposition discovery**

Having relevant documents in advance of a deposition allows you the luxury of time to fully review and decide how to use them, rather than seeing them for the first time moments before the deposition begins. Documents and photos will also invariably lead to other areas of interest to investigate prior to the deposition. Depending on the specific issues in your case, consider Demands for Production of Documents reflecting policies and procedures, employee manuals, handbooks and training guides, safety manuals, maintenance records, design plans, prior similar accidents, lawsuits, photo and video, employee files and correspondence. Likewise, where applicable, subpoena medical records, employment records and OSHA reports.

Be sure to consider whether there are any documents that you would like to obtain via a Freedom of Information Act Request. These can include a SWTRS (Statewide Integrated Traffic Records System) request, a CAD (Computer Aided Dispatch) log or a medical examiner/coroner's report.

- **Consider consulting experts**

If there are complex or highly technical issues involved, retaining an expert in advance of a key deposition will allow you to have the expert assist you in crafting questions that will provide them with the exact information they require to render an opinion.

- **Consider a site inspection**

Whether it is formal with experts or an informal walk-through, seeing any key location or machinery firsthand is invaluable. This allows you a more immediate understanding of the witness's descriptions, and gives you the opportunity to take pictures to use at the deposition.



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## Weeks before the depo

### • Review

Review all witness statements, private investigator reports and discovery responses for completeness.

### • Informal discovery

Consider if any additional informal discovery should be completed. For example, Google, Facebook and MySpace searches of the deponent are often incredibly fruitful. If there is a corporate defendant involved, take some time to explore the company's Web site. It is often the best way to come to the deposition with a basic understanding of the company, and can be great evidence that the company is holding itself out in a way that is inconsistent with the legal position that they are currently taking. Also consider state and federal agency Web sites such as the Code of Federal Regulations (CFR), California DMV's Motor Vehicle Code and the FDA's Web site that includes prescription drug and medical device recalls, required labeling, and approval history.

### • Demonstrative aids

Demonstrative aids are not just for the courtroom. Consider what visual aids such as maps, models or photographs can be used to flush out the witness's testimony. It is common to be faced with a witness that is not very good at gauging distance or using polar directions. By having a Google map available for reference (and remember to clarify on the record that "left" is east) you will be able to obtain a clearer account and understanding of your case.

### • Create a timeline

Virtually every type of case will benefit from a timeline to help you understand the chronology of events. If there are

medical issues involved, a medical chronology will allow you to follow the objective symptoms, subjective complaints, diagnoses and treatment over time.

A timeline of your client's employment, evaluations, reprimands, awards, raises and bonuses will help you understand your client's work history and performance. If knowledge or notice is an issue in your case, use memoranda, e-mails and other correspondence to give you an overview of who knew what and when.

### • Prepare a deposition outline

A deposition outline forces you to synthesize your materials and issues and helps you to remember any additional issues you want to use this deponent for, such as laying a foundation or eliciting specific background information. Most people prefer a checklist format, so that you are not tempted to read directly from the outline. An outline will allow you to conduct a non-chronological deposition or to follow any tempting tangent, and still insure that you cover everything you intended in the end.

## Days before the depo

### • Confirm

Confirm your deposition location, witness attendance, court reporter and if necessary, translator and videographer. Make sure you have everyone's contact information and preferably a cell phone number. It is not fun to sit waiting while someone is lost or late, unable to send word they are on their way.

### • To videotape or not to videotape

This is the time to decide if you want to videotape your deposition. As all deposition notices should go out with notice that the deposition of the deponent *may* be videotaped pursuant to Code of Civil

Procedure section 2025.220(a)(5), the decision to videotape the deposition can be left until you have more information.

In making this decision, consider what the odds are that the case will settle. If there is a good chance you may go to trial, having videotaped testimony is infinitely more interesting to a jury than reading from a transcript. Also, if you are deposing an out-of-state witness, remember that there is no way to force them to appear at trial, so you usually want to videotape these depositions. Conversely, if settlement is a good possibility, this may be an opportunity to bring out the big guns and show defense counsel and the witness how they would stand up to aggressive cross-examination. In that case, you probably do not want your tone and demeanor captured on video.

## Conclusion

By following these suggestions, you will be well prepared at your deposition and in the best position to successfully resolve your case.

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*William Veen founded The Veen Firm as a sole practitioner in 1975, gradually developing it into a firm of more than 40 attorneys and staff who represent severely injured workers and consumers. He is a member of the American Board of Trial Advocates and he was honored as the Trial Lawyer of the Year by the San Francisco Trial Lawyers Association in 2003.*

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