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UT Law Winning at Deposition: Skills and Strategy

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**Preparing Your Witness for Deposition**

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Frequently the jury's only exposure to a witness is through a 10-minute, highly edited excerpt of his deposition. This stark fact should guide the attorney who prepares a witness for a deposition. Below are some guidelines for preparing a witness well.<sup>1</sup>

**I. PREPARATION BEFORE YOU MEET WITH THE WITNESS**

**A. Prepare a cast of characters**

You need to know who the deponent is and how he fits into the story. A cast of characters is often the best starting point for this effort. A cast of characters lists everyone relevant to the case, their company affiliation and title, and a ten word or less description of each person's knowledge.

**B. Conduct interviews**

You will need to have interviewed not just the deponent but also all other relevant witnesses to whom you can gain access without the need for a subpoena. Consistency between witnesses on your side of the case is important. Interviewing everyone on your side of the case is the only way to discover any inconsistencies. You want to be able to test your deponent's story during the preparation session. Knowing only the deponent's story in isolation will not allow you to prepare sufficiently for the mock cross examination.

**C. Prepare a written chronology**

You need to have prepared a written chronology before you prepare your witness. A written chronology is a time-sorted listing of key events. It includes all key facts, not just those that are good for your case. It ties the facts to particular sources of information, such as a document, deposition, or interview.

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<sup>1</sup> Some of the guidelines below are not original but rather taken from my firm's internal memoranda.

**D. Highlight key documents in the witness file**

The next step is to review the witness file. The witness file should include every document on which your witness' name appears. Do not include only those documents authored or addressed to your witness. Include all documents on which your witness was copied. Affidavits executed by the witness, interrogatory answers, and copies of the live pleadings are also crucial to the witness file. The deposition notice should also be included so that the deponent is clear as to place, time, and whether the deposition will be videotaped.

You should highlight the key documents within that witness file that are likely to be shown to the witness so that the witness does not see the document cold for the first time at the deposition. Because witnesses tire easily, preparation time with the witness is precious, and you will not want to waste valuable time with the witness going through every single document a witness received or on which he was copied. Instead, you will use during the live preparation of the witness only those key documents that you have identified as warranting discussion.

If you show the witness a computer generated box of all documents that have his name on it, you have done nothing to prepare him. If you ask him the toughest questions the other side can throw at him and then review with him his answer, he will feel a great sense of comfort when he is deposed, whether you or a potted plant is at his side.

**E. Prepare an issues outline**

You will need to have an issues outline prepared and ready for use when you meet with your witness. The issues outline should include a checklist of the main issues in the case. It should be used by you -- the attorney -- only and not shown to the witness.

When you prepare the issues outline, you need to think about why your deponent is being deposed. You need to get into the mind of your opponent. Why did your opponent ask to depose this person? What are the likely themes of your opponent's case? If you were on the other side of the case, what would you ask to get the facts you need to prove your case?

As an example, in a theft of trade secrets case, common themes are unethical conduct. So review with the witness what constitutes unethical conduct. Ask him what training he received regarding handling intellectual property. Ask whether he thinks the alleged conduct is wrong. Consider whether there are any statements on your client's website that could be used by your opponent during questioning.

#### **F. Prepare the hardest questions and answers**

Before you meet with the witness, you should prepare a list of the ten hardest questions for the case. The questions should be the ones that keep you up at night. The answers should be developed with input from the client and the trial team.

You will not give a copy of the hardest questions memo to the witness. If you do, the witness will want to memorize the answers. Instead, the list of hardest questions and answers is a document that ensures you discuss with your witness the toughest questions your opponent could ask and the best answers to those tough questions in light of the entire view of the case.

## **II. PREPARATION WITH THE WITNESS**

### **A. Emphasize the artificial construct**

#### **1. Snap judgments**

The witness needs to understand that though he is sitting in a conference room, he is effectively speaking to a jury. In a videotaped deposition, how the witness looks and speaks is often more important than what he says. Jurors frequently form immediate impressions about a witness' demeanor. Either he's polite, responsive, helpful, straightforward, candid, competent

and honest, or he's argumentative, conniving, nonresponsive, nitpicking, stupid, forgetful and incredible. And the jury draws these conclusions almost instantly, and sometimes unfairly, from snippets that are carefully chosen by opposing counsel from hours of testimony. The witness can be certain that opposing counsel will select that testimony that reveals the witness in the worst possible light.

The male witness should wear a dark single-breasted coat, blue shirt, red tie and no fancy watches or jewelry. His coat should remain on during the deposition. The female witness should wear a suit or a solid colored dress and jacket. Jewelry should be discreet. Her jacket should remain on during the deposition. You should advise the witness to look at the camera and not the questioner, and tell the videographer that you want the camera shot to be (a) head on and not with the witness looking askance, and (b) that light and not shadows cover the witness' face. Instruct the video operator that at no time is counsel to be included in the camera frame. Check from time to time during the deposition to be sure this is being done.

## 2. No laughing matter

The witness should not make any wise cracks or jokes and should not request a conference with counsel. Nothing can be edited out of the videotape, no matter how much in jest, off-color or embarrassing. You should explain to the witness that you will not be able to object during the deposition, except to advise the witness not to disclose something that is privileged. That's the reason for thorough preparation, and yes indeed, counsel will sit there like a potted plant! Some courts will not edit out counsel's comments, so be prepared that anything you say may be heard by the jury. If the witness needs a conference with you, tell him to ask for a restroom break. After the camera and the lapel mikes are turned off, and you are outside the conference room, the conference with the witness can take place.

### 3. Old fashioned formality

You need to explain to the witness that while the lawyers may refer to each other by their first names and joke with each other, the witness is not to adopt this informality. He should be urged to say “no, sir” and “yes, sir” and never address the questioner by his first name. This avoids the tendency of being either hostile or too friendly to the questioner. He should also sit upright in his chair, leaning forward, prepared to answer the next question with a prompt “no sir,” “yes sir” or “absolutely not” or “of course,” in much the same way as a tennis player prepares for the next serve.

#### **B. Review odd procedures**

Reviewing aspects of the deposition like objections, where the witness will sit, where the videographer will stand, where the court reporter will stand, how documents are stickered and used as exhibits, where exactly the deposition will be held, will all help to relax your witness at the time of deposition. People perform better when they know what to expect.

Similarly, most first time witnesses will be taken aback by questions regarding preparation for the deposition if not prepared to answer those questions. Let your witness know that he may unabashedly admit that he met with his counsel for however many hours he did but should not reveal anything about what was discussed at the meeting.

#### **C. Ensure honest, clear and forthright answers**

##### 1. Honest

The witness must be 100% truthful. You need to explain that you can deal with any answer, other than a lie, at trial. Any lie will destroy your case. If the witness ever recognizes that he has misspoke, he should correct his mistake immediately. Do not wait for a conference with counsel at a break.

## 2. Clear

Most questions that require a “yes” or “no” answer—and all do except those that begin with “why,” “how,” “explain,” “when” or “where”—can usually be answered “no” because the questioner will generally load up the question with qualifiers and other adjectives that require a literal “no” answer. A “no sir” answer leaves the questioner with no place to go next. He will continue to invoke “no” answers until in frustration he asks “why did you say no?”

Witnesses must understand two rules: first, as soon as the question begins, the witness should determine whether it can be answered with a “Yes” or “No.” Second, if it can, it is 95% probable that a “No” is a truthful answer. A “Yes” answer can be proud “Yes” by saying: “certainly,” “of course”, “absolutely”, “I agree”. The “No’s” can be short answers that convey incredulity (*i.e.*, “are you kidding?”) such as: “not at all”, “never”, “that’s not true”, “I disagree”, “That’s wrong.” The witness should never add explanations. The attorney can ask for an explanation if he wants one. The witness should just answer “Yes” or “No.”

## 3. Forthright

Jurors do not like witnesses who are argumentative and non-responsive. Their natural sympathy lies with the witness whom the lawyer is questioning. However, if the witness loses his temper or fails to give the lawyer a straight answer, the jury’s sympathy can switch to the lawyer.

Do not allow the witness to say “I don’t know” or “I don’t recall” unless (a) you do not have any possibility of needing the witness to supply another answer at trial, and (b) there is no way the witness can discover the answer before his deposition.

Being forthright does not mean that the witness should volunteer information or try to help the questioning lawyer. When the witness gives an explanation, it should be because the questioner has clearly required it, not because the witness wants to tell his story. The witness

should make the questioner do his job. It is the lawyer's job to ask for information. Let him do his job.

You must convince the witness that his deposition will be great if it is a non-event when the questioner passes the witness. A witness cannot "win" a deposition, but only lose or cause it to be a non-event. The witness must be persuaded that you will not only tell his story at time of trial, but give him an opportunity to do so during direct at trial or even during your deposition questions. The deposition is not his day in court. He must also not be impatient with a questioner who asks stupid or wrong questions.

There is nothing wrong with a "yes sir" answer, but before your witness gives that answer, be sure the witness understands he must agree with all adjectives in the question. A "maybe" or "perhaps" or "it could have happened" will be read by the jury as a "yes," so if the witness truly believes that "yes" is honest, then that should be his answer. All answers should be given a positive tone. If the deponent is embarrassed by his answer, an "of course" is a better answer than "yes" or "that may be true." The more positive the "no" or "yes," the more likely a jury will believe that it helps rather than hurts the deponent's case.

Some lawyers encourage witnesses to be uninformed. This is a mistake. Jurors expect witnesses to have done their homework; expect a crisp memory of important facts; expect that a witness who doesn't know will at least suggest how to find out. Of course, there will be times when the witness must honestly say "I don't know" or "I don't recall that," even if there is some danger that the jury will read that answer as a "yes." But no witness should overdo this or be coached to do it. And if a witness must do it, the witness should try to help the questioner determine how he can find an answer to the question. This is the sole exception to the general rule not to volunteer information that has not been asked for by the opposing lawyer.

## **D. Prepare for cross examination**

### 1. Different questioner styles

There are many different styles of questioning attorneys. If you know who is taking the deposition and have seen him or her question before, review his or her style with the witness.

If not, review all the different styles and the pitfalls of each. Friendly questioners try to lull the witness into having a conversation, which relaxes the witness into using inexact language, filling silence and volunteering information. Angry questioners try to get the witness riled up so that their brains do not work as well and they say something stupid. Befuddled questioners hope that their innocence leads the witness into inadvertently conceding a point she shouldn't. Summarizing questioners try to restate the deponent's answers using words that sound better for his case.

### 2. Conduct a mock-cross

Preparing for cross examination takes practice. Do not give the witness a handout that explains what a deposition is and think he gets it. No witness is ready until you have taken him through several sessions of mock cross examination.

If the witness preparation is covered by a privilege, then you should have video equipment present and should either ask or have a colleague ask the witness some tough questions. Before you videotape the witness, you should yourself play the role of the witness and have someone question you. Witnesses learn best from watching an expert do it, and you will save a lot of time, if you show the witness how before you start taping him. Do not forget to use the hardest questions memo for cross fodder.

Do not video the witness for more than 10-15 minutes at a time, or you may only engrain bad habits. After each segment, critique the style of what you hear. Some witnesses need to watch each segment twice to really understand. For example, you may play a clip and say

“you’re mumbling at the end of your answer, and rocking back and forth in a distracting and discomforting way.” However, it may take a second watch of the clip for the witness to really understand the critique as applied to her performance.

Doing a mock cross also gives the witness comfort as to odd procedures. For example, the witness can hear how objections are made, understand why there needs to be a pause between the question and answer to allow for an objection, understand privilege assertions.

#### **E. Prepare a redirect**

The most serious mistake the deposition defender makes is to forego the opportunity to question her own witness, even if only for ten minutes or less. It is rare when you can be certain your own witness will be called live at trial. And even if you are certain this will be the case, there are still many good reasons to ask your own questions:

- (a) Bad answers will be quoted in dispositive motions. It is better to have clarifying deposition testimony than to rely on a counter-affidavit.
- (b) Helpful videotaped deposition testimony obtained through your own questions can be used for counter designations and/or mock trials.
- (c) Sometimes you don’t want to have to bring a witness to trial.

Doing a short redirect also often catches opposing counsel off guard: the hour is late and he is anxious to catch a plane home. So don’t get lazy and miss the golden opportunity.

## **CONCLUSION**

How well you prepare your witness depends not only on your hard work and preparation before and during the witness meeting but also the witness with whom you are working. Some witnesses will not be able to adjust fully to the artificial construct of a deposition. So, for example, while it is ideal to have the witness look at the camera rather than the questioner, your witness may be too nervous and too novice to develop that skill without having their brain lock up. At the end of the day, the witness needs to be able to think to testify truthfully. You will need to use your judgment to determine what your witness will be able to absorb without becoming an unthinking automaton.