

Effective and Ethical Witness Preparation for Depositions

“The rule is, never try to teach a pig to sing. It doesn’t work, and it annoys the hell out of the pig.”

Mark Twain

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In America today very few civil cases filed actually go to trial. Arbitration and mediation are the vehicle of choice in many cases. However, once a case is filed witnesses are nearly always deposed. When cases go to trial depositions are critical. Counsel will have pinned down the testimony of key witnesses beforehand in their depositions. The critical time for preparing a witness is before his or her deposition. Witnesses are entering a strange playing field—they need to be prepared on how to deal with it. They are essentially being asked to enter a new country and need to know how to speak the language. This is true of clients, lay witnesses, retained experts and treating health care providers.

Despite an abundance of “how-to” manuals on taking depositions, scholarly commentary on a lawyer’s ethical obligations in pre-deposition witness preparation is not extensive. Clearly while in the United States there is no “gold standard” on the ethics of witness preparation and what its scope should be, preparation is expected. The line between ethical and unethical witness preparation would seem to be the line between truth and tampering with the truth. The harder question is: When is that line crossed? Many foreign and international courts ban the practice completely. In England, a barrister must not rehearse, practice or coach a witness in relation to his evidence. Other countries where codes of conduct prohibit witness preparation by attorneys include Belgium, Italy, France, and Switzerland.

As we all know a client’s deposition is the most important deposition in the case, particularly if you represent a plaintiff. As the plaintiff you have the burden of proof. Moreover, many times the plaintiff is the only witness to affirmatively support your claims. Your client must be credible to a jury before you will prevail. Your client will almost always be experiencing anxiety about giving a deposition. The anxiety may result from a lack of information about the legal process and the importance of the case to him. In most occasions the plaintiff is the first witness

in the case to be deposed. Your client will likely be giving a deposition without having heard any other version of the events at issue in the case. For this reason it is important to conduct written discovery prior to the deposition and to review all of the information available with your client prior to the deposition. Prior to presenting your client for his deposition you should usually send out interrogatories and requests for production sufficiently far in advance to be able to review the answers prior to the deposition. Upon receipt of the opposing party's discovery responses have your client review them prior to scheduling a meeting to prepare for the deposition.

The limits on witness preparation are generally time and money. The level of preparation given witnesses is also determined by the significance of the case. Some firms maintain mock courtrooms for the purpose of giving their witnesses practice in testifying under more realistic circumstances. Some firms, with time and money available, will do mock trials during which they arrange to have their witnesses evaluated by mock jurors. The goal is to determine what can be fixed prior to trial. Witness preparation should include both a review of case facts and themes and instructions on how best to present the information. A focus on content without attention to presentation, or presentation training without review of content, will not produce a well-prepared witness.

Witness preparation has been called a "dark secret" of the legal profession because it is neither taught in law school nor directly regulated. The preparation of fact witnesses is protected from scrutiny by the attorney-client privilege. The ethical rules trump the desire to win a case; but scrupulous compliance with ethical rules is *not* the only goal of a lawyer. More is at stake. The important question—the question that lawyers preparing their witnesses face—is "What can I do to make this testimony better *without* violating the ethical rules?" Obviously, a lawyer's basic duty in representing his or her client is to try to achieve the best possible result. After all, this is a war often with significant stakes for seriously injured people. Lawyers are hired to win. Lawyers are generally competitive and hate to lose. If a case gets very far into litigation, both sides' cases are likely to contain a number of favorable and unfavorable facts. Otherwise, the case would likely have settled. The goal to improve settlement posture or to prevail at trial creates an incentive for lawyers to push the envelope in preparing their witnesses to testify. The better the testimony the better the lawyer's chances of prevailing.

There are a number of ways attorneys go wrong in preparing witnesses. Some give a handout of do's and don'ts. If the handout is the only preparation of

a witness receives, it will likely not produce an effective witness. There needs to be face time with the lawyer. It is as illogical to think that a witness can testify well by reading a list of instructions as it would be foolish to assume that someone could read a book of rules about golf and then go out and play the game without any practice. Sometimes attorneys will offer a video on how to be an effective witness. This is a little more helpful than written handouts, but the training is still general rather than specific. Video instructions, just as written handouts, can supplement witness communication training but does not work well alone. There are no short cuts—time with the witness is critical for effective preparation.

A research project conducted by trial consultants involving more than 500 jury-eligible citizens through the United States found 73 percent of respondents believed preparing witnesses to testify is a good idea. Another 66 percent agreed that it is appropriate for a witness to practice before testifying. Less than 15 percent of respondents believed that witnesses who practice their testimony have something to hide. Craig C. New, Samantha Schwartz, and Gary Giewat, “Witness Preparation by Trial Consultants,” 18 *The Jury Expert* 8 (Aug. 2006).

James Fenimore Cooper originated the phrase “horse-shedding the witness,” referring to attorneys who lingered in carriage sheds near the courthouse to rehearse their witnesses. The term “horse-shedding,” or “wood-shedding,” describes conduct that may come close to ethical boundaries, while the term “witness preparation” is generally understood to be a professional obligation.

The hard question is how to determine the ethical line between developing testimony so it will be effective and suborning perjury by telling the witness what to say, i.e., to balance our duty to clients with our ethical obligations to the court. Deposition preparation is a secret process, and, absent a slip by the witness or counsel, preparation will never come to the court’s or bar’s attention. The consequence of this secrecy is that, practically speaking, lawyers are essentially “on their honor” to prepare witnesses in accordance with ethical standards. In *Geders v. United States*, the Supreme Court stressed that “an attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it” in deposition preparation. 425 U.S. 80, 91 n.3 (1976). Legal ethics is hard. You must *try* to find the line between what is permitted and what is not, and then get as *close* to that line as you can without

crossing over. There are few clearly defined lines. Anything less is less than zealous representation.

Deposition preparation is important not only because of the frequency of depositions, but also because of the breadth of deposition inquiry. Depositions differ from trial testimony in three important respects. First, except on rare occasions, deposition witnesses testify outside of the presence of a judge, meaning that the proceedings are controlled by the interplay between the lawyers and the conduct and attitude of the witness. Second, witnesses primarily answer questions posed by opposing counsel, which essentially amounts to cross-examination without the limitations provided by the scope of direct examination. The third reason that deposition testimony deserves to be treated differently than trial testimony is that—except in the case of depositions taken to preserve testimony for trial—the rules of evidence essentially do not apply. Thus, apart from the attorney-client privilege, the work product doctrine, or a judicially-imposed restriction on the scope of discovery in the particular case, deposition rules only limit the scope of examination by the broad standard that the information sought be “reasonably calculated to lead to the discovery of admissible evidence.” Given their broad scope depositions regularly elicit information that would be inadmissible at trial. Competent lawyers must prepare their witnesses to respond to a broad array of questions on the fly.

Daily in the United States thousands of depositions take place. Before these depositions lawyers spend countless hours with witnesses preparing them. These preparation sessions are private and remain shielded from opponents and courts under the cloak of the attorney-client privilege. Detailed study of the ethical principles that govern the preparation of deposition witnesses is almost non-existent.

In most cases, depositions play a critical role in posturing cases for settlement. Ethical witness preparation should have several general purposes.

- ***To ascertain the witness’s recollection fully and objectively.***
- ***To discuss ways to present the witness’s recollection in an effective and accurate manner.***
- ***To discuss legitimate means to protect the witness’s testimony from being distorted or by adversarial attack.***

Commentators generally suggest that appropriate preparation includes:

- *Ascertaining and discussing the witness's recollection and the probable facts.*
- *Discussing lines of hostile cross-examination the witness should be prepared to meet.*
- *Rehearsing the witness's testimony.*
- *Discussing a witness's prior testimony to refresh the witness's recollection.*
- *Discussing and revealing the testimony of other witnesses and asking the witness to reconsider his or her recollection of events in that light.*
- *Suggesting a choice of words solely to clarify a witness's testimony (but not to change substantive testimony or to cause the witness to testify falsely regarding a material fact).*
- *Informing the witness regarding applicable law and its relation to the events at issue (but not for the purpose of inducing a witness to misrepresent the facts).*
- *Discussing the possible inclusion of testimony regarding factual matters not initially mentioned by the witness, but only if the witness has an actual recollection regarding the matter.*
- *Inviting the witness to provide truthful testimony that may be favorable to the lawyer's client.*
- *Reviewing with the witness the factual context into which the witness's testimony will fit.*
- *Discussing courtroom or deposition demeanor and procedure.*

Unethical witness preparation—improperly attempting to shape a witness's substantive testimony—directly undermines a level playing field, which depends on truthful witness testimony as its cornerstone. Instructing the witness to tell the truth sets the stage for ethical witness preparation. It helps build rapport with the witness by presenting you as a truth-seeking professional who will not require anything unlawful or unethical.

The extent to which a lawyer may “prepare” a witness to deliver his or her independent recollection gives rise to competing ethical responsibilities—serving the lawyer's “special obligation” to protect the justice system balanced with the lawyer's obligation to do one's best for the client. Lawyers are implicated in wrongdoing when false testimony is on the record, and they *know* that the testimony is inaccurate, yet they permit or encourage its introduction because it strengthens their case. The most basic ethical command governing witness preparation bars the informed presentation of inaccurate testimony. What matters in assessing the lawyer's conduct, however, is not that he *knows* the testimony he is seeking to elicit is false, but rather that he is trying to alter the

factual record. Lawyers are not precluded from helping their witnesses better articulate their testimony about their own perceptions. A witness's perceptions of critical events are easily eroded and distorted with time. Proper witness preparation should therefore help revive the witness's accurate memory.

Courts discourage manipulation or interference by advocates with the litigation fact-finding process. This culture includes the acknowledgment that the general purpose of witness testimony is to find out what a witness saw, heard, or did—what the witness thinks. Lawyers must accept the facts as they develop. Coaching or bending the witness's words to mold a legally convenient record is improper. The manner in which an attorney prepares his or her witness is probably as unique as the individual attorney. While there is clearly no one right way, the wrong way would be to intentionally, or unintentionally, suborn perjury.

Although easily stated the application of general ethical principles may become uncertain in the trenches. The line between proper witness preparation and behavior that, looking backward, will be described as unethical manipulation of a witness's testimony often can be difficult to ascertain. In most jurisdictions the attorney-client privilege and the duty of confidentiality are trumped by the lawyer's duty of candor to the court.

Counseling or assisting false testimony potentially has the most serious consequences where the witness is your client. When the falsity of the client's testimony is revealed, the client's prospects for success in litigation will be virtually destroyed. In today's hostile environment for many plaintiffs if you lose credibility you are done. The client also may be exposed to criminal prosecution. Disbarment or suspension is the usual sanction for counseling or assisting false witness testimony by the lawyer.

It obviously is unethical and illegal for a lawyer to offer a benefit in exchange for testimony with the intent to influence that testimony. Ethical witness preparation occurs without influencing the substance of testimony or "reshaping" the witness's independent recollection. It is appropriate and legitimate to enhance the manner and clarity with which a witness will present his or her untainted recollection. Conversely, it is not appropriate to attempt to change the substantive testimony of the witness.

A lawyer has a duty to prepare a witness to testify. This preparation may include discussion concerning the application of law to the events in issue. But an

attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it. An attorney enjoys extensive leeway in preparing a witness to testify truthfully, but the attorney crosses a line when he influences the witness to alter testimony in a false or misleading way.

However, a lawyer may tell a witness that his or her responses during a preparation session are misleading, confusing, unclear, or likely to be misinterpreted or misconstrued; may advise a witness to use powerful language and to avoid jargon; and may suggest other means to help the witness convey his or her truthful meaning.

Preparing a witness to give a rehearsed answer is improper if the purpose for doing so is to mislead the finder of fact or frustrate the inquiring party from obtaining honest discovery. A lawyer's duty is to "extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know."; *EEOC v. Mitsubishi Motor Mfg. of Am. Inc.*, No. 96-1192 (C.D. Ill. Oct. 23, 1997). While a lawyer may suggest particular words to a witness, the lawyer may not suggest wording that would cause the resulting testimony to be false. A lawyer may suggest a choice of words to improve the clarity and accuracy of the witness's testimony. See District of Columbia Bar Legal Ethics Comm., Op. 79 (1979) (a lawyer's suggestion of a choice of words that might be employed to make the witness's meaning clear is permissible if the substance of the ultimate testimony, as far as the lawyer knows or ought to know, remains truthful and is not misleading). A lawyer may not suggest particular words, even though not literally false, that are calculated to convey a misleading impression.

Although the Rules of Professional Conduct vary from state to state, there remains a consistent theme—an attorney cannot engage in subornation of perjury or create false evidence. The ABA Model Rules of Professional Conduct address our duties as follows:

- ***"A lawyer shall not knowingly...fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."***

- ***“A lawyer shall not knowingly...offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal”***
- ***“A lawyer shall not...unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.”***
- ***“A lawyer shall not...falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.”***

The client should be instructed that any response that leaves a misleading impression is inappropriate. A claim of lack of memory or knowledge is improper if the witness indeed can recall the facts. Likewise, responding to questions in a way that tells only half the truth can be viewed as perjury or, at the very least, doing so can injure your client’s credibility. A half truth equals a half lie.

Probably every attorney has instructed his or her client not to volunteer information. Likewise, it is commonplace for attorneys to instruct their clients not to guess or speculate in order to provide a response. If the client actually does not know the response to a question, the correct answer is “I don’t know.” However, it is not always that clear. How do you handle the following:

1. The client knows something, but their memory is not really clear;
2. The client uses the response when scared and/or nervous;
3. The client uses the response when the real answer will be contrary to their interests; or
4. The client uses the response when they cannot think of a better answer.

The client should be advised that the instruction not to volunteer information means just that. The client’s duty is to respond truthfully to the

question asked. The client should not use the “I don’t know” (or “I don’t recall”) response to hide the truth.

Frequently attorneys counsel their clients regarding the applicable laws related to their cases. Indeed, it would be difficult to understand how a client can make an informed decision regarding their case without knowing the applicable laws. However, what should the attorney do to avoid the potential of a client altering his or her testimony to conform to the law? Getting the facts from the witness prior to explaining the law would seem the safest approach.

Now that we have some idea of the parameters of the ethical issues in deposition preparation how do we proceed?

A. CLIENT DEPOSITION PREPARATION

- **Address any concerns your client has**

First, you must put them at ease. This will require you to first address any concerns your client may have going into the deposition. Do not rely on your client to willingly express his or her concerns. Rather, you must ask your witness about any concerns that they may have and respond accordingly.

- **Cover the logistics first**

Cover the logistics of the deposition at the beginning of the meeting. Explain to your client what to wear for the deposition, where and when to meet, what to bring with them, who will be present, and the seating arrangement. If the deposition will be held in your offices, show them the conference room where the deposition will be held, so that he may become familiar with the surroundings. If you anticipate that the deposition will be video taped, then explain that fact. You do not want any surprises immediately prior to the beginning of the deposition.

- **Review the objectives of a deposition**

You should also review the objectives of a deposition. Explain that the primary purposes are to learn information about the case, to assess the credibility and likeability of the witness, to obtain necessary admissions and information, and to pin the witness down on their story so they can prepare for trial.

- **Talk about the lawyer conducting the deposition**

Talk about the various roles that the defense lawyer may assume: solicitous, skeptical, aggressive, etc. Let the client know the opposing counsel may try to test him by trying to make him upset or angry. Tell your client that it is important to remain calm and not to get angry or feel intimidated. The more assured your client is of himself, and of you, the more likely your client will defeat opposing counsel's effort to trip your client up or lure him into making a critical admission.

- **Take an interactive approach in reviewing the pleadings**

Review the Complaint with your client. Be sure to involve your client in an interactive discussion of the factual allegations rather than simply having your client review the allegations in the Complaint. This will allow your client to actively recall the events at issue rather than simply rely on and adopt the allegations as worded in the Complaint.

- **Discuss litigation strategy**

Take this time as an opportunity to discuss any tasks that will need to be completed. The meeting should give you and your client a valuable opportunity to discuss the case, any strategy for litigating, and to determine whether any amendments to the pleading or discovery responses may be necessary.

- **Explain the nature of the claims asserted**

It will also be necessary to fully explain the nature of the allegations to your client. It is critical your client know the elements which must be proven to prevail both on the claims asserted and any potential defenses to those claims. This will allow your client to understand how his knowledge of the case fits into the big picture of proving the claim and articulate that knowledge adequately during the deposition.

- **Review discovery responses**

After having discussed the pleadings with your client, you should review the answers to interrogatories and documents produced by the other side. In preparing for your meeting with your client, both you and your client should have already reviewed the documents relevant to the case, including the documents which your client has provided to you, as well as those that were produced by the

defense. Your client should not be reviewing documents for the first time during your meeting to prepare for his deposition. Moreover, prior to the meeting, you should select the documents that are essential to your client's case and have your client refresh his or her recollection of those documents. Provide them well ahead of your meeting.

- **Your client should not speculate**

In many cases evidence on particular elements of the case may necessarily have to come from opposing witnesses. You should talk to your client about the need not to guess or speculate in order to respond to some of the questions. This may lead to critical admissions being made that are based purely on speculation.

- **Explain guidelines for the deposition**

After reviewing the facts underlying the case talk to your client about the ground rules for a deposition. Explain to your client that he is to answer only the question asked. Explain the importance of listening carefully to each question. Explain that he is to think about each word used and be sensitive to ambiguous terms. Also explain to your client the importance of taking ample time to respond.

- **Do not joke or argue during the deposition**

You should also caution your client against joking during the deposition. Under no circumstances should your client argue with opposing counsel. Rather, your client should maintain his position and should not play into the hands of opposing counsel by arguing with him back and forth.

- **Mistakes should be corrected promptly**

Explain to your client what to do if he realizes he gave an erroneous answer. If this happens your client should correct the mistake as soon as he realizes the error. Explain that, while he will have the opportunity to review the transcript, he should not wait until that time to correct the mistake.

- **Explain objections and privileges**

You should also explain the role of objections and privileges during a deposition. Tell your client that there may be times when opposing counsel asks a question to which you will need to state a legal objection. You should also inform your client that making objections is simply part of the legal process for

the record, and that, unless the client is instructed otherwise, that he will still have to answer the questions after the objection has been made.

- **Role play**

After fully reviewing the facts of the case and explaining the ground rules for a deposition conduct a brief role play. Begin your role play with the common introductory instructions given by most lawyers at the beginning of a deposition. Therefore, during the deposition, your client will be assured that he was adequately prepared if opposing counsel runs through the same guidelines. Of course, if opposing counsel does not go through the preliminary instructions, it will make it look like you are the more experienced lawyer. Moreover, if opposing counsel does not explain the ground rules, your client will already be familiar with them.

After explaining the ground rules begin with some basic questions that will allow your client to feel comfortable answering questions in a deposition format. You should then follow up those questions with inquiries about the critical facts which form the basis of the lawsuit. Be sure to ask both open-ended and closed-ended questions to expose your client to the various types of questions that he will face.

During the role play observe your client's mannerisms and gestures and determine whether they are distracting or annoying. You should offer suggestions on how to minimize any distracting habits. Keep in mind, however, that you cannot change your client's personality overnight. Nevertheless, you should point out such habits to your client and have him practice eliminating the habit.

- **Have a colleague conduct a cross-examination**

You may find it difficult to conduct an effective cross-examination of your client because of the relationship you have already established. You may find the client is not intimidated by you or may get confused by your questions because up to then he has only viewed your role as being his advocate. Therefore, if possible, you should ask one of your colleagues to conduct a short cross-examination of some of the critical points of the testimony. Having another lawyer in the room may help to duplicate the experience of a deposition more effectively. During the examination try to assert some objections to allow your client to further understand what will take place during the deposition.

- **Give positive reinforcement**

Following the examination talk to your client about both the good points of the examination and the areas which need work. It is very important to give your client confidence going into the deposition. Therefore, be sure to focus not only on the areas that need improvement but also what he is doing well.

- **Explain to your client that you may also ask questions**

You should alert your client to the fact you may need to examine him as well. Explain why you might need to ask questions so he will be prepared. Also, explain to your client the types of follow-up questions which may be asked, which will obviously vary, depending on the type of case involved.

B) LAY WITNESSES SUPPORTIVE TO YOUR CASE

Many of the techniques used in preparing your client for a deposition will apply to witnesses supportive to your case. Generally, these witnesses will agree to meet with you in preparation for their deposition. However, the first rule to keep in mind is that a third-party witness is not your client.

- **Explain there is no confidential relationship**

Explain early to the witness that what is said in your conversation is not confidential between you and that if the other side's lawyer asks about the conversation, the witness must disclose what was said.

- **Do not divulge privileged information**

Continually keep in mind there is no privilege in your communications with third-party witnesses so as not to disclose confidential information.

- **Inquire into previous deposition experience**

As with your client your initial task will be to relieve any anxiety about the deposition process. Ask the witness whether they have ever given a deposition before. Ask whether the witness has any concerns about giving a deposition and address those concerns prior to discussing the deposition.

- **Explain where the witness fits into the case**

It is important the witness has a basic level of understanding about the case. Without disclosing your litigation strategy you should be able to articulate a general description of the claims, the defenses, and where this witness fits into the case. If there are documents you plan to use during the witness's deposition, review these documents with the witness to ensure the witness recalls the content.

C) PREPARATION OF EXPERT WITNESS

- **Investigate the expert before retaining them**

Prior to even hiring your expert you should conduct an initial investigation. You can accomplish this by checking internet databases which reference your expert in published decisions, professional publications, journal articles, or news articles. Check with fellow lawyers.

- **Meet with your expert early in the litigation**

Meet with your expert early on in the litigation and find out what information he needs so that you may request it well before the expert's report or disclosure is due.

- **Conduct the necessary discovery**

You should complete the necessary discovery before your expert's deposition is taken to ensure he or she has the information necessary to formulate his or her opinions.

- **Review the expert's opinions with the expert**

In preparation for the expert's deposition, review the expert's opinions in detail to ensure you understand all of the opinions held. You should review the basis for the expert's opinion to ensure they are well-grounded.

- **Review the expert's curriculum vitae**

You should also review your expert's curriculum vitae. Obtain and read your expert's writings and any prior testimony available to ensure your expert has not previously taken a position inconsistent with the position taken in your case.

You should fully review your expert's qualifications as well as his deposition and trial experience and familiarize yourself with any areas for possible impeachment.

D. PREPARATION OF TREATING HEALTH CARE PROVIDERS

- **Generally explain the claims in the case**

In preparing the treator for the deposition discuss generally the claims and issues in the case. Explain how his testimony fits with your theory of damages and the important areas to be covered at trial.

- **Review the medical records**

Review the medical records, including chart notes, to ensure the physician can read his or her notes and is familiar with them. Also, you should review the treator's curriculum vitae and professional history.

- **Inquire into previous deposition experience**

In some instances the treator may not be familiar with the discovery process. You should ask whether the treator has ever given a deposition before. You should address any concerns the treator may have in giving a deposition and attempt to alleviate any anxiety the treator may have.

- **Review the questions to be asked**

You should also ask some of the questions the defendant's counsel is likely to ask during the deposition. Keep in mind there is no privilege that exists between you and the treator.