Deposition Testimony: 5 Simple Rules

Attorney Materials

(revised June 1, 2011)

These written materials are designed to assist you in preparing your clients and other witnesses to give their best possible testimony on deposition by reinforcing and expanding upon the material presented in the video. The materials are organized into chapters to correspond to the seven chapters in the video.

Chapter One. Trial

Synopsis: This chapter introduces a fictional civil litigation (a sex discrimination action against an advertising agency) to illustrate how careless deposition testimony can be used effectively to impeach or discredit a witness in a modern trial, i.e., by having video of the deposition testimony played back to the jury – and how costly such testimony can be for the company involved in the lawsuit. The plaintiff's former supervisor is shown being impeached and discredited on cross-examination at trial by careless testimony he gave in his deposition. The Narrator then observes that the company was forced to pay a large sum to settle even though it did not discriminate against the plaintiff, and explains that the settlement was precipitated in part by former supervisor's impeachment at trial.

Preparing clients or other witnesses to testify on deposition requires an assessment of the particular witness you are preparing. While some witnesses will be apprehensive about the deposition and eager to follow your instructions and advice, others will not take the deposition sufficiently seriously, thinking (mistakenly) that as a sophisticated businessman or woman, he or she can handle a few hours of answering questions put to them by a lawyer who doesn't know their business or company nearly as well as he or she does. Of course, a deposition is nothing like a business meeting, and the witnesses you prepare need to be disabused of that notion very quickly. They also need to recognize the serious potential consequences for them – and for their company that is involved in the lawsuit – if they give careless testimony in their depositions.

For these reasons, you should use the trial sequence as a way to "scare straight" those witnesses who fail to appreciate the seriousness or uniqueness of the deposition process and/or how careless deposition testimony can be used to discredit them at trial. You can reinforce these points by sharing anecdotes from your own experience of cases you lost at trial or that you were forced to settle on unfavorable terms in part because of poor deposition testimony. While you don't want to scare a witness into thinking that one wrong answer in a deposition will lead to disaster because doing so would put too much pressure on that witness and thereby cause him or her not to give his or her best testimony, the witnesses you prepare need to know that a very strong case can become a very weak one if company witnesses are careless in giving testimony in their depositions. They also need to understand that the lawyers on the other side often will find a way to use careless testimony against them and their company, which, depending on what that testimony is and how it's used, could turn a winning case into a losing one, or one that must be settled on unfavorable terms.

The trial sequence also demonstrates to witnesses how deposition testimony is used in modern civil litigation, and how with the advent of video depositions, careless testimony can be played back at trial in dramatic fashion and often to great effect on judges and juries. Witnesses also need to understand that the other side's lawyers can and will pick and choose among the hours of testimony they gave on deposition, selecting only certain portions to be played at trial (or cited in important motions or briefs) that support the point they are trying to make and often do not reflect the context in which that testimony was given, including any qualifiers the witness may have placed on his or her testimony. As a result, even innocent mistakes made in a deposition – such as a mistake about the timing of a conversation that the witness no longer recalls but unwisely chose to speculate about at his deposition – can be used to discredit the witness at trial and to paint a misleading picture as the trial sequence demonstrates. You need to make sure the witnesses you prepare are aware of these risks, and understand what is at stake so they will take preparing for and testifying at their depositions sufficiently seriously.

Chapter Two. Rule No. 1 Always Tell the Truth

Synopsis: Through a combination of deposition vignettes based on the fictional discrimination case and narration, this chapter illustrates why witnesses must always tell the truth when giving testimony on deposition.

You should remind your witnesses that even though depositions often take place in a conference room, that it is a formal proceeding where they are testifying under oath. If they are found to intentionally testify falsely at their depositions, witnesses can face significant penalties personally, and their company also can be sanctioned in the lawsuit. The other side's lawyer also can use any inconsistency between your witness' testimony and the other facts in the case to impeach your witness and otherwise undermine his or her credibility before a judge or jury. In preparing your witness to testify, you should make sure you advise him or her that the first rule of deposition testimony is to always tell the truth in your deposition.

Chapter Three. Rule No. 2 Don't Volunteer

Synopsis: Through a combination of deposition vignettes based on the fictional discrimination case and narration, this chapter illustrates how to teach witnesses why they should not volunteer when giving testimony on deposition.

A key point to emphasize to witnesses is to start from the very beginning of the deposition in "deposition mode," i.e., to listen carefully to the question that is asked, think about it, answer only that specific question and then wait for the next one. Often witnesses get off to the wrong start because they give narrative answers to background questions at the start of their depositions where it is natural – and unless you are careful – very difficult, to limit your answers just to the questions being asked. The other side's lawyer often will use the beginning of a deposition to try to build a friendly rapport with the witness in an effort to get him or her used to volunteering information so that this will carry over into questions that are substantive and material to the lawsuit. By training

your witnesses to be in "deposition mode" from the moment the deposition starts to the moment it ends, you should succeed in preventing them from volunteering information without thinking about it.

Often, witnesses will volunteer information not only because they think it is harmless, but because they think it is affirmatively helpful to their case. Of course, information this witness may think is helpful in fact might be harmful because this witness doesn't understand the case fully or appreciate its many complexities, or because even helpful facts can lead the other side's lawyer to ask more questions that can uncover harmful ones. It is important to emphasize to the witnesses you prepare that *any* information they volunteer in a deposition is dangerous because the other side's lawyer very likely will find a way to use it in ways the witness never intended.

One way to do this is to explain to the witness that information that is helpful to the company's case can be presented affirmatively – in the form of affidavits or direct testimony at trial – and need not come out in the deposition, unless the other side's lawyer specifically asks for that information, in which case the witness of course, should provide it. Witnesses often fail to understand the difference between a deposition – where the other side's lawyer is entitled only to find out the answers to the questions they ask – and testimony at trial – where you can ask this and other witnesses any questions you like that elicit information that is helpful to the company. You should emphasize to the witnesses you prepare that it is not his or her job to try to volunteer helpful testimony in the deposition, and that the opportunity to present helpful testimony will come later. Of course, there are exceptions to this rule, e.g., where you need a particular witness to testify about certain facts in order to establish a record for a dispositive motion, but in general, you should make sure your witnesses understand that giving testimony in a deposition is essentially a defensive exercise, and not an offensive one.

Another key take home message here for your witnesses is that each answer they give in a deposition must be capable of standing on its own. Because the other side's lawyer can quote their testimony selectively, there is no guarantee that any explanation or qualifiers the witness gives before answering a specific question -- that isn't part of his or her answer to that specific question – will be included in the testimony that is played to the judge or jury. Of course, you can seek to have such testimony included in the portions that are to be played but there's no guarantee the judge will agree, and besides, the goal is to teach the witness not to rely on the possibility that you will succeed in having all relevant testimony presented instead of just the soundbite. On the contrary, emphasizing to the witness that his or her answer to each question must be capable of standing on its own should make your witness more careful in choosing his or her words and therefore, more difficult for the other side's lawyer to isolate damaging soundbites.

You should emphasize to your witnesses that they should avoid using humor, sarcasm, loaded words or hyperbole when giving testimony on deposition. While it is good advice to tell your witnesses to avoid commenting on or characterizing facts when they testify, sometimes the other side's lawyer will ask a question that requires them to do so. You should advise your clients that their answers to such questions should be

truthful, brief and to the greatest extent possible, bland. Sticking to who did what and who said what – and to avoid commenting on or characterizing those facts – is the best way to testify on deposition.

Chapter Four. Rule No. 3 Don't Speculate

Synopsis: Through a combination of deposition vignettes based on the fictional discrimination case and narration, this chapter illustrates how to teach witnesses why they should not speculate when giving testimony on deposition.

Successful businessmen and women generally do not get to be successful by answering questions about their company or their business with "I don't know" or "I don't recall." On the contrary, your witnesses are highly paid and regarded within the company because they know the answers to these questions, and when they don't know or don't recall the answers, they know how to "fake it" by coming up with an answer that sounds good and is plausible based on what they do know and can remember. This is sometimes referred to as "CEO Syndrome" and it means never being able to admit that he or she doesn't know or wasn't involved in something important that happened in the company. For these reasons, often the same traits that make them successful executives threaten to make them terrible witnesses in a deposition.

Your job in preparing your witnesses to testify is to distinguish as much as possible the task of giving testimony under oath at a deposition from what they would say in business meetings or in casual conversation. Emphasize to the witness that everything he or she says in the deposition is "on the record," and that at the end of the day, he or she will be required to sign a copy of their deposition testimony to signify his or her belief under oath that that testimony was entirely true and accurate. As a result, you need to convince them that it is far less embarrassing in the unique context of a deposition to answer "I don't know" or "I don't recall" than to give an answer that turns out to be wrong and that the other side's lawyer will make sure they see again at trial.

It is also useful to force your witnesses to focus on their position and scope of responsibility within the company, and to encourage them to testify only about issues, events and circumstances that fall within their scope of responsibility. There is no reason for a witness to go out on a limb to answer a question that falls outside his or her scope of responsibility simply because the other side's lawyer chooses to ask it of him or her in the deposition when the better (and truthful) answer is to say "I don't know."

Similarly, just because the other side's lawyer chose to take this witness' deposition doesn't mean he or she is entitled to have this witness testify about anything and everything that goes on in the company, particularly if this witness has no personal knowledge of those issues, events or circumstances. For example, when preparing a sales executive to testify, you can and should emphasize that he or she should not testify about finance or accounting matters (unless he or she has specific, personal knowledge of such matters), and that he or she should feel free to respond to such questions by saying that they should be put to someone in finance or accounting and that any testimony he or she

could give on that subject would be speculation. To the extent the witness is required by a question to speculate in a deposition, you should make sure the witness knows to preface his or her answer to each such question with "I don't know the answer to your question but if you are asking me to guess" or similar so that the other side's lawyer cannot quote back the answer without the qualifier.

Chapter Five. Rule No. 4 Read the Documents

Synopsis: Through a combination of deposition vignettes based on the fictional discrimination case and narration, this chapter illustrates how to teach witnesses why they should review carefully each document they are shown before answering any questions about the document when giving testimony on deposition.

It is useful to teach your witnesses that being shown a document in their depositions presents them with an opportunity to assert control over the deposition because the other side's lawyer cannot start asking them questions about the document until the witness has had a reasonable time to review it. As the witness did in the example in the video, your witnesses can and should tell the other side's lawyer that they need more time to review the document before they can answer questions if he or she is pushing them to respond too quickly. The ability to slow down the questioning and assert control over the deposition when your witness is handed a document is something he or she can and should use whenever he or she feels the need to do so, particularly if he or she has lost focus or become fatigued, in which case asking for a break also may be wise.

You also should make sure your witnesses know that there is nothing wrong with taking their time to review documents they are shown in the deposition before responding to questions. While the other side's lawyer may complain that he or she only has limited time in an effort to speed up your witness, the fact is that the other side's lawyer is the one who chose to show the witness the document and in fairness, he or she must give the witness a reasonable amount of time to review it before demanding that they answer questions about it. When the other side's lawyer has made a choice to use his or her time to elicit testimony about a particular document, he or she must accept that it takes more time – and in the case of a long document, much more time – for a witness to review and testify about a document than simply to ask the witness questions without referring to the document. Your witness needs to understand that it's perfectly acceptable to take the time to review carefully each document he or she is shown in the deposition no matter how much the other side's lawyer may complain.

Teaching your witness to distinguish between what a document says and what he or she actually remembers is probably the most difficult lesson for non-lawyer witnesses to remember and apply when giving testimony. It is difficult to teach a witness to answer "I don't know" or "I don't recall" in response to a question where the answer to the question is set forth plainly in a document they are being shown, particularly if it's a document that this witness, or others in the company that he or she trusts, prepared. But as lawyers, we know that documents speak for themselves and that witnesses should not merely adopt or confirm information they don't know or can't recall at the time of their

depositions simply because it appears in a document. It may be useful to emphasize that people make mistakes, and because people create documents, documents can contain mistakes, and unless the witness knows and recalls for certain the information at issue, the fact that it is contained in a document is not proof of its accuracy or completeness. Your witness needs to understand why it is far better for a document that contains incorrect information to speak for itself than for the witness to add his or her inaccurate testimony, which only compounds the error and makes it more difficult to correct later.

Chapter Six. Rule No. 5 Listen to your Lawyer

Synopsis: Through a combination of deposition vignettes based on the fictional discrimination case and narration, this chapter illustrates how to teach witnesses why they should be sure to listen carefully to and take clues from their lawyer's objections, as well as any instructions the lawyer may give to the witness, when giving testimony on deposition.

Experienced deposition witnesses usually do a good job of listening to their lawyer's objections and using the content of those objections to help them answer the questions. The challenge is to teach witnesses who are testifying for the first or second time on deposition how to pick up on the clues you are giving them when you make an objection. Apart from taking the time to explain and illustrate the most common objections you will make during the deposition – as the Narrator does in the video – it's important to emphasize to inexperienced witnesses how important it is to pause and formulate their answers before they start to respond to the question. During this pause, they should be focusing very carefully on the wording of the question, and then on the objection, so that they can use what they have learned to help them answer the question and to do so narrowly.

If, for example, whenever the subject of the question is someone other than the witness, and your objection is speculation, your witness instinctively needs to be ready to answer "I don't know" unless he or she has personal knowledge of what is being asked. The same is true for questions that lack foundation because they contain information the witness has not testified to and may not be true. Often, putting your witness through a mock examination with another lawyer asking the questions while you make objections is an effective way to train your witness to pick up on the clues you are giving him or her in your objections and to respond to the questions accordingly.

If you practice in a jurisdiction where you are prohibited from stating the basis for your objection -- such as "Objection, speculation" – you should advise your witness that the only objection you will be able to make during his or her deposition is "I object to the form of the question" or more simply, "Objection as to form." Even if you can't state the basis for your objections in the deposition, you should continue to advise your witnesses that they still can take clues from those objections to help them answer the questions they are being asked. When you say "Objection as to form" in a deposition, your witnesses should be trained to ask themselves what the problem with the question might be that caused you to object to it. For example, does the question call for speculation, does it

lack foundation, has it already been asked and answered, or is it too vague or ambiguous for your witness to properly answer it? Once they know how identify the most common problems with deposition questions, your witness should be able to spot the problem when you object to a question and use that information to help him or her respond.

In jurisdictions where you are limited to saying "Objection as to form," you should be sure to advise your witnesses that notwithstanding that limitation, you always will be permitted to object and instruct your witness not to answer a question on grounds of privilege. This gives your witnesses comfort that they will not required to decide for themselves if a question asks for privileged information. That said, you may not always know when a question may require the witness to disclose privileged information so in addition, you should advise your witnesses that if at any time they have a concern about whether the question calls for privileged information, they should ask for a brief break to discuss it with you before they answer the question. Discussing the concern first before the witness answers the question is obviously very important because once privileged information is disclosed, it is very difficult to prevent the other side from using that information in the lawsuit.

It is important for your witnesses to feel that you are there in the deposition to protect them so that they will feel comfortable while testifying. For this reason, you should be prepared to defend him or her forcefully whenever the other side's lawyer insults, criticizes or goads your witness, or otherwise misbehaves while taking the deposition. While your response should be professional and proportionate to the offense, it should be forceful and swift so that your witness never feels that he or she needs to defend himself or herself. Some lawyers misbehave when taking depositions simply because they believe it will upset the witness and cause him or her not to give his or her best testimony. If you make your witness aware that the other side's lawyer may employ this tactic, and if you are quick to respond to any misbehavior that may occur, your witness will remain calm and not be distracted or upset by fighting among the lawyers.

Chapter Seven. Review

Synopsis: This section reviews the five simple rules for testifying in a deposition discussed above.

Although you undoubtedly will have many more points that you will want your witness to remember when he or she testifies, remembering and applying the five simple rules discussed above is the *sine qua non* of good deposition testimony. You should spend time reviewing these rules with the witness several times during your preparation sessions in connection with showing the video to the witness. You also should use the facts of the case you are handling as examples to illustrate the lessons these rules are intended to teach your witnesses so they can see how they apply in the context of questions they may be asked during the deposition.

Of course, these rules will be most useful for witnesses who have never testified before on deposition, but even witnesses who have testified many times on deposition

likely will find them a useful refresher in the days leading up to the deposition. Like a foreign language, the techniques necessary to give careful and thoughtful testimony on deposition need to be practiced and reinforced in order for your witnesses to be able to remember and apply them during their depositions.