



Taking the Mystery out of Depositions: *Preparing Witnesses, Taking and Defending*

Prepared by:
J.D. Smith
Ward Smith PLLC

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- I. Purpose of Depositions
 - a. The main purpose of taking a deposition is to gather information
 - b. Trial preparation should be the focus of any deposition
 - c. Depositions may also be used to preserve witness testimony
 - d. Some other reasons may include:
 - i. Use in motion for summary judgment
 - ii. Assessing the other party's willingness to settle
 - iii. Impeachment or to use at trial
- II. Rules of the Road (Civil Rules Applicable to Deposition)
 - a. Generally, depositions are governed by Rule 30
 - i. Notice
 - 1. You must provide reasonable notice to all parties.
 - 2. Subpoenas may be used to compel a non-party witness to be deposed.
 - 3. If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment.
 - ii. Limitations:
 - 1. Rule 30 limits you to ten depositions without leave from the court.
 - 2. The court, however, may alter the number of depositions allowed.
 - 3. A deposition is limited to 1 day of 7 hours.
 - iii. Taking the Deposition
 - 1. Deposition questioning may proceed as it would at trial under the Rules of Evidence.
 - 2. The scope of a deposition is limited to non-privileged information that is relevant to the claim or defense of any party.
 - 3. Requested information does not need to be admissible.
 - iv. Objections
 - 1. objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds
 - 2. You may only instruct your client to not answer in order to protect privilege, enforce a court order, or bring a motion to terminate the deposition.
 - 3. You may move to terminate or limit a deposition on the grounds that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party.
- III. Preparing Your Client for Deposition
 - a. Explain the purpose of the deposition
 - b. When discussing the purpose, process, timelines, the case, etc. remember to use plain language, not legal jargon.

- c. Before jumping in, always remember that listening is your best asset.
- d. Specifically ask about fears and concerns.
- e. Remember that this can be an emotional and overwhelming experience for your client and it is better to give them freedom during prep to express those emotions than to have them be anxious and fear “losing it” at the deposition.
- f. Listen to your client, answer any questions they may have, and address his or her concerns.
- g. Client should refresh his or her memory by reviewing any records related to the case including any interrogatories.
- h. Familiarize the client with depositions by having them watch videos of depositions.
- i. Explain to your client the foundations of your case and the other party’s defense.
 - i. Educate client on key elements that must be proven. For example, in a negligence case the plaintiff will need to show duty, breach, causation, and harm. Break these elements down and explain to them how the facts of your case support each one.
 - ii. Inform the client of any defenses that may be raised such as assumption of the risk, or contributory negligence.
 - iii. Be sure the client understands the importance of the details and facts. For example, in a slip and fall case, take special note of surface conditions, warnings, clothing, activities being participated in, weather conditions, etc. to establish contributory negligence. If plaintiff passed a “caution ground is slippery” sign in high heels or flip flops walking across an icy or muddy surface while texting . . . there may be an argument for contributory negligence.
- j. Your client should be prepared, but should not sound rehearsed.
 - i. I usually spend 2-3 hours for each hour of anticipated testimony. But the prep should take what is actually necessary for you to feel confident that you are ready.
 - ii. Mock depositions are a chance to get your client comfortable with the process.
 - iii. This may also be a good time to learn your client’s triggers for emotional responses. Opposing counsel may be looking to push your client in order to put them on the defensive and get them off their game. This is an opportunity to prep for that.
 - iv. During mock depositions spend some time discussing and focusing on body language
 - v. One of the most important benefits of mock deposition is that hidden/new information may come out.
 - vi. For video depositions you should record a mock deposition so the client can see what they look like on camera.
 - 1. Make sure client looks into the camera.
 - 2. Provide your client a dress code.

3. Get your client comfortable with being recorded.

k. General Rules and Guidance to Provide Your Client:

- Dress well—have a neat appearance
- Tell the truth
- Only answer what has been asked—never volunteer additional information
- It is okay to say you don't recall
- Maintain your composure—don't lose your temper
- Take your time in answering questions—it's okay to ask for clarification
- Ask for breaks when you need them
- You can consult privately with your attorney at any time
- Wait a moment after the question to give your answer—this gives you time to think about your answer and gives your attorney an opportunity to object
- Review any document provided or questioned about very carefully
- Don't bring anything to the deposition that has not been reviewed by your attorney

IV. Taking Depositions

a. Be Prepared

- i. Pro and Cons of Outlines
- ii. Decide in advance the order that you will use documents
- iii. Get your documents numbered and in order so you are not fumbling through them during the deposition. It's also a good idea to mark the sections you want to use or reference.

b. Know how to question effectively:

- i. Use your opening remarks to put the witness at ease.
- ii. Asking simple questions about the witness' background will help get them comfortable and talking.
- iii. The goal of questioning should be to funnel from broad facts about the case down to the key facts and elements—using follow-up questions to fill gaps.
- iv. Don't let the desire to get through pre written detailed questions distract you from what the witness is saying in the moment.
- v. Try to get the deponent to agree with you on facts and basic principles.
- vi. Take control by asking leading questions, but always try to maintain a rapport with the witness.
- vii. Act interested and express an attitude that will get the witness to open up and talk more.
- viii. Keep your questions simple.
- ix. Don't let note taking distract you from engaging and having a conversation with the witness.

c. Using documents and exhibits:

- i. Ask the witness what documents they used to prepare.
- ii. Establish the foundation for documents.

- iii. Always refer to documents by their names. This means when a witness says “this,” “that,” or otherwise vaguely refers to a document, clarify that they are talking about the named document.
 - iv. Read documents out loud.
 - v. Ask if you read the document correctly.
 - vi. Use documents to elicit testimony, not to let the document speak for itself.
 - d. Make a good record:
 - i. Don’t talk over the witness or opposing counsel
 - ii. Remind the witness to verbalize responses
- V. Defending Depositions
 - a. Client preparation should be your number one focus for defending a deposition.
 - b. Understand the applicable Rules of Procedure and the Rules of Evidence.
 - i. It’s okay to have a cheat sheet of allowable objections.
 - ii. Remember even when you object that the majority of the time the witness will still be required to answer.
 - c. Don’t object just to object
 - d. Protect privileged information and enforce court orders
 - e. Understand how to get a protective order
 - f. Your client should know to stop talking when you start objecting (ideally they will know to pause before answering to give you this opportunity).
 - g. If your witness starts to ramble remind them just to answer the question.
 - h. Don’t let your witness get fatigued. It’s your job to advocate for them and take breaks when they are frustrated or fatigued.
 - i. Keeping a clean record is key—if you didn’t put it on the record it didn’t happen.
- VI. General Thoughts and Parting Words

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