

NOTES ON PREPARING YOUR OWN WITNESS FOR DEPOSITION BY OPPOSING COUNSEL

1. Ask if the witness has ever had his deposition taken before. (The masculine herein includes the feminine.) Ask if he has ever testified in court before.
2. Describe what the physical setting will be like: position of opposing counsel, your position, reporter's position.
3. Explain the purpose of a deposition: to permit the opposite side to discover information that may aid it in the law suit; to lay a foundation for impeaching the witness on the stand. Explain what impeachment is--use of an inconsistent statement to cast doubt on credibility. Emphasize the breadth of questioning permitted. Questions may be asked that seem to him irrelevant, but they must be answered. Explain that you can instruct him not to answer certain questions, but that this is unlikely to occur.
4. Explain that the witness's duty is to tell the truth to the best of his ability. Explain that as counsel for the company or organization, you are instructing him that you want him to do no less.
5. Explain to him that he should not be thinking about shaping his answers to avoid damaging disclosures. He should leave litigation strategy to you, and simply answer the questions honestly. Every witness I have seen prepared has regarded this as an interesting and important point--and contrary to their expectations. He should not and need not volunteer information if he is not questioned about it. He should simply listen carefully to the questions, answer truthfully, and go no further. Add that he shouldn't worry if all the information that is being drawn out of him appears to be damaging. This is the other side's deposition. If you see fit, you will ask him to clarify certain matters at the end of the deposition, but you will not be trying to prove your entire case at this time.
6. He should try to answer truthfully, but briefly. He must listen carefully to the question, reflect, then answer if he has understood it. If not, he should simply state that he does not understand the question. He should not anticipate additional questions in making a response.
7. He must remember that he is speaking for the record. He wants to give answers that he can live with in the future.
8. Talk to him about knowledge. A question generally asks him only what he knows. He does not know what someone else has told him, though if he is asked what someone else has told him, he can answer that. Many questions have only three possible answers: "yes," "no," and "I don't know," (or "I don't remember").

9. If he is asked a numerical question, he may well not know the answer. If he is asked to estimate, or give his best estimate, he may do that if he has some basis for it, though he should make clear that he is only estimating.
10. The deposition may cover large periods of time. The questions should specify what period of time an answer is sought. If the question does not, the witness should ask for clarification or supply a time frame in the answer.
11. A question may contain an assumption about a matter of fact. If so, the witness should consider whether he accepts the assumption as a fact. If not, he should state that he does not, or make clear that he considers the question hypothetical. Caution him about answering hypothetical questions.
12. If he is asked about a document, he should not answer until he has received it and read it over carefully--all of it, not just the part about which he is questioned.
13. Warn him about answering very broad questions with incomplete answers. To pick a glaring example, a company's EEO affirmative action officer may be asked "what he did" in furtherance of the company's affirmative action plan. Assuming that he did a large number of things that could not reasonably be listed or remembered, he must understand how to keep his answer open-ended. E.g., "These are some of the things I did. I cannot remember the others." Etc. (Practice questions are useful to drive home points 8-13.)
14. He may find himself answering a long string of questions "I don't know" and begin to feel, or be made to feel by opposing counsel, stupid or incompetent. Warn him against this feeling, since it may affect his answers. It is perfectly natural not to know a lot of details. It is merely a lawyer's trick for opposing counsel to try to throw a witness off stride by asking a lot of these questions.
15. Warn him that he may find the opposing counsel irritating. In that event, his impulse may be to try to retaliate in his answers. Warn him strenuously against giving in to this impulse, since it will make his answers careless and less accurate. Tell him that the opposing counsel may be deliberately trying to anger him for just this reason.
16. Warn him conversely about the danger of finding the opposing counsel too friendly, which may give rise to a natural impulse to please or satisfy the opposing counsel. He must maintain his own objectivity and remember that he is speaking for the record. It is a formal occasion.
17. Similarly, warn him that he should not be concerned about pleasing you in his answers.

18. Describe what your own role will be at the deposition. Warn him that you may be saying very little. Tell him why this is so: it is the opposing counsel's deposition; your role is to object to questions that you believe are in improper form, but opposing counsel is not obliged to rephrase them. Furthermore, you are not usually trying to prove up your case at the deposition.
19. Work out a signal with him for the occasions on which you wish to object to the form of a question. E.g., placing your hand on his arm. When this happens, he should not answer the question, but remain silent until you have spoken and finished your colloquy with opposing counsel. It is possible, but unlikely, that you will instruct him not to answer a question.
20. Tell him that the depositions, if long, will be interrupted by short breaks. He should keep you informed if he is uncomfortable, tired, etc. You are there to look after such matters, to keep opposing counsel from harrassing him, etc.
21. Tell him that there may be a number of colloquies between opposing counsel--about documentary production, forms of questions, etc. These may appear to him to be angry or heated. He is not to concern himself with them or worry about them.
22. Finally, opposing counsel may ask him if he has discussed his testimony with you. He should not be embarrassed about answering affirmatively, since such discussions are perfectly proper. You told him what to expect at the deposition, that he should answer questions truthfully, etc.
23. Respond to questions using your own language rather than accepting questioner's whenever the question is argumentative or incomplete.