# The Winning Edge: Preparing Witnesses for Depositions and Trial

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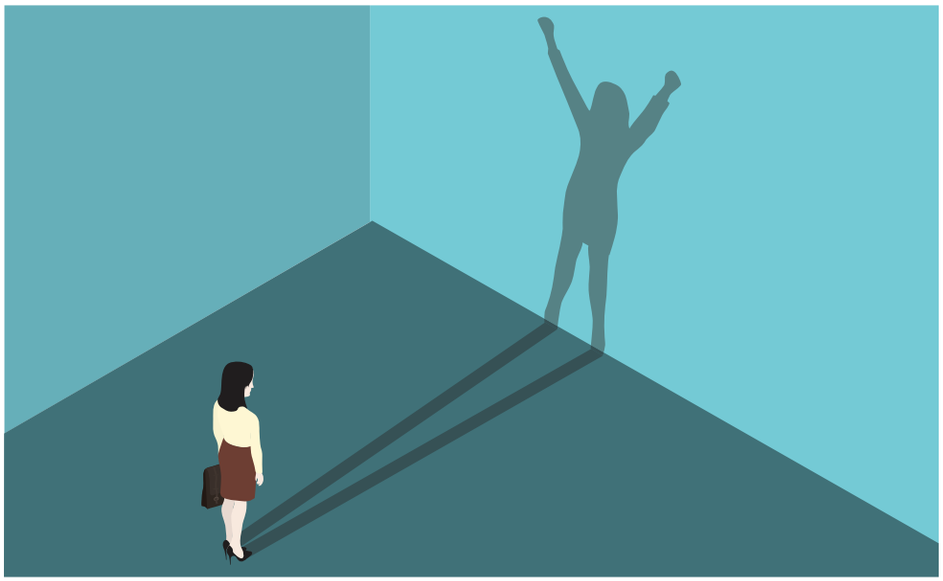

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## INTRODUCTION

Testimony, particularly when provided in depositions and live appearances before a fact-finder, is fundamental to the American system of justice. The opportunity by judges and jurors to evaluate the demeanor and words of a deponent or live witness is critical to their assessment of guilt or liability. Accordingly, perfecting this aspect of trial practice—as much as knowledge of the law and superior advocacy skills — should be a priority for every litigator.

### I. Preparation is Key!

Without a doubt, preparation and planning are key to successful depositions and trial examinations. Although witness testimony may appear free flowing and off-the-cuff, it is usually anything but. The process is much more involved than merely sitting down with a witness and conducting an interview, and starts well before the actual date of the deposition or trial. It is a joint effort between attorney and witness, an interactive process where the attorney must be well-prepared which, in turn, will result in successful witness preparation.

### A. Attorney Preparation

A well-prepared attorney is vital to a successful deposition and/or trial examination. The attorney must know in advance what testimony the witness or opposition will elicit and what exhibits to introduce, the anticipated order of the proceedings, the issues that are likely to arise, and what to emphasize and make persuasive. Therefore, it is imperative that the attorney knows the file inside and out, is familiar with all documents and available evidence, and can identify the potential issues in anticipation of opposing counsel's questions. Further, an attorney must know all the reports created in the case, the relevant law, and their role in the case.

#### 1. Think Big!

One of the most common mistakes any attorney can make in preparation is being bogged down in particular questions or specific aspects of a witness' anticipated testimony. As such, it is important that the attorney consider the bigger picture of the case. What are the essential elements of the claims and defenses? What do I know, and not know, about the case? What do I think I can prove about the case? How am I going to prove it? Once you understand the big picture, you can then look to individual witnesses and determine their strengths and weaknesses for every aspect of the case, and tailor the questions and witness preparation to those aspects.

Remember, examinations and depositions are not simply about asking a witness to tell everything he or she knows. It is important to select the topics to cover based on your theory of the case. Your preparation and big picture understanding will tell you which issues to pursue, what facts to emphasize, and which items of evidence will resolve disputes. At a minimum, you should be looking for sufficient facts to make out your prima facie case on every issue on which you bear the burden of proof, factual support for your main points of emphasis, information about witnesses' background that increases credibility, and testimony necessary to lay the foundation for other evidence.

#### 2. Goals and Objectives

For each witness, as a well-prepared attorney, you have specific goals and objectives. You will consider where the witness fits in the overall strategy of the case and will know exactly what you are trying to accomplish with this witness. Are you looking for admissions, contradictions or impeachment? Are you seeking facts into the particular situation and surrounding circumstances, or merely background information?

Moving into the witness preparation phase, it is important to consider four items: 1) the who, what, when, where, and why – the story of the case; 2) the strengths and weaknesses of each witness and their testimony; 3) the record – how to build it and fill in any missing gaps required to argue your point, in anticipation of motion practice and expert review; and 4) the preservation of testimony for trial in the event a witness becomes unavailable.

### B. Witness Preparation

When preparing a witness the key focus should be to establish their "core" posture in providing testimony. . Have your witness understand their message and what their role in this case is. This will allow a witness to narrow focus and limit

mistakes. When witnesses are provided with an overview and how it relates to the details of their knowledge, they are better able to understand the overall nature of his or her testimony. As such, it is important for a witness to understand the objective of his or her testimony. Going over a witness' testimony question by question is relevant; however, in the absence of the overall context, this strategy will likely result in a witness who becomes confused or unable to respond entirely when questions are phrased differently or unanticipated interrogation arises.

Finally, it is important to review with the witness the pleadings and how to handle questions concerning allegations, denials, and affirmative defenses. This not only provides for the aforementioned context of the testimony, but also makes sure a witness is comfortable with his or her testimony.

**II. As Applied to Code Enforcement Officers**

In addition to the points outlined above, there are particular witness preparation priorities for Code Enforcement Officers. For example, the Code Enforcement witness should be familiarized with all applicable ordinances, statutes, codes, and other regulations, and should understand his or her role – as officer or investigator, for example. Most importantly, the jury and/or the trier of fact needs to understand what is meant by Code Enforcement: it is the act of enforcing a set of rules, principles, or laws and ensuring adherence to a system of norms. A municipal authority enforces a civil code, a set of rules, or a body of laws and compels those subject to that authority to behave in a certain way. This involves the prevention, detection, investigation and enforcement of violations of statutes or ordinances regulating public health, safety, and welfare, public works, business activities and consumer protection, building standards, land-use, or other municipal affairs.

To accomplish this, additional preparation of Code Enforcement Officers is required. They must be prepared to explain what is meant by Code Enforcement, their particular duties, and what statutes, ordinances, and codes are encompassed in the enforcement action in question. Accordingly, attorneys representing the municipality need to ensure that the Code Enforcement witness has not only read, but fully understands the subject regulation. . Further, the Code Enforcement Officer needs to know whether the opposing party has an expert to contradict his or her testimony. If applicable, a return to the scene to refresh the witness' memory may be required, and if such access is not practicable (such as with a building or dwelling that is occupied) an empty identical area should be utilized. Above all, given that Code Enforcement Officers and municipal employees can be very busy, ample advance notice of depositions and trial dates is critical.

The final phase in readying a Code Enforcement Officer for deposition or trial is the ultimate question of preparation: "Is there anything you are concerned about and want to share with me?" As an attorney, the last thing you want at a trial or deposition is a surprise.

Surprise leads to confusion, confusion leads to scrambling, scrambling leads to a lack of focus-- and when there is less focus there is the potential for questions to not be asked, points not emphasized, and entire information missed. Attorneys must make sure they have all pertinent information. If something is "keeping the Code Enforcement Officer up at night," an attorney has to know about it. Thus, developing a relationship of trust and keeping lines of communication open with the witness is key.

**III. Outlines**

It is crucial that an attorney prepare a good outline prior to deposition or trial. An outline will reduce confusion or floundering when attempting to phrase questions which strengthen your position and lead to better, more accurate answers. There are also important substantive reasons to prepare an outline: for some testimony--namely evidentiary foundations--the way a question is propounded can be highly significant. Further, it is important that your outline include anticipated questions from the opposition counsel, so you know what is required to combat or deemphasize opposing counsel's points.

However, the outline should not evolve into a script. When attorneys create a script, they tend to become inflexible. By sticking to a script, you may not ask follow-up questions on very important topics or even be fully and properly listening to the witness' responses. More often than not, by following a script, you will miss information or the opportunity to ask more targeted and beneficial questions, potentially hurting your case severely down the road. An outline allows for the ability to think on your feet and get down to the important and vital information and details, while a script promotes rigidity and could result in missed information.

**IV. Depositions**

A deposition is a formal discovery process in which counsel take sworn testimony from a witness (the deponent), about the facts of the lawsuit. A deposition is used to develop facts and evidence in preparation for trial, determine what the witness knows about the case, observe the witness' demeanor, responsiveness, and general appearance, and/or to impeach the witness' credibility. A deposition is taken outside of the courtroom, usually at the offices of one of the party's attorneys, but has the same effect as if the witness were testifying in court. As such, the witness is placed under oath and will swear or affirm to tell "the truth, the whole truth, and nothing but the truth." Once the witness is sworn in, everything

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stated in the deposition becomes part of the record. Only counsel may agree to go off the record.

From this point, opposing counsel will ask the witness a series of questions and, if necessary, show documents relating to the facts and events of the lawsuit. It is important that the witness wait for counsel to complete a question before starting an answer. This will maintain a clear record in the transcript, ensure that the answer is a correct response to the question asked, and allow defending counsel the opportunity to object to an improper question. When counsel objects to questions, unless instructed not to answer, the deponent is nevertheless required to answer the question, even after an objection is made.

The entire deposition is transcribed word-for-word by a court reporter and may be videotaped. As such, all responses must be oral and spoken clearly and slowly with absolutely no gestures. The deposition will be attended by counsel for all parties and the court reporter/videographer, and may be attended by non-testifying parties. The deposition will go into a new day or another session until it is completed; however, breaks may be taken throughout the deposition as needed.

**A. Exhibits**

During the course of a deposition, exhibits in the form of documents and materials may be introduced to refresh a witness' memory, obtain clarification or information about the details of the exhibits and the events surrounding them, or even to impeach the credibility of the witness. It is important that the witness take ample time, read the materials from top to bottom, and ask questions if need be. The witness is not on a timer, and should take as much time as needed to review the materials and ensure a thorough grasp on what is being presented. It is possible, for example, that the way the materials are presented could be deceiving. Something as innocuous as the positioning of staples can create misperceptions, so the witness will need to make sure that all pages stapled together relate to a single exhibit. In addition, the witness should not begin speaking about an exhibit until the proponent of the exhibit has asked a question requiring a response.

**B. Objections**

Throughout a deposition, counsel may object to questions for various reasons. As a witness, it is therefore crucial to pause after each question to allow counsel time to object. While a deposition may seem like a conversation, and a witness may want to answer and continue the free flow of dialog, it is important that the witness remember it is a formal discovery process, with every answer having the potential to make or break a case. However, unless instructed not to answer, the witness is still required to answer the question.

Common objections that may arise during the deposition include:

- Form of question
- Asked and answered
- Document speaks for itself
- Argumentative
- Vague or ambiguous
- Mischaracterizing testimony
- Compound or complex
- Privileged
- Private work product/prepared in anticipation of litigation; and
- Attorney-client privilege.

**C. Five Keys to Success**

**1. Do Not Volunteer Information**

As mentioned above, the deposition may feel like an informal conversation, but it is important for the witness to remember it is not. An unprepared witness may be tempted to provide responses that he or she believes are being requested. Lawyers are in charge of deciding which topics to bring up and as such a witness should scrupulously limit answers to the subject-matter of the question.

To avoid this pitfall, it is essential to emphasize to your witness that he or she should not be concerned with appeasing the deposing counsel. Opposing counsel may try to get the witness to budge, and even imply that a lack of acquiescence is somehow improper, so it is important that the witness have confidence that what he or she is doing is correct. The witness must listen carefully to the question and answer only the question that is asked; there is no need to anticipate or provide explanations – make counsel work to get the answer. Answers should be accurate, but also short and direct, and information that was not expressly requested should never be divulged. Finally, before answering a question a witness should consider whether the question is an opportunity to present information favorable to your defense and/or damaging to the opposition.

**2. Beware of Tricky Questions**

An attorney's questions may be loaded with statements of fact or assumptions that are not supported by the record. If the witness is not sure of the answer to a question, he or she should just say so. The lawyer may be trying to trick the witnesses into giving testimony that they are not competent to give. Unless they know answers in their entirety, it is important that witnesses not speculate or guess.

Tn avoid tricky questions, witnesses should listen carefully to the question, in particular the wording and phrasing, and make sure to pause before giving an answer. This not only gives the witness time to think of the best and most appropriate answer, but gives counsel time to object, if necessary. Finally, if a question seems loaded, the witness should ask for clarification or clarify the issue in the answer. Witnesses should not be afraid to interrogate the interrogator – a witness can ask questions back. The witness is entitled to a question with a clear, simple meaning.

**3. Beware of Ambiguous Terms**

Many questions contain terms or phrases that are susceptible to multiple interpretations. As a result, a witness' answers to these types of questions, without clarification, may be used by the opposition for a purpose or meaning the witness did not intend. For example, a statement that a witness "participated" in a meeting could simply mean the witness attended the meeting, or could mean that the witness actively spoke there. These interpretations are drastically different and can make or break a case, so it is important that a witness gets the necessary clarification.

To avoid getting caught in the web of ambiguity, it is important for witnesses to harken back to their preparation and remember the important points and notes of the case. That way, when a question comes up that seems ambiguous, a witness understands the context and the need to ask follow-up questions of their own. Specifically, if a word's meaning is unclear, the witness must ask the attorney what was meant by the question. In that regard, it

is important to remember the witnesses' oath to tell the truth. If the ambiguity of a term can lead to multiple answers, it is important to clarify the intended meaning to ensure that the testimony is truthful.

**4. Never Guess at an Answer**
Counsel's questions may request that witnesses discuss facts, events, or dates that are not known or not recalled specifically. These questions could be related to incidents many years in the past. In these circumstances, it is important for witnesses to remember that if they are unsure of an answer, they are entitled to say they do not know or do not recall. If they only testify to what they actually know personally, they will not get caught speculating under oath. An alternative approach could be to rule things out that did not happen. For example, if a witness is not sure of what he or she had for dinner, but is allergic to shellfish, that could be stated. What a witness wants to avoid is guesswork or answers that are purely speculative.

**5. Honesty is Critical**
Whether the result of extensive preparation or the questions asked by opposing counsel, a witness may feel the temptation or pressure to give a false statement where truthful testimony is perceived as embarrassing or damaging to the case.

It is critical to remember that credibility is essential in any testimony. One proven false statement could not only damage an individual witness's credibility, but an entire case. While giving a false statement might appear to a witness to provide short-term relief, it is far more likely to create serious problems to the witness's side down the road. False statements made in the deposition can be researched by counsel and used to impeach the witness's credibility at trial. Further, at the deposition itself counsel could be in possession of documents that could refute any false statement and be used to show that the witness lied under oath. Finally, for attorneys, knowing that a false statement was given under oath could subject you to punishment by the court.

**D. Advice, Tips, and Recommendations**
The following are very important pointers that counsel should review with every witness in anticipation of a deposition:

It is critical to remember that credibility is essential in any testimony. One proven false statement could not only damage an individual witness's credibility, but an entire case. While giving a false statement might appear to a witness to provide short-term relief, it is far more likely to create serious problems to the witness's side down the road.

- Eat a good breakfast
- Dress code is up to you – what will make you comfortable?
- Turn your smart-phone off
- Do not bring documents (such as a diary, calendar, or address book)
- Do not take notes during the deposition
- Appearance (sit straight up, avoid smirks, fidgeting, rocking, hand position)
- Conserve battery life – set your own pace and finish strong – you want to be effective throughout the questioning
- Stay within your game (vocabulary, diction, and so on)
- Do not over-lawyer or over think your answers
- Awkward silence is okay
- Do not share feelings or your interpretations of the facts
- Keep your opinions to yourself – what did you actually see, say, do, hear?
- If you are doing a good job, do not change your approach
- Keep an even keel (avoid anger, frustration, or becoming flustered)
- Your main objective is to be credible, and nothing more

In addition, there are uniform questions that are a part of almost every deposition, including name, date of birth, residence address, and so on. Despite the seemingly simplistic nature of these questions it is important that the witness also expect to be asked about medications being taken and how they might affect his or her your capability as a witness, to be asked about what he or she did to prepare for the deposition and how much time was spent doing it, and to be asked about how documents were produced. While these questions may seem adversarial, it is important that the witness answer them truthfully.

**V. Trial**
**A. Subpoenas**
If your opponent subpoenas a Code Enforcement Officer or municipal employee for trial, it is important to begin thinking immediately about witness preparation. Just as for depositions, it is essential for an attorney to be prepared. Be sure to utilize the deposition transcript to get up to speed on all the issues in the case. In addition, it is important to make clear to the subpoenaed witness that he or she will be subject to cross-examination if the court acknowledges their status as an "Adverse Witness." Making this scope clear to the witness and being prepared yourself will be instrumental as you move towards trial.

**B. Preparation**
Part of the trial preparation process is preparing your witness to communicate effectively with jurors. Throughout a trial, attorneys address the jury with their own words; however, during direct and cross examinations it is up to the witness to address the jury while the attorney stays silent. Preparation for trial begins with an initial meeting. Here, it is important for an attorney to have available all relevant codes, statutes, and/or ordinances. Additionally, the witness must be familiarized with the pleadings, interrogatories, and responses that set forth the causes of action, and review all relevant documentary evidence to understand its purpose within the scope of the case. Finally, if an expert report was drafted for the opposition, it is vital that the witness review the

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report to aid with anticipating questions from opposing counsel. Once this initial preparation is complete, it is now time to focus the witness' attention to procedure and the substance of their testimony.

**1. Courtroom and Procedure**
It is vital that a witness is familiarized with courtroom procedures. As a first step, the witness should know where the courthouse and courtroom are, where to park, where they will wait, where the witness stand is, whether they should sit or stand, and even where the restrooms are located. A witness who is not frazzled and not in a rush is far superior to one who is stressed and unfocused. Next, the witness should be familiar with the procedure: the order of questioning, questions from a judge, objections by counsel and the need to wait for a ruling before answering are all important to be aware of. If the witness has not testified before, it may be beneficial to have him or her to visit the courthouse to relieve anxiety and ask questions.

**2. Prior Testimony**
With procedural preparation out of the way, the substance of the testimony becomes crucial. It is important for witnesses to review their past deposition transcripts. This will ensure that witnesses will not be impeached and may refresh their recollections to ensure they are not only comfortable, but appear credible on the witness standard. The review must include exhibits used in past deposition testimony; this helps with credibility, eliminates surprises and allows a witness to become familiar with the procedures in handling and referencing to exhibits to ensure the examination runs smoothly with a minimum of confusion or error.

**C. Direct Examination**
Just as with a deposition, a direct examination requires careful and considered planning. The following is a checklist to work through in preparation for a direct examination:

- Explain the attorney/client privilege, if applicable
- Have the witness give an initial quick recitation of facts in narrative form
- Review with the witness the nature and purpose of their testimony
- Discuss applicable law including elements
- Have the witness review all applicable facts in light of the above review of the law
- Review with the witness past depositions and documents previously produced
- Practice direct examination
- Practice cross-examination
- If necessary, conduct a full dress rehearsal

**VI. Ethical Obligations**
Every attorney knows that perjury or the fabrication of evidence is wrong, unethical, and illegal. As attorneys, ethical witness preparation is an essential part of the groundwork for depositions or trial. The crucial mandate is that a lawyer not falsify, distort, improperly influence, or suppress the substance of the testimony to be given by a witness. The key to staying above-board is understanding the clear and fundamental principle that, while witness preparation is essential, an attorney may neither personally fabricate evidence nor induce another to do so.

Fabrication on a grand scale, like hiring an actor to be a witness, is very rare, but smaller scale fabrication is far more common. In fact, attorneys preparing a witness may not even realize they are coaching the witness to change some aspect of his or her testimony to make it more persuasive or in line with the relevant law. To avoid this, it is essential to elicit all relevant facts and help marshal the client to express his or her case as persuasively as possible. This is done by carefully listening to the client and explaining the importance of the information they are sharing. In short, the attorney may not procure changes to the substance of any testimony, but may orient the form of the testimony to maximize its effectiveness without changing its meaning.

This is largely common sense and no rule should be required to state the obvious--that a lawyer may not use witness preparation as an excuse to tell the witness what to say and/or to create false evidence. However, when in doubt, attorneys must follow the Model Rules of Professional Conduct Rule 3.3(a)(3) which requires that a lawyer not "offer evidence that a lawyer knows to be false."

**Conclusion**
Once you have completed the demanding yet vital work of properly preparing your witnesses for a deposition or trial, the game begins. Your thoroughness in preparation will allow you to proceed with confidence that you know the law, you know the evidence, you know the facts and circumstances, you know how to build and protect the record, and you know exactly what you want and need from each and every witness. **ML**

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