



PROGRAM MATERIALS

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Deposition Strategy in a Personal Injury Practice

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DEPOSITION PRACTICE IN PERSONAL INJURY CASES – PLAINTIFF'S PERSPECTIVE



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OUR EMPHASIS

THE WHO, WHAT, WHEN, WHERE AND WHY
FOR *TAKING DEPOSITIONS* IN A PLAINTIFF'S
PERSONAL INJURY CASE*.

*With an Emphasis on Adverse Witnesses!

AGENDA

- Topic One: Who, Why and How?
- Topic Two: Timing and Order
- Topic Three: Bare Bones or Full Inquiry?
- Topic Four: The Uncooperative Witness/Deponent
- Topic Five: Who Not to Depose and Why?
- Topic Six: Using Video
- Topic Seven: Handling Objections

A person wearing a dark blue suit and a patterned tie is seated, holding a small, rectangular piece of white paper with both hands. The paper contains several lines of handwritten text in dark ink. The background is dark and out of focus, showing a wooden surface to the right.

“The way to get started is to quit
talking and begin doing.”

- - Walt Disney



Success = Preparation + Discipline

TOPIC ONE: WHO, WHY AND HOW?

WHO AND WHY?

- Who do you need to learn about the case merits?
 - Who is adverse and why?
 - Favorable witness unavailable?
 - Test reliability?
 - Where does this witness fit in?

OVERALL

- CONSIDER WHAT YOUR OBJECTIVE IS WITH THE WITNESS?
- DO YOU NEED DEPOSITION TO EITHER DISCOVER THE TESTIMONY, OR PRESERVE IT?

HOW?

Basic Mistakes to Avoid – Please!

WHO AND WHY?

- Who do you need to learn about the case merits?
 - Who is adverse and why?
 - Favorable witness unavailable?
 - Test reliability?
 - Where does this witness fit in?

BE PREPARED AND SHOW IT!

1. Have an outline; no blank sheet of paper in front of you.
2. Exhibits organized and premarked (with Exhibit List, if you can; give to court reporter at end of deposition not before to avoid sharing).
3. Exhibits presented at time of use, not before.
4. Have your objectives in mind with this witness.

DEPOSITION PRELIMINARIES

Go Through Them – NO SHORTCUTS

A HUGE MISTAKE: SHORTCUT ADMONITIONS?

**Prior Deposition Means Nothing nor Does
Being “Familiar” with “Admonitions”!**

TO BEGIN – STAY WITH BASICS

1. Avoid false starts.
2. Avoid multiple and complex questions.
3. Use simple, direct sentences.
- 4 Question and answer form a fact.
5. Get and ANSWER to the question!

SOME ADDITIONAL BASIC POINTERS . .

- Avoid rephrasing if you have a good question.
- Understand what it means to “unpack” a potentially adverse or hostile witness
 - Keep the transcript clean – avoid clutter.
 - Don’t get baited into arguments.
 - Stay on the record.
- *Listen, listen, listen (don’t move on without listening to the answer and getting an answer)!*

ALSO BODY LANGUAGE

BE AWARE OF *YOUR* BODY
LANGUAGE/POSITION/POSTURE SO THAT YOU SHOW
A *POSITIVE* AND *PROFESSIONAL* DEMEANOR

A SIDE POINT

DO A THOROUGH “INVESTIGATION” OF ALL
WITNESSES*

- Internet and social media activity.
- Possible independent investigation.
- Look and be prepared for impeachment information
 - Prior depositions or litigation activity.

*Make an inquiry and perform as your instincts indicate!

THE MAIN POINT FOR SUCCESS

Preparation, focus, and efficiency:

- ✓ Well framed questions.
- ✓ Simple, not complex.
- ✓ Complete answers.
- ✓ No evasive answers!
- ✓ A streamlined transcript.



ALWAYS MAINTAIN

A PROFESSIONAL AND RESPECTFUL POSTURE

-with an-

Occasional frustration (mild)

Dismay (mild)

Etc. (mimic jury if obvious)

Use these dramatic techniques only if appropriate and it is “natural”

TOPIC TWO: TIMING AND ORDER

SO HOW DO YOU APPROACH?

- How do the witnesses relate to the story?
 - Do their stories/versions fit?
 - Are they dependent?
 - Do they know one another?
- Have they contacted/talked to each other?
- Will they influence each other's version of the story?

AVAILABILITY ISSUES?

- Inquire as to availability of witness for depo AND trial.
- If out of the area, may need video deposition to use at trial.
 - Alternative of remote appearance – will you have cooperation for such?
- Don't risk losing critical testimony, so may need to get testimony quickly.
- Make sure you know the circumstances so you can make a decision how to proceed.

TOPIC THREE: BARE BONES OR FULL INQUIRY?

WHAT IS YOUR OBJECTIVE?

DESTRUCTIVE or *CONSTRUCTIVE*?

ALSO: WHAT IS YOUR OBJECTIVE?

Inquire and Expose *Contact* and
Influence of Opposing Counsel or
Party!

MORE: WHAT IS YOUR OBJECTIVE?

- Can you develop helpful testimony?
 - Do you need to challenge the testimony?
 - Is there a foundational, bias or credibility issue to develop?

BASIC APPROACH WITH ADVERSE WITNESSES

- Adverse witnesses: Unpack with open-ended questions.
- Tie down favorable facts – but make sure clean admission/agreement

BUT...

GET A *RESPONSIVE* ANSWER

- Do not accept an evasive response.
- Listen to the response and *make sure it is responsive (i.e. a complete answer to the question)*!

Seek court assistance if the witness continues to “wiggle”.

MAKING YOUR PLAN: THE ADVERSE WITNESS

- Remember this is a “plan” not a script
 - Be prepared to stray
 - But stay disciplined!
- Focus on ‘tight’ questions for admissions or concessions with a responsive answer – don’t let witness evade!
- List your key points for challenge and keep them in front of you.

TOPIC FOUR: THE UNCOOPERATIVE WITNESS/DEPONENT

THE CHALLENGE

- Likely get few favorable admissions or concessions.
- Take what the witness “gives” you but persist if . . .
 - Important to “unpack” fully.
 - Tie down – *again*, no evasive responses.
 - *More again*, stay disciplined!
- Look for ways to minimize impact/effectiveness.

AND

- Watch your questioning technique – laser beam questions (answer forms a “fact” or “admission”).
- Be sure to get and ANSWER (don’t put up with evasiveness – I’ll repeat this).
 - Watch for “filler verbiage” which disguises a “non-response”.
 - Stay on the record (you never know what will be said).
 - Watch for encouragement/support by opposing counsel (challenge?).

AND FURTHER

- Cautionary – move to strike non-responsive answers or portions thereof as you would at trial.
- *Don't tolerate evasive answers (it is often tolerated too many times).*
 - Again, push for responsive answers.
 - Glib witnesses will talk and avoid answering.
 - Get the witness into a responsive discipline.
 - You need an admission or fact in the response!
 - *If you can impeach, just set it up (hold for trial)*

TOPIC FIVE: WHO NOT TO DEPOSE AND WHY?

NEED THIS DEPO?

- Cooperative witness with favorable and essential testimony?
- Out of jurisdictional range for trial subpoena (and not able to attend trial)?
 - Need for “evidentiary” deposition?
 - Need for motion practice (alt: Declaration/Affidavit?).
- Even if Available – take no chances here if critical to case.

TOPIC SIX: USING VIDEO?

VIDEO CONSIDERATIONS?

- Need to document challenges (*i.e.* impeachment).
 - Need to use at trial (witness unavailable)?
 - Need for evaluation (to both see and hear).
- Need to put witness on spot (emphasis on importance) – truth telling emphasis.
 - Other considerations?

MORE VIDEO CONSIDERATIONS?

- If adverse witness may not be available for trial, maybe no video.
- Anticipate oppositions questioning (preserve testimony?)
 - If anticipated bad behavior or interference by opposing counsel, *video!*

TOPIC SEVEN: HANDLING OBJECTIONS

And Other Issues During Depositions?

PREPARE AND HAVE A STRATEGY!

- Don't get baited into argument.
 - Follow the “high road”.
- Watch a cluttered transcript with colloquy which obscures witnesses' testimony.
 - Again, if difficulties, seek court intervention/referee.

PREPARE AND HAVE A STRATEGY, cont'd.

- What is opposing counsel's practice/approach/history?
- Don't put up with intrusion/disruption/interference.
- Can you avoid confrontation with counsel – work around?
 - Assess merits of objections – more “work around”?
 - Stay the course if you can, but don't “give in”.
- Consider the purpose/objective of deposition – can you accomplish even with disruptions?
 - Need for referee if disruptive to your goals.

WATCH FOR

- Counsel wants a break (to talk to witness)*.

*Know jurisdiction's rules!

- Stay on the record: Put any contact with opposing counsel “on the record”.
 - Ask what as discussed with opposing counsel.
 - Don't tolerate continuous objections and witness coaching!
 - Of course, know what contact they had prior to the deposition.
 - *You should have identified any preserved statements by witness before the deposition (make sure you cover at deposition if you did not).*

ATTORNEY CONFERENCES DURING BREAKS

ABA's Formal Opinion 508 (9/5/23), "The Ethics of Witness Preparation":

“Although there is no express *ethical prohibition* on communications between witness and counsel during a break in testimony, adjudicative officers have, at times, exercised control over these circumstances, including entering specific orders and imposing deposition guidelines and/or sanctions.”

Note: Jurisdictional rules vary so check!

SOME ADDITIONAL TOPICS

- Handling difficult depositions (adverse, defensive, evasive, too glib, etc.)
- Overly cooperative – tends to offer “facts” without a basis (caution: if favorable witness. . .).
 - Defending your/favorable witnesses at deposition.
 - Presenting family members for testimony.
- Issues re experts, retained/non-retained and adverse.

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The Ethics of Witness Preparation: Does ABA Formal Opinion 508¹ Change the Dynamics and Rules of Witness Preparation?

By Guy O. Kornblum

A. An Overview²

The practice of law is demanding in many ways, one of which is the need to comply with the rules of professional conduct for lawyers.³ These ethical rules are intended to protect the public and maintain the integrity of the legal profession. Accordingly, you must be familiar with the applicable ethics rules and guide your professional conduct with them in mind.⁴

Before we start, if you want to test your judgment on this topic, see what is, in my opinion, one of the two best lawyer movies, “Anatomy of a Murder”⁵ (the other is “To Kill a Mockingbird”), in which James Stewart, as a small town lawyer is asked to defend Ben Gazara who is charged with killing a man his wife (Lee Remick) claims

raped and beat her. She tells Gazara and within an hour, he finds the alleged rapist and shoots him. Gazara is arrested, jailed and charged with murder. He seeks out Stewart, a former DA in the community who failed to be re-elected, to represent him as defense counsel. There is a scene in the movie in which Stewart, as Gazara’s defense counsel, discusses how Gazara will respond to the charge. In defending Gazara, Stewart suggests Gazara should assert a potential “insanity” defense. Is it improper coaching, or is he just informing the client of the possible defenses? Watch the movie and answer the question: Did Stewart’s inquiry and counsel cross the line of preparation or is it ethical?

Recently the American Bar Association Standing Committee on Ethics and Professional Responsibility adopted Formal Opinion 508, dated August 5, 2023, dealing with “The Ethics of Witness Preparation,” which includes this statement:

A lawyer’s role in preparing a witness to testify and providing testimonial guidance is not only an accepted professional function; it is considered an essential tactical component of a lawyer’s advocacy in a matter in which a client or witness will provide testimony. Under the Model Rules of Professional Conduct governing the client-lawyer relationship and a lawyer’s duties as an advisor, the failure to adequately prepare a witness would, in many situations, be classified as an ethical violation. But, in some witness-preparation situations, a lawyer clearly

steps over the line of what is ethically permissible. Counselling a witness to give false testimony or assisting a witness in offering false testimony, for example, is a violation of at least Model Rule 3.4(b). The task of delineating what is necessary and proper and what is ethically prohibited during witness preparation has become more urgent with the advent of commonly used remote technologies, some of which can be used to surreptitiously “coach” witnesses in new and ethically problematic ways.

What authority does the MRPC have for the California lawyer? Like sister state rules and court opinions, it is not binding in California, but it may be persuasive in those instances where there is no controlling rule of professional conduct, statute or court ruling in California. The MRPC, if otherwise applicable, is subject to California’s public policy and reasonable inferences which may be drawn from existing California Rules of Professional Conduct, statutes, and court rulings.⁶

As a general proposition, a lawyer may interview a witness for the purpose of preparing that witness to testify but may not obstruct another party’s access to a witness or induce or assist a prospective witness to evade or ignore process obliging the witness to appear to testify. Further, a lawyer may not request that a person refrain from voluntarily giving relevant testimony or information to another party, unless the person is the lawyer’s client in the matter; or if the person is not the lawyer’s client



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cases his entire career and has taught at UC Law San Francisco (Hastings), where he obtained his law degrees. Once on the defense side, he has been a plaintiff’s lawyer for the past 25 years. He also is an expert witness in insurance claims and legal malpractice cases. His firm handles a wide variety of civil cases, especially challenging personal injury and insurance related cases. kornblumlaw.com/



Witness preparation has always been an expected and even essential part of trial preparation.

but is a relative or employee or other agent of the lawyer or the lawyer's client, and the lawyer reasonably believes compliance will not materially and adversely affect the person's interests.⁷

B. Okay to Talk to Witness – A lawyer may interview a witness for the purpose of preparing the witness to testify

Most lawyers have heard the term “horse-shedding the witness.” The term was originated by James Fennimore Cooper in the 1800's, when there were horse sheds near the courthouse where lawyers would talk the case over with their witness. Witness preparation has always been an expected and even essential part of trial preparation. Section 116 of the Restatement of the Law Third, The Law Governing Lawyers expressly permits interviews with a witness for the purpose of preparing testimony, and Comment (b) to Section 116 lists a wide range of permissible witness preparation activities:

- Inviting the witness to provide truthful testimony favorable to the lawyer's client.
- Discussing the role of the witness and effective courtroom demeanor.
- Discussing the witness's recollection and probable testimony.
- Revealing to the witness other testimony or evidence that will be presented, and asking the witness to reconsider the witness's recollection or recounting of events in that light.

- Discussing the applicability of law to the events in issue.
- Reviewing the factual context into which the witness's observations or opinions will fit.
- Reviewing documents or other physical evidence that may be introduced.
- Discussing probable lines of hostile cross-examination that the witness should be prepared to meet.⁸

In addition, witness preparation may include rehearsal of testimony. A lawyer may suggest a choice of words that might be employed to make the witness's meaning clear. However, a lawyer may not assist the witness to testify falsely as to a material fact.

How you follow each of the above is important.⁹

ABA Formal Opinion 508 relating to a lawyer's ethical obligations for preparing witnesses has elaborated on this subject. How, if at all, does it change the ethical rules regarding witness preparation? And what are the restrictions regarding how we prepare that witness, what we say and tell the witness about the case, and how we approach that preparation without unethically influencing the witness?¹⁰

In short, this Opinion gives lawyers great leeway in dealing with clients and witnesses in preparing them to testify. As the Opinion notes, “There is a fair amount of latitude in the types of lawyer-orchestrated preparatory activities that are recognized as permissible.” As in the case of the Restatement, it relies heavily on lawyers to stay within the rules and use

common sense to govern themselves with a sense of fairness and propriety.

The Opinion lists activities that *are* permitted. They include:

- Reminding the witness of the oath they take.
- Emphasizing the importance of telling the truth.
- Explaining that telling the truth can include a truthful answer of “I do not recall.”
- Explaining case strategy and procedure, including the nature of the testimonial process or the purpose of the deposition.
- Suggesting proper attire and appropriate demeanor and decorum.
- Providing a context for the witness's testimony.
- Inquiring into the witness's probable testimony and recollection.
- Identifying other testimony that is expected to be presented to explore the witness's version of events considering that testimony.
- Reviewing documents or physical evidence with the witness including using documents to refresh a witness's recollection of the facts.
- Identifying lines of questioning and potential cross-examination.
- Suggesting a choice of words that might be employed to make the witness's meaning clear.
- Telling the witness not to answer a question until it has been completely asked.
- Emphasizing the importance of remaining calm and not arguing with the questioning lawyer.

- Telling the witness to testify only about what they know and remember and not to guess or speculate.
- Familiarizing the witness with the idea of focusing on answering the question, i.e., not volunteering information.

It also lists those that are *not ethical*, including:

- Counselling a witness to give false testimony.
- Assisting a witness in offering false testimony.
- Advising a client or witness to disobey a court order regulating discovery or the trial process.
- Offering an unlawful inducement to a witness.
- Procuring a witness's absence from a proceeding.

The ABA Opinion is required reading for all who are involved in litigation or presenting testimony where witness preparation is part of the process. While it gives wide latitude in the witness preparation process, caution is advised as lines between ethical and unethical conduct can be crossed because the witness preparation process is fluid. I suggest you include in your preparation a clear statement to the witness that you are interested only in the truth and are not trying to influence the witness' version of what happened in any way. You are only trying to help the

witness understand the process and what will take place so that they are comfortable with the procedure.

In carrying out this function, any lawyer needs to be able to recognize when the line of impropriety and unethical conduct are close to being crossed to assure that it is not. This process relies on the trust, honesty and good judgment of the lawyer involved. ■

¹ ABA ethics opinions are written by the Standing Committee on Ethics and Professional Responsibility. These opinions are advisory, and not binding on any court. Formal opinions are on matters deemed to be of interest to a large number of attorneys.

² See generally: <https://lawyertrialforms.com/power-litigation-tips-tactics/the-ethics-of-witness-preparation/>

³ The ABA Model Rules of Professional Conduct (MRPC) are a set of legal ethics rules that were created by the American Bar Association (ABA) in 1983 and are continually updated over the years. They serve as models for the ethics rules of most jurisdictions. Before the adoption of the Model Rules, the ABA model was the 1969 *Model Code of Professional Responsibility*. Preceding the Model Code were the *1908 Canons of Professional Ethics* (last amended in 1963). Although the MRPC generally is not binding law in and of itself, it is intended to be a model for state regulators of the legal profession (such as bar associations) to adopt, while leaving room for state-specific

adaptations. All fifty states and the District of Columbia have adopted legal ethics rules based at least in part on the MRPC.

California has not adopted the MRPC in their entirety. California's rules have a large degree of overlap with the MRPC, but also contain rules unique to the state.

The California Rules of Professional Conduct were adopted by the Board of Trustees and approved by the California Supreme Court pursuant to statute to protect the public and to promote respect and confidence in the legal profession. The rules and any related standards adopted by the Board are binding on all attorneys licensed by the State Bar. On May 10, 2018, the California Supreme Court issued an order approving new Rules of Professional Conduct, effective November 1, 2018, which is the current version governing California lawyers, subject to subsequent amendments.

⁴ This column deals with the topic of witness preparation. There are other ethical rules on witness coaching during a deposition, hearing or trial, attempting to influence testimony during that process or, assisting efforts to make a witness unavailable. The issue of improperly influencing or obstructing the testimonial process is more complex with the advent of remote or "Zoom" proceedings. This latter topic is discussed briefly at the end of Formal Opinion 508. For me, those are topics for another day or column.

⁵ <https://www.imdb.com/title/tt0052561/> https://en.wikipedia.org/wiki/Anatomy_of_a_Murder. See also, T. Bank, *Civil Trials: A Film Illusion*, 85 Fordham L.Rev. 1969. See the video at: https://youtu.be/JTnF14D8_-I?list=RDCMUC3gNmTGU-TTbFPpfSs5kNkg.

⁶ Formal Opinion No. 1983-71, The State Bar of California, Standing Committee on Professional Responsibility and Conduct

⁷ See generally, Restatement of the Law Third, The Law Governing Lawyers, Section 116 and 120; Model Rules of Professional Conduct, Rules 1, 3 and 8.

⁸ See a summary of J. Allen, "The Emerging from the Horse Shed, and Still Passing the Smell Test: Ethics of Witness Preparation and Testimony," <https://lawyertrialforms.com/power-litigation-tips-tactics/the-ethics-of-witness-preparation/>

⁹ *Geders v. U.S.*, 425 U.S. 80, 90 n. 3 (1976) ["An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it"]; *Hall v. Clifton Precision*, 150 FRD 525 (USDC E. Pa. 1993); *State v. Blakeney*, 408 A.2d 636 (Vt. Sup.Ct. 1979).

¹⁰ Companion rules that might govern your conduct include Rule 3.3 (Candor Toward the Tribunal), Rule 3.4 (Fairness to Opposing Party and Counsel), Rule 4.4 (Respect for the Rights of Third Persons) and Rule 8.4 (Misconduct).

Deposition Preliminaries and Use of “Admonitions”

By Guy O. Kornblum

Deposition “preliminaries” and “admonitions” have more importance than they are given by many lawyers. This is the time during the beginning of deposition when you set the stage for how it is going to proceed. In my view, few lawyers know how this process should work and what needs to be done.

The common beginning goes something like this:

- Q. Mr. Witness, have you had your deposition taken before?
A. Yes, I have, a few times.
Q. So you are familiar with the process?
A. I believe so.
Q. Since you are, can I dispense with the “usual” comments and admonitions?
A. Sure, ok.

Now, ask yourself: What has been accomplished by this exchange? Does the lawyer who is taking the deposition know if the witness understands the process? Of course not. This line of questions and answers leaves a great deal of ambiguity in what will take place after.

Review the basic principles that apply to depositions *with any witness*, even experts, to ensure that your record in this deposition is clear that the witness understands the way in which depositions proceed.

Instead, I believe the best practice is to review the basic principles that apply to depositions *with any witness*, even experts, to ensure that your record in this deposition is clear that the witness understands the way in which depositions proceed. This ensures that if the deposition is used at trial, the witness, or opposing counsel, cannot utilize the failure to do so to argue that the witness was naïve, confused, or failed to understand the process.

First, I make sure I have the deponent’s full name, and all other names and even “nicknames” by which the witness has been known, plus date and place of birth, and even a Social Security number if the

witness will provide it – but given the privacy concerns, it is not worth a fight. Next, I introduce the witness to the process of how the deposition will proceed, describing the question and answer format and advising the witness of the post-deposition process allowing that witness to review and make corrections if appropriate. I may at this point just establish some basic information about the witness including contact information, place of work or business and some initial information.

At that point I then review the basic principles of depositions, which include the following:

- 1. Prior depositions.** Ask whether the deponent has ever been deposed before and, if so, the specifics about that lawsuit, the role of the deponent in the lawsuit, and its conclusion. This will show the deponent’s familiarity with the requirements of testifying and will determine whether the deponent has been involved in related litigation or proceedings.
- 2. The oath effect.** Even though the deposition is being taken in a relatively informal setting, remind the deponent that they are under oath, have sworn to tell the truth. Also remind them of the effect of that oath – it is the same as if they were testifying in court.
- 3. Audible answers.** Tell the deponent to answer audibly and only after you have finished speaking, so the court reporter can take down each person’s words with only one person speaking at a time.



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4. **Don't answer until you hear the full question.** Wait until the question is completed before you begin to answer. Do not interrupt the lawyer asking the question and try to answer a question before the full question is stated, as you may misunderstand what is being asked.
5. **Clear questions.** Ask the deponent to advise you if any question is unclear in any way, after which you will reword the question.
6. **No guessing.** Tell the deponent not to guess when providing responses but, if appropriate, provide estimates based on their "best recollection."
7. **Use words, not gestures.** If a question calls for a yes or no answer, tell the deponent to answer "yes" or "no" rather than with a nod or a shake of the head.
8. **Right to break.** Advise the deponent that they are entitled to request a break anytime to confer with counsel, to use the restroom, or for any other reason.
9. **Heads up on objections.** Explain that other attorneys may make objections to

questions or answers; they are objections for the judge to consider later. Advise the deponent that they are still required to answer the question even though there is an objection, unless, as a party, they are told by counsel not to answer.

10. **Recording rules.** Tell the deponent that the court reporter is recording all the questions, answers, and objections and will reduce that information to booklet form after the deposition ends, at which point the deponent will have the opportunity to read the transcript and correct any inaccuracies.
11. **Changing testimony.** Explain that if the deponent makes changes to their testimony that are inconsistent with the answers given during the deposition, you will be entitled to comment on those discrepancies at trial to question the deponent's veracity.
12. **Effect of Answering:** Explain that if they answer the question as propounded, you will assume a) it was understood, b) the witness gave their best

answer, and c) the answer is full and complete based on their knowledge.

OUTLINE OF A SUCCINCT INTRODUCTION

- Full and complete name
- Work/personal address
- Email address for contact purposes
- Phone number for contact purposes
- Prior deposition
- Deposition procedural rules/admonitions
- Do you have any questions about these?
- Are you under any medication which would prevent you from giving full and complete testimony today?
- Is your hearing ok?
- Do you have any hearing impairment?
- Do you have any listening impairment?
- Do you have any difficulty expressing yourself in English?
- Do you understand what I have said?
- Do you have any questions about the process?
- Are you ready to proceed?

And then *you* are ready. ■

DEPOSITION PRELIMINARIES

BACKGROUND

- A. Name /formal/use/nickname
- B. Where lives
- C. Occupation
- D. Where employed currently
 - a. How long employed.
 - b. Job title/position.
- E. Alternate contact information.

INTRODUCTION TO PROCESS

- Describe process.
- Q and A.
- Booklet
- Have an opportunity to review after.
- CR will arrange
- Review and sign
- Provide any changes in testimony

PRIOR DEPOSITION TESTIMONY

- A. Been deposed before –
- B. Particulars
 - How many times? Last time?
 - Ho..
 - w many times while employed at State Farm?
- C. 00Familiar with how deposition works and the ground rules
- D 3.. Ever testified in trial concerning claims you worked on
 - Particulars
 - How many times? Last time?

DEPOSITION ADMONITIONS

1. **Prior depositions.** Ask whether the deponent has ever been deposed before and, if so, the specifics about that lawsuit, the role of the deponent in the lawsuit, and its conclusion. This will show the deponent's familiarity with the requirements of testifying and will determine whether the deponent has been involved in related litigation or proceedings
2. **The oath effect.** Even though the deposition is being taken in a relatively informal setting, remind the deponent that he or she is under oath, has sworn to tell the truth, and the effect of that oath is the same as if he or she was testifying in court.

3. **Audible answers.** Tell the deponent to answer audibly and only after the examiner has finished speaking, so the court reporter can take down each person's words with only one person speaking at a time.
4. **Don't answer until you hear full question.** Wait until completed before you begin answer.
5. **Clear questions.** Ask the deponent to advise the examining attorney if any question is unclear in any way, after which the examining attorney will reword the question.
6. **No guessing.** Tell the deponent not to guess when providing responses but, if appropriate, provide estimates based on his or her best recollection.
7. **Use words, not gestures.** If a question calls for a yes or no answer, tell the deponent to answer "yes" or "no" rather than with a nod or a shake of the head.
8. **Right to break.** Advise the deponent that he or she is entitled to request a break anytime to confer with counsel, to use the restroom, or for any other reason.
9. **Heads up on objections.** Explain that other attorneys may make objections to questions or answers; they are objections for the judge to consider later. Advise the deponent that he or she is required to answer unless, as a party, he or she is told not to by counsel.
10. **Recording rules.** Tell the deponent that the court reporter is recording all the questions, answers, and objections and will reduce that information to booklet form after the deposition ends, at which point the deponent will have the opportunity to read the transcript and correct any inaccuracies.
11. **Changing testimony.** Explain that if the deponent makes changes in his or her testimony that are inconsistent with the answers given during the deposition, the examining attorney will be entitled to comment on those discrepancies at trial to question the deponent's veracity.
12. **Effect of Answering:** Explain that if answers the question, you will assume a) it was understood, b) the witness gave his/her best answer, and c) the answer is full and complete based on the witness's knowledge.

SUCCINCT INTRODUCTION

- Full and complete name
- Work/personal address
- Email address for contact purposes
- Phone number for contact purposes
- Prior Deposition
- Deposition procedural rules/admonitions
- Do you have any questions about these?
- Are you under any medication which would prevent you from giving full and complete testimony today?
- Is your hearing ok?
- Do you have any hearing impairment?
- Do you have any listening impairment?

- Do you have any difficulty expressing yourself in English?
- Do understand these?
- Do you have any questions about them?
- Are you ready to proceed?

Preparation of Your Client for Deposition

By Guy O. Kornblum

From what I can tell in my many years of taking depositions, not all lawyers do what is necessary for preparing a client for deposition. That deposition is the key to allowing your client to tell the story of the case and to set the case up for potential resolution. If thorough preparation is not done, the client is essentially left alone to figure out how to approach the process. So, let's go over what needs to be done to fully prepare your client for deposition testimony – to make sure we are doing our job to get our client ready for the process.

From a plaintiff's perspective, your client needs to be prepared to talk about issues relating to liability and damages. Truth is the goal, but sometimes clients do not understand how to talk about the truth. They can get confused, forget the question,

and often fail to answer the question asked and thus become non-responsive. Obviously, that does not work.

The goal of client preparation for deposition is not to teach that client *what* to say, but *how* to respond to the question-and-answer process – which is far from the ordinary conversation process that is the day-to-day experience of anyone.

In my experience most clients are unfamiliar with the deposition process. Even if they have given a deposition before, you cannot trust that experience as being prepared for a deposition regarding the issues your client is facing now. My recommendation is that you simply start from scratch to be sure your client is fully prepared to tell the story of the case.

So, let's go over the preparation process.

are correct.

- Stress that time should be set aside to complete this process, so your client commits to making sure the transcript is accurate.
- Explain how changes are to be made and the consequences of making them – i.e., that opposing counsel may inquire about the changes and the reasons. However, if the transcript is inaccurate, your client should not hesitate in correcting inaccuracies. See also my comment below.
- Explain how the transcript will be received, so it can be reviewed.
- Explain the need to sign the deposition and that this means the transcript is verified as accurate.

• Prior Deposition Testimony

You should already know what your client's history is with litigation including any testimony at deposition. However, past experience does not necessarily mean your client knows how the process works. So, it is important that you cover the basics yourself as I have stressed.

The Deposition Process: The Guidelines for Testifying

The oath effect

Even though the deposition is being taken in a relatively informal setting, remind your client the testimony is under oath which requires "truth telling." I also tell my clients that this process is the same as if the testimony was in court. Not all clients understand this, so it is important

Introduction to the Process

The deposition is not a "water fountain" conversation. Most likely, it is a very unfamiliar one to your client. So, you need to explain how it works. Topics to be discussed should include:

- Describe the process of a question posed with an answer to that question to follow.
- Consider showing your client what a transcript looks like after it is transcribed. This will give your client a visual picture and a better understanding of what a transcript of the testimony looks like.
- Note that your client will have an opportunity to review the transcript after it is transcribed. Explain that this is an opportunity to make sure the answers



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to explain this.

Audible answers

Remind your client to answer audibly and only after the examiner has finished speaking, so the court reporter can take down each person's words with only one person speaking at a time.

Don't answer until you hear full question

In a normal conversation setting, my experience is that most participants do not wait for the other person to finish a thought; there are many interruptions and overlapping statements. Nothing frustrates a court reporter more than to have the questioner and witness talking at the same time. Only one person's comments can be recorded at a time, so the court reporter is likely to interrupt. So, explain the importance of waiting for the full question to be stated. Similarly, if the examiner cuts the witness off before a full answer is given, the witness should state as so.

Clear questions

Tell your client to advise the examining attorney if any question is unclear in any way, after which the examining attorney will reword the question. Stress the importance of making sure the full question is before your client and fully understood by your client before an answer is given.

No guessing

Tell your client not to guess when providing responses but, if appropriate, provide estimates based on their best recollection.

Use words, not gestures

If a question calls for a yes or no answer, tell the deponent to answer "yes" or "no" rather than with a nod or a shake of the head. But if that answer does not provide complete information about the subject matter, your client should be told to say so, and add any additional information to provide a complete answer to the question.

Right to break

Advise your client that they are entitled to request a break at any time to confer with counsel, to use the restroom, or for any other reason.

Heads up on objections

Explain that you or other attorneys may make objections to questions or move to strike responses to questions – which are objections for the judge to consider later. Advise your client that they are required to answer unless there is an instruction to not answer.

The Objection/Instruction Process

Review this process with your client. I tell my clients that if I (or another attorney present) objects, they are not to answer the question until I give the "OK." I also explain that if I give an instruction not to answer a question, nothing further needs to be said. We move on to the next question.

Recording rules

Explain that the court reporter is recording all the questions, answers, and objections and will reduce that information to booklet

form after the deposition ends, at which point your client will have the opportunity to read the transcript and correct any inaccuracies.

Explain the post deposition review process

Go over the process of reviewing the transcript during the post-deposition process, and how you chose to complete that process. You should review the rules on changing and finalizing the deposition transcript. (See Cal. Code Civ. Proc. § 2025, 520; Rule 30(e), Fed. Rule Civ. Proc.)

Changing testimony

Explain that if your client makes changes in their testimony that are inconsistent with the answers given during the deposition, the examining attorney will be entitled to comment on those discrepancies at trial to possibly question the deponent's veracity.

Conclusion

Good and thorough preparation means a quality deposition that allows your client to tell what happened and allows you to describe the impact on your client's life.

