

Best Practices for Deposition Witness Preparation

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Importance of Deposition Testimony

- **Continuing trend in decline in number of civil trials:**
 - various statistics identifying the so called “vanishing civil trial”
 - one statistic calculated .57% of federal civil cases between 2018-2022 were resolved via trial

- **As most civil cases do not go to trial, depositions are critical for obtaining better dispositive motion and/or settlement outcomes**

- **For cases that go to trial, deposition testimony can help or undermine your case**

Preparation is Key

“By failing to prepare, you are preparing to fail.”

-Benjamin Franklin

“Good fortune is what happens when opportunity meets with planning.”

-Thomas Edison

Cases That End Up At Trial

- Some attorneys use the strategy of keeping their controlled witnesses' testimony secret, saving it for trial so
 - This strategy leads to preparing your own witness only for defensive testimony without preparation for getting your client's story/theme out
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- Potential Problem:
 - Witness becomes **unavailable**:
 - death, disability, change of circumstances, no longer your client's employee, moves beyond the reach of a trial subpoena, or otherwise becoming uncooperative

Cases That Are Disposed Before Trial

1. Dispositive motions

2. Settlements

- In both situations it is important to get your client's story/theme out via testimony to show the strengths of your case



Obstacles to Testifying at Depositions

Obstacles:

- **Personality Obstacles** – issues with demeanor, tone, or anything unrelated to the case facts that can be off-putting
- **Fact Obstacles** – testimony that may cause unnecessary risk including answers to reptile questions
- **Communication Obstacles** – struggle to understand and answer questions
- **Emotional / psychological obstacles**

Obstacles to Testifying at Depositions

Obstacles – Lack of Preparation

- Familiarity with:
 - Discovery responses
 - Documents produced in discovery
 - Past deposition testimony
 - Safety policies
 - Federal regulations

Witnesses

Work with witnesses to avoid mistakes:

- Think they need to defend their position
- Guess / speculate
- Anticipate attorney questions (research your own witnesses)
- Over answering
- Answer questions that are confusing / don't understand
- Argue with opposing counsel / avoid becoming frustrated

Witnesses

Countering Plaintiff Narratives

Example:

- **Driver was tired / should not have been driving**
 - Lack of breaks
 - Drinking / eating habits
 - Sleep
 - Consumption of medications (prescribes or over-the-counter)

Witnesses

Countering Plaintiff Traps

- Identifying words in plaintiff questioning that raises red flags (always, should have, wouldn't you agree that, or any questions that require agreement with an absolute rule)
- Keep answers short except when you shouldn't identify topics / issues that can't be answered with yes/no response as it oversimplifies complex issues or responses to reptile questions
- Avoid speaking during long pauses
- Use attorney objections to identify questions that are problematic
- Avoid temptation to answer confusing questions or to speculate because they feel unknowledgeable if they don't
- Witness has control! (wait to respond, ask for clarification, take frequent breaks)

Witnesses

Witness Goals:

- **Witness must understand their role in the case and deposition**
- **Determine message you want the jury to hear about your company**
- **Educate witness that deposition is not a conversation and they do not need to please or convince the plaintiff attorney**
- **Witness must know the subject matter**
- **Witness must not become defensive if plaintiff counsel is critical of them and/or their employer**
- **Practice responding to reptilian questions and other questions criticizing their own and their company's actions**

Witnesses

Sample reptile questions:

- **Wouldn't you agree that safety is the top priority at your company?**
- **Wouldn't you agree that your employee's actions needlessly endangered the public?**
- **Wouldn't you agree that all accidents are preventable?**
- **Wouldn't you agree that the violation of your safety guidelines can lead to catastrophic results?**

Witnesses

Witness Goals:

- **Witness must understand issues related to attorney/client privilege**
 - Relatedly, witness must also have response for how they prepared for deposition
- **Witness must understand the standard of care – reasonableness does not mean what you should have done or could have done better in hindsight**

Witness Preparation Sessions

Preparing witnesses

Avoid lengthy witness preparation sessions.

- Conduct three sessions over several weeks prior to deposition to prepare witnesses:

- **Session 1:** Introduction to Deposition 101

- **Session 2:** Half-Day – Focus on strategy, avoiding plaintiff traps, begin depo practice

- **Session 3:** Half-Day – Review of session 2, videotaping of deposition and assessment

**** Key is practice, practice, and practice!**

Witness Preparation Sessions cont'd.

- **Be a critical thinker but also a critical listener – explore every relevant comment you hear from your witness during preparation sessions**
- **Coach witness about body language, facial expressions, & other actions especially if deposition will be video recorded**
 - **Power of video both at trial and nowadays via links for summary judgment motions**

Witnesses

Work Product

According to the prevailing law, the substance of a trial consultant's advice is highly-protected opinion work product.

- In re Cendant Corp. Securities Litigation, held that the advice of a non-testifying trial consultant hired to assist a witness in preparing for testifying at deposition was highly-protected opinion work product; however, certain limited facts were discoverable, including that a consultant was hired.

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