

Depositions

How to prepare the non-party witness for deposition

by Thomas J. Curcio

As ATLA stalwart Theodore I. Koskoff observed, success in the courtroom comes from hard work in the office. The thorough preparation of your client's case, whether as plaintiff or defendant, includes preparing the non-party witness for his deposition. However, the lawyer must be ever mindful of the lack of confidentiality with a non-client, non-party witness.

Ethical considerations surrounding the preparation of non-party witnesses for deposition

It is ethical for a lawyer to meet with a witness for the purpose of preparing the witness to testify.¹ Courts have consistently recognized that such preparation is the hallmark of diligent trial counsel.

... it could scarcely be suggested that it would be improper for counsel who called the witness to review with him prior to the deposition the testimony to be elicited. It is usual and legitimate practice for ethical and diligent counsel to confer with a witness whom he is about to call prior to his giving testimony, whether the testimony is to be given at deposition or at trial. Wigmore recognizes "the absolute necessity of such a conference for legitimate purpose" as part of intelligent and thorough preparation for the trial."²

Furthermore, courts have consistently recognized that witness preparation aids in the administration of justice. "Such preparation is the mark of a good trial lawyer and is to be commended because it promotes a more efficient administration of justice and saves court time."³

In discussing the parameters of witness preparation, the *Restatement (Third) of The Law Governing Lawyers* provides as follows:

In preparing a witness to testify, a lawyer may invite the witness to provide truthful testimony favorable to the lawyer's client. Preparation consistent with the rule of this Section may include the following: 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; and discussing probable lines of hostile cross-examination that the witness should be prepared to meet. Witness preparation may include rehearsal of testimony. A lawyer may suggest 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.⁴

That final point bears repeating. In preparing the witness to testify, the lawyer must act ethically and must encourage the witness to testify truthfully.

Furthermore witness preparation is consistent with the rules governing lawyer conduct. Rule 1.1 of the Rules of Professional Conduct requires a lawyer to "... provide competent representation to a client." Comments to that rule state that competence includes inquiry into and analysis of the facts of the matter and "... includes adequate preparation."

Reasons to prepare the non-party witness for deposition

There are several reasons why it is necessary to prepare the non-party witness for deposition:

1. First and foremost, the lawyer must recognize that non-party witnesses provide the evidence upon which the client's case is built. Consider the importance to your case of having an independent, impartial witness who will testify that your client's light was green when the client entered the intersection. Similarly, consider the benefit of having a witness, other than your client, to testify about how the injuries affected your client in performing his or her job.
2. A witness deposition is the blueprint upon which the case will be tried. If the witness does poorly in the deposition, it is difficult to improve their testimony at trial.
3. The impressions and appearance of a non-party witness during the depositions affects the strength of your client's case;
4. Proper preparation of the non-party witness for the deposition creates a relationship making it more likely that the witness will appear at trial and will be more cooperative;
5. The lawyer will gain insight into how the witness will appear and what impression he or she will make on the opposing lawyer and/or jury during the deposition, as well as gaining insight during the preparation of areas that need to be addressed before the trial; and
6. If the witness does well during the deposition, the case is more likely to be resolved before trial; and if the case is tried, the witness will feel more comfortable on the witness stand, having done a good job at the deposition based on having been prepared.

Laying the foundation to prepare a non-party witness properly for deposition

To have a non-party witness testify at deposition effectively, *i.e.* truthfully, and in a way that will help your client's case, several things must be done before actually meeting with the witness to prepare. Again, the steps flow naturally from thorough preparation of your client's case.

1. Contact the witnesses early on in the investigation of the case. This enables you to speak with the witness while his recollection of the events is fresh, facilitates being able to contact and locate the witness, and will establish a relationship with that witness.
2. Make certain that you understand what the witness knows and how it fits into your case.
3. Coordinate all deposition dates with the witness before setting the date. Give the witness plenty of lead time on the date and time of the deposition.
4. Be sensitive to the fact that witnesses are often

total strangers, and are inconvenienced by the legal process. Impart a sense of awareness of that inconvenience and continually convey appreciation for their time and cooperation.

5. Before preparing the witness for the deposition, the lawyer must be thoroughly familiar with the facts of the case, and all documents relating to both your case and your opponent's case. This would include reviewing all subpoenaed information, police reports, discovery responses, photographs, witness statements, and all relevant documents.
6. Make certain you have obtained any prior statement or description written by the witness. For example, witness statements are often contained in police files which are obtained only through a subpoena. Similarly, determine whether the witness testified at any hearings and if those hearings were recorded by a court reporter. If so, try to obtain the transcripts.
7. Determine whether the witness was contacted by the opposition. If so, find out when and by whom, what was said, what questions were asked, and whether a recorded or signed statement was given. If so, obtain it.
8. In an auto collision case, visit the scene of the collision before hand so that you are familiar with the scene layout.
9. The lawyer must be familiar with the rules governing discovery and the taking of depositions. The lawyer must understand the scope of discovery. Both the state and federal rules allow discovery of matters relating to claims or defenses of the parties, relevant documents, and the identity of persons having knowledge of these matters. The information is discoverable even if not admissible at trial if it "appears reasonably calculated to lead to discovery of admissible evidence."⁵ Additionally, the lawyer must be familiar with the Rules of Evidence. For example, witnesses are permitted to express opinions on certain topics which the lay person, through experience, has become familiar with, (*i.e.*, a lay person can express an opinion as to the speed of a moving vehicle.⁶)
10. The lawyer must also be familiar with Rule 4:5 which governs the location of the deposition. That Rule provides that the deposition shall be taken in the county or city where the suit is pending, in an adjacent county or in the county or city where a non-party witness resides, is employed, or has his principal place of business. That Rule further provides that if a non-party witness is not a resident of Virginia, his deposition may be taken in a locality where he resides or is employed or any other location agreed upon by the parties. F.R.C.P. 45 provides that a subpoena for a

witness deposition can be issued by the district court where the action is pending for a deposition to be taken within that district or within 100 miles of that district. If beyond 100 miles, the subpoena must issue from the district where the deposition will take place.

(See this issue's Practice Pointer on taking depositions in a foreign jurisdiction on page 3.)

11. Both state Rule 4:5(b)(6) and F.R.C.P. 30(b)(6) enable a party to require an entity to designate a person most knowledgeable in the areas set forth in a deposition notice. If you represent that entity, review the areas within the notice, make certain that the witness designated by the entity is in fact familiar with the designated areas. Review the designated areas with that witness.

Actual preparation of witness

After you have done all of the above, you are ready to meet in person with the non-party witness to prepare him or her for deposition. It is the author's firm belief that it is best to meet with the witness a few days before the deposition, rather than the day of the deposition. This will make the non-party witness feel more comfortable and confident. It also gives the attorney the opportunity to address any issues that arise which may relate to the deposition.

The following are matters to cover with the non-party witness during the preparation meeting.

1. Determine from the witness whether they have ever been deposed before and if so, the circumstances and any concerns they have based upon their prior experience. Explain thoroughly the deposition process to the witness.
2. Additionally, there are several videotapes available which assist the lawyer in preparing the witness for the deposition. Have the witness watch the tape to see how a deposition is conducted.
3. Discuss with the witness the legal issues in the case, what both sides contend occurred, and what you have to prove in order to prevail.
4. Review with the witness any recorded statement, signed statement, or any document that relates their version of the incident. Review all photos with the witness or any documents that bear on their testimony or likely areas of questioning. (Be aware of the cases holding that the lawyer's choice of documents that are reviewed with a witness prior to the deposition is protected from disclosure as the mental impressions, conclusions and opinions of counsel.⁷)
5. Review the rules of being a good witness with the witness. *(Be sure to refer to Lee Livingston's article beginning on page 4 of this issue.)* They are as follows:
 - First and foremost, tell the truth;

Listen to the question that is asked; Make sure you understand the question that is asked (explain to the witness that a question that is not understood cannot be answered honestly). Explain to the witness not to feel dumb if they do not understand the question and not to hesitate to tell the other lawyer to restate the question. Again, your goal is to have the witness tell the truth.

Answer the question that is asked and only the question that is asked. Emphasize to the witness not to volunteer information and tell him or her the more they say, the longer the deposition will take. Tell the witness not to worry about objections and explain that lawyers object to preserve points for the record. As is often the case, most rules have exceptions. The exception here applies if the witness is to discuss damages. In that situation, you should tell the witness to be as thorough and complete as possible (without exaggeration) in describing the plaintiff's injuries and their effect on the plaintiff. This caveat points to a broader perspective to keep in mind while preparing the non-party witness.

That is, in preparing the witness, the lawyer must focus on the important areas the witness will be questioned about, and adapt the preparation accordingly.

Tell the witness to be consistent. If the witness is telling the truth, they can be asked the same question a hundred times, and will give the same answer a hundred times.

Explain to the witness that it is proper and permissible to answer questions with "I don't know" or "I can't recall" provided that is the truthful response. Again, assure the witness that responding I don't know or I can't recall does not mean that they are dumb. Assure the witness that people are not expected to remember every detail and that is why there will be other witnesses testifying. Explain to the witness the difference between "I don't know" (appropriate when asked a question that they never knew the answer to) versus "I can't recall" (appropriate when asked a question they knew the answer to at one time but can no longer remember). Tell the witness not to lose his or her temper, to get cute or sassy with the lawyer or to ask questions of the lawyer beyond clarification of the question. Tell the witness not to be forced into giving estimates regarding time, speed, distances and things of that nature unless they are comfortable with such estimates.

It is often helpful and enlightening to ask a witness an estimate of time and then have them check it looking at a clock on the wall.

- Tell the witness that they can request a break at any time during the deposition.
- Tell the witness to avoid absolutes in answering questions, such as "never," "always," and to state, where appropriate, that that is all they can remember "at this time."
- It is extremely important to review with the witness the likely areas of the examination and to tell them the questions that are likely to be asked. Explain to the witness the format that the questioning usually take, *i.e.*, background information on the witness, information to determine bias or prejudice, what facts known relating to the case, and efforts to limit knowledge of facts.
- It is often a worthwhile and useful experience to briefly depose the witness and use their answers to reinforce the rules discussed above regarding being a good witness.
- Discuss with the witness the procedure of reviewing the deposition transcript or waiving the right to review and sign the transcript.
- Discuss with the witness to dress appropriately for the deposition. I tell the witness to dress as if appearing in court and to wear appropriate business-type apparel.
- Other issues to discuss with the witness are payment for their time, travel, lost wages and expenses associated with the deposition. Explain to the witness that in state court, they are only entitled to be compensated for daily mileage and tolls.⁸ In Federal Court the witness is entitled to a mileage and witness fee.⁹
- Discuss with the witness the question of what was done to prepare for the deposition. Tell the witness to answer this question like all others - truthfully.

Lack of confidentiality

The attorney preparing the non-party witness for deposition must bear in mind that his or her conversation with the witness is not protected by the confidentiality afforded attorney-client conferences. As an experienced trial practitioner has said, assume that everything you discuss with a witness may be repeated on the record. At least one circuit court in Virginia has ruled that the lawyer's discussion with his client's husband regarding his losing the right of way by speeding was properly discoverable and could be the subject of cross-

examination at trial.¹⁰ This is consistent with the law in other jurisdictions. "Some protection is afforded to a party against such abuses by permitting him to question the witness on cross-examination about prior conversation with counsel, and thus, if he can, to reflect on the credibility of the witness and the weight to be given to his testimony." "

Conclusion

As is true in all aspects of successful lawyering, the preparation of the non-party witness for deposition requires diligent and thorough preparation by a lawyer ever mindful of the ethics surrounding our noble profession.

Endnotes

1. *Restatement (Third) of The Law Governing Lawyers*, §116(1) (1998).
2. *Handi & Ibrahim Mango Co. v. Fire Ass'n of Philadelphia*, 20 F.R.D. 181 S.D.W.Y. 1957), citing 3 Wigmore on Evidence, (3d Ed.) § 788.
3. *State v. McCormick*, 298 N.C. 788, 259 S.E.2d 880, 882 (1979). (Citations omitted.)
4. *Restatement, supra*, §116(1), Comment b.
5. See Rule 4:1 of Virginia Supreme Court and F.R.C.P. 26.
6. *Smith v. Commonwealth*, 213 Va.781,195 S.E. 2d 845 (1973).
7. See Rule 4:1 (b)(3); *Mills v. MCC Behavioral Care, Inc.*, 13 Cir. LA811, (1995) and *Shanholtzer v. Dean*, 26 Cir.CL9911745 (2000).
8. See Va. Code § 17.1-612 (1950, as amended).
9. See F.R.C.P. 45(b).
10. *Hartman v. Ogbuokiri*, Fairfax County Circuit Court, Law #178849, Feb., 00 (Judge Roush).
11. *Handi & Ibrahim Mango Co. v. Fire Ass'n of Philadelphia, supra*. See also *State v. McCormick, supra*.



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