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Prepare your witness for the strange world of the deposition

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Deposition.

The word brings comfort to a lawyer's mind. It is, after all, the most common and familiar litigation environment.

To most lay people, however, it brings confusion. Look it up in the dictionary, and it has multiple meanings: deposing a leader, depositing sediment, etc. Even if a client or witness gets to the legal definition, "the giving of testimony under oath," it's still not clear what he's walking into.

That confusion and concern is important for lawyers to recognize and address. There is, after all, real cause for concern. In fact, a deposition is an extraordinarily deceptive event for most normal people, for several reasons.

• Formality

Unlike a trial, in which it is impossible to ignore the formality of the proceeding, a deposition often has some of the appearances of informality: There's no judge or jury, it may take place in a conference room and/or provide a casual atmosphere among counsel.

Don't allow your witness to be fooled. A deposition is actually a very formal and artificial procedure. It is formal testimony: under oath, transcribed and picked apart, as it would be in any formal legal proceeding. Treat it with all the caution that you would a full-scale trial.

• Conversation

With the lawyers chit-chatting, folks sitting around a table, and often a casual style of questioning (at least at first), it's easy to think of it as a friendly conversation. Don't let your witness make that mistake. This is testimony that must be handled with the unnatural language and rhythm of the witness environment: question, pause, answer, stop.

• Discovery

"This is just a discovery." "We're just at an early stage of this case." Both in the preparation and in the deposition itself, those can be easy excuses to treat the process lightly.

Nonsense. These days, only an absurdly small percentage of cases go to trial; it's too expensive, too time-consuming, too unpredictable, too risky. Most cases essentially get decided at the deposition stage. Even in the rare case that does go to trial, depositions often control the testimony — and the outcome.

So, with all that a deposition is not, how do we help a witness to understand what it is? As one court put it, depositions are "the factual battleground where the vast majority of litigation actually takes place." Hall v. Clifton Precision, 150 F.R.D. 525, 531 (E.D. Penn. 1993).

A deposition is an important fact-finding or discovery proceeding in a civil case. Depositions, or similar testimony situations, also happen in a wide range of government investigations, administrative hearings and other proceedings. Although the details may differ somewhat, for these purposes we will lump all these types of proceedings together with depositions.

A deposition consists primarily of questions by lawyers and answers by the witness, under oath. It is not a trial. No judge or jury is present, and nobody is there to keep score or award a verdict. Charm, persuasiveness, sincerity and

judge or jury is present, and nobody is there to keep score or award a verdict. Charm, persuasiveness, sincerity and other appealing human attributes are largely wasted in a deposition. The principal result is usually a written record known as a transcript, which will be used (or misused) by the lawyers further down the line. The true audience is not even in the room.

Therefore, the most important task for a witness in a deposition is to keep the transcript clear and accurate. A witness rarely "wins" a deposition in the sense that she convinces the questioner that she's right. The more realistic goal is to convince the questioner that she'll make a good witness by being clear, precise and careful, so mistakes aren't made that can be used later.

At the same time, the lawyer will want to work with the witness to understand what key themes, if any, both sides want to emphasize.

To help prepare for a deposition, it's important for the witness to understand the principal purposes of the process. In most depositions, the questioner has more than one purpose, and sometimes combines all five. Each purpose emphasizes a different part of the preparation.

1) Gathering information — The questioner is trying to learn more about the matter. The witness does not need to do the questioner's job. The witness should remember Rule No. 5: Don't answer a question you don't understand; and Rule 8: Don't volunteer.

2) Obtaining admissions — The questioner is trying to lock the witness in on certain points helpful to the other side's case. Help the witness to understand what those points are, legal and factual, and to admit what he must, if the questions are clear and fair, but no more.

3) Testing theories and themes — The old saying is appropriate here: "Just because someone said it doesn't mean it's true." The questioner may raise a variety of theories, but if the witness listens carefully and doesn't agree, the witness should say so.

4) Testing and evaluating the witness — The witness is not being tested on her ability to argue with or score points on the questioner; rather, the questioner is evaluating how the witness will appear to the finder of fact. The witness should stay focused and disciplined — and be relentlessly polite. Prepare the witness to avoid getting distracted.

5) Testing and evaluating the opponent — The questioner is evaluating everyone in the room. Lawyer and client need to show that they are in sync: on discipline, on substance and on responding to aggressive tactics, if necessary. The witness should listen to everyone in the room, carefully consider anything his counsel says and, when in doubt, ask counsel.

Before you allow witnesses to venture into the strange world of a deposition, make sure they clearly understand what it is and what it is not. Otherwise, you have put them at a terrible disadvantage.

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