

SO, YOU'RE GOING TO BE DEPOSED?

By
Shalem A. Massey

Well, there you are, serenely ensconced at your desk just before lunchtime on a Friday morning. Your thoughts turn to prospective lunch locations, the kids' soccer game on Saturday and devising a plausible explanation of why you need to leave early today. The phone rings and you flirt with the idea of just letting it go to voicemail and walking out the door toward lunch. Alas, being the consummate professional, you answer the phone. A barely perceptible tremor transits your torso as you realize it's your products liability counsel calling to update you on pending litigation. During the course of the conversation, you are informed that the opposing party has noticed your deposition to be taken in about a month.

While simply running away might be an enticing temporary solution, it is not particularly practical. Accordingly, given this reality, what can you do to prepare? What does it take to be a good witness? What are your goals as a witness? What are some common problems? And, what are some strategies that work? This article focuses on general guidelines to assist in preparing you for what to expect in your deposition. It is not intended to be an exhaustive analysis of the deposition process.

What is a Deposition?

Depositions are perhaps the single most important and powerful part of the discovery process in today's legal environment. Depositions are an extremely effective weapon which can be used to persuade opponents of the strengths and weaknesses of your defense. They also influence the settlement value of a case by giving opposing counsel opportunity to assess the impression a witness might make upon a judge or jury. Therefore, adequate preparation for depositions, coupled with a proficient defense, is vital in developing the case¹. Of course, nothing contributes more to a successful deposition than comprehensive preparation. And, it is at the deposition that exhaustive advance preparation begins to pay off². Obviously, preparation will vary from case to case. A complex aviation case requires quite different tactics and preparation than that which is required for a simple automobile rear end collision type case.

Initially, it is important to note some of the logistical matters associated with a deposition, which may seem obvious, but deserve mention:

1. Your testimony will be given under oath, which means under penalty of perjury, just as if you were present in a courtroom. Typically, in an aviation civil suit, a deposition takes place in a conference room either at a hotel or law firm.

¹ *Deposition Preparation and Defense for the Young Lawyer* FOR THE DEFENSE, Volume 42, No. 1, January 2000.

² SINCLAIR ON FEDERAL CIVIL PRACTICE – Third Edition, Practising Law Institute, Part 2 – Discovery, Chapter 10 – Depositions – Preparation for Oral Depositions.

2. The examining attorney, other party's counsel, a court reporter, and possibly the opposing party, or one of the experts, will attend the deposition.
3. The purpose of the deposition is to allow the adversary to learn the nature and extent of the deponent's (your) knowledge about the subject matter of the action.
4. The noticing party's attorney will ask most of the questions, after which other attorneys may also ask questions.
5. The court reporter will be present to record everything that is said during the deposition. The court reporter will administer an oath. A deponent is sworn in by the court reporter with words such as: "Raise your right hand. Do you swear to tell the truth, the whole truth and nothing but the truth, so help you God?" From this point on, everything on the record that the deponent says is under oath. Generally, the examination begins by a lawyer asking for the deponent's full name (including spelling), place of employment, job title, and so on. The deposition may also be videotaped (more on this later).
6. A transcript will be prepared of your testimony. Days or even weeks later, you will have a chance to review a typed transcript and make changes, if necessary. Generally, the fewer changes the better because lawyers are entitled to comment upon those changes at the time of trial. This transcript is signed by the deponent and becomes the witness' sworn testimony.
7. It is unlikely that your own counsel will ask any questions, but he/she will be present throughout the process to hear the testimony, to object to improper questions, to give instructions not to answer a question, and generally, to offer protection from any improper treatment³.

Well, it's *your* testimony, what are *you* going to do to prepare and what can you do to be an effective witness? To that end, there are some general guidelines, which are provided below to give some context to your deposition preparation. However, before we get to that, it is important to note the number one fear of every prospective deponent - - the fear of not knowing the answer to every question. In reality, the number one myth is that not knowing the answer to every question means you failed. It is fairly certain that you will not know the answer to every question. But, there are methods to overcome this fear. Generally, the best way is to:

- Know your message;
- Know it well enough to recognize when you are going off course; and
- Know how to get back on your message.

³ California Civil Discovery Practice – 3rd Edition, Chapter 4, SCHEDULING AND PREPARING FOR ORAL DEPOSITIONS, XIII, Preparing to Defend Oral Deposition, B. Advising client-deponent.

How Does One Know What One's Message Is?

In sharing your message, it is important to develop "Home Bases." A Home Base is a word, sentence, or concept which generally describes the core theme of your testimony. Home Bases meet jurors' expectations, help you gain control, and advance your key messages. For ABC assureds, your Mendes & Mount lawyer will be intimately involved in preparing you for your deposition, developing Home Bases, and shaping your key messages.

General Guidelines

While deposition preparation will vary according to the type of case, case complexity, the witness' role, and the subject of the litigation, there are some general guidelines, which will be helpful in preparing for your deposition. These are:

1. **Tell the truth.** Generally, you can truthfully respond to most questions with one of the following simple answers: "yes," "no," "I don't know," "I can't recall," or "I don't understand the question."
2. **Be yourself.** Often, there is no greater asset in the conference room or the courtroom than sincerity. Generally, you are not going to "win" the case with your deposition. While being an advocate in your position has its place, becoming somebody you are not for purposes of the deposition often has unintended and unpleasant consequences.
3. **Do not equivocate.** Be definite and firm about what you know and willing to admit what you do not know. Often vulnerability and sincerity are bound with components of persuasive testimony. Witness equivocation and hedging destroys credibility. Just like the old television show "*Dragnet*," Sergeant Joe Friday was always saying, "Just the facts, ma'am." This is essentially what you want to provide here - - just the facts. If you don't know, if you can't recall, if you don't understand the question - - just say so. Do not guess. Do not offer opinions.
4. **Do not answer questions you do not understand.** Capable and effective counsel truly wants a witness to understand the questions and will readily cooperate to ensure good communication. If you do not understand the question, simply say so.
5. **There is no need to be arrogant.** A boastful, over-advocating witness often is seen to lack credibility by a jury.
6. **Do not volunteer.** A good witness will answer the question put and only the question put. Be a good listener and answer the question as asked, without more. A deposition is not normal conversation. It is an interrogation by adversaries. You are a sponge. In order for your adversary to get information, they must ask the appropriate question and squeeze the sponge. Generally, there is no need to prompt the interrogator or re-phrase their wording for them. Make the interrogator formulate his/her own questions. The exception to this is where you are rock solid sure that you can hit a "home run" and are prepared to do so.

7. **Be a good listener.** In every day conversation, we generally ask questions which could be answered with a “yes” or “no.” However, being courteous, we like to provide more information. While this is similar to the preceding point, it is important to emphasize the importance of listening and then waiting. Often, after a witness answers a question, the interrogator will simply stare at him or her and watch as the witness attempts to fill the silence with run-on answers. After you have given your answer, simply stop. If there is silence, so be it.
8. **Do not speculate.** Often, a witness will feel obligated to know everything about the department in which he/she is employed. Sometimes, this takes the form of guessing or speculating. Often, a witness will estimate on topics such as distance to a traffic accident, the precise words used at a key corporate meeting ten years earlier, or to the age, height, or weight of an aircraft. Quite simply, a deposition is not a memory test. While in some cases the interrogator is entitled to a reasonable estimate, if a reasonable estimate is not reasonably within your grasp, simply decline. One graceful way to say this is: “I’m sorry, I do not know, and I do not want to guess.”
9. **Read documents thoroughly.** The interrogating counsel may focus you on a particular portion of a document (often a voluminous document) and ask for an interpretation of an isolated portion. You must be certain that you understand the document thoroughly before attempting to answer questions that may be presented completely out of context. Further, the document may be in error. Do not accept the interrogator’s characterization or description of the document blindly. Rely on your own reading. Check the recipient, the date, who signed it, and who got copies. If it is an email, check the header for date and time received, sender, distribution list, transmission path, and attachments. Be keenly aware that the date of the email is sometimes the date upon which it was printed and not the date upon which it was originally transmitted.
10. **Be aware of an interrogator’s lazy words.** Words such as “frequent,” “normal,” and “substantial” have peculiar and significant meanings depending upon the speaker, listener, and the context. Often, it is worthwhile to ask the interrogator for a definition of what is “normal,” “frequent,” or “substantial” before answering an open-ended question including these types of words.
11. **Recognize and resist interrogator’s style.** Many trial lawyers have “styles” or particular methods of communication. The most common styles are the “carrot” or the “stick.” The “carrot” style of examination is to be cheerful, magnanimous, and attempt to create a relaxed casual atmosphere - - a professional simply having a conversation over a drink. The alternative style is the “stick” - -the aggressive, sometimes hostile and contentious style that attempts to intimidate the witness. Each style has its own pitfalls. The interrogator might try to get you “steamed up” or try anything to get you to “see red” instead of seeing where you are being led. Remember, it is never personal. There is rarely any reason to argue, get sarcastic, or try to get even. Conversely, be aware of falling into a conversational pattern with the interrogator.

12. **Do not offer or agree to provide information.** It is a fortunate trait of human nature that people want to be liked and that people enjoy being helpful. However, in depositions the Rules of Civil Procedure, not principles of charity, govern the production of documents and disclosure of information. If you are asked for further information or data, simply tell the interrogator that you have no objection to producing the information but production is up to your lawyer.
13. **Promptly correct mistakes.** Witnesses are often nervous when testifying. This is, of course, natural and expected. If you do make a mistake, inadvertently or otherwise, correct the mistake promptly. Simply tell the interrogator that you have misspoken and that you would like to go back and amend an earlier statement. Often, you will have the opportunity to discuss this with your lawyer at a break.
14. **Use your own vocabulary - - stay away from aviation jargon.** Certainly, some technical words will be necessary in espousing and delineating your messages during the course of your testimony. Remember that the ultimate audience of your testimony will either be a judge or a jury, with little or no aviation experience.
15. **Leave when excused.** At the end of your deposition, simply leave or exit to another room. More often than one would expect, the interrogator suddenly remembers an important question or area and politely requests to reopen the deposition and ask a few more questions. Simply leaving upon being excused is a sure way to avoid this consequence⁴.

Video Depositions

Rule 30(b)(2) of the Federal Rules of Civil Procedure allows a party taking a deposition to notice a videotaped deposition, “unless the Court orders otherwise.” Rule 30(b)(3) allows any other party to designate that deposition which will be videotaped. Courts understand the advantages of videotaped depositions and often encourage their use. In *Rice’s Toyota World v. Southeast Toyota Distributors, Inc.*, 114 F.R.V. 647 (M.D.N.C. 1987), the Court discussed the advantages of video depositions. “[A] witness’ demeanor reflected in his motions, expressions, voice inflections, etc., give the fact finder a unique advantage in evaluating evidence resulting in appellate court’s granting greater deference to such findings. Video depositions can markedly increase accuracy and trustworthiness. In addition, to the extent that a video deposition reduces tedium, the fact finder’s concentration and attention will be enhanced, again to the benefit of the decision process.” *Id.*

Accordingly, as video depositions become ever more ubiquitous, it is important to note some special guidelines:

1. Realize that you are “on stage” at all times and act accordingly.

⁴ OPENING STATEMENT: POWERFUL WITNESS PREPARATION BY RONALD J. COHEN, 27 *Litigation One*, Fall, 2000.

2. Note that non-verbal behavior is extremely important in communicating credibility and that your mannerisms will be magnified on camera. Sit still (and do not slouch) with your hands in front of you on the table. Keep your hands away from your face and avoid such things as twirling your pencil, hair, or adjusting your glasses.
3. Speak in a normal voice. Don't be intimidated by the camera. Use your natural voice inflection, gesticulation, and other communicative devices. Be normal and natural.
4. Do not slump. This point bears repeating. Slouching or slumping on camera looks particularly poor when replayed. Stay as alert and erect as possible throughout all the time you are on camera.
5. Keep your eyes on the interrogator and avoid looking around the room.
6. Avoid looking at your attorney before answering the question. This may imply that you seek or need help answering the question.
7. When handed a document, look at it briefly to identify its subject matter, date, address, and signature, then look back at the interrogator to answer the question. Often, the camera will be turned off while you read. Again, do not accept the interrogator's characterization of the document.
8. Wear conservative clothing which is appropriate for your position.
9. Do not be distracted by the interrogating attorney's facial expressions such as raised eyebrows or a look of disbelief. Simply ignore these distractions and answer the question. Remember, the interrogator is not on camera.
10. Do not be impertinent, arrogant, or flippant. Remain calm, providing a dignified response, and answering questions as quickly as reasonably possible after they are posed⁵.

Conclusion

While the foregoing is a brief overview of some aspects of deposition preparation, there is certainly no substitute for meeting with your lawyer. Obviously, discussions with your lawyer in preparation of your deposition are privileged, and the substance of these discussions cannot be explored at your deposition. Do not hide problems from your lawyer. You need to give your lawyer any bad news up front, so they know in advance what to expect. ABC assureds, preparing for deposition, should thoroughly discuss all aspects of their deposition with their Mendes & Mount attorney.

⁵ Park I. Trial Preparation and Discovery: Preparing Your Witness For a Videotaped Deposition, *Defense Practice Notebook*, Volume 1996, No. 1.