

# Preparing the Witness and Defending the Deposition

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Rule changes over the past ten years, in federal and especially state courts, severely restrict counsel behavior when defending a deposition.

For the most part, except for questions implicating a privilege, the witness is likely to have to answer all or most of them – this makes preparation key.

There are only three types of witnesses: fact (personal knowledge), expert (opinion) or 30(b)(6) (corporate knowledge) – each presents its own challenges, but there are some basics.

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**Poll: 1. How many depositions have you taken?**

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**Poll: 2. How many depositions have you defended?**

# Preparing Your Witness for Deposition Testimony

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- **Generally**

- Depositions can be very stressful for the witness – most people do not want to be a witness
- Meet with the witness in person – as many times as necessary
- Explain the litigation and the witness's role
- Explain the purpose of a deposition
- The witness is to give their best and honest “present sense” recollection of facts
- The witness does not need to try to win the case
- With the exception of privilege issues, the witness will need to answer the question

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- **Ground Rules (*for the witness*)**

- Always be truthful
- Stay calm and focused
- Listen carefully to the question. Make sure the question is understood, and ask for clarification if the question is too vague, too general or unclear. Pause before you answer. (Pause provides time for objection). Be cautious in answering questions following an objection.
- Do not speculate or guess. Only testify as to facts.
- Do not think out loud (silence is fine)
- Just answer the question asked. Do not explain or volunteer answers.
- Read documents they are handed

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- **Ground Rules (for the witness)** *(cont'd.)*
    - Best answers are “yes”, “no” and “I don’t recall”
    - “I don’t recall” is fine, but then be quiet; don’t feel the need to help
    - If the question is preceded by a comment that is factually untrue or with a fact that is in dispute, do not let this pass without comment
    - Do not accept attorneys paraphrasing your responses unless they are accurate
    - Be careful responding to questions that start with “Isn’t it true...”, “Wouldn’t you agree...”, or other preamble proposing to answer a question for you.
    - You can ask for a break at any time except when a question is pending
    - Do not bring anything (e.g., diary, notes) with them

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- **Additional Considerations**

- Make sure the witness is comfortable in the room
- Introduce the witness to the court reporter
- OK to be friendly to others they recognize, but this is not a party.  
Opposing counsel is not your friend.
- Dress appropriately



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- **Preparing Fact and 30(b)(6) Witnesses**

- Fact vs. Expert: 30(b)(6) witnesses are “fact” witnesses
- 30(b)(6) witness can be anyone, and there can be more than one witness
- Topics must be set forth with specificity in the deposition notice
- Corporation is bound by answers
- Be cautious about “I don’t know” answers, unless outside the scope of the corporation’s knowledge
- Proposed rule change

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**Poll: 3. Have you experienced inappropriate or unprofessional behavior by opposing counsel during a deposition?**

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## *Live Content Slide*

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**Poll: 4. Have you had to call the Court during a deposition due to conduct of opposing counsel?**

# Dealing With Difficult Witnesses and Adversaries

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- Know with whom you are dealing
- Establish you are professional at the outset
- Get it in writing – create a record
- Do not let abusive behavior persist – seek the Court’s attention, if needed
- If the opposing attorney is acting inappropriately, point it out on the record. For example, say “It is more difficult for me to concentrate and properly answer your question when you are yelling at me.”
- Control your own behavior

# Defending Your Witness at Deposition

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- **Objectives**

- Ensure your witness's testimony is truthful and accurate
- Protect the witness from improper questions, harassment, etc.
- Protect the record by making the appropriate objections (when not reserved)
- Prevent disclosure of privileged information
- Present your witness's testimony in a manner most helpful to your client's cause (preparation)
- Cross-examine only if absolutely necessary

# Considerations for a Videotaped Deposition

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- Videotaped testimony has the potential for dramatic impact on jury
- “YouTube” world – people are fixated on video
- Before preparing your witness, prepare yourself – become tech savvy, or retain a professional
- Check local rules on what is, and is not, permissible “to replicate evidence at trial”

# Considerations for a Videotaped Deposition *(cont'd.)*

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- Preparing the witness for video
  - Be familiar, if possible, with the setting
  - Make friends with the videographer (who is also your official reporter)
  - Look through the camera – check background, colors, general layout, seating, and fix things if necessary – “rocking chair” (Bill Gates), objects on table

# Considerations for a Videotaped Deposition *(cont'd.)*

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- Ensure witness knows the difference that video makes
  - Mannerisms can seem magnified
  - Long pauses can seem evasive (in a way that doesn't show up in paper transcript)
  - Where will client focus (camera, examining attorney – but not floor, ceiling, etc.)
  - How will client dress, and act (video is different than appearing live)
  - Rehearse with video so witness can actually see how they look on camera
  - Remind them that the camera captures everything, so wait until operator says “off”



# Questions?

# Thank You

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