Witness Preparation: Best Practices for a Successful Deposition

By Robert P. Redemann

Whiter. The witness literally turned whiter. The lyrics from the song echoed in my mind, "…a whiiiiter shade of paaaaale." And I was really seeing it with my own eyes. I couldn't tell if he actually sputtered because I was looking to see how the videographer and the court reporter were reacting, but I think he did. It did not look good. Of course, it was April in London, and the witness was English so he hadn't seen much sun, but he still changed color to even whiter. Why? The questions he was being posed caught him completely off guard. He had no understanding of how he was going to be treated and he had no good strategy for answering the questions he was getting. He was the president of the company and he wasn't used to being treated this way. I knew we would be blamed later but our hands had been tied by the witness himself.

The case later settled and how the president had performed in his video deposition was not a small part of why that happened. He did not want to come to Oklahoma and have to explain his answers or not come and have the video replayed for the jury.

As any good trial attorney might ask — how could this be allowed to happen? The answer is lack of preparation. The president refused to give us any time for preparation until a few hours before the deposition, and even then it was only about 20 minutes. We simply did not have enough time to adequately prepare him for our able opponent. It confirmed a long-held belief that preparation before a deposition isn't a luxury, it's vital. What follows is not the only way to prepare for defending a deposition, but it is a method that has worked.

MAKING THE WITNESS COMFORTABLE

The Wrong Way

Is the preparation for the attorney or the witness? Many attorneys have a list of things they want to teach the witness. They are proud of this knowledge because they have learned it either at the side of skilled mentors or by the hard lessons of experience. They want to make sure that the witness has the advantage of that experience, whether it is what he (the male pronoun is used throughout for consistency purposes) is interested in or not. They are preparing the witness the way they want by covering all the procedural and formal things the witness needs to know. After all, they are the attorneys and the witness typically does not have much experience with giving depositions. In their minds, he needs the help.

But, who is that kind of preparation for — the witness or the attorney? Think about what you would want if you were a witness. Comfort is one common answer. If you were the witness, you would want to be as comfortable as possible in an unfamiliar situation. The best way for that to happen would be for the witness to have a chance to explain his fears and to have his questions answered. Also, you might want to practice a little. So, let the witness start things off and dictate where the conversation leads.

Teaching and Listening

In short, a first step is to change your approach from being the teacher to being the student. You need to know what it is about the deposition process, the other parties, the other attorney or the facts of the case that worry your witness. You cannot address these issues unless you know about them, and your witness needs the chance to express any concerns.

Listening to the witness before you begin the part of the preparation involving the mechanics of the deposition has several benefits. First, it builds rapport with the witness. This is important because the witness is likely not to be familiar with you, which can add to his apprehension. It is much easier for him to face the inherent uncertainty in a deposition with someone he knows. We have all seen some depositions where the attorney's relationship with the witness was so poor that the witness was virtually on their own. It rarely turned out very well.

Second, it allows the witness to express what concerns he has. This lets the witness know that you value his perspective, and it helps build both his confidence and the bond between you. It also allows you to evaluate the type and severity of the concerns. Third, it allows you to help ease his anxiety by discussing and addressing the concerns he identifies. You can change the order of your instruction to address the most dangerous concerns first and spend time where the witness is least confident. Fourth, it may shorten the time you need for preparation because you can focus on the things that the witness finds important. As long as you still help prepare him for the things he doesn't know about, dealing with his issues first is valuable. Finally, you may learn something about the case that you did not yet know.

Letting the witness converse freely, the opposite of what you want him to do in the deposition, may let you discover things about the case that could be useful or dangerous to your position that you might not have heard until the deposition. It may also give you insights into whether or not your witness is naturally reticent or expansive and will allow you to help address those qualities, too. A deposition is a type of performance and the witness usually needs to practice or rehearse to feel comfortable. At the very least, he needs to know the edges of the stage that he is on and what his role is.

Addressing Concerns

The deposition process is not normal human conversation. Almost everything about it is foreign to most people, and none of it is designed to make the witness feel at ease. For example, it takes place under sets of rules regarding legal procedure[1] and evidence[2] about which the witness has no knowledge. It takes place in a formalized setting, though not a court like he has seen on television. All of the statements are recorded. The witness is placed under oath. There is a clear opponent who is typically adverse to the witness. It is like an oral exam but there is no way to know what the exact questions will be. No one can assure the witness how long it will take.[3] The questions and answers are likely to be interrupted by objections. The witness may face documents or statements that require him to suggest other people are not remembering correctly or even lying. He knows there is a good chance that if he says something wrong or inaccurate, he will likely be called to task for it later.

All of these things are likely to be new and potentially confusing or frightening to the witness. He does not want to look foolish or unschooled. Your job is to address these issues. A good way to do this is mention to the witness that there are rules regarding the deposition process and ask if he has any questions about them. If he declines, consider raising one, like the person requesting the deposition gets to ask questions first, and see if that generates some discussion. You can do the same for each of the items listed above. For example, you could explain why there is a requirement for the witness to be placed under oath and how testimony under oath has greater weight in the eyes of the law than comments made outside of an oath.

Listen to the comments he gives in response to your statements about the process and respond to his questions. If he is naturally shy,

try asking a few questions, such as, "You may be wondering what the court reporter does with his notes after the deposition," and then show him a transcript. The more you can do to demystify the process for him, the more relaxed he can be and the more he can focus on the content of his answers during the deposition.

If he is the bearer of unexpected or potentially damaging evidence, this is the time to discuss strategies for honestly and accurately answering the questions in ways that soften its impact. You may also decide to ask a series of questions to put the answer in its proper context, and this is the time to develop those questions. If the witness knows that you have a plan for dealing with potentially damaging testimony that he might have to give, he is more likely to answer in ways that are more effective, simply because he is more at ease.

Explaining the Process

As basic as it may seem to you, the witness may not know where to go, when to appear, what room to go to, where to sit in the room, why he is being asked to testify, who will be at the deposition, how to dress or if he should talk to people in the waiting room before the deposition. He may not know if he should be polite or antagonistic to the other attorneys. He may not know if he is allowed to request a break. These are all things any good preparation will address.

CASE-SPECIFIC GOALS

Minimizing Exposure

When you are presenting a witness for deposition, the procedure is usually a defensive one. Generally, you want to avoid giving the opposition any more information than the rules require. Let the witness know that you may not be asking any questions, because it allows the other side a chance to develop additional areas of inquiry and prolongs the deposition. If he doesn't understand this, he may feel that you are not doing your job and lose some confidence in you. Also, plan for a break at the end of the opposing attorney's questions, that way the witness can alert you to anything that he feels needs to be addressed.

Mention to the witness that if this were a war, this procedure would be considered a defensive one. He needs to know that his obligation is to honestly and accurately answer the questions that are posed, but no more than that. Your witness may feel the need to try to advance his side of the case during testimony. You need to explain to him that his time will come later when you create the direct testimony for trial and when his testimony can be controlled and focused on what he knows. For now, he needs to provide the factual bricks that help you build the structure of the case and not be the architect of the legal case. That is part of your job.

Because the procedure is a defensive one, the shorter he can keep his answers, generally, the better. Most people can understand this concept and to mention it several times during the preparation helps him to see its importance. It helps to either show him transcripts where the witness has volunteered information, or for you to pose a question and a mock answer that is too broad so he can see how those things lead to more questions. The main exception to this thought is when you want the other side to learn something from the witness, possibly for settlement leverage or to direct them to other information helpful to your case. If you want the witness to expound in certain areas, let him know that in advance.

Advancing the Case

The best way for the witness to help the case along is to be as accurate as possible in his testimony. As trial attorneys, we do not have the privilege of creating the facts surrounding our cases, only the privilege of presenting them. However, it is crucial to know what the facts are, and a deposition is a little like a card game where cards are turned face up for all the players to see as the game progresses.

If he has apparently damaging information, you need to develop a plan to present it in a way that reduces its shock value, either by couching it in a context that softens its blow or raising it yourself in a way that allows you to minimize its impact. How you place its context is going to be dependent on the facts of the case, but further preparation questioning of the witness may help you understand why an apparent "bad" fact may actually be perfectly reasonable, once you know all of the circumstances from the witness' perspective. But, you will never know unless you ask and listen.

Establishing Witness Credibility

One of the goals in deposition preparation is to prepare your witness well enough that the other side becomes worried about what a good witness he will be at trial. As an attorney you

should not try to influence the substance of what a witness says, but you can give him strategies for answering questions in a way that helps his credibility. There's no big secret about how to do that, it just takes some awareness on the part of the witness about what is happening. Following are some strategies to help that credibility:

First, encourage him to listen closely to the question that is asked. His obligation is to answer honestly and accurately. For example, the answer to the question, "Do you have an opinion about who is at fault in this accident?" is not who he thinks is at fault. It is "yes" or "no." While this may appear to be a nitpicking response, it helps him understand that the deposition is not normal human communication. It is a litigation procedure with specific duties and obligations, and those duties are not unlimited. It helps him focus on the actual words used in the question. It forces him to listen to the question asked. If he gives answers to the question that is asked and not what he thinks the questioner is driving at, the questioner will understand that the witness is listening and they will have to be careful in how they ask their questions. This puts pressure on the questioner and it also increases the value of the witness to your side of the case because it tells the questioner that sloppy or overly broad questions won't suffice. The harder you make the questioner fairly work, the more likely they will tire and end the deposition sooner.

Another positive side effect of having the witness listen carefully to the question posed is that he will have a better chance of fully understanding the question before he responds. Your witness may believe he knows what the attorney is asking, but when he starts answering he may realize that it was a confusing or vague question. Listening to the question helps him figure out if he understands the question in the first place. Having a witness honestly tell the questioner that he doesn't understand the question also puts pressure on the questioner for the same reasons mentioned above, but it is fully compatible with the witness's duties.

Suggest to the witness to pause briefly after the question is complete. The pause does not have to be great but if you show him a transcript from another deposition, you can point out that there is no time stamp between a question and an answer so he should feel free to take enough time to make sure he understands the question before answering. This also gives him some modicum of control over the deposition process and can help him understand that he is not helpless.

In a video deposition, the need to answer without an unusually long pause is present. However, a jury will not begrudge a witness a reasonable amount of time to formulate an answer. If the witness will be in a video deposition, some practice in front of a camera so both you and he can see what the pauses look like is essential.

Additionally, even though you have been objecting to deposition questions for many years, it still takes a little bit of time for even the quickest of us to evaluate the question for objection, and if it is objectionable, to make the decision to object or not. By asking him to pause before answering, you make him part of the "team" because what he does helps you perform one of your functions. If he answers too quickly, you can object, but technically an answer to a poorly formed question is an answer and an objection to form that comes afterward has been waived. Again, if your opponent sees good cooperation and teamwork between you and the witness, the witness becomes a greater danger to them.

It also helps to explain to the witness that even if the questioner asks questions that are objectionable, you may not necessarily object. One of the reasons to do this is to show the other side that you have confidence in the ability of the witness to handle a poorly worded or otherwise objectionable question. The more you can let the witness respond without having to interpose yourself during the deposition, the stronger the witness will appear to the other side. The stronger the witness appears, the more worried your opponents will be about that witness appearing at trial.

PROFESSIONAL GOALS

Your obligations at a deposition are to speak for your client in a zealous but courteous fashion and to maintain the integrity of the process. The latter trumps the former.

You Are Not the Witness

It is often hard for less experienced attorneys to understand that they are neither their client nor the witness at a deposition. No matter how intensely you want the witness to support your case, the witness can only address what he knows and he is obligated to do it in an honest and accurate fashion. You have to find equa-

nimity in this position and understand that every case has a few "bad" facts and if the questioner asks the right questions, he is entitled to an answer. Your job is not to hide the bad facts, but to put them into the proper context if and when they come out.

Objections

You have to be willing to seek the court's protection if the other side gets out of hand.[4] Both objections and the procedure for contacting the court is something that you should mention to the witness during preparation so that if it occurs he is not suddenly concerned that he has done something wrong. If the witness is prepared for this eventuality, there is less chance for him to cave into the pressure being exerted by the other side.

> **"...if your witness continually avoids answering questions, is too expansive in his answers or is overreacting to opposing counsel, you should ask for a recess..."**

Pursuant to the Oklahoma Discovery Code, objections as to the competency of the witness, or the competency, relevancy or materiality of the testimony are waived if the ground of the objection might have been obviated or removed if presented at that time.[5] Error or irregularities in the manner of oral examination, the form of the questions or answers, in the oath or the conduct of the parties or any other kind of error that could be removed or cured if promptly presented are waived unless made at the deposition.[6] If these occur, you cannot remain silent.

You will need to explain to the witness that the procedure for objections in a deposition is not like what he sees on television. 12 O.S. §3230(D) (West 2013) provides that after all objections, the examination continues subject to the objection. He may not initially understand why he needs to answer after an objection and explaining it to him helps him be familiar with the process. The only exceptions to this are listed in 12 O.S. §3230(E) (West 2013) as: 1) asserting a privilege or a work product protection; 2) enforcing a limitation given by a court; 3) presenting a motion to cease the deposition for bad behavior; or 4) moving for a protective order.

Many court rules now limit deposition objections to only the form of the question.[7] You should review the more common forms of objectionable poor form questions with your witness during preparation. For instance, many attorneys ask overly broad or multiple questions at once, assume facts or present incomplete hypothetical questions. It helps the witness to hear these kinds of questions during preparation so he can identify them on his own, and so you can help him develop strategies for responding to them. You should instruct your witness to listen to your objection because he may gain some insight into what you think is wrong with the question from your objection.

If you do not push the envelope too much or too often, you can still abide by the rule and give some form of explanation about the defect in the form of the question. For instance, it is the author's belief that most courts would find an objection such as, "object to the form, assumes facts," or "…multiple questions" as being reasonable. You are fulfilling your obligation to the other side by stating an objection and informing the questioner of what you think the defect in their question is. They have the opportunity to revise the question or let it stand. The fact that your witness hears the objection is simply part of the process. If you have reviewed these common objections with your witness beforehand, he will be more comfortable responding to the question if it is left standing.

Witnesses Gone Wild

Most witnesses are compliant, but we have all had those that are not. There seem to be two main forms of non-compliance. First, if your witness continually avoids answering questions, is too expansive in his answers or is overreacting to opposing counsel, you should ask for a recess and address his non-compliance by finding out why he is acting in this manner. All these forms of responding reduce his credibility and make him appear weaker as a witness. Explain to him during your preparation that you may ask for a recess to discuss his responses or reactions, and that this is a normal part of the process. You don't want your witness feeling like he has done something wrong or that

you are disciplining him. Paving the way for such a conference will help ease any anxiety he might have about it if you need to do it during the deposition. Your job is to help him feel comfortable so that he can honestly and accurately answer the questions posed.

The second way witnesses can go wild is by stating things that are simply not true. During preparation, you should emphasize that he has the duty to honestly and accurately answer the questions that are asked. Also, you should be alert for any indications that the witness is willing to say whatever is necessary to advance the case and explain to him that such an approach is damaging. If he becomes an advocate for your side, he reduces his credibility. He is much stronger if he simply presents the facts he knows, refuses to speculate about those he doesn't know and sticks to the truth. If you see any indications that your witness feels like honesty and accuracy regarding the case facts are plastic concepts, remind him of his duty and point out the loss of credibility that comes from the exposure of a dishonest, inaccurate or overly cute response. If you think he may still go down the wrong path after your warnings, remind him that you have an obligation to assure the honesty and accuracy of his responses, and if he is not honest, you will have to take actions that strongly suggest to everyone that he is lying. You cannot be a party to perjury and he needs to know that you have a duty to the system that overrides your duty to the case.

One way to emphasize the need to be honest and accurate is a mock question. Go into role-playing mode and ask the witness, as if you are the other attorney, "Did you do anything to prepare for this deposition?" His answer will often be a good barometer of how well he is listening to the question and if he has a predisposition to conceal information, such as with an answer of "nothing." He has obviously met with you and needs to know he can reveal the facts of the meeting, if not the content.

MEETING WITH THE WITNESS AND TOPICS TO DISCUSS

Primary Goals

Your witness and you have different goals with a deposition. The primary goal for the witness is to get the deposition over with. It is not a comfortable position to be the witness. Your goal in the deposition preparation is to make the witness feel at ease with the process while emphasizing the need to be honest and accurate in his responses. Your goal in the deposition is to keep any damage to a minimum, elicit any needed testimony and to show the other side the power and credibility of the witness.

Place, People and Phones

You need at least one meeting with your witness beforehand. It should be long enough before the deposition to allow him some time to process the information you are presenting to him and to allow him to ask any questions that he might have. It should not be so far in advance, however, that he forgets what you discussed. Usually, a week to two weeks before the deposition is the optimal time. One meeting is generally enough, but if the witness is unusually important or if it will be a video deposition, you may consider more than one session.

Try to meet where you can show him the physical surroundings of the deposition room so he can be at ease with them. If he knows where to park, how long it takes to get the deposition site and where the restrooms are beforehand, he will be more relaxed when the deposition starts.

Explain to him who will be at the deposition and what their roles will be. Show him where people are likely to sit. If you plan to have a legal assistant or someone else from your office in the deposition with you, introduce the witness to them at the preparation session. Provide him with writing materials during the preparation session so he can take notes. Mention to him that if he makes notes at the deposition, they may be subject to inspection by the other parties, so you will recommend not having a note pad for him then. If he has something important to mention to you, he can ask for a break after the posed question is answered.

Witnesses need to concentrate on the deposition, so cell phones should be left in the private room or at your or your assistant's desk until after the deposition. He needs to know that you expect no phones or any other personal electronics in the deposition room. There is an argument to be made that if a witness uses a phone during the deposition that any privacy he might normally expect is waived about the conversation or the phone itself.

Procedure

He needs to know the mechanics of how a deposition is taken. So, you should discuss that he needs to speak up, answer out loud, not to speak over another person and make sure the court reporter hears him. You should tell him the likely order of questioning. He should be informed that some background, education and work history questions are likely and appropriate. Attorneys are allowed to inquire as to a witness' background to help them evaluate the witness' credibility. He should know that he will likely be asked about any criminal record or daily medications and why these questions are allowed. He should know that the opposing attorney is not his friend, no matter how congenial he or she appears.

When the witness arrives at your office, he should be taken to a private room to wait for the other participants. Do not allow the witness to sit out in your reception area alone or with the opposing counsel. Chance comments can come back to haunt the witness. Have everyone else be present and ready before bringing the witness in so that conversation between the witness and the other participants is minimized. Also, limit small talk between yourself and the other attorneys as it may make the witness feel like an outsider. The witness and you are a team and you don't want any wedges to come between you during the deposition. The witness should know that once he is in the deposition room, he is "performing" because how he acts is part of what the opposing attorneys will be evaluating. He should know that after any question is answered, he may request a break. He should also know that you may decide not to ask any questions and that such a decision is common.

You should prepare him to know that once the deposition is over, you intend to escort him out of the deposition room and back to the private room. He needs to understand that he is "on stage" as long as he is in the presence of the opposing parties and attorneys. You should let him know that you will finish your host duties to the other participants and will be back to speak with him. Let him know that after you are sure the others have left your office, you will visit with him to see if he has any questions about the deposition. After that, you may discuss any problems that his testimony may have caused to arise and how to address them.

Objections

As mentioned above, explain that objections may occur and that the witness should listen to your objection so that he understands what you think is wrong with the question. Let him know what it means when the lawyers agree to the "usual stipulations" at the beginning of the deposition or any other stipulations you think might occur. For example, one objection by a side will be presumed to be an objection by all parties on that side. Explain that even though an objection is made, save for privileged material, he will need to answer the question and why this is so.

Explain to him what privileged material is and why it is privileged. Let him know that if a privilege objection is raised, the questioning attorney may ask if he chooses to answer in spite of the privilege objection. Witnesses and clients have the right to waive the privilege so it's not an unfair question. Most witnesses will follow your recommendation not to answer if they are not caught off guard by the request.

Transcript Review

Explain his right to review the deposition transcript for errors. Let him know that you or opposing counsel will have to ask if he wishes to review the transcript while the court reporter is still recording everything. You should discuss this prior to the deposition and determine what his answer will be so the deposition ends smoothly. Impress upon him the relatively short time to review the transcript once it is completed by the court reporter and discuss the arrangements for the physical transfer of the transcript to him and back.

DOCUMENTS AND DISCOVERY — TO REVIEW OR NOT TO REVIEW

The Decision

If you anticipate that documents will be shown to the witness you should discuss with the witness whether or not you are going to review the documents together. Some attorneys prefer their witnesses not to review such documents, others generally recommend review. Even though the fact of a document review may come out during the deposition, those that favor a review think being prepared has more advantages than what you might lose by having the witness identify what documents were reviewed, assuming no successful privilege objection.

Witness' Documents vs. Someone Else's Documents

If the witness is asked to comment on documents he created, unless he remembers all that went before and after, he should be cautious in answering. Your witness may feel that if he created a document, he will look foolish if he doesn't address all questions about it. However, every document is created within a context, and the witness needs to be able to explain that context to you beforehand, so that when it is discussed during the deposition, he can explain the document clearly. All attorneys are experts at taking statements or documents out of context for their apparent intrinsic value and the witness must be alert to this. Together, you must devise a strategy to place the document back into context. As a single musical note is meaningless without the rest of the melody, a document out of context cannot be fully understood by itself. Commenting on single documents, even ones the witness created, is dangerous business.

If you think the witness will be asked to comment on documents created by someone else, urge him to proceed with great caution. No matter how much a witness knows about another person, no one can state with certainty why another person chose the specific words they used in the text of a document. The document is literally out context twice, and the witness probably cannot place it in any context. If pressed, the witness should qualify his answer by noting he did not create the document and his comments are only his opinion about what it means. To determine the document's true intent, the author is the appropriate source.

CONCLUSION

Preparation is key, and cases can be won and lost at the deposition stage depending on what comes out of your witnesses' mouths. If the witness at the beginning of this article had given us the time to school him on only half of things mentioned above, perhaps he would not have turned that whiter shade of pale.

1. Rule 33 of Federal Rules of Civil Procedure and Okla. Stat. tit. 12 §3233.

2. Federal Rules of Evidence, Pub.L. 93-595; 88 Stat. 1926 (1975, revised 2013), and Oklahoma Evidence Code, Okla. Stat. tit. 12 §2101 through 3011 (West 2013).

3. Oklahoma's Discovery Code, Okla. Stat. tit. 12 § 3230 A.3 (West 2013) and F.R.C.P. Rule 30 (d)(1) now limit the length of depositions to no more than 6 and 7 hours, respectively, for one day without the court's permission or the parties' agreement to extend the time. So you can tell the witness it probably will not be longer than that.

4. Okla. Stat. tit. 12 §3230 E (West 2013).

5. Okla. Stat. tit. 12 §3232 D 3 a (West 2013).

6. Okla. Stat. tit. 12 §3232 D 3 b (West 2013).

7. Local Rule 18, I. A. for the Seventh & Twenty-Sixth Judicial Districts (Oklahoma & Canadian Counties)(West 2013);Local Rule CV 20.5 for the Fourteenth Judicial District (Tulsa & Pawnee Counties)(West 2013).

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