cedure, however, the designated person under the federal rules is expressly required to become educated about the "matters on which examination is requested."[9] Due to the corporation's obligations when designating and preparing a witness, the testimony provided by that witness is binding on the company.[10]

The corporate deponent is responsible for educating the designated witness. If, as is often the case, the company no longer employs persons knowledgeable on the specified topics, it must prepare a witness to testify by providing the witness with corporate records to review and former employees or third parties to interview.[11] A party can be sanctioned for producing a witness who lacks adequate knowledge or who failed to prepare adequately for the deposition.[12] The corporation also can be ordered to designate and produce a new qualified witness.[13]

The federal court corporate deposition notice is similar to the state court notice. The notice must identify the deponent as the corporation rather than a particular person and must set forth the topics of examination with as much specificity as possible to ensure that the deponent is prepared to testify on matters of most interest to the noticing party.

As the deposing attorney, whether in state or federal court, do not forget to inquire at a corporate deposition about the reasons the designated witness was selected by the company. You should also elicit specific information about the persons the witness consulted in preparation for the deposition as well as the documents that were either provided to or reviewed by the witness. The witness may have been selected to shield from examination the person truly knowledgeable about the topic, so an inquiry into the witness's background, preparation, and the selection process is critical. ■

1 CODE CIV. PROC. §2025.220.
2 CODE CIV. PROC. §2025.230.
3 *Id.*
4 Maldonado v. Superior Court, 94 Cal. App. 4th 1390, 1398 (2002).
5 *Id.*
6 *Id.* at 1396.
7 FED. R. CIV. P. 30(b)(6).
8 *Id.* (emphasis added).
9 *Id.*
10 United States v. Taylor, 166 F.R.D. 356, 361 (M.D. N.C. 1996).
11 *Id.* at 362.
12 *Id.* at 363; FED. R. CIV. P. 26(g).
13 Marker v. Union Fid. Life Ins. Co., 125 F.R.D. 121, 126 (M.D. N.C. 1989).

By Robert C. O'Brien

Preparing a Witness for a Deposition

Virtually all lawyers would agree that depositions are crucial to discovery and the outcome of litigation. New lawyers are often given an important responsibility—to prepare witnesses for deposition. While the job of taking key depositions is often reserved for more senior lawyers in a case, defending depositions—even those of relatively major witnesses—is often delegated to the junior lawyers on the litigation team. Despite the importance of depositions, it is not unusual for a witness to receive only a brief summary of the process over a hurried breakfast on the morning of the deposition or during a telephone call the day before. Busy executives, already unhappy about losing a day or more of work to be deposed, may be reluctant to take time out of their schedules for a preparation session. Others who have been deposed in other matters may feel sufficiently familiar with the process to forego meaningful preparation.

Regardless of these common attitudes, you will do well as a new associate to remember that deposition testimony can have a powerful effect on a case's outcome. There are several factors to consider when preparing witnesses to be deposed by opposing counsel.

Let the witness know who is likely to attend the deposition. The witness will usually understand that opposing counsel will be asking the questions. But he or she may be surprised to learn that a party opponent or a representative from the other side may also attend. Explain the role of the court reporter, particularly the fact that the reporter will transcribe every word that is audible to the reporter while on the record. Thus, it is important for the witness not to say anything that he or she would not want to become part of the record.

Finally, ask the witness to appear for deposition well groomed and attired. Depending on the witness's customary dress, anything from business casual to a suit or a professional uniform may suffice. The clothing should be clean, and the witness should do his or her best to present a good appearance. This is especially important if the deposition is to be videotaped. If videotaping will occur, inform the witness of this as well, to avoid surprise.

Give the witness a basic overview of the case and his or her role in telling the party's story. As part of this process, it is useful to explain what admissions the examining lawyer is likely to seek. Likewise, if the witness is able to make certain points that would be helpful to your party's case, you can outline the points for the witness.

- **Of all the advice you can offer your witness in deposition preparation, the most important is to always tell the truth**
- **The witness should never speculate**
- **Conduct a mock deposition**

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PRIOR EVIDENCE The witness may incorrectly believe that the deposition will be the first time he or she has testified in the case. If the witness has verified a complaint or discovery responses, or supplied declarations in connection with motions, then he or she has already effectively testified. Such documents often provide fertile ground for examination at deposition, especially if subsequent discovery has shed further light on, or contradicted, earlier stated positions. When conflict arises between the current evidentiary record and earlier written testimony, you should carefully review the prior testimony and related issues with the witness and fully discuss responses.

Although lawyers often believe otherwise, it is the witness who controls the deposition, not the examining lawyer. Indeed, the deposition cannot go forward without the witness's participation. You should encourage the witness to avoid being intimidated or swayed by the questioner's browbeating or solicitousness.

At the same time, remind the witness not to argue with opposing counsel. Not only is the examining lawyer unlikely to be swayed, but the witness will appear uncooperative when the deposition transcript is eventually brought before the court. While the witness should understand that he or she is in control of the process, he or she also must understand that his or her credibility and answers will ultimately be evaluated by others in deciding the case, whether for settlement purposes or on the merits. Accordingly, the witness should maintain a calm and professional demeanor.

The witness should listen to each question carefully. He or she should wait until the question has been fully stated and not try to anticipate where the examining lawyer is going. An unexpected twist at the end of a question could lead to an answer that is very different from the one the witness had initially anticipated making. Instruct the witness to pause before answering all questions. This enables you, as the defending lawyer, to object if necessary, and allows the witness to thoughtfully compose a response. Also explain to the witness that objections are often raised to help alert the witness to problems with a question (i.e., the question is vague or compound).

A deposed witness is under a solemn obligation to tell the truth, but he or she is not pouring out his or her heart to a member of the clergy or a psychotherapist. The witness is often sitting across the table from someone who would like to take his or her money or prevent the witness or his or her party from obtaining relief in a court of law. The difference here is important. Advise the witness to provide an accurate answer but not volunteer information to the questioner.

Remind the witness that the deposition proceeds in a question-and-answer format. It is not an informal conversation. After considering each question, the witness should respond with either a yes or no, if possible. If a yes or no answer would be misleading, however, the witness should expand the answer. For example, the witness should avoid a yes or no answer if providing it would lead to ambiguity (e.g., Are you still kicking your dog?). Where a yes or no answer is not appropriate, the witness should aim to keep the answer short.

Likewise, the witness should generally not answer either/or questions because they are ambiguous. Such questions also tend to eliminate other possible alternative answers. Where appropriate, the witness can break the answer into parts. Such a response might be as follows: "With respect to part one of your question, my answer is..." and "With respect to the second part of your question, my answer is...."

The witness should never assume that his or her testimony as rephrased by the questioner is accurate. Lawyers often rephrase or, worse, mischaracterize prior testimony when they are unhappy with the original answer. This tends to be a problem late in the day when the questioner is "helpfully" trying to "move things along" so he or she can "wrap things up."

Similarly, when the examining lawyer uses predicates such as "is it fair to say," the witness should answer the question as if the clause does not exist. An objection from you as the defending lawyer would also be proper in such an instance.

The witness must understand that it is acceptable not to remember an event. The witness should use common sense when it comes to this area. For instance, it may be credible for a witness not to remember what he or she ate for lunch on a certain day last month, but it would be less credible for him or her not to remember if he or she had been in an auto accident the week before.

In answering, the witness should never speculate. You should explain the difference between speculating (improper) and estimating (proper) as follows: If the witness is asked the size of the conference table in front of him or her, an estimate would be proper. If the witness is asked the size of the conference table in a room on another floor, which the witness has not seen, a response would be speculation and improper.

SMALL TALK The witness (and you) should avoid small talk with the examining lawyer or others in the deposition while on the record. Such comments usually appear unprofessional when the transcript is printed, regardless of how witty the statements seem at the time. Further, you should warn the witness to avoid all conversations, aside from exchanging common courtesies, with the examining lawyer and other parties during breaks and in the hallways. In particular, the witness should not try to explain answers. Many comments made in the hallway find their way onto the record when the deposition resumes.

Perhaps the most effective part of a deposition preparation session is to conduct a mock deposition. In the mock session, be alternatively aggressive with and solicitous of the witness. Focus on the areas that are likely to be most troublesome in the actual deposition. Use documents, the complaint, and written discovery responses (especially if the witness has verified the responses) as part of the process, so as to give the witness the feel of the actual deposition. Such practice will serve several purposes. These include exposing the witness's weaknesses so that further preparation can be undertaken, and familiarizing the witness with the deposition process.

Even the most experienced witness is most vulnerable after lunch or near the close of the deposition, when the witness is tired and less alert. At such times, a desire to "finish up after just a few more questions" may lead a witness to tell the questioner what he or she thinks the questioner wants to hear. To avoid witness fatigue, keep track of the length of questioning and require regular hourly breaks, even if only for a few minutes, to give the witness time to stretch and get some fresh air.

Of all the advice you can offer your witness in deposition preparation, the most important is to always tell the truth. Failure to adhere to this obligation undermines the legal system and almost invariably leads to serious problems.

Depending on the complexity of the case and the witness's role in the action, the proper preparation of a witness can take anywhere from an hour to days. Any such time will be well spent. As a young lawyer seeking to make an impact on the team and impress the client, your skillful preparation of deposition witnesses will be noticed. ■