

Speaking parts

How to prepare your employees for a deposition **Interviewed by Matt McClellan**

If your employees are called to testify at a deposition, their testimony has the power to severely help or hinder your case. To ensure a mistake-free deposition, executives must prepare employees for what they will face.

“Cases are not won strictly on the basis of your deposition testimony,” says John H. Cowley Jr., executive partner with Secret Wardle. “However, cases certainly are lost or seriously damaged if you are untruthful or provide answers that conflict with company records, statements, interrogatories, or written or electronic correspondence.”

Smart Business spoke with Cowley about how leaders can prepare employees for effective presentation at deposition.

How do depositions fit into the overall course of litigation?

All parties to a lawsuit have a period of time after the suit is filed to conduct discovery, which simply means the discovery of the facts about the case in order to prepare for trial. Discovery is accomplished through interrogatories, which are answers to written questions under oath, and through depositions of witnesses. A deposition is testimony under oath, and there is no judge present. The deposition will be taken in an attorney's office, with lawyers present for all parties. A court reporter will administer the oath and will prepare a transcript of the questions, answers and objections.

Remember that this is an adversarial proceeding. The opposing lawyer is not your friend, and this is not an opportunity to tell your side of the story. The opposition is represented by an attorney whose sole purpose is to persuade a jury that his client is right and that you are wrong. The deposition is not for your benefit; it is to afford the opposition a chance to question you regarding your actual knowledge and evaluate you as a witness, including whether you appear truthful and if a jury would like you.

It is important to be properly dressed in business attire. Wear something that you would wear to a meeting with upper-level management. Avoid trendy clothes, and dress neatly and professionally.

How should you prepare yourself or an employee prior to a deposition, and what materials should be reviewed?

At a minimum, you must review any and



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all documents or records that were authored by you that pertain to the subject matter of the litigation. Don't forget to review with legal counsel any e-mails, written statements or taped statements on the subject. There is a problem if your deposition testimony is inconsistent with prior statements, records or e-mails that you have authored.

Additionally, you should review any interrogatories that have been answered by you or company representatives, in addition to discussing plaintiff's legal theory and the alleged facts that support that theory.

If you have not been asked to bring any documents but believe that you have documents within your possession or control that might be helpful, discuss this issue with counsel prior to your preparation for deposition.

The Michigan Rules of Evidence provide that, if, before testifying, a witness uses a writing or object to refresh his or her memory for purposes of testifying, an adverse party is entitled to have that writing or object produced at the trial, hearing or deposition in which the witness is testifying. The rule in essence provides for production of any document that is used for the purpose of refreshing a witness's memory prior to testifying.

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How should someone testifying at a deposition respond to opposing counsel's questions?

Remember, this is an adversarial proceeding. Your purpose at deposition is to respond to specific questions, assuming that there is no objection by your counsel. This is not the time to volunteer or provide the opposition with any additional information beyond what the question calls for.

The goal can be accomplished by listening carefully to the question and answering only the question that is asked. If you have any doubt about what you are being asked, tell the opposing counsel that you do not understand the question. If you can answer the question with a simple 'yes' or 'no,' do so.

It is imperative that you do not guess or testify about matters that are not within your personal knowledge. If you do not remember, say so. It does not help anyone if you speculate. Testify to facts, and never give an opinion unless asked for it. This would be voluntary information, and in the vast majority of cases, it is not helpful to your side.

If you are asked about a specific document, ask to see the document prior to answering. Also, if your counsel begins to speak, stop testifying. Your counsel will advise you if you can continue your answer.

The opposition may attempt to summarize your testimony or interrupt you. If the summation of your testimony by the opposition is not exactly true in all respects, say you do not agree with the summation. If you have been interrupted while giving an answer, advise counsel that you have not finished your answer and insist upon finishing. At least make the record clear that you have not fully answered the question.

At any time during the deposition, you may request to consult with your attorney. However, this should be done only as a last option.

It is best to be polite and courteous to the opposition. If the opposition is rude or discourteous, let your lawyer handle those issues. Your job is to stay focused, listen to the questions and provide brief and truthful responses. The failure to tell the truth not only exposes you to potential criminal prosecution for perjury but also will undoubtedly seriously damage your case. <<