

Checklist: Preparing a Deponent for Deposition



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Summary

This Checklist assists practitioners preparing a deponent for a deposition.

Counsel should check the appropriate county or federal websites to verify the most recent local rules, standing orders, and other relevant information.

For further discussion on depositions generally, see California Trial Practice: Civil Procedure During Trial chapters 5 and 6.

I. Give General Instructions to Deponent

Begin preparing the deponent for deposition by giving general instructions on the procedures and purpose of the deposition.

🔍 Judge's Perspective

Counsel should prepare a client for a deposition as if it were the trial. Counsel should carefully refresh the client's memory. Witnesses whose memories have not been refreshed often make incorrect statements about their observations. The effect of inaccurate and damaging deposition testimony is indelible and will last throughout the trial. On the other hand, deponents who lack knowledge of a potential subject of the deposition should not necessarily be educated about it for the purpose of the deposition. At a deposition, the deponent testifies only as to his or her personal knowledge and is not required to investigate facts in anticipation of the deposition.

- 1. Explain the deposition process and purpose to the deponent, including the persons expected to attend and the usual admonishments on deposition procedures offered at deposition by the examining attorney.

🔧 Practice Note

Counsel might explain to the client-deponent that there is a difference between normal conversation and the deposition. For example, the examiner may ask: "Do you know the time?" In normal conversation, the answer is "Yes, it's 10:30." In a deposition, however, the answer is either yes or no; the examining attorney may then ask "What time is it?" if he or she chooses.

- 2. Instruct the deponent to address those attending deposition by formal names, and otherwise behave as if in the courtroom.
- 3. Stress the importance of remaining calm and businesslike, regardless of the examining counsel's behavior. Say that you will object to any improper behavior.

👁 Judge's Perspective

The view from the bench makes it all too clear how a hostile client or witness almost always detracts attention from the issues in the case, usually focuses on unimportant collateral matters, and ultimately damages his or her own credibility. On the other hand, if motions are made, e.g., to compel discovery, the court may look favorably on a witness who is complying reasonably with the deposition process.

- 4. Point out that the examining counsel may interrupt an answer and that the deponent should not lose their composure if interrupted. Explain that you will then ask the examining counsel to try not to interrupt deponent.
- 5. Remind the deponent not to use their hands or otherwise use gestures that cannot be accurately reflected in the transcript.
- 6. Instruct deponent not to use technical slang or imprecise terminology, which could be misunderstood when the transcript is used at trial months or years after the deposition took place. Encourage the deponent to use clear and concise language.
- 7. Emphasize the importance of telling the truth at the deposition.
- 8. Explain that the deponent must have personal knowledge of matters to which they are testifying and that it is not acceptable to "guess" at an answer. An "estimate" or a range based on what the deponent saw is appropriate; e.g., the

red car was 40 to 60 feet from the intersection. The deponent should not give exact numbers absent personal knowledge of exact measurements.

- 9. Advise the deponent of any papers or other items to bring to the deposition in compliance with the deposition notice.

⚠ Caution

Warn the client not to bring anything to the deposition except that which he or she has been requested to bring. The client should not bring the case files or other case information; documents that are brought into the deposition sometimes become the object of deposition questions.

- 10. Tell the deponent that you or another attorney at the deposition may object to a question. Ask the deponent to briefly pause before answering the question to allow time for objections and any instruction not to answer.
- 11. Explain that the deponent can ask to take a break at any time.

🔧 Practice Note

Counsel may want to give the deponent other instructions, e.g., if counsel suggests that it is time to take a break, the deponent should agree because counsel wants to speak with the client. Counsel should also instruct the deponent to ask for a break if he or she is tired or wants to speak to counsel.

- 12. Advise the deponent to tell you privately during breaks if they want to enlarge or correct an answer. Advise deponent to avoid taking notes as the notes may be discoverable.

🔧 Practice Note

The attorney-client privilege is likely to protect notes the deponent made for the purpose of communicating with counsel.

- 13. If the deposition will be video recorded, work with the deponent to correct any mannerisms or habits that could mar their testimony. Engage in mock video depositions with the deponent as an aid to identify and correct any problems.

🚩 Practice Note

If economic factors permit, and the client's deposition is expected to be unusually problematic or complicated, counsel defending the deposition may consider a video recorded practice session in which counsel plays the role of the examining attorney. Counsel can then review and discuss the video with the client, making comments or recommendations where appropriate.

In some cases, e.g., when the client is a particularly bad witness or the exposure to liability is great, counsel might consider retaining a jury consultant to help with witness preparation. Such consultants are expensive, but may be justified in certain circumstances.

II. How to Respond Generally

After the deponent understands the general purpose of the deposition, practice with the deponent on how they will answer questions and behave during the deposition.

- 1. Explain that the deponent needs to listen carefully to the question, wait until the question is completed, and answer the question carefully, **if** it is understood. If the question is confusing, the deponent can ask the examiner to rephrase the question.

🚩 Practice Note

Advise the deponent not to rephrase or attempt to clarify ambiguous questions for the examining attorney.

- 2. Encourage the deponent to give the shortest possible answer, e.g., "yes," "no," or "I don't know," if they are fair and accurate answers; not to volunteer any information, but to give explanation if question requires one; and speak as though dictating to the court reporter.

🚩 Practice Note

Advise the deponent to only answer the question asked and to avoid providing more information than requested.

- 3. Point out that if the deponent does not know the answer, the deponent should say so. Tell the deponent that no one is required to answer a question unless they have personal knowledge of the facts and can provide an accurate answer.
- 4. Advise the deponent to answer based on their knowledge of the facts and not to offer any estimates or opinions unless there is good reason.
- 5. Call the deponent's attention to the fact that sometimes the examining counsel's questions may really be statements or arguments. Instruct the deponent not to respond in that situation, but to wait for deponent's counsel's objection.
- 6. Explain that if the question contains mistakes or incorrect premises, the deponent should say so politely.
- 7. Tell the deponent that if a question cannot be answered without qualifications, the deponent should begin answer by saying so and wait for examining counsel to qualify question.

III. How to Respond When Deponent Should Rely on Documents

Next, practice with the deponent on the procedures regarding the use of documents to refresh their recollection.

- 1. Stress that the deponent's best recollection is all that is required and that guessing or speculating is unwise.
- 2. Explain that to refresh their recollection, the deponent can ask to look at document or other item available at the deposition if question refers to it. Advise the deponent that they should read the entire document carefully to have a good understanding of the context in which a statement was made and to frame the answer or allow the deponent's counsel to frame the objection.

📌 Practice Note

*An effective alternative to showing the client documents during preparation is to describe the items in the document and discuss which of its provisions are pertinent. This method does not risk discovery because attorney-client communications during deposition preparation are absolutely protected. See *Sullivan v Superior Court* (1972) 29 Cal.App.3d 64, 69.)*

- 3. Explain the difference between past recollection recorded and present recollection refreshed. Past recollection recorded is where the deponent has an insufficient present recollection of the past, but a past recollection has been recorded and it is shown to deponent to verify. (See Evid. Code, § 1237.) Present recollection refreshed is a present recollection, but the deponent's memory needs stimulation by showing the deponent a document or other evidentiary item. (Evid. Code, § 771.)
- 4. Point out that if the deponent's answer is based on a document or other item used before the deposition to prepare the deponent or refresh their recollection, the opposing counsel is entitled to inspect and copy it. Suggest that the deponent try to prepare without reviewing evidence.
- 5. Advise the deponent to refer to documents or other items by exhibit number or other identification, to review this evidence before answering questions, and to relate it to answers.
- 6. Stress to the deponent not to volunteer information about documents or other items if the deponent is not certain they are being mentioned or called for by the examining counsel.

Related Documents



Standard Documents

- Deposition Admonitions



How-To Guides

- How to Handle Problems and Disputes During a Deposition in Federal and State Civil Actions
- How to Notice a Deposition of a Party to a Lawsuit



Strategy Notes

- Strategic Considerations in Dealing With Difficult Deposition Witness or Counsel



Charts & Checklists

- Checklist: Preparing for Depositions
- Checklist: Preparing for Video Recorded Depositions
- Checklist: Preparing for Written Depositions

Referenced Authorities

Cases

- Sullivan v. Superior Court, 29 Cal.App.3d 64, 105 Cal.Rptr. 241 (1972)

Statutes

- Cal. Evid. Code, § 1237
- Cal. Evid. Code, § 771