5
Defending Depositions

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Forms

I. Preparation

A. Preparing Yourself

§5.1 The key to successfully defending depositions can be summarized in the following four words: preparation, anticipation, reaction, and record. Most lawyers can survive some depositions by simply reacting. However, if one is serious about litigation as a career, showing up at depositions and simply reacting to what takes place will not get the job done.

Preparation involves both long-term and short-term considerations. Long-term, career-oriented preparation starts with the library (or relevant online resources) and a process that I refer to as "rip 'n read." The current *Michigan Court Rules and Rules of Evidence* volume is lengthy. Yet the portions that have any impact on taking and defending depositions are limited to the Michigan Rules of Evidence and the court rules subchapter on discovery. If, like me, you get a new copy of the *Michigan Court Rules and Rules of Evidence* every year, take last year's copy, rip out the two portions that are of use to you regarding depositions, throw the rest away, and throw the good stuff in your briefcase. Then, when you are sitting in the back of a courtroom on motion day waiting for your case to be called, look over the rules that apply to taking depositions. It is amazing how many times problems arise during a deposition that are covered by either the Michigan Rules of Evidence or MCR 2.301 et seq. Of course, you can also follow the spirit of rip 'n read by accessing the pertinent rules online.

The rip 'n read concept should not be limited to those two items. One of the easiest ways to prepare to defend depositions is to find out how other people do it. Throughout your career, you will come across articles on how to defend depositions. If you throw the magazine or journal into your big stack in the corner of your office, you will never remember the article later when you need it, and if, by chance, you do remember the article, you will never find it in the stack. Buy a three-ring notebook and, as you come across these articles, rip them out and throw them into your deposition skills notebook. Bookmark online articles and save them in a special deposition prep folder. Then, when the critical deposition is on the horizon, you can pull out the notebook or scroll through the articles and review the collected wisdom of others on how to take or defend the deposition. You will be amazed at how often you will have an article on the specific issue that confronts you.

Don't limit your resources to articles. If you attend a deposition and observe someone effectively making a particular objection or doing something else that worked well, remember to make a copy of those transcript pages or save the electronic files so that you can later use the same techniques to your own advantage. If a good case is reported regarding objections made at depositions, save it so you

don't have to search for it when you need it. By studying other lawyers' experiences, you can learn from their mistakes without making them yourself.

B. Understanding Your Case

§5.2 In addition to long-term, career-oriented preparation, you need to do short-term, case-oriented preparation to successfully defend a deposition. Critical to this preparation is a general knowledge of the case and where the particular deposition fits into the scheme of things. Ask yourself questions such as the following:

- Is this your case, where you are making the decisions, or are you a role player for the firm, with specific instructions?
- Is this a case that is likely to be tried, or is it likely to be settled?
- Is this a discovery deposition or one that either is designated *de bene esse* (for use at trial) or is otherwise likely to be read to a jury? If the case is designated *de bene esse,* you need to spend time deciding which objections you will want to make and phrase them in jury-friendly terms so that you sound reasonable should the jury hear the objections. You will also need to decide whether you need to bring out testimony from the witness to advance your case.
- Is this a case where you want your witness to tell the whole story, or one where you are satisfied to have the witness answer only the questions asked by the other side?
- If the other side has a problem asking proper questions, do you want a transcript that you can use at trial or one that your opponent can't find a way to use because of the improper questions? If you need the witness's anticipated testimony at trial and are fearful that the witness may be unavailable for some reason, you need a transcript with intelligently phrased questions and understandable answers. If opposing counsel has not succeeded in generating that kind of transcript on direct exam, you will have to do so when it's your turn. Otherwise, you will have to read your opponent's poor questions, and the jury will think the poor questions were yours. If you don't need the witness's anticipated testimony or you know that the witness will be available, you can do less (or nothing at all) without hurting your case.
- Do you want to protect the witness, or do you want to find out how the witness will perform unprotected (as the witness would be in the courtroom)?

Overall, there are at least three things that you have to think about defending. In no particular order of priority, you need to defend the case, your client, and your witness. Each of these elements requires consideration. Sometimes, by defending one of these things, you leave another vulnerable. For example, you can defend your witness, take an obstructionist approach to discovery, and constantly object when your opponent is deposing your witness. Every time that your opponent gets close to an important issue, you can launch a barrage of objections and possibly prevent him or her from obtaining the information sought. You do a good job of defending the witness—but are you doing a good job of defending the case and your client? If your witnesses are constantly protected at depositions with

obstructionist tactics, you never get a feel for how they will act in front of a jury (where you can't protect them). If your witnesses will fall apart on the stand at trial, you are much better off learning that in depositions by exposing your witnesses to some hard questions. You can then properly evaluate your case and advise your client. On the other hand, you may have a good repeat client with an indefensible case. You may determine that the best course of action is to aggressively defend (and thereby keep) your client, even if the aggressive defense of the client won't materially affect the outcome of the case.

There is actually a fourth thing to defend—yourself. You need to defend your reputation for competent, ethical lawyering. Your reputation is not enhanced when you make spurious, unnecessary objections, when your witness is ill-prepared for the deposition, or if your client's regard for the truth is suspect.

C. Preparing the Witness

1. Privilege Issues

§5.3 The first thing you need to determine when preparing a witness to testify is whether the witness is a client or an independent witness. When you are preparing your client, you have the protection of the attorney-client privilege. What you tell your client is not generally discoverable. *People v Nash*, 418 Mich 196, 341 NW2d 439 (1983); *Linday v Lipson*, 367 Mich 1, 116 NW2d 60 (1962). The situation is different if you are preparing a witness to whom privilege does not attach. If the first time you appreciate this distinction is during a deposition when opposing counsel says, "Tell me what you talked about when you met with Mr. Smith's attorney," two things will happen. First, opposing counsel will learn everything you told the witness. Second, you probably won't make that mistake again in your career. The response to that question may reveal important trial strategy, previously unappreciated weaknesses in your case, or other damaging information. Assume that anything that you discuss with a nonclient witness will be discovered by your opponent and acted on accordingly. Also assume that anything you show that witness in deposition preparation will be discoverable. MRE 612(b), (c).

2. Witness Preparation in General

§5.4 In some circumstances, witness preparation may last a relatively short period of time. In other situations, it may involve numerous sessions over days with sample questioning by you or another member of your firm. How much time you spend preparing a particular witness depends on many factors, including

- the size and importance of the case, and the amount in controversy;
- the size of the litigation budget;
- the witness's availability, innate capabilities, and testifying experience;
- the importance of the witness's testimony to the essential elements of the case;

- the willingness of the witness to put in time for preparation, and the likelihood that more time will improve the quality of the witness's performance; and
- the availability of the attorney for preparation.

Be creative in the options that you have available to prepare a witness. Some witnesses do not have the time or inclination to spend the requisite effort to come to your office to prepare, particularly those involved in corporate litigation. Make yourself (or at least your talents) available in a variety of formats. Maybe a witness should be sent a generic guide ahead of time to read when he or she has time. Or you can send the witness one of a number of professionally prepared videotapes available to review at his or her convenience. Depending on the situation, you may want to videotape a practice session and then review the videotape with or without the witness to highlight areas that require further work.

Just remember that what you show a nonclient witness during preparation may be discoverable, so be sure to exercise caution in what you discuss during the deposition preparation. In addition, take into consideration whether your witness has missed an appointment or has appeared late—you may not want to leave witness preparation to the day of the deposition, as you may not have the necessary time to do a good job.

Two examples of generic guides to witness preparation accompany this chapter. Form 5.1 is more extensive, and form 5.2 is more succinct. Both are designed to cover basic witness preparation. Don't ever assume that your client is too smart or too experienced to need your efforts at witness preparation. Go over whatever guide you use with your client. Areas to highlight include the following:

- It's okay to keep your mouth closed under certain circumstances, such as during breaks, after objections if instructed not to answer, or after having given a complete answer.
- It's your right to understand the question before answering, and if you don't understand the question, tell the questioner so and do not answer.
- If you make a mistake in testifying, say so and correct the mistake.
- A deposition is not an endurance contest, and if you need to go to the bathroom or need a break, such conduct is acceptable (within reason).
- If the question is especially long, you can ask the court reporter to reread the question.
- If the question can't be answered with a yes or no, you may explain your answer and, in fact, have an obligation to the oath you took to do so.
- Even though the other attorney says "just a few more questions," the deposition may continue for hours longer. Some attorneys actually use this tactic to soften up witnesses (either through fatigue or annoyance).
- If your attorney objects to a question, listen to the objection and then wait for an instruction from the attorney as to whether you should then answer the question.

- If your attorney asks that the question be reread, the question is likely a critical one.

Be sure to explain key issues to the witness and what questions he or she may anticipate hearing, and try to eliminate surprises to yourself and to the witness whenever possible.

However, covering the matters raised in the guide and in this chapter with your witness will satisfy only part of your task of properly preparing your witness to testify at a deposition. It is the easy part that will apply to the vast majority of witnesses. It deals with the *manner* of testifying—it does not deal with the substantive *matter* of the testimony. In other words, it will assist in helping the witness understand "how" to testify, what goes on at depositions, and what is expected of the witness from a how-to-look, how-to-act point of view. The generic guide will not help the witness understand what questions will be asked, what issues are critical, or what testimony would be devastating to the case. No generic guide can do that job. You need to know your case so that you can discuss critical issues and testimony with your witness, an essential part of witness preparation.

During your career, you will encounter the seemingly incurably bad witness. Hopefully, it will be your opponent's client, but sometimes it will be your own. When it is your own client, you need to understand the impact this witness will have on the case. If, after spending the necessary time to prepare your client for the deposition, you realize that your client's testimony will destroy your case, don't stick your head in the sand—face the facts and deal with it. How? If it is an incurable situation, settle the case. Give your client your honest evaluation of the situation. Don't think that the problem will go away by ignoring it. This situation is another reason why you may not want to leave witness preparation to the day of the deposition itself. You may, given enough time, conclude that the case is salvageable by making your client's testimony a relatively minor part of the case and developing the majority of facts through other witnesses.

3. Client Expectations

§5.5 You'll also need to prepare your client about what *you* will do. Many clients' expectations concerning their attorney's conduct at depositions come from television shows and movies. They expect you to be their personal Secret Service agent and "take the bullet" for them. You already know that you will not be acting that way, but your clients don't. Tell them what you will and will not be doing in the deposition on their behalf. Let them know that you won't rant and rave whenever a difficult question is asked because such conduct is not allowed. If there will be inquiry into sensitive personal matters, let your client hear it first from you during preparation and not from your opponent's question at the deposition. Pre-education is important for client retention. If your client leaves his or her deposition thinking that you were ineffective and weak (you didn't scream at the other attorney even once), your future mail might include a substitution of attorney.