

The Most Important Deposition You Will Never Take

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Introduction

The most important deposition in any case is your client’s deposition—the deposition you will never take. Odds are your client will not win her case with her deposition testimony, but she can certainly lose it. She can create a fact issue and cost you the summary judgment motion you planned on filing, or she can make admissions that serve up a summary judgment to opposing counsel. Her testimony can help you settle at mediation on your terms or make you settle on less than favorable terms. The opposing party, key witnesses, experts—these are all important depositions, but your client’s? Hers is the most important of all.

If we start with the premise that our client’s deposition is crucial, how do we ensure it goes smoothly? What steps do we take to prepare our client to give the best deposition testimony she can possibly give? Each experienced attorney has a mental checklist of how to prepare their clients for deposition.¹ Some even have a detailed written checklist, and they check off each box as they complete each task. This Article is not about that checklist, mental, written, or otherwise. It is about “The Speech.”

The Speech is crucial. You will have one or more conversations with your client preparing her for her deposition.² The Speech can make the

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¹ See FRANK RAMOS, *THE ASSOCIATE’S HANDBOOK: A RESOURCE FOR ASPIRING TRIAL LAWYERS* 145-50 (DRI 2016) (giving an example of a proposed list of topics to cover in preparing your client for her deposition).

² See ROBERT C. GROELLE, *Preparing for and Defending Your Client’s Deposition*, in *TRIAL TACTICS DEFENSE LITIGATION MANUAL* 93 (2006) (“The effort that goes into preparing a client for deposition is important to the outcome of a case, and adequate preparation goes a long way toward a favorable result at mediation or trial.”); JAMES C. SAWRAN & JASON A. MCGRATH, *Preparing Your Client for Deposition: Trials and Tribulations*, in *THE DEFENSE SPEAKS, MORE THAN A DEFENSE MANUAL: A WINDOW INTO FLORIDA’S CIVIL DEFENSE PRACTICE* 217 (2006) (“[P]reparing your client well in advance of deposition is a fundamental necessity.”).

difference between a bad deposition performance and a good one, and it can likewise make the difference between a good deposition performance and a great one. What is “The Speech”? The Speech is part instructional and part motivational. It is part paint-by-numbers and part theoretical. It is part lecture and part conversation. It is how you train your client to give the best deposition she has ever given and will ever give. You are a teacher, coach, preacher, and psychologist all wrapped in one when you give The Speech. Do not underestimate its power. Do not devalue the process. Fail to appreciate the power of The Speech and run the risk of having a client deposition that goes off the rails.

I have given The Speech over 200 times to clients in commercial, employment, personal injury, and product liability cases. Each speech is slightly different based on the facts, the law, the case, and the client. But looking back, The Speech has been remarkably consistent. To be effective advocates, each attorney must hone and perfect The Speech and share it with fervor, earnestness, seriousness, and hope. We have to balance equipping and encouraging our client with arousing sufficient concern and when necessary, fear, to ensure that she performs optimally when she testifies.

There is no right way or wrong way to deliver The Speech.³ No two attorneys will cover all the same subjects or offer all the same advice. No two attorneys will share the exact same tone, approach, anecdotes, examples, or rules of the road. It is like listening to the same jazz tunes played by different jazz ensembles. Each provides its own interpretation and improvisation of the tune. What follows—my Speech—is just that: my Speech. It is not meant to be your Speech. It is not meant to suggest your Speech is incomplete, incorrect, or insufficient, and in full disclosure, it is not verbatim. It is an approximation of what I say considering I am not giving the Speech with any specific case or set of facts in mind. It is generic. The reason I share it is to give you, the reader, some ideas about what to tell your client and how to say it. There is the substance and there is the style, and I encapsulate both in my Speech.

³ See DAVID M. MALONE & PETER T. HOFFMAN, *THE EFFECTIVE DEPOSITION: TECHNIQUES AND STRATEGIES THAT WORK* 297 (4th ed. 2012) (“Some lawyers also provide witnesses with summaries of what other witnesses have said in their depositions.”); cf. GROELLE, *supra* note 2 (“Before you can prepare your client, you must first prepare yourself.”); SAWRAN & MCGRATH, *supra* note 2 (“One strategic decision you must make is exactly how much information you want to provide to your client in preparation for deposition.”).

I wish you the best when you give your Speech to your client, and I wish her the best at her deposition.

The Speech

Opposing counsel has asked to take your deposition. A deposition is an opportunity for an attorney to ask a witness, under oath, what she knows about the case.⁴ At the deposition, I, you, opposing counsel, and a court reporter will be present.⁵ We will sit around a conference room much like this one. You will sit at one end of the table. I will sit beside you on one side and the court reporter will sit beside you on the other. Opposing counsel will sit across from you or near you and will ask you questions about this case. He will ask you many questions. Clients, like you, are often surprised how many questions a lawyer can ask of them in a deposition. Every question you are asked and every response you provide will be taken down by the court reporter on her court reporting machine. Eventually she will type it all out and provide us a transcript of the deposition. It will look a lot like a book. This book may be very long. I have received deposition transcripts that have been hundreds of pages long. That deposition will become part of the record for this case. We lawyers will use it when we argue before the court, or if the case goes to trial, will use it when we present our cases to the jury. These depositions are very important, and your deposition, being the client, is the most important deposition in the case. It is the most important because what you say can help you win the case or lose it. Win it or lose it. Let us talk why.

To better understand the significance of your deposition, let us take a step back and discuss your lawsuit as a whole. Each side in the case must prove or disprove certain elements to win.⁶ Early in the case, counsel for each party will analyze how to win the case on behalf of her client. Of course, a win can mean different things to different clients in

⁴ See generally FED. R. CIV. P. 30 (explaining the federal rules for “Depositions by Oral Examination”).

⁵ See FED. R. CIV. P. 30(b)(5)(A) (“[A] deposition must be conducted before an officer appointed or designated under Rule 28.”).

⁶ See GROELLE, *supra* note 2, at 93 (discussing the importance of “facts and evidence . . . [and] claims and defenses”).

different lawsuits. When we first discussed this case, we discussed what a win would look like for you. We also discussed what opposing party likely perceived as a win for her client. We discussed the facts, the law, the judge, opposing counsel, opposing party, the likely jury venire, and taking all those factors into consideration, we concluded and agreed that a win would look like X. We also discussed what a loss would look like and I informed you what we could do to secure the win we wanted and avoid the loss we sought to avoid. Based on our case evaluation, we devised a plan to pursue our goal of winning and set out to enact that plan. Part of that plan entailed defining our trial themes and predicting opposing counsel's trial themes.⁷ I provided you those trial themes and we have tweaked them as we have learned of new facts, evidence, and witnesses. We discussed how we would weave our themes throughout every aspect of this case and counter their themes at every corner.⁸ We have done this and will continue do so. We did it with our pleadings, motions, and written discovery and will do so in our depositions.

Of course, all this brings us back to your deposition and why it is the most important deposition in this case. What you say, the record you create with your words, will help us win or lose at summary judgment, mediation, and trial.⁹ We want to prove or disprove certain facts. Opposing counsel wants to do the same. What you say in depositions are considered admissions, statements you make where you admit this fact or deny that fact, and these statements can be used by either side to prove their case or disprove the other side's case.¹⁰ What you say in a deposition has consequences.¹¹ What you say can help you win or cause

⁷ MARILYN J. BERGER ET AL., TRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY 103 (4th ed. 2015).

⁸ *Id.*

⁹ See RAMOS, *supra* note 1, at 140 (“An aberrant admission can serve up a summary judgment to the other side or cost you dearly at trial.”).

¹⁰ See GROELLE, *supra* note 2, at 97-98 (stating that procedural rules of the court permit broad admissibility of depositions into evidence, regardless of whether “the information sought [in the deposition] will be inadmissible at trial, [as long as] the information sought appears reasonably calculated to lead to the discovery of admissible evidence”).

¹¹ See *id.* at 95 (stating that a client being deposed should “be[] aware that any statements made are admissions against interest, and any testimony can, and potentially will, be used against [the] client . . . in the case at trial”).

you to lose.¹² What you say may result in a motion for summary judgment either in support of our case or in support of the opponent's case. I have been successful in getting the opposing party to admit to facts in deposition that obliterate their case. I have then taken those admissions, referenced them in a motion for summary judgment, and won the case without it ever going to mediation or trial. And to add insult to injury, I have then sought my attorney's fees. A few careless statements in a deposition by the opposing party allowed my client to win. We want to make sure that does not happen to you. We want to make sure your words do not cause you to lose your case.

We lawyers are clever. We have ways of putting words into a deponent's mouth. We have ways to make parties admit things without them appreciating that they are admitting things until it is too late.¹³ We have ways to question, befriend, cajole, distract, intimidate, pressure, and flatter a deponent, and we have countless other tools at our disposal to get deponents to say what we want them to say. We are not to be trusted in a deposition. We are sharks in the water catching a whiff of blood and circling for any and all openings to feast. This is me when I depose someone, and this is opposing counsel when she deposes you.

And because she wants to use you to win her case, she is not your friend. She is a wolf in sheep's clothing, a lion waiting to devour, a snake wanting to strike at your heel, and a host of other Biblical references for Satan incarnate.¹⁴ She will sit you down, have the Court reporter swear you in, and try everything she can to get you to admit to things she can cite in a motion for summary judgment, reference at mediation,¹⁵ blow

¹² *E.g.*, Evan Schaeffer, *When Your Client Testifies*, 47 JUL TRIAL 22, 23-25 (2011) (giving an example situation in which a client self-destructed his case through his own deposition testimony); see RAMOS, *supra* note 1, at 140 (warning that statements made in depositions can significantly affect a party at trial).

¹³ See generally Don M. Jackson, *Cross-examination of Plaintiff and Plaintiff's Witnesses*, 6 AM. JUR. TRIALS 201 § 1 (1967) ("Cross-examination is one of several tools available for the trial attorney's use in establishing the truth.").

¹⁴ See *Matthew* 7:15 (NIV) ("They come to you in sheep's clothing, but inwardly they are ferocious wolves."); see also *Genesis* 3:14-15 (NIV) ("So the Lord God said to the serpent, 'Because you have done this . . . he will crush your head, you will strike his heel.'").

¹⁵ See Steven Lubet, *Showing Your Hand: A Counter-Intuitive Strategy for Deposition Defense*, 21 No. 2 GPSOLO 32, 32 (2004) ("[D]epositions are most likely to be used as negotiating tools rather than trial bombshells.").

up and show the jury at trial, or use to impeach you at trial. And not to get ahead of ourselves, but let me explain what impeachment is. You make an admission in deposition. It is terrible for your case. At trial, to cover it up, you say the opposite. Well, you cannot do that.¹⁶ It is lying. There is a term we lawyers use—perjury.¹⁷ What does opposing counsel do? He reads your deposition testimony, makes a point of telling the jury you made the statement under oath, under threat of perjury. And yet, here you are contradicting yourself in a court of law.¹⁸ What does the jury think? They think you are lying to them. And what is the significance of that? Based on my experience, once you lose credibility with a jury, you have lost your case. This is another reason to choose your words in your deposition carefully. You do not want to be impeached with a poorly thought admission.¹⁹ Like they say about letting worms out of a can—no matter how hard you try, you will never get them all back in.

By now I have made clear how important your deposition testimony is. I have explained why what you say matters (more than what anyone else says in the case) because of the effect your words have on your case. I have made clear that opposing counsel is not your friend. She is your enemy. She will do everything she can to convince you she is your friend. She will be polite, offer you water, offer you breaks, pour you coffee, and ask whether you want milk or cream, sugar, or Splenda. She will be as nice as nice can be. *Do not fall for it.* There is a line from a movie that is relevant to our discussion: “The greatest trick the Devil ever pulled was convincing the world he didn’t exist.”²⁰ The greatest trick opposing counsel will try to pull is to convince you she is on your side, convince you to just spill your guts, to say everything that is on your

¹⁶ See MODEL RULES OF PROF’L CONDUCT r. 3.3(a)(3) (AM. BAR ASS’N 2018) (A lawyer cannot knowingly allow a witness called by the lawyer to testify dishonestly).

¹⁷ See 18 U.S.C. § 1621 (2018) (describing what constitutes perjury).

¹⁸ See FED. R. EVID. 613(b) (“Extrinsic evidence of a witness’s prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires.”).

¹⁹ See, e.g., *Thomas v. United States*, 104 F.2d 986, 986 (4th Cir. 1939) (finding there was no reversible error when the attorney impeached “a recalcitrant witness with respect to a prior inconsistent statement”).

²⁰ THE USUAL SUSPECTS (Bad Hat Harry Productions 1995).

mind; that saying anything and everything is best for everyone involved, including you. Remember, the only friend you have in the deposition room is me.

If I scared you, I meant to. If you are concerned about saying the wrong thing, you should be. If you are now going to think long and hard before uttering a syllable at deposition, I did my job. Now let us channel that fear to our advantage. I am going to teach you how to excel at deposition. I am going to teach you how to be a Grade A deponent. If giving a deposition were an Olympic sport, I am going to show you how to secure the gold medal. This is not hyperbole. *I mean it.* I have sat in this conference room across from clients many times. I have told them what I am telling you today. I gave them the tools I am sharing with you today. Those clients who listened to me and followed my advice did exemplary. I was very proud of them and they were very proud of their performances. If you listen carefully to what I have to say and follow my advice, you and I both will be very pleased with your deposition performance.

Before we roll up our sleeves and dive into preparing you for your deposition, let me tell you what the process will entail. First, we will go through the facts of the case as you know them. Second, we will review and discuss all the documents you might see during deposition. You should never see a document for the first time in deposition,²¹ and I will do my best to prevent that from happening. Third, we will discuss the rules of the road. The dos and don'ts. What to say and what not to say. I have created a written list of rules for deponents.²² We will discuss that list and I will provide you a copy to read on your own and keep as a reference tool. I won't lie. There are a lot of rules. But we will go through them together. I will explain them to you, show you how they apply, and ensure you understand each rule before moving to the next one. Fourth, I will tell you the categories and types of questions to expect and discuss with you how to answer the tough questions that, based on the facts of this case and the applicable law, I expect you will be asked.

²¹ See MALONE, *supra* note 3, at 296-99 (discussing “How to Handle Documents in Preparation”).

²² RAMOS, *supra* note 1, at 146-48. To read the rules of the road I share with clients, go to page 146 of my book, *The Associate's Handbook*, which you can download for free at <http://bit.ly/2iAnOJM>.

Fifth, I will perform a mock cross examination of you. I will stop during the mock examination to discuss your answers to my questions and how you can improve them. I will record you answering my questions with my smart phone and then we will watch the video together. I will point out what you did well and what you can improve upon. These are the parameters of the deposition preparation session.

I expect this preparation session will take all day. I tell you this for two reasons. First, a full day is a long time, and we both need to clear our schedules. Preparing a client for deposition is a time-consuming process.²³ I anticipate every difficult question you may be asked, and I prepare you on how best to answer them truthfully. And I must emphasize the word *truthfully*. I am not going to teach you how to lie or mislead. You will answer all the questions truthfully.²⁴ You will take an oath to do so, and you will abide by that oath.²⁵ But there are right ways to answer questions and wrong ways. There are answers that will help you and those that will hurt you. It will take a day to ensure you understand and follow the rules of the road I will teach you and for you to learn to answer questions just right. In fact, there have been times I have had to spend two full days with a client to prepare them for deposition. Once it took me over three full days. You have my word that I will continue preparing you until you are ready to be deposed. In return, I ask that you make yourself available for all the time necessary to go from a novice deponent to an expert.

Now, I said I was telling you that deposition prep will take all day for two reasons. The first was not to surprise you or have you looking at your watch when the morning turns to midday and the midday turns to the afternoon and we are still knee deep in prep. The second reason I am telling you it will take all day is so you know that I am committed to empowering you to be the best deponent you can be. Just as your deposition is the most important deposition in the case, preparing you for your deposition is the most important job I have as your attorney. It is more important than any pleading I prepare, any motion I draft, any deposition I take, and any argument I make. I take pride in my work and I take pride in transforming my clients into great deponents. Based on

²³ See *id.* at 140 (discussing how to “properly prepare your client for deposition”).

²⁴ See FED. R. CIV. P. 30(b)(5)(A)(iv) (stating that a deponent must be under oath).

²⁵ *Id.*

our conversations about your case so far and your understanding of our goals, I expect you, too, will be a great deponent.

Before we decide on a date and location for your all-day prep session, let us unpack the five parts of the session I mentioned. First, we are going to discuss the facts of your case. I have prepared memos of our prior conversations and my conversations with other witnesses. We will go through everything you know and remember about the facts of the case.²⁶ For areas you do not know or remember, I will share with you what I have learned from other sources in hopes of refreshing your recollection or filling in the blanks. I do not want your memory triggered for the first time at deposition and you providing an answer neither of us expected.²⁷ And I cannot emphasize enough what I am about to say—you need to be honest with me, even about any bad facts. Each side must deal with bad facts. Bad facts have a nasty habit of always making themselves known during a case. No matter how much a party may try, bad facts seep out like contaminated fluids in a landfill. Trying to hide them from me will not help your case;²⁸ it will only hurt it. I can help you deal with the bad facts, but I cannot help if I do not know them. You will not know how to deal with them if you are asked about them in deposition and we have never discussed how to answer them. Remember, your job is to help me help you. Help me by telling me the good, the bad, and the ugly.

As we go through the facts, we will prepare a chronology together and discuss what facts, if any, are missing from the chronology. I have found chronologies to be one of the best tools to understand the facts of a case.²⁹ It is rare that a case will not benefit from a well-written, well-thought-out chronology. We will write it down on a yellow pad, and, on a later date, I will type it out and provide you a copy for reference.

Part two is reviewing all the relevant documents, and some not so relevant documents. You know what surprises me the most in deposi-

²⁶ GROELLE, *supra* note 2, at 94.

²⁷ *See id.* at 96 (discussing responses to questions when the deponent “draw[s] a blank”).

²⁸ *See id.* (“Whether the information gained is helpful or harmful, it’s always better to know before the deposition.”).

²⁹ *See id.* at 93 (stating that an attorney needs to be “familiar . . . with the facts and evidence . . . for a successful deposition”).

tion? When I show an opposing party a document that is central to the case and he is looking at it for the first time. I will ask him, “Have you seen this document before?” expecting the deponent to say “Yes,” and the answer is “No.” Can you believe that? The answer is “No!” Crazy. If a deponent is not prepared to answer questions about the relevant documents, how she will perform becomes a crap shoot. Maybe you roll an 11, maybe your roll comes up snake eyes. You never leave any aspect of deposition prep to chance.³⁰ If I believe opposing counsel will show you documents at trial, we will review it together during deposition prep, and you will be prepared to answer any questions about that document.

My modus operandi is to gather all the relevant documents, including the Complaint, the Answer, Answers to Interrogatories, relevant correspondence and e-mails, and any other documents you may be shown at deposition, organize the documents chronologically, put them in a binder with a table of contents, and create two copies—one for you and one for me.³¹ I will mail you yours two weeks before we meet for your all day prep session. I know you have a lot of demands on your time, but my experience has been that clients who read these materials before their prep session have a much more productive session and perform better at their depositions. Along with the materials, I will e-mail you a series of thoughts and questions to keep in mind when reviewing them. It is important we think critically about these documents, their role in the case, and how we will address them in your deposition.³²

For part three, we will discuss the rules of the road. I have 45 rules.³³ I know—45 is a lot of rules. Do not worry. Most are common sense. The rules are meant to help you give the best deposition you can possibly give. The rules are your friends, your guide, and your helper through opposing party’s cross examination.³⁴ If you learn them, embrace them,

³⁰ See MALONE, *supra* note 3, at 296 (stating that “predeposition review assures the witness that her testimony will be consistent”).

³¹ See *id.* at 296-97 (explaining how to deal with documents pertinent to your client’s deposition).

³² See *id.* (addressing the need to limit documents that are reviewed for a deposition).

³³ RAMOS, *supra* note 1, at 146-48.

³⁴ See RAMOS, *supra* note 1, at 144-45 (discussing the importance of conducting a mock cross-examination of your client).

and apply them, I guarantee you will do well at deposition. I have no doubt. We are not going to go through all the rules now. But let me tell you a few of them.

First, tell the truth.³⁵ I tell that to my kids, I tell that to the attorneys and staff in my office, and I tell that to all deponents. The truth is not always pretty. It is not always easy. But it is the truth. If you lie in deposition you have committed perjury.³⁶ If you are caught lying, you could go to jail.³⁷ As far as your case is concerned, the court could also impose sanctions on you.³⁸ I can deal with bad facts; I cannot deal with lies. I can deal with truthful statements that hurt our case; I cannot deal with untruthful ones which have the potential to bury our case. You have heard the following quote—it is Biblical—“[t]hen you will know the truth, and the truth will set you free.”³⁹ (This verse comes from John 8:32 if you want to look it up.) Tell the truth in deposition “and the truth will set you free.”⁴⁰

Second, listen to the question carefully, wait a full two seconds, then respond.⁴¹ I do not care if you know the answer to the question. I do not care if this causes the deposition to take longer. I do not care if it feels uncomfortable pausing after every question. Listen to the question—one Mississippi, two Mississippi—then answer. What is your address? One Mississippi, two Mississippi—My address is X. How long have you worked at Y? One Mississippi, two Mississippi—I have worked at Y for Z years. You want to think about every question, no matter how simple or basic, formulate the answer in your head and then, and only then, respond. You may need to count to three or more for certain questions.

³⁵ *Id.* at 146; Bradley C. Nahrstadt, *Preparing Clients (and Yourself) for Depositions*, THE PRACTICAL LITIGATOR, May 2010, at 33 (“Tell the truth. This is a rule of self-preservation for witnesses. The witness will be under oath and perjury will subject the witness to criminal sanctions.”).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *John* 8:32 (NIV).

⁴⁰ *Id.*

⁴¹ RAMOS, *supra* note 1, at 146; *see* Nahrstadt, *supra* note 35, at 33 (“Answer the question after allowing two full seconds to pass.”).

That is fine. Take your time to think about the question before responding.

In addition to ensuring you think before answering a question, waiting has another benefit. It breaks the attorney's cadence and pacing.⁴² When I depose a witness, I go into a zone. I know the questions I want to ask, the order I want to ask them in, and the responses I want and how to get them. I speak fast, and I want the deponent to answer fast and I want a quick rhythm to keep the deponent from thinking about my questions and thinking about the hole they are digging for themselves. I do not want anything to break that rhythm—the rat tat tat—the rapid gunfire going off with the shells showering down around us. Now if a witness slows down, waits before answering, and thinks before speaking, my cadence is thrown off. Suddenly I have to work a lot harder to get the answers I want. Suddenly the witness is setting the pace, not me. Suddenly my automatic weapon is jammed, and I am limited to firing off one question at a time. Most lawyers, when thrown for this loop, will give up along the way. They will not push through. They will lose their patience. And they will leave the deposition securing fewer admissions. If you create the pace, if you create the tone and the rhythm, you have gone a long way in winning the deposition. And yes, I am sorry for the shocking reference of automatic weapons in this day of school and workplace shootings, but it is meant to remind you of a point I made earlier—opposing counsel is looking to bury you.

Third, answer only the question asked.⁴³ Do not volunteer more. Do not offer a sentence, phrase or even a word more than you have to. If you are asked “Do you have the time?” The answer is “Yes.” It is not “Yes, it's 2:41 p.m.” The four answers you should rely upon the most are “Yes,” “No,” “I don't know,” and “I don't recall at this time.” You think by saying more, by getting everything off your chest, you will make the deposition go faster. Just have diarrhea of the mouth, share everything

⁴² See GROELLE, *supra* note 2, at 96 (explaining that it is important for deponents to listen carefully to questions and pause before providing an answer because it “has the positive effect of keeping the question-answer exchange on a regular rhythm that will avoid rising anxiety levels or tempers that can so detrimentally affect a client's deposition testimony”).

⁴³ RAMOS, *supra* note 1, at 146; see MALONE, *supra* note 3, at 314 (suggesting attorneys should prepare their clients for cross-examination in depositions by advising them to give “the shortest correct answer to each question”).

and wrap things up more quickly. Ironically, volunteering facts and information makes the deposition longer, not shorter.⁴⁴

Every fact you volunteer will result in five questions about that fact. Every bit of information you offer up will lead to ten questions about it. The fact or information you are offering up may be innocuous, but it may trigger one or more questions that extricate facts that are quite damaging to your case, questions that may never have been asked if you had not volunteered. And yes, there are exceptions to the rule. Sometimes you have to provide a more fulsome answer to prevent opposing counsel from putting words in your mouth, but the default rule is to only answer the question asked.

Fourth, only answer questions you understand.⁴⁵ You have the right to ask opposing counsel to repeat a question or clarify it if you do not understand it. This is your deposition. Be assertive and seek clarification for questions that are difficult to understand.

Fifth, do not guess.⁴⁶ If you do not know an answer, say so. You are going to be asked a lot of questions. You will not have answers for all of them. “I don’t know” is a perfectly acceptable answer.

And sixth, if you are asked a question about a document, read it before answering it.⁴⁷ We likely reviewed it to prepare you for your deposition, but read it anyway. It may be a slightly different document or you may misremember what it says if you do not look at it. Yes, it will make the deposition take longer but this is a marathon, it is not a sprint.

Although I said I have 45 rules,⁴⁸ these are the main six. Keep these in mind as you review the binder of documents I will be sending you.

⁴⁴ See MALONE, *supra* note 3, at 315 (explaining that providing longer answers results in attorneys asking more questions).

⁴⁵ RAMOS, *supra* note 1, at 146; see MALONE, *supra* note 3, at 316 (pointing out that witnesses frequently answer questions they do not understand and lawyers should prepare witnesses and inform them that it is acceptable to say that they do not understand).

⁴⁶ RAMOS, *supra* note 1, at 146; see MALONE, *supra* note 3, at 316 (stating witnesses should not try to guess the answer to a question and advising that deponents be instructed to say “I don’t know” if they do not know the answer to a question).

⁴⁷ RAMOS, *supra* note 1, at 146; see MALONE, *supra* note 3, at 299 (“[When] the questioner directs the witness’s attention to one portion of the document, the witness should look at related portions to guard against things being taken out of context.”).

⁴⁸ RAMOS, *supra* note 1, at 146.

The fourth part of our deposition prep will consist of discussing the questions I expect you will be asked and how to answer them.⁴⁹ Typically, opposing counsel will begin with general questions.⁵⁰ She will ask about your background, your education, your job, and your experience.⁵¹ From there, she will ask about the facts of this case, and get into excruciating detail about what you know. She will ask about every conceivable document, witness, and fact relevant to the case (and many asked about may not be relevant to the case).⁵² When we meet, I will approximate, as best as I can, every question I expect the other side to ask you and we will discuss in detail how to answer the tough questions, the trick questions, and the crucial questions. Getting your answers just right to these questions is the most important part of the deposition preparation. Again, I expect you to tell the truth, but you can tell the truth in such a way that helps your case and you can tell the truth in such a way that hurts it. We will focus on how to do the former while avoiding the latter.

The fifth and final part of the prep session is the mock deposition.⁵³ It is one thing to talk about the questions you will be asked and go back and forth about how to answer them; it is another thing to sit in the hot seat and undergo rigorous cross examination.⁵⁴ Basketball players can practice all they want. It is not until the game starts that we see what they are made of. My job is to recreate game-time conditions as closely as possible. That means that I will assume the role of opposing counsel and do to you what I expect she will do to you. Ask the tough questions. Keep asking them. Be persistent, be clever, be conniving if need be and

⁴⁹ See MALONE, *supra* note 3, at 300 (stating the importance of “hav[ing] the witness practice answering questions on those topics” that are “reasonably certain to be examined”).

⁵⁰ GROELLE, *supra* note 2, at 97 (discussing types of questions to expect at the beginning of a deposition).

⁵¹ *Id.*

⁵² FED. R. CIV. P. 30(c)(1); see SAWRAN & MCGRATH, *supra* note 2, at 219 (noting witnesses may be asked questions that are not based solely on “[the deponent’s] personal knowledge”); see also MALONE, *supra* note 3, at 330 (“The interrogating attorney often challenges and argues with the witness, asks personally embarrassing questions, and even suggests, directly or indirectly, that the witness is a scoundrel and a liar.”).

⁵³ RAMOS, *supra* note 1, at 144-45.

⁵⁴ See SAWRAN & MCGRATH, *supra* note 2, at 218-20 (discussing the emotions of a deponent).

do my best to get you to make admissions that help me and hurt you. Do not be offended. Do not be surprised. Do not wonder why I channel opposing counsel as well as I do. My goal is put you through the toughest cross examination you will ever go through, tougher than what opposing counsel will put you through, so when you are done with your deposition you will say two things: “I was expecting it to be much tougher” and “that opposing counsel has nothing on you and your mock cross exam.”

I will videotape a portion of the cross examination with my smartphone. We will watch it together and we can discuss what we like about your answers, diction, body language, facial expressions, and the like and what can be improved upon.⁵⁵ We will go through this process a few times until we both feel comfortable with how you appear on the video. This whole process is very unnatural.⁵⁶ You will be sitting in a conference room, being asked hours of questions under oath, with a person writing down everything you say. By conducting a mock cross exam and videotaping portions of it, I will help you get acclimated to the process and be prepared for it.⁵⁷

Conclusion

That is the deposition process. When you sit down for your deposition, you will be ready to give the best answers to the hardest questions. We can never anticipate every question that will be asked or everything that may occur, but you will be as ready as a person can be for your deposition. I look forward to our upcoming all-day deposition prep and your deposition.

⁵⁵ RAMOS, *supra* note 1, at 148.

⁵⁶ See SAWRAN & MCGRATH, *supra* note 2, at 220 (“[T]he way we perceive ourselves . . . is often inconsistent with the way that others perceive us.”).

⁵⁷ See *id.* (discussing the importance of videotaping in regard to depositions); MALONE, *supra* note 3, at 302 (stating a witness needs to be “comfortable with [aggressive] questioning” before the actual deposition).

