Whether representing a plaintiff or a defendant, we all know that our client's deposition is a defensive exercise. Thus, in preparing clients for depositions, we explain the usual cautionary *procedural* guidelines: Say as little as possible, answer only what is asked, and don't volunteer information. Our goal is to have a deposition record that to the extent possible will not contradict the theory of the case we seek to prove at trial.

But when preparing for trial, we spend hours, days, or even weeks going over the substance of our clients' testimony with them. We review the facts and the documents in detail. We carefully craft the most effective presentation of our clients' direct testimony. We prepare them for cross-examination.

Do we prepare with such care for the *substance* of our clients' testimony at their depositions? I think not. Ought we to do so? I think we should.

Under the Federal Rules of Civil Procedure[1]—and under many state practice statutes[2]—a party's deposition may be used at trial "for any purpose." This means your client's deposition may be read to the jury even if the client testifies at trial. Of course, your client's deposition may also be used for impeachment purposes. Accordingly, in preparing your client, you must assume that everything said by the client will be read to the jury. In other words, your client's deposition is not merely preparation for the trial, it *is* the trial.[3]

Clearly, then, if your client is to be an effective deposition witness—that is, a witness who does not harm the case—your preparation process must achieve a union of substance and procedure. Half a loaf will be as bad as none.[4]

Getting It Right

Say you represent the plaintiff in an accident case. On a rainy night, your client was driving under the speed limit when the defendant's car allegedly crossed the double yellow line, hitting your client's car on the driver's side. The key issue is the location of the vehicles at the time of impact, including who—if anyone—crossed the double yellow line.

Your client has told you that a half-mile before the spot where the accident occurred—remember, it was raining—he skidded out of control and managed to stop his car in the left lane, narrowly avoiding hitting the Elm Street sign. You have confirmed that Elm Street is about one-half mile before the site of the collision. After recovering from the skid, your client was driving with extra caution when the defendant careened into him without warning.

Your adversary knows or suspects that on the night of the accident your client skidded into the left lane. You know your adversary will try to show that the skid occurred at the time of the accident and actually caused it. Thus, your client will have to be prepared for the inevitable deposition question, "Isn't it true, Mr. Plaintiff, that on the night of the accident your car skidded across the double yellow line into the left lane?"

If you prepare your client for deposition with only the standard procedural warnings—like "Only answer the specific question asked and nothing more"—he may respond with a simple "yes." But every litigator knows that, despite all the explanations in the world, an answer like that, which will surely be read to the jury at trial, can be devastating. Even when your client explains at trial that the skid occurred a half-mile before the accident site, the jury will wonder why your client did not say so at the deposition. The jury is likely to conclude that the explanation was made up after the fact to save the case.

But if you have prepared your client on the substance of the case as well as on the procedural guidelines of deposition practice, the deposition will go more like this:

Q. Isn't it true, Mr. Plaintiff, that on the night of the accident your car skidded across the double yellow line into the left lane?

A. Not at the time of the collision.

Q. So you don't deny that your car crossed the double yellow line that night?

A. I don't deny it, but it didn't happen at the time of the collision.

Q. When do you claim it occurred?

A. About half a mile before the site of the accident, I skidded into the left lane and narrowly avoided hitting a street sign. I drove with extra caution after that until your client hit me.

Q. Now, Mr. Plaintiff, you can't be sure that this skid occurred half a mile before where the accident happened, can you?

A. I am quite sure of it. I have a vivid recollection of looking up when my car came to rest and seeing "Elm Street" on the street sign. I remember feeling relieved not only that no car was coming the other way at the time, but also that I avoided hitting that street sign.

These answers are as truthful as the simple but dangerous "yes" response, but they also reinforce your theory of the case and lay the foundation for your proof at trial.

Concentrating on Core Issues

How do you prepare clients to give deposition testimony like that above? You prepare them on the case's core issues just as you would for trial.

The core issues are those at the heart of the dispute—they are what the case is all about. Your client cannot be an effective witness without a basic understanding of what both you and your adversary are trying to prove. You cannot effectively prepare your client on the core issues unless you have first thoroughly prepared yourself. You must be steeped in the case's legal and factual issues, you must be fully familiar with the relevant documents, and you must formulate your theory of the case—all before meeting with your client.

Begin the deposition preparation session by having the client recount the key facts of the case to you, in his or her own words and in chronological order. Direct the client to the fact issues you know are important, but be careful not to tell the client what to say. Explain that it is important for you to have a complete and truthful explanation of the facts—good and bad—to represent a client effectively. You should do this even if you reviewed the facts with your client earlier in the case. Remember, you want to refresh your client's recollection *before* the deposition.

As the facts are being recited, refresh the client's recollection with and about all relevant documents, making sure key documents are explained to you. Emphasize documents that the witness wrote, sent, received, reviewed, or relied on. Don't be afraid to omit reviewing documents, no matter how voluminous,

that do not involve the client. For those documents, a truthful "I don't know" answer at the deposition will not do any harm.

After your client recites the facts, explain what the key disputed fact issues in the case are and why they are legally significant. Frame these core issues by referring to your client's recitation of the facts, using his or her actual words where possible. Don't be too detailed or technical; your purpose here is simply to give the client a rudimentary understanding of the legal and factual crux of the dispute and of your theory of the case.

Once you have given your client a working understanding of the core issues —and a refreshed recollection as to the key facts and documents—you may begin the second half of the preparation. Remember that an understanding of the case's substance does not, in itself, show your client how to handle the deposition process. That's what the procedural guidelines are for.

A word of caution before turning to procedure. If you think you will be able to wait until *after* the deposition process to identify core issues and form a theory of the case, you will have a rude awakening: At that stage, the only issues and theories left will be your adversary's.

Procedural Guidelines: Less Is More

The procedural guidelines for defensive deposition practice may be expressed in two fundamental rules. The first rule —Tell the truth—is simple and has no exceptions. The second rule—Don't volunteer—is complicated, requires explanation, and has exceptions.

Tell the truth. Tell your client that you are serious about this rule; that the truth is what he or she must live with; and that there is a case—or defense—if the client tells the truth. Explain what perjury is and why it's to be avoided at all cost. If you discover at the preparation session that you actually do not have a case or defense—which is something you should have known earlier—explain that to your client, adjourn the deposition, and settle or withdraw. If you have a problem with this, I suggest a prompt application to barber college.

Don't volunteer. Most procedural checklists that lawyers use for deposition preparation—including the following—are amplifications of this principle.[5] Here is my checklist of what to tell clients:

► Remember that we're playing defense. Your deposition is only a defensive exercise. Your goal is not to prove your case but to avoid contradicting what you intend to prove at trial. The less you say, the better off you are. Remember the sagacious words of the mounted fish hanging on the wall in the lawyer's office: "If I had kept my mouth shut, I wouldn't be here now."

► Use the five preferred answers when possible. If truthful, answer with (1) yes, (2) no, (3) I don't know, (4) I don't remember, or (5) I don't understand the question. The key here is not to volunteer explanations. Explanations not only may include hidden dangers but also will make the examining attorney's job easier by suggesting follow-up questions. You want examiners to work hard. They are trying to prove their case, not yours.

► Answer the question and stop. If none of the five preferred answers fits, you will have to give a factual response. Edit your answer mentally before speaking. Say no more than is necessary. Don't add gratuitous explanations. Don't try to guess where the examining attorney is going. That is a no-win situation. You will lose.

► Pause before answering. This will allow you to think first, and review these guidelines. It also affords your lawyer a chance to object (see below). Most harmful deposition mistakes result from hasty responses.

► Watch out for "when" questions. Don't be afraid to say "I don't remember." Never articulate the contextual associations that we all use to answer "when" questions—"It was the same week as my daughter's birthday," for example. A "when" question refers only to time, not to sequence. Don't use "before," "during," "after," "at the same time as," or other temporal relationships in your answer. Volunteered information could be a time bomb.

► Don't volunteer where the examiner can find the answer. Don't answer a substantive question with unnecessary gifts such as (1) you'll have to ask Joe, (2) I'd have to check my diary, (3) I'd have to ask my secretary, or (4) the answer is in the files. Wait for the examining attorney to ask where the information is. If you voluntarily say where to look, the attorney will attach greater significance to your answer and will undoubtedly pursue your lead.

► Listen to and learn from objections. Always defer to your lawyer when an objection is made, and pay close attention to what your lawyer says. After most objections, you will be permitted to answer the question. But if the examiner rephrases or asks a new question, deal with the new question and ignore the old one.

Objections are made exclusively by the lawyer, not the witness. The lawyer is not governed by the rules that apply to you. If your lawyer spars with the adversary, you should take note of what your lawyer says, but not do likewise.

► Review documents carefully. If you are asked about a document, review as much of it as is necessary to answer the question. Take as much time as you need. Do not be afraid to refer to parts of the document other than those the examiner has pointed out to you.

► Learn the exceptions to "Don't volunteer," and how to apply them. They are just as important as the rule itself. The basic exceptions are these:

1. Explain core issues clearly. If a question implicates a core issue, explain your answer clearly and fully, in your own words. The danger here is that unless you are careful, a cleverly worded question—like the one in the example about crossing the double yellow line—can yield a confusing, confused, or misleading response. This kind of response is likely to support an adverse inference, which is exactly what the examining attorney wants.

You know what the core issues are. Be sure your testimony makes your position on those issues clear. In the example, the witness understood that the location of the vehicles at the time of the collision was the core issue. Therefore, the witness understood the importance of explaining that his car was not in the left lane when the accident occurred. The rest of the testimony follows naturally from this premise. Recognizing the core issue was the key.

2. Don't let yourself be pushed around. Don't be tricked into answering unfairly worded questions or questions containing erroneous assumptions. Even if your lawyer fails to object you may say, "Your assumption is wrong," or "I can't answer that question in that form." Don't let the examining attorney put words in your mouth.

3. Sometimes voluntarily refer to documents. With the key documents that implicate core issues, like the contract in a contracts case, you may answer by referring to the document rather than trying to remember or describe its contents. Don't confuse this exception with the rule against voluntarily telling the examiner where to find the answer.

► Follow these additional rules:

Do not be drawn into seemingly innocent conversation off the record or during breaks with the examining attorney or the opposing party. Anything and everything you say can and will be used against you.

During breaks, stay with your lawyer. Do not consult with anyone else.

During the deposition, you may ask your lawyer for a break whenever you want one to consult or otherwise, but wait until the recess is implemented by the lawyers.

Practice Makes Perfect

Learning how to apply all these rules takes practice by your client. Remember that the deposition process is unfamiliar, contrived, and probably intimidating for your client. That's why, after reviewing these rules with your client, you must conduct a practice examination.

Ask both easy and difficult questions. Emphasize the core issues. Use the strategies and approaches that you anticipate your adversary will use. Consider having another lawyer in your firm conduct the examination or interpose objections.

Take as much time and go into as much detail as is necessary for the particular client. Remember that the time to deal with your client's anxiety, surprise, and frustration is at the practice session, not in the deposition room. But don't over-prepare. Your client's testimony should never be scripted, memorized, or automatic.

If you follow these principles, preparing your client on *both* substance and procedure, you will likely have a record that leaves you relatively unimpeded to prove your case. In defensive deposition practice, that's as good as it gets. □

Notes

1 FED. R. CIV. P. 32(a)(2).

2 *See, e.g.*, CONN. R. CT. §248(1)(c).

3 In addition, as James W. McElhaney points out in *Preparing Witnesses for Depositions*, A.B.A. J., June 1992, at 84, more than 90 percent of all cases settle before trial. Therefore, the deposition is likely to be the client's only chance to be heard. The impression that your client makes during deposition will inevitably be reflected in the settlement.

4 See the instructional videotape *Preparing the Lay Witness for the Deposition*, produced by the American Bar Association Consortium for Professional Education and the Section of Litigation. The tape not only discusses combining substance and procedure in the deposition preparation process, it also presents a simulated preparation session, demonstrating effectively how these principles work in practice.

5 *See, e.g.*, the effective procedural checklist set forth in McElhaney, *supra* note 3.