JANUARY 7, 2022

PREPARING AND DEFENDING YOUR CLIENT FOR DEPOSITION

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I. DISCUSSION WITH CLIENT OF GROUND RULES

(Attachments 2.1, 2.2 and 2.3)

A. Dress and demeanor.

1. Suit/Pants Suit, light colors — No jewelry other than a wedding ring

2. No looking at ceiling, rocking in chair

3. Hands on table

B. No jokes, sarcasm or arguing with opposing counsel.

C. IN PREPARING YOUR CLIENT FOR HIS/HER DEPOSITION, EMPHASIZE THAT **YOU CAN'T** USE HIS/HER DEPOSITION AT TRIAL

1. This means anything your client says, no matter how favorable, can't be used at trial.

2. This means your client talks as little as possible and doesn't volunteer.

3. "W" questions: Who, where, when.

4. Don't answer questions you don't understand. Instead, say you don't understand.

D. FULL ANSWERS BY CLIENT

1. What was said questions, especially conversations involving other side's admissions.

2. Damages.—especially for a plaintiff.

E. "I DON'T RECALL AT THIS TIME" **versus** "I DON'T KNOW," OR "I'M NOT SURE" – especially when deponent believes answer may be harmful

1. Keep door open.

F. SIGNALS: TRICKY OR DIFFICULT QUESTIONS

1. Court reporter - Read back questions.

2. Speaking objections (use sparingly).

3. Wait a second before answering the question to listen for signals.

G. TAKE CLIENT OUTSIDE ROOM **(Attachments 2.1, 2.2 and 2.3)**

H. CLIENT STOPS SPEAKING WHEN YOU SPEAK **(Attachment 2.1)**

I. BUILD CONFIDENCE – MAINTAIN EYE CONTACT WITH YOUR CLIENT

II. DISCUSSION WITH CLIENT OF CASE

A. PREPARATION OF YOUR CLIENT (**ATTACHMENTS 2.1, 2.2; AND 2.3**)

1. Review facts with client – tell client your version of the facts, then ask if client wants to add or correct your version.

(a) Show documents -- documents which refresh recollection are discoverable even if privileged under work product privilege. *Mize v. Atchison, T. & S. F. Ry. Co.*, 46 Cal.App.3d 436 (1975); *Kern v. Superior Court of California*, 266 Cal.App.2d 405 (1968).

2. Cross-examine your client.

Attachment 2.1

[Deponent], you understand that your deposition is going to be taken this afternoon? . . .

Have you ever had a deposition taken before? . . .

Let me spend a moment, then, just mechanically telling you what the deposition is all about. When the deposition starts, [opposing counsel], who represents your adversary, will probably say to you in substance a lot of the same things, but I want to make sure you understand and are comfortable with the procedure.

The deposition will be taken in a law office and a court reporter will be present. He/she will be taking down a transcript of everything that is said in the room. Before the proceeding starts, you are going to be sworn to tell the truth, so that you will be testifying under oath under penalty of perjury. So, although it is an informal atmosphere, it is very important that you tell the truth. Do you understand? . . .

[Opposing counsel], who is going to be asking you these questions, is **NOT YOUR FRIEND**. He/she is getting paid to do a job for your adversary. It is very important that you understand that and that you listen very carefully to his/her questions. He/she will tell you at the outset that his/her purpose is not to trick or confuse you. I promise you that his/her real purpose is to trick or confuse you. He/she wants to demonstrate that your case is no good and that his/her client's case is very good. Because of that, he/she will try to confuse and contradict you and will try to make you contradict yourself. Please listen very carefully to the questions he/she is going to ask you. In that connection, certain things are very important which you should keep in mind.

First of all, everything that is going to be said in the room gets taken down by the court reporter and prepared into a booklet form. That booklet will be presented to you for your signature later on. At that time, you will have an opportunity to review it and to make any changes. If you make changes that are substantive changes, such as you say "yes" in the room and then change your answer to "no" later on, you are going to look terrible. So, it is important for you to try to give the best answers that are (a) accurate and truthful, but (b) also help your case. Do you understand that? . . .

Now, when [opposing counsel] starts to talk, you listen. Similarly, when I start to talk, I don't care if you are in the middle of a sentence or in the middle of a word, you stop. If I put up my hand, even if [opposing counsel] is asking a question, I want you to stop. The reason for that is I will often be making objections to questions and I am doing that for legal purposes ostensibly -- for purposes of the record -- because if this case ever goes to trial, your deposition transcript can be used at trial. I want you to understand that what I am really doing if I make an objection, 99% of the time, is to try to get a message to you -- there is something about the question I don't like, there is something tricky in it, you may be getting into an area that you shouldn't be testifying about. So, please, if I start to talk, if I give you any sort of a signal, listen to what I have to say even though I am going to be speaking across the table to [opposing counsel]. I am really getting a message to you. Do you understand that, so far? . . .

Now, you can make [opposing counsel's] job very easy or you can make it very difficult. It is really up to you to try to make him/her earn his/her money. He/she is going to be asking questions that can be answered in a variety of ways. For example, he might ask you, "What did you do last night?" You might answer by saying, "Well, I went to the movies, and it was my wife's birthday, and we saw the new Dustin Hoffman movie. It was terrific and we stopped and had dinner afterward." That would be an appropriate answer but it also would be volunteering a lot more information than called for by the question asked.

If you answer the question simply by saying, "I went to the movies," it would require him/her to think of a whole bunch of additional questions. Whereas, with the other answer I suggested you might have given, you are going to suggest five or six other areas he/she can begin asking you about. That is going to have a lot of impact.

Part of the impact is that it is going to make the deposition much longer. Part of the impact is that it is going to make it much easier for [opposing counsel] because you are suggesting all of these other questions. You can drive a lawyer crazy if you limit your answers just to the questions that he/she asks you. In that connection, the trick that I have learned is that most questions contain a key word: who, when, where. If you can focus on that portion of the questions, you can often answer the question with a one word answer -- the name, the date, the place, the time. It will drive the other lawyer nuts. Because if you answer that way, he has to really do his job. He has to think about what his next question is going to be and where he is going.

A couple of other things: You can't win a lawsuit at a deposition. There is nothing that you can do at this deposition today that can win your lawsuit, but you can lose it. And the way you can lose it is by setting yourself up, painting yourself into a corner, contradicting yourself or giving the other attorney the ability to impeach you later on with something that contradicts you. So, you have to be careful about how you testify.

In that same vein, there are certain things that don't look well in a transcript. This is a serious proceeding and [opposing counsel] is your adversary. Jokes and sarcasm never come across well in a transcript. You have to give clear and concise answers without kidding around. By the same token, even though he is your adversary, you don't want to be fighting with him. You don't want to argue with him.

You know the facts of what happened and we will get to them when we review the facts in a while. Listen to the question, then answer it. If you have a problem with the question, you have a right any time you want to consult with me. If you want to go out of the room, all you have to do is ask for a break. We can step outside for a few minutes and then we can talk about it.

[Opposing counsel] can make a big stink about that. He/she will look at the court reporter and say, "Note for the record that the witness is conferring with his/her counsel." The court reporter does that anyway. It is all an act, a little game that he/she is going to play to try to intimidate you. Don't worry about it. 99% of the time, nobody will ever read those comments. It will never appear before any judge. It is never going to matter very much.

Don't overdo it. Don't ask for a conference every time he/she asks you a question. But, if there is anything that troubles you, if you are not clear about a question, tell him/her. If you are not clear about how you think you should answer it, or if you just want to discuss it, sit down with me, we'll walk out of the room, we'll talk about it for the future. Any questions so far?

Let's talk now about the facts of the case itself.

Attachment 2.2

1. You cannot over-emphasize enough to your client the importance of limiting his/her answers to the questions asked. Under no circumstances should a client volunteer information or give a non-responsive answer.

There are only a few specific circumstances where a client should "stress" points or "expand" or "amplify" his/her answer:

(a) When he/she is asked about conversations, he/she must be sure to testify as to everything that was said, particularly where the other party has made damaging admissions.

(b) When he/she is asked about his/her damages, he/she must be able to give a thorough answer, particularly if he/she is asked about it or is claiming emotional distress damages.

It may also be necessary for the client to answer more expansively when his testimony must be preserved because he is likely to die or otherwise be unable to attend trial; however, this is an extremely rare exception and should be the topic of a separate discussion at a future litigation meeting.

2. There are times during a deposition when a question is asked to which you want your client to pay particular attention before he/she answers. You should let your client know that you will give him/her a specific signal when this happens, thereby alerting him/her to the fact that he/she should listen very carefully to the question, and should think for a while before he/she answers or asks to confer with you if he/she does not understand the significance of the question. The signal I generally use is to ask the court reporter to read back the question.

3. If, despite your best efforts at preparation, you sense during the deposition that your client is about to give a damaging answer, you should do everything you can to stop the answer. This includes taking the client out of the room (grabbing him/her by the arm if necessary) to confer privately, whether before or after a question is asked or even while the answer is being given. Opposing counsel will rant and rave, but cannot prevent you from doing this. Any "damage" that might result from comments on the record about your behavior in trying to coach your client will be relatively minimal compared to the effect on your client's case if you permit him/her to give a damaging answer during the deposition.

Remember, his/her deposition testimony can be read into evidence at trial. Moreover, during trial, you will not be able to do the same thing to prevent your client's damaging testimony from coming in.

4. Don't close the door -- If you answer a question, "I don't remember," or "I don't recall," and opposing counsel asks, "Is there any way you can refresh your recollection?" Don't say "no." Instead, say "there may be."

Attachment 2.3

A. Dress and Demeanor

1. Coach your client on demeanor. He/she should dress the part, with a suit or jacket (i.e., formal attire).

2. Coach your client on body language. He/she should be leaning slightly forward in his/her seat, with hands clasped on the table. Tell your client not to rock back and forth, and not to look up toward the ceiling as if he/she is searching for the right answer.

B. Don't Close the Door — Keep it Open

If your client does not recall something, and if your client is asked if there is any way to refresh his/her recollection, he/she should not answer "No." Instead, he/she should say, "There may be [some way to refresh recollection] . . . I'm not sure . . . perhaps documents/speak with someone . . . I don't know at this time."

C. Use Client Conferences Outside the Deposition Room

1. The matters discussed are attorney-client privileged.

2. Conferences are critical when a client is in a "danger zone" in terms of a potentially harmful answer.

3. Don't be afraid to instruct a client not to answer. The other side may not seek a court order. And, even if the other side does, there is a meet and confer procedure. If the client needs to answer the question at another session of his/her deposition, he/she will give a better answer.

4. Whatever you do, don't let the client give a bad answer. Have a conference with him/her outside the deposition room.

5. Avoid having a conference while a question is pending, especially if the deposition is being videotaped, except if the answer to the question may be very damaging. If you have to have a conference while a question is pending, do it no more than once or twice during the deposition.

On the flip side, when taking a deposition, make sure to keep the camera rolling when the witness and his/her counsel leave the room for a conference.

D. Instructions Not to Answer Based on Relevance

1. In California, it is not appropriate to instruct a witness not to answer on the basis of irrelevance. *Stewart v. Colonial Western Agency*, 87 Cal.App.4th 1006 (2001). This holds true in federal court as well.

2. The strategy for dealing with this is to instruct the witness not to answer on the basis of the right to privacy, and also add a relevance objection.

E. Do You Contend That . . ." Questions are Inappropriate

These questions are appropriate for interrogatories, but not depositions. *Rifkind v. Superior Court*, 22 Cal.App.4th 1255 (1994).

III. DEFENDING YOUR CLIENT AT DEPOSITION

A. OBJECTIONS

1. Instruction not to answer.

No	Yes
Irrelevance (*Stewart v. Colonial Title*, 87 C.A.4th 1006 (2001)	1) Privilege (including work product/attorney-client privilege when asked about document review) 2) Invasion of privacy (couple with relevancy) 3) Contention Questions: (*Rifkind v. Superior Court*, 22 Cal.App.4th 1255 (1994) (a) "Do you contend" (b) Identify (state) facts, witnesses, documents which support allegations 4) Harassment -- asked and answered 5) Misstates the evidence

2. Form of Questions

No	Yes
Hearsay	1) Ambiguous, unintelligible 2) Compound 3) Calls for speculation 4) Leading and suggestive 5) Argumentative 6) Assumes facts not in evidence 7) Calls for conclusion and opinion 8) Asked and answered 9) Document speaks for itself -- Best evidence (secondary evidence) 10) Lacks foundation (lack of personal knowledge)

3. Objection to form of questions waived if not made (**<u>Attachment 2.4 - CCP § 2025.460(b)</u>**), but can still object at trial on other grounds

4. "(1) I object to the question

on the grounds that it ________________

(2) [and I instruct the witness not to answer]"

B. CLIENT CONFERENCES OUTSIDE OF THE DEPOSITION ROOM

1. Attorney/client privilege

(a) Seek an agreement to go off the record

C. CORRECTION BY CLIENT

Three ways to correct:

1. Self correct by client – Not after a break
2. Questions at end of deposition
3. Corrections to transcript

D. DO NOT EXAMINE YOUR CLIENT (EXCEPT IN RARE INSTANCES TO CORRECT A BAD ANSWER)

E. CONTROL THE DEPOSITION

1. Harassment
2. Threaten to leave -- Special Master
3. Be aggressive with objections/instructions - Meet and confer