

# **SECTION VI**

## **Prepping for Depositions**

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**“Modern Deposition Preparation” – Outline for Publication & Distribution**



**Topline Concept:**

Deposition preparation is no longer about “woodshedding,” but rather building comfort and confidence in the witness to improve the quality and credibility of their answers.

I. Introduction

For as long as witnesses have been giving testimony, there have been lawyers trying to convince, cajole, or compel those witnesses to give testimony in a fashion more effective for their case. This has happened truly as long as the modern trial has existed – in his 1850 novel, *The Ways of the Hour*, James Fenimore Cooper described in exquisite detail “country phrases ... and country customs” for “horse-shedding” witnesses: taking witnesses into the horse sheds outside the courthouse and rehearsing testimony with witnesses. Cooper’s novel accurately treats the concept with contempt, as an example of the corruption he saw throughout 19<sup>th</sup> century New York courts.

Over time, as attorneys and trial courts have become more sophisticated, the need for proper preparation of witnesses has come to the fore – even as ethical rules have developed to try to prevent the practices Cooper decried. After all, “[the lawyer’s] duty is to extract the facts from the witness, not to pour them into him.” *In re Eldridge*, 82 N.Y. 161, 171 (1880).

In this presentation, we will seek to explore modern methods for witness preparation that move beyond horse-shedding (nowadays often called “woodshedding”) and toward a model that can produce far greater clarity and quality in the answers of a witness. Because I’m a plaintiff’s lawyer, prepping the injured person will of course be my focus, but these techniques should work on any witness – corporate/employer, doctor, lay, etc.

We will explore what makes a witness credible, and how to unlock that credibility within each witness. Our goal will be to create compelling testimony that gives the finder of fact much better material to work with in making its ultimate decision, regardless of the form that takes in your case. The goal will not be ‘coaching’ a witness, or feeding them canned answers –even disregarding the ethical minefield that creates, such techniques are incredibly ineffective, and should never be used.

## 2. What is the Goal of Witness Preparation?

If I asked every attorney in the room for this presentation this question, it is extremely likely I would get dozens of different answers. This makes some sense – certainly, different cases might demand different styles or goals for preparation. I would posit that, for the majority of cases, the goal of witness preparation is simple: to improve the witness’s ability to respond to the questions they will be asked.

This takes on several forms, but for the most part, there are three specific goals: (1) help the witness give more complete, honest answers; (2) allow the witness to present their testimony more credibly, and (3) provide reliability in the witness’s answers (both in terms of something the fact-finder can rely upon, and that those answers will stay consistent and reliable over time and across all areas of questioning).

Goal (1) is likely the most pressing for the average case – most witnesses have either never testified before (such as claimants/injured parties), or have testified consistently in a capacity that often isn’t conducive to the purposes of your particular deposition (officers, doctors). Witnesses are usually nervous, which can serve to limit the quality of answers given. Further, witnesses are often concerned about giving bad testimony, being fooled or misled, or have images in their minds of television dramas where a wily lawyer tricks the witness into giving up the ghost – all of which can serve to shut witnesses down and limit their responses.

Proper preparation can help the witness give more full, complete, and honest answers by overcoming these concerns.

Goal (2) is likely the most important practical consideration from the attorney's standpoint – after all, a case without credible witnesses likely is not going anywhere good. Credibility has been extensively researched and studied – we will not repeat that research here, but instead give a basic overview. Confidence, expertise, trustworthiness, consistency, and reliability are factors that build into credibility, though, and should be improved through careful preparation.

Goal (3) is an extremely underrated aspect of preparation – nearly every attorney has a horror story about talking with a witness, who appears set to give wonderful testimony, who then completely lays an egg in the deposition. In particular, experts often fall prey to this type of “deer in the headlights” change in responses. Proper preparation can help avoid this kind of mess, and make sure that the testimony is reliable and consistent.

### 3. How Do We Meet Those Goals?

To meet those goals, there are both general and specific considerations. Generally, experts suggest preparation should last between two and three times longer than the expected testimony. This means if you expect a claimant's deposition to last 90 minutes, preparation should generally be around four to five hours. How often do you believe that happens, in the average worker's compensation case?

Often, schedules dictate that preparation must be compressed. We will discuss strategies to help there, as well. However, some general considerations serve as baseline. First, preparation time is far better utilized when the witness talks, and not the attorney. Most witness preps I've attended feature the attorney lecturing the witness for the first hour or so, and that is about the least effective method of teaching possible. Second, realize that the preparation goes far beyond questions and answers – the witness is nervous about the entire thing, so explaining things like what a deposition is, how it will proceed, the topics it will cover, even things as small as what to wear and how long it will take go a long way toward getting the witness comfortable and

confident. Finally, often a series of one-hour sessions is more effective than one long session, as people need reinforcement and time for the lessons to sink in.

Preparation should happen in three main stages: background explanation and process, understanding the witness personally, and practicing credible answers. These three stages do not happen linearly – meaning they do not happen necessarily in order, and indeed each individual preparation session should include elements of all three, generally.

Discussing background and process includes both logistical issues, and whatever your in-house ‘rules’ for testifying might be. Our ‘house rules’ for deposition testimony is below:



**Rob’s Rules for Deposition Testimony:**

1. Always tell the truth.
2. Only answer the question asked.
3. Use powerful language and tell stories where possible.

These rules are something we discuss during each prep, and they become the basis for the other two stages. Note that these are very different from how ‘everyday,’ non-courtroom communication works in the real world – we start with them so that the deponent can practice those things in everyday life and get a feel for those differences.

The logistical and background issues include explaining why this person has to give a deposition in the first place, even if the answer is simply “because the rules say so” – it usually is something attorneys skip over, and we find witnesses are significantly more comfortable once they know the answer. Explaining the basic facts can help make the witness comfortable as well – how long it will take, where it will happen, what to wear, and how the day will progress are all important things to cover, and often get skipped. Next, explaining the witness’s role in the case helps immensely to bring that person into a good place – if they’re the claimant, obviously that’s a bit unnecessary, but for lay or fact witnesses, outlining exactly why their testimony is important gives them important confidence.

The next stage is getting to know the witness and understand their thinking, learning style, and response style. Adapting your preparation to their particular learning style saves immense amounts of time and energy. Generally, the baseline is determining whether they do better with ‘doing’ or with ‘seeing/observing’ when picking up new information. You also want

to get a feel for whether they want to be challenged through cross examination-style questions, or whether they're more comfortable with open-ended questions to start. Often, it is helpful here to spend time with the witness outside of a conference room or law office environment – for clients, spending time in their home and at their work gives valuable insight into what is important to them. At this stage, you can collect photos and stories/memories to help guide the witness through difficult questions.

The final stage is the longest, and will gradually become the focus of sessions. It consists of practicing answering questions in a credible fashion. Research indicates that credibility is based on several characteristics: reliability, knowledge, trustworthiness, consistency, dynamism, and most importantly, confidence. Turning the average witness into a dynamic speaker is likely beyond the purview of most depositions, and certainly this outline, but we can work on the others through repetition and feedback. Confidence is the easiest – the entirety of your preparation sessions should be geared toward making the witness as confident and comfortable as possible during the deposition.

One of the most effective methods during this stage is to ask questions in a formal, deposition-like way but about wide-ranging things normally outside of the legal case. Ask about daily life or work, how they met their significant other, etc. Critique those answers and develop an effective response to non-legal questions, then focus on the elements (or even the 'feeling') of those answers. The goal, then, will be to replicate those kinds of answers about legal issues too. This type of learning is much more likely to be retained and replicated than lecturing about answers or any form of 'suggestion' (ethical or otherwise).

Other methods that can help, depending on the case, include using video or audio recording – this is something of a 'nuclear method,' as most people hate seeing themselves on video. However, this is really the only way to point out tics, facial expressions, or other behavior that can affect credibility. Play-acting, roleplay, or psychodrama are also very effective ways to improve response quality. Simply putting the witness in the shoes of another can break out of nervous habits, or create good habits, as well.

4. Conclusion

Proper preparation of witnesses for deposition involves both improving and increasing efficiency of each session, and simply spending more time and effort on the preparation. The goal should be increased comfort and confidence, which will improve the witness's ability to answer questions in an effective and complete way. Nervousness and expectations of legal questioning are the enemy and should be battled at each step of the way. Simple techniques like roleplaying or video taping can go a long way to pushing a witness in an effective direction.

**LAWYER, LAWYER, DUTTON,  
DRAKE & CONKLIN, LLP**

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Rob Conklin

# Modern Deposition Preparation



THE

# WAYS OF THE HOUR

A TALK

BY  
J. PINKHORN COOPER

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John W. Lovell Company

NEW YORK  
JOHN W. LOVELL COMPANY  
15 AND 16 WEST STREET

# “Horse shedding”

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**Goal:**

**Improve witness  
responses.**

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**Goal: Better answers.**

**1 – More complete.**

**2 – More credible.**

**3 – More reliable.**

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**Three stages:**

**Explain the process.**

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**Three stages:**

**Get to know and  
undersand the witness.**

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**Three stages:**

**Practice credible  
answers.**

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# **Explain the process:**

- **Why?**
  - **How long?**
  - **When?**
  - **Where?**
  - **How?**
-

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# **Explain the rules:**

- 1 – Always tell the truth**
  - 2 – Only answer Q asked**
  - 3 – Powerful language.**
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# **Understand them:**

- **Who are they?**
  - **How do they learn?**
  - **What is good?**
  - **What is bad?**
  - **Why?**
-

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# **Credibility:**

- **Confidence**
  - **Reliability**
  - **Trustworthiness**
  - **Consistency**
  - **Knowledge**
-

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**Practice the elements of  
credibility, not specific  
answers.**

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- **Video recording**
  - **Audio recording**
  - **Play-acting/roleplay**
  - **Non-legal subjects**
-