

# Advanced Witness Preparation

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- EXPERT WITNESS DEPOSITION PREPARATION
- CLIENT WITNESS DEPOSITION PREPARATION

# Expert Witness Deposition Preparation: Why was the Rule 26 changed?

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Rule 26 was changed to “address concerns about expert discovery” and to prevent the discovery of “theories or mental impressions of counsel.” Fed. R. Civ. P. 26, Committee Notes on Rules – 2010 Amendment.

# Expert Witness Deposition Preparation: “New” Federal Rule of Civil Procedure 26(b)(4): Drafts

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Under the “new” Rules, drafts of reports are no longer discoverable:

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

Fed. R. Civ. P. 26(b)(4)(B).

# Expert Witness Deposition Preparation: “New” Federal Rule of Civil Procedure (b)(4)(C)

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Under the “new” Rules, most communications are protected (in theory):

*(C) Trial-Preparation Protection for Communications Between a Party’s Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party’s attorney and any witness required to provide a report under Rule 26(a)(2)(B) regardless of the form of the communications, except to the extent that the communications:

- (i) relate to compensation for the expert’s study or testimony;
- (ii) identify facts or data that the party’s attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify the assumptions that the party’s attorney provided and that the expert relied on in forming the opinions to be expressed.

Fed. R. Civ. P. 26(b)(4)(C).

# Expert Witness Deposition Preparation: Precautions

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- Despite protections of the “new” rules, exercise caution in expert communications
- Do not assume the expert understands the discovery rules
- Share only information necessary to develop opinions, or protect expert’s opinions
- Explain the limits of the expert’s opinions/testimony
- Make sure you understand potential negative opinions or testimony that is beyond the report

# Expert Witness Deposition Preparation: New Expert: Explain the Process

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- Explain that an expert may rely upon “assumptions”
- Explain relevant Rules of Evidence
- The Expert Witness Book (NITA)

# Expert Witness Deposition Preparation: Deposition Discussion and Examination

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## “Standard” Expert Deposition Questions:

- Do you have any opinions?
- Please list the opinions.
- Please tell me all the assumptions, facts or evidence upon which you rely in forming your opinions?

# Client Witness Deposition Preparation

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## BEFORE THE DEPOSITION PREPARATION:

- Client witness preparation begins at the beginning of the case
- Federal Rule of Evidence 612: Instruct witness to avoid independently “refreshing” memory in the weeks prior to the deposition
- Schedule witness preparation sufficiently in advance, in case something goes badly

# Client Witness Deposition Preparation

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Level of preparation depends upon the witness

Deposition preparation should reduce stress

Ways to reduce stress:

- Explain the Logistics
- Explain the Legal Theories (to the extent possible / reasonable)
- Explain the Deposition Process
- Attorney guidance on how to answer questions
- Mock Examination

# Client Witness Deposition Preparation

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Explain the Logistics:

- Date
- Time
- Pre-deposition meeting place (your office, if at all possible)
- Breaks / lunch
- No “public” discussion about the deposition (elevator, hall, restroom)

# Client Witness Deposition Preparation

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## Explain the Legal Theories

- Level of explanation depends upon level of sophistication
- Simplicity – for sophisticated and unsophisticated witnesses
- Read / review the Complaint / Answer / Counterclaim / 3<sup>rd</sup> Party Claims  
(assume pleadings will be an exhibit)
- Consider explaining what is not relevant, if witness is focused on wrong issues

# Client Witness Deposition Preparation

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## Explain the Deposition Process

- Court reporter will transcribe
- Explain the transcript
- Question and answer format – envision the transcript (consider sharing a transcript)
- Explain objections (witness must answer unless instructed)
- Explain exhibits
- Explain “Standard” questions – Testimony is under oath; Criminal conviction; Deposition preparation and document review (Rule 612)

# Client Witness Deposition Preparation

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- The Art: Provide attorney guidance on how to answer questions
  - Every client is different, and will react differently
  - Shortest Possible Truthful Answer
  - How much information is enough / too much
  - Tricks / traps

# Client Witness Deposition Preparation

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## Mock Examination

- Procedure: Black hat – no cheating
- Mock examination is the most unpleasant and the most essential
- If you have to skip something, skip something else
- You never know which client/witness will show up for the deposition
- Include “standard” / introductory questions
- Ask hard questions
- Ask obvious questions
- Ask bad questions – confusing, ambiguous, double negative, unfair, argumentative, repetitive