

## 4 Simple Rules For Witness Note Taking

By **Matthew Keenan** (January 6, 2020, 5:03 PM EST)

Witness notations have become the stuff of Hollywood screenplays — the gotcha moment that impeaches a witness' testimony with a handwritten scribble. And, generally speaking, I don't mean Disney movies. In more recent Hollywood history, incriminating notations come in the form of medical records.

For instance, in "The Verdict" starring Paul Newman, the defendant anesthesiologist, Dr. Robert Towler, forced the nurse to change a medical record that described the patient as having eaten a full meal one hour before admission, which meant anesthesia was contraindicated. But before the nurse made the change, she made a photocopy of the original records, which she brought with her to court.



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The rest, as they say, is Hollywood lore.

These days the contemporaneous notes that form the centerpiece of a plaintiff's case have largely been replaced by digital document preservation systems. Still, witness notes remain very much on defense counsel's radar, typically as a part of the witness preparation process.

There are really only two kinds of witnesses: those who ask permission to take notes in advance of the deposition, and those who don't but do anyway. With proper safeguards, it's my experience that witness notes created during deposition preparation are the witnesses' best friend.

Here are my four simple rules for witness note taking:

### 1. Initially, keep the pens down.

At the initial meeting, or if necessary, the first phone call, I ask them to refrain from taking notes. I'll say, "Just listen for a bit and once we have given you the background, then we can start to create your file for the deposition." The first hour is replete with attorney discussions that can be a mix of attorney-client work product.

Things to do, things to prepare. What happened? Finger-pointing can work its way in this initial narrative. These are the most basic reactions without all the facts, often formed by the witness long before counsel got involved. Giving them guidance out of the blocks can be reassuring.

Sometimes in my quality control, I find notes from these initial meetings and on occasion I redact the notations on the grounds of work product attorney-client privilege. The balance of notes, however, I won't protect.

## **2. Review the content.**

Notes should be facts, not opinions. Yes, I'm channeling Captain Obvious here. But this distinction is not always clear.

The who, what, when, where: I give witnesses examples of notes that would be useful and those that are problematic. This is obviously a case-by-case determination, but they need specific guidance. I like to reference big questions that are outside their box of responsibility that can unnecessarily expand their scope and complicate their deposition.

## **3. Prepare the documents.**

Deposition notices always include document requests, and so I like my witnesses to bring their own materials, whether or not they are directly responsive to what the adversary is expecting. My documents give the witnesses anchors to the client's themes and factual predicates.

These might include standard operating procedures, design history files, regulatory documents, organizational charts, even the witnesses' CVs. These are materials they select, as opposed to what I may provide. I like to get their file started with some of these basic documents, which then permits note taking to be more unconventional, such as sticky notes, highlights or scribbles on the pages of documents.

The note taking tends to be in proportion to the level of preparation required. Witnesses deposed under Federal Rule of Civil Procedure 30(b)(6) obviously demand more.

Depositions typically include time limits. The time plaintiffs attorneys spend on my clients' notes is time diverted from the plaintiffs' own documents or questions from their 100-page outline.

In fact, many plaintiffs attorneys understand this very point. Consequently, they do not spend time on the notes because they understand they were the product of a system with safeguards in place.

## **4. Implement quality oversight.**

Notes demand a quality control evaluation. If the meeting is in person, I inspect them. If it's via phone, I have them read them to me.

Before the deposition I may go over all the notes if necessary. This should not be time-consuming and may even be an affirmation of their preparation for the topics.

As the deposition approaches, I like to show them the conference room and, if available, the layout, which I typically capture with a photo from my phone. I will discuss a brief direct exam with a handful of exhibits.

## **The Bottom Line**

Witnesses who are preparing to give testimony in litigation deserve counsel who can give them the most effective tools to make the endeavor successful. Everyone eventually finds shortcuts that lighten the load. For me, recognizing that allowing witnesses the freedom to create a road map to become prepared, and then using their documents as a bedrock as needed, has worked very well.

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