

CONTACTING A NON-PARTY WITNESS BEFORE A SCHEDULED DEPOSITION?

Hi Jennifer, Please post anonymously to SOLOSEZ.

My office is currently having a discussion on the following, was hoping to get some weigh-ins from the group:

When, if ever, is it appropriate to contact a non-party witness before a scheduled deposition when you have not previously contacted that witness in regard to the case ever before?

I say never and that you will have to find out what they are going to say at deposition; otherwise, it will look unethical.

However, would like to know thoughts of anyone who has had a difference experience or need.

I'm really not sure where the line of "coaching a witness" begins, but would think anyone should really like to avoid even the suggestion of appearing to do so.

Thank you

You can talk to a non-party witness as much and in as detailed a fashion as you wish, as long as you neither suggest nor provide answers for them. Contact is not the same as tampering. Tampering involves using intimidation or force to influence testimony of a witness. The key is whether the witness is cooperating voluntarily. You can't compel them to talk to you prior to deposition, and you can't even suggest that you could compel them to talk to you if they don't want to. But pre-deposition meetings with a non-party witness are perfectly acceptable in general. Similarly, asking the witness to tell you their story before deposition is not "coaching." You can collect information, just don't try to direct the answers. Do be careful and inquire whether the witness is represented. Even if not a party, a witness may choose to have legal representation, and if they do you should only contact them through their designated representative.

Aaron Rittmaster, Kansas

I'm assuming that the non-party is not presently or formerly associated enough with your opposing party, so that the restrictions on contacting a adverse, represented party don't apply here.

That being the case, I have no problem contacting a non-party before the deposition. I never mislead, even a little bit. I never suggest that they have to meet with me. I always assume that they will repeat, under oath, anything I say to them or they say to me. I tell them that it's not a problem for them to talk to the other side, or to repeat anything we discussed.

If they are likely identify more closing with my adversary, I might not do it at all. Too much risk of them saying I said something I didn't.

But it can be helpful to streamline a deposition if I can interview the person ahead of time.

Patrick W. Begos, Connecticut

Is the non party witness an adult? Represented by counsel? If an adult and no attorney, you can talk all you want with that person -- if they want to talk to you. If the witness has an attorney, you have to go through their attorney.

You can prepare witnesses (I have a document called "some rules for witnesses that a former boss created long ago -- I.e., listen carefully to the question, don't lie, etc.), but you want to be careful that the witnesses are clear you are not their lawyer. If they are the opposition's witness and they tell you they don't want to talk with you, you can't force it (that's what depositions are for).

Are we missing some facts that might invoke some sort of prohibitions against talking to witnesses?

N. Lynn Perls, New Mexico

I do it all the time. So do the lawyers on the other side. It's part of the investigation I do in every case. There's nothing unethical about it per se. Just keep in mind there's no attorney-client communication / work product privilege so everything that is said is discoverable by the other side. Also, don't do anything that could be perceived as influencing the witness's testimony. Don't even foot the bill for coffee or food.

Cheers,

Eugene Lee, California

I disagree and think that its good practice to ask a percipient witness what the witness knows/recalls although while doing that you should try to be careful to not become a witness yourself (have someone accompany you whom you could put on the stand if necessary to impeach the 3P wit, or ask

the 3P wit to sign a dec. or statement for example). BUT if the non-party witness might be subject to certain laws regarding confidentiality (e.g. HIPAA or state medical confidentiality laws, or perhaps marital privilege, etc.) then you should be upfront with the witness about you do not want to have the wit. disclose to you informally anything that may be subject to such rules.

Michael Boli, California

know this is rough with an anonymous post, but I'd like more information.

How did the deposition get scheduled with no contact? Did you just subpoena the witness and you expect them to appear? That has never worked for me, no one appears. Sometimes they call opposing counsel, but no one ever just shows up.

I usually contact non-party witnesses prior to even sending a subpoena, sometimes a subpoena can be avoided all together if a witness will agree to make a voluntary declaration. I'd rather keep my witnesses to myself. I may have a private investigator contact them if I need a declaration, especially if it is something to be used in a motion for summary judgment.

I have learned that it is VERY important to keep contact with witnesses, both prior to filing suit and after. NEVER believe what your client tells you about a witness, not about how friendly the witness is or about what the witness will say. NEVER.

I call witnesses every 2-3 months just to touch base, tell them that the case is still on-going and thank them for agreeing to be available should they be needed. I tell them to feel free to ask me any questions. Usually I get "what could happen" -- procedural or timeline questions. Occasionally someone starts down the line of "would it help if I said ..." or "What if the other side sets me for deposition and asks xyx?" Then my answer is swift, loud, and leaves no room for doubt. "You tell the truth!" I usually follow it up with a few repetitions and I add that "Seriously, it benefits no one and could really hurt YOU if you do not tell the truth, I don't want that to happen and neither do you. Tell the truth".

Another question witnesses occasionally ask is "What if the other side asks if I talked to you?" Again, "Tell the truth!" Then I ask, "Why are you worried about that? Do you feel like I tried to tell you what to say?" Since I don't do that, the witness always has said No. So I tell the witness "If the other side asks what did I tell you to say,

just tell them I yelled at you to always tell the truth!" Then we laugh how I just told them what to say.

However, all jokes aside, I never tell a witness what to say other than telling them to feel free to answer truthfully. If witnesses ask for advice on how to do a deposition -- and they really are asking advice because they have never done a deposition, not asking me to put words in their mouths -- I tell them they are totally allowed to get their own attorney, but I also tell them they can go on amazon and they have books about depositions, what happens at deposition, etc.

If a witness asks could they get in trouble for testifying, I tell them they need to talk to their own lawyer. When I did more employment law, I would encourage employee witnesses to contact their union rep for guidance when that was applicable.

I baby my witnesses and it has paid off for me. I've ignored witnesses and it has turned out horrible, awful, and expensive. I have absolutely seen successful lawyers do the opposite of me (be rude, dismissive, and demanding) and it has worked for them. But me, I kid-glove my outside witnesses.

Amy Clark Kleinpeter, Texas

Well, on what grounds do you think it is unethical? Specifically, what rule of the bar or court prohibits this?

"it will look unethical" Why? Why would it "look" unethical?

I do it all the time: I'm involved in probate case, decedent had been evaluated by two psychiatrists and I've talked to both of them prior to their deposition. I also talked to the attorney who drafted the will prior to his depo.

I'm not suggesting "coaching a witness" by telling them what to say; but "anyone should really like to avoid even the suggestion of appearing to do so" is different than actually doing it. You're a lawyer; you're not caesars wife; you're an advocate and your job is to handle the case. This means you need information.

It's one thing to ask "did the other attorney contact you prior to this deposition"; and if they did you can ask "what did you say, what did he tell you, what did you talk about"? And if asked, they'd say something to the effect that Mr. Jones asked about the circumstances of the psychiatric evaluation or the drafting of the will; if asked whether I told or suggested

what they should say, they would have truthfully answered NO, in fact, Mr. Jones emphasized that we were to tell the truth.

If I think witness is potentially hostile I won't talk to them prior to the depo, but I've yet to see a lawyer locally who won't talk to at least some potential witnesses.

Ronald Jones, Florida

This whole discussion brings up another point I've been wondering about, relating to experts. The other side hires an expert, we know about it because we have to arrange with the expert to inspect something we own. We are present for the inspection and answer the expert's questions about the item in question; as the inspection proceeds, we get the feeling that the expert's opinion just might help us. Not sure, but it might.

A little while later the other side receives a report from the expert (I know this because I asked OC if he'd received his expert's report yet and he said he had; when I asked if he was going to share the contents with us, he was noncommittal and basically said he hadn't had time to read it yet - yeah, right). Of course, if this expert's opinion does not favor them, they don't have to call the expert to testify.

Is there any way we can discover the expert's opinion, if OC elects not to call him to testify? Is there any way we can use this in our favor? We can't compel the expert to testify, right? At least, not to give an opinion. Can we call him to testify and just ask if he inspected the item? Why? (i.e., get out the fact that he was hired by OC to provide an opinion - raising an inference that it must have been bad if OC elected not to present it at trial?)

Cynthia Hannah-White, Hawaii
