

## **DEPOSITION PREPARATION FOR CLIENT WITNESSES**

Because you are scheduled to give a deposition in this case, I wanted to give you some general information about the role of witnesses at depositions.

The purpose of the deposition is to allow a party the opportunity to determine the facts of the case prior to trial. Because a deposition is taken under oath and can be used at trial, it is important that a witness be certain of his answers, not volunteer information and not speculate on matters about which he has no information. In view of the fact that there is a possibility that a deposition will be presented to a jury, it is also important that there be as little hostility displayed on the record as possible. Something that is said which may appear innocuous when said, can be devastating when it is read by someone else to a jury which does not have at that time the ability to judge the demeanor of the witness.

Further, because a deposition is being taken down by a court reporter who cannot take the testimony of two people at one time, it is important that the witness make certain that the questioner has completely finished his sentence before responding. This avoids the possibility of an erroneous answer to a question. For example, if the questioner says "Are you dead or are you alive?", and not waiting the second part of the question, you answer "Yes", when the complete question and answer are typed it will appear as though you stated you were dead. It is also important to wait for a few seconds after the question has been asked so that if there is an objection to the form of the question, I can interpose an objection before you answer the question.

Another reason for this deposition will be to freeze your story. In the event that you were to testify at the time of trial in any way that was different from your testimony during this deposition, opposing party's attorney would be able to use the deposition to contradict and embarrass you by showing the prior inconsistent statements. This is what lawyers call impeachment. It is very effective in front of a jury as a jury is generally inclined not to believe a witness that changes his or her story.

In order to help you prepare for your deposition, you need to understand that there is a great difference between a deposition and a trial. This deposition is going to be a one-sided affair. It will seem that it favors the opposing party. Opposing party's attorney is asking all the questions. As the deponent, you are under a general obligation to answer all questions. Some of his questions certainly would not be permissible at the courthouse during trial. These questions do not have to be directed toward admissible evidence. He has wide latitude in asking such questions. This is to permit adequate discovery and pre-trial preparation by

both sides. No judge will be present to rule on any objections at our deposition. I will be playing a limited role. It is crucial that you remember this. I will be listening to each and every question that you are asked. If any of them are improper, I will object. However, I do not anticipate any large numbers of objections. It may be that there are none. I do not want you to misconstrue my silence as a failure to protect your interests.

Next, I want to give you some information that will assist you in knowing what the opposing party's attorney is attempting to do while he is asking you questions. As I mentioned above, he has more than one reason for taking this deposition. The form of his questions may reveal to you his major interest. When he is asking you questions primarily for discovery purposes, just to obtain information, the questions are going to be broad and the subject far-reaching. He is trying to encourage you to give rambling answers that might reveal new facts. If he is attempting to elicit from you admissible evidence, things that he can read right to the jury at the time of trial, his questions are going to be more sharply focused. When he is doing this, he is attempting to "freeze" your testimony. He is going to repeatedly ask you "was there anything else?" or "is that everything you remember?" He is forcing you to commit yourself to a position that you cannot amend or correct at the time of the trial without risking impeachment.

He will probably ask you many leading questions. A leading question is one that is really just a statement of fact which only asks the deponent to agree or disagree. He is going to be asking you things to which he wants a "yes" or "no" answer. He is going to try to put words in your mouth through this process. If any part of his leading question is incorrect, do not answer "Yes" and make it clear by your answer that you cannot entirely agree with the statement he has made. He will probably ask you why, restate it including the correct fact, and again ask you to agree or disagree. Remember, he is trying to freeze every detail of your testimony. Make sure it's correct before you agree with his statement.

He is going to be attempting to always get responsive answers from you. In other words, he is going to want a clear "Yes" or "No." He will probably ask you the question in several different ways to get a response. He is going to be after accuracy to the limit that you can provide it. He will want to know everything that you remember. Additionally, he is going to be watchful for prior inconsistent statements. However, if he notices one, he will more than likely not mention it during the deposition, but save it for trial.

It is probable that the opposing party's attorney's first step in the deposition will be to create a record that he can use during the trial to show that you understood the full nature of the deposition and all of the uses to which it can be put. What he is trying to do is to protect himself if, at trial, you insist that a contradictory statement was caused by your failure to understand what was going on at the deposition. After he establishes that you understand the deposition, that you are under oath, that the deposition can be used at

trial, and that your testimony during a deposition is subject to the same penalties or perjury as testimony at trial, he will probably proceed with incidental questions. Typically, he will ask a lot of demographic questions - name, address, age, family background, where you are from, what high school did you go to, names of spouse and other family members, etc. These questions are to get you in the habit of answering and to get you to think this isn't so tough. However, do NOT let your guard down! He will probably proceed in a chronological fashion – oldest to latest. I expect him to go into great detail on your education, training and previous employment. With regard to questions which he asks you about the specific incident in question that gave rise to the lawsuit, his questions are going to be meticulous, often redundant, and exhaustive. Not all questions will seem relevant, not all questions will be relevant, and not all of his questions are even going to be intelligent. Lawyers often are thinking ahead while they are posing their questions, and may get lost in the weeds with a rambling, seemingly incoherent question. I will, of course, object to the form of the question, but do not hesitate to point out to opposing counsel that his question makes no sense, and to please have him rephrase his question.

I am enclosing a list of pointers below for deposition witnesses which may give you some helpful general information. A jury can easily be influenced by their emotional reactions to a witness, and it is undoubtedly in your best interest, as well as that of your employer, that the jury hearing your testimony would find you a person who is credible, sympathetic, and someone with whom they can relate to as a human beings.

Remember that “pauses” will not show up on a written transcript. Therefore, take time to think before you answer. If a question is unclear or you do not understand it, ask that it be repeated. If a question is really a compound question, I will object as to the form of the question, but in case I don't, please make sure you ask him to rephrase into two separate questions.

## **BASIC RULES FOR DEPOSITION WITNESSES**

### **1. Tell the truth**

You must always follow this rule. You should not interpret anything else to be at odds with this rule. You will undoubtedly be encountering questions that we have not covered here today. When that occurs, do not get upset. Focus on the question and, if you can, answer it. You may be asked if we met to prepare for the deposition. Tell the truth, and say we did, but do not reveal any of our conversations, because those conversations are attorney-client privileged. All lawyers know better than to ask about our conversations, but even if they ask, I will instruct you to not answer.

### **2. Listen to the question**

Concentrate on every word. Wait until you hear the last word of the question before you start your answer. If you listen closely to ordinary conversation, you will see that we cut one another off quite frequently - not to be rude but to keep the conversation moving. Listening is hard work. If you listen as you should, you will be tired at the end of the day.

### **3. Make sure you hear the question**

If the lawyer drops his voice or someone coughs and you miss a word or two, say that you did not hear the question, and ask them to repeat it. Do this even if you are almost certain that you know what the word is that you missed.

### **4. Make sure you understand the question**

Sometimes the question will be so long or so convoluted that you do not know what you are being asked except that it concerns subject "A". You may be tempted to answer by saying something about subject "A" in the hope that the lawyer will then go on to some other subject. Do not do that. Just say that you do not understand.

If you do not understand, do not help the other lawyer in asking the question. Do not say, "If you mean this, then my answer would be such and such; if you mean that, my answer would be so and so." You may very well give the other lawyer ideas that he never had himself. Every word in your answer could lead to a new question. Say only that you do not understand.

### **5. Answer the question**

After you have listened to, heard, and understood the question, then answer the question. Some lawyers say that if you are asked your name, you should give your name but not your address. Others say that 95 percent of the questions can be answered, "Yes," "No", "I don't know," or "I don't remember."

Those statements go too far but they make the point. Generally you should keep your answer short and to the point. Remember, every word in your answer could be the seed for a new question.

Always answer “Yes”, or “No”, not “Uh-huh” or “Uh-unh”, or nodding or shaking your head. The court reporter may misinterpret your answer.

Do not volunteer information. Be straight and precise with your answer. Once it’s been said, it can’t be unsaid. If you do not know or do not remember, say that. You do not get extra points by guessing. If you are pretty sure of the answer but not 100 percent certain, say that. It is fine to answer a question with “I don’t know the answer to that question”, or “I don’t remember exactly – it all happened such a long time ago.” It’s perfectly natural to forget minor details. Just don’t guess or make something up. Be careful of making absolute statements such as “Nothing else happened” unless you are 100% sure that the statement is correct. If it is a time or distance question, and you aren’t sure, tell them that. If they ask you to approximate, make sure that you preface your answer with “I don’t know exactly, but the time was between 8:30 and 9:00.” Only answer a question with facts from your personal knowledge – what you yourself saw or heard – not what somebody else told you.

What you learned in taking tests in high school or college applies here. Answer the question you are asked. If the question begins “Who,” your answer should be a name; if “Where,” a place; if “When,” a date or time; and so on. If you do not know or remember, say that and then keep quiet. Do not volunteer a reference to a document, such as, “I don’t know; I would have to check my desk calendar.”

You may be asked the same question later in the deposition, but phrased in different words. Be consistent with your answers.

You do not get extra points for giving perfectly clear and complete answers. Normally if there is some ambiguity in your answer, that will be a problem for the opposing party, not for you.

Sometimes, after you give your answer there will be a silence. The other lawyer may be thinking how to word his next question. Silences sometimes make the witness uncomfortable. You may be tempted to fill the silence with words, or volunteer information. Do not do that. Keep quiet and wait for the next question.

If a question irritates you or makes you angry, resist the temptation to argue with the other lawyer. If you get into an argument with a lawyer, you will lose. It is not a personal attack, but be careful of the lawyer baiting you into losing your temper. Stay cool and collected. Just give whatever facts you know responsive to the question and then keep quiet. If you feel like you are losing control or your temper, ask me to take a break. Just make sure you answer the question that’s on the table.

If you are asked a question that requires a long answer, give it. Use your common sense. If you are in doubt, keep your answer short, or ask the other lawyer to break down the question into subparts. Do not make speeches. Remember that every word you say is another target for opposing counsel.

In dealing with the other lawyer, your manner should be courteous and open, but mentally you should be on guard at all times. Even if something is said “off the record,” the other lawyer can ask you about it when you are back on the record.

I may object to certain questions. When you hear my voice – **STOP TALKING!** Try not to be distracted by my objection. Listen to the objection. It may point out some hidden trap in the question. I may just be interrupting opposing counsel’s rhythm. The objection is also a reminder to you to keep concentrating.

I may go further and instruct you not to answer the question. If I do, follow my instruction. I may get into trouble with the court if I am wrong, but you will not.

#### **6. Stick to *truthful* answers**

You may hear the same question more than once. If your original answer was accurate, stick to it. The fact that the other lawyer keeps coming back to the question does not mean that you are answering incorrectly. You must give the facts as you know them. If you gave the facts right the first time, stick to your answer.

Of course, the other lawyer is an experienced and skillful questioner, and through his questions he may try to create doubt in your mind even about facts that you know very well. Take this example - which has nothing to do with any case. Suppose he shows you a coffee cup and asks you what it is. You say a coffee cup. He then pauses, gazes at the cup, and lets you squirm. Then, after letting you wonder what he knows that you don't, he leans forward and says, “Now, Mr. Witness, is it your testimony here today--under oath--that this is a coffee cup? Do you really mean to say that?” There is a natural tendency to back off and say, “Well, I thought it was a coffee cup.” That small change in your testimony may be crucial. Suppose a witness says the first time that he had the green light and then says that he thought he had it. That would be a devastating change. So if your answer was true, stick to it and say, “Yes, it is a coffee cup.” What does the other lawyer do then? He will go on to another subject quickly when he sees that you cannot be shaken.

Of course, if you realize that your earlier answer was in error or incomplete, you should correct or supplement it. Obviously, you should not say that an earlier answer is true if you become aware that it is not.

Follow these suggestions, don’t be in a hurry to answer, and you will be a good witness