

TRIAL WITNESS PREPARATION

Because you are scheduled to give witness testimony in the upcoming trial, below is some general information about preparing for your testimony:

- You may have already given a deposition in this case. It is important that you thoroughly review the transcript, and be intimately familiar with your prior testimony. You also need to review the exhibits attached, if any, because you will probably be asked about them again at trial. Remember, you will be sworn in as a witness at trial to tell the whole truth. It is important that you, as a witness, be certain of your answers, not volunteer information and not speculate on matters about which you has no information. In view of the fact that you will be in front of a jury, it is also important that there be as little hostility and emotion displayed as possible. The jury will be judging your demeanor to determine your credibility and trustworthiness.

- In the event that you were to testify at trial in any way that was different from your testimony during your deposition, opposing counsel 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 they are generally inclined not to believe a witness that changes his or her story.

- It is understandable that you will be nervous, and the judge and jury will understand it as well. Testifying in court before all of those people is not something you do every day. However, if you are testifying truthfully and consistently with your deposition, you have nothing to worry about. Also, remember I will be there to protect you by objecting in case opposing counsel starts getting aggressive or belligerent. I will be listening to each and every question that you are asked. If any of them are improper, I will object. It may be that there are none. I do not want you to misconstrue my silence as a failure to protect your interests. It is important that you make certain that opposing counsel has completely finished her question before you respond. This avoids the possibility of an erroneous answer to a question. For example, if she asks “Are you alive or are you dead?”, and you answer before hearing the second part of the question and you answer “yes,” 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 I can interpose an objection before you answer the question.

- Next, I want to give you some information that will assist you in knowing what opposing counsel is attempting to do while she is asking you questions. She may ask you “was there anything else?” or “is that everything you remember?” She is forcing you to commit yourself to a position that you cannot amend without risking impeachment.

- She may ask leading questions. A leading question is one that is really just a statement of fact which only asks the witness to agree or disagree. She is going to be asking you things to which she wants a “yes” answer. She is going to try to put words in your mouth through this process. If any part of her leading question is incorrect, do not answer yes and make it clear by your answer that you cannot entirely agree with the statement she has made. She will probably ask you why, restate it including the correct fact, and again ask you to agree or disagree. Make sure it’s correct before you agree.

- She will always try to elicit responsive answers from you. In other words, she is going to want a clear “yes” or “no.” She may ask you the question in several different ways to get a response she likes. She will want to know everything that you remember. Additionally, she is going to be watchful for prior inconsistent statements from your deposition. If you do testify differently than your deposition, it is not the end of the world. You can qualify it by saying something like “My deposition was taken three years ago, and I didn’t remember that fact.”

- 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 the agency/university you represent, 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 being.

- Remember to 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 double question, I will object, but feel free to comment that there are really two questions. It is the same with compound questions. I will object as to the form of the question, but in case I don’t, make sure you ask her to rephrase into two separate questions.

BASIC RULES FOR 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 asked some questions that we have not covered here in witness prep. 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 trial. Tell the truth, and say we did, but do not reveal any of our conversations, because those conversations are lawyer-client privileged.

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, it will tire you out.

3. Make sure you hear the question

If the lawyer drops her 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 word you've 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 opposing counsel 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 opposing counsel 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 opposing counsel ideas that she 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 jury and 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 what 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 cross-examination, 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 opposing counsel, not for you.

Sometimes, after you give your answer there will be a silence. Opposing counsel may be thinking how to word her 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 opposing counsel. If you get into an argument with a lawyer, you will lose. It is not a personal attack, but be careful of opposing counsel 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 of your emotions or your temper, take a long drink of water, and take a deep breath. 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 opposing counsel to break down the question into subparts. Do not make speeches. Remember that every word you say is another target for opposing counsel for follow-up questions.

In dealing with opposing counsel, your manner should be courteous and open, but mentally you should be on guard at all times. Even if you said something “off the record” (which you should never do), 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 my objection. It may point out some hidden trap in the question. The objection is also a reminder to you to keep concentrating.

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 opposing counsel keeps coming back to the question does not mean that you are not answering properly. You must give the facts as you know them. If you gave them right the first time, stick to your answer.

Of course, opposing counsel is an experienced and skillful questioner, and through her questions she may try to create doubt in your mind even about facts that you know very well. Take an easy example which has nothing to do with this case. Suppose she shows you a coffee cup and asks you what it is. You say a coffee cup. She then pauses, gazes at the cup, and lets you squirm. Then, after letting you wonder what she knows that you don't, she 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 she had made the green light, and then changes it to she thought she 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 opposing counsel do then? She will go on to another subject quickly when she sees that you cannot be shaken.

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

Follow these suggestions, don't be in a hurry to answer, and you will be a good witness. My job is to get you on and off of the witness stand in as short a time as possible.