



DEPOSITION PREPARATION GUIDE

I. DESCRIPTION OF A DEPOSITION

A deposition is your oral testimony taken under oath by a court reporter in response to questions by other attorneys, and in some cases, by an attorney representing you. The testimony is transcribed after the deposition is concluded and is available for use by either side for summary judgment or trial. A judge or jury is not present during the deposition; only the lawyers, the witness, the court reporter, and a representative of each party usually attend. In all likelihood, the proceedings will be held in one of the attorneys' offices or in a court reporter's office.

II. PURPOSE OF A DEPOSITION

The opposing side is taking your deposition for several reasons:

(a) They want to ascertain what facts you know concerning the issues in the lawsuit. They are interested in knowing now the contents of your trial testimony.

(b) They want to document a specific story on record so that you will have to tell the same story at trial. This eliminates surprises and any unexpected new information so it is important to remain truthful for consistency.

(c) They hope to catch you in any type of misstatement so that they can show at the trial that you are not a truthful person and, therefore, that your testimony should not be believed on any of the points, particularly the crucial ones.

(d) They want to look at you, observe your manner of answering questions, and form an idea of the type of witness you will be in court. This last consideration is the most important, for the lawyer is really trying to determine the probable effect your testimony will have on the jury. Lawyers are discouraged when opposing witnesses are confident, informed, solid, and apparently unshakable.

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III. DRESS AND APPEARANCE

Your appearance is very important. The opposing party, judge and jury's first impression of you will be based on your appearance and your attire. Attire: Please dress in a conservative, business-appropriate manner.

IV. SUGGESTIONS FOR TESTIFYING AND PITFALLS TO AVOID

A. Tell The Truth.

The truth, whether in the deposition or on the witness stand at trial, will never really hurt a litigant. A lawyer may successfully "defend or explain" the truth, but there is no defending or explaining why a witness lied or concealed the truth. In the eyes of the judge or jury, untruth devastates the credibility of a witness.

B. Just Give the Facts.

Remember that you have no purpose to serve other than to give the facts as you know them. A deposition is not a trial and you are not obligated to persuade the other attorney of the merits of your position or to state your case in full.

C. Never State Facts That are Beyond Your Knowledge.

If you do not know an answer to a question, even though you think you may appear uninformed or evasive by stating that you do not know, you should nevertheless admit your lack of knowledge. "I guess," "Possibly," "Probably," "Maybe," "The odds are that...", "I have no reason to doubt...", and similar answers are generally the wrong answers from which your opponents can show that you either do not know what you're talking about or that you're deliberately misstating. If you recall, state your recollection. If you do not recall, say "I do not recall at this time". Provide no explanation of your failure to recall and offer no further assistance to the examiner.

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D. Never Attempt to Explain Your Answer.

You are there to give the facts as you know them, and if a proper question is asked, you may be required to elaborate on your answer. However, you are not supposed to apologize for or attempt to justify those facts. Simply state the facts required to answer the question you were asked and then stop.

E. You Should Give Only the Information That You Have Readily at Hand.

If you do not know certain information, do not attempt to give it. Do not turn to anyone in the room and ask for information. Do not promise more information and do not promise to look up something in the future. Do not voluntarily testify about the existence of documents possibly unknown to your opponent. Also, if you do not know an answer but you know the person who does know the answer, do not tell the examiner unless they ask. Make the lawyer ask follow-up questions. Do not give the lawyer a break.

F. Do Not Use Documents During Your Depositions.

The purpose of a deposition is to find out the facts to which you can testify either of your own knowledge without documents or with the help of documents properly placed before you and identified on the record. Depositions are not a vehicle for the spontaneous production of documents. Accordingly, do not reach into your pocket or briefcase for notes or memoranda, produce any documents (particularly ones I have not seen), ask me to produce documents you have furnished me, or refer to any documents in any way in answering any questions unless the documents is presented to you by the other side and approved by me.

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G. Do Not Answer a Question Which Calls For a Simple “Yes” Or “No” Reply With a Statement That Invites Further Probing.

For example, you may be asked “Did you speak with Mr. Smith last week?” If you answer “No, I didn’t speak with him last week,” you are actually saying “I spoke with him but not last week.” Opposing counsel surely will continue questions concerning conversations with Mr. Smith. An answer of “No” is more likely to prevent further questioning.

H. Do Not Let the Opposing Attorney Get You Angry or Excited.

Attorneys sometimes try to get a deponent mad hoping that they will say things that may be used against them. Under no circumstances should you argue with the opposing attorney. Give the opposing attorney only the information that you have. That is all to which they are entitled. Try to give them the information in a courteous and unemotional tone of voice and manner.

I. If I Begin to Speak for Any Reason, Stop Your Testimony Immediately.

Do not speak again until I have completely finished speaking and listen carefully to what I say. If I object to a question, do not answer the question unless I instruct you to do so. If I instruct you not to answer, you should refuse to do so, of course.

J. You May Take Your Time Answering a Question.

You should avoid being drawn into a series of rapid fire questions and answers by the other side. Remember that the opposing counsel is attempting to encourage you to “blurt out” answers before you have time to think or I have time to object. Resist the temptation. TAKE YOUR TIME!



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K. Wait Until the Question Is Completed Before Beginning Your Answer.

(1) Although you may anticipate the balance of the question, you may guess incorrectly, and as a result, answer incorrectly.

(2) I may want to object to the question. My objection is lost if you answer too quickly.

(3) In order to accurately transcribe your testimony, the court reporter must hear the complete question and answer. The reporter cannot accurately capture the words with two persons talking simultaneously.

(4) You should think about both the question and your answer before you give your answer. Obviously, if you answer before the question is complete, you have not thought about the question. This is dangerous.

L. You Are Not Required to Give Information That You Learn in a Conference With Your Attorney.

If you are asked a question that would require you to give such information, simply state that your answer would have to be based upon information learned from your attorneys and I will make an appropriate objection, instructing you not to answer.

M. Freely Admit Discussing With Counsel Your Probable Deposition Testimony.

Discussions between a client and an attorney concerning the facts in issue occur in every case; consultation is entirely proper and expected. Freely admit your preparation.

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N. Be Very Careful About Estimating Time or Distance (Or Anything Else).

Most people have difficulty with estimates. Examiners love for their witnesses to estimate. After an estimate you can expect a series of irritating questions attempting to require you to narrow the range of your estimates. Obviously, that is a trap into which you should not fall.

O. Do Not Try to Decide Before You Answer Whether a Truthful Answer Will Help or Hinder Your Case.

Answer truthfully. Your answer should not vary because of the effect you believe the answer will have on the case. The witness stand is a relatively poor place to make hurried judgments about the legal consequences of testimony. Avoid the temptation to adjust your answer in accordance with its possible consequences.

P. Resist The Temptation to Give Your Side of The Case In Its Entirety During Deposition.

After each question, consider the scope of the question and answer only the question you are asked. You need not elaborate, explain, or justify your answer. Make the opposing counsel work for every bit of information you give them. Do not give an answer not required by the scope of the question.

Q. Remember That Your Recollection Has Faded With Respect to Many of the Issues In This Litigation.

Never say “my memory is bad,” “I’m not good at remembering names,” or anything similar. You do not owe anyone an apology or explanation for not remembering. Simply state “I do not recall at this time” and stop.

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R. Watch Out For Leading Questions.

For example, questions like “Is it not true that...” or “Is it not more like...” are leading questions. The opposing lawyer is trying to either characterize your testimony by using terms favorable to their case or require a short answer to a question garnished with words that are argumentative or “loaded.” If you have given a satisfactory answer, stick with it. You do not need to accept opposing counsel’s characterizations or limit yourself to their vocabulary.

S. Your Knowledge Necessarily Includes Hearsay.

The other lawyer may ask about hearsay during a deposition. In answering their questions, clearly distinguish between facts that are a matter of personal knowledge to you (things seen, heard, done, or spoken yourself) and matters that you know because you have been told them by someone else. This is an important distinction.

T. Never Joke During a Deposition.

Humor is not apparent on the typed transcript and you may look crude or cavalier about the truth. Avoid flippancy. Never use profanity—not even “hell” or “damn.” Never use racist, sexist, ethnic, religious, or other slurs. A deposition is serious business and requires complete focus.

U. Before, During, And After Mediation, Do Not Chat With The Opponents or The Opposing Party.

Remember, the other attorney and the opposing parties are not your “friend” for purposes of this case. Do not let their friendly manner cause you to drop your guard.

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V. If You Are Handed a Document By Opposing Counsel And Asked a Question About It, Make Sure You Read the Document Before You Answer the Question.

Do not be concerned or nervous if the document is lengthy and requires five, ten, or fifteen minutes to read. Read it carefully in its entirety. Even if you think you recall the contents of the document, read it carefully in its entirety.

W. If You Do Not Understand the Question, Insist That the Opposing Counsel Rephrase It.

If you are unsure of the question, you should state such.

V. DO NOT DISCUSS YOUR CASE WITH THE OPPOSING PARTY

Remember, the other attorney and the opposing party(ies) are not your “friend” for purposes of this case. Do not let their friendly manner cause you to drop your guard. Under no circumstances should you discuss your case with the opposing attorney or speak to me about your case while anyone else is present. If there is something you wish to discuss, ask me to speak with you in private, so I can discuss such with you.

VI. RESIST THE TEMPTATION TO GIVE YOUR SIDE OF THE CASE

The time to present your case will come later—in a forum much more receptive than a deposition taken by opposing counsel. You need not elaborate, explain, or justify any facts or allegations made during your deposition. You can discuss them with me in private.