

PREPARING FOR YOUR DEPOSITION

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Dear Client, your deposition has been scheduled to take place in the near future. The following explains the purpose of a deposition, an overview of the deposition procedure, how best to conduct yourself at the deposition, and strategies for answering questions. Please read this material before your pre-deposition meeting with your lawyer. The lawyer will answer any questions you have about the deposition and this lawsuit at that time.

What is a Deposition?

A deposition is part of the discovery process in a lawsuit. It is the examination of a witness under oath, outside the courtroom, with the witness's testimony being recorded by a certified court reporter. The purpose of the deposition is to allow the lawyers for the parties in a lawsuit an opportunity to learn what a witness knows about the facts and issues pertinent to the lawsuit. With certain exceptions, lawyers may take the deposition of any person whom they believe has knowledge pertinent to the issues in the lawsuit.

The depositions are sometimes taken to simply learn what a witness knows. They may also be taken to preserve a witness's testimony if there is some reason to believe the witness may not be available when the case goes to trial. In such cases, the recorded testimony, or transcript, may be used at trial as if the witness is testifying in person. Lawyers at trial may also use the deposition transcript to show inconsistencies in a witness's testimony.

The Deposition Setting

The deposition will take place outside the courtroom, most likely in a conference room in a law office. The court reporter will sit near you so that he or she can see and hear you clearly while you testify. Your lawyer will sit next to you, and the opposing counsel, or the lawyer taking your deposition, will generally sit across from you. In most cases only these people will be present at your deposition. However, it is permissible for parties in a lawsuit to be present at all depositions; therefore, it is possible, though unlikely, that one or more of the parties to the lawsuit will be present at your deposition. In addition, if there are parties represented by different lawyers in the lawsuit, those other lawyers may be present, and will also be permitted to ask you questions.

The Court Reporter

Your testimony will be recorded by a certified shorthand reporter, or court reporter, who will sit before a small machine and type in shorthand all of the questions and all of your answers. When your deposition has concluded the court reporter will transcribe the shorthand notes into a bound booklet, which constitutes the transcript of the deposition. A few weeks after your deposition you will be provided a transcript with instructions to review it carefully and bring to your lawyer's attention any mistakes you notice. In some cases your lawyer may ask you to make corrections to the transcript to ensure its accuracy.

Occasionally depositions are videotaped. In such cases the court reporter will still make a shorthand recording of the proceeding, and there will be a videographer present who will operate a camera to record

the proceeding on videotape. Except for some minor technical requirements handled by the videographer, the deposition procedure is the same in all other respects.

Should I Prepare for My Deposition?

A deposition requires intense concentration and can be extremely tiring for witnesses. You should avoid the use of alcohol and drugs and be sure to get a good night's sleep before your deposition. Otherwise, you should not do anything to prepare for your deposition unless your lawyer asks you to. In particular, do not take it upon yourself to do research or review documents in preparation for your deposition without first discussing it with your lawyer.

Dressing for the Deposition

You should come to the deposition dressed as you would if you were testifying in court. If you are a professional you should wear business attire. If you don't normally wear a suit and tie you should dress in nice casual clothing. Remember the opposing counsel is attempting to "size you up" as a witness, and you should try to give the best impression possible. If you have any questions about how to dress for your deposition ask your lawyer.

Your Conduct at the Deposition

You should make every attempt to conduct yourself in a professional manner at your deposition, both while you are under oath and while you are anywhere where you can be seen or heard by opposing counsel or other parties at the deposition. You should do your best to avoid any displays of anger or frustration toward opposing counsel or other attendees, and you should not speak to opposing counsel about the case off the record, outside the deposition room, or in any casual manner. It is best to confine your comments to the answers you are required to give while under oath during the deposition.

The opposing lawyer will be carefully watching your demeanor during the deposition to assess the affect you will have on the jury. He may attempt to rattle you or "get under your skin" to see how you react. Regardless of the tactics employed by the opposing lawyer, you should avoid being defensive or combative. If you "rise to the bait" he will have achieved his goal. Do your best to remain calm and poised, regardless of the nature of the questions or the manner in which they are asked. In most cases the opposing lawyer will be professional and courteous; however, if for any reason the opposing lawyer becomes abusive or otherwise acts inappropriately, your lawyer will stop the deposition and take appropriate action.

You are Testifying Under Oath

When the deposition begins you will be asked to raise your right hand and "...solemnly state that the evidence you shall give in this matter is the truth, the whole truth, and nothing but the truth, so help you God." This is the same oath that you would take if your testimony was being given in a courtroom, and it signifies that you are testifying under penalty of perjury. This simply means you are legally obligated to tell the truth. While it is extremely uncommon, it is theoretically possible for a witness to be convicted of perjury if it can be proven that they willfully lied while under oath at a deposition. As long as you testify truthfully there is no need to be concerned about perjury.

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Questions You Will Likely be Asked

Lawyers are permitted wide latitude in questioning witnesses at depositions. They are permitted to ask questions that not only are directly relevant to the lawsuit in which the deposition is given, but they may also ask questions that may *lead* to evidence that is relevant to the lawsuit. Therefore, the lawyers asking questions at a deposition can range far a field in their questioning, on the ground that their questions might elicit information that may lead them to other relevant information.

Generally the deposition will begin with the opposing lawyer asking you to state and spell your name for the record. From there the lawyer will advise you about the nature of the deposition, and of most the procedural ground rules lawyers refer to as “admonitions.” Many of the procedural instructions given here will be repeated by the opposing lawyer to insure the record reflects that you understood the “rules” and the importance of the deposition proceeding.

Thereafter the opposing lawyer will most likely ask questions about your personal history, including your education and work history. Depending on the nature of the case and the relevance of your education and work history to the issues, it may be some time before you are asked any questions that specifically relate to the issues in this lawsuit. However, as to every question you are asked at the deposition, listen closely and respond truthfully, carefully and deliberately.

You’re Making a Record

As stated above, the court reporter is recording your examination. The questions and your answers are recorded word for word. Therefore, it is important for the court reporter to hear all of your words. You must speak clearly and audibly at all times during the deposition. You may not answer with a shake of the head or a nod to indicate disagreement or assent. Likewise, you should not answer a question with an “uh-huh” or any of the other non-verbal utterances we use in normal conversation.

Additionally, the court reporter can only record one voice at a time. Therefore, wait until the opposing lawyer has completely asked his question before you begin your response. Do not begin talking when anyone else in the room is talking, and if you begin talking and someone interrupts you, stop talking immediately and wait until you are asked to respond. Sometimes you will be interrupted by your own lawyer making an objection. Objections will be discussed below, but it is important for you to allow your lawyer to make the objection before you give your response.

If you refer to something in a document or to an object in the room during your deposition you should describe what you are referring to, rather than pointing to it and saying “this” or “that”. The transcript will give no indication of the object you are referring to unless you describe it in words.

“On the Record”

Once the deposition begins we will be “on the record.” As stated above, the court reporter is obligated to record everything said in the deposition room while we are “on the record.” While in the deposition room there will be times when we are “off the record.” During these times the court reporter will not be recording; however, you cannot tell the court reporter to go off the record, and you may not know when we are off the record or on the record. Only the lawyer taking the deposition is permitted to ask the court reporter to go off the record. Therefore, be careful about what you say in the deposition room, because it may end up in the transcript. To avoid any confusion or embarrassing statements in the transcript it is best

to assume that anything you say in the deposition room will end up in the transcript. If you want to speak with your lawyer off the record, you should indicate that you would like to talk outside, and your lawyer will ask to go off the record. You can then leave the deposition room and speak with your lawyer in private, outside the hearing of the court reporter and the opposing lawyer.

Likewise, do not make jokes or use profanity in the deposition room, as these may be embarrassing inclusions in your deposition transcript, which could be brought up by the opposing lawyer at trial.

Objections

During most depositions lawyer will make objections. Lawyers are required to object to questions they believe are improper in order to preserve the objection for a time when a judge will be present to rule on it. Since there is no judge present at the deposition, objections are simply stated for the record, and the deposition continues. The exception is if your lawyer makes an objection and then instructs you not to answer the question. If this happens, follow your lawyer's instruction and don't answer the question.

There are many objections lawyers can make during a deposition, and some are made more frequently than others. Your lawyer's objections may be a cue that the question is problematic for one or more reasons. For instance, a common objection is "vague and ambiguous." If your lawyer makes this objection it may alert you to something about the question that needs clarification. If so, you can ask that the question be rephrased to enable you to answer it.

If your lawyer makes no objections, or makes very few objections, it simply means the questions are proper and that no legal objection applies.

What if I don't understand the Question?

Never answer a question you don't understand. A question may be difficult or impossible for you to answer for a number of reasons. For example, a question may contain a term or word that is unfamiliar to you, the question may use vague or ambiguous words or terms that are subject to different meanings, the question may be long and confusing, or you may not hear the question correctly. Whatever the reason, never answer a question you don't understand. You are not required to answer such questions, and it is not appropriate for you to answer such questions. Don't hesitate to request that a question be restated or rephrased to allow you to answer it. However, be prepared to explain why the question is difficult for you to answer in the way it was originally asked.

If you ask for the question to be restated or rephrased, the opposing lawyer may repeat it, ask the court reporter to read it back, or simply ask a new question. Whatever the case, be sure to listen carefully to the question and make sure that it is one you can answer. If the lawyer rephrases the question and it is still difficult or impossible for you to answer, don't answer the question and again ask that it be rephrased. Once again, *never* answer a question you don't understand.

How Long Will the Deposition Last?

The length of each deposition depends upon a variety of factors, including the nature of the lawsuit, the nature of the witness's testimony, the deposition style of the opposing counsel, and the quantity and nature of documents that are discussed during the deposition. Most depositions last less than a day, but it is common for depositions to recess at the end of the first day and resume on a later day for conclusion. Your

lawyer may be able to give you an estimate of the length of your deposition based upon your role in the lawsuit.

What If I Need to Take a Break?

Breaks are generally taken once an hour during depositions, with a lunch break taken around the noon hour, if the deposition will continue into the afternoon. If you need more frequent breaks you are entitled to them, and you should simply ask your lawyer. You are entitled to take a break for any reason you wish, including to discuss something with your lawyer. This will be discussed in more detail below; however, do not hesitate to ask for a break if you are distracted by hunger, thirst, the need to use the restroom, or even the need to call your office. It is more important that you are able to devote your full attention to the questions and your answers than to shorten the duration of the deposition by a break or two.

What if I Want to Talk to my Lawyer?

You are entitled to talk to your lawyer at anytime during a deposition. If you wish to do so, tell your lawyer you would like to speak with him or her outside the room. The lawyer will indicate that the proceedings should be halted briefly, and will leave the room with you to speak with you in private. You should always ask to speak with your lawyer before answering a question that elicits incriminating testimony. In addition, you should ask to speak with your lawyer if a question would require you to reveal privileged information that you have received from a lawyer. You should ask to speak with your lawyer at any time you feel hesitant to answer a question, either because it requires you to divulge sensitive or private information, or because you simply aren't sure how to answer.

What if I Make a Mistake During my Deposition?

If during the deposition you realize an answer you gave earlier is wrong, or that it simply needs clarification, tell your lawyer in private at the first break. If the deposition will conclude before another break is taken, tell your lawyer you wish to have a discussion in private. Your lawyer will decide whether to have you correct your testimony before the deposition concludes, and will explain how to do that.

As stated above, you will also have an opportunity to correct mistakes in your testimony after you receive the transcript. However, if you testify at trial, other lawyers are permitted to draw attention to such corrections and, if they are significant, they may detract from your credibility. This is one more reason for you to listen carefully to the questions and give your best testimony in response.

Always Wait for a Question.

Never offer information during your deposition that is not in direct response to a pending question. Do **NOT** attempt to educate the opposing lawyer, or "tell your story," because you don't think are being asked the right questions. If the opposing lawyer does not ask the right questions, he is not entitled to the information. It is in your best interest if there are gaps in the story, because the opposing lawyer will be hindered in his trial preparation.

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What if I Become Upset or Get Tired?

Depending on the nature of your testimony, it is possible that a line of questioning may upset you, or make you angry. If so, and particularly if it interferes with your ability to concentrate on the questions, tell your lawyer you would like to take a break.

Similarly, if you get tired during the deposition, such that it interferes with your level of concentration, tell your lawyer you would like to take a break. Your lawyer will determine whether the deposition should be recessed for the day.

Don't Answer Questions Not Asked.

Limit your answers to the specific question asked. Be as brief and concise as possible when answering questions. If the question can be answered with a "yes" or "no," do so. Do not anticipate the next question and provide an answer to it; you might not be asked that question. For example, the question, "Do you know what time you arrived here this morning?" Should elicit the response: "yes". You should not respond to that question by providing the time you arrived; you would only give that response if the question was, "what time did you arrive this morning?"

Take Your Time.

Don't feel the urge to answer questions quickly. There is no time limit for you to respond to questions, and unless the deposition is videotaped, the deposition transcript will not indicate how much time elapsed between the end of the question and the beginning of your answer. The best way to ensure a good record is to take your time in responding to questions. Listen to the question carefully, formulate your answer in your head, then give your answer verbally. Hasty responses can cause mistakes. It is much better to be slow and deliberate in giving your testimony. In addition, by slowing down your response time your lawyer will have a better opportunity to voice any objections she has to the question. If you respond too quickly to a question, your lawyer may have to interrupt you to make an objection on the record.

Always Follow Your Lawyer's Instructions During the Deposition.

Do not attempt to do your lawyer's job. Your lawyer knows the legal and evidentiary implications of your testimony, and may make decisions during the deposition that will require giving you instructions on the record. As stated above, your lawyer may instruct you not to answer a question. Always follow your lawyer's advice, and do not answer the question. The opposing lawyer may attempt to intimidate you by advising you a judge could find you in contempt of court if you don't answer the question. Don't pay attention to such comments; you cannot get into trouble by following your lawyer's instructions. *Always follow your lawyer's instructions at a deposition.*

Never Guess or Speculate in Response to a Question.

Only testify from your own knowledge. You *know* information if you have received it through one of your five senses. If you are asked a question that requires you to guess or assume facts, your answer should be "I don't know." Speculation is another form of guessing and it is strictly prohibited. Your lawyer will not allow you to answer questions that require you to speculate.

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The lawyer taking your deposition is entitled to an estimate in response to his questions, if you are able to give one. Generally estimates can be given when referring to dates, times, distances, quantities, and the like. An estimate differs from a guess in that you have some basis for giving the estimate. If you are estimating in response to a question, you should state that, and be sure that your estimate is not simply a “guess.” An example of the difference between a guess and an estimate is the following:

“If you were asked to state the length of your kitchen table, you could probably provide an estimate of its length, even if you have never measured it. However, if you were asked to state the length of the opposing counsel’s kitchen table, you would have to guess because you have never seen it.”

I Don’t Know and I Don’t Recall Are Acceptable Responses, If True.

If you don’t know the answer to a question, your response should be “I don’t know.” There may also be questions that you don’t *recall* the answer to, although you knew the answer in the past. Your response to such questions should be “I don’t recall.”

If either of those answers is the truth, it is the one you should give. Don’t worry about appearing ignorant or uncooperative by giving one of those responses. The worst thing you can do is to attempt to be helpful by responding to a question with a guess. You will most likely damage your credibility or be required to correct your testimony later.

Ask Questions and Frankly Discuss Your Concerns with Your Lawyer

Your lawyer will have a pre-deposition meeting with you. At that time, she will discuss the facts and important issues in the case. You will also be advised of the kinds of questions you will be asked by opposing counsel. At this meeting you should raise any concerns or questions you have pertaining to the case or your testimony. Additionally, if you have a criminal record, no matter how minor, you must inform your lawyer of this fact. Your lawyer will decide whether any action can or should be taken to maintain the confidentiality of this information. Remember that your lawyer can only do her job if she is informed with complete and accurate information. For that reason it is important that you be frank with your lawyer. Unfortunately, some witnesses have the attitude that, “the other side won’t find out, so I don’t need to tell my lawyer.” This assumption invariably proves wrong, sometimes with disastrous effects to the value of the lawsuit. If your lawyer knows all the facts, especially the damaging ones, he can formulate a strategy for dealing with them.