|  |
| --- |
|  |
| DEPOSITIONS |
| Client Guide |

The following advice for clients and witnesses is designed to provide an understanding of the operation and function of a deposition and assist in preparing to give deposition testimony. These are rules of general appli­cation only; you may be given specific directions, which are in addition - or even contrary - to these instruc­tions. You should not hesitate to ask any additional questions you may have.

**GENERAL INFORMATION**

A deposition, which consists of one or more attor­neys orally questioning a party or a witness, under oath, before a court reporter, is one of a number of devices utilized in the 'discovery' phase of litigation. The transcript of the deposition may be used at trial if the witness is not available; it may also be used at trial to attack or 'impeach' the credibility of a party or witness who does appear but gives a different account on the witness stand.

Given these limited purposes, your function at a deposition is, in most instances, purely defensive. You should give up any idea that you are going to convince the examiner of your account by telling the examiner all that you know, and, indeed, you should be aware that in most cases the examiner is seeking to obtain information, or knowledge of the source of information, which is contrary to your account. Similarly, you must also disregard the notion that you are going to score points in the deposi­tion, since, in most, if not all, circum­stances, your 'favorable' testimony will not be admissi­ble at trial.

At the same time, it is essential that you ade­quately prepare for the deposition since the transcript of the deposition may be used at trial not only to im­peach your testimony, but also to show that your memory has 'improved' during the passing of time between the taking of the deposition and at trial.

Finally, you should understand the role of your attorney at the deposition. In most cases, the attor­ney's objections at the deposition must be limited to those which relate to the form of the examiner's ques­tions or to questions which seek to discover 'privileged' information, such as attorney-client communications. The numerous other objections which may relate to the admis­sibility of your deposition testimony at trial must be made, and will be made, at the trial itself. Therefore, you should not be concerned at the limited participation of your counsel in the conduct of the deposition -- in fact, as a general rule, the less he is saying at the deposition, the better the deposition is going from your standpoint.

**INSTRUCTIONS**

1. Tell the truth.

2. Listen to the question. Understand the ques­tion. Do not be afraid to say that you do not understand the question.

3. Do not answer a question you do not understand. It is up to the examiner to frame intelligible questions; if he cannot do it, do not help him. Do not explain to the examiner that the question is incomprehensible be­cause he has misunderstood words of art in your business, trade or science. Do not help the examiner by saying "do you mean X" or "do you mean Y". You will be asked both of these questions.

4. Think about your answer before you respond to the question.

5. Do not be embarrassed about taking your time in answering. No judge or jury is present. The written transcript will not reflect how long you wait to answer. If the examining attorney comments on the record that you are taking a long time, say that you want to be sure that your answer is accurate and complete. Repeat this as many times as he makes the comment. Do not otherwise attempt to explain why it is taking you a long time to answer.

6. Your attorney may simply object for the record and then tell you to go ahead and answer the question. Or he may object and instruct you not to answer. Follow his instruction.

7. Answer the question accurately, but be as brief as possible. Respond only to the question asked and do not, under any circumstances, volunteer information. The examiner is entitled to an answer to the question which he asks and only to that question. You are not there to educate the examiner. Do not make a speech. Do not try to explain why you did or said something. Do not try to appear friendly and helpful. This is not a social occa­sion, and it is not a game. The examiner's interests are the exact opposite of yours; do not trust him for one second, charming though he may be.

8. In connection with answering questions:

a) do not make up an answer, even though you think that is what the answer probably is or ought to be;

b) do not guess; and

C) do not be afraid to say that you do not remember, if in fact you do not remember.

9. Do not argue with the examining attorney. Do not let him make you angry. Do not try to make him angry. If your attorney appears to be angry, that is not a signal for you to allow yourself to be angry.

10. Conversely, as already indicated, do not be beguiled by the examining attorney. Be polite, but not friendly.

11. When there is a silence - and this is very important - do not try to fill the silence. Answer the question. Then be quiet. Do not be embarrassed by the silence. Do not try to expand on your answer. Sit there for 40 minutes of silence if that is what it takes. Wait for the next question.

12. Speak distinctly and slowly in order that the stenographer can accurately transcribe your testimony.

13. Do not try to memorize your testimony.

14. Talk in full, complete sentences. Unless it is a simple question, the question should not be answered yes or no. Beware of questions with double negatives in them.

15. Be as specific or as vague as your memory allows, but do not be put in a position contrary to your true recollection. If you are asked when something occurred and you remember that it occurred on January 15, state on January 15. If, on the other hand, you cannot recall the exact date, state the approximate date.

16. Do not explain your thought process as to how you reached the answer to a question. In answering a question in which your answer depends on your recollec­tion of other facts not called for by the question, do not refer to those other facts in explaining how you can answer the question. In other words, if you are asked when a conversation with Jones occurred, and you recall that it had to be in December because you met Smith after Jones and that was in January, do not explain this thought process to the examiner.

17. In testifying on conversations, make it clear whether you are paraphrasing or quoting directly.

18. In answering questions calling for a complicated series of events or extensive conversations, summarize these where possible. The examiner, if he is doing his job properly, will ask for all the details. It is always possible, however, that the examiner will accept your summary and this is so much the better.

19. Never characterize your own testimony. "In all candor", "honestly", "I am doing the best I can", are out.

20. Avoid all adjectives and superlatives. I "never" or I "always" have a way of coming back to haunt you.

21. Do not testify as to what other people know unless you are asked specifically for such a statement.

22. You only know what you have seen or heard. Questions are often phrased "do you know". A question on deposition may legitimately call for something you do not know, but it must be so phrased. There is a difference between a question which asks do you know and a question which asks whether you have any information bearing on a particular subject.

23. Do not testify as to your state of mind unless you are specifically asked. In other words, if the question is: "Did you read that document?", the answer is: "Yes.", not "Yes, and I believe every word of it.".

24. Documents may be marked as exhibits at a deposition. If you are asked about a document, review it before testifying. Do not make any comments whatsoever about the document, except in answer to the question that elicits your testimony.

25. If information is in a document which is an exhibit, ask to see the document unless you are very certain of your answer.

26. If information is in a document which is not an exhibit at the deposition, answer the question if you can recall the answer. Do not tip off the examiner as to the existence of documents he does not know about. If you cannot answer the question without looking at a document which is not marked as an exhibit, you may simply answer the question by stating you do not recall. If you can answer the question, it should be done. After a witness states he does not recall a fact which the examiner believes he should have knowledge of, the examiner will ask if there is a document which can refresh his recollection.

27. Do not let the examiner put words in your mouth. Do not accept his characterization of time, distances, personalities, events, etc. Rephrase the question into a sentence of your own, using your own words.

28. Do not answer a compound question unless you are certain that you have all parts of it in your mind. It if is too complex to be held in your mind, it is too complex and ambiguous to answer.

29. Pay particular attention to the introductory clauses preceding the guts of the question. Leading questions are often preceded by statements which are either half-true or contain facts which you do not know to be true. Do not let the examiner put you in the position of adopting these half-truths or unknown facts on which he will then base further questions.

30. If you are hit with a flash of insight or recollection while testifying and this has not been previously discussed with your attorney, hold this to yourself, if possible, until you have had an opportunity to go over it with your attorney.

31. Use all recesses to follow your attorney to a place where both of you can confer in private.

32. If you are interrupted, let the examiner or other lawyer finish his interruption and then, firmly but courteously, state that you were interrupted, that you had not finished your answer to the previous question, and then answer that question.

33. If you are caught in an inconsistency, do not collapse. What will happen next will depend upon what questions are asked of you. State, if asked, what your present recollection is. State the reason for the incon­sistency, only if you are asked. Rehabilitation is done at trial.

34. Do not adopt an examiner's summary of your prior testimony.

35. Do not agree to supply any information or documents requested by the examiner. If a request is made for documents or information, the request is made to counsel. Counsel will either answer the request or will take the request under advisement.

36. If an objection is phrased to the question, listen to the objection very carefully. You may learn something about the question and how it should be handled from the objection.

37. Do not expect to testify without the other side scoring points. If the other side appears to you to be asking questions which call for answers that do not help your case, accept the fact that every law suit has two sides and sit back and take your punishment. Avoid the temptation to guess and/or to expand on your answer where the expansion is not called for.

38. Avoid any attempt at levity. You will be hauled over the coals as not taking your solemn oath seriously if you make jokes or wise cracks.

39. There is no such thing as 'off the record'. If you have any conversation with anybody in the deposition room, be prepared for questions on that conversation.

40. If the examiner appears totally confused about your business and its technical aspects, do not attempt to educate him.

41. Every witness makes mistakes in a deposition. Do not become upset if you find you have made one. If you realize you made a mistake during the deposition, the mistake should be corrected as soon as it is realized. Mistakes after a deposition may be corrected at the time you sign the transcript.

42. If you are asked whether you talked to anyone about your testimony, you should respond that you spoke to your attorney, if that is the case.

43. You should prepare for your testimony only with your attorney or under his direction. Do not, in the course of preparation, refer to any documents unless he knows about these documents. Any documents you refer to in the course of preparation for your testimony will probably be obtainable by the examiner. Under no circumstances -- **absolutely no circumstances** -- are you to bring any piece of paper into the examination room. Any pieces of paper which need to be brought into the examination room will be brought by your attorney. There is nothing more frightening to a lawyer than for his witness, in the middle of an examination,

to pull a piece of paper out of his pocket and say, "Oh, in order to be sure that I had all this right, I made myself some notes.".

44. If you are being examined as a director of a corporation and you are asked whether the directors considered a particular matter, think very carefully. Probably, in one way or another, one or more directors considered everything which might have been beneficial to the corporation. What they did about it, if anything, may be another matter.