

DEPOSITION

By law, the opposing attorney has a right to take your “deposition”. This means that you will be put under oath just as you would be in court, and a attorney will ask you questions relating to this case. The attorney=s questions and your answers will be taken down by a court reporter. Your attorney will also be present. No judge will be present. After the deposition, if one of the attorneys orders it, the court reporter will type the questions and answers. You, the opposing party, and the attorneys can buy copies. The original eventually may be filed with the court.

If the case goes to trial and your testimony at trial differs from your deposition testimony, the deposition can be used by opposing counsel to cross-examine you. Any part of your deposition or your spouse=s deposition can be read by opposing counsel at the final hearing. **Careful what you say.**

I will review your case with you before your deposition, but it is helpful for you to refresh your recollection before you meet with us. It is extremely important that you have everything in mind about the case at your deposition. Prior to your testimony, refresh your recollection by reading your notes about the case as well as the pleadings and notes provided. Do not memorize any statement you have given or anything that you are going to say in response to questions. You should simply visualize what happened and in your own words answer any question concerning it. You should prepare a list of questions or any concerns you have about responding to certain lines of inquiry and a list of questions that you want us to ask the opposition.

During your deposition, opposing counsel can ask you questions that are admissible in court under the rules of evidence. In addition, he or she can ask questions that may seem to be none of his or her business and would not be admissible in court. The legal allows any question that could lend to relevant material. The courts allow discovery in these depositions, and you may be asked for hearsay (something you heard another person say, but about which you have no direct knowledge) and other things that will enable the other side to make further investigations of the case. Because of the broad scope of discovery, do not be surprised if I do not object to questions that seem to be out of line. If the opposing attorney asks improper questions, I will object to the question. Only if I object to the question and instruct you not to answer it should you refuse to answer the question. Please do not refuse to answer any question unless I instruct you to do so.

The rules of procedure require the court reporter to submit a typed copy of your testimony for your review so that you can make corrections. You will be asked at the end of the deposition whether you waive that right. If you waive that right, then the transcript will remain

as typed. Usually I will announce whether or not you will be waiving your right to review and sign the deposition. **If, however, you are in doubt, do not waive that right.**

When the court reporter makes the transcript available to you, you may make changes in form or substance. You should be ready to provide your reasons for making changes.

Rarely will I ask you questions during your deposition. Because I may want an opportunity to discuss your testimony with you, I may save questions for the final hearing. If, however, it is advantageous to ask some leading questions, your answers should be very brief. Don't be disappointed if I don't ask any questions.

If you are a witness in this case (rather than a party), you must understand that neither attorney represents you. Counsel for the parties can make suggestions to you, but they cannot instruct you. It may be advisable for you to bring your own attorney.

Why Is My Deposition Being Taken

The opposition is taking your deposition for at least three reasons:

They want to ***find out what facts*** you have in your actual knowledge and possession regarding the issues in the case. In other words, they are interested in what your story is now and what it is going to be at trial.

They want to ***pin you down*** to a specific story so that you will have to tell the same story at trial.

They may hope to ***catch you in a lie*** to show at trial that you are not a truthful person and, therefore, that your testimony should not be believed, particularly on crucial points.

Your deposition also will assist the other side in evaluating this case for settlement purposes. This is often the first and only opportunity the opposition has to see you before the case comes to trial. You should answer the questions in an honest and straightforward manner so that the opposition will be impressed with the potential impact your honest and sincere testimony will have on the judge at trial.

If the facts to which you testify at the final hearing differ from the facts you give at the deposition, the opposing counsel can use that difference to undermine or impeach the believability of your testimony at the final hearing.

How to Behave at the Deposition

Tell the truth. Almost nothing you can admit to can be as damaging as being caught in a lie. In a lawsuit, as in all other matters, honesty is the best policy. A lie may lose the case. Telling the truth means more than refraining from telling a deliberate falsehood. It requires that a witness testify accurately about what he or she knows. If you tell the truth and tell it accurately, nobody can cross you up. It is important that you not be trapped into telling something that is not true.

Be straightforward in your answers. Respond to counsel's questions in an attentive and polite manner.

Do not try to anticipate whether your response will help or hinder your case. Answer each question truthfully. Your attorney can deal with the truth effectively, but he or she will be handicapped by any other kind of answer.

Listen to each question carefully and be sure that you understand it before answering. If you do not understand the question, ask the attorney to repeat the question or rephrase it so that you understand it. When you understand the question, answer it honestly and accurately. If you don't know the answer, say "I don't know" or "I don't remember." No one can remember everything. However, you should remember the important things and must give honest and accurate answers to these questions.

Listen to the question. Do not answer until you hear the entire question.

Hear the question. If the attorney lowers his or her voice or a noise in the room prevents you from hearing every word, ask to have that particular question repeated.

Understand the question. Before you attempt to give an answer, make sure that you understand the question. You can't possibly give a truthful and accurate answer unless you know what is being asked. If you don't understand, ask the attorney to repeat the question. The attorney may ask the court reporter to read the question aloud. Keep a lookout for a question with a double meaning or a question that assumes you have testified to a fact when you have not.

Make sure the question is exact. If you are not certain about the meaning of a word, do not be embarrassed. Ask the attorney to explain it.

Take your time. Pause after the question is asked before you answer it. Count one, two, and tap a finger on your knee under the table with each count. Give each question the thought it requires and formulate your answers carefully. Do not give a snap answer without thinking. Do not hurry. If you need a break, ask for one.

Take a break. Feel free to request a cup of coffee or tea, a cold drink of water, or whatever you need. *Do not hesitate to request a recess of the proceedings if you are tired or you need to use the restroom or to make an important telephone call.* If you must smoke, request a break.

Do not volunteer information. Listen carefully to each question and answer only what is asked. Do not ramble or elaborate. If opposing counsel wants an explanation, he or she must ask for one. If I want you to explain further, I will ask when it comes time for questions. What you volunteer will turn out to be harmful to you.

Don't worry about silence. Do not be tempted to fill the silence with words. Keep quiet and wait. They may be trying to manipulate you to fill the silence with the information they want.

Repetitious questions. You may hear the same question more than once. If your original answer was accurate, stick to it even if you are challenged. Don't let opposing counsel shake your confidence.

Speak slowly and clearly. Do not nod or shake your head in response to a question. Answer audibly. The court reporter must hear your answer in order to record it. If you point or motion, try to describe what you are pointing to or indicating. It is up to counsel to describe for the record what you are pointing to or indicating. Avoid "uhu" and "uhhu": they are difficult to tell apart and they will be confusing when read back in court.

Beware of compound questions. Answer only one question at a time. If you are confused by a complicated or multipart question, ask to have it repeated and clarified.

Don't look to me for assistance to answer. When you are being questioned, you must answer the question yourself. *Do not watch us for some "signal" for how to answer.* You may

be asked to sign an authorization to allow opposing counsel to obtain medical reports or be asked to submit to an examination by a doctor of the other attorney's choosing or to allow an inspection of papers or to furnish other information. Respond by saying that you will follow your attorney's recommendation.

Beware of questions involving distance and time. If you estimate something, make sure that everyone understands that it is your best effort to answer the question accurately. Think clearly about distances and intervals of time. Be sure your estimates are reasonable.

If counsel insists on an estimate. If you respond to a question with an estimate, make it clear that it is only an estimate.

Do not guess. If you do not know the answer, say so.

Limit your testimony. Testify only to facts within your knowledge and do not speculate about anything, unless specifically asked to do so.

Do not exaggerate.

Give only the information that is readily available to you. If you know an answer to a question, answer it. If you do not know certain information, do not try to answer. Do not turn to your counsel and ask him or her for the information, and do not ask another witness. Do not promise to get information that you do not have at hand unless we advise you to.

Do not search for documents. Do not reach into your pocket for a social security card or other document unless your counsel requests it. The purpose of a discover deposition is to elicit the facts that you know, not to produce documents. If the opposition is interested in obtaining documents from you, there are other legal procedures through which to obtain them. Do not ask your attorney to produce anything in his or her file, because similar rules apply.

Do not joke. Humor is not apparent on a transcript and may make you look crude or cavalier about the truth. This is serious business. If you joke, you may lower your guard. Then you make a mistake and the joke is on you.

Do not chat with the opposing attorneys. Remember, the opposing counsel is your legal enemy. Do not let his or her friendly manner cause you to drop your guard. They may be using this conversation as an underhanded discovery tool.

Do not make friends. Depositions are not social occasions. If the deposition becomes friendly, beware. They are probably trying to get you to lower your guard so you will talk more freely. You do not want to talk freely.

Off-the-record statements. Frequently attorneys will make an “off-the-record statement.” That means that the court reporter does not write down what is said. Be careful, however. This can be disarming. When the deposition resumes “on the record,” the attorney can question you about something that was said off the record.

Do not attempt to outwit opposing counsel. If opposing counsel is asking improper questions or harassing you, your attorney will protect you.

Do not argue with opposing counsel. Opposing counsel has a right to question you, and if you respond with smart talk or give evasive answers, opposing counsel may jump down your throat. Don’t answer a question with a question unless the question you are asked is not clear.

Do not lose your temper. No matter how hard you are pressed, maintain your composure. Lose your temper and you may lose the case. If the other attorney gets you mad, you are easier to fight.

If asked. . . Opposing counsel may ask if you have talked to your attorney about the facts about which you are testifying. Admit it. If we came to your deposition without discussing the facts about which you are testifying, we would both be idiots. If you are a party to the lawsuit and you are asked this question, we could object because of attorney-client privilege. You are expected to have talked with your attorney. A good attorney would not let you testify without first discussing the matter with you. If asked whether the attorney told you what to say, respond, “He told me to tell the truth!”

Don’t be afraid to answer under oath. Don’t let opposing counsel unnerve you by asking whether you are willing to swear to testify. If you were there and know what happened or didn’t happen, don’t hesitate to “swear” to it. You were “sworn” to tell the truth when you began the deposition.

If I make an objection. When I make an objection, wait for me to advise you whether to answer the question.

Your appearance. Dress modestly and conservatively. Be on time.

Your manner. Treat everyone at the deposition with respect.

Maintain your composure. Try not to become upset over the length or detail of the questions. Frequently such questions will provide insight into the approach your opponent's attorney plans to use at trial.

Correct and clarify. If your answer was wrong, correct it immediately or as soon as you realize you made an error.

Don't box yourself in. Don't say, "that's the whole conversation" or "nothing else happened." Say instead, "that's all I recall," or "that's all I remember now." It may be that after more thought or another question, you will remember something important.

Sinful words. "Always," "all," "never," and "ever" are sinful words. If you use these words in your deposition testimony, the law god will punish you. There is nothing so certain in this world, that these would be the proper words to describe it with in a deposition. It will blow up in your face, embarrass you, and aggravate me.

Documents. If you are shown documents, take your time to read them carefully and thoroughly. Look at the date, the author, the signature, the addressee, and to whom copies were sent.

Depositions are not fun. On the other hand, it will not kill you. To be entirely honest, the real danger is driving to and from a deposition. A good deposition is an easy deposition and the best way to give an easy deposition is to tell the truth.