

Depositions

Once you are involved in a lawsuit, you quickly realize that most TV court dramas are nothing like reality. The simple fact is that most cases settle long before a judge or jury even know the case existed. The idea is to posture your case so that it is more cost effective for the other side to settle now than to proceed to trial. One of the best posturing tools a lawyer has is a deposition. The purpose of this article is provide some tips on how to be an effective witness during a deposition. But first, here is an explanation of what a deposition is and how it works.

What is a deposition? A deposition is a formal legal proceeding in which the oral testimony of a witness is recorded under oath. Depositions are private. They usually occur in a lawyer's office. The people present are the lawyers, the parties, and a court reporter.

How does it work? First, you (the person giving the testimony) are sworn in. Then the lawyer taking the deposition proceeds to ask questions related to the case. You answer the questions. Sometimes a lawyer may interrupt with an objection. If that is your lawyer, he/she may instruct you not to answer a question. After the first lawyer has asked its questions, any other lawyers in the case gets to ask questions and clarify any problems.

What is the purpose of a deposition? There are a number of reasons to take depositions. First, it provides the parties a chance to discover facts they otherwise would not know. Once educated, both sides can approach settlement with a more realistic view. Second, depositions allow lawyers to evaluate the strength of a case and a witness's ability to testify. Although a witness may be telling the complete truth, due to the intimidating environment, he may sound unsure of himself. In contrast, a confident witness increases the strength of his testimony. Third, depositions can be used to record a person's testimony. If the person later changes his story, the lawyer can produce the record of the deposition and point out the inconsistency. Also, depositions can be used to record the testimony of someone who may die before trial or move far away.

With that foundation, here are some basic rules which every witness should follow:

1. Tell the truth. Remember that you are under oath just as if you were testifying at trial. Do not delay answering by trying to figure out whether your answers will help or hurt either side, just answer the questions to the best of your memory.
2. Listen to the entire question. Questions with traps often include half-truths, assumptions, or facts which you do not know to be true and facts of which you are unsure. Do not allow the examiner put you in the position of adopting half-truths or unknown facts.
3. Think before you speak. Give yourself a few seconds before answering each question. This allows your lawyer to make an objection, if necessary, and allows you to think through your answer.
4. Answer the question you are asked (and none other). The examiner is entitled to an answer to the question he asks, but only to that question. Do not provide the lawyer with extra information, just the information he requests. Do not attempt or expect your answer to persuade the examiner with your answer. Remember that your lawyer has the opportunity to ask you questions later.
5. Do not answer a question you do not understand. It is up to the examiner to ask good questions; if he cannot, do not help him. Do not help the examiner by saying "do you mean X or do you mean Y." (If you do, expect to be

asked both of these questions.) If you are confused by a question, simply ask the examiner to rephrase the question.

6. Speak in your own words. Don't try to memorize what you are going to say. Doing so will make your testimony sound "rehearsed" and unconvincing. Instead, prior to the deposition, get by yourself and go over in your mind those matters which you will be questioned.

7. Answer in complete sentences. Answers like "yeah" and "uh huh" are difficult for the court reporter to record. Feel free to make gestures, but remember they will not be recorded. Give positive, definite answers when at all possible. Avoid saying, "I think," "I believe," or "In my opinion."

8. Do not speculate or guess. You only know what you have seen or heard. Do not speak for other people. Do not be tricked into answering a question to which you do not know the answer. If you do not know or cannot recall something, say so in spite of the examiner's attempts to make you look stupid for not knowing something. Answer as specific or as vague as your memory allows. Likewise, avoid conclusions. Let the facts as you remember them speak for themselves.

9. When testifying about conversations, make it clear whether you are paraphrasing or quoting directly.

10. Do not characterize your own testimony. Saying "and this is the honest truth" is an indicator to lawyers that you are not. Besides, it sounds self serving.

11. Do not paint your self into a corner. Avoid superlatives like "Never" and "Always." Unless you are certain, don't say "That was all that was said." Instead say, "That's all I recall." It may be that after more thought or another question, you will remember something else.

12. Do not testify as to your "state of mind" unless you are specifically asked about it. For instance, if the question is: "Did you read that document?", the answer is: "Yes." Do not respond "Yes, and I believe every word in it."

13. Look it up. If information is in a document that is available, ask to see the document unless you are very certain of your answer. If information is in a document which is not available, answer the question only if you can recall the answer. Be careful not to tip off the examiner as to the existence of documents he does not know and has not asked about.

14. Do not let the examiner put words in your mouth. Do not accept his characterization of time, distances, personalities, or events. Rephrase the question into a sentence of your own, using your own words. Take your time when dealing with these kinds of details. Likewise, do not adopt the examiner's summary of your prior testimony.

15. Do not answer a "compound question" unless you are certain that you have all the parts of it in your mind. A compound question would be: "Did you run the red light and were you looking straight ahead?" Your best bet for a compound question is to request that the question to be rephrased.

16. Take a break. If you need a rest or have a question for your lawyer that you do not want the other side to know about, ask for a break. Also, if you are hit with a flash of insight or recollection while testifying and this has not been previously

discussed with your lawyer, hold this to yourself, if possible, until you have had an opportunity to go over it with your lawyer at a break.

17. If you are caught in an inconsistency, do not collapse. State your present answer to the question. Give your reason for the inconsistency only if you are asked. Let your lawyer worry about fixing the problem.

18. If you have finished your answer, remain quiet. Do not add to your answer because the examiner looks at you expectantly. If the examiner asks you if that is all you recollect, say yes, if that is the case. Lawyers use uncomfortable moments of silence to see if you will volunteer information.

19. Do not agree to supply any information or documents requested by the examiner. Let your lawyer worry about that. You can say, "I will do what my lawyer tells me to do."

20. If your lawyer objects to the question, listen to the objection very carefully. You may learn how you should answer the question. Generally speaking, you must answer all questions asked in a deposition. If you should not answer a question, your lawyer should make it very clear to you.

21. Remain calm. Never express anger or argue with the lawyer asking the questions. Your lawyer should speak for you if the deposition is getting out of hand. Always be courteous, even if the examiner appears discourteous. However, do not be a push over. If you are interrupted, let the examiner finish his interruption and then firmly but courteously state that you had not finished your answer to the previous question; then, answer that question.

22. Do not trust or attempt to become the friend of the examiner. If the examiner is being nice, remind yourself who is paying him/her.

23. Do not be surprised if the other side gets good information from your testimony. If the examiner is asking questions which call for answers that do not help your case, accept the fact that every lawsuit has two sides.

24. Avoid jokes. They are not funny on the record. Especially avoid sarcasm. Avoid even the mildest obscenity. Do not cuss. Avoid absolutely any ethnic slurs or references which could be considered derogatory.

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

26. Most witnesses makes some mistake or say something they regret at a deposition. Do not become upset if you do. If you realize you made a mistake during the deposition, correct it. Mistakes discovered after a deposition may be corrected when you sign the errata sheet to the transcript.

27. Dress to impress. At the time of the deposition, you should remember that this is probably the first opportunity that the opposition has to meet you. You will be judged by your honesty, frankness and possible "jury appeal." Therefore, you should appear on time, dressed as you would expect to dress if you were actually going to Court to appear before the jury. Remember that making a good impression is your goal.

28. If the examiner asks if you talked with anyone about the case, know that it is perfectly proper for you to have talked with your lawyer or family members before you testify. Knowing this respond truthfully to this question as you would any other. However, refrain from discussing the subject matter of conversations with your lawyer.

29. Review the court documentation- the lawsuit, answer and discovery responses. Be sure you understand the nature of your claim.

30. Some lawyers will attempt to make your position seem ridiculous in order to pressure you into making a concession. Hold the line.

This article is meant as general knowledge and not meant to substitute for legal advice on specific issues. If you have a question, please call Doug McClanahan at 861-0693.