Giving Testimony at a Deposition
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Whether a party to, or witness in, a legal action, you might find yourself with the obligation to be deposed. This article offers in easy-to-digest form detailed advice regarding how to prepare for and give testimony at a deposition.

The deposition, sometimes appropriately referred to as an "examination before trial," is an important component of the pretrial fact-finding process (often called "discovery"). The parties in a litigation are afforded an opportunity through their lawyers to question each other, and sometimes persons who are not named as parties in the lawsuit, about facts that might be relevant to the case. This discovery process helps the litigants prepare for possible motions, out-of-court settlement, or trial.

Depending upon the case, it might be a good idea to prepare for your deposition by reviewing in advance the pleadings (e.g., complaint, answer, reply), previous deposition testimony, motion papers, affidavits, correspondence, and/or other underlying documents relevant to the case. This brushing-up should clarify for you your posture in the lawsuit, refresh your recollection of facts and chronology, and make you a more confident and comfortable witness.

A certified shorthand reporter or stenographer will transcribe verbatim the examining lawyer’s questions, the witnesses' answers, and any additional discussions between counsel during the deposition. As witness, you generally will have the opportunity later to read and make honest corrections to the typed transcript before signing it. Counsel should have control over the conduct of the deposition, and you should follow your counsel's instructions. The nature of the proceedings may range from quite polite, even "friendly," to adversarial and contentious, depending upon the nature of the case and the participants. The following advice applies to all depositions.

CREDIBILITY AND DEMEANOR

– Dress appropriately. No jeans, shorts, tube tops.

– Tell the truth. It is your obligation to do so. You will be under oath, and it is a crime to give perjured testimony. The truth will come out eventually. You will only hurt yourself and your case by lying or shading the truth. If asked, you should acknowledge having prepared with counsel for your deposition -- that is the truth.

– Take the deposition seriously. Do not make jokes, use foul language, or be sarcastic. These techniques create harmful or misleading impressions when read from a transcript. Be business-like.

– Do not argue with the examining lawyer. If necessary, that is your lawyer's job, not yours. Just answer the questions truthfully, and maintain your composure. An excited witness tends to reason less effectively.

– Treat the examiner with respect, the same respect you would want if you were asking the questions. The transcript will reflect your attitude.

– Try to be yourself, consistent with the solemnity of the proceeding.

– Try not to be condescending. It is not good form and the examiner might know more than you think.
- Do not fidget: do not shuffle your feet, tap your hands, snap your fingers, or play with rubber bands or paper clips. The examiner might misconstrue this as a sign of nervousness or guilt.
- Do not make faces, gestures, or hand signals. Opposing counsel will have the written transcript reflect any inappropriate physical actions, which will not help your case.

FIELDING QUESTIONS PROPERLY
- Listen to the question carefully. Concentrate on every word.
- Let the examiner finish the entire question before you respond.
- Give your lawyer time to object before you respond, but do not pause for an inordinate amount of time after every question. Also, listen to your lawyer's objections. They might provide a clue as to how you should handle a question. As witness, you do not object or refuse to answer a question. If a question addresses a particularly sensitive area (e.g., a trade secret), tell your lawyer the problem before declining to respond. You should request a private talk with your lawyer only seldom, when truly necessary, and preferably when no question is pending. Opposing counsel will mention such conferences on the record, thereby casting doubt on the candor of your answers that follow. Also, do not look to your lawyer for approval of your answers during the deposition. You can speak later, during a break.
- Think about your answer before responding. Concentrate on the time period and other particulars of the question.
- If your answer would require you to disclose any communication you had with a lawyer, whether or not your current counsel, ask to consult before disclosing it. In general, such communications are privileged. You do not want to waive the attorney-client privilege by revealing the substance of any oral or written communication with your lawyers.
- Answer only the question asked -- nothing more, nothing less. Most questions are susceptible of relatively short answers. Do not volunteer information -- almost always, you will help your case by giving the minimum answer consistent with your obligation to tell the truth. Do not ramble. Try to organize your answers, make your point, and stop.
- Maintain your position consistently: do not let opposing counsel put words in your mouth or coerce factual concessions that are at odds with your understanding of the facts. If your first answer was correct, stick to it even if the examiner returns to the same subject later.
- Do not speculate or guess. In general, you only know what you saw, heard, or did. State only the facts, and avoid conjecture. If you believe something to be true and you have a factual basis for believing it, you may answer. But be careful and consider qualifying your response with "to the best of my knowledge," "it's my best recollection," or similar language.
- It is perfectly acceptable to say "I don't recall" if it is the truth. Examining counsel might find a way to refresh your recollection, or might ask to leave a space in the transcript for you to fill in later. Do not assist opposing counsel by revealing voluntarily that you would have to check your files or speak with someone to refresh your memory -- that is an invitation to further discovery.
- It is perfectly acceptable to say "I don't know" if it is the truth. But if you answer "I don't recall" or "I don't know" about information you ought to know or remember (e.g., To whom do you report?; Do you keep any files?; What are your job responsibilities?), you are going to have credibility problems, and that can infect the rest of your testimony.
– If you did not hear the question or any part of it, say so. Similarly, if a discussion between lawyers follows the question and you do not recall the question with complete accuracy, say so and ask to hear the question again. The examiner will repeat the question or have the reporter read it back.

– If you do not understand a question or any part of it, say so. It is important that you understand fully what it is you are responding to.

– Make sure your words alone convey the thoughts you intend to express. Gestures, inflections, tone, and non-verbal responses will not be recorded in the transcript.

– If you want to amend or supplement an answer, ask to consult with your lawyer or speak with your lawyer during a break. You will have an opportunity to clarify your testimony, if appropriate.

– There is nothing wrong with asking for a break. The participants take breaks at regular intervals. If you are tired, hungry, or thirsty, or need to use the restroom, speak with your lawyer privately. It is best to do this when no question is pending -- use your judgment.

MAKING A RECORD

– Speak clearly, in sentences, in a normal tone, and at a normal speed. Someone has to transcribe your testimony. Others have to read and understand it later on.

– Finish your answers. If the examiner interrupts before you finish, state that you have not finished your answer to the previous question and then do so.

– Nothing is "off the record." Even if not recorded by a stenographer, examining counsel may summarize your words on the record and ask you to confirm them. Moreover, you eventually might see your words repeated in an attorney's affidavit.

– Do not make notes during the deposition. The other side has the right to see your notes, and they may wind up as an exhibit to your testimony and provide the adversary with insight into what you deem significant.

– Do not take any documents with you into the deposition room (e.g., pocket calendars, diaries, notes), except as discussed in advance with your lawyer. They might wind up as exhibits to your testimony. Your lawyer should have had an opportunity to review in advance any documents responsive to the adversary's request.

– Only the record counts, but a solid performance can help your case. Unlike testimony at trial, there is no trier of fact to observe your demeanor and assess your credibility (absent video-taping, which occurs in some cases, and which your lawyer will discuss with you in advance if planned for your case). All that remains is a written transcript. Therefore, making a good record is the primary objective. However, everyone in the room will be assessing your credibility, your performance as a witness, and the likely impact on the outcome of the case. A solid performance could lead to an earlier or more favorable settlement.

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