

PREPARING FOR THE DEPOSITION - TIPS FOR WITNESSES

1. Tell the truth. Not just because it is the right thing to do, but also because it's the smart thing to do. You will also need to divorce what you have come to learn through the litigation or post-event processes from what you knew on the day you are being questioned about at the deposition. Finally, exaggeration or overplaying your injuries or grief will not help your case.

2. Don't be too nervous, but don't be too relaxed. A little anxiety is to be expected and is probably a good sign that your adrenaline is flowing and keeping you alert. There is no need, however, to be overly nervous. You are simply answering questions concerning your knowledge and information about the matter in dispute. At the same time, do not get too relaxed. A deposition has the appearance of a normal conversation, but it is *not*. It is a formal procedure with potentially serious consequences.

3. Think before you speak. Make sure the questioner has finished the question and pause briefly before answering. This allows counsel to formulate objections and further allows you to reflect on what your answer will be. The transcript will not record that you waited one second or one hour before making your answer.

4. Answer the question. The examiner is entitled to an answer to the question asked and only to that question.

5. Do not volunteer. You are not there to educate the examiner. If the examiner appears totally confused about your business and its technical aspects, resist the urge to educate the examiner.

6. Do not answer a question you do not understand. It is up to the examiner to frame intelligible questions. If he or she cannot do so, do not offer to help. Do not help the examiner by saying "do you mean 'x' or do you mean 'y.'?" You will then be asked both questions.

7. Talk in complete sentences. Beware of questions with double negatives.

8. Do not guess. If you do not know or cannot recall something, say so. There is nothing wrong with a truthful statement that you do not know or do not remember. You may be asked if a statement or document refreshes your recollection. If it does, say so. If it does not, the answer remains that you do not remember. Do not underestimate the "powers" of defense counsel through subpoenas, interviews, and surveillance to collaborate or impeach your testimony.

9. 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, for example, on January 15, state "on January 15." If you cannot recall the exact date, state the approximate date.

10. Do not be defensive. Answer the questions directly and forthrightly. Resist the temptation to explain or justify answers.

11. If you are finished with an answer and the answer is complete and truthful, remain quiet and do not expand upon it. 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. Do not feel the need to fill silences.

12. Never characterize your own testimony. Do not use “in all candor,” “honestly,” “I am doing the best I can,” or similar phrases.

13. Avoid adjectives and superlatives. “I never” or “I always” can have a way of coming back to haunt you. This is also known as the “Mark Furhman trap.” The only exception to that rule is with time lapse estimates. If you do not know precisely how long something took to occur, do not guess but state “very short,” “very long,” etc.

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

15. Numerous documents are typically marked as exhibits at deposition. Before testifying about a document, read it. Do not make any comments whatsoever about the document except to answer a question.

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

17. If the information is in a document that is not an exhibit to the deposition, answer the question if you can recall the answer. Do not tip off the examiner as to the existence of documents he or she does not know about.

18. Do not let the examiner put words in your mouth. Do not accept the examiner’s characterization of time, distances, personalities, events, and the like. Rephrase the question into a sentence of your own using your own words. Do not always assume that if it’s written down that it is true, accurate, or demonstrates that your recollection is incorrect.

19. Pay particular attention to the introductory clauses preceding the guts of the question. Leading questions are often preceded by statements that are either half true or contain facts that you do not know to be true. Do not have the examiner put you in the position of adopting these half truths, unknown facts, or his or her “spin” on the facts. Be aware that if you adopt those characterizations, he or she will then base further questioning on them.

20. If you are interrupted, let the lawyer finish the interruption and then firmly but courteously state that you were interrupted and that you had not yet finished your answer to the previous question, and then answer that question.

21. 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, your present recollection. State the reason for the inconsistency only if you are asked. Your counsel will be responsible for

rehabilitation either when it is your counsel's turn to ask questions or at trial.

22. Do not expect to testify without the other side "scoring some points." If the other side appears to be asking some questions which call for answers that do not help your case, accept the fact that every lawsuit has two sides. Avoid the temptation to guess or expand on your answer where expansion is not called for or to be equivocal in your response.

23. Every witness makes mistakes at a deposition. Do not become upset if you find you have made one. If you realize you have made a mistake, correct it as soon as it is realized.

24. Never express anger or argue with the examiner. If a deposition becomes unpleasant, your counsel will deal with the situation. Do not allow the other attorney to learn how to "press your buttons," because it can come back to haunt you at trial. As difficult as it may be, try to keep the emotion, anger, and frustration out of your testimony.

25. Avoid any attempt at levity.

26. Avoid even the mildest obscenity and absolutely avoid any ethnic slurs or references that could be considered as derogatory.

27. There is no such thing as "off the record." If you have a conversation with anybody in the deposition room, be prepared for questions about the conversation.

28. If you are hit with a flash of insight or recollection while testifying that has not been previously discussed with your counsel, keep the matter to yourself, if possible, until you have had an opportunity to go over it with counsel.

29. Dress and act conservatively at the deposition. In this instance, first impressions are important impressions.

30. Keep your counsel informed. Please remember that it is easier to stay out of trouble than to stop trouble once it has begun. Please keep your counsel informed and please disclose to your counsel anything that may have any impact on the case. Please also remember that if this is a personal injury suit, your medical, employment, and insurance records (not just those related to the accident or incident) may be subject to subpoena. Those records can provide a great deal of ammunition to opposing counsel. Your counsel cannot minimize their impact if the facts and opinions that may be recorded in those records are unknown to your counsel. The contents of those records are properly the subject of questions at a deposition.