

## Advice on Effective Deposition Witness Techniques <http://www.kalbianhagerty.com/depotips.htm>

### GENERAL INFORMATION

A deposition consists of one or more attorneys questioning a witness, under oath, before a stenographer who records the testimony. Usually a judge is not present. It is one of several devices used in the discovery phase of litigation.

Depositions have three purposes. First, they allow one side to find out what its opponents know about the case. Second, a deposition fixes a hostile witness's story early on, before he can amend his story to fit the proof his side needs to present. It limits the amount the witness can change his story at trial. Third, it preserves testimony while memories are fresh and for witnesses who may not be available later to testify at trial.

Depositions are most frequently used at trial to impugn or impeach the credibility of a witness whose trial testimony is inconsistent with his deposition testimony. It is essential that you adequately prepare for the deposition, since the transcript of the deposition can be used to show that your memory has "lapsed" or "improved" between the time of the deposition and the trial.

Your success as a deposition witness depends in large part on your mastery of effective deposition technique. It is, of course, desirable for a deposition witness to be intelligent, well-informed, articulate, and secure in the knowledge that his cause is just; but many deposition witnesses have all of these attributes and still give abysmal deposition testimony.

When such a failure occurs, the main reason is that the deposition witness does not realize that the deposition does not take place on his "home court." The witness may be someone who operates masterfully in his accustomed surroundings (the plant, the laboratory, the executive office), but the deposition takes the witness out of those familiar surroundings and puts him in the witness chair. No matter how much expertise the witness has in his profession, he will not succeed in the witness chair unless he also knows how to be a good deposition witness.

There is no mystery to being a good deposition witness. It does not depend on natural ability. It is a learned skill which depends on the conscientious application of the techniques listed below.

Your function as a deposition witness is, in most instances, purely defensive. You are not going to convince the examiner of the merit of your case; his job is trying to obtain information to prove your opponent's case.

Your attorney will be at the deposition. In most cases, his objections must be limited to the form of the examiner's questions or to questions that seek to discover privileged information, such as attorney-client communications. Objections to the admissibility or relevance of your testimony will be made at the trial itself. Therefore, do not be concerned at the limited participation of your counsel in the conduct of the deposition. As a general rule, the less he says at the deposition, the better the deposition is going from your standpoint.

You always have the right to stop the deposition and confer with your lawyer.

## INSTRUCTIONS

### I. Truth

1. Tell the truth. This rule comes first because it is the most important. It is more than a moral maxim or a warning about the consequences of perjury. It is a rule of self-preservation. You should assume that the person who is examining you knows the answer before you give it and has a document to support this. You may find yourself reluctant to give a completely candid answer to a particular question because it seems to you that such an answer may damage your case. In that situation, consider the following:

- a. Such answers are rarely as damaging as they first appear. We can and will put them in their proper context at the proper time.
- b. We expect the opposition to score some points. We do not have to win every battle to win the war.
- c. Any damage caused by a completely candid answer is almost invariably much smaller than the damage from a false response.

2. If you are asked whether you talked to anyone about your testimony, you can respond that you spoke to your attorney, if that is true. If you are asked whether anyone told you what to say at the deposition, respond that your attorney instructed you to tell the truth.

## II. Analyzing the Question

3. Listen to the Question. Understand the question. Do not be afraid to say that you do not understand the question. Do not hesitate to have the examiner repeat the question.

4. Do not answer a question you do not understand. It is up to the examiner to frame intelligible, unambiguous 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, or has gone down a meaningless path. Do not help the examiner by saying, "Do you mean X or do you mean Y?" If you do, he will ask you both of those questions. Simply state that you don't understand the question. It is then up to the examiner either to re-phrase the question or to ask what you don't understand about the question.

5. Watch out for complex questions. Do not answer a compound question. Require the examiner to split it up into its parts. Complex questions require complex answers which often lead to problems. Beware of questions with double negatives in them.

6. 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 that you do not know to be true. Tell the examiner you cannot answer the question because you disagree with or have no knowledge about its underlying premise. Don't let the examiner force you to adopt these half-truths or unknown facts, on which he will then base further questions. Carefully consider the examiner's choice of words (e.g., "Do you always...?").

7. Do not let the examiner put words in your mouth. If you do not agree with his characterization of your prior testimony as to time, distances, personalities, events, etc., do not answer the question. Simply state that you do not agree with the characterization he has made of such testimony, e.g., "I did not say that." Pay particular attention to the examiner's use of adjectives, rejecting those you would not use. Watch for legal buzzwords, such as duty, breach, mistake, obligation, etc.

8. Ask yourself whether the examiner is setting you up. If you sense that he is trying to pin you down, think about whether you need to qualify your answer. Also, reject the examiner's efforts to overstate your experience or qualifications; he may be doing that so he can show that you don't measure up to that image.

9. Pause and think before answering every question. Following this rule may seem unnecessary when a simple question has been asked, but there are good reasons for following it anyway. First, it helps you to make analyzing the question and your proposed answer into a habit; the more this becomes second nature, the better off you are. Second, it permits you, rather than the examiner, to dictate the tempo of the deposition; this will be important when you get tired or feel under pressure. Third, it gives your attorney an opportunity to formulate objections to the question. Do not be embarrassed about taking your time in answering. The written transcript will not reflect how long you take 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. Do not otherwise try to explain why you are taking time to answer.

10. 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 that might have affected the corporation. What they did about it, if anything, may be another matter.

### III. Objections By Your Attorney

11. Your attorney may object to a question asked of you. If he does, stop talking and listen to the objection very carefully. You may learn something about the question and how it could be handled from the objection. The more usual grounds for an objection include the following:

- a. the question is not sufficiently specific;
- b. the question is not relevant to the case;
- c. the question calls for a legal conclusion;
- d. the question calls for privileged information;
- e. the question calls for information which, even if not privileged, is confidential and not relevant to the case;
- f. the question assumes facts that have not yet been established; that is, the proper foundation has not been laid;
- g. the question calls for more than one answer.

Your attorney may object simply 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. Do not be intimidated by the examining attorney. If he demands that you answer when your attorney instructs you not to respond, ignore him.

#### IV. Responding to the Question

12. Do not begin speaking until you have mentally formulated an honest, short, direct answer.

Thinking the answer through to the very end allows you to correct errors before you speak.

13. Answer the question put to you -- nothing more, nothing less. The examiner is entitled to an answer to the question he asks, but only to that question. Answer the question asked -- not what you suspect the examiner is trying to get at.

14. Answer the question accurately but as briefly as possible. 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; don't trust him for one second.

15. Do not volunteer information. You are not there to educate the examiner. At times you will feel a strong urge to add to your answer the additional facts that explain it or put it in a context that helps your cause. Resist that impulse. Let the examiner remain in the dark. There will be an opportunity later to present that additional information in the manner that helps your case the most.

16. Do not explain the thought process by which you reached the answer to a question. If your answer depends on your recollection of other facts not called for by the question, do not refer to these other facts or explain how you answered the question. For example, 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. Furnish only those facts that are within your personal knowledge -- what you personally have seen and heard -- unless specifically asked to do otherwise. There is a difference between what you know to be the case (personal knowledge), what you are told is the case (information), and what you merely believe to be the case based on other experiences, intuition, etc. (belief). If you don't know the answer, say so. The examiner may properly inquire as to your information or belief, but don't provide either unless you are specifically asked. Even then, be reluctant to express opinions in areas outside your field of expertise.

18. If the examiner appears confused about your business and its technical aspects, do not try to educate him. You are not conducting a seminar.

19. 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. When there is a silence -- and this is very important -- do not fill the silence. Answer the questions; 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's what it takes. Wait for the next question.

20. Speak distinctly and slowly so that the reporter can transcribe your testimony accurately. Talk in full, complete sentences.

21. Do not try to memorize your testimony.

22. Be as specific or as vague as your memory allows. 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 you cannot recall the exact date, state the approximate date, if you know. If not, say "I don't remember."

23. Do not guess. If the answer to the question is something you don't know or can't recall, say so. Deposition witnesses often fall into the trap of feeling that they "should" know the answer to the question and then conceal their lack of knowledge by guessing. That is disastrous in a deposition. Guessing is different from estimating; you may answer a question by giving an estimate if you have enough information to do so confidently.

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

#### V. Characterization

25. Never characterize your own testimony. "In all candor," "honestly," "I'm doing the best I can," are out.

26. Avoid absolutes and superlatives. "I never" or "I always" have a way of coming back to haunt you.

27. In testifying about conversations, make it clear whether you are paraphrasing or quoting directly.

28. In answering questions requiring you to describe a complicated series of events or extensive conversations, summarize if possible. The examiner, if he is doing his job properly, will ask for all the details. It is always possible, however, that he will accept your summary.

29. Do not testify as to what other people know unless you are asked specifically for such a statement and you know first hand what they know.

30. 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 believed every word of it."

#### VI. Demeanor

31. Never express anger or argue with the examiner. If a deposition is to become unpleasant, that is what your attorney gets paid for. Do not argue with the examiner. Do not let him make you angry. Do not try to make him angry. Do not get involved in arguments among attorneys. If your attorney appears to be angry, that is not a signal for you to allow yourself to be angry.

32. Conversely, do not be beguiled by the examiner. Be polite, but not friendly.

33. There is no such thing as "off the record." Don't discuss the case with the examiner, his assistants, or the reporter during breaks or lunch. If you have any conversation with anybody in the deposition room, be prepared for questions on that conversation.

34. Avoid any attempt at levity. You will be hauled over the coals for not taking your solemn oath seriously if you make jokes.

35. Avoid even the mildest obscenity and avoid any references which could be considered derogatory to any race, sex, ethnic origin, or religion.

36. Interruptions. If you are interrupted, let the examiner finish his interruption and then firmly but courteously state that you were interrupted and that you had not finished your prior answer to the previous question. The examiner should then withdraw the previous question or permit you to complete your answer.

## VII. Documents

37. You should prepare for your testimony only with your attorney or under his direction. Do not, during preparation, refer to any documents unless your lawyer knows about these documents. This is because any documents you refer to during preparation for your testimony may be obtainable by the examiner.

38. Under no circumstances -- absolutely no circumstances -- are you to bring any papers into the examination room. Your attorney will bring any papers that need to be brought into the examination room. There is nothing worse than a 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."

39. If you are asked about a document, read it before testifying. Numerous documents are marked as exhibits at a deposition. Do not make any comments whatsoever about the document, except in answer to a specific question about the document.

40. Ask to see the documents. If the examiner is using a document to question you but does not show it to you, or if information is in a document that is an exhibit, do not answer unless you see the document.

41. Do not tip off the examiner to the existence of documents he does not know about. If you cannot answer a question without looking at a document that is not marked as an exhibit, you may simply answer the question by stating you do not recall. If you can answer the question, do so. After a witness states he does not recall a fact which the examiner believes he should have knowledge of, the examiner may ask if there is a document that can refresh his recollection. Obviously, if the examiner specifically inquires about such documents, you must identify them.

42. Identifying documents. If you are asked to identify a document, examine it carefully to see whether or not it is identical in every respect with a document you can recall. If you are satisfied that it is identical, say so. But if it merely looks like a document you can recall, so state.

43. Do not agree to supply any information or documents requested by the examiner. Such requests should be made to your attorney, who will either answer the request or will take it under advisement.

### VIII. Mistakes

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

45. 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. Do not state the reason for the inconsistency unless you are asked. Discuss the inconsistency with your attorney at the next recess. Your lawyer may decide to wait until trial to rehabilitate your testimony.

46. Do not expect to testify without the other side scoring points. If the other side appears to you to be asking questions that 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, expand on your answer when the expansion is not called for, or even worse, equivocate.

47. Use all recesses to confer with your attorney in private.

48. If at any time you want or need a break, tell your attorney.

49. No matter how well the deposition appears to be going, keep your guard up. Deposition witnesses make a disproportionate number of errors toward the end of the deposition and toward the end of the day, usually because they get tired or careless. Most examiners are aware of this tendency, and often save their most difficult and dangerous questions until they think the witness has been softened up. Your testimony cannot be regarded as a success until the deposition has concluded.

## GUIDELINES FOR DEPOSITIONS

1. ANSWER THE QUESTION ASKED; DON'T VOLUNTEER - Listen to the question - pause - formulate your response to the question - your response should not exceed the scope of the question, nor should you answer the question you think should have been asked. For example, if you're asked how long you've been employed, simply respond, "X years." Don't give the time period and then describe all the positions you've held. THAT'S VOLUNTEERING!
  
2. TELL ONLY WHAT YOU KNOW - Tell only what you know from first-hand experience, i.e., because you saw it, you said it, you did it, you heard it first-hand. Do not repeat what you have heard, what you concluded was probably true, or anything except first-hand knowledge. This leads to the next guideline:
  
3. DON'T SPECULATE - If you hear yourself saying "I guess" or "I could speculate" - STOP! If you don't know or can't recall the answer to a question, simply say "I don't know," "I don't recall," or "I don't remember."
  
4. DON'T RELAX - Listen to the question carefully and understand all of its components. Make sure you understand each term the questioner used before you respond. If you don't understand, simply say so; for example, "What do you mean by 'region'?"
  
5. DON'T ANSWER COMPOUND OR HYPOTHETICAL QUESTIONS - Compound questions are questions that contain two or more questions, and the answer to part two may depend on part one.
  
6. MAKE THE QUESTIONER BE SPECIFIC - Don't respond to general questions that are not specific or that you do not understand.
  
7. WAIT FOR THE QUESTION TO BE FINISHED BEFORE YOU RESPOND - Most people respond too quickly because they think they know what's being asked. Wait for the questioner to finish - pause - then formulate your response. Pausing allows your attorney to object if there is a need to do so.