

GENERAL DEPOSITION GUIDELINES

AN ORAL DEPOSITION IS SWORN TESTIMONY TAKEN AND RECORDED BEFORE TRIAL.

The purpose is to discover facts, obtain leads to other evidence, preserve testimony of an witness who may not be available at the time of trial, and nail down a witness' version of events. Cases are frequently won and lost because of a witness' deposition testimony. One of the best ways to destroy a trial witness, for example, is to show contradictions between his trial and deposition testimonies. So, take your deposition as seriously as you would your testimony at trial. The following guidelines should prove helpful to you.

1. DO NOT BRING ANY MATERIALS (INCLUDING PERSONAL NOTES) TO THE DEPOSITION ROOM UNLESS I SPECIFICALLY REVIEWED THEM IN ADVANCE AND APPROVED THEM. Anything you consult at the deposition must be made available to the other attorney if he/she asks for it.
2. LISTEN CAREFULLY TO EACH QUESTION AND BE SURE YOU UNDERSTAND THE QUESTION. If you don't understand a question, ask the court reporter to read it back. If you still do not understand the question, state that you do not understand the question and cannot answer it. Don't explain why you don't understand it. This is especially important if the question is vague or contains value judgment words, such as "Isn't it a fact that..."
3. IF APPROPRIATE, QUALIFY YOUR ANSWERS WITH WORDS SUCH AS "TO THE BEST OF MY RECOLLECTION," "AS BEST AS I RECALL," "MY BEST RECOLLECTION IS," "I BELIEVE". On the other hand, when you are sure, do not hedge or unnecessarily weaken the force of a strong answer. Sidestepping and circumventing look and sound just like that.
4. DO NOT GUESS OR EXAGGERATE. If you do not know the answer or do not recall, say so. Do not venture an opinion unless it is specifically called for and then only after giving me an opportunity to object.
5. ANSWER ONLY THE QUESTION THAT IS ASKED. Do not anticipate questions. Do not volunteer information not specifically called for. Keep your answers short. "Yes" or "No" is often the ideal answer. However, many questions cannot be answered accurately with "Yes" or "No" because they contain half truths or ambiguous phrases that can be misinterpreted later if answered "Yes" or "No. These are the questions that call for an explanation and in response to which you should state the facts of what happened in your own words. If the lawyer asks you to answer "Yes" or "No," you are entitled to tell him/her that it cannot be answered "Yes" or "No" without the answer being misleading. If he insists, you can say something like, "If it has to be answered 'Yes' or 'No, I suppose the answer would be 'No'. However, I need to explain it or it is misleading.
6. THINK BEFORE YOU RESPOND. Pause a moment or two before beginning each answer. This gives you time to reflect on the question, and it gives me time to formulate and interpose objections. Stop answering immediately if I start talking.
7. LISTEN TO MY OBJECTIONS and answer the question after I have made the objection unless I advise you not to answer it. It will be unusual for me to instruct you not to answer. Under our procedure, your testimony is taken subject to objections. That

means I make objections and a judge will later decide whether or not they were proper. In the meantime, you may answer. I will generally be objecting to protect our right at trial to protect your deposition testimony, and so that I will not waive my objection if opposing counsel attempts to use the deposition testimony at trial. An objection may, however, indicate that I believe a question to be ambiguous, confusing or somehow unfair. Listen to my objection and consider the question in the light of my objection. As a matter of routine, you may ask to have those questions to which I have objected reread by the court reporter.

8. IF ASKED ABOUT THE CONTENTS OF A DOCUMENT WITHOUT IT BEING SHOWN TO YOU BY THE OPPOSING ATTORNEY, ASK TO SEE THE DOCUMENT TO REFRESH YOUR RECOLLECTION OF ITS CONTENTS. If asked about a document that shown to you by the opposing attorney, read it carefully before beginning to answer. If you do not recall the document, or do not know what its author meant, say so. Do not guess at what may have been meant.

9. IF I INSTRUCT YOU NOT TO ANSWER, DO NOT ANSWER EVEN IF YOU BELIEVE THE ANSWER WOULD BE HELPFUL.

10. YOU MAY SPEAK PRIVATELY WITH ME AT ANY TIME AND SHOULD FEEL FREE TO DO SO, BUT DO NOT DO SO UNLESS IT IS REALLY NECESSARY.

11. IN GENERAL, DO NOT PROMISE TO LOOK UP INFORMATION OR TO OBTAIN MATERIALS, TO MAKE CALCULATIONS, ETC. WITHOUT FIRST CLEARING IT WITH ME.

12. BE COURTEOUS TO THE OPPOSING ATTORNEY AT ALL TIMES. Do not argue with him/her. Avoid any display of hostility. He may try to provoke you in the hopes that anger will cloud your judgment. Do not let him/her succeed; keep your temper.

13. IF YOU FEEL TIRED OR UNCOMFORTABLE AT ANY POINT, DO NOT HESITATE TO ASK FOR A BREAK.

14. THIS DEPOSITION IS ONLY ONE PART OF THE CASE. Do not be concerned that all relevant facts may not be elicited by the opposing attorney, or that his questions create a misleading or partial picture. We will have an opportunity later to present our own materials, or to clarify your answers.

15. STICK WITH WHAT YOU KNOW. Do not hesitate to say that you do not know. Do not volunteer who might know.

16. DO NOT TRY TO SELL A STORY TO THE OPPOSING LAWYER. You will not persuade him/her that you are right; do not try. You cannot win the case at the deposition. I find it helpful to think of a deposition as a dictation exercise. Listen to the question, then turn to the reporter and dictate your answer. That will reduce your chance of trying to sell a story to our opponent's lawyer. The purpose of the deposition is discovery. The less our opponent discovers, the better.

17. DO NOT BE INFLUENCED BY THE OPPOSING LAWYER'S FRIENDLINESS, APPARENT COOPERATIVENESS OR COURTESY. He/she is not your friend. No matter how charming he/she may appear, his/her one purpose is to discredit you. Do not be concerned about convincing him/her about the merit of credibility of your testimony.

18. DO NOT BE CONCERNED ABOUT WHETHER THE OPPOSING ATTORNEY UNDERSTANDS OR SEEMS TO UNDERSTAND WHAT YOU ARE SAYING AS LONG AS YOU ARE SATISFIED YOU HAVE ANSWERED THE QUESTION TRUTHFULLY AND TO THE BEST OF YOUR ABILITY. If, on the other hand, I indicate some problem with your answer, rethink it very carefully. If on further reflection, you are still satisfied with your answer, you can consult with me. You can ask at any point for your answer or a question to be read back to you.

19. DO NOT BE UPSET BY THE OPPOSING ATTORNEY'S ACCUSATION THAT YOUR TESTIMONY IS INCONSISTENT WITH SOME DOCUMENT, OR WITH ANOTHER PERSON'S TESTIMONY, OR WITH YOUR OWN PRIOR TESTIMONY. IT IS A COMMON TACTIC FOR THE OPPOSING ATTORNEY TO SUGGEST AN INCONSISTENCY WHEN ONE MAY NOT EXIST. Whenever, you can, first be convinced that there is an inconsistency before attempting to explain it. Any time a person tells the same story twice, no matter how carefully, there are likely to be at least some inconsistencies. If there is an inconsistency with a prior statement you made, simply tell the best recollection you have of what happened, and if there is an explanation for the inconsistency, give it. Sometimes it is not your mistake, but the mistake of the one who took your statement. If that is so, simply say that your recollection is that you told him/her something else, and you believe it is his/her mistake.

20. DO NOT ASSUME THAT THE OPPOSING ATTORNEY HAS ACCURATELY DESCRIBED YOUR PRIOR TESTIMONY OR THAT OF ANY OTHER WITNESS OR A DOCUMENT WHEN HE/SHE PURPORTS TO DO SO. Give your counsel time to object to any inaccuracy. Think hard before accepting the accuracy of the opposing attorney's statement. Do not let him/her put words in your mouth.

21. BEWARE OF COMPOUND QUESTIONS. If you are asked several questions rolled into one it will usually be impossible to answer accurately unless you break them down. In such a case, you may say, "That contains several aspects, which I will try to answer one by one." Or, if the question is too long, you can say, "Can you break that down for me and ask me the questions one at a time."

22. BEWARE OF LEADING QUESTIONS CONTAINING HALF TRUTHS. Witnesses are frequently asked leading questions suggesting information that is either half-true or contains facts not within the witness' knowledge. Such questions frequently sound plausible on their face, and there is a temptation to answer them "Yes" or "No" when that would not be accurate. If a question contains information that is partly true and partly false, an explanation is necessary. The explanation should be in your own words. DO NOT allow the opposing attorney to put words in your mouth. Remember that the judge or jury will draw conclusions from your answers. The opposing lawyer is not there to engage in polite conversations. He is trying to establish facts, which he thinks will help his client. It is your duty to see to it that whatever is established by your testimony is "the truth, the whole truth, and nothing but the truth."

23. BE AWARE AND CAUTIOUS OF QUESTIONS THAT ASSUME A FACT, SUCH AS: "What did you notice about the operation of the assembly line when you were at the plant in October?" By your answer, whatever it is, you will affirm the asserted fact that you were at the plant in October.

24. BE AWARE AND CAUTIOUS OF QUESTIONS THAT ARE FRAMED WITH REFERENCE TO ONLY TWO ALTERNATIVES, SUCH AS: DID YOU OBTAIN THIS INFORMATION FROM JONES OR SMITH?" There may be many other alternatives and sources.

25. DO NOT LET THE OPPOSING ATTORNEY INCORRECTLY PARAPHRASE YOUR ANSWERS. If he says, "Well, then, what you are saying is that you did carefully examine the contract." Your answer might be "That is not what I said, and I will stand on my answer to your previous question."

26. WHEN MAKING APPROXIMATIONS OF DOLLAR FIGURES, DISTANCE, TIME, DATES, ETC., BE CERTAIN THAT YOU USE A QUALIFYING WORD SUCH AS "APPROXIMATELY," "ABOUT," OR "MY BEST GUESS IS." Also, beware of questions that are framed in terms of absolutes, such as "always" or "never." Equivocate if you can truthfully do so.

27. IF YOU ARE CONCERNED ABOUT SOMETHING YOU KNOW THAT MIGHT PROVE EMBARRASSING, OR ABOUT SOMETHING YOU HAVE DONE EITHER IN THE TRANSACTION AT ISSUE OR IN PREPARING FOR THE DEPOSITION, DISCUSS IT WITH ME WELL BEFORE THE DEPOSITION. Let me decide whether the matter is relevant. Do not spring any surprises on me during the deposition.

28. ANSWER EVERY QUESTION HONESTLY. You are under oath and intentionally false answers may constitute a crime. Moreover, falsehoods on the most minor or irrelevant points may be used to destroy your credibility on more important issues. This does not mean you have to volunteer information that is not expressly called for by the questions asked. Do not do so.

29. YOU MUST ANSWER VERBALLY. Speak slowly, clearly and audibly, so that the court reporter will be able to take down every word.

30. IF THERE IS A SILENCE AFTER YOUR ANSWER, DO NOT FEEL COMPELLED TO FILL THE SILENCE WITH WORDS. Just remain silent and wait for the next question.

31. YOU MAY RE ASKED THE SAME QUESTION SEVERAL TIMES. If your original answer was accurate, stick with it and do not change it because the question is repeated in a slightly different form.

32. RECOGNIZED THAT THERE MAY BE SOME QUESTIONS THAT REQUIRE YOU TO GIVE AN UNHELPFUL OR DAMAGING ANSWER IF YOU ANSWER IT RESPONSIVELY AND TRUTHFULLY. Do not equivocate. Tell the truth. But, if it is appropriate to explain or qualify an unhelpful answer, do so. I will ensure that you have the opportunity to give a complete answer.

33. UNLESS IT IS ABSOLUTELY CRITICAL, DO NOT TRY TO TALK TO ME WHILE YOU ARE BEING QUESTIONED EXCEPT TO ASK FOR A RECESS.

34. YOU WILL BE APPRAISED BY OUR OPPONENT. If you make a good appearance as a tough, honest, clear, responsive witness, it will materially assist us in settlement negotiations as well as at trial.

35. BE PREPARED TO TELL WHAT YOU DID TO PREPARE FOR THE DEPOSITION AND TO ADMIT THAT YOU HAVE TALKED ABOUT THE CASE WITH WHOMEVER YOU TALKED TO ABOUT IT (E.G., YOUR BOSS, YOUR SPOUSE, ME). It is perfectly proper to admit that you spoke to your lawyer and that I told you to be accurate and that you had nothing to hide.

36. THE MOST IMPORTANT THING YOU CAN DO IS TO LISTEN TO THE QUESTION AND WHEN YOU UNDERSTAND IT, ANSWER IT BRIEFLY AND ACCURATELY.

This article is taken in part from an article written by W. Jack Keiser for the Michigan Family Law Section of the State Bar of Michigan.