

## DEPOSITION INSTRUCTIONS

The purpose of this memorandum is to inform you of what a deposition is, why it is being taken, how it will be taken, and the pitfalls to be avoided during its taking.

### WHAT IS DEPOSITION

A deposition is your testimony under oath. You will be asked questions by the opposing attorney and, in some cases, by your attorney. The questions and your answers will be recorded by an official court reporter. No judge will be present and the deposition will be taken in an office, usually that of one of the attorneys. Little difference exists between testimony at a deposition and testimony in the courtroom, except no judge presides and rules over the matters as they arise. The judge may do so later at trial.

### THE PURPOSE OF A DEPOSITION

The opposing side is taking your deposition for three primary reasons. First, the examiner wants to find out what facts you know about the issues in the lawsuit and is interested in what your story is now and what it is going to be at trial. Secondly, the examiner wants to pin you down to a specific story so that you will have to tell the same story at the trial and he/she will know in advance what your story is going to be. And, thirdly, the examiner hopes to catch you in a lie to show at trial that you are not truthful and, therefore, your testimony should not be believed on any of the points, particularly the crucial ones.

These are legitimate purposes and the opposing side has every right to take your deposition for these purposes and in this fashion. You have the same right to take the deposition of the opposing litigant.

### PITFALLS TO AVOID

1. Tell the truth. An attorney may explain away the truth, but there is no explaining why a client lied or concealed the truth.
2. Do not volunteer information. You are not there to educate the examiner.
3. As a witness you must give the facts as you know them. You should not evade questions or refuse to give facts within your knowledge. You, however, do not have to answer certain types of questions. Generally, if you are asked a question which calls for an answer you are not required to give, your attorney will object to the question. If your attorney advises you to answer after the objection and you have an answer, then you should give it.

4. Listen carefully to the question before answering and answer only the question asked. Think before you speak. Allow a few seconds to elapse before answering the question. This allows your attorney to formulate objections and you to think through what your answer is going to be. The examiner is entitled to an answer to the question he asks and only that question. Do not attempt to insert facts favorable to your case or argue your position in response to a question.
5. Do not answer a question you do not understand. It is up to the examiner to frame intelligible questions; if he cannot do it, do not help him/her. Do not explain to the examiner that the question is incomprehensible because he/she has misunderstood words of art in your business, trade or science. Do not help the examiner by saying "do you mean X" or "Do you mean Y."
6. Talk in full and complete sentences. Beware of questions with a double negative in them.
7. Do not guess. Quite frequently questions are asked to which you feel you should know the answer and you will be tempted to question. **DO NOT GUESS.** If you do not know the answer, state that you do not know. A guess is almost always the wrong answer and one from which the opponent can show that you either do not know about what you are talking or imply that you are deliberately misstating the truth. Do not confuse "I do not know" with "I knew but I do not now recall" or "I am not certain, but my best recollection is..." Never refuse to give an answer on an important fact within your knowledge and to not say "I do not know" or "I do not recall" if you do know or do recall the facts. Questions are often phrased "do you know." A question in a deposition may legitimately call for something you do not know, but it must be so phrased. There is a difference between a question which states, "Do you know" and a question which asks whether you have any information bearing upon a particular subject.
8. Never attempt to explain or justify your answer. You are there to give the facts as you know them. Do not apologize or attempt to justify those facts. Any such attempt makes it appear as if you doubt the accuracy of your testimony. Do not explain your thought process as to how you reached the answer to a question. In answering a question in which your answer depends on your recollection of other facts not called for by the question, do not refer to these other facts in explaining how you can answer the question. In other words, if you are asked when a conversation with Jones occurred, and you recall that it had to be in December because you met Jones after meeting Smith in November, do not explain this thought process to the examiner.
9. You are only to give the information which you have readily at hand. Do not volunteer where the information can be located or discovered. If you do not know certain information, do not give it. Do not turn to your attorney, or anyone else, and ask them for the information. Do not agree to supply any information or documents requested by the examiner. If reference is made to documents or

information, the request is or should be made to your attorney. Counsel will either answer the request or will take the request under advisement.

10. Do not agree to produce documents at a later time. Do not, without your attorney's request, produce documents, e.g., reach into your pocket for a Social Security card or other document. If the opposing side is interested in obtaining documents from you, other legal procedures exist with which to obtain them. Do not ask your attorney to produce anything which is in his file at the time because, generally, the same rule for obtaining such items applies to those matters as applies to things which may be in your pocket, office or home.
11. In testifying about conversations, make it clear whether you are paraphrasing or quoting directly.
12. In answering questions calling for a complicated series of events or extensive conversations, summarize these where possible. The examiner, if he/she is doing his/her job properly, will ask for all the details. It is always possible, however, that the examiner will accept your summary; and this is so much the better.
13. Never characterize your own testimony. Avoid speech mannerism, such as "in all candor," "honestly," "to tell the truth," and "I am doing the best I can."
14. Avoid adjectives and superlatives. I "never" or I "always" have a way of coming back to haunt you.
15. Do not testify as to what other people know. You can only testify as to what they said they know or what you believe they should know.
16. Do not testify as to your state of mind unless you are specifically asked. If the question is: Did you read that document, the answer is "Yes," not "Yes, and I believe every work of it."
17. If information is in a document which is in an exhibit, ask to see the document unless you are very certain of your answer. Do not make any comments whatsoever about the document except in answer to the question that elicits your testimony. If information is in a document which is not an exhibit at the deposition, answer the question if you can recall the answer.
18. Do not tip off the examiner about the existence of documents of which he/she does not know. If you cannot answer the question without looking at a document which is marked as an exhibit, you may simply answer the question by stating you do not recall. If you can answer the question, you should do so. If you state that you do not recall a fact of which the examiner believes you should have knowledge, you should do so. If you believe you should have knowledge, the examiner probably will ask if there is a document which can refresh your recollection.

19. Do not let the examiner put words in your mouth. Do not accept his characterization of time, distances, personalities, events, etc. Rephrase the question into a sentence of your own, using your own words.
20. Do not answer a compound question unless you are certain that you have all parts of it in your mind. If it is too complex to be held in your mind, it is too complex and ambiguous to answer.
21. Pay particular attention to the introductory clauses preceding the actual question. Leading questions are often preceded by statements which are either half-true or contain facts which you do not know to be true. Do not have the examiner put you in the position of adopting these half-truths or unknown facts upon which he then will base further questions.
22. At all recesses leave the room with your attorney to confer in private.
23. If you are interrupted, let the attorney finish his interruption and then firmly but courteously state that you were interrupted, that you had not finished your answer to the previous question and, then, finish your answer.
24. If you are caught in an inconsistency, do not become overly concerned. 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. Rehabilitation is done at trial.
25. Do not adopt an examiner's summary of your prior testimony.
26. 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.
27. Do not let the opposing attorney get you angry or excited. This destroys the effect of your testimony and you say things which may be used to your disadvantage later. It is sometimes the intent of attorneys to get a deponent excited during his testimony, hoping to elicit things which may be used against the deponent. Under no circumstances should you argue with the opposing attorney. Give the examiner only the information you have. That is all to which the examiner is entitled. Give the information in the same tone of voice and manner that you do in answer to your own attorney's questions.
28. If your attorney begins to speak, stop whatever answer you may be giving. If your attorney is making an objection to the question, do not answer until advised to complete your answer. If your attorney tells you not to answer a question, then

- you should refuse to do so. Listen to your attorney's objection. It may indicate to you that the question poses a trap.
29. Never joke in a deposition. The humor will not be apparent on the cold transcript and may make you look crude or cavalier about the truth.
  30. Do not try to figure out before you answer whether a truthful answer will help or hinder your case. Answer truthfully. We can deal with the truth effectively; we are handicapped when you answer any other way.
  31. Avoid even the mildest obscenity. Avoid absolutely any ethnic slurs or reference which could be considered as derogatory.
  32. There is no such thing as "off the record." If you have any conversation with anybody in the deposition room, be prepared for questions on that conversation.
  33. If the examiner appears totally confused about your business and its technical aspects, do not attempt to educate him/her.
  34. If you are hit with a flash of insight or recollection while testifying and this has not been previously discussed with your attorney, hold this to yourself, if possible, until you have an opportunity to go over it with counsel.
  35. Do not become upset if you make a mistake. If you realize that you made a mistake, correct it at once; otherwise, mistakes noticed after a deposition may be corrected at the time you sign the actual transcript.

After you read all of these suggestions, please write down any questions which you may have and ask them of us at the time of your pre-deposition meeting or before the deposition.