

Preparing a Witness for Deposition

1. The Attorney is the Captain of the Ship
 - a. The lawyer must be more prepared for the deposition than the client. The lawyer must know the legal and factual issues, as well as the relevant documents and theory of the case prior to the deposition preparation.
 - b. Review FRCP 26 and 30

2. David v. Goliath
 - a. Frequently, plaintiffs are up against a big corporation and a team of high-priced lawyers
 - b. When you believe the deck is stacked against you, work that much harder. If your deponent is not properly prepped, the deposition can turn into a disaster.

3. General Overview:
 - a. Deposition- although not occurring in the courtroom, a formal judicial proceeding at which sworn testimony is taken from a witness in the form of a question-and-answer session. As a deponent, the witness will be asked questions by the opposing attorney and the witness' answers will become part of the official record of the case.
 - b. The deposition testimony is every bit as important as live testimony at trial.
 - i. First, it is testimony given under oath and thus subjects the witness to the penalties of perjury.
 - ii. Second, it is testimony which is intended to be used at trial, and can be used against a witness if his or her story changes. As such, it is imperative that you, the witness, take your deposition seriously and prepare yourself adequately.
 - c. The deposition will take place in the witness' attorney's office, the office of the opposing attorney, or some other neutral site.
 - d. There are three people in the room with the witness during a deposition:
 - i. The Attorney of the Witness
 - ii. The Opposing Attorney
 - iii. The Court Reporter
 - iv. If there are other parties to the witness' dispute, then their attorneys

4. Appearance and Demeanor:
 - a. The witness should wear conservative, professional clothing and be well-groomed during a deposition, like he/she would at court.
 - i. Since the deposition may be videotaped and could be played to the jury at trial, the witness should dress as he/she would if he/she were testifying at trial.
 - ii. It is also important for the witness to project him/herself to the opposing counsel as a capable and confident witness, and someone who knows what they are talking about.

- b. The demeanor of the witness should be pleasant but professional and, when possible, address the opposing attorney as “sir” or madam”.
5. Rules Witnesses Should Follow During Deposition:
- a. Tell the truth.
 - i. It is imperative that you are truthful at all times during your deposition. Remember, you will be under oath and, if it is shown that you were less than truthful, you may be guilty of perjury. Lying during your deposition can only be harmful. It is better to give a truthful but painful answer than to offer false testimony.
 - b. Do not get angry with or fight with the opposing attorney, and treat the opposing attorney with respect.
 - i. Whatever you do, do not argue with or get angry at the opposing counsel. If you do, then the attorney has won. When angry or argumentative, you are more likely to speak without thinking first, or make a statement or comment you wish you could take back. Remain calm and collected, even if the opposing attorney gets riled up or upset. That way you will avoid letting the attorney use our emotions against you. Also, if the witness argues or gets upset with the opposing attorney, it may seem like the witness is not honest.
 - c. Do not guess the meaning of a question.
 - i. Be sure you know *exactly* what the attorney is getting at before you answer the question. Do not speculate. If you are at all unsure, ask the attorney to rephrase the question, and keep asking until you are certain you understand.
 - d. Do Not Volunteer Information
 - i. Make sure that once you have answered the attorney’s question, you stop talking. While it is important to be truthful, it is also important not to give more information than the question calls for. Often times, witnesses get caught up in talking about a particular subject and accidentally give out information that the opposing attorney might never have thought to ask about.
 - e. Never Interrupt the Question/Pause Before Answering
 - i. This one is very important for several reasons.
 - 1. You want to make sure that you give yourself time to think about the question, identify any pitfalls, and consider your response before blurting out an answer. This can be difficult because in everyday conversation it is common to anticipate a person’s question and begin answering before they are through. Do not fall into that harmful habit during your deposition.
 - 2. Another reason it is important to pause is that it gives your attorney time to object to the question for the record if he/she so desires.

Always pause a second or two after the conclusion of the question before you start your answer.

- f. In case you, the witness, do not know an answer to a question, simply state that you do not know.

6. Tricky Questions Opposing Attorney May Ask:

- a. Compound Questions- two or more questions put together as one question. By giving an answer to one, the witness may accidentally be binding him/herself as to the other. To spot a compound question, listen carefully to the entire question and determine whether the attorney is really making more than one inquiry.

For Example:

“Wouldn’t you agree that the stop sign was clearly visible and that it had been raining for several hours at the time of the accident?”

If you suspect that a question may be compound, say to the attorney, “That sounds like more than one question, would you mind breaking it down for me?” Keep asking until you feel comfortable that only one question is being asked.

- b. Questions that Assume Facts that Are Not True- be careful that the opposing attorney does not try to slip a false statement in with the question. By answering the question, you may inadvertently be making an admission as to the statement. Correct the incorrect statement and ask to rephrase the question.

Consider, for example:

“After the car in front of you put on his turn signal, describe to me the chain of events that led to the car wreck.”

If the driver in front of you did not really turn on his signal, then answering the question without clarifying that fact could be dangerous. Do not get caught up in the question and forget about the statement. If you think a question has assumed a fact that is not true, correct the attorney about the fact before you begin answering the question. “First, Mr. Smith, let me make it very clear that the driver in front of me never turned on his turn signal, so it is not really possible for me to answer the question the way you asked it. I would be happy, however, to describe to you the events that led to the wreck.”

- c. Summary Questions- Beware of the opposing attorney asking a blanket question that summarizes your testimony and then asking you if you agree with his/her statement. “Let me make sure I understand, you’re saying that a, b, c, d, x, y, and z. Is that right?” Often times, the attorney’s summary is inaccurate and thus you may be agreeing to something that is not true. Never let the opposing attorney to put words in your mouth. Make sure you listen carefully to what the attorney is saying, and if you feel like he/she has not fairly characterized your testimony, do not agree with the attorney’s statement.

Note: Lawyers can also attempt to put words in your mouth with compound questions and assuming facts that are not true.

- d. Tell Me Everything Question- opposing attorneys sometimes try to rephrase a witness' story by making the witness remember differently at court by asking this type of question, knowing that the witness will not necessarily remember everything at the deposition.

If you come across this question, state that there are more things related to the question that you do not remember. Otherwise, the opposing attorney could make you, the witness, look like a liar at court if there is something you remember and only state at court but not during the deposition.

7. DO'S and DON'TS During the Deposition:

- a. DO:
 - i. Feel free to say "I don't know" or "I don't understand"
 - ii. Ask the opposing attorney if he/she has a document that might help refresh your memory.
 - iii. Treat the opposing attorney with respect.
 - iv. Ask the attorney to repeat the question if you are unsure about its meaning.
 - v. Ask for a break if you need one. This can be a good time to consult with your attorney privately.
 - vi. Answer questions with "yes" or "no" if the questions call for it.
- b. DON'T:
 - i. Use phrases like "In all honesty" or "I'm doing the best I can" or "in all candor"
 - ii. Use words like "Always" or "Never" (If you do, the opposing attorney need only find one exception to make you out to be a liar).
 - iii. Be lulled into a relaxed conversation where you might let down your guard.
 - iv. Give long narrative answers where you might accidentally provide more information than you were asked for.
 - v. Look to your attorney for answers in the middle of a question.
 - vi. Use words like "uh-huh" or "mm-hmm", since they can be misinterpreted by the court reporter.

8. Quick Reference Review

- a. General Points
 - i. Dress conservatively and act professionally at all times
 - ii. Treat the opposing attorney with respect.
 - iii. Do not let the attorney put words in your mouth.
 - iv. If you do not know the answer to a question, say so.
- b. Rules

- i. Tell the Truth.
- ii. Do Not Argue or Get Angry
- iii. Do Not Guess the Meaning of a Question
- iv. Do Not Volunteer Information/Answer Only the Questions Asked
- v. Only Answer Questions Asked
- vi. Never Interrupt the Question/Pause Before Answering
- vii. Treat Opposing Attorney with Respect
- c. Watch Out for Trick Questions
 - i. Compound Questions
 - ii. Questions that Assume Facts that Are Not True
 - iii. Summary Questions
 - iv. Tell Me Everything-type of Questions

Taking and Defending Depositions

Taking a Party Deposition:

1. Before the deposition:
 - a. Review sample depositions and outlines if available
 - b. Planning begins with looking at what you do and do not know
 - i. What happened?
 - ii. Who did what?
 - iii. Who said what?
 - iv. How did it happen?
 - v. Where did it happen?
 - vi. Who was involved?
 - vii. Who witnesses it?
 - viii. Why did it happen?
 - ix. What documents record what happened?
 - x. Who can verify it happening?
 - xi. What conclusions verify it happening?
 - xii. What conclusions could someone draw from it happening?
 - xiii. What facts are missing?
 - xiv. What will be the opponent's story?
 - c. Make sure you have the following:
 - i. Blueprint of plaintiff's legal and factual theories of the case;
 - ii. Understanding and appreciation of defendant's legal and factual theories;
 - iii. Honest assessment of strengths and weaknesses in your/opponent's case.

2. At the outset, identify the reason(s) for the deposition:
 - a. Why am I doing this?
 - i. Do I need to take this position?
 - ii. If so, for what reason?

- b. What do I want to achieve?
 - i. Trying to pin down liability;
 - ii. Producing evidence for summary judgment;
 - iii. Creating foundation for later impeachment at trial;
 - iv. Evaluating credibility;
 - v. Discovering additional facts or evidence;
 - vi. Eliminate surprises;
 - vii. Perpetuating testimony;
 - viii. Enhance settlement potential
3. Order of questions:
 - a. Chronological
 - b. By subject
 - c. By document
 - d. Hop, skip, jump
4. Form of questions:
 - a. General – if trying to learn as much as possible
 - b. Specific – if trying to hone in on a particular answer
5. Clarify and/or summarize useful responses:
 - a. Good testimony may be buried in the middle of useless statements
 - b. Summarizing the statement gives a clear statement of evidence for later use
6. Document what is not on the record
 - a. Describe any nonverbal responses or gestures of the deponent
 - b. Describe the tone of voice, loudness, and physicality of the opposing attorney
 - i. Especially if not being videotaped
7. Nail down any critical testimony
 - a. This is the witness' complete memory of the event
 - b. There are no documents that he or she could review that would change the answer
 - c. There are no other witnesses known who could change the answer
 - d. There are no other facts known that could change the answer
8. Nail down the witness' inability to recall
 - a. Ask as many questions as possible about the facts of the transaction, event, or document to solicit as many "I don't recall" responses as possible.
 - b. Confirm
 - i. There are no documents for review that could change the answer
 - ii. There are no witnesses known who could change the answer
 - iii. There are no other facts that could change the answer

9. Ten Rules for Depositions:
 - a. Have a discovery plan
 - i. Issues
 - ii. Facts
 - iii. Topics
 - b. Develop goals for the deposition
 - i. What do you want out of it?
 - c. Decide on questioning approach
 - i. Long versus short
 - ii. Chronological, subject, hop-skip-jump
 - iii. Friendly versus hostile
 - iv. General versus specific
 - d. Control the environment
 - i. Location
 - ii. Witness placement
 - iii. Breaks/refreshment
 - e. Stipulations
 - i. Objections except as to form
 - ii. Reading/signature
 - iii. Authenticity of exhibits
 - iv. Admissibility of exhibits
 - v. Attachments/numbering
 - f. Box in the witness on critical issues and facts; Example:
 - i. Q. Tell me why you fired X?
A. He did poor quality work, for one.
Q. What were the other reasons?
A. He didn't take instructions well.
Q. Besides doing poor quality work and failing to take instructions well, were there any other reasons you fired X?
A. He didn't turn in assignments on time and he didn't get to work on time.
Q. Other than doing poor quality work, failing to take instructions well, not turning in assignments on time, and not getting to work on time, were there other reasons that you fired X?
A. No.
Q. What do you mean when you say that X's work quality was "poor"?...
 - g. Box in the witness on lack of memory/opinion.
 - h. Explore and exhaust
 - i. Announce subject or change of subject
 - ii. Who, what, when, where, why
 - iii. Listen to the answer
 - iv. Prompts to the witness:
 1. Tell me more
 2. I don't get it

3. Silence
4. Is that everything?
- i. Get material for cross
 - i. Restate/summarize
 - ii. "I don't know"
 - iii. Embed your case theory
- j. Plan the end of the deposition
 - i. Sequence questions for the end
 - ii. Look back through outline if needed

Defending a Party Deposition:

1. Attorney preparation – Same as above
2. Witness preparation – Same as above
3. Professionalism
4. Normal stipulations – What are they? Object to form? Read and sign?
5. Objection versus obstruction
6. Instructing the witness not to answer under FRCP 30(c)(2)
 - a. Privilege
 - b. Limitation by Court Order
 - c. Terminate deposition under FRCP 30(d)(3), Must be:
 - a. Bad faith
 - b. Annoys, embarrasses, or oppresses deponent
7. Do not waive reading and signature – Witness should review it per FRCP 30(e)