Depositions

You are being deposed by the lawyers in a law suit. You are not being sued but are a potential witness. The purpose of the deposition is to find out facts that may have a bearing on the case. Wide latitude is allowed to the questioners to try and get these facts, but our attorney may object to some questions and may instruct you not to answer them. In that case, do not answer.

Here Are Some Basic Ground Rules:

a. First, to answer the question you must understand it. Understanding the question is one of your main jobs. If you do not understand the question, your answer will be wrong. Do not hesitate to ask the attorney to repeat or rephrase the question. If you are asked, "Do you have a watch," the question is not “Are you wearing a wrist watch.” Many people repeat the question as they understand it “Do I have a wrist watch with me now? Yes.”

b. Second, answer the question. Do not answer some other question. Do not add information that is not called for. Answer "Yes" or "No if that is the answer, otherwise, give a short answer but stick to the question. In the example, do not say what time it is.

c. Third, do not try and educate the questioner and explain things to her. This suggests new questions for her to ask and radically lengthens the deposition. “No, I track when I do things by using the journal feature of Outlook that records everything that I do.” is not a good answer.

d. Finally, tell the truth, no matter how much you think it hurts. If the answer is harmful to you but does not have anything to do with the suit, depend on the lawyers on the other side to keep it out of evidence at trial. If in doubt, complain about the relevancy of the question. The most common answer to any question is “I do not know”. Do not guess and do not repeat what others have told you if you do not know it is true. For example, you know it is true that the landlord said you would be able to use the gym but do not know if every other tenant has the same rights.

Training Materials for the Lawyer

The following is a whole slew of suggestions from experienced lawyers for new lawyers about deposition witness. It will be helpful if you scan the material.

The examining attorney ordinarily asks the witness to agree not to answer any question that she does not understand but to state her lack of understanding so that the attorney can repeat or rephrase the question. In posing those questions, the attorney may point out that the witness has her own counsel present and that she may at any time take a break to talk with her counsel. The examining attorney is likely to conclude with a question similar to this one: "So I can fairly assume that whenever you answer a question in this deposition, you will have understood the question. Is that correct?" Most witnesses answer "Yes" to that question, but an unqualified "Yes" does not take into account the possibility that the witness may thoroughly believe that she understands the question when she does not. Thus, it may be appropriate for the witness to add that qualification, as for example with the following response: "I will answer the question only when I believe that I have understood it. But there could be a time when I think I understand the question and go ahead and answer it but I have really misunderstood the question. I will agree, though, to do the best that I can."

When the witness is instructed only to give an answer to the question being asked, the witness usually nods in a knowing manner as if to say, "I am sure that I never thought of doing anything else." In fact, few witnesses are accustomed to a literal application of that rule and need some concrete examples. One example is the following: "If the attorney asks you whether you have a watch, tell him 'Yes' or 'No,' but don't tell him what time it is." A lawyer might even lead into that example by way of illustrating the typical response of a person. Thus, the lawyer could ask the client whether the client has a watch, and nine times out of ten, the client will tell the lawyer what time it is.

Another example, is an old story about the testimony given by a railroad employee who had witnessed a disastrous train wreck. The employee knew about the accident because he had been given the task of standing beside the railroad tracks and waving his lantern on that foggy night to warn approaching trains that the bridge just ahead had collapsed earlier that day. The doomed train had passed the railroad employee going full speed and had plummeted to the river below. The railroad employee was asked whether he was standing at his appointed place at the time of the accident, and he said that he had been there all night. The railroad employee was asked whether he had been swinging his lantern at the time of the accident, and he said that he had been doing so. The question never asked was whether the lantern had been lit -- and it had not. If the employee had been asked that question, he would have answered truthfully. Because he simply answered the questions asked of him, the information was not discovered.

Literally following the rule of answering the question is difficult for many witnesses and may require some practice. The witness may balk out of a feeling that it will make the deposition longer and more tedious. The lawyer should explain to the witness that the converse is true. The witness who volunteers information and gives more than the question calls for is likely to be cross-examined for many hours. The length of the testimony will occur for two reasons. First, the extraneous material will make the deposition much less organized and may actually impede the other attorney from accomplishing her planned examination. Second, the information volunteered may lead the other attorney into asking questions that she would not have asked otherwise. The lawyer should explain to the witness that it is opposing counsel's job to formulate all of the essential and important questions, and the witness's job is simply to answer the questions asked and not to either help or hurt the opposing lawyer by volunteering information.

The last component of the golden rule for witnesses is answering the question on the basis of what the witness knows. The lawyer should explain the concept of personal knowledge. The best definition is what the witness knows from her five senses; she is not asked to guess or speculate. The witness need not have an opinion, nor should she answer with what she has concluded by putting two and two together. Witnesses have a great propensity to guess and speculate. There are several reasons for that. First, witnesses like to appear knowledgeable. Second, most people like to reach a conclusion or opinion about why something happened or how it happened. It is human nature to strive for explanations. Third, the examining lawyer often attempts in various ways to guess or speculate. Almost all lawyers casually attempt to elicit opinions and speculations from witnesses. Some examiners will badger the witness with such questions as, "You mean you were right there and you cannot tell us how it happened?" Such a question is designed to make the witness feel like a fool if she does not give her opinion. Another approach is to start off at extremes and then coax the witness into giving an approximation. If the witness cannot recall how much time elapsed between two im-

portant events, the lawyer may ask a series of questions. "It took less time than twenty-four hours, did it not? And it took more than five seconds, did it not?" Those two extremes will be narrowed until the witness is almost forced into giving an estimate. Another method is simply to use the word "approximation" rather than "guess." The lawyer will say, "I do not want you to guess, Mr. Jones, but give us your approximation." A guess by any other name would be just as inaccurate and misleading.

The witness should be warned about all of those tricks of the trade. The witness should be admonished to state only what she can clearly recall with assurance of accuracy. She should not feel inadequate or stupid if she does not know the answer to the question or cannot recall what she once knew. For example, the lawyer might tell the witness that she is not taking a test and will not get partial credit for a partially right answer. Obviously, the witness can give some approximations. Virtually all testimony consists of approximations. Nevertheless, some bounds must be put on approximations. When the witness feels that her answer can be refined no more, then she should decline to give an estimate. Thus, the witness may say, "It all happened in about five or ten minutes, but I can give no better estimate than that."

Finally, the lawyer should stress the concept of "personal knowledge." The witness should never assume that the other attorney is asking for hearsay information. The lawyer should explain to the witness how misleading it can be for the witness to answer on the basis of what someone has told her. It gives the appearance that the witness actually saw or heard the events in question. If it later turns out that the information supplied to the witness was inaccurate, the witness may appear to be lying when she was only relying on bad information.

Nevertheless, there will be instances during depositions when the witness will testify to hearsay. Explain to the witness that the other lawyer will ask about what other people have said about the events. Although that information is not likely to be admissible at trial, it may reveal the names of other witnesses who can be questioned about the facts. But the witness should always assume that the examining attorney is asking for the witness's personal knowledge and should never volunteer hearsay information but should give it only when requested to do so.

Although the lawyer must educate the witness not to volunteer or speculate, the lawyer should be careful not to give the impression that the witness should stonewall. Instead, the lawyer should explain that depositions are taken under oath and require a precision beyond that usually required in ordinary conversation.

6. Never volunteer information to my opposing counsel. If you can simply say "yes" or "no," then do so. If you finish your answer, and the examining lawyer sits silently, as though he were expecting more, resist the temptation to fill up the silence with more testimony.

7. Stick to the facts -- that is, what you saw, heard, felt, tasted, or smelled. Make no assumptions. Do not base your testimony on what someone told you. Talk about what someone else told you only if you are asked what someone else told you.

8. If you do not know or cannot remember, then say so. The law requires only that you say what you remember. No one can remember everything, especially if the events happened a long time ago.

12. Beware of being too positive on details, such as distances, speeds, and time. Qualify these details by testifying to the best of your recollection; in other words, leave yourself an out. On the other hand, do not qualify everything you say by words such as "I think" and "I believe." When you know something, state it positively.

13. Do not underestimate or try to second guess the other attorney. Listen to the questions carefully and watch out for the following tricks:

a. The "friend" act: The attorney may appear very chummy so that he or she can lull you into agreeing with something that is not true. This approach may include flattery.

b. The "prosecutor" act: The other attorney may badger you and attempt to stir up your anger so that you will be careless in listening to and in answering questions.

c. The hypothetical or multiple questions: The attorney may try to get you to assume an untruth. For example, the attorney may say: "Did you run or walk to the accident scene, after the red car ran the stop sign?" Do not answer the question, unless the red car really did run the stop sign.

d. The trick of summarizing: The attorney may, in the course of asking a question, summarize your earlier testimony in a distorted or false manner. For example, the attorney may say: "Now you said earlier that you ran to the accident scene after the red car ran the stop sign. How long did it take you to get to the accident?" Do not answer unless you really did testify about the red car running the stop sign. Say that you stand by your earlier testimony or repeat what you said.

14. Do not let the other attorney interrupt you and keep you from finishing your answer. If you are interrupted, ask permission to finish answering.

15. If an answer was wrong, correct it immediately. If an answer was unclear, clarify it immediately.

16. Freely admit that you have talked with me about the case, but do not reveal the content of our conversations.

20. Beware of the question: "Is that all that took place?" Your answer should be: "That is all I can recall." You may remember something else later, so allow for that possibility.

21. Do not let the attorney put words in your mouth. If the attorney insists on a "yes" or "no" answer, but the question cannot be answered truthfully by a simple "yes" or "no," then explain your answer, after first saying you cannot answer with just "yes" or "no."

22. Do not exaggerate.

23. Do not anticipate a question; answer a question before it is finished; or listen to only a part of a question. Listen carefully to the whole question.

24. Do not give any off-the-record comments, or the opposing counsel will simply go back on the record and quiz you concerning those comments.

25. Do not talk when an objection is being made.

If the examining attorney asks you to agree not to answer a question you do not understand, then answer that you will not answer a question if you realize that you do not understand it.

32. If you remember something that you did not recall earlier in answering a question, take a break and discuss it with me before stating your new recollection.

33. Be sure to read all documents and papers that you are asked about. Take all the time you need. We can even take a break while you do so. Do not speculate on what a document means if you were not the one who prepared the document. Do not agree to what a document says unless you know the accuracy of the information. Remember the difference between agreeing on what the document says and agreeing with what it says.

34. Consider each question individually. Do not let the attorney lull you into agreeing with a series of statements when you really do not agree with everything.