Witness Guide

The Deposition

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Some thoughts
on how to be
a good witness.

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As the date of your deposition approaches, I think you will find it helpful to have a few guidlines on paper. It will be time well spent for you to review these guidelines several times prior to your deposition. I want you to be the best witness that you can be, and I believe this guide will help achieve that goal.

◆ one ◆

What a deposition is, and what it is not.

A deposition is a formal question-and-answer proceeding in which your opponent's lawyer will try to find out everything you know that might be relevant to your lawsuit. The deposition is an extension of the trial and you should think of it as such. You are placed under oath by a court reporter who will write down verbatim everything that is said during the deposition. The court reporter usually sits at the end of a conference table with your opponent and his or her attorney (who will ask the questions) on one side of the table and you (who will anwer the questions) and me on the other side of the table.

Obviously, you are concerned about what questions your opponent's attorney will ask you. To put your mind at ease, you will only be asked questions about three things: (1) Your background (personal, education, employment, marriage, etc.); (2) What you remember about events that you experienced (the setting, the participants, what happened, who said what, etc.); and (3) What you know about the consequences of those events (past, present, future).

Every question that your opponent's lawyer asks you in your deposition will fall into one of the above three categories. See, it's really nothing to worry about. Your opponent's lawyer is simply trying to find out everything that you know about each of the three categories. The reason for the court reporter and written record is to commit you to a position regarding what you know. Therefore, the real question to ask yourself before the deposition is: "What do I know?"

You only "know" those things that you have actually experienced through your senses (you did it, you lived it, you saw it, you heard it, you touched it, you smelled it, you tasted it, you felt it, etc.). As an example, let's assume your friend John was in a car wreck. You see John the next day and he tells you all about his wreck. You now know most of the

details about John's accident the day before, right? **No, you don't!** The only thing you know about the accident is what you experienced: the conversation with John. You don't know anything about the accident. It sounds simple because that was a simple example. Believe me, it can get much more complicated. Unless your answer to a question is based upon your personal experience, you do not know the answer. Remember, you are under oath. If you are asked about John's accident, your answer should be "I don't know."

You also should be aware of what a deposition is not. A deposition is not your opportunity to argue your view of the case. That is my job. I guarantee you that you will hurt the entire case by arguing your views. Not only will you educate your opponent's lawyer and therefore better prepare him or her to respond to my argument at trial, you will likely provide information to your opponent that he or she may never have considered important before. Remember, you do not know the Rules of Evidence; you do not know the Rules of Civil Procedure; you have not studied the principles of law that control your lawsuit; therefore you cannot appreciate the impact your statements and any information conveyed will have on your case. If that doesn't convince you not to argue with the opponent's lawyer, you will have wasted all of the money paid to me up to that point, and it will likely cost you twice as much for me to undo the damage that you do.

On a similar note, a deposition is not your opportunity to educate the opponent's lawyer. You obviously know more about the facts of your case and the context in which those facts developed than your opponent's lawyer could ever learn. While you may feel the urge to impress your opponent's lawyer with your knowledge of all the facts, don't do it. The only obligation you have in the deposition is to answer the question asked, nothing more, nothing less. It is up to your opponent's lawyer to pull every piece of information out of you.

Finally, a deposition is not a social occasion, even if your opponent's lawyer takes a very informal approach in asking you questions. As I stated earlier, we will most likely be sitting around a conference table. Before we begin, the lawyers and clients may engage in idle conversation;

the coats may come off; you may be offered coffee or a cold drink. Do not relax. Just because lawyers are civil to one another does not diminish the fact that they are opponents. Just because the tone is relaxed and the questions are easy, remember the phrase you hear all the time in police shows: "Everything you say may be used against you in a court of law."

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The rule: Tell the truth, but be certain you understand what the truth is.

In your deposition, as in court, your obligation and your legal duty is to tell the truth. You must tell the truth even if you think that the truth will hurt your case. If you don't tell the truth, I guarantee that your answers will hurt your case. If you deny something that you know to be true, you run the risk that your opponent may be able to prove that you lied. In addition to risking 10 years in prison, you will probably lose your lawsuit if your opponent proves that you lied under oath. Along these same lines, if you avoid testifying about something that you should know about, your opponent will make you look like an ignorant fool on the stand.

Be sure, however, that you are telling the truth. Remember, you are under oath; you are swearing that the words coming from your mouth are true and accurate. You are answering questions, and the court will hold you to the commitment that the words you speak in response to those questions are the truth. If you need to, refer back to the previous chapter about what you actually know. In addition, it may be helpful to review some general guidlines in anticipation of your deposition. You do not have to memorize the rules set forth below; however, they are very useful in assuring that your answers are the truth. Please read them all and

consider how they impact the way in which you communicate with people. Then, read them again.

◆ *Do not attempt to tell the truth until you hear and understand the entire question that was asked.* In conversation, we attempt to anticipate what will be said to us. If we don't understand a question or comment, we are likely to guess rather than place the speaker on the spot by asking the speaker to repeat or rephrase a question, or admit that we did not understand. Your deposition is not a conversation. ***Never*** attempt to answer a question until you are sure that you understand it. If you need to have the question repeated, ask your opponent's lawyer to repeat it or ask the court reporter to read it back. If you simply do not understand the question - if the question is ambiguous, confusing, unintelligible or just plain dumb - do not attempt to answer it; instead, ask your opponent's lawyer to re-phrase the question.

◆ *Once you are sure you have heard and understood the entire question, answer it as succinctly as possible.* To understand the question, you have to hear and understand each and every word of the question. Once you have heard the question, you must then think about it and frame your response. Consider your response, assure that it is accurate, and then state it as succinctly as possible.

◆ *Ask yourself, "Am I willing to swear to this response?"* If you are not willing to swear to it under oath, then you probably do not know it well enough to preserve it as the truth. If you have to qualify your answer by saying, "I think, I believe, I probably, etc. ," then you should consider how confident you really are of the answer. Stated another way, do not guess. Do not assume that just because you know the beginning point and the ending point that everything in between proceeded logically; life is not that logical.

◆ *As a general rule, "I don't know" is an appropriate response.* No one expects you to recall what you were doing at 2:00 p.m. a year ago. No one

expects your memory to be perfect. Nor does anyone expect you to know everything about every topic. Do not hold yourself to a standard that no one expects you to meet, especially when you are under oath.

◆ *Do not be afraid of silence.* If you have answered the question, stop talking. The silence of your opponent's lawyer or a confused look on his or her face is no reason to keep talking. The fact that your opponent's lawyer does not appear to understand or does not like your response does not mean that you have not told the truth, or that your response is incomplete. Sit still; the silence will pass.

◆ *Do not be afraid to repeat an answer.* Your opponent's lawyer may ask the same question over and over in different ways. He or she may be providing you an opportunity to answer the question differently in the hope that you will give a contradictory answer; or, he or she may have simply forgotten your original answer. Do **not** feel any obligation whatsoever to re-phrase your original answer simply because the question has been repeated or asked in a slightly different way. There is no need to embellish your previous answer. If your opponent's lawyer asks a question that has already been asked, simply repeat the same answer that you gave previously. The same question asked a different way takes the same answer as the first time it was asked.

◆ *If the question calls for a yes or no response, answer the question yes or no.* In conversation, we tend to skip that part of our answer. In testimony, a direct response to a direct question is the surest way to impress the court with your credibility. If the question takes a yes or no, you should respond with the appropriate answer and then be quiet.

◆ *Do not qualify your response unless it is absolutely necessary.* "The sky was blue" is a more direct, and therefore more believable, statement than, "Well, this morning when I got up and looked outside I seem to recall that the sky, except for the clouds that is, was, at least to my way of thinking, a shade of blue." As I have noted previously, if you have to qualify a

response, you should consider whether you know it well enough to be swearing to it.

◆ *Do not guess.* Every time you assume a fact to be true, you assume the risk of being proven wrong.

◆ *Speak clearly and slowly.* The considered response, articulated in a manner which assures that the person asking the question hears the response, impresses the fact finder as the response of a person who is confident in the truthfulness of the response.

◆ *Always finish your answer.* If the lawyer interrupts you, wait until you have the chance to finish the answer, tell the lawyer that you were not finished and complete your response.

◆ *Do not confuse what you read with what you remember.* Your opponent's lawyer may show you a document which you wrote or received at some point in the past. The presence of your signature on a document is not a certification that you have committed the contents of the documents to your memory. If you remember the contents of the document, you can testify about the events described in it. If you do not remember the contents of the document, then the most you can testify to is that the signature is yours, or that you received the document. Take the time to read anything that is put in front of you.

◆ *Never let your answer be influenced by your emotions, especially if you are upset or angry.* If the emotions are running high and you begin to get angry or upset, stop and take a break. After you have cooled down, we can resume the desposition.

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Your opponent's lawyer.

Your opponent's lawyer has two functions: gathering the facts and arguing the facts. There is a simple, effective, yet exhaustive, way that a lawyer gathers all of the facts in a question-and-answer proceeding such as your depostition. I call it the "round-up" technique. To show you how it works, assume that your opponent's lawyer wants to know about all of the vacations you have taken in your life. The inquiry will begin with an open-ended question such as: "Tell me about every vacation that you have taken." You, as the witness, may list three that you recall. The lawyer may ask you further questions about each vacation, a process which may take some time; however, eventually the lawyer will ask you the round-up question which will sound something like this: "Are there any other vacations that you have taken?" or "You have mentioned one, two and three, are those all of the vacations you've taken?" or "Do you recall any others?" and so on. If you have taken 10 vacations, eventually your opponent's lawyer will have you name all 10 by continuously ending the line of questioning with some form of "anything else?" It is a circular process that is very effective in rounding-up all information about any given event. Don't be surprised if you experience the round-up over and over throughout your deposition.

Your opponent's lawyer's second function is arguing the facts. Lawyers are advocates, but they do not make the facts. They only find out the facts that already exist. They are not above, however, allowing you to make some bad facts. It is your job to keep this from happening. One way your opponent's lawyer may try to create some bad facts is by confusing you about the time frame in which your answer is required. Obviously, you know more about what happened today than you know about what happened a year ago today. Be very sure that you understand the time frame in which your answer is required. The distinction is evident in the two questions "What did you know?" and "What do you

know?" A second technique your opponent's lawyer may use to have you create bad facts involves the "misleading factual predicate." Using this technique, your opponent's lawyer will begin the question with a statement of fact that is not entirely accurate, and then he will ask a question. Because you answer the question, you appear to confirm the inaccurate statement of fact. This is the classic "Are you still beating your wife?" question which presumes that you did in fact beat your wife at some point. Anytime a question is long, complicated or purports ro restate and establish facts of previous testimony, listen carefully to insure that the entire question is accurate. If it is not, say so.

Along the same lines of the misleading factual predicate question, watch out if your opponent's lawyer summarizes your testimony for you. Oftentimes, a lawyer will ask one or more long-winded questions which summarize your testimony. The questions usually begin with the phrase "If I understand your testimony, ..." If the summary is completely accurate, then you can agree to it. It is more likely, however, that your response should be that the summary is "too broad to accurately characterize your testimony on that point."

Finally, remember that your opponent's lawyers will play to your vanity and will ask you questions that presume that you have knowledge of the facts contained in the question. Do not be afraid to say that you don't know about those facts if indeed you don't. As a practical matter, the bigger the organization or event, the less likely it is that you know everything that went on regarding the organization or event and, therefore, the more likely it is that you do not have knowledge (remember, you're under oath) about the particular subject.

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If and when I object

With all of these rules, why do I need a lawyer? Very good question. As a practical matter, there is very little that I can ethically say or do dur-

ing the course of your deposition. Remember, it is just as if we were at trial in the courthouse. That means that there are very few legitimate means by which I can interject myself into your deposition.

There also are very few constraints on what your opponent's lawyer can ask you. Even if the question is inane or stupid, the rules that govern depositions allow your opponent's lawyer to ask any question that is likely to lead to useful evidence. It is a very broad standard and gives your opponent's lawyer a great deal of leeway.

If I do interject myself into the deposition and say anything, listen, because it is important. If I say anything during your deposition, quit talking, and then remain silent until I give you some indication that you may go ahead and respond.

You may talk to me during the deposition, but it is not recommended. If you must, it is preferable to answer the question and then ask to confer. If you think that you must confer with me prior to answering the question, then do so, but appreciate the fact that it will make you appear evasive. If at all possible, save the thought until the next break, or answer the question and then tell your opponent's lawyer that you want to take a break.

five

This is <u>your</u> deposition.

This is your deposition. If you are physically uncomfortable, we stop. If you are hungry, we stop. If you are thirsty, we stop. If you need to go to the bathroom, we stop. If you do not like the way a question is phrased, the lawyer has to re-phrase it. **You are in control.**

Now, put these pages down and relax. These are only guidelines that are intended to help you be a good witness; they are not a moral code, and they are not absolute. They should not be brought to the deposition, and they should not interfere with our goal of assuring that you respond accurately and succinctly to the questions that will be asked.

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Please do not hesitate to contact me if you have any questions or need me to do anything for you.

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