

The Dummy's Guide to a Deposition

BY ANDREW MARTON

Your first experience in a lawsuit may be as a witness in a deposition. Here is a general guide to the process and what you should be aware of.

A deposition is like going to the dentist – only longer. Actually, it is an informal proceeding intended to preserve the out-of-court testimony of a witness and is typically used in court at the time of trial. The deposition is usually held at an attorney's office. But don't let this informality mislead you – depositions are vitally important to a lawsuit, and the attorneys are deadly serious.

The court reporter will record everything said during the deposition. The record will later be typed (double space) and bound in booklet form, which is typically referred to as a "transcript" or "deposition."

The deposition process itself is quite simple. The reporter will ask you to raise your right hand and take the standard witness oath. The questioning begins with the lawyer who scheduled your deposition. Each lawyer present will have an opportunity to ask you questions. The process continues in an orderly fashion until the lawyers have no further questions to ask you.

How to Make the Process Work for You

Life would be simple if one could obtain justice by merely appearing in the courtroom and telling the truth. The trouble is that your opponent's attorney will use your deposition testimony to ridicule your story and contrive ways to suggest to the jury that you are not telling the truth.

The Purpose of a Deposition.

Let's assume that you are an employee of the defendant and that the plaintiff's attorney is taking your deposition. What is the plaintiff's attorney looking for?

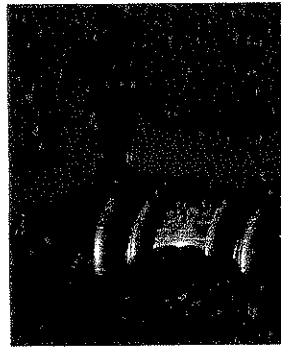
First, the objective of plaintiff's attorney will usually be to discover what you know concerning the matters involved in the case. In this respect, he is legitimately searching for evidence.

Second, he is looking for evidence favorable to plaintiff's case. For instance, in a personal injury case, he would like to have you admit facts that establish that your employer was negligent.

Third, plaintiff's attorney may be looking for ways to discredit your testimony or to discredit the testimony of other defense witnesses through you. Lawyers call this process "impeachment."

Fourth, he will attempt to learn what your employer's defenses are to the lawsuit. It is common for plaintiff's lawyers to start off litigation on the basis of one claim and, on discovering the defenses, to shift plaintiff's claim to a wholly new and different theory.

Fifth, in some cases, a lawyer may take a deposition to simply preserve the testimony for trial or to lock you in on your testimony.



So here are some suggestions on how to make the deposition process work for you – rather than against you:

1: Remember the Name of the Game.

If you are the defendant or an employee, you can rest assured that plaintiff's attorney's purpose in taking your deposition will be to enhance the case against you or your employer. The atmosphere in the deposition may be causal and

friendly. But beware, it's still money that plaintiff's attorney is after and he or she can afford to be charming. So keep your guard up.

2: Never Volunteer.

The simplest rule is always the hardest to follow: Never volunteer information. The road to hell is paved with good intentions. More damage is done to a lawsuit by a "helpful" witness than from any other source. If the answer can be answered with a "yes" or "no," do not volunteer more information.

For instance, if you are asked if you have a document or file, simply respond "yes" or "no," rather than answering, "No, Mr. Smith has the file" as you have guaranteed that Mr. Smith's deposition will be taken soon.

3: Make Sure You Understand the Question.

Never answer a question unless you fully understand it, and always wait until you hear the entire question. There is an assumption that if you answered the question, you understood it. So if the question is long or complicated, ask the court reporter to repeat it for you. You also have a right to ask for a clarification if the question is unclear.

4: Take Time to Think.

First, listen to the whole question. Second, consider the question carefully. Third, think through your answer. And finally, state your answer concisely. Never rush the process.

5: Never Guess.

If you do not know the answer to a question, just say so. "I don't know" is a legitimate full and complete answer. Let the lawyer then try to jog or refresh your recollection if the subject matter is worth the effort.

6: Never Assume.

There will be times when you can't remember important facts. If this happens, do not be afraid to say that you can't remember. It is much more dangerous to testify based upon assumption rather than memory. The last thing you want to do is create evidence that may be harmful to you or your employer's case.

7: Never Lose Your Temper.

Some lawyers intentionally try to push your buttons. They know that an angry witness is a bad witness. Be polite but firm, and do not let the opposing attorney get the best of you.

8: Always Read the Fine Print.

Documents (e.g., accident / incident reports, contracts, leases, insurance policies) are a common subject matter for questions in a deposition. However, there are some rules you should follow before testifying about a document. First, always read the entire document to refresh your recollection and to ensure you have the right document in mind. Read it slowly and at a comfortable pace. You can always ask for a break if you feel pressured. Never assume that what the opposing attorney represents to you about a document is a true or an accurate representation of the intent or meaning of it.

9. Listen to Objections.

Lawyers occasionally object to questions in depositions (which are later ruled upon by a judge). The witness is still expected to answer the question unless the attorney instructs him or her not to do so. If your attorney objects to a question, you should listen very carefully to the objection, because it will give you a clue as to his concern and you may be able to tailor your answer accordingly. Your attorney will love you for it.

10. The Theory of Relativity.

Just how precise should your answers be? Well, there is no precise answer, but as a general rule, your answer should be as precise as the question. Again, if opposing counsel fails to ask the right question, do not provide information not requested.

11. Check Your Baggage.

Always ask your attorney in advance what documents you should bring to the deposition. Chances are that he will suggest that you rely solely on your recollection of facts and leave all your documents at home. The reason is because in most instances, opposing counsel has a right to inspect any documents you bring with you or reviewed to refresh your recollection.

12. Never Assume Falsely.

Occasionally the opposing lawyer will have you assume certain facts and then ask you to formulate an opinion based upon the hypothetical he has described to you. Be very careful in these situations, as the hypothetical is usually designed to support a claim against you. If the facts are unacceptable because they are based on an impossible premise or contrary to known physical facts and scientific principles, then decline to answer the question on the basis that you cannot accept the premise as stated.

13. Be Consistent.

Some lawyers will ask the same question 10 different ways. The tactic of repetitive questions is typically used when the asking attorney does not like your initial answer so he tries to take another shot at it with a differently worded question. Or the tactic is used to lock you in on an answer as it is hard to say that you didn't understand the question when you answered the same question consistently nine other times. Another motive for repetitive questions is to test the truthfulness of your recollection, as it is difficult to keep facts straight if your answers are less than truthful.

Some people will tell you that they would rather sit in a dentist chair than a witness chair. But the truth is that most lawyers are afraid that some fast talking, smart answering, know-it-all witness is going to make fools of them – or worse, is going to blow their case out of the water. Remember, the lawyer can only ask questions, so if you know the answers and keep your cool, you are in control of the deposition process.

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