

Guidelines for Deposition Testimony

As part of the legal process, you may need to give a deposition, and you may need to testify in trial. In the event that you do give a deposition, your testimony may affect settlement. Your testimony will be recorded, and it will definitely appear in a written transcript. Your testimony also might be videotaped and be replayed at trial. Opposing counsel might select excerpts of your words or reread your response to a judge, a mediator, an arbitrator, or a jury. The team working with you is fully aware of that possibility and will be preparing you with that ultimate audience in mind.

The materials in this brief handout are designed to supplement the information presented at your Litigation Education Retreat and to familiarize you with your part in the litigation process and provide you with the tools to help you make your deposition as effective as possible.

Important Note: *This material only covers the general traits of an effective witness. In using this handout, it is critical to discuss your deposition and your anticipated answers with your own attorney.*

An Effective Witness...

1. Stays within Clear Parameters of Testimony

a. Stay within your area of expertise	Don't guess when counsel asks you a question which goes beyond your scope of <i>expertise</i> (experience and training). Instead stay firmly within your own experience and area of expertise.
b. Stay within your area of knowledge	Don't guess when counsel asks you a question which goes beyond your scope of <i>knowledge</i> (direct observation of the facts). If you don't truly know, then the best answer is "I don't know."
c. Testify only about what you remember	Don't fill in gaps and make estimates about what <i>probably</i> happened if you don't specifically remember. Be explicit (and not apologetic) about what you don't remember.
d. Don't volunteer information beyond the scope of a question	Just answer the question asked. If additional information needs to come out, your attorney will make sure that it does. It isn't your responsibility to anticipate and answer questions you aren't asked. Don't mention individuals, events, or documents unless or until you are asked about them.



1. Stays within Clear Parameters of Testimony (cont.)	
e. Don't get sucked into hypotheticals	IF counsel is asking you about a hypothetical or fictitious scenario, you should assume counsel is doing so to second guess your actions in the case. Your attorney may object, but if you do answer, it is fair to point out that you don't know, or that the scenario would depend on too many additional factors to be spelled out.
f. Be careful of evaluating another's testimony	Don't allow opposing counsel to create or magnify a conflict or pull you into speculation about testimony you didn't hear or facts you didn't observe. The observation that other individuals can best speak for themselves is often the best answer.
g. Resist addressing the motives (or other unknowns) of others	Because you can't know what other people might have been thinking, don't speculate. Instead, testify about what you know, heard, read or saw.
h. Be careful of 'custom and practice' questions	Don't allow opposing counsel to turn you into an expert witness by eliciting statements about the common standards and practices within a specialization. Follow your counsel's advice on whether you need to answer these questions or not. When you do, stick to what you know is true.
i. Avoid humor	You may feel tempted to lighten the mood by eliciting a chuckle from the lawyers, the court reporter, or the videographer. Don't risk it. You don't have to play it rigid, but you should play it straight. It is never as funny when it appears in the transcript.
2. Focuses and Listens Carefully	
a. Listen to every word of the question	Don't guess about where the question is going once you've heard the start of it. Focus on each word, and let it sink in before you start your answer.
b. Don't answer until you understand the meaning of a question	It is never safe to answer your "best guess" of what you thought that the question meant. Ask the attorney to rephrase the question, or ask for clarification if the question was unclear, or if your attention drifted while you were being asked.
c. Wait for question completion before answering	Don't begin to answer if the questioner hasn't finished yet. Make sure that the questioner is finished before you start to form your response.



2. Focuses and Listens Carefully (cont.)	
d. Allow a brief pause before answering	Don't answer immediately after the questioner finishes. Allow a quick beat of silence before you answer to ensure that you are on the right track and to allow your lawyer time to object, if necessary.
e. Listen to objections	Don't assume that objections are just "lawyer talk." The content of an objection can be important for you as well. For example, if your attorney's objection is that a question "calls for speculation" then let that be a reminder to you not to speculate in your answer.
f. Don't divide attention between a question and a document	Opposing counsel may hand you a document and ask you a question about it at the same time. Don't immediately answer or answer at the same time you are reading it. Instead, ask for a moment to look it over, and then answer the question.
3. Is Verbally Precise	
a. Ask for clarification when you need it	Don't guess at the meaning of an unclear or garbled question. In order to make sure that you understand the question correctly, ask opposing counsel to rephrase it.
b. Correct assumptions within the question	If a question contains an assumption that you wouldn't agree with, don't let it slide. Instead, call attention to the fact that the question contains an assumption that you believe is incorrect.
c. Correct inaccuracies	If a question contains an inaccuracy, don't just let it pass. Instead, address and correct the inaccuracy.
d. Break down multi-part questions	Opposing counsel may ask a multi-part question. Avoid giving a general answer which could seem to indicate agreement with all of the parts of the question. Instead, ask that questions be broken down so you can answer one part at a time.
e. Don't be sucked in by an over-broad question	Resist the temptation to turn an overbroad question ("Tell me about being a doctor") into a "speech topic." Don't launch off on a long monologue. Instead, answer a general question at the same level of generality: "Being a doctor is an interesting line of work."



3. Is Verbally Precise (cont.)	
f. Avoid inaccurate absolutes (always, never)	Don't use absolute language just to show emphasis. It's only "never" if you really mean "never," and it is only "always" when it is absolutely "always."
g. Avoid unnecessary qualifications	Don't use qualifiers like "In my opinion...", "To the best of my recollection..." or "I think..." as filler words. Instead, use these qualifications to convey real and accurate uncertainty. Using qualifiers just as habits of speech risks conveying hesitancy or self-protection.
h. Keep lists open	Opposing counsel may try to elicit a complete list from you relating to a number of things (e.g., the steps you took, the contacts you had, etc.). Be sure before you supply finality to that list. If accurate, for example, it is perfectly acceptable to say, "Those are three elements that I recall <i>at this point</i> " instead of "Those are <i>the</i> three elements."
i. Don't re-answer a question you have already answered	If counsel asks the same question for a second time, some witnesses will presume that there was something wrong with their first answer, and try to answer it a little differently a second time. If a question has been asked before, your own lawyer may object ("objection - asked and answered") but if not, feel free to rely on your previous answer. You have no obligation to 'improve' it.
j. Don't think out loud	After you hear a question, think silently, be sure, and then answer. Pause if you need to, but speak only when you know what the answer will be.
4. Doesn't Give Up Full Control to the Questioner	
a. Give full sentence answers	Don't allow opposing counsel to lull you into a pattern of single word answers: "yes", "no", "2002", "4 centimeters", etc. Instead, complete the thought: "Yes, I did record her temperature on the chart", "I received my license in 2002", "Dilation at that time was 4 centimeters."
b. Answer in your own words	A trained lawyer will often choose his words in his question to get you to adopt that damaging phrasing in your answer. There is no need to parrot counsel's words and phrases in your answer. Carefully chose your own words and phrases.




4. Doesn't Give Up Full Control to the Questioner (cont.)	
c. Be critical of counsel's attempts to summarize your testimony for you	Don't allow opposing counsel to wrap your testimony up into one big ball which you then say "yes" to. Instead, if a question attempts to summarize, ask the questioner to break the question down so you can consider the items one at a time.
d. Be critical of attempts to lead	It is likely that opposing counsel will ask a series of leading questions, seeking a "yes" from each one. Don't fall into a pattern of automatically saying "yes" to each of counsel's statements. Instead, carefully consider <i>every</i> question and answer in your own words, not theirs.
e. Keep your own pace, don't get sucked into the rapid-fire pace of the opposing counsel	If opposing counsel seeks control by asking questions at a rapid pace, some witnesses will respond by attempting to answer the questions at an equally rapid pace. Recognize that only you have the power to set the pace and you have the right to have a moment of thought before answering.
f. Don't get confused by the attorney's structure, or lack of structure	If opposing counsel jumps around from topic to topic, it may seem natural to try to figure out where she is going, or to draw conclusions from the fact that she moved from topic A to topic B. Make sure you understand what topic you are on for each question. Then, take each question as it comes.
g. Don't be 'baited' by a 'baited silence'	If counsel is silent after you have provided a complete answer, then you should be silent as well. Don't fall prey to the social convention of 'filling the silence' by continuing to provide more information. Instead give a complete answer, then simply enjoy the silence and wait for the next question.
5. Resists Defensiveness	
a. Don't get angry	Don't let your emotions show by, for example, raising your voice, refusing to look at opposing counsel, or making your answers cutting or defensive. Remain poised, and don't give the opposing counsel the satisfaction of seeing you crack. Instead, save your frustration for after the deposition and then share it with your own lawyer if necessary.
b. Don't be riled by 'emotionally-charged language'	Don't respond emotionally to the connotations of counsel's language. Answer on your own terms. Correct inaccuracies, but otherwise just answer the questions.



5. Resists Defensiveness (cont.)	
c. Don't respond to hostile questions with hostility	You will lose credibility if you reduce your responses to grudging one-word grunts, or embark on long defensive speeches. Remain calm no matter what.
d. Don't fight an obvious (or inevitable) answer	If an admission on your part is obvious or inescapable, then avoid the drama of resisting and provide that obvious and inescapable answer as soon as opposing counsel asks for it. If you can't deny it, don't attempt to dance away from it.
e. Accept that there may be small errors or inconsistencies in your care of the patient	Remember that a deposition isn't a quiz show and small errors or inconsistencies don't necessarily constitute a 'point' against you. Instead of responding to suggestions of error with defensiveness, denial, resignation, or regret, simply own up to inescapable errors and inconsistencies. After discussing with your attorney exactly what might constitute an obvious or inescapable conclusion, don't fight the obvious during your deposition.
6. Employs Clear and Confident <i>Verbal</i> Communication	
a. Give complete and concise answers (more than a word, less than 3 sentences)	Listen to the question, take a moment to think, and then answer in a complete and concise fashion. You should neither rely on one-word answers nor resort to paragraphs-long answers. Two sentences is about the limit for most questions. The first sentence is for the answer. The second sentence (only if necessary) is for the explanation. If you can answer in one sentence, do so.
b. Avoid unnecessarily technical language	Avoid using terms that your ultimate audience is unlikely to understand. For example, if it is accurate and in context to call it a "headache" then there is no need to call it "Cephalalgia." Explain what you mean without being pressed to do so. Use an unfamiliar term only when understanding <i>the term</i> (and not just the concept) is important to the ultimate audience. Ideally, break it down to simple English: "She had a severe headache, which we refer to as Cephalalgia." When you do use an unfamiliar term, explain what it means before you use it.



6. Employs Clear and Confident <i>Verbal</i> Communication (cont.)	
c. Avoid vocal fillers	Avoid using vocal pauses like “um” and “ahh,” or content-free words such as “like” and “okay.” Intensifiers such as “really”, “honestly”, “actually” and “truly” are also unnecessary and reduce the power of your expression. Speak more slowly and think through your messages so that you can eliminate or minimize filler words.
d. Avoid non-literal indications of uncertainty	Reserve indications of uncertainty for those times when you genuinely are uncertain. Don't let it become a habit of speech. Be sure not to pepper your language with phrases like “I think...”, “I believe...”, “kind of...”, etc. when you don't mean it.
7. Employs Clear and Confident <i>Nonverbal</i> Communication	
a. Speak loud enough to be heard easily and to convey confidence	Make sure that you aren't mumbling, speaking too softly for the room, or dropping your volume at the end of your sentences. Speak at a volume that is suited to the room, so that everyone can hear you without trying. One of the easiest ways to boost your appearance of confidence is to speak at a somewhat louder volume.
b. Maintain a relaxed and alert posture	Even in a long deposition, avoid the temptation to slouch in your chair, lean back, hunch your shoulders, let your head tilt to one side or the other, or fold your arms in front of you. Instead, sit straight, leaning slightly forward. Place your arms on the table in front of you, fold your hands one on top of the other, and gesture when it is appropriate. Keep your head erect and toward the questioner. 
c. Maintain a relaxed facial expression	Don't ‘wear your tension’ by furrowing your eyebrows or showing a skeptical, hostile, or bewildered expression when opposing counsel is questioning you. Your expression should convey that you are alert and interested, but not tense or angry.



7. Employs Clear and Confident <i>Nonverbal</i> Communication (cont.)	
d. Avoid repetitive or distracting mannerisms	Avoid tapping on the table, playing with a pen, or gazing at the ceiling or the floor. Don't let nervous energy take the form of uncontrolled movement. Move when you want to gesture; otherwise, stay still.
e. End sentences with a strong vocal period	End sentences confidently with a downward inflection. Rising intonation at the end (as if you were asking a question) is an indication of uncertainty or deference.

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