

The Deposition Guide

A Practical Handbook for Witnesses

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CHAPTER 1

WHAT ARE DEPOSITIONS FOR?

All federal and most state courts follow what are known as the Rules of Civil Procedure. First adopted by the United States Supreme Court in 1938 and amended from time to time since then, the Rules govern how lawyers prepare and try civil cases. Rule 26 provides for different “discovery methods,” including depositions.

The purpose of “discovery” is to obtain information from the opposing party in advance of trial in order to avoid surprise and to promote settlements. The theory is that once litigants know how strong or weak their (or their opponent’s) case is the more likely it is they will arrive at a fair settlement. Further, by eliminating surprise at trial each side can properly prepare, with appropriate rebuttal witnesses if necessary, for a trial on all issues of merit.

In simple cases, the theory usually works in practice. An automobile collision occurs, there are from 2 to 10 witnesses (including experts) and a police report. The damages may range from \$5,000 to \$100,000. The depositions, if any, are swift and to the point, and consequently the case will usually settle without the additional social burden of a trial.

The difference between theory and practice

It seems that where a lot of money is at stake in a case, the rationale for depositions goes out the window, and a deposition witness may become the innocent victim of a process based on tactics, not information gathering.

In an *ABA Journal* article entitled “Civil Discovery: How Bad Are the Problems,” Hastings College of Law Professor Wayne Brazil concluded from a study of 180 Chicago trial lawyers that “there are great differences between the character of discovery in large cases and in smaller cases and that in the larger lawsuits [cases in excess of \$1,000,000] the system is plagued with severe problems that prevent it from effectively serving the purposes for which it was designed.”

The “big case lawyers” in the study confessed that in 40% of their cases they used discovery tools “for the purpose of gaining time or slowing down part or all of an action.” In a third of their cases, they admitted that “the purpose of imposing work burdens for economic pressure on another party or attorney’ affects how they conduct discovery.”

As far as discovery being an information exchange, most of the trial lawyers polled by the study “made it quite clear that they spend considerable time and creative energy trying to increase the odds that opposing counsel will fail to discover damaging information from their clients. As one declared, ‘Most attorneys still see discovery as a game and play it to the hilt to avoid disclosure.’”

Most staggering of all was this admission from the “big case” litigators: “tactical considerations affect how they conduct or respond to discovery in 99 per cent of their cases and that tactics affect how they time discovery events in 92 per cent.”

Professor Brazil concludes: “The evasive, dilatory, and other tactical purposes that play such a large role in the pretrial development of big cases help make discovery a wasteful process”; and: “In the 1930s proponents of the Federal Rules of Civil Procedure hoped that the provisions for discovery would be largely self-executing and would reduce substantially the role of adversary pressures and tactics during the pretrial stage of litigation.

Our data suggest that these hopes were naïve and stillborn.” As a witness called to give testimony in a deposition (a “deponent”), especially in big-money cases, you may find yourself on the unfamiliar turf of hardball gamesters who are more intent on winning their case than on your welfare.

CHAPTER 2

YOUR RIGHTS AS A WITNESS

If you are aware of a lawsuit that is brewing or has been filed where you might at some time be called to give testimony as a witness, see your lawyer to find out your specific rights.

In terms of depositions, a potential witness is anyone who has information relevant to the issues of a lawsuit, or who has information that may lead to relevant information. Civil Rule 26(b) gives depositions a broader scope of inquiry than would be possible at trial. Unlike at trial, where a judge can rule on objections according to established rules of evidence, at a deposition lawyers can ask irrelevant questions and inquire into hearsay.

Rule 26 specifically states that it “is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”

This “fishing expedition” aspect of depositions can be used to justify inquiries into areas sensitive to you that have nothing to do with the lawsuit. Lawyers in the case may even decide to sue you after your deposition, on the basis of the testimony you give, to make you an additional party to their lawsuit.

Even if your deposition deals with innocuous facts, you may be unduly inconvenienced in your job and home life unless you are aware of your rights.

A call to your lawyer before your deposition could save you a lot of unpleasantness. Tell him what you

know about the case, the names of others involved, and the name of the lawyer who wants to depose you. Be completely frank and open with him; what you two discuss cannot be forced out of you at your deposition, since it is protected by the attorney-client privilege. Based on what you tell him, he may decide to be at your deposition with you to protect your rights, or he may counsel you to call him at any time during the course of your deposition.

Whether subpoenaed or volunteering to appear at your deposition, you will have to pay your own attorney's fees. If your lawyer is an experienced trial attorney, he will know the general reputation of the lawyer or lawyers seeking your deposition. If they are "straight shooters" in his opinion, you probably can relax.

Your lawyer will also know the peculiar local customs, practices and laws of your jurisdiction. Trust his advice on the specifics of your case.

Rights generally applicable

In most instances, your lawyer will confirm that you have a number of rights you can exercise at your deposition, including...

Your right not to incriminate yourself

If you feel any answer you give at a deposition may ultimately provide information that could put you behind bars, by all means have a lawyer present at your deposition. If you start answering any line of potentially incriminating questions, you may be deemed to have waived your Fifth Amendment right to silence. At that point you have blown it — there is no way to put the toothpaste back into the tube.

Still, you do not need a lawyer present to invoke the

privilege. Say: “I refuse to answer that question as it might tend to incriminate me,” or words to that effect. In civil cases, a lawyer hostile to a side you may be on can call to the jury’s attention the fact that you “took the Fifth,” and can suggest conclusions as for why you did so. Thus, “taking the Fifth” can have serious consequences.

It is foolish to do so if it is not called for. Again, the advice of a trained and experienced lawyer should be followed.

Your attorney-client privilege

Anything you discuss with your own lawyer is “out of bounds” in a deposition. It is *your* privilege, and you may invoke it by stating: “That question asks me to divulge communications between me and my lawyer, and I invoke the attorney-client privilege in not answering that question,” or words to that effect.

If you think you might be wrong in invoking the privilege, ask for a break while you discuss the matter with your lawyer. (If any lawyer present refuses your request, take the break anyway. You are nobody’s chattel at your deposition, and unless your behavior is intentionally disruptive to the point where a *judge* orders you to sit still, you are free to move about and take breaks as you like.)

The attorney-client privilege is lost if your conversations with your lawyer take place in the presence of third parties, like your friends, perhaps even your spouse. There is an exception to this rule if the third persons have a “community of interest” with you in a given matter, but why risk losing the privilege if you can help it?

There is also no attorney-client privilege between you and a lawyer who is not your lawyer. Your

company's lawyer can be considered "your" lawyer if your discussions relate to matters of your employment with the company, or if that attorney customarily handles employees' personal legal problems as part of his duties. But your company's lawyer may have a potential conflict of interest if he ever has to represent both the company and you in any given matter. It's always best to have your *own* lawyer advise you, even it costs you in the short run. In the long run, it may cost you much more if you act on your own.

The attorney-client privilege, like your Fifth Amendment rights, can be waived if you start to talk about what you and your lawyer discussed at any time. An interrogator may ask you innocuous questions about your dealings with your lawyer just to get you in a position where you will waive the privilege.

If you have had significant conversations with your lawyer about anything dealing with the case in which you are asked to give deposition testimony, the best protection against inadvertently waiving your attorney-client privilege is to have your lawyer with you at the deposition.

Your right to a subpoena

The only way you can be forced to give a deposition is through the service of a subpoena upon you personally. You are usually also entitled to a modest witness fee, which should accompany the subpoena, calculated on the basis of how far you will have to travel to your deposition. If you are entitled to a witness fee and you do not get one in advance of your deposition, you can ignore the subpoena and stay home.

Unfortunately, unless you are an expert witness hired to give testimony for a party, you are not entitled to

compensation for lost wages or business opportunities during the time of your deposition. You are performing a civic duty.

You cannot be subpoenaed to a deposition far from where you live. The subpoena power of courts vary, but as a general rule you cannot be subpoenaed to appear at a deposition outside of the county where you live (for most state lawsuits) or outside the jurisdictional boundaries of the U.S. District Court where you reside, which may encompass part or all of your state, but not more (the Districts do not cross state borders). Thus, it may be possible to avoid your deposition altogether if the lawyer wanting it does not wish to bear the expense of traveling to your state.

It is generally a good idea to insist upon a subpoena, even if it is a hassle for the lawyer wanting your testimony on the record, especially if you are expected to produce documents that you or others consider confidential or sensitive.

Your right to a protective order

You have the right to a protective order to keep records confidential; to guard trade secrets; to limit the scope of discovery; to limit the number of persons present at your deposition; to foreclose discovery altogether; or to limit discovery to some method other than deposition.

Rule 26(c) provides for judicial intervention in any of the above circumstances, *before* your deposition begins.

If you are entrusted with confidential information, or you have reason to believe that your deposition is being sought to promote chicanery, have your lawyer seek a protective order forbidding any undesirable acts before they happen.

My experience has been that courts are willing to protect trade secrets from being disclosed, but otherwise allow the free flow of unbridled depositions, regardless of the inconvenience to the witness.

Your right to bring anything that may assist you at your deposition.

If you want to bring this pamphlet as a handy reference guide, go ahead and do so. If you, or others, have prepared notes that will help your recollection, bring them (although expect them to be made exhibits!). Don't, however, bring rehearsed, "pat" answers to anticipated questions. That will severely hurt your credibility, since most people associate truth-telling with ease and spontaneity of response. Other items may be helpful, depending on the type of case and the testimony you anticipate giving: rulers (to make schematic or scaled drawings); a calendar; a calculator; maps.

If you are the victim of injuries and can be expected to testify about your pain and suffering, it is a good idea (subject to contrary advice from your lawyer) to keep a diary of how you feel each day and the dosages of the medications you are taking. Such a chronicle can be indispensable at the time of your deposition or trial months or years later, when you have healed and look the picture of health. Bring a thermos of tea or juice if you don't like coffee (the standard deposition beverage).

Your right to any statement given by you before your deposition.

Rule 26 of the Rules of Civil Procedure adopted by the federal and most state courts specifically states that any statement taken from you prior to your deposition must be given to you if you request it. If you don't have a copy of such a statement (assuming you gave one), by all means request a copy. If you do

not get it, you have a right to petition a court to have an order issued requiring its production. To bring such a motion before a judge will require the services of a lawyer.

An interrogator may be motivated to prompt you to contradict a prior statement made by you when an incident was still fresh in your memory. In fairness, you should be able to review that statement to refresh your memory, especially if you no longer have a copy or were never given one in the first place.

Your right not to answer a question

Only a judge can order you to answer a question, but be sure you have a good reason for your refusal to answer, as repeated refusals to answer on frivolous grounds can result in your being held in contempt, with attendant fines or jail until you do answer.

Always refuse to answer if your attorney so instructs you.

Your right to change answers after the deposition is over

Rule 30(e) gives you the right to read your deposition, once it is transcribed, and make any corrections, such as typos or misspellings. More important, you *can even change your answers* if you feel they were wrong or incomplete.

For each change you are to state the reason for the change. Then you sign the deposition, and all your changes are tacked on as an addendum to the official transcript.

You will most likely be questioned thoroughly at trial about any substantial changes in the transcript. Be prepared for these questions, and be open and forthright in defending the changes. Be quick to

admit a mistake. It will aid your credibility.

Too often, lawyers, perhaps unaware of Rule 30(e), mistakenly tell a witness they may correct for typos and misspellings only.

At the end of your deposition, one or more interrogators may suggest that you “waive signature.” This means you will thereby be giving up your right to read the final transcript and make corrections. Often this can be a convenience to the witness if the deposition is of no consequence. But if your deposition might have any significance at all, do not fall for the invitation to “waive signature” as a supposed courtesy to you. One of the interrogators may mislead you into thinking that reading your testimony would only bore you, and all you will be doing is correcting occasional typos, anyway.

They rarely tell you that you will also have the opportunity to make any changes you wish regarding your testimony!

A court reporter friend of mine has this to say about many lawyers’ apparent ignorance of Rule 30(e):
“Almost always, when discussing signature, lawyers tell the witnesses they can’t make substantive changes in testimony, but can only correct the court reporter. I have seen this done countless times. It’s amazing that so many lawyers don’t know about Rule 30.

“Whenever I can, I try to beat these lawyers to it by saying to the witness something like, ‘Where can I notify you that the transcript is ready to be read, corrected and signed?’ The reporter has to jump right in there, soon as the last attorney says, ‘Well, looks like that’s it,’ or someone will start the old ‘can’t-make-changes’ speech. “I must have bitten my tongue a thousand times so as not to correct some well-intentioned but un-informed lawyer giving this

erroneous advice. I've wanted, for years, to have my people carry a copy of Rule 30(e) to hand to the witness at the end of the deposition, but have been too chicken."

Even if all you do is correct typos, that is reason enough to go over your transcribed testimony. Court reporters are not infallible and may have unintentionally put words in your mouth. Further, a word spoken by you may, upon a look at the cold record, be ambiguous. When you are given a finished, typed copy of the transcript to review, you will have a golden opportunity to set the record straight with whatever additional words you want to add.

The deposition could be used to "impeach" you at trial. "Impeachment" means: a lawyer may produce a copy of your deposition and ask you to read along with him specified questions he asked and the answers you gave. His intent will be to show an inconsistency between your deposition testimony and your trial testimony. If your deposition testimony is harmful to an interrogator's case, he will look for every opportunity to make you look like a liar or a fool before the jury. By not "waiving signature" you minimize the potential occurrence of those opportunities.

Your right to retain originals of exhibits

You may have been served with a *subpoena duces tecum* prior to your deposition (Latin for "under penalty you shall bring with you..."). You were thereby commanded to *bring* with you the items listed in the subpoena. That does not mean you have to *part* with those items at your deposition!

Rule 30(f) states that you may have copies of originals marked as exhibits, rather than the originals. As long as you can give any interested party an opportunity to compare the copies with the originals,

you will have satisfied your duty to comply with the subpoena. A party to the lawsuit may seek a court order requiring you to produce the original as a deposition exhibit (in which case the document or object will usually stay with the court reporter until the case is over), but such an effort is very rare.

Lawyers often have a bad habit of simply asking the court reporter to affix an exhibit sticker onto anything you produce at your deposition, and to have an exhibit number or letter written on the sticker. The impression a witness often gains by that act is that his property has now been officially taken away from him. The property remains yours, but it may be a while before you see it again.

After such an apparent act of forfeiture, you still have the right to present a substitute exhibit, in the form of a copy, and you can have your original back. But why risk petty squabbles? Offer up photocopies. Original objects can be ready to show outside the deposition room at your office (or some other place under your control) and compared with the copies.

Your right to nullify or modify a subpoena

As in the case with getting a protective order, you'll need a lawyer for this, but it may well be worth it. It is unwise to show up at your deposition with only those things you feel are relevant to the case, with everything else subpoenaed purposely left out. It is even unwise not to show up at all. The subpoena-issuing lawyer can obtain an order from a judge to compel your attendance at a later date. Then if you disobey that order, you could face contempt proceedings, with the possibility of being jailed or fined.

A subpoena is officially a court-issued summons, even if it comes from the office of an attorney. The

proper response to an unreasonable summons is to nullify (“quash”) or modify it. The motion to quash is heard by a judge, who may rule that the time and/or place of the deposition must be changed for the convenience of you, the witness. If a subpoena duces tecum is overly broad, the judge will usually limit its scope to manageable proportions, or tell the party seeking the documents to procure them in some other manner.

Or, as often happens, the judge may do nothing at all but let you go through the grind of one grand fishing expedition.

Welcome to the NFL!

Your right to terminate or limit the duration of your deposition

Rule 30(d) is designed to keep depositions civil, focused on the issues of the case, and to prevent marathon interrogations.

For example, a recent change in the Federal Rules of Civil Procedure (Rule 30) limits depositions to seven hours over the course of one day. Unless there is a court order somebody can show you to indicate an exception should apply in your case, or unless you’re a party to the case and your lawyer asks you to testify beyond the seven-hour limit for some legitimate reason, you have no further obligation to testify when the seven hours are up.

You can get up and leave. In a case involving a lot of money, the usual excuse available to the harassing interrogators used to be that they cannot afford “to leave any stone unturned.” Judges in the past often afforded a wider degree of latitude (and opportunity for abuse) in the big-money cases. I’ve had to attend depositions that would go on and on for *weeks*.

But changes in Civil Rule 30(d)(4) made in December of 2000 now show a clear policy of the judiciary to cut off discovery abuse at the pass, should it occur:

“At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.” (The italics in this quotation are mine, and the reference to “deponent” is *you*, the witness).

The sentence of particular interest is this one: “ Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order.”

What that means is this: you have the power to bring a deposition to a halt immediately if you feel unreasonably annoyed, embarrassed or oppressed. You should make sure the court reporter takes down your words when you state that it is your intention, under Rule 30(d)(4), to have the deposition suspended so that you or your lawyer can have the time necessary to bring a motion before the judge, asking that the deposition be ordered terminated and the interrogator pay your attorneys fees for having to

bring the motion, along with any other sanctions (punishment) available under Rule 37.

Remember, though, that throughout this book I refer only to the Federal Rules of Civil Procedure. Most states have indeed adopted the federal civil rules in part or entirely; but only if your deposition is being taken in a federal civil case can you be absolutely sure that the Civil Rules discussed in this book apply. If your deposition is given in a state court proceeding, then you need to confer with an attorney to find out whether that state's rules parallel the federal ones, especially the amended federal rules like Rule 30(d)(4), which is new and bold enough that many states have yet to adopt it and may not adopt it. Also, be careful. Just because the interrogator is making you feel uncomfortable with some tough questions, or just because you think some of the questions are too personal, your annoyance, embarrassment or oppression by the examiner has to be "unreasonable," otherwise *you* may be the one subject to fines and possible other punishment for stopping the deposition.

If you stop the deposition under Rule 30(d)(4), make sure you have a really good argument to support your action.

Here's a good example of unreasonable annoyance, embarrassment and oppression visited upon a client of mine that would have justified a suspension of the deposition and the imposition of sanctions on the interrogator:

During a doctor's deposition, the first question asked was, 'Well, Dr., I see you are not married. How many different women have you slept with in the past 6 months?'

Which reminds me of a joke that has been attributed to Henry Kissinger: "It's 90% of the lawyers that give

the other 10% such a bad name.”

In any event, there are people who *can* punish crude and abusive lawyers like the one encountered by the good doctor. They are called *judges* and *bar associations*. If you are the subject of deposition abuse, you’ll be doing the public a favor if you push back. Here is another welcome provision in new Rule 30(d)(3):

“If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney’s fees incurred by any parties as a result thereof.”

I can conjure a number of lawyer shenanigans this provision would cover: taking the deposition in a hot, stuffy room; making everybody at the deposition wait an hour or more while the interrogator “takes an important conference call;” putting a video camera almost in front of the witness’s face when videotaping a deposition; making a witness wait interminably during a “break” while the interrogator and his client “confer” about what the deponent has said or what questions to ask next; “lunch breaks” that last two or more hours while you sit in the lobby, twiddling your thumbs; the interrogator reading through documents one by one, adding huge delays between questions -- documents he could have read before your deposition; and so on and on.

Here’s another helpful admonition from new Civil Rule 30(d)(1): “Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4).” This provision should help put an end to a

bad habit of many lawyers: to give long speeches in an objection, either to try to distract or sidetrack the interrogator, or to give obvious coaching from the way the “objection” is worded to the witness.

CHAPTER 3

HOW TO HANDLE YOURSELF AT YOUR DEPOSITION - SOME TIPS

Before the deposition

Disclose to your lawyer any illnesses, disabilities

Now is not the time to be shy about any physical ailments you have, especially if they may affect your ability to testify. Let your lawyer know what medications you are taking and how they affect your memory or speech. If you need to take breaks to take medication or to go to the bathroom, tell your attorney. If you cannot take a normal 9:00 AM to 5:00 PM deposition schedule, tell your lawyer so he can arrange, through a protective order if necessary, to have the deposition taken at your home or other comfortable place, and to shorten the duration of deposition sessions.

Some lawyers save their tough or tricky questions until they know a witness is tiring. If you tire easily, get up and stretch whenever you feel like it, and take frequent breaks.

Dress

Dress like you would for a day at work. Be

comfortable and be yourself. Don't dress to make some kind of impression.

Interrupting the deposition for personal business

If you have an important appointment or business meeting scheduled at the time of your deposition, tell your attorney about it as soon as possible. He may get your deposition rescheduled, or reach an agreement with the other lawyers to allow for a lengthy break while you attend your meeting.

Don't surprise everyone with your appointment at the deposition, as a judge may order you to stay right there in the deposition room until it is concluded.

Don't rehearse the deposition

You have only one job to do: tell the truth. If you lie under oath, you commit the crime of perjury, a felony in every state in the United States. Unfortunately, perjury in depositions occurs with some frequency. In any event, most juries have an uncanny ability to detect a liar. The voice changes slightly; the words sound flat and pat; the eyes flit about the room; the hands fidget; the story defies common sense; detail is missing — in short, the whole performance doesn't "ring true." A harmful truth is never as bad as a "helpful" lie.

As a practical matter, every harmful truth you admit to will underscore the credibility of all the helpful truths you tell. Juries understand that everything is not black and white, and they will forgive your human foibles more than you may think.

They will not forgive you if they think you are trying to fool them.

Tell the truth. Even if it means losing your case. You will still have your integrity. Lie, and you'll get caught. Hey, if even Bill Clinton, the President of the United States with a bevy of lawyers, can get caught in a lie, think of what *your* chances are!

Do prepare yourself for your deposition

It is not only right but proper that you *prepare* for your deposition. Being prepared for your deposition is what this pamphlet is all about.

You should read anew any documents that may be produced at your deposition, so your memory will be refreshed as to the circumstances surrounding the creation of those documents. Discuss candidly with your lawyer the potential negative conclusions one could properly or improperly draw from reading the documents alone.

The “damage” you see may not be very significant in terms of the issues of the case, and any embarrassment or discomfort you might experience from the documents should be put in perspective. There is nothing to be gained by signaling with body language or otherwise that you may have something to hide, when in fact you do not (besides perhaps an injured ego).

Always be prepared to admit mistakes, all the more so if they do not have any real impact on the outcome of the lawsuit.

Never let a lawyer tell you the answer you should give to a question. If he should persuade you to lie, you both become criminals: you for perjury and he for “suborning” perjury. Use your own words, and

tell the truth.

No matter how damaging to your case, do not destroy or purposely “forget” any documents that you have been subpoenaed to bring. Remember Watergate?

Communications with other lawyers before your deposition

If the lawyer claiming you as “his” witness is not your personal attorney, you can have your own lawyer represent you at the deposition, even though you are not directly involved in the litigation. You may confer with your lawyer at any time, and what you two discuss is protected from discovery by the attorney-client privilege. What you discuss with other lawyers who may be “on your side” but not representing you may not be privileged.

Since you cannot be sure what the lawyers other than your own may ultimately want to do with your testimony, it is best not to discuss the case with them until you’re “on the record,” and only then.

It is unethical for any lawyer in the case to volunteer to act as your lawyer at your deposition if he has any potential conflict of interest by his so doing, and it probably is unethical in any event for him to make a direct solicitation of his services, even if he offers to represent you free of charge.

Helping the court reporter before the deposition

If you have a business card, give it to the reporter. He may need your full address or phone number to get the completed transcript to you for your review, corrections, and signature. Give the reporter a prepared list of unusual names, technical terms, foreign words or other esoterica that will probably

come up in the deposition.

If you are going to read from documents, especially lists of numbers, then read them slowly and distinctly. Give a copy of the document to the reporter so he can follow along if he wants to.

Repeat a word or sentence if it appears the reporter had trouble with it.

During the deposition

Thirteen “Do’s” and “Don’t’s”: The “Traffic Rules” of giving testimony

Remember the whole exercise is to “build a record” on the transcript prepared by the court reporter. The record is only as good as the reporter’s opportunity to hear everyone clearly.

Now, the 13 Traffic Rules...

1. Don’t: Mumble.

Do: Speak audibly, clearly and slowly.

2. Don’t: Start answering a question before it is finished, or interject words while a question is being asked.

Do: Wait until the question is finished. The reporter can hear only one person at a time.

3. Don’t: Make “ambiguous affirmatives,” i.e. nod your head for “Yes”; shake it for “No;” say “Yeah,” “Un-huh” or “Un-unh”; or shrug.

Do: Say “Yes,” “No,” or “I don’t know.”

4. Don’t: Talk when somebody else is talking.

Do: Wait your turn; the court reporter can take down only one person at a time.

5. Don’t: Respond to a question immediately, as you would in a normal conversation. (Remember: you are being *interrogated*.)

6. Don’t: Put your hand over your mouth, chew gum, or duck your head.

Do: Use good posture, sit erect, with hands relaxed on table or lap. Take frequent breaks to stay alert and relaxed.

7. Don’t: Mumble through jargon, technical or foreign words, especially if you are not sure of how they are pronounced.

Do: Spell unusual words after clearly enunciating them.

8. Don’t: Say “this” or “that” or “here” or “there” when pointing at an exhibit such as a map, picture, or drawing. The record will later not reflect what the “this,” “that,” “here” or “there” were. **Do: Make marks on an exhibit with a pencil, if necessary, to indicate what you want to point out, along with appropriate labels.**

9. Don’t: Walk off with any documents marked as exhibits. **Do: Bring an original and provide copies, once that arrangement is made clear on the record.**

10. Don't: Rush through a reading of any document you quote from. Court reporters often write twice as fast as any good typist, but there is no need to strain their ability.

11. Don't: Leave a sentence dangling or a question only half answered.

12. Don't: Guess at what was asked.

Do: Ask the interrogator to rephrase the question because you didn't understand it, or have the court reporter read it back to you if you didn't hear it well.

13. Don't: Drink an alcoholic beverage at lunch or during any of the breaks, or stay up late the night before your deposition.

Time Limits

Feel free to ask for a break for any reason. You are nobody's captive while you are in that room. If nobody is polite enough to grant you a reasonable recess, then take one anyway.

A recent change in the Federal Rules of Civil Procedure (Rule 30) limits depositions to seven hours over the course of one day, unless the lawyers agree to extend the time; be sure your lawyer *does not* agree to extend the time unless it's absolutely necessary. If it's 5:00 PM and you're tired, interrogators often like to say, "I have only about another thirty minutes of questions." That rarely happens. He won't stop at 5:30 PM if he still has more questions to ask.

If you're tired (or angry!) it's better to call it a day

and come back the next day, or on another day when you are fresh again. Insist on it. There will be another person in the room grateful for the halt: the court reporter. “The [Rule 30 seven-hour] limit is one of the most significant changes being brought about by the amendments [to the federal rules],” says a proponent for the change to Rule 30. “There is now a presumption against extended depositions.” That change, however, applies only to cases under federal court jurisdiction. If the case in which you are giving your deposition is filed in state court, check with your local attorney to see if the court rules for your state set similar time limits on depositions. At the start of the deposition it is a good idea to have your attorney get a feel for how often you will break, how long the lunch breaks will be, and when you will quit for the day. You and the court reporter should be asked if you are willing to stay longer than normal working hours, if for some reason that is necessary. If any lawyer present intends to do a marathon session to wear you down, you may as well find out about it right away.

If necessary, your lawyer may have to get a judge on the phone to help set time limits. Absent that, just walk out at 5:00 P.M. and announce you’ll be back at 9:00 A.M. the next day. None of the lawyers in the room “owns” you.

Going to the judge

As described in Chapter 2, you have certain legal rights at your deposition which can be enforced by a judge. As a practical matter, you will probably not have the training to know when you would be entitled to judicial intervention — another reason to have your lawyer with you at your deposition or near at hand.

When you don't know the answer

Say you don't know! After all, that's the only truthful answer. Don't speculate as to what might have been, could have been, or must have been. There is no shame in saying you can't remember something, or you simply have no information one way or another to support a given contention.

If you hesitate to answer a given question, your lawyer may interject with "If you know..." or object to "lack of foundation as it has not been established that the witness knows." Let that serve as a signal to you: you don't need to answer other than "I don't know," or "I can't recall," if such is the truth.

Of course, if you do have specific knowledge with which to respond to a question, then give it.

Use the court reporter when you want to

If you didn't hear a question or want to gain some time to think (although you can take all the time you want before answering!), just ask the court reporter to read back the question.

Every now and then your lawyer should ask the reporter to read back something just to see how well the reporter is taking down the testimony.

Objections may be a signal

As part of witness preparation, lawyers in the past have often encouraged witnesses to be alert to the objections they make, since the objections may help "coach" the witness to the proper answer. That practice should now be very limited to short objections of a very narrow and specific kind.

As mentioned earlier in this book, new Civil Rule 30(d)(1) provides: “Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4).”

Nobody wants to be a puppet responding to prearranged signals, and the important thing is always to tell the truth. Nonetheless, a proper objection to the form or foundation of a question may be also an appropriate signal that the question is in some way misleading. Give your attorney ample time between questions and answers to make his objections for the record. Listen to the objection being made, and carefully consider whether the question can properly be answered without qualification.

Remember, if a question doesn't make sense to you, you should say so and ask that it be rephrased. If you fail to give your attorney adequate opportunities to object between questions and answers or to instruct you not to answer, you might inadvertently prejudice some of your rights.

Remember that a jury may someday hear your words as transcribed

A joke may backfire if all that is taken down are your bare words, without the inflections and the laughter that follows. Some reporters help you by inserting the fact that your remark produced laughter. Others don't. Likewise, wisecracks and slurs on people not present at the deposition will read differently to a jury later on. Testify as you would in court, in front of a judge and jury.

Levity is appreciated as a tension-breaker at

depositions (and trials), but remember you are present at a serious and formal proceeding (even if appearances suggest otherwise).

Beware of answering a question with a question

Do so only when you can't be sure what is being asked. A deposition is a one-way interrogation, not a conversation. A wisecrack or rhetorical question for an answer can only lead to a fruitless argument with the interrogator.

What happens if you refuse to answer a question?

If you are represented by a lawyer at the deposition, and he tells you not to answer a question, then your job is a simple one: don't answer it. If you decide on your own that you don't want to answer a question, ask for a break so you can confer with your attorney. If your attorney is not present, state that you want to confer with him before answering the question, and refuse to answer until then.

Nobody at the deposition can force you to answer a question. The deposition can be interrupted so that a judge can be found who will probably order you to answer the question, and that is usually the end of it. If you don't answer after a judge has instructed you to, you may be held in contempt of court and fined or even jailed until you do answer.

Don't volunteer information

This is *not* the trial of the case. Your time to tell your story is later, in the courtroom before a judge and jury. That is, if the case doesn't settle first, as happens in 90% of civil cases filed.

So listen carefully to the questions, pause to gather your thoughts, *and then answer **specifically and narrowly** only the question that is asked.* If a “Yes” or a “No” suffices, then say that and no more. You are under no obligation to explain or supplement your answers, or to “sell” your side of the case. If the interrogator waits, as if he expects you to say more, then just sit there quietly until he finally gets to the next question.

If you follow this advice, the deposition will be over sooner. You may even be surprised that the interrogator didn’t ask a lot of questions you thought he would.

Avoid evasiveness

Only lying is worse than evasiveness in undermining your credibility. Some people, especially under stress, seem incapable of giving a straight answer. They may know the truth, but somehow they fear if the truth is spoken too plainly the interrogator will take some kind of unfair advantage by twisting and distorting the truth into something else. Sometimes the truth *is* stranger than fiction, and you may be pressured from many sides (maybe even your own lawyer) to sugarcoat the truth so it better fits a “story” or a “strategy.” Maybe you’ll be tempted to bury the truth somewhere in a half-truth or smother it in euphemisms.

But remember this: before you give your testimony, the court reporter will administer an oath whereby you swear to “tell the whole truth.” You don’t have to volunteer information to make any of your answers more complete. But what you *do* answer has to be 100% truthful.

Dealings with the lawyers

All the lawyers will have their turn to interrogate you on the record. Don't discuss the case with them during breaks or outside the deposition context, as their allegiances in the case may be adverse to you, even if you are not now a party to the lawsuit (you may well become one later!).

Don't argue with the lawyer interrogating you. If he is particularly obnoxious, you will win the sympathy of the other lawyers present by being above the battle. If you have the best of an argument, the interrogator will probably expend a good deal of time and energy fruitlessly thereafter in "one-upmanship." Most trial lawyers have big egos and often thrive on spite matches. Spare yourself the trouble.

Don't ask the interrogator to define simple words everybody knows. State your definition for the word in his question, then answer it. If you're off into territory where the interrogator did not want to go, he'll rephrase his questions to reorient the inquiry.

Stick by your answer

Here are some common techniques lawyers use to try to confuse a witness or to get him to change his answer, and what you can do to avoid them:

1. **Silence** - the interrogator waits for you to say more, as if somehow your answer was incomplete. If your answer was complete, then just sit there and wait for the next question.
2. **The incomprehensible question** - your lawyer will occasionally object to questions "for the record,"

and then you will still be expected to answer. If a question is truly absurd or incomprehensible to you, you are under no obligation to answer. Simply say: "That question makes no sense to me, so I cannot give you a meaningful answer. Can you rephrase it, please?" or words to that effect.

Be stubborn if necessary, but always polite, and stand by your testimony that you simply cannot answer the question.

3. **"That's a 'Yes' or 'No' question"** - there is no such thing as a 'Yes' or 'No' question, even though the interrogator may think so. You are the only person in the room under oath, and you can answer any question any way that you want. You may wish to answer with a "Maybe," or an "I can't recall," or "Yes," with a qualification and explanation. Don't let the interrogator intimidate you into giving an answer that you find uncomfortably narrow or incomplete.

4. **The incomplete hypothetical** - like the incomprehensible question, the interrogator may ask you a hypothetical that leaves out key information in its assumptions.

If you feel the hypothetical as posed is incomplete or absurd, say so, then do your best to answer it. If you cannot give an answer, so state, and wait for the next question. If the hypothetical seeks an opinion in an area where you are not an expert, be sure to say you are not an expert in that area.

5. **"Do you mean to tell me..."** - don't let the interrogator bait you. If you meant your last answer, then stick by it. Don't ever feel you have to justify your actions or beliefs to an adverse attorney. He might agree with you privately over drinks some day, but right now he has a job to do as a paid advocate.

6. **“This is off the record”** - there is no such thing. Anything you think is “off the record” can be brought onto the record in an embarrassingly swift way: “Mr. Jones, during the break, isn’t it true that you admitted to having an affair once with the plaintiff in this case?”