

DEPOSITION—PREPARATION AND EXECUTION

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An envelope from your attorney. Never good news. Today is no exception. It contains a notice for your deposition. It can trigger either feelings in you of fear or loathing depending on your prior experience or lack of it.

To the newcomer, the notice jolts and brain. It sends impulses of self doubt and internal questioning. What do they want? What did I fail to do? What could or should I have done that I did not? These thoughts most often disrupt an otherwise peaceful sleep in the wee hours of the morning.

To the old hand, the notice evokes a range of feeling: “I was waiting for this”, “Bring ‘em on”, “what a pain in the....”

Both are reacting to the same event. However, their reactions are at polar extremes.

WHAT IS A DEPOSITION?

In a law suit, each side is able to find out the information possessed by the other. However, attorneys may not have contact with the opposing parties in the lawsuit. Instead, their sole means of obtaining information from the other side is through a formal process set forth in the legal rules. This process is known as “discovery”.

There are two forms of discovery. One form is “written discovery”. This be in the form of written question (“interrogatories”), demands for documentary evidence (“requests or documents”), or responses to declarative statements (“requests for admissions”).

The other form is through oral questioning. These are known as depositions.

Depositions usually occur in the offices of one of the attorneys. Those suing or those being sued (“parties”) may be at all depositions. For corporations, a representative may be present.

The witness is asked questions by the opposing attorney. Generally (word frequently used by an attorney to avoid admissions of fallibility), “parties” are asked questions by their own attorneys. Generally (that word again) the same applies to employees and family members of the party.

The questions and answers are recorded by a court reporter and later typed and produced in the form of a booklet. This is known as a “transcript.”

WHAT IS THE PURPOSE OF A DEPOSITION

Generally (it is set as a macro on my computer), the purpose of all discovery is to prevent any surprises at trial by obtaining the evidence possessed by the other side. Depositions reveal and memorialize the testimony that may be presented at time of trial.

Depositions may lead to other sources of information for later follow-up by other written or oral discovery. For example, a witness, in her deposition, may disclose the existence of documents that were previously unknown or a witness that had been previously unidentified.

At trial, depositions may have several uses. Depositions of parties may be read at trial as if it is testimony. Transcripts of witnesses who are unavailable may also generally be read. Unavailability may be due to death, illness, geography, or the lack of the court's authority over a witness who is outside their jurisdiction.

Depositions of any person, parties or others, may be used to challenge a version of testimony at trial that differs from that given in the deposition ("impeachment"). This is done to challenge the veracity and/or recollection of a witness.

HOW DOES ANY OF THIS RELATE TO YOU?

Football coaching legend, Woody Hayes' offense was built upon running the ball. His philosophy was described as "three yards and a cloud of dust." Hayes defended his anti-passing bent by noting that three things can happen when you pass the ball, and two of them are bad (incomplete or intercepted).

Several things can happen in a deposition. None of them are good. You cannot win the case in the deposition. You can lose it there.

As I said at the outset, this is the other parties' opportunity to ask you questions. Your obligation is to provide truthful responses to those questions. You are not obligated to do anymore.

Giving unsolicited information on the notion that it will persuade the other side in the errors of their way, leading them to drop the case, is naïve at best and foolish at worst. Do not believe that the other attorney is a nice guy who genuinely appreciates your assistance in helping him to understand matters of which he was previously unaware.

The other attorney is there to eat your lunch. He wants to use you. He wants to use you in order to get money from your company (or its insurer, which you ultimately pay in increased premiums).

He wants get money for his client, an act of charity to which he is rewarded by a substantial percentage of money. His tasseled loafers were paid for with the blood of talkative, helpful witnesses who he used and tossed away.

Remember what he is after. Follow the mantra of the legal philosopher, Larry the Cable Guy. “Git-r-done.” Give answers to his questions and no more. You are not there to win the case. You are there to “git-r-done”.

WHAT DO I DO?

When I was in school, I had the now-illogical notion that you could not study for math tests. You either knew it or you didn’t. Now that I have children, I realize that this attitude lies somewhere between naïve and lazy. I have also fortunately learned that it is not genetic.

Some will tell you that you can not prepare for depositions. Like my existential philosophy of math tests, this ranges from naïve to lazy, and maybe goes the whole way to dumb (I am checking qualcomm on the location of that thought).

Not only can you prepare, you must prepare. The only thing you cannot do is prepare too much.

A. MEET WITH YOUR ATTORNEY

First, meet with your attorney prior to the day of the deposition. Insist on it. Unless absolutely impossible due to schedule or geography, it is a crucial step in the process. Even if it is geographically impossible to meet in person, insist on a phone conference of unlimited duration.

Whether in person or on the phone, you need and are entitled to be fully prepared. Accept nothing less.

B. REVIEW OF DEPOSITION PROCESS

The first element of your meeting with your counsel should review the deposition process. Even if you have done it a thousand times, a review of the process is beneficial. Further, this counsel may have insight that eluded the thousand that preceded her.

Your counsel should remind you of the following:

- a. Tell the truth—I remind everyone of this point. It is not a judgment of the veracity of a particular witness. It is a reminder to every witness of the basis of the judicial process. I just want to make sure I have fully done my job.

Not only is lying wrong, it is terrible for the case. I can defend bad truth. The jury will accept it. I cannot not defend, and the jury will not forgive, a lie.

- b. Listen to the entire question—An attorney may ask a meandering question, starting in one direction and turning to another. He is not necessarily doing

this to trick you. Often, he starts without knowing where his question will end, composing it as he goes. If you stop listening in the beginning the question, the answer you give may not be responsive to the ultimate question. Have patience. Listen to the entire question.

- c. Don't answer if you can not hear or understand the question—If you cannot hear the spoken words or cannot understand what is being asked, you cannot give a truthful answer. Don't answer. Politely ask the attorney to repeat or clarify the question.
- d. Answer only what is asked—You are required to respond to the questions. You are not to educate or persuade the other side. Any additional information you give will only help them.
- e. Be succinct—Give direct answers to what is asked. The more you say, the longer you will be there.
- f. When you are done, stop—Do not fill dead air or react to an attorney's stare by talking. There is a good chance that the attorney is trying to come up with his next question. Your continued talking will only give him more time to generate questions and more substance to ask about. An unprepared attorney will often omit questions when pressed to proceed. Stop. Look silently at him. The ball is in his court. Silence is his problem, not yours.
- g. Do not guess—If you know the answer, say it (succinctly) and stop. If you do not know the answer exactly, but can estimate it based on your knowledge and experience (such as speed, distance, time, etc.) indicate that you would estimate the answer to be _____. If you don't know, you don't know. There is no shame in this answer. If you don't know, the truthful answer is "I don't know." Anything else is not truthful.
- h. Don't "figure"—Some witness "figure" their way into an answer. The don't know "A". But, knowing "B" and "C", the "figure" the answer to "A" is _____. Don't do it. If you don't know the answer, don't speculate based on other information, what it "should be", or what it "probably" is. The truthful answer is "I don't know."
- i. Don't argue—Give your answer. If the attorney tries to shake you from the answer by arguing with you, respectfully indicate that you have given your answer. Hold your ground. If that is your answer, so be it. Do not argue. Do not rise for the bait. You are only falling into his trap.
- j. Remain calm—Sometimes the attorney may get loud, abusive or nasty. Again, don't rise for the bait. If anything, be calmer and nicer. This accentuates the difference between your appropriate behavior and his

inappropriate conduct. Further, it will probably serve to frustrate him. Let your attorney handle the fray, not you.

- k. Don't try to win the case—You are there to answer the questions, not win the case. Don't try to outsmart the attorney for several reasons. First, any gains are minimal compared to the damage if you fail. Second, you only tip your hand as to your best arguments and allow him to prepare to respond at trial. Third, the other attorney does this every day. You don't. Don't be drawn into competing with him in his arena. Stick to what you know.

If you have any questions on these points, ask them of your attorney. You need to be comfortable with the basics of the process. If possible, see the room in which the deposition will be held. The less new elements on the day of the deposition, the better you will do.

C. PREPARE FOR THE SUBSTANCE OF YOUR DEPOSITION

Your attorney has worked with the case for months. She should know the theories of the other side and the points they are seeking to establish. She should be familiar with the evidence produced in discovery. It is her job to prepare you for the questions you are anticipated to face.

My goal is to ask my client more questions than they will face in the deposition. If they are asked a question in the deposition for which I have not prepared them, I have failed. You should expect no less from your counsel.

Your preparation on the substantive questions should include the following:

- a. Dialog, not monolog—Your preparation should be comprised of your attorney asking you the anticipated questions and you giving your responses. The two of you can discuss the answers, making sure they are clear and accurate. Do not permit the process to be a monolog of the attorney telling you the anticipated questions and your answers. First, you lack of active involvement lessens your level of preparation. Second, you waste time memorizing his answers rather than making minor modifications to your questions. Third, you will be the one having to answer at the deposition, not him. Thus, you are the one who needs to prepare to do so.
- b. Personal information questions—You will be asked personal information about your background. This is not to be unduly invasive of your privacy. Much, if not all, of the inquiry may be pertinent. However, this is the opposition's only chance to question you. They are permitted to ask this information—your age, employment history, education, training, etc. They are looking for information related to

your qualifications or perhaps your biases. Your attorney will do the same of their witnesses. Make sure your attorney goes over these questions with you.

- c. Pleadings—Review the pleadings, particularly if you were the one that signed the verification. Be prepared to explain or address any averments in the pleadings that are asked by the opposing attorney.
- d. Discovery—Like pleadings, you may be asked about responses in answers to interrogatories or responses to requests for admissions, particularly if you verified them. Be prepared to explain your responses.
- e. Documents—Review the documents related to the case. Doing so in chronological order will assist your comprehension of their relation to one another. While this is not a memory test, you don't want to be contradicted by documents either in the deposition or at a later time. Further, if you generated the document, you should be prepared to explain it and its context.

Again, take all the time you need to be prepared. Make sure all potential areas of inquiry are covered. The key is to avoid any surprises.

All cases have problems. Be prepared to address yours. This does not mean make something up. It does mean to be prepared to provide the truthful explanation in a coherent manner to the problem issues of your case. Coming up with an answer on the drive home from the deposition does you no good.

D. FINAL PREPARATION

You will be inundated with information at the initial meeting with your attorney. You will be saturated with information about the process and substance of the case.

Questions will come to you as drive from the attorney's office or later as you shower. That is why the first meeting must be several days before the deposition, not just a cram session that day.

You should allow time for follow-up with the attorney. This is to cover the specific questions you developed since the first visit. Write the questions down. Make sure they are all covered before the deposition starts.

The follow-up session can be by phone or in person. It is preferably done prior to the day of the deposition in case any research is required to determine the answer. Whenever it is done, this step is to clean up the loose ends and be prepared for the deposition.

E. THE DEPOSITION

This advice is simple—do the above. Follow the instructions as to how to conduct yourself during the information. Know the information. Give short succinct answers. Stop when done. Don't argue or try to outsmart. Stop when you are done (I can't say it enough).

With the proper, thorough preparation, the deposition is easy. As in football, just run the play you have prepared. You will only get yourself in trouble by "winging it."

F. POST DEPOSITION REMORSE

You gave your deposition. You did your best. You did well. Don't beat yourself up with "coulda's" and "shoulda's".

We all have great hindsight. We all think of what we could have done better. However, the way to reduce this post deposition angst is to take the time to prepare and do so in a proper manner.