

## **DEPOSITION AND TRIAL TESTIMONY**

You are about to testify either in a temporary hearing, deposition, or trial. The purpose of this outline is to answer common questions that many witnesses have, and to give you an idea of what to expect when you testify. The ideas in this handout will apply not only to clients, but also to other witnesses.

### **Trial vs. Deposition**

Trial testimony takes place in a courtroom before a judge. You may be testifying at a temporary hearing, or at a final hearing. Testimony in a final hearing may be to a judge, or in some cases to a jury. I will advise you if this is going to be the case.

At either the temporary hearing, or the trial, there will be a court reporter present, a bailiff, both parties, and their attorneys.

Deposition testimony occurs before a trial. It will take place in the court reporter's office, or in the office of one of the attorneys. Neither a judge nor bailiff is present at the deposition (in rare cases a judge could be present – I will tell you about this, if it is going to occur, in advance).

Opposing counsel will be taking your deposition for the following reasons:

1. They want to determine what information you have, and what records you may have in your possession, that bear on the issues in the lawsuit. They will try to learn everything you know about the case.
2. They want to tie you down to a specific story so that they will know how you are going to testify at trial. If your testimony is different at trial, they can use your deposition testimony to impeach you, and to make it appear to the court or jury that you are not telling the truth at trial.
3. Your testimony given at a deposition may be read at trial. They hope to catch you in a lie or omission, because if they can do so, they can claim at trial that you are not a truthful person and, your testimony should not be believed on any of the points, particularly the crucial ones.
4. The deposition may be used to narrow the issues in the case. Stipulations of fact and other agreements may be made during the course of the deposition which may substantially shorten the length of the trial.
5. If the deposition is being taken by the other lawyer, I will not usually ask you questions, but will save them instead for trial. Do not be concerned, however, if I ask some questions to clear up areas of your testimony. If I intend to question you extensively, I will let you know before the deposition.

6. Remember that the attorney who is deposing you, at the time of the deposition, will also be evaluating what type of witness you will make at trial. Therefore, you need to follow the rules set forth below to the best of your ability. Many cases are settled without the need of a trial, and the other attorney's evaluation of you and your witnesses will play a part in whether or not the case can be settled.
7. If the case must go to trial, the deposition can be used as if you were actually on the witness stand, and read into evidence before the judge or jury, and can be used to cross-examine you in an attempt to impeach your testimony at trial.

### Dress/Behavior

If you will be testifying at trial, you need to dress for your testimony as if you were going to church. Women need to wear darker clothing, no extensive flashy jewelry, and light makeup. Men should wear a suit, or at least a tie.

If your deposition is being taken, although you do not need to wear a suit or tie, you should be neat and well groomed, unless the deposition is to be by video tape. I will let you know about this in advance.

Everyone is nervous before testifying at either a deposition or trial. Never, however, "fortify" yourself for testimony by taking tranquilizers, drinking alcohol, or having anything else which will either slow down or speed up your nervous system.

If you are testifying at trial, remember that you will be observed both in and out of the courtroom by jurors, attorneys, witnesses for the other side, and, sometimes, the judge. Jurors may see you in the elevator or on the stairway at the courthouse, or in the restroom or on the street. They may see you driving to the courthouse in your car. It is important that you conduct yourself in a courteous manner at all times. Obviously, a witness is not going to make a good impression on the stand if he has had an unfriendly encounter with a juror in traffic, or, if after his testimony, a juror hears him in the hall laughing at something humorous that occurred in the courtroom. While you are at the courthouse, either before or after your testimony, be serious, do not joke with other witnesses or attorneys, or do anything else that might give a juror the impression that you are taking your testimony, or the case itself, lightly.

If your case is to a jury, try to avoid the individual jurors. A friendly smile to a juror is all right if it is not forced. You might even say, "Good morning." But under no circumstances should you ever enter into any conversation with any juror for any reason at any time. The same rules will apply to the judge.

### Children in the Courtroom

You should **never**, under any circumstance, bring children into court unless you specifically are instructed to do so by me or the judge. The courtroom is no place for children.

## Tell the Truth

Always tell the truth when testifying, whether at a deposition or at trial. Failure to tell the truth constitutes perjury, a crime under the Texas Penal Code. Tell the truth to the best of your ability, whether it may "help" our side's case, or "hurt" our case. Do not exaggerate, or try to make anything seem better or worse than it really is.

I hope that you have not held anything back in our prior conversations. Some clients and witnesses feel that if they do not tell everything to their lawyer, that the other side may not know, or be able to find out about the concealed facts. The problem with this approach is that the other side may know those detrimental facts, or learn about them, while I am not aware of them. The only way that I can be properly prepared to explain or perhaps overcome the impact of detrimental facts is to know about them in advance, and not hear about them for the first time at trial or deposition.

The corollary to this rule is that once I am aware of these facts, I cannot allow you at deposition, or trial, if asked a question about these detrimental facts, to be untruthful about them.

It is also important for me to know if you have ever had any prior arrests, criminal convictions, or other allegations of wrongdoing to misdeeds made against you, whether fairly or not. It is possible that the other side may try to use this to "impeach" your testimony, and therefore it is important for me to be aware of this information.

Finally, if you have made any statements to police officers, investigators, etc., whether orally or in writing, you need to let me know about that. You have a right to copies of any written statements which you have made. Additionally, if you have written any letters, cards, or other writings to the other side, which bear on any issues in the case, you need to let me know. This is particularly true if those writings contain information which you might not want to hear in the courtroom. The same rule applies to telephone conversations. It is not uncommon for one party to a lawsuit to record their conversation with another party to the lawsuit, and if you have said anything to your spouse which you would not want repeated in the courtroom, you need to let me know about that also.

## General Rules

When I am asking you questions, it is called "direct-examination." I must ask questions that are non-leading, and which do not suggest the actual answer. The questions that the other lawyer will ask you are "cross-examination." He may ask you leading questions, that is, questions that suggest answers. When the other lawyer is asking you these questions, he is trying to "put words in your mouth." Leading questions many times begin with "Isn't it a fact," "Isn't it true that," or similar questions. If you sense that the answer is in the question, be careful. These questions may contain implications that are only partially true and that require an explanation.

Different lawyers have different techniques in cross-examining witnesses. At the outset of the cross-examination, the other attorney may appear to be friendly, but remember that he represents

the other side of the lawsuit. Many lawyers, at the outset of cross-examination, are careful not to antagonize the witness so that the witness will provide what appears to be non-controversial information voluntarily and readily. Once this information is obtained, the lawyer will start to ask the harder questions, and press the witness. The moral of this story is although the other lawyer may appear to be friendly, he is not your friend and be careful that he does not lead you into saying something that you do not believe.

Remain calm and polite, and do not lose your temper no matter how hard you may be pressed. Even though something may happen during your testimony that makes you angry or embarrassed, always be courteous to everyone including the judge, the jury, and particularly the lawyer who is cross-examining you. Many times in life it may be appropriate to "talk back" or make some type of wisecrack, but it is never appropriate when you are testifying. Neither judges nor juries like witnesses that appear to be flippant, antagonistic, vindictive, or hostile, and this type of behavior can only have an adverse effect on the case. When answering the cross-examining attorney's questions, give him the information in the same tone of voice and manner that you do your own attorney's questions.

For example, a woman would be simply stating the facts and would be an effective witness if she would say, reluctantly, that her husband slept until noon every day. On the other hand, if she were to go on and add that he was a "worthless, shiftless, lazy person who slept every day until noon" her vindictiveness would be very likely to help the cause of her husband.

Never answer a question with a question. For example, if the other lawyer asks you how old are you, do not answer with, "How old do you think I am?"

Do not react while the other party, or a witness for the other party, is testifying. You should remain calm and your expression should not change no matter what the testimony is from the witness stand. No one likes histrionics from a client at counsel table.

Do not try to memorize what you are going to say in your testimony, either in response to my direct-examination, or cross-examination. You will sound coached and far less believable than if you are simply spontaneous. It is a good idea for you to have a general idea of what you intend to say but do not worry about saying it exactly the same way every time.

If you have previously been deposed, we will review your deposition testimony before your trial testimony, but, again, do not try to memorize the answers which you gave on deposition. You need only to be familiar with what you previously said, and give clear, truthful answers without exaggeration.

At both trial and at deposition, speak clearly and do not mumble. At trial, while you are on the witness stand, look at the members of the jury or at the judge. Talk to them, and speak to them frankly as you would to a neighbor or a friend. Do not cover your mouth with your hand. It is important that you speak loudly enough for everyone in the courtroom to hear you.

Avoid certain expressions like "To tell you the truth," or "I'll tell you the truth," or "To be honest," or "Well, to be perfectly frank," etc. The judge or the jurors may be suspicious of witnesses who begin their testimony with these statements. They may believe that a witness who has to keep telling them that something is the truth may not be telling the truth.

Although you and I will discuss the different areas upon which you will be cross-examined, and the types of questions which I believe the other lawyer will ask, there certainly will be some questions which we have not discussed. If the other lawyer asks you a tough question, do not turn and look to me for the answer. Look him in the eye and answer the question as truthfully as you can. I will not let the other lawyer abuse you on the witness stand, but I cannot keep him from asking you hard questions, nor can I provide you the answers.

Many times, a witness will worry whether or not he is doing a good job in testifying. This is a natural concern, but if you are worried, do not show it. If you believe that your testimony has hurt your side of the case, or the other side of the case, or if you are embarrassed or angry, do not show it. Never leave the witness stand with a downcast expression, or a smile or a smirk.

### Understand the Question

Everyone is nervous when they testify, and nervous people tend not to comprehend things as well when nervous. Do not hesitate to ask the other lawyer to repeat or rephrase the question, as many times as necessary, until you are certain that you have understood it. If you do not believe that you heard the questions correctly, ask the lawyer to repeat it. Once you are certain that you have heard the question correctly, and understood it, answer it, but answer only the question that is asked of you and then stop. I do not mean be evasive – provide the information that is requested, but once you have done this stop talking. Do not provide additional information. You do not testify on cross-examination in order to "tell your story." You testify only to answer the questions which are asked and, on cross-examination, the best answer to any question is the shortest honest answer. For example, if you are asked how many children are in your family, simply give the number. Do not answer like this, "We have two children. I would have liked many more, but due to the fact that my spouse spent five years in the penitentiary, we were unable to have a larger family." This is what I mean when I say do not volunteer information.

### Do Not Guess

Many witnesses think that they are supposed to know the answer to every question that is asked. Do not guess at any answer. If you do not know the answer to a question, even though you are concerned that you may appear ignorant or evasive by saying that you do not know, you should nevertheless do so. It is always wrong to guess or estimate.

### Be Verbal

As stated above, speak loudly enough so everyone can hear you. Do not nod or make gestures, as these cannot be recorded by the court reporter.

### Time and Distance

Be careful with questions involving distances and time. If at any time you estimate distances or time in any of your answers, be sure that you say that it is an estimate.

### Quoting Others

When you are testifying about conversations with other people, be sure to make it clear whether you are paraphrasing comments made by you, or the other persons, or whether you are quoting directly what was said.

### Never Say Never

Nothing "always happens," and nothing "never happens." Eliminate adjectives and superlatives such as "never" and "always" from your vocabulary when testifying.

### Notes, Diaries, etc.

Do not plan to use any notes, diaries, or any other documents to assist you during your testimony unless you have reviewed them with me. If you refer to notes, etc., during your testimony, the other lawyer will have the right to examine those documents.

Use of notes to refresh your memory or any other such documents will allow the other side to examine them.

### Questions About Documents

If information is in a document which you need to see in order to testify truthfully and accurately, ask the other lawyer to provide you with a copy of that document, if you know that he has it. When confronted with documents, either at trial or at deposition, examine them carefully. If you have not seen a particular document before or did not prepare it, do not try to guess what it means, and do not vouch for its accuracy. If you are at a deposition, do not agree to supplement any documents or information, but instead refer the other lawyer to me. At deposition, do not, without my request, reach into your pocket for a social security card, driver's license, or any other document. Similarly, do not ask me to produce anything which is in my file.

### Mistakes

If, at any time during your testimony at deposition or at trial, you realize you have made a mistake, correct your answer as soon as you recognize you have made an error.

### Listen

Do not let the other attorney put words in your mouth. If it is necessary, restate or rephrase

in your own words the attorney's question. Pay particular attention to introductory clauses preceding questions. Do not accept the other attorney's summary of your testimony unless it is completely accurate.

### Is That All There Is?

Beware of questions by the other attorney, either at trial or at deposition, beginning with words similar to "Is that all?" THE OTHER SIDE IS ATTEMPTING TO FREEZE YOUR TESTIMONY. A good answer to such a question would include phrases such as "to the best of my recollection at this time," "that is all I can remember at this time," etc.

### Do Not Interrupt

Make sure that you allow the other attorney on cross, and me on direct, to complete our questions before you begin to answer. If you interrupt the cross-examining attorney, you may be answering a question which he is not really even asking, therefore providing him additional information to ask more questions about. If you interrupt my questions to answer a question, it will seem as if we have rehearsed your testimony.

### Compound Questions

Many times, a question will contain several questions. For example, "When you talked to Elliot, didn't you say that you were in Dallas and didn't have time to drive to Tyler to meet with John that afternoon?" It may not be possible to give an accurate answer unless you answer the questions one at a time. In such a case you may say, "The question has several parts, and I will try to answer each one. When I spoke to Elliot I don't believe I told him I was in Dallas. I said it would be difficult to meet with John that afternoon, but I don't believe I told Elliot about meeting John in Tyler." The best way to handle this, however, is to simply tell the other lawyer he asked you more than one question, and ask him to break the question down for you.

### Interruptions By the Other Attorney

Many times, in the heat of battle, the other lawyer may interrupt you while you are trying to answer a question. Let him finish his new question, and say, "Before I answer that question, I need to finish the answer to the last question." If you haven't finished an answer, that is, if your answer to a question is not complete, you need to say so. Don't count on the judge or lawyers to know that your answer was cut off.

### Demands for Yes and No Answers

While you should never volunteer information on cross-examination, there are times when you need to give an explanation. There are also some questions which cannot be answered with a "yes" or "no" answer. An example is, "Have you stopped beating your wife?" Obviously this question cannot be answered by either a yes or no answer, because either answer would imply guilt.

A short answer setting forth the facts would be called for.

Remember that the other lawyer is motivated to make your answers fit his case. Sometimes, a lawyer may even try to force your answers to be what he wants to hear. He may try to intimidate you with commands with "just answer 'yes' or 'no.'" If you can't answer the question that way, say so. Be prepared to insist that a question cannot be answered with a simple "yes" or "no." Be prepared to insist that the answer requires some explanation. I will be there to help you get a complete answer into the record.

### Objections

There will be many objections during the trial. Whenever an objection is made while you are testifying, stop instantly, particularly when I am the one that makes the objection. Do not try to give an answer before the judge rules on the objection. Wait until the judge has ruled. If the objection has been "sustained," the judge believes the objection is correct. If an objection is "overruled," the judge believes the objection is not correct. Do not try to decide what the effect of an objection is on your testimony. When the objection is being made and the judge is giving his ruling, wait silently. After the judge has ruled, either you will be asked another question, or you will be told what to do next.

Whenever the judge tells you something, of course, you will follow his instructions. One common instruction is, "Please just tell us what you observed, don't tell us what anybody else told you." We will go over these rules before your testimony begins, so don't be concerned about having to learn the rules of evidence. Whatever you need to know at the courthouse, either the judge or I will tell you.

If a question is asked that you do not wish to answer, do not turn to the judge and ask, "Judge, do I have to answer that question?" If the question is improper, I will make an objection. If I do not make an objection, answer the question as truthfully and honestly as you can. If there are any questions that you do not want to answer, tell me now, before you give your testimony, so that we can protect you from having to answer any improper question.

### Notes to Me

This applies only to clients, while others are testifying. During the testimony of someone else, do not tug at my sleeve, whisper in my ear, or give me a nudge. I am trying to concentrate on the testimony, and I cannot listen to that testimony and listen to you at the same time. Simply make a note of what you wanted to tell me, and, when the other lawyer's examination of the witness is complete, I will review those notes either at the beginning, or at the end of my redirect or cross-examination of that witness.

### Talking About Our Preparation

You should never be embarrassed about admitting that you have met with and consulted with



me prior to your deposition or your trial testimony. If asked what you talked about, simply say that I instructed you to be truthful and honest. The other lawyer may simply ask you, "Who have you talked to about this case?" What the other lawyer may try to suggest is that some person has prepared you for your testimony, and sometimes he goes even further and suggests someone has told you what answers to give. There is nothing wrong with having spoken to me about your testimony. If you have talked with members of your family, your doctor, your pastor, your counselor, or anyone else, do not be afraid to say so. There is absolutely nothing wrong with talking about your case with other persons as long as you do not violate the witness rule discussed later in this memorandum. People who say they have never talked to anybody about their case, or their testimony, usually will not be believed.

The important point here is that no one ever should be allowed to tell you what your testimony should be. I will never tell you what evidence to give. I will never tell you to cover the facts in a certain way, or to lie, or to distort the truth. What you and I will discuss before you testify is simply the most effective way in which to tell the truth.

#### Don't Converse With the Opponent

After a deposition or testimony at trial for the day is over, do not chat with the other side or their lawyer.

#### Do Not Speculate

Do not try to figure out before you answer whether a truthful answer will help or hinder our case. Answer truthfully. I can deal with the truth effectively, but I am handicapped when you answer any other way.

#### The Witness Rule

As witnesses are sworn in at the beginning of a trial, one of the lawyers will usually "invoke the rule." The rule is also sometimes called the witness rule. The most important thing you need to remember about the rule is that the testimony must be your own. Your testimony must not be affected by the testimony of others. If you are not a party, you must not see or hear the testimony of others. Neither a party nor witnesses may discuss their own testimony or the testimony of others.

If the rule has been invoked, the judge will place you under oath and explain the meaning of the rule to you. From that point forward, until the case is over, you may not discuss any facts of the case with any person but me. Only the lawyers in the case will be able to discuss the case with you.

#### Be Careful

Even though the judge may not formally place you under the rule and explain it to you, do not assume that the rule has not been invoked. Always assume that you are under the rule unless I tell you otherwise.

In order to comply with the rule, once the case has begun, do not discuss the facts of this case with anyone but me. Do not discuss the facts of the case with your spouse or any member of your family or with anyone that you work with or with anyone who will or may be a witness in the case. If you are my client, do not discuss the facts with any witness whom we have asked here on your behalf, and do not discuss the facts with any witness who may be appearing for the other side. If you are a witness and have been asked to appear, either by my client or by me, do not discuss the facts with my client. If you are a witness, and the lawyer on the other side asks to speak with you about the facts in this case, the best thing to do from my client's point of view is to decline to speak with him or her unless I am there. You can say, for example, I will be glad to speak with you if the other attorney is present when we talk.

Unfortunately, some people do not follow the rule. If you see or overhear anyone else discuss the facts of the case in disobedience of the judge's order, you need to let me know right away.

If a witness violates the rule, there can be very serious consequences. The judge, for example, may order the testimony of the defending witness to be "stricken from the record," which means it would be just as though the witness had never testified. Additionally, since it is an order of the court given to you personally, if you disobey that order, the judge can hold you in contempt of court and punish you.

#### Depositions – Reading and Signing

After your deposition is concluded, a court reporter will transcribe the records into a typed written deposition. You will then be given an opportunity to read the deposition and to make corrections, either in misspellings, mistaken dates, or other changes. You also will need to give a reason for each such change.

## **GUIDELINES FOR GIVING TESTIMONY**

### **Rule 1: Dress appropriately**

It is important that you dress appropriately when you come to the courthouse. Always dress neatly and avoid suggestive clothing. No person (male or female) should wear jeans. Provocative hemlines and necklines are also not appropriate. Flip flops do not tend to make a memorable impression either!

### **Rule 2: Always tell the truth**

It is imperative that you tell the truth, regardless of the question. You are under oath, and a lie can be subject to a charge of perjury.

### **Rule 3: Listen to the question (and wait for count of three)**

Try to listen to the question that is asked (rather than just think of what you want to say). A good idea is to silently repeat the question, then think of your answer, then say the answer. This will take about 3 seconds, but that time will allow the attorney on the other side to make an objection. If an attorney does stand after the question is asked, do not answer the question until the Court tells you that you may answer.

### **Rule 4: Make certain you understand the question**

If there is any doubt in your mind that you may not have heard the question correctly, feel free to ask that it be repeated. It is also perfectly OK to say, "I don't understand your question."

### **Rule 5: Answer the question asked, but only that question**

Listen to the question that is asked. Only answer that question, and do not give more information than what was requested. Remember, the more you say, the more you may be interviewed about your response.

### **Rule 6: Do not guess**

This is simple – if you do not know the answer, and if you think the answer is something that you were told (from a third person, not from your own information) – do not make up your response.

### **Rule 7: Answer Orally and Clearly**

Usually, there is a court reporter, whose job is to make a record of your

testimony. It is important to speak clearly. Gum is not a good idea, and some Judges are actually offended by a witness who is chewing gum during their testimony.

**Rule 8:                    Do not argue with the "Interrogator"**

Sometimes we tend to give testimony that is not what the attorney expected or wanted to hear. Sometimes the testimony will actually disappoint the attorney that called you to the stand. Do not argue; simply answer the question. Usually, the Judge will reprimand an attorney who argues with the witness. You should not be the one to challenge!

**Rule 9:                    The "Rule"**

Many times, the Court will put you under the "rule" when you are sworn in as a witness. The Court will instruct you to be careful and not discuss the testimony or any of the proceedings in the Courtroom after you have testified. You should not discuss your testimony with people out in the hallways. The Court could exclude your testimony if it is found that you were discussing your answers and your testimony to other witnesses. Do not, however, feel you cannot speak to anyone. You are limited only as to discussions about the case or the information you were asked.

**Rule 10:                Be on time and take your time**

Do remember to be on time. Most Courts try to arrange your testimony in a manner that will not keep you waiting. You should try to give yourself plenty of time to be at the Courthouse. However, when you are on the witness stand, do not be hurried. You will not be rushed if you need to "think" about the question.