

INSTRUCTIONS FOR DEPOSITION

The Herskowitz Law Firm

By separate letter you have been advised that either your deposition is going to be taken by the opponent, or that your case is coming up for trial. The purpose of these instructions is to inform you as to what a deposition is, why it is being taken, how it will be taken, and the pitfalls to avoid during its taking, plus preparing you for testifying at trial.

1. WHAT IS A DEPOSITION:

A deposition is your testimony under oath. You will be asked questions by the opposing attorney and, in most cases, the proceedings and all questions and answers will be recorded by an official court reporter. The judge will not be present at a deposition, and in all likelihood, the deposition will be taken in an office of one of the attorneys. There is little difference between the testimony at a deposition and the testimony in the courtroom, with the exception that in a courtroom, the judge presides and rules over the matters as they arise. In a deposition, if a controversy arises, the judge will make his ruling later.

2. THE PURPOSE OF A DEPOSITION:

The opposing side is taking your deposition for three main reasons:

a. They may want to find out what facts you have in your actual knowledge and possession regarding the issues in the case. In other words, they are interested in what your story is now and what it will be at the time of final hearing.

b. They want to pin you down to a specific story, so that you will have to tell the same story at the final hearing. Through a deposition, they will know in advance what your story is going to be.

c. They hope to catch you in a lie so that they can show at the final hearing that you are not a truthful person and, therefore, your testimony should not be believed on any points, particularly the crucial ones.

These are very legitimate purposes and the opposing side has every right to take your deposition. Correspondingly, we have the same right to take depositions of the opposing party and all of his/her witnesses.

3. GENERAL SUGGESTIONS FOR DEPOSITION AND TRIAL:

a. Wear clean clothes and dress conservatively.

b. Do not chew gum while testifying and taking oath.

c. Stand or sit upright when taking the oath. Pay attention and say "I do" clearly. Avoid answers such as "yeah" or "uh huh."

- d. Do not memorize what you are going to say.
- e. Be serious at all times. Avoid laughing and talking about the case in the halls, restrooms, elevators, or any other place.
- f. If you realize that your answer was wrong, correct it immediately.
- g. If you realize that your answer was not clear, clarify it immediately.
- h. Do not say "that's all the conversation" or "nothing else happened." Say, "that's all that I recall" or "that's all that I remember happening". It may be, after more thought or another question, that you will remember something important.
- i. Always be polite, especially to the other attorney.
- j. You are sworn to tell the truth. Tell it. Every material truth should be readily admitted, even if it is not to your advantage. Do not stop to figure out whether your answer will help or hurt your side. Just answer the question to the best of your memory.
- k. Do not try to think back to what was said in an earlier statement you made. When a question is asked, visualize what you actually saw and answer it from that.
- l. Give positive, definite answers when at all possible. Avoid saying, "I think," "I believe," or "in my opinion." If you do not know, say so, don't make up an answer. You cannot be positive about the things that you naturally would not remember, it is best just to say that you do not remember. However, do not let the cross-examiner get you in the trap of answering question after question with "I don't know."
- m. Do not act nervous.
- n. Above all - this is the most important - do not lose your temper. Testifying for a length of time is tiring. It causes fatigue. You will recognize fatigue by certain symptoms: (1) tiredness, (2) crossness, (3) nervousness, (4) anger, (5) careless answers, and (6) the willingness to say anything or answer any questions in order to leave the witness stand. When you feel these symptoms come on, recognize them and strive to overcome fatigue. Remember that some attorneys on cross-examination will try to wear you out until you lose your temper and say things that are incorrect or that will hurt you or your testimony. You will be helping the opposition if you allow this to happen.
- o. Do not look at me for help in answering a question. If you do not know the answer, tell that to the questioning attorney. Do not ask me or anyone else in the room. Simply say you do not know. If the question is improper, I will object.
- p. Do not "hedge" or argue with the other attorney.

q. Do not nod your head in response to a yes or no question. Speak slowly and clearly. The court reporter must record your answer and he or she must hear the answer to record it.

r. If the attorney insists that you estimate your answer, be sure you make it clear that it is an estimate. If you honestly do not know the answer, you should not make a guess. You are not required to guess. If the question is about distances or time and your answer is only an estimate, be sure that you say that it is only an estimate. Be sure to think about distances and intervals of time before testifying, and discuss the matter with your attorney, so that your memory is reasonable.

s. When you leave after testifying, wear a confident expression, not a downcast one. Do not ask questions of me relevant to your testimony until we are alone.

t. There are several questions that are known as "trick" questions. If you answer them the way the other attorney hopes you will, he can later make your answer sound bad to the judge. Here is one of them:

"Have you talked to anybody about this case?" If you say "no," the other attorneys know that is not right, and good lawyers may try to infer that you were told what to say. The best thing to do is to say very frankly that you talked to whoever you have -- lawyer, party to suit, police, etc., -- and that you were just asked what the facts were. All you do is tell the truth.

4. PITFALLS TO AVOID:

a. Always remember that, either as a litigant or a witness, you do not have any purpose to serve other than to give the facts as you know them. You must give the facts if you have them. You do not, however, have to give opinions and you should never give opinions. Generally speaking, if you are asked a question which calls for an opinion, I will object to the question. However, after my objection, if I advise you to go ahead and answer and you do have an opinion on the subject, then you may give it.

b. Never state facts that you do not know. Quite frequently you will be asked a question by the attorney and even though you feel you should know the answer, and you do not and you will be tempted to guess or estimate what the answer should be. This is a mistake. If you do not know an answer to a question even though you would appear ignorant or evasive by stating that you do not know, you should nevertheless do so because a guess or an estimate for an answer is usually the wrong answer and one from which the opponent can show that you either do not know what you are talking about or imply that you are deliberately not stating the truth. Generally speaking, the attorney is in a

position to know what the answer should have been and it may very well be that the reason he asked the question was because he knew you would not know the answer but felt that you would be compelled to guess.

c. Explain your answers if necessary. This is better than a simple "yes" or "no." Give an answer in your words. If a question can't be truthfully answered with a "yes" or "no," you have a right to explain the answer. BUT, never attempt to apologize for or justify your answer. You are there to give the facts as you know them and not to apologize or attempt to justify those facts. Any attempt at such would make it appear as if you doubt the accuracy or authenticity of your own testimony.

d. You are only to give the information which you have readily available. If you do not know certain information, do not give it. Do not turn to me and ask me for the information or turn to another witness, if one should be present. Do not promise to get information that you do not have readily at hand, unless I advise it. If you know an answer to a question at the time that it is being asked, then you should answer it. Do not agree to look up anything in the future and supplement the answer you are giving, unless you are advised to do so.

e. Do not, without my advice, reach in your pocket for any kind of document or information. A deposition is taken for the purpose of eliciting facts which you know and have in your mind and not for the production of documents. If the opposing side is interested in obtaining documents from you, there are other legal procedures to obtain them. Do not ask me to produce anything which is in my file.

f. Do not let the opposing attorney get you angry or excited. This destroys the effect of your testimony and you may say things which can be used to your disadvantage later. It is sometimes the intent of attorneys to get a deponent excited during the testimony hoping that he or she will say things which may be used against the deponent later. Under no circumstances should you argue with the opposing attorney. Give him or her only the information you have which is all he or she is entitled to. Respond to his or her questions in the same tone of voice and manner that you would in answering my questions. The mere fact that you get emotional about certain matters could be to your opponent's advantage in the case.

g. If I begin to speak, STOP WHATEVER ANSWER YOU MAY BE GIVING and allow me to make my statement. If I am making an objection to the question being asked, do not answer until I, after making an objection, advise you to go ahead and complete your answer. Once I tell you not to answer a question, you should refuse to do so.

h. You should take your time in answering questions when necessary. Listen carefully to the questions asked of you. No matter how nice the other attorney may seem, he may be trying to hurt you as a witness. Understand the question. Have it repeated if necessary, then give a thoughtful, considered answer. Do not offer a snap

answer without thinking. You cannot be rushed into answering. Remember, the transcript of your deposition does not show the length of time used in considering your answer.

i. Tell the truth. The truth during a deposition or on the witness stand will never hurt a litigant. I may explain away the truth, but I cannot explain a client's lies or concealment of the truth. Do not put either one of us in that position.

j. Never joke in a deposition. The humor will not be apparent on the cold transcript and will make you look crude or cavalier about the truth.

k. Do not volunteer any facts that are not specifically requested by a question. Such information cannot help, but rather hinder your case.

l. After a deposition is over, do not chat with the opponent or the opposing attorney. Remember, they are your legal enemies. Do not let friendly manners cause you to drop your guard and become chatty.

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

After you have read all these suggestions, please write down any questions which you may have and discuss them with your counsel prior to the deposition or trial.