

DEPOSITIONS WHAT IS A DEPOSITION?

A deposition is a proceeding, usually in an attorney's office, where the parties and their attorneys get together in the presence of a court reporter and have questions answered by a witness. Sometimes the witness is one of the parties and sometimes it's a third party. No judge will be present, but the testimony is taken under oath and recorded by a court reporter. A transcript of the testimony may be produced later and used at trial.

Depositions are very important proceedings in litigation. What you say at the deposition can come back to haunt you if the opposing counsel is skillful. For this reason, you need to be very cautious, accurate, and truthful in your deposition testimony. It is very important to understand that what you say in the deposition is recorded, and it can later be used to impeach you if you testify at trial in a manner that is at variance with the deposition testimony. The one problem I have seen reoccurring in depositions is the same problem most clients have at most proceedings: they want to talk too much. The deposition is not the trial. You do not have to prove anything to anybody at the deposition. You do not need to convince the opposing counsel of a single thing. The time to argue is when we are in front of a judge. Furthermore, you are not to do the arguing; that is up to me. At the deposition, you want to be as civil and friendly as possible. You do not want to get into any type of rivalry or gamesmanship with the opposing counsel. Nothing good can come of such situations. You want to present yourself as honest, straightforward, and likeable. There is no judge at the deposition, and nothing is going to be decided there. You do not need to feel compelled to get out "your story" or to provide information that you think is vitally important. At the trial, we will ensure that your story is completely told and that all vital information is purveyed to the judge.

Purpose of a Deposition

1. *Get information* the witness has and the questioner does not have.
2. *Pin down the witness* to a story so the witness can't change their story later.
3. *Get an admission* about something the questioner cannot prove any other way.
4. *Get the witness to lie* so that the questioner can discredit the witness when they testify at trial.

Things To Remember If You Are Deposed

1. *Give the facts as you know them*, not opinions or hearsay that somebody else told you. Either you have the first hand knowledge to answer or your answer is "I don't know." The only exception to that is if you are directly asked to quote or recall what someone else said to you, in which case you should give the answer.
2. *Never guess or speculate*, even if you will look foolish by saying you don't know.

Guessing will always get you in trouble because the opposing party will either substitute what you said for the truth if it helps their case, or, if it doesn't, try to prove you were wrong and imply your testimony cannot be trusted. If you are asked "what do you think" or "what would you say", you are being asked to speculate. As your attorney, I will probably object to a question like that. If the questioner tries to make you guess or speculate, simply say "I don't have a good basis to say." If you find yourself saying "It seems like..." or "It must have been...", or "I guess...", or "Maybe...", you are probably speculating. Stop and think about what you know and just state that.

3. *Never explain or justify your answer.* If you are asked for a "yes" or "no" answer that will make you look bad, just give the basic answer to the question. The fact that you've got a good explanation they didn't ask for is their problem, not yours. You'll have plenty of opportunity to tell your story later.
4. *Never volunteer information you were not asked for.* Just answer the questions exactly as they are asked and leave the explanations for later. If the questioner does not ask for the explanation, that, again, is their problem.
5. *Never let the questioner put words in your mouth;* answer the question in your own words, but remember not to explain, speculate, or volunteer any information.
6. *Never let the questioner mesmerize you.* If you are asked a lot of "yes" or "no" questions in a row, look out -- a zinger is being set up. Just because you answered "yes" to all of the questions leading up to the zinger does not mean that you have to answer "yes" to the zinger. There may be information the questioner has not asked about that makes the answer "no". That is their problem. Just answer "no" and don't explain it unless the questioner asks you to explain.
7. *Never agree to look anything up or get copies of documents unless it will be simple to do so or you are the only person who can do it.* If the other side can get the information as easily as you, they should do so.
8. *Never reach into your pocket, purse, or briefcase unless I tell you to.* Don't ask me for permission to do so -- I will tell you to do so when the time is right. In fact, *never bring any documents to the deposition unless you have specifically discussed it with me beforehand.* The other side has ways to demand the production of documents -- if they want you to bring documents to the deposition, they will need to request those ahead of time.
9. *Never let the questioner get you angry or upset.* It will make you look bad and you will say things you shouldn't. That's what they are provoking you for. *Don't argue* with the questioner. If they don't believe you, that is their problem -- they don't decide the facts and you don't have to prove anything to them.

10. *Never interrupt me.* If the questioner interrupts you, let him speak. If I instruct you not to answer a question, don't answer it. If I instruct you to answer a question, answer it the same way these instructions tell you to answer all other questions.
11. *Never make jokes or give sarcastic answers.* It will not look paper the way you wanted it to sound. In fact, it might look like exactly the opposite of what you intended -- for example, "oh, sure."
12. *Never chat with the other side* when the deposition is over; respond only to my questions at that time.
13. *Take your time.* If the questioner acts like they are in a big hurry, that is their problem. Think about the question, think about the answer, then give the answer in your own words.
14. *When estimating time or distances or other things,* make it clear that you are only estimating. That is not speculation, it is an attempt to clarify something you know about.
15. *Focus on the questions and answer only the question asked.* It does not good at all to skip over the answer and start talking about your explanation of other things that justify what you did. You'll be able to give that information at the appropriate time. Just answer the question as simply and accurately as possible.
16. *Tell the truth.* You can explain at trial an honest answer that looked bad at the deposition, but you can never explain a lie. Don't stop to consider whether the answer is good or bad for your case -- only stop to consider how best to accurately answer the exact question you were asked. If you don't have the information to answer, say "I don't know."

In my opinion, the single most important use of a deposition is to develop information that can later be used during cross examination at the trial. The purpose of cross examination is to produce facts favorable to the party represented by the cross examiner, and/or to expose impeachment material which casts doubt upon the witness' credibility. In other words, during the deposition, the examiner is seeking to elicit from you facts which are favorable to their side of the controversy, and which they can later bring out in cross examination. On the other hand, if you testify one way at the deposition, and another way at trial, you will be severely impeached when the cross examiner reveals that you testified under oath at your deposition in a manner that contradicts your later testimony. This may sound complicated, but the solution is pretty simple. You need to understand what facts are important in the over all resolution of the controversy at hand, and you need to tell the truth. If it turns out that your deposition testimony is incorrect, and you will be testifying in a manner that varies from it at trial, you need to be aware of the discrepancy and be prepared to explain it.