ADVICE TO A WITNESS
BEFORE DEPOSITION OR TRIAL

A deposition is your testimony under oath. You will be asked question by the opposing attorney and in some cases by your attorney, and the questions and your answers thereto will be recorded by an official court reporter. There will be no judge present and in all likelihood the deposition will be taken in one of the attorney's offices. There is little difference between testimony at a deposition and testimony at trial except there is no judge presiding and ruling over the legal questions as they arise. The judge may do so later.

The Purposes of a Deposition: The opposing side is taking your deposition for three reasons. The first reason is that they want to find out what facts you have in your actual knowledge and possession regarding the issues in the lawsuit. In other words, they are interested in what your story is now and what it is going to be at the trial. Secondly, they want to pin you down to a specific story so that you will have to tell the same story at the trial and they will know in advance what your story is going to be. And, thirdly, they hope to catch you in a lie because if they were to catch you in a lie they can show at the trial that you are not a truthful person and therefore your testimony should not be believed on any of the points, particularly the crucial ones.

These are very legitimate purposes and the opposing side has every right to take your discovery deposition for these purposes and in this fashion. Correspondingly, you have the same right to take the discovery deposition of the opposing litigant.

You, as a witness in a deposition or trial, have a very important job to do. Important not only to the party for whom you appear, and to yourself, but most important to the American system of justice. A jury, to make a correct and wise decision, must have all of the evidence put before it in a truthful manner.

You already know that you take an oath in court to tell nothing but the truth. But there are two ways to tell the truth. One is in a halting, stumbling, hesitant manner, which makes the jury doubt that you are truthfully telling all of the facts. The other is in a confident, straightforward manner, which makes the jury have more faith in what you are saying. You help yourself, the party you are testifying for, the judge, and the jury by giving your testimony in this last way.

To assist you in this, we have prepared a list of hints and aids which will make your testimony more effective:

1. If you are a witness in a case involving an accident, and you saw the accident happen, try to visit the scene again before testifying. Stand on all the corners so you will be familiar with the place. Close your eyes and try to picture the scene, the objects there, and the distances.

2. Before you testify at trial, visit the court, and listen to other witnesses testify so you will become familiar with court procedure. This will help you to understand some of the things you will come up against when you give your testimony.

3. Wear clean clothes in court. Dress naturally and conservatively. Do not affect a manner of dress.

4. Do not chew gum while testifying or taking the oath.

5. Stand upright when taking the oath. Pay attention and say, “I do” clearly.

6. A witness’ recital should never be memorized. If he is chained to certain words regardless how true, their weight will retard him. If, however, knowing the facts, he speaks spontaneously, he is bound to relive them, and the emotions that originally accompanied them may come to the fore again. He may involuntarily reproduce his anger or sympathy, or tears may come to his eyes. The persuasive effect is overwhelming, because not merely the words, but the whole event has been reproduced and its accuracy is unmistakable.

7. Be serious at all times. Never joke when testifying. Avoid laughing and talking about the case in the halls, restrooms, or any place in the courthouse.

8. Talk to the members of the jury. Look at them most of the time and speak to them frankly and openly as you would to a friend or neighbor. Do not cover your mouth with your hand. Speak clearly and loudly enough so that the farthest juror can hear you easily.

9. Listen carefully to the questions asked of you. Regardless of how nice the other attorney may seem on cross-examination, he may be trying to hurt you as a witness. Understand the questions. Have it repeated if necessary; then give a thoughtful, considered answer. Do not give a snap answer without thinking. You should not be rushed into answering, although, of course, it would look bad to take so much time on each question that the jury would think you were composing an answer. In a deposition hearing it does not show the length of time taken for your answer.

10. Explain your answer if necessary. This is better than a simple “yes” or “no.” Give an answer in your own words. If a question cannot be truthfully answered with a “yes” or “no,” you have a right to explain your answer. Answer directly and simply only the question asked you, and then stop. Do not volunteer information not actually asked for. Do not, without your counsel’s request, reach in your pocket for a Social Security Card, or other documents. A discovery deposition is to elicit facts which you now and have in your mind and not for the production of documents. Do not ask your counsel to produce anything which is in his file at the time because generally

the same rule for obtaining them applies to those matters that applies to things which may be in your pocket. Do not turn to another witness, if one should be present, and ask him for the information. Do not promise to get information that you don't have readily at hand unless your attorney advises it. Do not agree to look up anything in the future and then supplement the answer you are then giving unless your counsel advises you to do so.

11. If your answer was wrong, correct it immediately.

12. If your answer was not clear, clarify it immediately.

13. The court and jury only want facts: Not hearsay, nor your conclusions, not opinions. You usually cannot testify about what someone else told you. Generally speaking if you are asked a question which calls for an opinion, your attorney will object to the question; however, after his objection if he advises you to go ahead and answer and you do have an opinion on the subject then you may give it.

14. Don't say "That's all of the conversation," or "nothing else happened;" say, "That's all I recall happening." It may be that after more thought or another question you will remember something important.

15. Be polite always, even to the other attorney. Always address him as "sir." A witness who meets the violence of the cross-examiner with forbearance is likely to capture the hearts of the jury as well as their minds. A good witness can be provoked to righteous wrath, but must never resort to insult. Do not let the opposing attorney get you angry or excited. This destroys the effect of your testimony and you say things which may be used to your disadvantage later. It is sometimes the intent of the attorneys to get a deponent excited during his testimony hoping that he will say things which may be used against him. Under no circumstances should you argue with the opposing attorney. Give him the information in the same tone of voice and manner that you do in answer to your own attorney's questions. The mere fact that you get emotional about a certain point could be to your opponent's advantage in a lawsuit.

16. Do not be a smart aleck or a cocky witness! This will lose you the respect of the judge and jury.

17. Tell the truth. The truth in the deposition or on the witness stand will never really hurt a litigant. A lawyer may explain away the truth but there is no explaining why a client lied or concealed the truth. The mere fact that you may have had an accident before of almost identical nature or for similar injuries or that you may have sued or been sued by other people at other times or similar claims or even a criminal record does not destroy the validity of your claim or defense. However, the deliberate concealing of such an

action would be devastating to your veracity at the trial and would hurt your case immeasurably.

18. Do not try to think back to what was said in a statement you made or a deposition. When a question is asked, visualize what you actually saw and answer from that. the jury thinks a witness is lying if his story seems too "pat" or memorized, or if he answers several questions in the same language.

19. Do not exaggerate.

20. If the judge or your attorney begins to speak, stop whatever answer you may be giving and allow him to make his statement. If your attorney is making an objection to the question that is being asked of you do not answer the question until after he has made his objection, advises you to go ahead and complete your answer. If your attorney tells you not to answer a question then you should refuse to do so.

21. Give positive, definite answers when possible. Avoid saying, "I think," "I believe," "in my opinion." If you know, say so, don't make up an answer. You can be positive about the important things which you naturally would remember. If asked about little details which a person naturally would not remember, it is best to just say that you don't remember. But don't let the cross-examiner get you in the trap of answering question after question with "I don't know."

23. Don't act nervous. Do not hedge. Avoid mannerisms which will make the jury think you are scared, or not telling the truth or all that you know.

24. Above all—this is 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: (a) irritation, (b) nervousness, (c) anger, (d) careless answers, (e) willingness to say anything or answer any question to leave the witness stand. When you feel these symptoms, recognize them and strive to overcome fatigue. Remember that some attorneys on cross-examination will try to wear you out so you will lose your temper and say things that are not correct or that will hurt you or your testimony. Do not let this happen.

25. Do not look at your attorney or at the judge for help in answering a question. If you do not want to answer a question, do not ask the judge whether you must answer it. You are on your own. If the question is improper, your attorney will object. If the judge then says to answer it, do so.

26. Do not nod your head for a "yes" or "no" answer. Speak out clearly. The court reporter must hear the answer.

27. Never attempt to explain or justify your answer. You are there to give the facts as you know them. You are not supposed to apologize or attempt to justify those

facts. Any attempt as such would make it appear as if you doubt the accuracy or authenticity or your own testimony.

28. If the question is about distances or time and your answer is only an estimate be sure that you say it is only an estimate. Be sure to think about speeds, distances, and intervals of time before testifying, and discuss these subjects with your attorney so that your memory is reasonable.

29. When you leave the witness stand after testifying wear a confident expression, not a downcast one.

30. There are several questions which are known as "trick questions." That is, if you answer them the way the other attorney hopes you will, he can make your answer sound bad to the jury. Here are two of them:

(a) "Have you talked to anybody about this case?" If you say "no," the jury knows that isn't right because good lawyers always talk to the witnesses before they testify. If you say "yes," the lawyer may try to infer that you were told what to say. The best thing to do is to say very frankly that you have talked to whomever you have – lawyer, party to suit, police, etc. – and that you were asked what the facts were. All your lawyer wants you to do is just tell the truth.

(b) "Are you getting paid to testify in this case?" The lawyer asking this hopes your answer will be "yes," thereby inferring that you are being paid to say what your side wants you to say. Your answer should be something like, "No, I am not getting paid to testify; I am only getting compensation for my time off from work, and the expense (if any) it is costing me to be here."

31. Except in a few situations, an insurance company cannot be joined as a defendant, and if anything is said which will let the jury know that an insurance company is actually defending the case, the judge will declare a mistrial. The jury will be discharged and the case started all over.

32. At the deposition and at trial, do not chat with the opponents or their attorneys. Remember they are your legal enemies. Do not let a friendly manner cause you to drop your guard and become chatty.

CONCLUSION

A deposition or trial is merely a formal procedure for eliciting the truth. Americans hold the principle of fair play in high regard. The law places great emphasis on the jury's opportunity to observe the witness, particularly under fire. A witness maybe letter-perfect and yet be disbelieved by the jury. His sincerity and forthrightness

are under constant scrutiny. You as a witness should conduct yourself with courage, judgment, and integrity.

After you have read these suggestions, please reread them now, and write down any questions which you may have and ask me about them.

From an article by Payne H. Ratner Jr.
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