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What is a Deposition and How Do I Prepare for One?

A deposition is testimony taken before the actual trial. It is taken in front of a court reporter and the witness is sworn to tell the truth, just as if he was in court.

Depositions are done for many reasons. One reason is to find out what the other side is going to say in court and pin them down to it, so they cannot change their story at trial. Another reason is to preserve testimony from someone who may not be available the date of the trial. A somewhat less important reason is to see what kind of person the witness will be on the stand – are they credible?; what are the hot buttons that will make them angry (thus damaging their credibility)?

Depositions are a normal part of litigation. They are not harassment. They are specifically permitted under the trial rules. Your attorney will determine if he needs to depose the other party or any witnesses. Just because the other side deposes you does not mean your attorney needs to or will want to depose the other side. Depositions can be expensive, so they should not be done on a whim. The person requesting the deposition has to pay the court reporter and purchase the transcript. This can range from about three hundred dollars for a half hour deposition to thousands for an all day deposition or depositions of several people.

The most important thing to remember for a deposition is to treat it just as if it was in front of the judge. Remember, you are not talking to the person asking the questions, **you are talking to the Judge**.

- Always be honest, even if you think an honest answer makes you look bad or is bad for your case. Your attorney can come back and ask questions to clarify or explain the answer.
- Listen carefully to the question and answer only the question asked. For example, when asked "Do you know what time it is?" most people will look at their watch and tell the person what time it is. But the answer to that question is either yes or no. Either you <u>know</u> what time it is or you do not. Pay attention to the verbs.
- If you don't understand the question say so politely. If the question has more than two facts in it, politely ask the questioner to break it down or break down your answer to each fact.
- Keep your answers short. If your attorney needs more information he will ask for it.
- Do not guess or speculate at an answer. If you did not actually see something with your own eyes or hear it with your own ears, you really don't KNOW it. The most common example of that is "do you know who your Mother is?" Well, you probably can't remember coming out of the birth canal and looking up to see her, so you really don't have what the law calls 'actual knowledge'. If the questioner insists, make sure you qualify the answer as speculation or a guess. The same thing goes for estimates. Make sure you qualify any estimates as to time, speed, date, height or any other facts. "I estimate he was about 40 years old."
- "I don't know" or "I don't remember" are perfectly good answers, if they are true. If you answer this way, the questioner may ask you if there are any documents that would help you remember or if there was anyone else who was there, or who you would ask if you had to find out today. However, if you say you do not remember a large part of what you are asked, or only seem not to remember the things that may hurt your case, it casts doubts on what you say you DO remember.
- Do not argue with the person asking questions. Do not cut the questioner off in mid sentence or attempt to talk over him. Do not try to ask the questioner questions. Do not get sarcastic, flippant or try to be funny with your answers. And I don't care if the questioner says you skydive naked, do not get angry. Remember, every time you open your mouth, **you are talking to the Judge.**
- The questioner may box you in to yes or no questions that you think make you look bad or are bad for the case. Do not let this frustrate you or make you angry. It is a normal questioning practice for all attorneys. Just answer yes or no. Your attorney will be able to ask follow up questions to explain.
- Do not anticipate the question and begin answering before the questioner is done. In fact, take a moment to breath, analyze the question for what it is asking, and compose your response. DO NOT JUST START TALKING. First, this pause gives your attorney a chance to object if needed. Second, if you just start talking you will talk yourself right into a loss.

While We Are on the Subject, What is Discovery?

Depositions are part of what is called discovery. Discovery is the procedure whereby both sides seek information about the other side's case. This is not Texas Hold 'em Poker. They have a legal right to obtain records relevant to the issues, as well as have you answer written interrogatories (a fancy Latin term for questions), make inspections of places or things and request a medical or mental examination.

Discovery is not an attempt to invade your privacy or harass you. This is normal trial procedure. Your attorney may be able to object to some of the requests, but you must give her the requested material first and she will make that determination. And just because the other side uses a certain form of discovery does not mean your attorney will want or need to respond in kind.

If you receive a request for production of documents, you need to get copies of all documents that are requested. Do not write on the documents, but indicate which request the document is for by a sticky note or separation page with the request number on it.

If you do not have a document, but can get it from someone else, you must do so. For example, if the request asks for medical records, you need to contact your doctor and get copies. This may include having to pay for the copies. This is a cost of litigation.

Interrogatories are like depositions, but they are written questions and answers. Your attorney will review and probably edit your responses. This is not the place to make catty remarks or take jabs at the other party. Your answers can be admitted into evidence, so the rule about depositions applies – **you are talking to the judge.**

The other side also has the right to request an inspection of places or things. In the case of a divorce, this could mean taking pictures inside the house where you live. In the case of an auto accident, it could mean taking pictures of your wrecked car or having an expert examine the car.

In an auto accident where you are claiming injury, the other party frequently requests a medical examination. You will have to go to their doctor and undergo an examination of your injuries. This may include x-rays or other tests. In a custody battle, if mental instability is alleged, you may have to undergo a mental evaluation by a psychiatrist or psychologist.

A more common examination in a custody battle is a drug test. If any form of substance abuse is alleged, you may have to give a urine or hair follicle sample.

If you fail to cooperate with discovery or do not respond in a timely manner, the court can impose sanctions or punishment. This may range from having you pay the other party's attorney fees, to assuming that the information you have not provided would support the other side's argument or dismissal of your case.

Depositions, *continued from front*

- Before your deposition, review any pleadings filed in the case and any documents produced in discovery. If discovery has not been requested, review any documents that you feel are relevant to the issues. Consult with your attorney to see if he has any recommendations. Do not bring any documents with you to the deposition unless you discuss them with your attorney first. The questioner can ask to see any documents you bring with you.
- Do not ask your attorney or anyone else in the room for help in answering. They can't help you.
- If you need a break, politely ask for one. However, if you have just been asked a question you will not be permitted to take a break until after you answer it.

Depositions are really very simple. Remember, every time you open your mouth, **you are talking to the Judge.**

Newsletter Index

For those of you who are receiving this newsletter for the first time, or those who have lost copies, here is an index of back issues. Call 897-5031 or e-mail mattersm@AOL.com to request back issues.

September 03 Estate Planning, PI Top 10 List
December 03 Custody/Support Top 10 List, Bio, Customer Survey, New Child Support Guidelines, Probate Myths, Other Estate Planning Documents
February 04 POA, Criminal Top 5 List, Small Business Issues, Car Titles
May 04 Pro Se, TV Law, Dave Back, Footlite Show,
August 04 Small Claims Primer
November 04 My Family Law Rules, Time Limits for Actions, Rental Property Deposit Law
February 05 Buying Used Cars, Lemon Law
May 05 So You Are A PR, Reminder About Estate Planning
August 05 So U R a Guardian, Exercising a Power of Attorney
November 05 New Employee Announcement; Civics 101 Jury Duty
February 06 ID Theft, Credit Repair, New Years Resolution
May 06 Know-it-All --NOT, Correction on ID Theft, After Hours, Ethical Wills
August 06 Identity Theft PS, New Custody Law on Moving, Random Musings on the Law
November 06 Instructions to a Surviving Spouse, Home Repair Contracts
May 07 Why cases take so long to get to trial, Top Ten things to do with your tax refund
August 07 Long Term Care Insurance Primer, Wake Up Call for Unmarried Couples - Gay or Straight, Another Reason to Make a Will