

American Bar Association
Young Lawyers Division

Depositions 101

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DEPOSITIONS DOS AND DON'TS

DEFENDING A DEPOSITION:

1. Prepare your client a few days in advance of the deposition.
2. Give your client a checklist of basic instructions for the deposition (see attachment).
3. Practice the deposition by asking your client some likely questions and critique their response.
4. Use a deposition preparation video.
5. Know your case and review your file, concentrating on the elements of all claims and defenses and key documents.
6. Be careful about giving the deponent work product materials during deposition preparation. They may be discoverable.
7. One the day of the deposition, meet with your client 30 minutes in advance of the deposition to answer any last minute questions.
8. Do not let you client take any documents into the deposition. That means no notes, no calendar, no files, not even blank paper and a pen. Your client should not take any notes during the deposition.
9. If more than one attorney attends the deposition from your opponent, only permit one attorney to ask questions. Do not allow the opposing side to "tag team" your witness.
10. Be familiar with objections made during a deposition. Objections to form must be made or they are waived. This allows the questioner to ask a proper question.
11. Be familiar with when you can instruct your witness not to answer a question. You can only instruction the witness not to answer a question "to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion [under Fed. R. Civ. Proc. 30(d)(3) to cease the deposition or to obtain a protective order]." Fed. R. Civ. Proc. 30(d).
12. If a dispute arises and the judge is called, stay on the record.
13. Take frequent breaks. During these breaks, avoid giving your client assistance with their testimony. Do tell your client that he or she is doing fine and to keep telling the truth.
14. If opposing counsel asks for documents on the record, ask that they follow it up with a written request. This will allow you to make and preserve any necessary objections for the record.
15. Have your client read and sign the deposition.
16. At the end of the day, no matter how the deposition went, tell your client they did a good job.

TAKING A DEPOSITION:

1. Know your case and review your file, concentrating on the elements of all claims and defenses. Search the witness's name from other depositions, documents, public records, etc.
2. Determine what information you need to obtain from the witness.
3. Prepare a deposition outline. Include in your outline, background information (i.e., education, work history, does he or she know plaintiff, defendant, or key witnesses and if so, how), corporate structure, industry information, documents).

4. Ask your client about possible areas of inquiry for the deponent.
5. Have plenty of copies of documents that you intend on using with the deponent (one copy for court reporter, one for you marked with your notes, one copy for deponent, one copy for all counsel, one for your client).
6. Determine whether the deposition should be videotaped. Is the witness on "death's door"? Is the deposition testimony going to serve as trial testimony? Is the witness likely to become unavailable for purposes of trial?
7. At the deposition, introduce yourself to deponent, have witness sworn, and go over ground rules (see attachment).
8. If the witness brought documents into the deposition, ask to see them.
9. Ask the witness what they did to prepare for the deposition? Did he or she meet with anyone? If so, whom? Who was present? How long did the meeting last? Where was the meeting held? Did he or she review any documents in preparation for the deposition? If so, what?
10. Don't permit the deponent's attorney to make speaking objections or otherwise coach the witness as to how to answer a question. If you know in advance that this might be a problem, consider having the deposition videotaped.
11. If the witness is instructed by counsel not to answer a question, confirm that fact on the record. Then ask the witness if he or she intends to follow counsel's instruction. Have opposing counsel state on the record the basis for the objection and assertion of privilege. State on the record why you think the objection and instruction are improper and why the privilege does not apply. Resume questioning. You can later determine whether you need to raise the issue with the court through a motion to compel.
12. If problems arise, call the court as a last resort.
13. Before concluding the deposition, take a short break to review your notes and confer with your client. Generally, this will be your only opportunity to depose this individual, so make sure you ask everything you need to. (Fed. R. Civ. Proc. 30(a)(2)(B) requires a party to obtain leave of court to re-depose an individual.)
14. Remember, Fed. R. Civ. Proc. 30(a)(2)(A) requires you obtain leave of court if you intend on taking more than 10 depositions.

WITNESS GUIDELINES

1. Tell the truth.
2. Listen carefully to the question and answer the question asked and only the question asked.
3. Don't volunteer information. Put opposing counsel through their paces and make them do their job.
4. If you don't understand a question, ask that it be repeated or rephrased. You are entitled to an intelligible question.
5. Before you answer a question, pause. This will give you an opportunity to process the question and it will give your attorney an opportunity to object.
6. Be concise. Answer yes or no to yes or no questions. If you don't know the answer, then say you don't know. Don't speculate.
7. Listen to my objections. If I object to a question because of its form, you will still be required to answer, assuming you understood the question. However, if I object to a question and instruct you not to answer, then do not answer the question.
8. Do not reveal the substance of any conversations that you had with your attorney.
9. If you need a break, then ask for one. However, if a question is pending you will need to answer it first.
10. Don't bring anything with you to the deposition and do not take any notes during the deposition.

DEPOSITION GROUND RULES

1. It is important that only one of us speak at a time so that the court reporter can take down everything that we say. Therefore, if you let me finish my questions, I will let you finish your answers.
2. The court reporter can only record words, so I need you to answer questions verbally – that means, no nodding your head and no “uh-huhs or “un-uhns.”
3. If you don’t hear or understand a question, ask me to repeat it or rephrase it. Otherwise, if I ask a question and you answer it, I will assume you understood it.
4. If you need a break, just ask for one. However, if there is a question pending, you will have to answer it first, okay?
5. Are you taking any medication that effects your memory or impair your ability to truthfully answer my questions?