

## **INSTRUCTION FOR DEPOSITION WITNESSES**

These INSTRUCTIONS are to prepare you for your deposition. In large part they will reiterate what I have already told you, but you may find it helpful to read them yourself at a time that is convenient for you.

The INSTRUCTIONS are organized in two parts: CARDINAL RULES and GUIDELINES. Because the CARDINAL RULES are so very important to remember, you should become very familiar with the admonitions contained in this section. The GUIDELINES elaborate on the CARDINAL RULES and give you a better feel for some common issues and the context in which they may arise. While you should be familiar with the GUIDELINES, you should not clutter your mind with trying to memorize them.

### **I. CARDINAL RULES**

1. LISTEN TO THE QUESTION. This means listen to the entire question. Wait for the lawyer to complete the question without interrupting him/her. Do not try to formulate your answer until you have heard the entire question.

2. UNDERSTAND THE QUESTION. This is much more difficult than it sounds. If more than one question is unclear, ask the lawyer to rephrase or repeat it. You should never attempt to answer a question that you do not completely understand. To insure that you understand the question and think about it, you should pause before you begin your answer.

3. TELL THE TRUTH. You will be under oath to tell the truth, and it is absolutely essential that you tell the truth about what you know to the best of your ability. You should remember, however, that what you know does not include hearsay and surmise.

4. DON'T GUESS. If you do not know or cannot recollect the answer to a question, you should say so. Your answer should be only as vague or specific as your memory allows. You are not telling the truth if you speculate or guess. Since your memory is the only star you have with which to navigate, you must let your memory be your guide. Again, if you do not know or cannot remember, there is nothing wrong with saying, "I don't know" or "I don't remember".

5. ANSWER ONLY THE QUESTION THAT IS ASKED. Preferably, questions should be answered "yes" or "no". Try to keep your answer as short as possible and limit it only to the question that is asked. Remember that a verbatim transcript is being made of everything you say. Do not volunteer other information, and do not try to anticipate the direction of the line of examination. There may be instances, however, where a longer answer is necessary. Let common sense be your guide, but answer only the question that is asked of you.

6. RETAIN YOUR COMPOSURE. Your demeanor should be polite and civil. It is imperative that you do not lose your temper or argue with the lawyer conducting the deposition. You should be aware that in some instances the conduct of the lawyer and the method of examination may be designed to provoke you into losing your composure.

7. LISTEN TO ANY OBJECTIONS OR STATEMENTS I MAKE AND FOLLOW MY INSTRUCTIONS. It may be necessary to make objections to some of the questions or with respect to the conduct of the lawyer taking the deposition. If I speak, you should stop speaking and listen to me. What I say may have a direct bearing on your answer. Above all, if I instruct you not to answer a question, you should not do so.

## **II. GUIDELINES**

1. You should dress neatly, but do not overdress. You should wear your normal business clothing. You should take no documents, materials, or notes into the deposition with you without my approval.

2. You should remember that as your lawyer, I probably will have a very limited role in the deposition. It is not the purpose of the deposition, in most cases, to bring out our side of the case. For this reason, my cross-examination of you may be quite limited or nonexistent. You should not worry that this may make you feel that the deposition is one-sided.

3. The deposition may begin with questions on what you did to prepare for the deposition. You should answer this question truthfully, including that you consulted with your attorney, but you should not reveal any conversations between you and me. You may have to disclose what particular documents you reviewed prior to the deposition.

4. Early in the deposition, an attorney frequently asks questions directed at one's personal life and background. These questions should be answered truthfully. If such questions go beyond the scope of relevant evidence, I will object, but such questions are quite standard. Do not be surprised, however, if the attorney taking the deposition skips over such preliminary matters to go to substantive questions.

5. If you are questioned with respect to any documents, you should first review the document silently and completely before you answer. Even if you have seen this document before, you should read it again. This includes questions later in the examination with respect to documents which you may have seen earlier. You should have a document in front of you when answering questions with respect to it. If you feel a document would be helpful or necessary in answering questions, ask to look at it.

6. Be wary of the lawyer conducting the deposition. Just as you should not let an aggressive attorney embroil you in any argument or compromise your composure, you should not let the friendly or seemingly cooperative lawyer disarm you. The opposing counsel is your adversary.

7. Be mindful of compound questions. Lawyers sometimes deliberately ask more than one question at the same time. Answering such questions as they are propounded can be dangerous at worst and ambiguous at best. Ask the lawyer to rephrase the question to pose only one question.

8. Be wary of certain trick questions. Many times a lawyer will preface a question with "Isn't it true that..." or "Would it be fair to say...". As always, answer the questions truthfully to the best of your ability. Remember it is not truthful to guess. If you do not know the answer, say that you do not know. Similarly, lawyers will frequently mischaracterize part of your prior testimony or preface a question with a half-truth. If this is done to you, you should indicate that you disagree with his characterization of your prior testimony or the premise in his question. Examples of how to deal with this are: "I do not believe I said that, or if I did, I was mistaken. The proper answer should be..." and "I do not agree with the assumption in the first part of your question..." Above all, don't let the lawyer put words in your mouth.

9. Be careful in answering questions which ask you to characterize or quantify time, distance, speed, amounts or similar matters. Our perceptions on such matters are often mistaken.

10. Many times an attorney will attempt to ask you whether you have provided all the information you know or whether there is anything else that you know on a particular subject. These "round up" questions are essential for his purposes. Your response should be that you have given him the information to the best of your recollection.

11. Some questions cannot be answered with a simple yes or no. If you are asked such a question, indicate that a simple yes or no answer is not possible.

12. If your answer is interrupted with another question, wait patiently until the end of the question and indicate politely that you were not through answering the previous question. First, complete your answer to the first question. If you do not then remember the second question, ask to have it repeated or reread to you by the court reporter.

13. If you would like a short recess, you may request one. You may consult with me anytime you feel necessary.

14. Never say "never" and "always". Invariably, these words have a way of coming back to haunt you.

15. Do not fill pauses in the examination with an elaboration of your answers. Give a short concise answer to the question and then remain silent for however long it takes until the next question is asked.

16. Avoid jokes, obscenities and any other type of casual or colloquial expression. You should always remember that there is a court reporter taking down a verbatim transcript of what you are saying and this may later be used in court.

17. Remember that your performance and demeanor as a witness is being evaluated by the lawyers taking the deposition for purposes of assessing how effective you will be in court.

18. Remember that you should speak up loudly and clearly enough for the court reporter to hear you. Since a verbatim transcript is being made of your responses, a nod or a shake of the head is an insufficient response. Similarly, when referring to documents, avoid saying "this one" or "that one". Instead, identify the documents by their exhibit number or some other means of identification.

19. Think of the deposition as dictation, but remember that you will not have a chance to edit your statements. Pauses, however, are not usually reflected in the deposition transcript, so take as much time as you need to think about your answer.

20. If, in the course of your deposition, you realize that you may have misstated something, you should indicate that fact to the lawyer taking the deposition and suggest that you would like to make your answer more clear. If he does not permit you to do so, I probably will.

21. Reread and remember the **CARDINAL RULES**.

### **THE DAY OF YOUR COURT TESTIMONY or DEPOSITION:**

1. Dress neatly, but do not overdress. You should wear your normal business clothing.

2. If you have received a subpoena, bring it with you. It may prove useful, for example, if you are not sure in which courtroom the trial is being held.

3. Meet your attorney earlier than is required for the deposition or hearing so that you can ask him any final questions that you may have with regard to your testimony.

4. Avoid any undignified behavior from the moment you enter into the courthouse or the office where the deposition is being taken. For example, smoking and gum chewing are usually not permitted in the courthouse.

### **WHEN YOU ARE TESTIFYING:**

1. When you are called to testify in either the deposition or in court, you will take an oath to tell the truth. Pay attention to the court clerk or the court reporter who is administering

the oath and say "I do", clearly, so that all can hear. Try not to be nervous; and compose yourself for the questions that will follow.

2. While you are deposed or while you are on the witness stand, you are sworn to tell the truth. Tell it!

3. Speak in your own words. There is no need to memorize your testimony beforehand, in fact, doing so is likely to make your testimony sound "pat" and unconvincing. Be yourself.

4. Listen carefully to each question and make sure you understand it before you start to answer. Have the question repeated if necessary. If you still do not understand it, say so. Never answer a question that you do not fully comprehend or before you have thought your answer through.

5. Answer directly and simply, with a "yes" or "no", if possible. Answer only the question asked then--Stop. Do not volunteer additional information that is not requested. Otherwise, your answer may become legally objectionable under the rules of evidence and may also cause you to appear biased. If, however, an explanation is required, say so. Sometimes an attorney will try to limit you to a "yes" or "no" answer. If that happens, simply say that you cannot answer the question, "yes" or "no".

6. Never state facts that you do not know. If you are asked a question, and even though you feel that you should know the answer to it, but you do not, then you should not guess what that answer should be. Generally, the attorney who has asked the question knows what the answer should be, and it may be the reason he asked you the question was because he knew that you would not know the answer, but felt that you might feel compelled to guess.

7. Never attempt to explain or justify your answer. You are to testify to the facts as you know them and you should not apologize or attempt to justify those facts. If you do so, it appears that you doubt the accuracy or authenticity of your testimony.

8. You should only give the information which you have readily available. If you do not have certain information, do not attempt to give it to opposing counsel. Do not turn to your lawyer and ask him for the information or turn to another witness, if one is present. Do not promise to get that information that you do not have readily at hand, unless your attorney advises it.

9. Do not, without your attorney's advise, reach into a pocket or into a file for any kind of documents for information. At a deposition, the purpose is generally to obtain facts which you know and have in your mind and not for the production of documents. If the opposing attorney is interested in obtaining documents from you, then there are other legal procedures to obtain them. Do not ask your attorney to produce anything from his file.

10. Do not let the opposing attorney make you angry. This destroys the effects of your testimony, and you may say certain things that can later be used against you. Sometimes opposing counsel wants to have a witness become excited hoping that he or she will say things which may be used against them later. Do not argue with the opposing attorney. If he asks you questions which you feel are improper, your attorney will make the appropriate objections.

11. If your attorney begins to speak, stop and do not finish the answer that you may be giving and allow him to make his statement. If your attorney makes an objection to the question being asked, do not answer that question until after the attorney completes his objection. If this is a deposition, do not continue and complete your answer until your attorney advises you

to do so. If this is during a hearing, the Judge will rule on the objection and indicate to you whether you can or cannot answer the question.

12. You should take your time in answering questions. Remember, the transcript of your deposition does not indicate the length of time used in considering your answer, although it is advisable to answer all questions in a direct and forward manner.

13. Never joke during a deposition or during a hearing. The humor will not be apparent in the transcript for the deposition and will make you look cavalier. During a hearing before a Judge, if you make a joke the Judge may feel that you are not treating the Court with respect.

14. Do not volunteer any facts that are not specifically requested by the questions. Such information will not help your case but will probably hurt it.

15. After the deposition or hearing is over, do not chat with the opposing attorney or the opponent. Remember that the opposing attorney is taking your deposition for a purpose and that your spouse in a contested hearing is not looking out for your best interests. Therefore, do not let friendly manners cause you to drop your guard and become chatty.

16. Always be courteous to the opposing attorney. Even though you feel that he has been hostile, you should always try to be courteous. Your demeanor and body language will be observed by the other attorney and at the court hearing by the Judge. It will affect your credibility. It will help determine whether people want to help you or not. If you remain courteous to the opposing attorney when he is not courteous to you, this will help you.

17. When at all possible, give positive, definite answers. Avoid saying, "I think", "I believe" or "in my opinion" when you actually know the facts. But if you do not know or are not sure of the answer, say so. There is absolutely nothing wrong with saying "I don't know". You

can be positive about the important things without remembering all the details. If you are asked about little details that you do not remember, just answer that you do not recall.

18. Do not exaggerate. Beware of overbroad generalizations that you may have to retract. Be particularly careful to responding to questions that begin "Wouldn't you agree that..". Note also that statements like "Nothing else happened" are dangerous; after more thought or after another question, you may remember something else. Say instead, "That's all that I recall," or "That's all I remember happening".

19. If your answer was wrong or unclear, correct it immediately. It is better to correct a mistake yourself than to have the opposing attorney discover an error in your testimony. If you realize that you have answered incorrectly, say "May I correct something I said earlier?" or "I realize now that something I said earlier should be corrected."

20. Stop instantly when the Judge interrupts you or when the other attorney objects to what you are saying. Do not try to sneak in an answer.

21. Usually, a witness should not ask a Judge for advice. It is his or her attorney's job to object to any improper questions.

22. Testifying for a substantial length of time is surprisingly tiring and can cause fatigue, crossness, nervousness, anger, careless answers, and a willingness to say anything in order to leave the witness stand. If you feel these symptoms, strive to overcome them, or ask the judge for a five-minute break or to allow you to have a glass of water.

If you have any questions about anything you have read, please discuss them with me when we meet to review your testimony before the deposition or hearing.