

Deposition Do's and Don'ts

Staying out of trouble when you least can afford to make a mistake



GEOPROFESSIONAL
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- Lawsuits are supposed to be a search for the truth, arrived at through the adversarial process.
 - Discovery
 - 1. Document production
 - 2. Depositions

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- Deposition testimony IS evidence
 - It can — and will be — admitted as evidence in trial
 - And that's why you should care

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- It will be videotaped and shown to the jury, blown up and on a screen
 - So it's not just your words, but your appearance and image that also matter
 - Be and look professional
 - Particularly for "first-timers," it will be stressful, but relax and be yourself



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- “Uses” for deposition testimony:
 - At trial
 - For settlement purposes
 - For dispositive motions

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- Are you a fact witness or an expert witness?
 - Fact witness: 5 senses
 - Expert witness: opinions

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- Preparing for your deposition
 - Communicate effectively with your lawyer
 - Review materials requested by your lawyer
 - Your job is *not* to win the lawsuit
 - Your job is to answer the questions put to you

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- How to approach being questioned:
 - Tell the truth



- How to approach being questioned:
 - Listen and listen hard!
 - If unsure of the question, ask that it be repeated
 - Answer the question; don't volunteer



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- How to approach being questioned:
 - Leave your ego at the door — don't be afraid to say "I don't know"
 - Don't guess!

- How to approach being questioned:
 - Be brief:
 - “Yes” ... “No” ...
“I don’t know” ...
“I don’t remember”
 - But don’t let
“I don’t remember”
become the default if you
really do remember



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- How to approach being questioned:
 - The “pause”
 - The “conversational trap”
 - *“Silence is golden; words are made of lead ... and in the alchemy of love (and litigation!) some things are better left unsaid...”*

- Deposition pitfalls:
 - Being verbose



- Deposition pitfalls:
 - Being helpful
 - Being clever
 - Being angry
 - Being arrogant



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- Expert witnesses:
 - Must adhere to Caselaw standard
 - Reliable facts
 - Reliable principles and methods
 - Principles/methods correctly applied to facts

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- Expert witnesses:
 - Limit to area of expertise only
 - Be objective — not an advocate
 - Intellectual honesty

- Expert witnesses:
 - Standard of care
 - Not just what you do
 - Must be knowledgeable about what profession does



Additional Resources

Ten Commandments for Giving a Deposition

1. Tell the truth, the whole truth, and nothing but the truth.
2. Listen to the question very carefully and if you do not hear or understand the question, ask for it to be repeated or rephrased.
3. Take as long as you want to think about your answer before answering.
4. Testify only to facts based upon your own personal knowledge.
5. Qualify your answer, if needed, but do not guess or speculate when it comes to the facts.
6. Do not embellish, exaggerate, or overstate your answers, the facts, or opinions.
7. Give short concise answers, whenever possible:
 - a. Yes.
 - b. No.
 - c. I do not recall.
 - d. I do not know.
8. Do not try to help the questioner but do not try to hinder the questioner, either.
9. When expressing a professional opinion, be objective and impartial based upon good science and the facts presented.
10. Be firm and do not back down when you are confident about the fact or opinion but be professional; check the attitude and ego at the door.



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Deposition Do's and Don'ts for Fact Witnesses

Geoprosessionals are often called on to act as fact witnesses during lawsuits - This document provides considerations for geoprosessionals called upon to testify as a fact witness.

Overview of the deposition and its role/ function in a lawsuit.

A lawsuit is supposed to be a search for the truth, which is arrived at through an adversarial process. Under this process, each party is expected to advocate for its interests by developing those facts that support its position. Our justice system anticipates that through adversarial advocacy, the truth will emerge, making resolution of the case possible by discerning relevant facts and then applying appropriate law to those facts.

Therefore, the legal process intends that the parties exchange information to educate each side about the facts - this is called "discovery." Discovery should result in an absence of surprise if the case goes to court. Properly conducted discovery should mean that there is no surprise moment at trial when a previously unknown-yet-significant fact is revealed as a stunning shocker - there is no "trial by ambush."

If that "aha" shocking moment occurs at trial, it almost certainly means that someone's lawyer failed during discovery. In this regard, a deposition is a vital part of the discovery process whereby an attorney asks questions and the deponent (the individual being questioned) answers while a court reporter or tape recorder (or sometimes both) records the verbatim testimony. More frequently, depositions are videotaped. Deposition testimony is taken under oath, and the court reporter and the deponent often sign affidavits attesting to the accuracy of the subsequent printed transcript. Typically, depositions provide the greatest amount of information about relevant case facts, and often as importantly, as to a witness' credibility, demeanor, and effectiveness.

Sequentially, depositions typically follow the early phase of discovery, which involves the parties providing documents and sworn answers to written questions (i.e., interrogatories). That information production then informs the deposition process. Attorneys should have reviewed the relevant documents to be prepared to take a productive and meaningful deposition.

Depositions are typically taken in a law firm's conference room (but may occur in other locations). The "rules" about testimony in depositions are somewhat relaxed compared to those rules applied in court. This is intentional - the idea is that parties should be permitted to search for facts. Thus, questions that would never be allowed in trial, can and will be asked in a deposition.

Deposition testimony IS evidence. It can - and will be - admitted as evidence in trial. And that's why you should care.

Other purposes of depositions.

Most lawsuits are settled and never see the light of a courtroom. A big reason why this is true can be evidence obtained during depositions. Because a deposition is sworn testimony given under oath, it creates a binding record - the witness is now locked

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PAGE 1

The Design Professional as Witness – A Clash of Worlds

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1