604 - Preparing CEOs & Officers for Depositions: Pitfalls & Traps

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Faculty Biographies

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Before joining MarketTools, Mr. Strauss was general counsel at public enterprise software companies Actuate Corporation and Brio Software, as well as corporate counsel at Adobe Systems. Before going in-house, Mr. Strauss held associate positions in the structured finance department at Shearman & Sterling in New York and in the general litigation department at Jones Day in Chicago. Mr. Strauss began his legal career as a clerk for the Alaska Supreme Court.

Mr. Strauss is the two-term immediate past president of ACC's San Francisco Bay Area Chapter. Mr. Strauss currently serves as the chapter's communication chair and co-chair of the chapter's privacy & eCommerce committee. Mr. Strauss has chaired the chapter's intellectual property and small law department committees, as well as the national new-to-in-house practice committee, which he founded and for which he received the Robert I. Townsend, Jr. Award for ACC national member of the year. Mr. Strauss also writes a regular column for both the ACC Docket and SF Recorder magazines, as well as Law.com.

Mr. Strauss received his B.A. from Emory University, his J.D. from Duke University, and his M.B.A. from the Walter A. Haas School of Business at the University of California-Berkeley, where he is an adjunct instructor in business law.

Rule 30(b)(6) Deposition Question Topics

Electronic Data Systems & Management—Technical Witness

The parameters of a Rule 30(b)(6) deposition may vary greatly from case to case, but the following categories of deposition questions and topics will serve as a good outline when preparing questions for deposition or when preparing a corporate witness for questions by opposing counsel.

Qualifications and Organizational Structure

- **Describe your educational background and work experience.**
  - What is your educational background, including all diplomas, degrees or certificates received?
  - What formal technical training have you had?
  - List your work experiences (including all companies and positions held) for the past 15 years.
  - How long have you been employed with your current company? List all positions held.
  - Describe your current position and all duties associated with it.
  - What steps did you take to prepare for deposition?
- **Describe the company's organizational structure.**
  - To whom do you report? Who reports to you?
  - Describe IT department structure (including other physical locations).
  - What role have you had or will you have in responding to electronic discovery requests?

Systems Profile

- **Describe the types of data processing and data storage devices used by the company in the course of business.**
  - What backroom hardware is in your organization? (Mainframes, mini computers, electronic mail servers, file servers, fax servers, voicemail servers, etc.)?
  - What workstation hardware? What brand (Dell, Gateway, generic IBM clone, etc.); what operating system (Win 95/98/ME/XP, other); and what is the average size of desktop hard drives?
  - Are notebooks used? What brand (Dell, Gateway, generic IBM clone, etc.); what operating system (Win 95/98/ME/XP, other); and what is the average size of notebook hard drives?
  - Are personal digital assistants (PDAs) used? If so, what brand(s) (Palm, Pocket PC devices, etc.)?
  - What backup systems are in use? Specifically, provide the hardware, tape formats (DAT, DLT, QIC), tape capacities, and backup software (brand, version, configuration) used.
  - What optical storage devices are used? What type (CD-R, CD-RW, DVD-RAM), and recording software (brand, version, configuration)?
  - What electronic storage devices are used (non-volatile RAM, smart cards, etc.)?
  - What office machines are used? What copiers, fax machines, voicemail systems (brands, models, serial numbers)? (NOTE: Most of these devices contain hard drives.)

Network Infrastructure and Network Services

- **Describe the company's network architecture and usage policies.**
  - How is the company's network configured (router, hubs, firewalls, etc.)? Who manages the network devices?

APPLIED DISCOVERY SAMPLE DOCUMENT

- Do desktop/laptop/handheld systems have network cards and/or modems installed? If so, identify make, model, speed settings, and usage policy.
- Does the company's network use any non-Ethernet connectivity? If so, describe.
- How many users are on the network at this location and at other locations?
- How is user data segmented and protected on the network?
- How do users work on the network (e.g., file sharing, file storage, centralized applications, and other applications)?
- Describe/identify the types of network services and software programs used on the company's computer system(s):
  - Industry-specific applications (e.g., distribution control, reservation system, manufacturing inventory control, etc.).
  - Proprietary systems.
  - Office automation software. Word processing, spreadsheet, presentation programs, etc.
  - Internet browsers.
  - Database servers and database management programs (statistical, risk analysis, etc.).
  - Electronic mail systems and client programs.
  - Calendar/scheduling servers and client programs.
  - Document management systems.
  - Finance or accounting systems.
  - Remote connection applications (e.g., FTP server/client, web-based (GotoMyPC.com), PCAnywhere, LapLink).
  - Chat programs (e.g., ICQ, IRC, etc.).
  - Other applications

User Workstations

- **Describe all type(s) of user workstation systems and client programs currently in use.**
  - What operating systems are used? (Windows NT/2000/XP, Linux) If Microsoft-based, what service packs are installed? If Linux, what is the distribution (Red Hat, Debian, Mandrake, etc.); what version of the Kernel is running; and what windowing system is in use (Gnome, KDE)?
  - Provide a list of the software packages installed.
  - List installation date(s).
  - Provide the number of users who have access to each workstation.
  - Identify location of users' electronic mail files. For example, are electronic mail messages stored in My Documents?
  - Do users select the location for their electronic mail messages, or does the system administrator make that decision?

- **Identify the person(s) responsible for the ongoing operation, maintenance, expansion, backup, and upkeep of the user workstations.**
  - How frequently do these activities occur (according to policy and actual practice)?
  - Are outsourced facilities/contractors used? List names and services provided, if applicable.

- **Do any employees use home computers for business purposes? If yes:**
  - Identify relevant employees.
  - How are files transferred to and from home computer (remote access, types of removable media, if used), electronic mail, LapLink, mapped drive to server, etc.)?

- **Are user workstations backed up? Obtain information for each system.**
  - Describe the backup software program(s) used (e.g., ARCserve, Backup Exec, etc.).
  - What content do backups contain?
  - How frequently are backups performed (daily, weekly, monthly)?
  - Is the backup process automated?
  - Describe the type of backup media used (tapes, discs, drives, and/or cartridges).
  - Describe the tape rotation cycle.
  - Have any tapes been pulled from rotation?
  - What is the location of the backup media (off-site storage, out-of-state storage, etc.)? How does the media get to the storage location?
  - How are tapes stored (e.g., racks, cabinets, etc.)?
  - What is your tape destruction method (e.g., degauss, shred, etc.)?
  - Are backup tapes labeled? If so, describe labeling protocol.
  - Are backup tapes indexed by the backup software and/or logged?
  - Do you keep or discard outdated backup drives or software?
  - Who has access to backups?
  - Who actually performs backups?
  - Are backups password-protected? Who has the passwords?

- **Have you modified your backup procedures to comply with recent discovery requests?**
  - Describe any modifications.
  - Describe the steps taken to notify employees involved in performing backups.

- **Are files ever deleted from the computer system(s)? If yes:**
  - Does the company have a file purge schedule?
  - Are files routinely deleted from workstations when employees leave or are reassigned?
  - Describe the method(s) used to delete files.

- **Are files "archived" off the system?**
  - What files have been archived?
  - Where are the archival backups maintained?

- **Have you restored data from a workstation backup tape within the past [XX] months? If yes:**
  - What data was restored?
  - Was the restoration operation successful?
  - Describe the resources required to perform the restoration (labor hours, equipment, drive space, etc.).
  - Why was the data restored?

- **Are passwords or encrypted files used on any of the user workstations? If yes:**
  - Describe what is protected (electronic mail, files, transmission of data, etc.).
  - Describe how files are protected.
  - Who could provide access codes if required?
  - Who has super user status?

- **Are passwords and access codes revoked/changed when an employee leaves the company/agency?**
  - How and by whom is this process managed?

Electronic Mail

- **Identify personnel responsible for administering the electronic mail system(s).**
  - Include information about multiple offices or locations, if relevant.

- **Describe all type(s) of electronic mail server systems and client programs currently in use.**
  - What operating systems are used (Windows NT/2000/XP, Linux, Novell, Unix, proprietary)? If Microsoft-based, what service packs are installed? If Linux, what is the distribution (Red Hat, Debian, Mandrake, etc.); what version of the Kernel is running; and what windowing system is in use (Gnome, KDE)?
  - Provide server name(s) and version number(s).
  - List installation date(s).
  - Provide the number of users on each system.
  - Identify location of users' electronic mail files. For example, are electronic mail messages stored in a central location—a server—or locally on users' desktops, or both?
  - Do users select the location for their electronic mail messages, or does the system administrator make that decision?
  - Is there more than one post office on the system? If yes, identify post office locations.
  - Are post offices located on more than one server or drive?

APPLIED DISCOVERY SAMPLE DOCUMENT

- Is electronic mail transferred via POP, IMAP, SMTP?
- Is there more than one post office on the system? If yes, identify post office locations.
- Are post offices located on more than one server or drive?
- Is electronic mail transferred via POP, IMAP, SMTP?

• Can users access their electronic mail remotely (i.e., from outside the office)?
- If yes, what programs or applications are used?
- Does a transaction record exist to document access?

• Are electronic mail passwords routinely changed?
- Describe protocols.
- Who manages this process?

• Are "janitorial" programs run to purge electronic mail? (Janitorial programs can be set by system administrators to empty wastebaskets on a set schedule.)
- Describe protocols.
- Who manages this process?

• Were other electronic mail systems used in the past? If so, provide answers to questions in electronic mail section above.

• Are special electronic mail retention settings active (e.g., the Deleted Items Retention setting in Microsoft Exchange)?

• List all electronic mail systems in the company that are backed up. Obtain information for each system.
- Describe the electronic mail backup software program(s) used (e.g., ARCserve, Backup Exec, etc.).
- Is the backup a full backup or a brick level backup?
- How frequently are electronic mail backups performed (daily, weekly, monthly)?
- Is the electronic mail backup process automated?
- Describe the type of electronic mail backup media used (tapes, discs, drives, and/or cartridges).
- Describe the tape rotation cycle.
- Have any tapes been pulled from rotation?
- What is the location of the electronic mail backup media (off-site storage, out-of-state storage, etc.)? How does the media get to the storage location?
- How are electronic mail backup tapes stored (e.g., racks, cabinets, etc.)?
- What is your tape destruction method (e.g., degauss, shred, etc.)?
- Are electronic mail backup tapes labeled? If so, describe labeling protocol.
- Are electronic mail backup tapes indexed by the backup software and/or logged?
- Do you keep or discard outdated electronic mail backup drives or software?
- Who has access to electronic mail backups?
- Who actually performs electronic mail backups?
- Are electronic mail backups password-protected? Who has the passwords?

• Have you modified your electronic mail backup procedures to comply with recent discovery requests?
- Describe any modifications.
- Describe the steps taken to notify employees involved in performing backups.

• Are files ever deleted from the electronic mail system(s)? If yes:
- Does the company have a file purge schedule?
- Are files routinely deleted from servers when employees leave or are reassigned?
- Describe the method(s) used to delete files.
- Are electronic mail accounts closed/purged when an employee leaves?

• Are files "archived" off the system?
- What files have been archived?
- Where are the archival backups maintained?

• Have you restored data from an electronic mail backup tape within the past [XX] months? If yes:
- What data was restored?
- Was the restoration operation successful?
- Describe the resources required to perform the restoration (labor hours, equipment, drive space, etc.).
- Why was the data restored?

• Are passwords or encrypted files used on any of the electronic mail systems? If yes:
- Describe what is protected (electronic mail, attachments, transmission of data, etc.).
- Describe how files are protected.
- Who could provide access codes if required?
- Who has super user status?
- What access rights do different groups/users have?

• Are passwords and access codes revoked/changed when an employee leaves the company/agency?
- How and by whom is this process managed?

Databases

• Describe all type(s) of database server systems and client programs currently in use.
- What operating systems are used (Windows NT/2000/XP, Linux, Novell, Unix, proprietary)? If Microsoft-based, what service packs are installed? If Linux, what is the distribution (Red Hat, Debian, Mandrake, etc.); what version of the Kernel is running; and what windowing system is in use (Gnome, KDE)?
- Describe the type of databases used by the company (CRM, accounting, etc.).
- Identify the system administrator for each.

• Identify the type(s) (names) of database software used. (Oracle, dBASE, Advanced Revelation, Access, proprietary, etc.).
- Describe the fields of information used in the database(s). (Data fields are categories of information such as names, social security numbers, file numbers, dates, etc.)

• Identify the person(s) responsible for:
- Database design.
- Database maintenance (editing, adding, "packing," etc.).
- Report design.
- Database backup.
- User requests/suggestions.

• Identify the individual(s) who enter information into the database:
- What is the source of information?
- Are entries verified? If so, by whom?

• Describe how the database is accessed.
- Identify users.
- Identify access security levels for users.
- Are queries (reports to the database) stored? If so, where?
- Describe the output/responses to queries. (Printed reports? Online response?)
- Are the responses stored? If so, where?

• Describe any standard reports prepared on a routine basis.
- Identify recipients.
- Are these reports stored? If so, where?
- Describe protocol and detailed instructions for reviewing the database as it existed [XX] months/years ago.

• List all database systems in the company that are backed up. Obtain information for each system.
- Describe the backup software program(s) used (e.g., ARCserve, Backup Exec, etc.).

APPLIED DISCOVERY SAMPLE DOCUMENT

- What content do database backups contain?
- How frequently are database backups performed (daily, weekly, monthly)?
- Is the database backup process automated?
- Describe the type(s) of backup media used (tapes, discs, drives, and/or cartridges).
- Describe the tape rotation cycle.
- Have any tapes been pulled from rotation?
- What is the location of the database backup media (off-site storage, out-of-state storage, etc.)? How does the media get to the storage location?
- How are database backup tapes stored (e.g., racks, cabinets, etc.)?
- What is your database backup tape destruction method (e.g., degauss, shred, etc.)?
- Are database backup tapes labeled? If so, describe labeling protocol.
- Are database backup tapes indexed by the backup software and/or logged?
- Do you keep or discard outdated database backup drives or software?
- Who has access to database backups?
- Who actually performs database backups?
- Are database backups password-protected? Who has the passwords?

• Have you modified your database backup procedures to comply with recent discovery requests?
- Describe any modifications.
- Describe the steps taken to notify employees involved in performing backups.

• Is data ever deleted from the database system(s)? If yes:
- Does the company have a purge schedule?
- Describe the method(s) used to delete data.
- Are accounts closed/purged when an employee leaves?

• Are databases "archived" off the system?
- What databases have been archived?
- Where are the archival backups maintained?

• Have you restored data from a backup tape within the past [XX] months? If yes:
- What data was restored?
- Was the restoration operation successful?
- Describe the resources required to perform the restoration (labor hours, equipment, drive space, etc.).
- Why was the data restored?

• Are passwords or encrypted files used on any of the database systems? If yes:
- Describe what is protected (data, transmission of data, etc.).
- Describe how files are protected.
- Who could provide access codes if required?
- Who has super user status?

• Are passwords and access codes revoked/changed when an employee leaves the company/agency?
- How and by whom is this process managed?

Miscellaneous

• Are you aware of the production of electronic documents in other litigation or legal proceedings?
- What cases?
- Relevant time periods?
- What was produced, and in what format?

• Are you aware of any alternative sources of electronic data or information?
- Any locations outside the company where electronic documents are regularly sent (including employees' home computers as well as other business entities)?
- Persons who would have knowledge of third parties' computer systems, where applicable?
- Details about the company's website (Who develops content? What are revision intervals? Which third parties have access)?

• Has anyone examined any of the company's computers since learning of this lawsuit? If yes:
- Identity of all involved parties?
- Details about reasons for examination?
- Protocol utilized?
- Results?

Litigation Specific Questions

• Have you modified the use of any computers since notice of litigation or to comply with recent discovery requests?
- Describe any modifications.
- Describe the steps taken to notify employees.

• What steps have you taken to ensure electronic data was preserved?
- Performed mirror image backups?
- Removed backup tapes from rotation cycle?
- Isolated key systems from usage (including removing power from these systems)?
- Disconnected unnecessary network connections?
- Stopped hardware/software updates?
- Saved broken drives and media?
- Other?

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Disclaimer: This sample checklist is provided for informational and discussion purposes only. The views and information provided herein are solely those of the author and are not meant to apply to the facts or circumstances of your particular client matters.

FIRST 90 DAYS HANDLING LITIGATION CHECKLIST

- ✓ **Understand your client's business!** Manufacturing? Services? Financial Industry? Not for Profit? Each sector has unique litigation exposures. Schedule meetings as needed with business persons in Risk Management, Marketing, Treasury/Finance, Environmental, and Procurement.
- ✓ **Get to Know Your Risk Manager!** Obtain history of claims, insurance coverage types and amounts, potential risks and exposures.
- ✓ **Review All Insurance Policies!** Supplement the D&O coverage as may be needed to fully address the needs of all in-house counsel and your officers. Suggest other changes as needed. Understand your deductibles! Understand your exclusions!
- ✓ **Review All Pending Litigation!** Look for trends, big exposure matters and odd matters. Settle what you can. Always do a de-brief at the end of the case with clients to discuss learnings obtained from the litigation and suggested practice and policy changes.
- ✓ **Determine What Your Company's Litigation Settlement Philosophy Is!**
- ✓ **Develop Billing and Budget Formats and Guidelines for Outside Counsel!**
- ✓ **Review Your Company's Records Retention Policy!** Draw up a plan to develop one if none is in place.
- ✓ **Review and Update Your Litigation Hold Policy and Processes!** Develop them if none in place.
- ✓ **Identify Electronic Discovery Vendor!** Should litigation arise, you will want to already have a vendor in place.
- ✓ **Analyze Your Litigation Spend!** Propose RFP's, flat fees, alternate billing arrangements as needed.
- ✓ **Select Outside Counsel!** Identify sources you will rely upon to make outside counsel selections.
- ✓ **Review Any Comparative Advertising Currently in Use!** Discuss planned future comparative advertising.
- ✓ **Gain Understanding of Any Key Studies that Support Your Comparative Ad Claims!**
- ✓ **Determine Your Environmental Exposures!**
- ✓ **Meet With Personnel To Understand Personnel Practices and Exposure Areas.** Develop policies and training plans to address gaps.
- ✓ **Understand Your Deal/M&A Activities and Potential Exposures!**
- ✓ **Ensure Financial Exposure of Pending Litigation is Known to Appropriate Persons!**

- ✓ **Determine Whether Your Company is SOX Compliant!** Suggest becoming so if not already compliant.
- ✓ **Review SOX!** Become familiar with its provisions, esp. those pertaining to liability and duties.
- ✓ **Determine Whether There Are Crisis Management and Security Programs In Place!** Enhance, help develop as needed.
- ✓ **Prepare List of Training Topics and Sources!** ACC, on-line, in-person, third party vendor, self conducted are all sources. Common topics include: How to conduct workplace investigations for your personnel dept., how to make comparative claims for your advertising group, how to draft termination provisions in contracts for your procurement group, etc.
- ✓ **Additional Items As Needed For Your Environment!**
- ✓ **Have Fun, Stay Calm and Don't Get Overwhelmed!**

ACCA DOCKET

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Feature Article October 2002

Help! I've Been Subpoenaed! What Do I Do?

How the legal department responds to a subpoena is fairly routine, so the most important thing for you to do is to take this first step: let an attorney in the legal department know right away that you have received a subpoena, and then let the legal department work with you from there.

The first thing that the legal department will do with your subpoena is figure out whether it involves the company or just you personally. If the subpoena has to do with just you personally, the legal department lawyer will likely tell you that you should obtain immediately your own attorney because the legal department will not be able to represent you. The legal department lawyer may also tell you that, even if your subpoena has to do with the company, you may still want to hire your own attorney because the legal department represents the company and not you individually.

This article will discuss subpoenas for depositions in civil matters and for grand juries in criminal matters that have to do with the company. The discussion will be general and will stick to federal law. You also need to know that states and counties and local federal courts may have other requirements that you will also need to abide by regarding your particular subpoena but that are beyond the scope of this article. Your attorney will explain those rules to you as necessary. The purpose of this article is to help you see that, although the process is complex, there's usually no need for panic.

Subpoenas for Depositions in Civil Matters

The kind of case for which you received a subpoena may be a civil action. A civil action is a noncriminal lawsuit. For example, lawsuits involving breach of contract, probate, divorce, negligence, and copyright violations are just a few of the many hundreds of varieties of civil lawsuits, and civil actions usually involve complaining parties seeking money from defendants.

You likely received your subpoena during the discovery part of the litigation. Discovery is the process of formal investigation that both sides in the lawsuit conduct between the time that someone files a complaint to start the lawsuit and the actual trial. During discovery, both sides may ask the judge for permission (1) to question the other parties involved orally under oath at a deposition, (2) to question the other parties involved in writing under oath with interrogatories, (3) to ask the other party to produce documents that would be useful as evidence, or (4) to conduct a site inspection.

What Is a Subpoena?

A subpoena is a court order that informs you that you must appear and provide testimony on a certain date and/or produce documents related to the litigation. Subpoenas come in two kinds: one requires documents; the other, testimony. Sometimes, however, a subpoena requires both.

The first kind of subpoena, called a subpoena duces tecum, requires you to bring to trial or to a deposition certain documents that are identified in the subpoena or an attachment to it. If you are asked to produce documents, you must find, identify, and produce all documents requested in the subpoena that are in your physical possession or within your control, including documents in storage, documents that someone else is holding or keeping for you at your request, or documents that you can otherwise obtain and have a legal right to access. Be sure that you do not inadvertently or otherwise destroy any documents or other information, including any electronically stored documents, data, or other information, that a subpoena may request. Destroying any such information or having or allowing someone else in your control to do so could result in a judge imposing sanctions, such as a fine, upon you and the company.

The second kind of subpoena requires you to appear and testify at a trial, hearing, or deposition on a date and at a time specified in the subpoena.

Do I Have to Respond to the Subpoena? What Happens If I Don't?

Yes, you have to respond to a valid subpoena. But to be clear, someone from the legal department will respond to the subpoena for you if the subpoena involves the company and is not about you personally. You may have to help with this process by identifying and giving the legal department information or documents responsive to the subpoena, meeting with someone from the legal department, and possibly providing testimony, an affidavit, or sworn answers to written questions (interrogatories). The legal department, however, must decide what the appropriate response will be.

The legal department may decide that the best response is for you to show up at the date and time specified in the subpoena and give your testimony in person. In case that you wonder whether you will receive compensation, the subpoena will include a witness fee for one day's attendance and the mileage allowed by law. Someone in the legal department will usually work with the lawyer who asked the judge to issue the subpoena to discuss, in advance of any deposition, issuance of an appropriate fee for any testimony that you may have to provide. But don't expect to get rich. The federal statutory fee for attendance at a deposition is $40 per day. You are also entitled to reimbursement for reasonable travel costs to and from the deposition. You are also entitled by statute to a subsistence allowance for any proceeding that lasts longer than one day when it requires an overnight stay.

I Am a U.S. Citizen Working Abroad. Do I Have to Respond to a Subpoena from a U.S. Court?

Yes. A valid subpoena requires a response. A U.S. court may issue a subpoena requiring a U.S. national or resident in a foreign country to appear for testimony or to produce documents if doing so is "necessary in the interests of justice" and there is no less burdensome alternative.[1] If a U.S. court issues a subpoena for the deposition of a U.S. citizen, the "person serving the subpoena shall tender to the person to whom the subpoena is addressed his estimated necessary travel and attendance expenses, the amount of which shall be determined by the court and stated in the order directing the issuance of the subpoena."[2] Failure to comply with a subpoena issued by a U.S. court may constitute contempt resulting in the seizure and sale of any property that the witness has in the United States and the imposition of a fine of up to $100,000.[3]

If I No Longer Work at the Company, Do I Still Have to Respond to a Subpoena?

Yes. As noted above, unless a subpoena is invalid on its face, the subpoena requires a response. An employer may be compelled to comply with any subpoena that it receives, including a subpoena seeking information regarding one of its current or former employees.[4]

If the Subpoena Requests Only Documents, Do I Still Have to Testify?

It depends. In many instances, all that a party is looking for is copies of documents. A party producing documents pursuant to a subpoena need not appear in person at the place where production is requested unless the subpoena for documents is combined with a command to appear for a deposition, a trial, or a hearing.[5] Sometimes, however, the party issuing the subpoena may still want to take the deposition merely to ask the person responsible for collecting the subpoenaed documents whether he or she, in fact, has produced all of the documents requested in the subpoena and, if not, why certain documents were not produced. Sometimes, documents may not be produced in response to a subpoena, and instead, the legal department may object to certain categories on any number of grounds, such as attorney-client privilege or attorney work product protection.

What Is a Deposition?

In a civil case, you will likely give your testimony in the form of a deposition.

Noted above as one of the four kinds of discovery, a deposition is the sworn testimony of a witness that is taken outside of court without a judge present and that is transcribed in a written document. The discovery stage is a time for both sides to ask for a lot of information in hopes that the information will help their case and hurt the other side's case. Knowing this fact ahead of time may help you keep from

getting so upset at the sheer volume and kinds of questions that one side or the other may ask you during a deposition. Sometimes, the questions are excruciatingly detailed. You may hear, for example, the same set of 20 questions for each piece of paper that you have been requested to bring with you to the deposition and must therefore explain. Your attorney will explain how this process works so that you won't be surprised. As to fishing expeditions and the like, attorneys may object to a question in case that they need to be able to say later that they had objected to the question, but you will likely have to answer every question that an attorney asks you during a deposition except questions that disclose private information that you talked to your lawyer about. Your attorney will also explain to you what is called your Fifth Amendment right to refuse to answer a particular question if doing so would incriminate you, and please see the second half of this article for a discussion on testifying in criminal grand jury proceedings.

It also helps to know who may be present during your deposition. The following people may be in the room during your deposition: you, your attorney (if you have one other than the in-house counsel who represents your company), the in-house counsel who represents your company, the attorney who asked the judge to approve the request for the deposition and who will likely be asking most if not all of the questions, the attorney on the other side in the lawsuit who may ask some questions if you are a third party, a court reporter who will record every word that anyone in the room says and later transcribe it into a written transcript of the deposition, and sometimes more attorneys for either or both sides or for your company. The judge will not be there, and neither will a jury or any other witnesses or any spectators or the press.

Again, the deposition will not occur in open court. It will occur wherever the side in the lawsuit that has requested the deposition asks for it to be held, within reason. Depositions often occur in conference rooms in law offices, corporations, and other places where you and everyone else at the deposition won't be disturbed. Depositions can last for several hours or several days. Various jurisdictions and local rules may limit deposition times. Your in-house counsel will tell you what you need to know in that regard.

Sometimes, it helps to understand why one side or the other wants to take your deposition and what someone would do with the transcript of your deposition. One side or the other or both sides could use the transcript before and during trial. For example, before trial, one side might point to your answers in the transcript of the deposition to show why the other side ought to consider giving up the idea of going to court and make some effort to settle the lawsuit out of court. Or your answers during a deposition may be used to support a motion for summary judgment-that is, a decision without a trial. A judge can grant such a motion in cases in which the facts are not disputed and the law clearly establishes who should win. During trial, if you become unavailable to testify, such as by becoming too ill to testify, the parties could use your deposition testimony to bring out what you would have said if you could have been called as a witness. Or if you do testify, one side or the other might try to impeach you-that is, try to show that the judge or the jury should not believe your testimony in court because it is different from what you said in answer to the same questions in the deposition.

Impeachment for inconsistent statements will likely be the least of your worries if you have failed to tell the truth somewhere along the way during the investigation, the deposition, or a hearing or in court. During a deposition, for example, you will be under oath, and a court reporter will record every word of every question and every answer. Your answers must be truthful, and failure to testify truthfully can result in the judge finding you in contempt of court. Further, failure to respond to a subpoena-even if you or the company is not a party to the particular case-may also constitute contempt of court. The punishment for contempt can take many forms: fines, jail time, and other sanctions. If the deponent is a corporate officer/named party and refuses to testify or testifies falsely, the court might impose monetary sanctions, strike a complaint or defense, permit the drawing of an adverse inference, and so forth.

If I Am Supposed to Testify, What Do I Do?

One of the legal department attorneys will meet with you, walk you through the process, and prepare you for your deposition. If you are deposed, you may find it helpful to keep the following general guidance in mind:

** Tell the truth.*

** Think before you speak.* This practice allows you to make sure that you understand the question and to think through your answer. Further, the time that you take to think gives the lawyer a chance to make any objections.

** Expect the other side to score some points.* There are two sides to every lawsuit. The other side is going to ask questions that call for answers that may be unhelpful to one side or the other.

Answer the question. The lawyer taking the deposition is entitled to an answer to the question asked, but only to the question asked. This practice takes a little getting used to, because you can usually anticipate the next question and you may want to move right ahead. But slow down. For example, if you can answer affirmatively the question "Do you know who made this decision?" you should answer, "Yes." Do not offer the name of the person. Wait until the attorney asks the question "Who made this decision?" The best answer is the shortest truthful answer.

Make sure that you understand the question. It is up to the lawyer asking the questions to frame intelligible questions. Do not help or explain that the question is incomprehensible because the questioner has misunderstood terms of art in your business, trade, or science. Do not help the questioner by responding to the question with "do you mean such and such?" If, after you have thought about the question, you do not understand it, say so.

Do not answer a compound question unless you understand it completely. Questions involving more than one event-and for which there is more than one answer-are usually too complex and ambiguous. If you are unsure or confused about a complex question, say so.

You know only what you have seen or heard. Questions are often phrased "Do you know . . . ?" A question in a deposition may legitimately call for something that you do not know, but it must be so phrased. There is a difference between a question, that asks "do you know" and a question that asks whether you have any knowledge or information about a particular subject.

Do not guess. If you do not know or cannot recall something, say so.

Be as specific (or as vague) as your memory allows. If you are asked when something occurred and you remember the date, state the date. If on the other hand, you cannot remember the exact date, say so. Do not allow yourself to be put in a position contrary to your true recollection.

Unless specifically asked, do not testify as to your state of mind. If you can answer affirmatively the question "Did you read this document?" say, "Yes." Do not say, "Yes, and I believe every word of it." Again, the shortest truthful answer is the best answer. In this case, the examiner has not asked about your belief or state of mind. You need not answer as to your belief unless specifically asked.

In testifying about conversations, make clear whether you are paraphrasing or quoting directly.

Summarize extensive conversations and complex series of events whenever possible. If you indicate that you are summarizing, a good examiner will ask for all the details. The examiner may, however, accept your summary and move on.

Do not characterize your own testimony. Testify clearly; do not say, "in all condor," "honestly," "I'm doing the best I can," and other related characterizations.

Avoid absolutes and superlatives. "Never" and "always" can come back to haunt you.

Do not testify as to what other people know. This deposition is your testimony, so you should testify as to your own knowledge and not someone else's.

Do not let the questioner put words into your mouth. Unless it is completely correct, do not accept the questioner's characterization or summary of your testimony.

After answering a question completely and truthfully, do not expand upon it. Do not add to an answer simply because the examiner seems unsatisfied or looks at you expectantly or because silence descends on the room for several seconds or minutes. Let it descend. It's not your job to fill the silence when no one has asked you a question. There are often pauses in a deposition as the lawyers confer, look through documents and notes, and so forth. Do not keep speaking just because it appears that the ball is still in your court. Your part is done as soon as your answer is complete and truthful.

Do not offer or agree to help the examiner. Do not volunteer information.

Never express anger or argue with the examiner. If a deposition becomes unpleasant, let your lawyer take over. Further, you can ask to take a short break at any time.

* Read any documents that the questioner shows you before you speak.

Watch your language! Avoid even the mildest obscenity and absolutely avoid ethnic or sexist slurs or any other references that could be considered derogatory.

There is no such thing as "off the record." During a deposition, lawyers often go off the record to clear up objections and procedural matters. Remain quiet during this time, and do not speak unless directly

addressed; even then, make sure that your lawyer is paying attention and has a chance to speak first. If you are speaking off the record, understand that you are still in a room with adverse parties, so be careful what you say. Otherwise, you may at best give the opposing lawyers a tip, and at worst, your statement may end up on the record.

Everyone makes mistakes. Every witness makes mistakes in a deposition. If you make a mistake, do not become upset. If you find that you have made a mistake, discuss it with your lawyer at the next break. If you feel that the mistake is serious, ask for a break, and discuss it with your lawyer then and there.

Be professional. Finally, you should always be at your professional best when testifying. Although participating in this process can be disruptive to your work or personal life, it is a legally required process, so it is important to take the process seriously.

Subpoenas for Grand Juries

Although much of the discussion above concerning responding to a subpoena to give testimony at a deposition in a civil matter would also apply to responding to a subpoena to give testimony before a grand jury in a criminal matter, enough differences exist to warrant a separate section on grand jury subpoenas in this primer.

White Collar Prosecution: A Growth Industry

The past two decades have witnessed a steady rise in federal white collar prosecutions, but most experts believe that the sharpest increase is yet to come. The Department of Justice had already vowed to focus on white collar crime after September 11, and then came Enron. Adding to the political pressure, in July of this year, Congress hurriedly passed legislation to increase criminal penalties for business fraud, widen the net of criminal liability, and increase corporate oversight.[6] Unless federal law enforcement priorities change, grand jury subpoenas to corporate employees and officers will abound.

What Is a Federal Grand Jury?

The grand jury is the principal tool of a federal criminal investigation. Consisting of 16 to 23 individuals drawn from the voter registration rolls, the grand jury hears testimony, reviews documents, and votes on whether probable cause exists to return an indictment (as prepared by the prosecutor). The Fifth Amendment to the U.S. Constitution requires that all federal felony charges be brought by an indictment approved ("returned") by a grand jury.

Grand jury proceedings are secret and take place in a private room in the federal court house. Exceptions to the laws requiring secrecy permit witnesses to discuss their testimony outside the grand jury room and government officials to share grand jury evidence across agencies. If you receive a grand jury subpoena, you are not required to keep that fact a secret; however, you would be well advised not to discuss the matter with anyone but your attorney.

The Grand Jury Subpoena

In deciding whether to return an indictment, grand juries use subpoenas to gather evidence. As with depositions, the subpoena will call for your testimony or demand that you produce certain documents or both. Although a grand jury subpoena does not imply any wrongdoing on your part, it should not be taken lightly. Regardless of whether you think that you have done something wrong, legal advice is imperative at this stage-that is, before any grand jury appearance or government interview.

Who Will Represent Me?

Depending on circumstances and corporation policies, you may avail yourself of the corporation's regular outside counsel or counsel of your own choosing. If you are personally at risk for criminal liability, representation by the corporation's regular outside counsel would be inappropriate because of the potential conflict of interest and the appearance of impropriety. On the other hand, one attorney or law firm may represent multiple employees who are mere witnesses and who are unlikely to have conflicting interests.

You will want to acquaint yourself with the state laws and your company's policies respecting reimbursement of legal expenses. It is the policy of some corporations to reimburse officers and employees for certain legal expenses. Concern exists that this important benefit, which is as much a

matter of fairness as it is sound corporate policy, may disappear in the face of what some consider unseemly and heavy handed attempts by the Department of Justice to discourage reimbursement.[7]

How Do I Know Whether I'm Likely to Be Indicted?

After having met with you, your lawyer will seek additional information about the investigation and your exposure by contacting the prosecutor. One purpose of this initial conference is to find out whether the prosecutor considers you to be a "witness," a "subject," or a "target." These terms are loosely defined as follows, to paraphrase the Department of Justice:

* "Target." Someone as to whom the prosecutor has incriminating evidence and whom the government is seeking to indict.

* "Subject." Someone whom the government is not specifically seeking to indict but whose possibly illegal conduct is within the scope of the grand jury's investigation.

* "Witness." Someone who is neither a target nor a subject but who has information that may assist the grand jury in its investigation.[8]

Although every individual subpoenaed by a grand jury falls within one of these three categories, the prosecutor's opinion that you are a mere witness is no guarantee that you will remain so. Today's witness may be tomorrow's target (and vice versa).

What If I Receive a Document Subpoena?

If you received only a document subpoena, you may be able to avoid a personal appearance before the grand jury. Some document subpoenas specify that the recipient may comply by turning over the documents to the agent serving the subpoena. Even if the subpoena omits this language, however, your attorney or the corporation's attorney may be able to obtain the prosecutor's consent to production without a grand jury appearance.

Before you actually produce any documents, the corporation's attorneys will review all of the pertinent documents for any materials not subject to subpoena under the attorney-client privilege or work product protection. If the document subpoena is unreasonable, the lawyers may ask that the prosecutor limit its scope or may file a motion with the court to "quash" (make void) the subpoena.

The Grand Jury Appearance: Taking the Fifth and Immunity

Although an appearance before the grand jury may subject you to self-incrimination, imprisonment for contempt, and other serious consequences, your attorney is not permitted inside the federal grand jury room. Contrary to the law in at least 20 states, all witnesses testifying before the federal grand jury must go through the awkward and time-consuming process of stepping outside the grand jury room to consult with their attorneys.[9] Still, you would be well advised to take advantage of this process if you have concerns regarding any questions posed inside the grand jury room. If you need to consult with your attorney before or in the course of answering a question, ask permission of the grand jury foreperson, and normally you will be permitted to leave the grand jury room. Prosecutors have been known to interfere with a grand jury witness's efforts to consult with counsel. If such interference happens to you, you should not answer the problematic question until you have been given an opportunity to consult with your attorney.

If there is any risk that you will be indicted, your attorney will almost certainly advise you to invoke the Fifth Amendment privilege against self-incrimination. Under this constitutional doctrine, a witness may refuse to answer questions if the answers might "furnish a link in a chain of evidence needed to prosecute" the witness for a crime.[10] Usually, taking the Fifth is an all-or-nothing proposition, meaning that you will provide your name and address and nothing else. If advised to take the Fifth, you should ask that your attorney prepare a statement for you to make after you have given your name and address. Although it contravenes the U.S. Attorney's Manual, which is a set of mere guidelines without the force of law, prosecutors often subpoena targets whom they know will take the Fifth in order to harass, intimidate, or embarrass them.

Can the Prosecutor Force Me to Testify?

After you have invoked the Fifth Amendment, the prosecutor may decide that your testimony is important enough to warrant a grant of formal immunity.[11] Once the judge has granted formal

immunity, you may no longer refuse to testify on the basis of the privilege. Such refusal is punished as civil or criminal contempt and can result in several months' incarceration. Formal immunity means that no information derived directly or indirectly from your testimony can be used against you in a criminal prosecution. This immunity is not, however, a get-out-of-jail-free card because you could still be prosecuted for perjury, false swearing, or contempt committed in answering or failing to answer questions.

Another, less-favored type of immunity, which does not require a judicial order, is informal immunity or "letter immunity." Unlike formal immunity, letter immunity can vary in scope and, in its broadest form, may consist of an agreement not to prosecute you for certain conduct. Also unlike formal immunity, letter immunity often covers nontestimony, such as statements made during a meeting with the government. Despite these advantages, formal immunity generally is preferred over informal immunity because informal immunity is more difficult to enforce and may commit you to extensive cooperation with the government.

The Grand Jury Appearance: Testifying

If you intend to testify, your attorney will help prepare your answers to every anticipated question, much the same way that your attorney would prepare you for a civil deposition. Grand jury witnesses are permitted to take notes regarding the questioning, but your attorney may have reasons for advising against note taking. Once you have been dismissed from the grand jury, your attorney should immediately debrief you about every question and answer. Because you are not entitled to a transcript of your testimony, it is important to memorialize this information while your memory is fresh. This step not only gives your attorney insight into the investigation, but also protects you from a "perjury trap" if you are subpoenaed months or years later and, because of memory lapse, answer a question differently from the way that you had answered it before the grand jury.

Can I Refuse to Answer Certain Questions?

Perhaps most difficult for the employee and officer testifying before the grand jury is determining when information is protected by privileges. Although several privileges may protect you from certain inquiries, such as spousal privilege, clergy-communicant privilege, and so forth, particularly relevant to white collar investigations is the attorney-client privilege. Your attorney or the corporation's attorney or both may request that you assert the attorney-client privilege in response to certain areas of inquiry. As a rule of thumb, any question that concerns communications with your attorney or in any way refers to your attorney is cause for concern. Upon being asked such a question, immediately ask permission to step outside the grand jury room to consult with your attorney.

What Should I Do If Government Agents Show Up at My Home?

During the course of a white collar investigation, it is not uncommon for government agents to show up at an employee's home in the early morning or late evening, frequently under the guise of serving a grand jury subpoena. Law enforcement agents know that, by catching you off guard, far from the corporation's legal department, you are more likely to submit to questioning without the presence of counsel.

In 1989, the Department of Justice declared its lawyers exempt from the fundamental ethical rule against contacting represented persons outside the presence of the person's lawyer ("no-contact rule"). The Department abused this self-created power to interrogate and in some cases intimidate high-level employees of corporations under criminal or civil (regulatory) investigation. With the support of ACCA, the American Bar Association, and the National Association of Criminal Defense Lawyers, Congress passed in 1998 the McDade-Murtha Law, which requires that federal prosecutors abide by the ethics rules governing all attorneys, including the no-contact rule.[12]

This requirement means that federal law enforcement agents generally may not contact high-level employees whose statements could bind the corporation and who are represented by the corporation's attorneys. The law does not, however, necessarily protect lower-level employees from such visits. But remember that, if the government shows up at your house or elsewhere, you are under no obligation to talk. Before discussing any matter with someone who wields the extensive power of the federal government, you should consult an attorney. Many times, counsel for the corporation will request that employees not communicate with government attorneys (and vice versa) without first having consulted with the appropriate company officials.

The Golden Rule

We hope that this discussion will help alleviate the anxiety and confusion that generally accompany receipt of a grand jury subpoena. But you need to be mindful of two things, a fact and an old saying: (1) the consequences of a federal grand jury investigation can be devastating, and (2) "a good prosecutor could get a grand jury to indict a ham sandwich." The federal grand jury's failure to protect citizens from unwarranted prosecution has fueled several reform proposals, such as allowing witnesses to have counsel in the grand jury room, requiring the prosecutor to introduce evidence that the target is innocent, and giving witnesses a transcript of their testimony (see the proposed federal grand jury bill of rights in the sidebar on page 32). Without these and other overdue protections, the federal grand jury is a minefield, even for the innocent. Following the golden rule of grand juries will help your attorney secure the best possible result for you: "Do not make a bad situation worse" by communicating with witnesses, attempting to cover your tracks, or misleading your attorney.

Conclusion

Now, you know likely more than you have ever wanted to know about subpoenas, depositions, and grand juries, we trust that you will be able to respond to a subpoena in the best possible manner. Good luck.

NOTES

1. 28 U.S.C. § 1783(a).
2. 28 U.S.C. § 1783(b).
3. 28 U.S.C. § 1784.
4. See Baker, We're Not Being Sued: Do We Have to Produce Employee Records? 8 INDIANA EMPL. LAW LTR. 1 (Aug. 1998).
5. See Fed. R. Civ. P. 45(c)(2)(A).
6. Public Company Accounting Reform and Investor Protection Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (July 30, 2002).
7. Memorandum from Deputy Attorney General Eric H. Holder Jr., U.S. Department of Justice, to Heads of Department Components and all United States Attorneys (June 16, 1999) ("Holder memorandum").
8. U.S. Department of Justice, United States Attorneys' Manual § 9-11.150 (Oct. 1, 1990).
9. SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 6:27 (2d ed. 2001).
10. Hoffman v. United States, 341 U.S. 479, 486 (1951).
11. 18 U.S.C. § 6002.
12. 28 U.S.C. § 530A.

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DEPOSITIONS: A GUIDE FOR THE WITNESS
-or-
EVERYTHING YOU EVER WANTED TO KNOW ABOUT A DEPOSITION, BUT THOUGHT YOU COULDN'T AFFORD TO ASK YOUR LAWYER

INTRODUCTION

Hollywood has created a fearsome image of trial lawyers. Whether at trial or at a deposition, the heroic, relentless lawyer deftly forces the cowering witness to confess to all manner of horrible misdeeds. The lawyer uses words like swords in a duel the lawyer is destined to win. The wretched witness would get our sympathy if only he or she wasn't such a pathetic example of human depravity. In Hollywood, attorneys are awesome.

If the real life witness feels apprehensive about being deposed, Hollywood has made this feeling understandable.

Fortunately, there are ways to prepare yourself for your deposition or trial testimony. The experience need not be approached in terror. This guide is designed to help you, a first-time witness, prepare for your deposition. In this guide it is assumed that: (1) you are represented by an attorney; (2) your attorney has asked you to read this manual; (3) you have no experience in being deposed; and (4) your only knowledge of legal procedures comes from tv, movies, or novels. Even if none of these assumptions apply to you, the information provided here should still be helpful to you.

A premise of this guide is that court or deposition testimony is a kind of drama or theatre. A good performance requires certain basic skills which anybody can learn. The truly great players have special talents, of course, but all of us can be reasonably effective if we have a knowledge of the basic rules and techniques. A deposition is like a conversation, or the telling of a story. Everyone can do it!

This manual will not encourage you to give smart, snappy responses to bullying attorneys. A premise of this manual is that a first-time witness should avoid repartee with the opposing attorney. Instead, this manual will encourage you to give short, simple, accurate answers which minimize the chance that you will say something which you later regret.

.As you read this manual, you should mark any part which you have a question about. Discuss your questions with your attorney. You will better prepare yourself for your deposition if you take an active role in the process.

I. PRELIMINARY CONSIDERATIONS

THE ROLE OF THE PLAYERS

In order to begin your preparation, you must first understand the role of the people attending the deposition.

THE OPPOSING ATTORNEY: The examining attorney wants to know the facts; but, even more importantly, the attorney wants to shape the facts so that they seem to favor the attorney's client. Even if you testify truthfully, the jury may disregard your testimony if it is suspicious of what you say. The examining attorney wants to create that suspicion. The deposing attorney has a long list of ways to try to discredit your testimony. These include trying to show that:

(1) you could not accurately see or hear what you testify to;
(2) you do not remember accurately what you saw or heard;
(3) you are prejudiced against the opposing party and so won't be truthful;
(4) your testimony contradicts other statements you have made or documents you have prepared; and
(5) your testimony is contradicted by the testimony of other witnesses or by documents prepared by other persons. This list does not exhaust the ways that your truthful testimony can be totally or partially discredited! Remember, the opposing attorney is NOT your friend, no matter how nice the attorney appears to be. The opposing attorney wants your testimony to seem unbelievable.

YOUR ATTORNEY: Your attorney protects you from unfair or improper tactics the deposing attorney may try to use against you. Your attorney cannot give answers for you, but you may consult privately with your attorney during the deposition if you desire to do so. Don't hesitate to ask for this if you think you need to do so! That is why your attorney is there.

YOU:* Your role as a witness is simple: you must answer questions truthfully and you must follow any instructions your attorney may give you. Your goal at your deposition is also simple: you want to answer the questions as briefly and truthfully as possible and finish your deposition as soon as possible. Brevity is important because every extra word or sentence you speak may provide an opportunity to find an inconsistency in your testimony. Truthfulness is important because it is the foundation of our judicial system.

Your goal is NOT to overwhelm the other side with facts in order to convince them to abandon the case. If no settlement occurs and the case goes to trial, then your chance to tell your whole story will be at the trial, not at your deposition. The message you must accept is simple: DON'T TALK TOO MUCH AT YOUR DEPOSITION.

Some people like to deal with stressful situations by visualizing themselves successfully coping with the situation. if you use this technique, the image you should create is that of you, an adult, trying to explain proper behavior to a stubborn, uncooperative child (the opposing attorney), who is trying to control you and provoke you. As an adult you know that the child can control or anger you only if you allow the child to do so. You also know that that is what the child wants to happen. As an adult you know that you will control the

situation if you remain firm and calm.

Some people mistakenly imagine the opposing attorney as a large angry gorilla from whom they must escape. Don't use this image. The end of the story will be very sad if the gorilla catches you. Do not create an image of a situation where you might be in fear for yourself. A deposition is not an attack on you; it is a conversation. You will be in control of the conversation if you are truthful and brief, calm and firm. Imagine that.

PREPARING OR NOT PREPARING FOR YOUR DEPOSITION

Preparing for your deposition usually means reviewing any documents about the case, and then meeting with your attorney. Consult your attorney before you review any documents. Your attorney may want to limit what you review. In some cases, your attorney may prefer that you review nothing at all and that you rely only upon your memory. Discuss with your attorney the strategy you should follow. Your attorney will advise you.

REHEARSALS - PRACTICING YOUR TESTIMONY

Depending on many factors, you and your attorney may spend time practicing your testimony. It is entirely proper for you to do this. Your oath at your deposition obligates you to tell the truth. Your attorney is entitled to assist you so that your truthful testimony will appear as favorable as possible to you. This may include lengthy practice answering questions expected to be asked.

You must spend enough time with your attorney so that you and your attorney believe that you are prepared to testify. The amount of time needed varies with each witness and each case. Discuss with your attorney any fears or concerns you have about your deposition beforehand. It may not be possible to calm all your fears, but you should be able to minimize unexpected questions.

HOW TO DRESS FOR YOUR DEPOSITION

What you wear says something about you. The opposing attorney evaluates everything about you to try to predict how effective you will be before a judge or jury. The way you dress is sometimes a factor. Your attorney may or may not want you to convey a message about you by what you wear. Discuss this with your attorney if there is anything unusual about your appearance or how you dress. If you intend to give no special message about yourself, wear plain business clothes. If there are no special considerations about how you should dress, follow this rule: dress comfortably but neatly.

WHO WILL ATTEND YOUR DEPOSITION

Each attorney involved in the case may attend the deposition. Every party to the lawsuit may also attend. Usually only the attorneys appear. A court reporter will also attend. The court reporter is not an employee of the court. The reporter's duty is simply to record everything said during the deposition. Very recently many courts have allowed depositions to be video taped. Few cases justify the expense of video taping. This guide does not discuss issues created by video taping of depositions.

TRANSLATORS TO AND FROM ENGLISH

If English is not your native language, then you may request a translator to assist you.

You may request a translator even if you have some ability to speak English. If you believe that you will understand the questions better in your own language, then request a translator. The translator will translate all questions into your native language; you then answer in your native language. The translator will translate your answers to English; the reporter will record only the English questions and English translated answers. If you desire a translator, advise your attorney so that arrangements can be made.

GETTING TO THE DEPOSITION/TALKING TO OTHERS ABOUT YOUR CASE

Your deposition will usually be held at the office of an opposing attorney. If possible, arrange to meet your attorney and then go to the deposition together. This avoids the possibility that you might arrive before your attorney and inadvertently engage in conversation with someone about the case. The attorney-client privilege permits you to refuse to answer questions about conversations or written communications with your attorney. However, at the deposition you can be asked about any conversation you have had with anyone else about the case. Depending upon the magnitude of the case, everyone to whom you have spoken may be forced to appear for a deposition to answer questions about what you told them. To minimize the chance of this, you should talk about your case only to those who need to know. The old wartime admonition applies here: loose lips sink ships.

WHAT SHOULD YOU BRING TO YOUR DEPOSITION?

Answer: nothing, unless your attorney tells you to bring something. The party who asks for your deposition can require you to bring documents or things related to the case. Bring only what your attorney tells you to bring. Generally you should let your attorney carry in whatever you bring. Let your attorney control the handling and review of your documents during the deposition.

STARTING THE DEPOSITION: THE OATH

Your deposition begins with your oath to tell the truth.
The reporter will ask you to raise your right hand and ask you essentially the following question: Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth? You must answer affirmatively before the deposition can begin. Let your attorney know if there is any religious or other reason why you object to taking an oath. The oath can be modified to fit your requirements; but some form of affirmation that you will tell the truth is required. From that time until-the conclusion of the deposition, you must speak truthfully.

STARTING THE DEPOSITION: THE ADMONITIONS

A common ritual at depositions is for the deposing attorney to start by asking questions to see if the witness understands what a deposition is all about. The questions often seem designed to put you to sleep, humiliate you, or to get you into the habit of answering "yes" to whatever the deposing attorney asks you. This process usually lasts from 2 to 15 minutes. The time varies because attorneys don't agree on what questions need to be

asked. Most attorneys can recite catechism-like reasons for asking these questions, but few attorneys can give you an example of how these questions ever affected a case. Experience tells us that the admonition questions are rarely needed. Expect them anyway.

One improper use of "admonitions" is to induce you to agree to something which you need not agree to. A common and seemingly innocuous example is:

QUESTIONER: "If you answer a question I ask, then I will assume that you understand the question, okay?"

You do not need to agree to this. You may misunderstand a question for many reasons. Even if you answer, that does not always mean that you understood the question. You are sworn to tell the truth and that is your obligation to the questioner. Any agreements or deals about the deposition process should be made only through your attorney. You may simply answer "no" to any question which sounds like an agreement about the deposition process.

STARTING THE DEPOSITION: BACKGROUND QUESTIONS ABOUT YOU

After the admonition questions are finished, the questioner usually begins a series of background questions about you. The length of this inquiry will vary depending upon the importance of your testimony in the case. The questions may be wide ranging and include any of the following about you:

- name and any previous names you have used
- address and previous addresses
- marital and family status
- educational history
- employment history/military service history
- medical history
- income history
- arrest, criminal conviction and imprisonment history
- previous lawsuits as a party sued or suing
- previous testimony in trials or depositions .
- previous jury duty
- licenses and professional memberships
- honors or awards received
- social club memberships
- hobbies
- materials published
- your relationship to any other party or witness in the case
- any materials you reviewed to prepare for the deposition
- names of any person you have spoken to about the case
- just about anything else about you which may be relevant

Not all of these categories may be asked about in every case. You must discuss with your attorney in advance anything about you that you do not want discussed at your deposition. You must advise your attorney of anything important about you or the case which your attorney may not be aware of. The questioner cannot ask you to disclose what you talked about with your attorney.

GENERAL DEMEANOR: GETTING "ON THE RECORD"

Do not nod your head for "yes" or "no" or "I don't know" answers. The court reporter types only the words spoken. Gestures, movements or conduct do not appear in the official transcript. Speak up to get "on the record."

GENERAL DEMEANOR: KEEP THE RECORD CLEAN

Your testimony may someday be read to a judge or jury. You want the judge or jury to think well of you. Be polite, in spite of what anyone is doing to provoke you. Avoid levity, sarcasm, anger, profanity, or any strong language or emotion. Play it straight. Keep it clean. Be serious. A bit of nervousness is natural and okay. It won't show on the transcript.

READING BACK THE RECORD

In order to remind everyone of what has been said or asked, the attorneys may occasionally ask the reporter to "read back" a short portion of the transcript. The reporter will comply with the request.

SHOULD YOU LOOK AT THE EXAMINER DURING THE QUESTIONING?

This is partly a matter of your personal conversational style. The printed transcript of your testimony is much more important than anyone's memory of what happened or was said. You want the transcript to be accurate. Misquotes by the reporter tend to be embarrassing, and fast paced depositions are more likely to have misquotes. You can help insure accuracy by watching the court reporter and waiting until the reporter finishes typing a question before you answer it. You are less likely to be distracted if you watch the reporter. It is not considered rude if you decide not to look at the examiner during the deposition. Do whatever helps you to focus on the question and to answer it truthfully.

COPING WITH ANNOYING, RUDE, OR ABUSIVE CONDUCT

In order for you to concentrate and think, you are entitled to an atmosphere without distractions, harassment or intimidation. Offensive conduct sometimes occurs at depositions. Ask to consult with your attorney in private if anything is happening which you think is inappropriate or affects your ability' to concentrate. Depending upon the circumstances, you and/or your attorney may both need to become active in combating offensive conduct. Follow your attorney's advice. Your attorney should usually take the active role in combating the offensive conduct.

In combating offensive conduct you must first remember that the court reporter types only what is said at the deposition. You or your attorney must therefore describe whatever the offending person is doing. The reporter will type the verbal picture into the record. This will effectively deter the conduct in almost all cases. If the conduct persists, you or your attorney should continue to state that fact. You may also need to state your opinion as to whether the conduct affects your ability to pay attention to the questions and to give proper responses. In extreme cases, you may need to preface every response you give with your complaint and a threat to leave. In very rare cases, you

may need to leave the deposition.

The courts can impose sanctions for misconduct occurring at a deposition. Your attorney should clearly establish the misconduct "on the record" before doing anything drastic, like leaving or threatening to leave. You or your attorney can be sanctioned if you disrupt the deposition by making frivolous complaints on the record.

II. ANSWERING THE QUESTIONS: THE RULES

All of history's accumulated wisdom on answering questions at depositions boils down to two rules: (1) Tell the truth; (2) but be brief. These two maxims are sometimes helpfully reformulated as follows: (1) say only what you know, (2) but volunteer nothing. Either formulation gives you the two fundamental principles for answering questions at a deposition. In the excitement and tension of a deposition, you may forget everything else in this manual, but if you follow these two rules you will still do well. A discussion of each of these rules follows.

TELL THE TRUTH

We all know people who, have no qualms about misstating or "shading" the truth Don't do this at your deposition. The reasons follow.

1. All major ethical and moral philosophies in the world urge honesty as the proper policy. Hopefully you are in tune with the majority of great thinkers who have written at length on this subject.

2. Perjury is the deliberate giving of false testimony while under oath. It is a very serious crime.

3. The opposing attorney's job is to ferret out any lies you may tell in order to destroy your credibility. Lawyers have the mystique of being able to smell a lie from a mile away. Telling lies to lawyers is like diving into shark-infested waters with oozing wounds. You may survive, but you invite an attack by someone who will enjoy eating you up. Few thrills excite a trial lawyer like the chance to expose a liar.

A famous story is told about Abraham Lincoln when he was a trial lawyer. Mr. Lincoln's client was on trial for murder. Mr. Lincoln was interrogating a man who was the only known witness to the murder. The murder occurred in the country in the middle of the night. The witness claimed to be several dozen yards away from the scene of the crime. Mr. Lincoln asked the witness how he could be sure of the identity of the killer. The witness confidently answered that he could see the killer by the light of the moon. Mr. Lincoln then went to his briefcase and pulled out his Farmer's Almanac. The Almanac reported that the night in question was moonless. Mr. Lincoln's client was acquitted.

The lesson is simple: don't think you can outwit lawyers by telling lies. You never know what evidence they may pull out of their briefcases. If you challenge the lawyer mystique, you too may become a famous example of why it exists.

4. Jurors are not dumb. Even if the opposing lawyer cannot decisively prove that you have lied, if the jurors believe you are lying about any small thing, then they may disregard all of your testimony as if it were all lies.

5. The penalty for lying can be grossly disproportional to the seriousness of the lie.

History's greatest example of this truth is Richard Nixon who lost the presidency for being dishonest about what he knew about the Watergate burglary. Even if the truth hurts, that hurt is better than the pain which a lie can inflict on you. Cut your losses; lies can multiply them.

6. None of us are saints. The temptation to lie or stretch the truth can strike anyone. Talk to your lawyer about anything, you may be tempted to lie about. You may find that the facts which you thought would hurt really have no legal impact at all, or that their impact can effectively be minimized. Your attorney has the same kind of schooling as the opposing lawyer. Discuss possible weaknesses in your case with your lawyer in advance. Let your lawyer show you how to, present bad facts in the best light. Trust your lawyer. Avoid temptation. Don't tell lies.

7. Your memory is fickle. Each time you tell the story about something you saw or did, you make small changes in the story. In almost every case your trial and deposition testimony will vary, even if in only subtle ways. A trial lawyer is trained to discover these microscopic changes in your story. These changes will be used against you as if you are fabricating everything, or as if you simply don't know what you are talking about. Trial attorneys make mountains out of molehills. Your attorney has enough work to do just fending off attacks on you due to normal lapses in your memory. You can make your attorney's job hopeless if you add deliberate lies on top of that.

SAY ONLY WHAT YOU KNOW - BUT WHAT DO YOU KNOW?

You can only testify about what you know. Attorneys divide your testimony into general categories. The main categories are:

Percipient/firsthand knowledge: things you have directly perceived by hearing, sight, taste, touch or smell. Percipient facts are anything you perceive with your five senses. You normally are expected to testify only to what you have perceived.

Hearsay: : facts you know from another source such as someone telling you or something you read about. You may testify about your hearsay knowledge at a deposition, but usually not at a trial.

Opinion: your interpretation of the meaning of facts. You may testify about your opinions at a deposition, but you usually are not allowed to do so at trial because the jury is expected to form its own opinion from the facts.

Estimate/guess: a fact you believe exists or an opinion you hold based on related knowledge or recollection you have. You are usually allowed to testify to "educated" guesses or estimates, especially when you are asked about events you witnessed.

Speculation: a fact you believe exists or an opinion you hold based upon inadequate knowledge or recollection of an event. Speculation is always improper even when asked for. You may advise the questioner if you think the only answer you can give to a question would be speculation. The questioner will then usually withdraw the question.

These categories overlap. Each category has different legal effects. The outcome of the case may depend upon which category your testimony falls into. Attorneys will therefore argue at length about which category your testimony belongs in.

BE BRIEF: VOLUNTEER NOTHING

A deposition is not the chance for you to sell your story to the other side. A deposition is a chance for the other side to poke as many holes as possible in your story. Nothing you can say at your deposition will convince the other side to give up. That is not the purpose of a deposition. Anything you say that is not responsive to the examiner's question may provide an opportunity to discredit your testimony. Each extra sentence and word you speak is an opportunity for you to make a mistake. You must be truthful; but try to be brief.

Another reason for being brief is that you will save time and money. You save money two ways. Your attorney is probably paid by the hour. Shorter depositions means lower attorneys' fees. The court reporter is paid by the number of pages of transcript. This means that the court reporter is effectively paid by the word! Fewer words means lower costs. Finally, if you are brief, you will also save your own time because the deposition will end sooner.

The essence of being brief is best understood by analyzing how to answer the following question:

"Can you tell me the time?"

In normal conversation, your natural response to this question is to give the questioner the time of day. That is the wrong answer in a deposition. In a deposition the correct response is either "yes" or "no", depending upon whether you know the time of day. In a deposition, you should then stop taking because you have answered the question. If the questioner wants to know the time of day, then wait for that question to be asked. (Warning - do not practice these deposition techniques on your spouse - or you will end up divorced.)

ANSWER ONLY THE QUESTION ASKED: THEN STOP

You are most likely to violate this rule when a question calls for a simple yes, no, or maybe answer. In normal conversation you will usually explain your response without being asked to do so. In a deposition, wait for the examiner to ask for the explanation. Sometimes you won't get asked.

Example:

QUESTIONER: Can you tell me your favorite color?

RESPONSE: yes.

-- Stop and wait for the next question.

THE BIG 5 SIMPLE ANSWERS

Simple short answers should be used whenever possible. The most important simple and short answers are:

Yes.

No.

I don't know.

I don't recall.

Maybe/sometimes (or similar indefinite answers)

Try to be accurate when using "I don't know" and "I don't recall" answers. "I don't know" can often be used instead of "I don't recall." However, it is better to use "I don't know" only in situations where you never knew the answer. Use "I don't recall" when you have forgotten what you previously knew.

Example: QUESTIONER: Who was at the meeting?

If you weren't at the meeting, your answer is "I don't know." If you were at the meeting, but can't recall who also attended, use "I don't recall" even though "I don't know" could also apply.

Many people can be embarrassed into trying to answer a question about an event when they have forgotten what actually occurred. Do not let shame or embarrassment tempt you to say something which you do not recall. Overstretching your memory can easily cause you to make a false statement which the examiner may then pounce on. Stick with "I don't recall" or "I don't know" unless you are certain of your answer. On the other hand, you must not let the examiner coax you or bully you into saying you do not recall an event just because your memory is hazy about parts of it.

Sometimes your answer to a question will be an indefinite response such as "maybe", or "sometimes", or "not always." In normal conversation you usually then go on to explain why your response is indefinite. Do not give the explanation unless asked to do so. Volunteer nothing.

Avoid diluting short answers with tag-on qualifiers such as:

"Yes, I think so"

"No, probably not"

"I don't know for sure"

"I don't remember right now"

Such qualifiers invite follow-up questions about why you have qualified your answer. If you think you must dilute one of these answers, then you probably need to rethink your answer. Take more time to give an answer which does not qualify your answer, if you can.

Some people have inhibitions about using "I don't know" or "I don't recall" answers because these answers were abused by many witnesses in the famous Watergate and Contragate hearings on TV. Don't be intimidated by history. When either of these two answers applies, anything else you say may get you into trouble. It is always dangerous to say

anything at a deposition unless you are certain it is true.

EXAGGERATION: OVERSTATEMENT AND UNDERSTATEMENT

Any form of exaggeration is just as bad as a false statement. It casts doubt on the truth of anything else you may say. Don't let the inability to be precise tempt you to overstate or understate a fact. Say only what you know.

SUMMARIZE WHEN ANSWERING OPEN-ENDED QUESTIONS

Open-ended questions are those which potentially require long answers. Questions asking for what, why or how are usually open-ended type questions. Questions asking for who, when, or where usually are not open-ended, but may still require long answers. When possible, give short summary answers to all questions.

For example, on a particular night you may have done the following: you met friends after work; you went with them to a restaurant for dinner; then you all went to a theater to see a movie; then some of you went to an ice cream parlor for some dessert, and then a few of you went to a late night bowling alley for a few games; then you went home. If the questioner asks you what you did that night after work, you could respond with a long explanation of everything you did. You could also give a short summary answer as follows:

RESPONSE: "I went out."

Note that the long explanation and the short summary are both 100% responsive to the question and both 100% true. But the long explanation violates the "be brief - volunteer nothing" rule. Give summary answers whenever you can. Let the examiner ask follow-up questions for whatever detail is desired. If your summary is accepted without any follow-ups, then you have shortened your deposition.

It may take you several moments or minutes to think of a proper summary answer. Take all the time you need.

DO NOT RUSH YOUR ANSWERS; PAUSE TO THINK BEFORE SPEAKING.

A short accurate answer may take longer to prepare than a long answer. Stories are told about witnesses who thought silently for a half-hour or more before answering a difficult question. You likely will never need that much time; but if you do, take it. The pace of a deposition is the only part of a deposition which you can control. You must slow the pace to whatever is comfortable for you. You must not let the opposing attorney rush you if that may cause you to make a mistake.

MARKING OF DOCUMENTS

The examiner may ask the reporter to "mark" a document. That means that a copy of the document will be attached to the deposition transcript. Each marked document is given an identifying number or letter.

TESTIFYING ABOUT DOCUMENTS

Many depositions revolve around identifying documents and explaining the information contained in them. The questioner may ask you questions about the documents before showing them to you.
This is proper in order to see how much you recall without

reading the document. If you cannot answer a question without looking at the document, then your proper response is simply "I don't know" or "I don't recall." After exhausting your memory, the examiner may let you see the document in order to refresh your memory and to ask you more questions.

TESTIFYING ABOUT CONVERSATIONS

You will frequently be asked to testify about conversations. This may include where and when held, who participated, and most importantly, what was said. You may not remember exactly what was said in a conversation. If asked, tell the examiner only what you recall. Do not summarize or paraphrase the conversation until asked to do so. You will probably be asked to do so. A typical exchange in a deposition may go like this:

QUESTIONER: Do you remember having a conversation with Mr. X? RESPONSE: Yes.

QUESTIONER: Tell me what was said in the conversation. RESPONSE: I don't recall the exact words spoken.

QUESTIONER: Can you tell me in general what the conversation was about?

RESPONSE: Yes.

QUESTIONER: Tell me in general what the conversation was about.

TESTIFYING ABOUT OBSERVATIONS

Your deposition may be taken only because you saw something happen - such as an automobile accident. You may have no connection to the lawsuit other than that you saw something happen. In these situations you may not have your own attorney.

Even in these situations the questioning may seem hostile to you. This is because the attorney who does not like what you say will try to find a way to discredit your testimony. To avoid complications and embarrassment you should still follow the basic rules: be truthful and be brief.

"ANYTHING ELSE" QUESTIONS

In order to be sure that you have stated all that you know about an event or a conversation, most attorneys will continue to ask you “Is there anything else you recall" about that event.

Eventually, your memory will be exhausted. At that point, don't let the examiner box you into a statement that nothing else was said or done at the event. Simply say that is all you can recall. This allows for the possibility that you will have a "flash recall" later.

FLASH RECALL
Long after answering a question you may remember something that you should have said. Keep these flash recollections to yourself until you have had an opportunity to speak to your attorney. Ask for a private conference. Let your attorney advise you as to when and how to correct your testimony.

DO NOT VOLUNTEER OTHER SOURCES OF INFORMATION

If you cannot answer a question unless you refer to other sources of information, simply state that you cannot answer the question. Do not volunteer what information you need or where you could get it. Never identify other persons who might have information unless specifically asked to do so. Except as discussed below, don't hint that you could get other information by qualified answers such as: "I don't know right now" or "I can't tell you from memory." If you don't know, simply say: "I don't know." Then wait for the next question.

Sometimes you will be able to answer a question only because someone else gave you the information. This is hearsay knowledge, not percipient knowledge. It is risky to give an answer based upon hearsay knowledge unless you are certain the hearsay is true or unless you alert the questioner that your knowledge is hearsay. This is because your hearsay information may be erroneous. Your credibility may be questioned if you gave the impression that your answer was from your firsthand knowledge. On the other hand, an "I don't know" answer might not be appropriate because of the hearsay information you have.

Example:

QUESTIONER: Who was at the meeting?

If you were not at the meeting and are not sure if your hearsay information is correct, you could give a qualified answer such as:

RESPONSE: I don't know for sure.
-or
RESPONSE: I don't have any firsthand knowledge of that.

The second suggested response is a slight evasion of the question, but it would be a 100% true statement for you to make.

Both of these responses give a hint to the examiner to ask follow up questions about what you may or may not know. Wait for the follow up questions. You may or may not get any.

EVASIVE ANSWERS

Politicians are masters of this technique: A television reporter asks the politician a tough question. The politician ignores the question and gives a short speech about something which may not even be related to what was asked. The reporter thanks the politician and has already forgotten what he asked about. Don't expect this technique to work well for you at your deposition. Attorneys are better trained than reporters to get the information they ask for. Expect persistence in response to evasiveness.

Evasive answers also violate the "volunteer nothing" rule. Anything you say which is not responsive to the question is volunteered information. Avoid evasive answers; but see the limited exception in the preceding section.

A final reason for avoiding evasive answers is that they make you appear to be evasive! Judges, juries, and attorneys get suspicious of evasive people. You will occasionally misunderstand a question and give an unintentional evasive answer. Don't compound this by deliberately giving evasive answers.

DO NOT EXPLAIN WHY YOU REMEMBER AN EVENT

Ironically, it can be harmful when you remember too much detail about an event. It may appear that you are fabricating everything. There may be a special reason why you remember an event in unusual detail. Don't disclose that reason unless you are asked to do so. Let your attorney know later if there is such a reason. Your attorney will see that you get an opportunity to explain that reason at trial, if it is necessary to do so.

DO NOT ASSIST THE CONFUSED EXAMINER

The examiner's questions may be nonsensical because the examiner does not understand words used in your occupation or because the examiner does not understand something else about you. If you notice this happening, ask for a private conference with your attorney before answering. Your attorney may or may not want you to clear up the misunderstanding. Let your attorney decide what to do.

PUTTING WORDS IN YOUR MOUTH: LEADING QUESTIONS

Leading questions are any questions in which you are asked to affirm or deny a version of the facts. This is sometimes called "putting words in your mouth" because the questioner tells the story; you just affirm or deny it. Example:
QUESTIONER: Isn't it true that you drove straight to work from your home this morning?

RESPONSE: Yes.

This form of question is proper for the examiner to ask. Answer these questions if you can with a simple answer such as: yes, no, I don't know, I don't recall, maybe, etc. But be on guard because the questioner's version of the case is not the same as yours. Slight changes in the question may change your answer.

PUTTING WORDS IN YOUR MOUTH: THE SUMMARIZING QUESTION

A summarizing question is a type of leading question in which the questioner rephrases your testimony and asks you if you agree with the rephrasing. The rephrasing will often have a new twist on it with which you do not agree. Be careful when answering this type of question to be sure you agree with every part of the questioner's summary.

Attorneys often abuse this questioning technique. The questioner may try to summarize large portions of your testimony and misstate important parts when doing so. The length and convoluted nature of the question may make it hard to pinpoint all of the ways that the summary is inaccurate. You need not reexplain every portion of your testimony if you simply deny that the questioner's summary is accurate.

The examiner may then ask you to pinpoint the inaccurate parts of the examiner's question. If you can do so easily, then do so. But you need not explain each error in the examiner's convoluted misstatement of your testimony. This is not the purpose of a deposition. If the question was too lengthy or convoluted for you to easily answer or explain, then say so. You may ask the questioner to rephrase the summary question so that you can easily understand it, analyze it, and answer it.

DEALING WITH CONFUSING QUESTIONS

As a witness you are entitled to refuse to answer questions which you do not understand. For many reasons, lawyers have a tendency to ask confusing questions. A sampling of five different types of confusing questions and how to deal with them follows.

THE GIBBERISH QUESTION: Attorneys are highly educated, but they trip over the English language just like everyone else. If you hear a question which you don't understand, say so. The questioner will rephrase it.

Example:

QUESTIONER: Proud to be your bud?
RESPONSE: I'm sorry, I don't understand your question. Could you rephrase that question?

You must not answer any question you do not understand. You may ask that a question be repeated or rephrased if that helps you.

COMPOUND QUESTIONS: A compound question is really two or more questions combined into one. These questions are improper and often occur through carelessness by the questioner.

Example:
QUESTIONER: Tell me who you work for and what you do.

If your attorney does not object to this question, you have several options:

Answer both questions.
Ask the questioner which question you should answer first and answer only that question.
Wait to see if the second question gets asked again.
Ask the questioner to repeat the question because you heard more than one question and you don't know which one to answer.
The latter two approaches are most consistent with the "volunteer nothing" rule.

MULTIPLE NEGATIVES: Many attorneys are indirect or evasive in speaking. These attorneys often lace their questions with multiple negatives. Ask for the question to be restated if it confuses you.

Example:
QUESTIONER: Do you deny that you don't categorically oppose the conclusions rejected in this report?

RESPONSE: Can you rephrase that question and simplify it for me?

QUESTIONER: Oh, okay. Do you agree with what is said in this report?

LOADED QUESTIONS: QUESTIONS WITH BUILT-IN ASSUMPTIONS: The most famous question with a built-in assumption is "When did you stop beating your wife?" You have sufficiently answered such a question if you simply deny that you beat your spouse. Modern versions of the classic question "tack-on" offensive elements to an otherwise innocent question.

Example:
QUESTIONER: Isn't it true that you drove straight to work from home this morning after abandoning your starving children?

You need not answer such a question. You can simply say that you do not agree with the assumptions stated in the question. Then wait for the examiner's next question. If you answer the innocent part of the question, you must still make clear that you do not agree with the tacked-on assumptions.

Example:
RESPONSE: I did not leave my children starving at home, but I did drive straight to work from home this morning.

It is usually safer not to answer this type of question at all. Simply say that you do not agree with the assumptions in the question. Any answer you give will probably violate the volunteer nothing rule. You can ask the examiner to break down the question into its various parts so that you can easily identify those parts which are true from those which are not.

THE LONG QUESTION: THE "NICKEL AND DIME" RULE: Some attorneys just seem to enjoy listening to themselves. Their questions show it by their length. Use the unofficial "nickel and dime" or "5 and 10" rule to measure objectionable length:

Any question that takes more than 10 seconds to ask is almost always too long. You can ask the questioner to simplify it. Questions that are too long are usually objectionable because they are gibberish, compound, contain too many built-in assumptions or multiple negatives.
Any question that takes between 5 and 10 seconds to ask may be too long. Pause and think before you respond.

Any question that takes less than 5 seconds to ask is not too long.
The "5 and 10" rule also applies to your answers. If you think that your answer to a question will take more than 5 or 10 seconds, you should pause an extra few moments before answering. Your answers should not normally take that long. Be brief! Summarize. Volunteer nothing.

STATEMENTS AND SPEECHES AS QUESTIONS

Frustrated attorneys sometimes resort to giving long statements or speeches which are often insulting and intended to provoke you. At the end of the speech they turn to you as if it was your turn to say something in reply. If this happens, your only reply should be "what is your question?"

Speak only in reply to a proper question. Don't make speeches. Don't let yourself be provoked.

INTERRUPTIONS

Interruptions of your testimony come from three main sources: the opposing attorney, your own attorney, or the reporter. Your response is different for each type of interruption.

The opposing attorney: The examiner should not interrupt your answers with a new question. In order to discourage this conduct your attorney (or you, if your attorney doesn't notice the interruption) should point out the interruption to the examiner.

Your attorney: Stop speaking when your attorney interrupts.
Your attorney probably intends to object to the question. Listen to your attorney's objection. Your attorney is not allowed to tell you what to say, but each objection has that effect anyway. Take the hint if you can. But wait to see if your attorney allows you to answer the question. Sometimes your attorney will object and then "instruct" you not to answer a question. Follow your attorney's advice.

The reporter: Stop speaking whenever the reporter interrupts. The reporter interrupts only when two people speak at once or when one person speaks too fast. You must stop to allow the reporter to record everything. Then, slow down if necessary.

BREAKS

As a witness you are entitled to be reasonably comfortable so that you can think clearly and give accurate answers to the questions. If you want to stop briefly to eat, drink, smoke, get fresh air, go to the bathroom, make a phone call, talk privately to your attorney, or for any other reason, just ask for it.

"OFF THE RECORD"

At any time the deposing attorney may ask to go "off the record." This means that the court reporter will stop typing until the attorney asks to "go back on." Off the record conversations do not appear in the transcript, but when you "go back on" the opposing attorney may ask you questions about conversations which occurred off the record (except private conversations with your attorney). Stay alert, even when "off the record." The sharks are still circling.

MISSTATEMENTS AND INCONSISTENCIES

No matter how certain you are in the truth of your testimony, misstatements and inconsistencies will occur. If the examiner confronts you with an inconsistency in your testimony, do not fear that your case is lost. State, if asked, your present recollection. State, if asked, the reason for any inconsistency if you know it. You may ask to meet

privately with your attorney so you can think about your responses. Let your attorney advise you on how to correct your testimony, if that is necessary. Stay calm.

QUESTIONS BY YOUR ATTORNEY

Your attorney is entitled to ask you questions when the opposing attorney finishes. Usually your attorney will not ask any questions. This is consistent with the volunteer nothing rule. Sometimes, however, your attorney will ask you questions. The most common reason for doing so is to correct or clarify your testimony. If you will not be available for trial, then your attorney may question you so that your entire story will be available at least in transcript form for the trial.

REVIEW/SIGNING THE DEPOSITION

You receive still one more chance to correct errors after the deposition is over. When the transcript is prepared you are given 30 days to review, correct and/or make written changes to your testimony. You will also be asked to sign the final version of the transcript. If you make changes, then both the original version and your corrections become part of the official record. At trial the opposing attorney may ask you about any changes you have made.

You are not required to review, correct or sign your transcript. Some attorneys advise their clients not to correct the transcript or sign it. Discuss this with your attorney.

III. FINAL CONSIDERATIONS

COMPARING TRIAL AND DEPOSITION TESTIMONY

Your approach to testifying in a trial will differ from the approach you take at your deposition. That is because you have different objectives. At trial you want your full story to come before the judge or jury. At your deposition you want to say the minimum necessary in order to avoid attacks on your story. These differing goals should never be inconsistent with your duty to tell the truth.

Your opportunity to tell your story at trial will typically be during your attorney's examination of you. You must discuss with your attorney the important parts of your story which were not covered at your deposition. You need not be concerned that your deposition focused only on things unfavorable to you because you can tell your whole story at trial.

BREAKING THESE RULES

Following the rules in this guide will not guarantee that you will win your lawsuit. Following these rules is not even an assurance that you will make the best possible presentation of your story. Experience, good judgment and common sense must sometimes override these rules. When there are no other considerations, however, following the rules in this guide will usually be your best course.

Testifying, like storytelling, is an art, not a science. The only absolutely unbreakable rule is rule number 1: you must tell the truth. All other rules are merely guidelines. You can ignore the

guidelines and sometimes you should do so, but you should have a good reason for doing so.

FORGETTING THESE RULES

At your deposition you will not remember all that you have learned in this manual. You will make mistakes and violate even the rules you remember. When all else fails you must remember at least the two basic rules for deposition testimony:

1. Tell the truth; say only what you know. 2. Be brief; volunteer nothing. You can do well with just that much.

Preparing Executives for Testimony

Carl C. Straub Jr. General Counsel Photon Dynamics, Inc.
Phil Strauss

Agenda

- General Comments on Witness Preparation
- Focus on Internal Investigations
- Interviews and Depositions by Regulatory Agencies
- Jury views on Witnesses and Preparation

General Comments

- Preparation is Key
- Gathering of Documents
- Review time
- Different preparation between Rule 30 (b) (6) witness and fact witness
- Deposition as impeachment tools
- Candor and risk are important in preparing executive

Key Cautions for Executives

- You need to spend preparation time
  - For every hour of deposition time you should expect five hour of prep
- Don't try to outsmart or under estimate opposing counsel
- Basically you are on your own. Counsel will object but most of the time you will answer.
- Your Counsel will not ask a lot of questions
- Always wait after the question for objection
- Listen to the questions
- If given document read it.
- Don't guess or speculate.
- If you have an epiphany at trial you will have to dig out of hole.
- Best way to avoid trial testimony is to give a great deposition
- I don't know only plays so often (especially with jury)

Internal Investigations

- "Corporate Miranda" warning
- Owner of privilege
- Independent Committee Counsel
- Witnesses counsel

External Investigations

- SEC
  - Civil
  - Criminal
- Justice Department
- Current issues with stock options

Juries

- Expect CEO to know the facts
  - Equate salary to knowledge
- I am very busy is not an answer
- Do not expect executives and Directors to be surprised by documents
- Do take into account contrary testimony
- Do understand corporate governance
- Have been educated by Enron
- You can say I don't know once, twice but not 64 times
- Body language is important