

JANUARY 21, 2022

TAKING A DEPOSITION

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3. TAKING DEPOSITIONS

A. PURPOSES OF DEPOSITION

1. To ascertain the facts
2. To pin down a witness to a story
3. To pin down a witness to your story in your words - Admissions
4. To cause a witness to contradict himself or herself - Opportunity to impeach

B. THE TWO PURPOSES WHICH MAY MAKE THE DIFFERENCE BETWEEN WINNING AND LOSING

1. To obtain admissions
2. Create opportunities to impeach at trial

Attachment 3.3

ADMONITIONS (PREAMBLE) FOR DEPOSITION

Attached is a suggested statement which should be made at the beginning of all depositions.

You begin a deposition with the following;

Q: Please state your full name.

Q: What is your residence address?

Q: What is your residence phone?

Q: What is your business address:

Q: What is your business phone?

After these preliminary questions, you should make the statements attached hereto.

Q: Has your attorney explained to you the nature and purpose of a deposition?

Q: In order to make sure that there is no misunderstanding, let me describe the nature and purpose of the deposition proceeding. Your deposition is part of the case of *A v. B* pending in the _____ Court. The oath which was administered to you by the court reporter here in my office is entitled to the same degree of respect and solemnity as is the oath administered in a courtroom.

Q: Do you understand that?

Q: I am going to ask you a series of questions. If you don't answer those questions truthfully, you will have committed perjury, a criminal offense.

Q: Do you understand that?

Q: My questions and your answers will be taken down by the court reporter, who will transcribe those questions and answers into a booklet. That booklet will thereafter be submitted to you for your review and signature. Do you understand that?

Q: Before you sign it, you have the right to make changes or additions to your answers, but I must caution you that if you do make any such changes or additions, I have the right to bring that fact to the attention of the judge and jury. Do you understand that?

Q: If I do so, your testimony here today and at the trial of this matter may be viewed with considerable skepticism. Accordingly, it is of critical importance that your testimony here today be truthful and accurate. Do you understand that?

Q: I will attempt to make my questions easily understandable by you. If, for some reason, you don't understand a question, ask me to rephrase it so that it will be understandable by you. Do you understand that?

Q: What I just said is extremely important. Please don't answer a question unless you are 100% sure of what the question means. If you are not 100% sure of what the question means, ask me to rephrase it. Don't answer until you are 100% sure of the meaning of the question. Do you understand that?

Q: If you are 99.9% sure, and not 100% sure, ask me to rephrase it. If you don't ask me to rephrase the question, it will be assumed that you do understand it.

Q: Do you understand that?

Q: Have you ever been convicted of a felony?

Q: Have you ever served in the U.S. military?

2. Mark Request for Production for identification (**Attachment 3.2**)

a. How to mark exhibits for identification:

(1) "I'd like the reporter to mark for identification as Plaintiff's Exhibit __ (numbers) (Defendant also uses numbers) a (describe exhibit by title, number of pages, date and signature).

(2) Don't say "I'd like to "introduce as Plaintiff's Exhibit __."

(3) Give copies to reporter, deponent and deponent's counsel.

(4) Use Bates numbers.

b. Go through each category of documents requested [**Attachment 3.2**]

(1) Have you brought all of the document requested

(a) Please produce the documents

(2) Search -- who did what

(3) What did you do to carry out your legal obligation to search for all documents described.

c. Deponent's preparation for deposition

(1) What documents did you look at to prepare for this deposition.
Work product, attorney/client privilege

(2) In preparing for your deposition, did you look at documents without assistance from your lawyer? If yes,

(a) What documents did you look at?

(3) In preparing for your deposition, did you review any documents which refreshed your recollection? If yes,

(4) In preparing for your deposition, what documents did you look at which refreshed your recollection

Mize v. Atchison, 46 Cal.App.3d 436 (1975)

(5) What people did you talk to to prepare for this deposition? If lawyer:

(a) How many times did you meet with your lawyer?
(b) Anyone else present?
(c) How much time did you spend with your lawyer preparing for your deposition?

F. THE EIGHT GOLDEN RULES

1. Skip around.
 - (a) In terms of chronology, issues/subject matter, etc.
 - (b) Train yourself to do it, even though it may be difficult.

2. Ask leading questions.

(a) How to ask leading questions -- declarative statement followed by "correct?"

(b) The questions should be phrased exactly the same as you would ask them at trial, word-for-word. This allows for direct impeachment when the answer is different at trial.

(c) Ask leading questions to third party witnesses. A leading question to third party witnesses is objectionable; however, such questions often will not draw an objection from opposing counsel. If the objection is not made at deposition, it is waived at trial. If you do draw an objection, then ask it in the proper, "open-ended" way.

(d) Asking about conversations:

(1) Don't begin by asking the witness to tell you what was said in the conversation. Instead, ask leading questions that are helpful to your case, e.g., "didn't you say [x,y]"

(2) Then, follow up with, "is there anything else that was discussed in that conversation."

(3) Did you make any notes or memoranda of this conversation?

(e) Don't repeat witness' answer or say "good" or "great," or anything else.

(f) Ask deponent questions based on conversations and events before asking about documents. Then consider the pros and cons of using impeaching documents.

(g) It is okay to ask leading questions as to which you don't know the answer to the adverse party and to an in-state third party witness.

3. You must get an answer (unless there is an instruction not to answer).

(a) If you ask a question, and there is an objection as to form, you either rephrase the question or demand that the deponent answer the existing question.

(b) In either case, you must get an answer.

(c) If the witness gives an evasive answer:

(1) Move to strike as non-responsive.

(2) Ask reporter to restate the question.

(3) Request (insist) that witness answers the question.

4. Close the door: If witness doesn't recall, don't accept that answer. Instead, ask if there is any way to refresh his/her recollection.

- (a) If "no," move on.
- (b) If unclear, then close the door: Are there documents, people, etc. that can help refresh your recollection?
- (c) Don't be satisfied with the response "I don't recall."
- (d) List documents and people.
- (e) Is there even one document which can refresh your recollection. Can you name even one person who can refresh your recollection.

5. Don't ask one question too many.

(a) If you get a good answer, move as far away from the topic as possible -- don't allow the witness to correct the answer.

Example of what not to do:

Q: "Did you kill my client?"

A: "Yes."

Q: "Are you sure?"

(b) Have some transition questions ready to go, which allow you to switch effortlessly to a new topic.

(c) Jump to the topic of background questions (e.g., educational background) after getting a good answer.

(d) If you get a good answer which requires follow-up, wait some time before asking the follow-up.

6. Motion to strike non-responsive answers

(a) Objection to non-responsive answer waived if not made. CCP § 2025.460
(Attachment 3.8)

(b) “I move to strike everything in the answer after the word(s) _____ on the grounds that it is not responsive to the pending question.”

(c) Don’t move to strike non-responsive answers that are helpful.

(d) Live Note.

7. Must follow up

- (a) Must listen to answer and ask follow-up questions, if necessary.
- (b) Should you ask follow-up questions immediately or later.
 - (1) Good answer -- later
 - (2) Regular answer -- immediately

8. Don't Ask "Do you recall"

H. VIDEOTAPE DEPOSITIONS

1. Cuts down on coaching
2. Better than transcript for out-of-state witness
3. Be careful with out-of-state witnesses who are adverse and are good witnesses
4. Adjust tone of voice to be friendly

K. WHEN TO ASK IMPORTANT QUESTIONS

1. At end of day (when witness is tired). This is also a good trial trick.

M. CONTROL

1. Speaking objections - Request that objection state grounds, and no more. Otherwise, threaten to suspend deposition
2. If deponent wants to confer with lawyer, keep videotape rolling and note the length of the conference on the record
3. Don't agree to go off the record