

## **PREPARING FOR YOUR DEPOSITION**

### **I. WHAT IS A DEPOSITION?**

A deposition is a commonly used pretrial discovery device. You, as the deponent, are placed under oath and will answer questions asked by your spouse's attorney in front of a court reporter. The questions and answers will be recorded by the court reporter who will prepare a written transcript of the deposition. Your deposition may also be videotaped.

Your deposition must be taken seriously, as you will be testifying in your deposition just as if you are testifying in court.

### **II. PURPOSE OF A DEPOSITION**

The main reasons for a deposition are as follows:

- A. Your spouse's attorney wants to find out your knowledge regarding the issues in your divorce action. He or she is interested in what your story is now and what it is going to be at trial.
- B. Your spouse's attorney wants to size up your demeanor and determine what type of witness you will make at trial.
- C. Your spouse's attorney wants to nail down your version of the facts before trial so that they know in advance what your testimony will be at trial.
- D. Your spouse's attorney wants to catch you in a lie or an omission that can be used at trial to show that you are not honest and cast doubt on the veracity of your testimony. The transcript of your deposition may be used at trial by the opposing attorney to point out any trial testimony which varies from your deposition testimony.

Your spouse's attorney has every right to take your deposition. Your attorney also has the right to ask questions of you during the deposition, but most often your attorney will only ask questions to clarify an answer which may have been misleading or confusing.

Avoid the natural tendency to launch into your entire version of the case. This is not the proper time or place. Briefly and concisely answer only the question asked.

The testimony given in your deposition can be used in the trial of your case. A well-done deposition can have a positive effect on your case – the opposing attorney can see that you are an excellent witness and that you have a good case. Your chances of settlement will then be greatly improved.

**III. WHO WILL BE PRESENT AT THE DEPOSITION**

Depositions are usually taken in a conference room at the opposing attorney's office. The people typically in attendance are the parties, their attorneys and the court reporter. Spouses of the parties may also attend the deposition. Occasionally, a legal assistant will be present at the deposition. No judge is present.

**IV. LENGTH OF DEPOSITION**

The length of your deposition will depend on the complexity of the issues in your case, as well as the number of questions opposing counsel asks you. Do not make any other appointments or commitments on the day of your deposition. Under the Texas Rules of Civil Procedure, an individual may not be deposed for more than 6 hours. Breaks during the depositions do not count against this limitation.

**V. QUESTIONS ASKED**

Under the Texas Rules of Civil Procedure, attorneys have the right to ask a number of questions. Some of the topics discussed at your deposition will not be admissible at trial. Unless your attorney instructs you not to answer a particular question, you must answer the question, even if your attorney objects to the question.

While opposing counsel may act like your friend in order to get you to relax and trust him or her, do not let your guard down. On the other hand, opposing counsel may try to wear you down by being confrontational, relentless and harassing. Regardless of the technique used, always be on guard and maintain a calm composure.

**VI. OBJECTIONS BY YOUR ATTORNEY**

Your attorney will protect you from any improper questions by opposing counsel. Rarely will your attorney ask you any questions. The objections that can be made during the deposition are (1) leading, (2) form, and (3) nonresponsive. Attorneys may also object and instruct the witness not to answer questions seeking privileged information. If the opposing attorney asks an improper question, your attorney may make an objection (e.g. "I object to the question on the ground of attorney-client privilege.") If your attorney ever instructs you not to answer a question, do not answer the question.

**VII. HOW SHOULD I DRESS?**

Your personal appearance should be conservative, neat, clean, and comfortable. Business or business/casual attire is appropriate. Your appearance should indicate that you are taking this matter and your deposition seriously. If your deposition will be videotaped, it is especially important for you to dress appropriately.

**VIII. THE COURT REPORTER'S ROLE**

The court reporter is present to administer the oath (under which you swear to tell the truth) and record everything that you, the opposing attorney and your attorney say during the deposition. The court reporter is neutral and does not decide or mediate any disputes between the attorneys or parties. After the deposition, the court reporter prepares a written transcript of your deposition testimony and sends it to the attorneys.

**IX. PREPARING FOR YOUR DEPOSITION**

**A. Review the Pleadings and Discovery Responses**

In preparing for your deposition, review all of the pleadings filed in your case, as well as any affidavits, motions and discovery responses. Make sure that you understand all of the allegations, requests, causes of action and/or defenses raised in these documents.

**B. Gather Any Requested Documents**

You may have been requested to bring documents to your deposition. If the notice of your deposition includes a document request, you must gather documents, review them with your attorney and bring them to your deposition.

If you have not been asked to bring documents to your deposition, do not bring anything. Leave your briefcase, calendars, palm pilots, etc at home. You are not required to, and should not bring any documents which you are not expressly requested to bring. Even if you think that a particular document is important, discuss the matter with your attorney before bringing it to your deposition.

Letters and e-mails between you and your attorney or his or her staff, and any memos or other documents prepared solely by your attorney or his staff, or prepared by you at the request of and for your attorney, are usually protected by law from being disclosed under the "attorney-client privilege" and the "work-product privilege." You should not produce such documents. If it appears to you that the request for documents would include documents which are privileged and confidential, bring this to the attention of your attorney.

If a document has not been requested, do not agree to supply documents or information. If you are asked to supply documents or information, refer the attorney to your counsel. Do not ask your lawyer to produce anything in his or her file.

C. Conference with Your Attorney

Before the deposition, you and your attorney will have a conference to discuss the documents you are to bring to your deposition and what you can expect during your deposition. It is important that you be totally candid and tell the complete truth to your attorney, even if it appears to be damaging to your case.

It is okay to admit in your deposition that you have met and consulted with your attorney prior to your deposition. Anything that you and your attorney discuss is confidential and should not be revealed to the other side. If the opposing attorney asks you a question that your attorney believes you should not answer as it is an attorney-client communication, your attorney will object to the question and instruct you not to answer it.

Private conferences with your attorney during the deposition are improper except to determine if a privilege should be asserted, although they may be held during agreed recesses and adjournments.

X. ANSWERING QUESTIONS

A. Give Truthful and Accurate Testimony

In responding to the questions you are asked, you should always give truthful and accurate testimony. At the beginning of your deposition, you take an oath to tell the truth. You must tell the truth even if it is damaging to your case. If your testimony is not truthful and accurate, opposing counsel can later use your testimony against you at trial. Further, failure to tell the truth in a deposition constitutes perjury, which is a crime in Texas.

The following tips will help you give truthful and accurate testimony:

1. Your answers must be based upon your personal knowledge. Never volunteer your opinion unless expressly asked to do so. Never guess or speculate about a fact. If you did not personally witness or observe something, then you are justified in saying that you do not know the answer, even though you may have heard second hand facts or information. Additionally, if you are asked why a certain decision was made but you did not participate in making the decision, you should say that you do not know why the decision was made. Similarly, do not speculate as to what “probably” happened. Your deposition

testimony should rest upon first-hand knowledge and a clear memory, not upon hearsay or speculation.

2. If you do not know the answer to a question, say so. If you cannot remember, say so.
3. If you are not sure of a particular fact, qualify your answer by beginning “to the best of my recollection.”
4. Do not let opposing counsel put words in your mouth. If the opposing attorney attempts to summarize facts or testimony, listen very carefully to his or her summary and do not agree with it unless it is completely accurate. If it is not, simply state that you do not agree with the summary. If the introductory clause to a question contains any inaccurate information, be certain to specify the inaccurate information contained in the question prior to answering the question. If the questions asked calls for a yes or no answer, and a yes or no answer does not accurately reflect the facts, you are not required to answer only yes or no. Indicate that you are unable to do this.
5. Do not be intimidated by insinuations by the opposing attorney regarding your lack of truthfulness. If the attorney says “you mean to tell me that you are willing to sit here under oath and swear to that fact?,” Just remain calm, look the attorney in the eyes and say “I have just testified to that fact under oath.”
6. Be careful of questions that ask “is that all?” It is okay to say “to the best of my knowledge at this time.”
7. You may be asked a question like: “Tell me all of the negative qualities of your spouse as a parent.” The lawyer asking the question is trying to put you in a box and limit you at trial to what your answer was in your deposition. If you are asked this type of question, give as many reasons as you can, but when you finish, give yourself an escape route out of the box by saying, “I am sure there are other reasons, but I cannot think of them right now.”

Another way an attorney will try to put a box around your testimony is to ask you to tell everything you can remember about a certain event. Always leave yourself an exit route out of the box by saying, “That is all I can remember at this time.”

8. Be careful about events that happened a long time ago. For

example, if you are asked about some event that occurred many years ago and you do not remember the exact time or date, simply say so. Do not guess.

9. You can phrase your answers at times in a manner that may be helpful to your case. For example, instead of simply saying “yes”, a more heart-felt response might be “of course” or “absolutely.”
10. Avoid using “always” and “never.”
11. If opposing counsel asks you about certain documents, you may ask to see the document before you answer the questions. When confronted with documents, examine them carefully. If you haven’t seen a particular document before or did not prepare it, don’t try to guess what it means. Do not vouch for the accuracy of someone else’s document.
12. If at any time during the deposition you realize you have given an erroneous answer, correct your answer as soon as you recognize your error.
13. Watch out for compound questions.
14. If your testimony is based upon an approximation, you should make this clear to the examining lawyer. Any testimony which is based on estimates should be given only where the record unequivocally reflects that this is the basis for the testimony.
14. Do not guess details. Be careful of giving exact information (such as measurements, dates, time intervals, and business statistics) if you are uncertain about the details, particularly when the information is available in some business or other records. If you are asked a question of this nature and you are uncertain, respond that you do not remember the exact information. If the information requested is available from certain records, you may add that any answer you give will be your best estimate only, and is subject to verification through applicable records.

B. Listen to the Question and Make Sure you Understand It.

Listen to the question carefully and make sure you understand it before you answer. Pause for a few seconds before responding to each question to make sure that you understand the question and think about the answer. If you did not hear or understand the question, politely inform the opposing counsel to repeat or explain the question.

C. Do Not Volunteer Information

Answer the question you are asked as concisely as possible and then stop. Give as short an answer as possible, and be sure your response is narrowed to the exact question asked. There is usually no benefit to volunteering information. Your deposition is not the time to tell your side of the story.

Following are some tips in answering questions without volunteering information:

1. Do not give your opinion regarding any fact or issue unless you are asked for your opinion – just answer the question that you are asked.
2. If the opposing counsel asks you a question that calls for a “yes” or “no” answer, simply answer “yes” or “no.”
3. Avoid rambling answers – do not explain details unless you are requested to do so.
4. Even if the opposing attorney pauses as though he or she is waiting for you to give an explanation, stop talking and wait for the next question.
5. Do not try to anticipate the answer to the next question that you will be asked.
6. Do not voluntarily offer information to the opposing attorney as to where he or she can find information being inquired about, unless expressly asked to do so.
7. Do not refer to or volunteer to provide any documents unless expressly requested to do so.
8. Do not let opposing counsel interrupt your full answer. If this happens, politely state that you were not through with your answer and ask if you may finish it.

**XI. THINGS TO AVOID**

A. Avoid Becoming Nervous or Flustered.

Remember that the opposing attorney is sizing up your demeanor as a witness during your deposition (which may greatly affect settlement negotiations). Therefore, your conduct, appearance and demeanor at your deposition are important. It is important to present a good impression. You should try to relax, remain calm and not appear nervous. Speak loudly and positively and with self-assurance. There is no need to show fear or anxiety or to be afraid to answer questions truthfully.

B. Avoid Getting Angry or Mad.

It is important that you conduct yourself in a reasonable and mature fashion during your deposition. Avoid losing your temper, getting mad or upset, cursing or engaging in name calling. Opposing counsel may try to provoke you so that you hurt your case – do not let this happen. Your conduct should be polite, courteous and calm. Do not interrupt opposing counsel's questions. Never argue with opposing counsel.

C. Avoid Humor.

Avoid all jokes or wisecracks in a deposition. What may at the time seem like an innocent joke may not appear to be a joking matter in the written transcript. Never try to get the upper hand on the opposing attorney by using some clever “comeback” or by turning the tables and asking him or her questions.

D. Referring to Documents.

Never refer to any document to refresh your memory unless you have been authorized to do so by your attorney. A rule of law in Texas is that if a deponent is asked a question, and he or she stops and looks at a document in order to refresh his memory, then that document is required to be disclosed and handed over to the opposing attorney.

**XII. READING AND SIGNING THE DEPOSITION**

After your deposition is concluded, the court reporter will transcribe the record into a typed written deposition transcript. You will then be given an opportunity to read the deposition and make corrections, either in misspellings, mistaken dates, or other such changes. You will also need to give a reason for each such change.

**BASIC RULES FOR GIVING TESTIMONY**

1. Always tell the truth.
2. Listen to the question.
3. Make certain you understand the question asked.
4. Be sure to answer the question.
5. Take your time.
6. Answer only the question asked.
7. Answer orally and distinctly.
8. Do not guess.
9. Avoid boxing yourself in.
10. Don't argue with the opposing counsel.
11. If you forget the question, ask the attorney to repeat it.
12. Dress appropriately.
13. It is okay for witnesses or your attorney to have spoken to you.
14. Do not begin to respond to the question until the opposing attorney has completed the question and is silent.