DEPOSITION DOs AND DON’Ts

1. Do tell the truth.

   For all the reasons your mother mentioned when you were five years old.

   Don’t try and reason your way to an answer. If you don’t remember or don’t know, then say that.

2. Do listen to the question that you are asked and answer THAT question and ONLY that question.

   Make sure you understand the question. Tell opposing counsel if you do not.

   Don’t try to second-guess opposing counsel. Don’t try to figure out where he or she is headed by his or her questions. Let your lawyer worry about those issues.

   Therefore, answer only the question you are asked, instead of trying to anticipate where opposing counsel is going and therefore, answer questions that he or she has not asked. You may end up helping the other side or giving incorrect information instead of answering the question.

3. Don’t volunteer information. If you aren’t asked about it, don’t talk about it.

   Also, if you aren’t asked a question, don’t talk. A deposition is not a social conversation, so don’t feel compelled to fill periods of silence by talking.

4. Do be factual. Don’t allow opposing counsel to characterize your testimony.

   “I was driving 45 miles per hour” is a fact. I was driving fast or slow is a characterization.
“I complained to Human Resources on four occasions” is a fact. I complained frequently or infrequently is a characterization.

Sometimes, opposing counsel will try to summarize testimony by asking: Is it fair to say, then, that . . . If it is fair to put it that way - and precisely that way - then you may agree. If not precisely correct, however, you should rephrase your answer in your own words.

Don’t say something happened “always” or “never,” be factual and give specific examples.

5. Do use your own words.

It’s very easy to agree or disagree with what opposing counsel says. But when you agree or disagree, you are allowing his or her words to tell the story. Unless opposing counsel summarizes your position exactly, you should re-phrase your answer so that it is what you mean in your own words.

6. Don’t become too trusting. Opposing counsel is not your friend.

He or she isn’t your enemy either. But he or she is your adversary. Opposing counsel has a right to ask you questions and to know the facts that you know and remember.

But DON’T let opposing counsel seduce you into his or her confidence. Opposing counsel wants to win this case as much as you do, because he or she wants to keep the client happy and cost the client as little as possible.

7. Don’t speculate.

You are responsible at your deposition for what you know and what you remember. You are not responsible for what you don’t know or don’t remember. The answer I don’t know is a valid answer so long as it is a truthful answer. The answer I don’t recall is a valid answer so long as it is a truthful answer.
[If you do know and say you don’t, that’s a lie. If you do remember and say you don’t, that’s a lie.]

If you feel comfortable making an estimate and confident it will be accurate regarding time, distance, or other similar topics, you may do so, as long as you make it clear that it is an estimate.

Do not speculate on what others may know or not know. You are not responsible for others’ beliefs and thoughts. You can’t say what other people thought or might have done unless you saw or heard something actually happen.

1. Don’t try to say it all. You can’t tell your whole story in one sentence (and maybe not even in one deposition).

Don’t even try. Opposing counsel is mostly interested in how you can help his or her case. Remember that we will have an opportunity to tell the whole story - focusing on the parts most favorable to our case - at trial.

In addition, if something that you say at deposition requires supplementation and/or correcting, your lawyer can use the time after opposing counsel has completed his examination to set the record straight.

2. Do focus on your case.

Most of the questions during a Plaintiff’s deposition are irrelevant to the case. Most of the questions are a waste of time (except insofar as the Defendant’s counsel gets a chance to see you as a witness and projects what kind of a witness you’ll make in front of a jury). The crucial questions are those that go directly to your cause of action:

What leads you to believe that you were discharged because of your race?
What facts do you have to show that you were not promoted because of your age?
Why do you believe you were demoted because of your disability?

These are the kinds of questions that go to the heart of your lawsuit. You should prepare for these questions seriously, even to the point of making a mental list of your facts before the deposition.

3. Do review all documents you are given during your deposition. If the attorney hands you a document and asks you a questions about it, READ IT BEFORE answering the question.

You should also review your complaint and your responses to interrogatories or requests for admissions (if any) 1 or 2 days before your deposition. You should have copies of these documents. If you have misplaced them, please notify my office immediately so that we can email you another copy.