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Do's & Don'ts of Depositions

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Your Presenters



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Clausen Miller, P.C. is national law firm that specializes in malpractice insurance defense via a team of smart, experienced, and efficient litigators. The firm has successfully defended thousands of lawsuits across the country.

Do's & Don'ts of Depositions

Introduction:

- Accountants can be deposed even when not a party to a lawsuit.
- Unwitting testimony can provide ammunition for a plaintiff.
- Lack of preparation can cause careless mistakes.
- What is the deposition process and how can a deponent prepare for, and conduct themselves, in order to mitigate the possibility of a malpractice risk?



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What is a deposition?

A deposition is...

- A formal part of the discovery process (“discovery”) which is part of the pre-trial access to facts and evidence.
- Discovery can take the form of subpoenas for documents, interrogatories (written questions), and depositions - verbal statements under oath.
- Purpose is to establish what a witness knows and preserve their testimony.
- Permits parties to know facts before trial, so there are no surprises, and learn the weak aspects of their cases in order to prepare ways to avoid or rebut them at trial.



A deposition is... (con't)

- a process that takes place outside of the courtroom where an attorney asks the witness questions of fact pertaining to the case which is recorded by a court reporter who later produces a transcript.
- All parties to the case may attend, and the witness often has legal representation.
- Questions may be broader than allowed in Court, but attorneys can object. The deponent does not ask questions, but merely answers.
- Deponents are under oath, and false statements can have both civil and criminal penalties.

POLL QUESTION

What is the primary reason for a deposition?

1. To provide a forum to respond to allegations.
2. To gather facts not available via normal rules of evidence.
3. To establish what the witness knows and preserve testimony.
4. To debate evidence with the opposing Counsel.



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When are depositions needed?

- Depends upon the facts of the case.
- Depositions provide a more complete picture of the events.
- An attorney can help guide you and protect your interests, particularly in complex matters with multiple parties.
- Gives parties the opportunity to ask direct questions of a witness to help build their case or defense.

Note: CPAGold™ provides additional coverage in the policy for subpoenas, and QBE will assign an attorney to assist you to respond. This is considered part of the early intervention/pre-claims process. Talk to your agent about this.

POLL QUESTION

When are depositions needed?

1. To make a good impression on the Judge
2. To meet opposing counsel.
3. To establish complete picture of the facts and events.
4. To put pressure on opposing witnesses.



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Deposition Preparation

Depositions Preparation – Part 1

- Meet with your counsel before to discuss the facts, the claims at issue, and to review your file.
- Don't memorize the contents of your file. Refresh your memory by reviewing the file. Counsel will guide you as to likely areas of inquiry, and help identify important documents.
- One misguided belief, is that an intelligent response will prove that the whole suit is a mistake.
- In reality, the less you say, the better.

Depositions Preparation – Part 2

- Do not teach. Leave that to experts.
- The deposition transcript is a document that is going to be used against you.
- Try to avoid giving the plaintiff's attorney ammunition.

POLL QUESTION

What should you NOT do to prepare for a deposition?

1. Meet with Counsel.
2. Read your file.
3. Memorize all pertinent papers.
4. Disclose to your Counsel any pertinent matters.



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During the deposition



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During the deposition – Part 1

- It is a ritualized interrogation, and can be a “fishing” expedition.
- Be professional, courteous, and answer questions with as much civility, and patience as you can muster.
- Cooperate with codefendants.
- Answer every question honestly and succinctly - do not elaborate. Respond directly exclusively to questions being asked.
- Don't be funny, cute, or sarcastic! Remember, everything said is going to be in the transcript, and may not read well.
- Listen to a question carefully, and have it repeated if unclear or confusing.
- If you do not understand a question, say so, and request plaintiff's counsel to rephrase it.



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During the deposition – Part 2

- Don't over talk. Don't nod or grunt. Don't mumble. The Court Reporter must be able to understand everything.
- You may be shown documents you have never seen before. If you are shown a document that you do not recall seeing, and asked a question about the document, take your time to review it. There is no time limit.
- When presented with a document, do not immediately begin talking. If there is no question before you, wait for one to be asked.
- It can take time to review a complex document, and you may have forgotten the question once you have completed a review. If this occurs, ask counsel to rephrase or repeat the question.
- Follow your attorney's lead if there is an objection or request for clarification.

POLL QUESTION

How should you behave during the deposition?

1. Be funny and endearing with opposing Counsel.
2. Be professional, courteous and civil
3. Elaborate your answers to opposing Counsel's questions.
4. Answer questions quickly even if you don't understand.



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Things to avoid



Things to avoid – Part 1

- Multi-part or compound questions – break them down. Ask the counsel to restate a question in a simpler form.
- Repetitive questions – these seek to find a contradiction in your testimony. Be consistent, and refer to previous answers.
- Questions that require speculation or guessing – DON'T - stick to the facts.
- If you don't know, say so. If you don't remember, say so.
- Don't give a lengthy answer and go off on a tangent. Resist this temptation. Do not answer the question that you think that the plaintiff's counsel should have, or intended to, ask. Treat the questions literally, and answer them specifically.



Things to avoid – Part 2

- Skimming the facts. If the response requires a complex answer, give it, and be as detailed as possible. Go through each aspect in excruciating detail, and make sure you are familiar with facts and each technical term.
- Do not fight with plaintiff's counsel. A deposition is a ritualized interrogation where the plaintiff's counsel has the advantage and asks the questions. Plaintiff's counsel can suspend the deposition to seek an order from the court compelling you to answer a specific question or to be more responsive.
- However, do not take everything the plaintiff's counsel suggests as the truth. For example, if the lawyer's question includes a fact that is not accurate, then you should correct the inaccuracy.
- If you receive a question that includes an incorrect assumption, you should correct plaintiff's counsel before providing a substantive answer.



POLL QUESTION

What should you not do during the depositions?

1. Look to your counsel to make objections or seek clarifications.
2. Pause to review before responding to unfamiliar documents.
3. Over talk and confuse the court reporter.
4. Wait for clear question before responding.



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Special Considerations



Special Considerations– Part 1

- **Plaintiff's counsel is not your friend.** They have agendas, and will attempt to elicit testimony that supports their particular view of the case. Sometimes, plaintiff's counsel try to give an appearance of being a friend, or ally. Do not forget, that they do not have your interest at heart.
- **Never answer compound questions.** If a question has two or more parts, do not answer it. Your attorney should object to this question; or you must state that you can't answer, because there are multiple questions being posed. Ask for clarification.
- **If a question is preceded by a long-winded statement,** wait for the end of the statement/question, then ask for clarification as to what the question was. Answering a convoluted question, may imply your agreement with the statements just made. Don't get sucked in by this common tactic.



Special Considerations– Part 2

- **Don't respond to double negatives.** The plaintiff's attorney may inadvertently (or purposefully) attempt to confuse you by asking a question that contains a double negative. Don't assume you know what they mean, just ask for clarification.
- **Avoid non-verbal communication.** A deposition can be videotaped, which means you must be conscious of your physical appearance. Nervous ticks, eye rolling, stuttering, or large gesticulations can be distracting to a jury if some of the footage is used at the trial.
- **A Deposition Is Not Emotionally Satisfying.** The deposition should not be confused with a day in court. The deposition is not an opportunity to tell your side of the story with any realistic hope that this story will have a beneficial impact on the life of the case. Plaintiff's counsel are paid to display a poker face and often feign indifference, disbelief, or boredom. This is intended to undermine your confidence, and should be ignored.

POLL QUESTION

What are the most common traps in depositions?

1. Questions that require speculation.
2. Multi-part and double negative questions.
3. Questions that exceed your knowledge or memory.
4. Leading questions and pre-question statements.



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After the deposition



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After the Deposition

- Within two to three weeks following the deposition, the stenographer will prepare a verbatim **transcript** of everything that was said.
- As the testifying witness at the deposition, you have a **right to read and review** the transcript for accuracy. It is always advisable to **take advantage of your right** to read and review the transcript.
- There is one page of the deposition that is known as the **errata sheet**. This sheet provides space for you to identify the page and line number of transcription errors and requests that you write in the corrected testimony. Once you have prepared the errata sheet, you should next sign and date the signature page.
- Depending upon the stipulations that counsel enter at the onset of the deposition, it is sometimes necessary for you to **sign the signature page before a notary**; other times it is sufficient to sign the signature page under the pains and penalties of perjury.

POLL QUESTION

The most important fact about a deposition is?

1. It is a forum to tell your side of the story.
2. You can change any of your answers.
3. You can make changes in the errata sheet.
4. You may sign the deposition if required.



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Conclusion



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A deposition can make or break a case.

Any insecurity you have will come out. Go over your case with your attorney until all of your doubts disappear and you are truly confident.

If you present a strong, professional front, the plaintiff's attorney will realize that you will also make a formidable opponent on the witness stand.

You might get lucky and get your lawsuit dropped or dismissed; if not, you will (at the very least) have set yourself up well for the trial.

POLL QUESTION

What cannot happen after a deposition?

1. You can review the transcript.
2. You can change your answers.
3. You can make minor changes in the errata sheet.
4. You may sign the deposition if required.



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Thank You

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