INTRODUCTION - DEPOSITIONS

You have been called as a witness in a deposition in a civil case. A deposition consists primarily of questions by lawyers and your answers, under oath, with your lawyer present. A deposition *is not* a trial. There is no judge or jury present, and nobody is there to keep score or award a verdict. Charm, persuasiveness, sincerity, and other appealing human attributes are largely wasted in a deposition. The result is a written record known as a transcript, which will be used (or misused) by the lawyers when the actual trial occurs. Therefore, the most important task for a witness in a deposition is to keep the transcript clear and accurate.

Although it often has some of the appearances of informality-a conference room setting, a casual atmosphere among counsel-a deposition is a difficult, often artificial and unnatural procedure that demands your careful attention and preparation. The notion that you can just "go in and tell my story" without intensive preparation is an invitation to disaster. This memorandum is intended to help you *begin* the process of preparation. Please study it, think about it, and use it as a basis for asking questions when you meet with counsel.

The oath you will take at the beginning of the deposition is to tell "The Truth, The Whole Truth, and Nothing But The Truth." Like many things in our normal lives, we tend to blur it all together into one image. Like many things in the precise and artificial world of a deposition, you need to examine the entire statement, and make sure that you understand and seriously consider all three parts. There are, after all, three parts to the oath for good reasons.

In a deposition, the hardest part of following your oath is to tell "Nothing But The Truth." This takes a surprising amount of preparation, concentration, and internal discipline. Much of what we do or say to keep a normal, casual conversation going must be avoided at a deposition. In friendly conversation, to avoid looking rude, or foolish, or uninformed, we often embellish or shade our knowledge or understanding, in perfectly innocent and acceptable ways: We guess, we assume, we hide our lack of memory or knowledge, we gossip, we talk too much, and we speak without careful thinking. Changing these normal habits is hard work, but *essential* for a successful deposition.

There are two basic principles that should guide you in this effort. The first is that it has often been said that the three most important rules for any witness are "listen, listen, and listen." To respond appropriately and precisely, you must listen to every word of every question with a focus and discipline that none of us use in our normal conversations. The second basic principle sounds even simpler, but it is actually very hard to achieve. Most witnesses get into difficulty *not* because they are trying to

lie, but rather because they are trying *too hard* to tell the truth. As a result, they end up going beyond what they truly know or remember. So the other principle is, simply, "don't try too hard." The ten rules that follow are really just guides to help you put these two principles into practice.

PREPARATION RULES

1. Take Your Time (Or: "He who writes the rules wins the game.") Follow this rule and the rest will be much easier. There are no shortcuts: The harder you try to move things along and "be helpful," the longer and harder your testimony will be. Instead, right from the first question, pause a good five seconds after every question before answering. Don't wait until the middle of the testimony to do this; it will be much harder. Remember, it's your oath and your testimony: You should control the pace, whether it makes someone else happy or not. The written record looks the same whether you take a minute or a second to formulate your answer, but your answer will be better for the extra thought. Waiting five seconds after every question will help you in several ways:

a. It will keep you from feeling rushed. People in a hurry make mistakes. Lawyers know that, and some may try to push you faster just for that reason.

b. It will give you time to make sure you really understand the question, and to think about the best, most truthful, and most precise answer.

c. It will give your lawyer time to object, if appropriate. If there is an objection, stop, listen, and wait until you are advised to continue.

2. ALWAYS REMEMBER YOU ARE MAKING A RECORD

(Or: "You can't un-ring the bell.") The most important person in the room is the only one who doesn't say anything: the court reporter or other person taking notes. Everything-questions, answers, comments: everything-may be taken down. Answer each question as if you were dictating the first and only draft of an important document (you are!). This may help force you to discipline yourself to make a thoughtful, careful reply.

3. TELL THE TRUTH

(Or: "Always tell the truth: It makes it so much easier to remember what you said the first time.") This is more than a useless maxim; it is a rule of self-preservation. Lying here is not only a crime: It's foolish. Assume that the questioner is more experienced than you think, and that this includes the ability to make a witness who is playing fast and loose with the truth very uncomfortable. Telling the truth includes being yourself, warts and all, without being defensive.

4. BE RELENTLESSLY POLITE

(Or: "Don't tease the bear.") Everyone here has a job to do. Yours is to listen hard, think carefully, and answer questions if you can. Theirs is to ask questions. Don't waste your time and energy belittling or attacking their job: thinking, saying or implying negative things about the investigation, the questions, and so on. You will accomplish nothing, distract yourself from your difficult job, and needlessly antagonize the questioner. If there is a reason for things to get difficult, leave that to your lawyer: Stay above the fray.

5. DON'T ANSWER A QUESTION YOU DON'T UNDERSTAND

(Or: "What we have here is a failure to communicate.") When you review your transcript, you will be amazed at how many questions were really incomprehensible (or misunderstood). Do not wait until it is too late. You have a right to clear, simple questions; and to answer only questions you understand. Even the best lawyers sometimes phrase questions badly, and even the best witnesses get distracted and don't hear a question. Don't answer. Just say, "Would you please rephrase the question." No more than that. Understanding includes being comfortable with a question, the language, and the assumptions that are included. If you're not comfortable with any of these, don't answer it. Challenge bad assumptions (When did you stop beating your spouse?").

6. IF YOU DO NOT REMEMBER, SAY SO

The pace of litigation today means that testimony often doesn't happen until months or even years after the events at issue. This is not your fault; it's just reality. Events or facts that may have been insignificant to you even when they happened may now, much later, have taken on some significance to the questioner, but you can still only testify to what you precisely remember. This is surprisingly unnatural and difficult: In our normal conversations, we rarelyjust say "I don't remember," and stop. Rather, we guess and assume to help keep the conversation going (and maybe to make ourselves look smart). Don't do it in testimony: If you don't have a clear and precise memory, just say, "I don't remember," and stop.

7. DO NOT GUESS

If you are not sure or don't know, say so. Just say "I don't know," and stop. This, again, is unnatural, but critical. In our everyday conversations, we guess, estimate, and make other kinds of imprecise comments to keep the conversation going, knowing that we will never be cross-examined or held to our precise statement. Everything changes here: You can be only as precise as you are precisely and absolutely certain. "Guessing" includes two broad categories.

FACTUAL DETAILS

This is particularly dangerous with things like dates, times, and numbers. If you say "I don't know," and the questioner pushes for your "best memory," or something like that, make it very clear that "I would have to guess." If he or she still pushes for your "best guess," give a range that leaves you a generous "margin of error." Don't narrow that wide range unless you're absolutely certain.

INFERENCES

The other type of guessing we also do every day, but may not recognize as guessing: We draw conclusions, inferences, and opinions. ("Why did X do this?"; "What did Y mean by that?"). You may know enough about the issue that there's a good chance you are right. That's fine in a normal conversation. In testimony, 95 percent isn't good enough: It's 100 percent or nothing. That means that you can only testify about what you precisely saw, heard, or did.

8. DO NOT VOLUNTEER

You are there to answer the questions carefully, briefly, and precisely, and then go home. Keep It Simple. If a question is too long or complex, don't answer it: Ask that it be rephrased.

Whatever the question, keep your answer as short, simple, and narrow as possible, and then stop. If a questioner doesn't follow up with more questions, and thereby misses other information, that's not your problem. Do not:

* volunteer information beyond the narrow lines of the question; * help educate the questioner;
* help the questioner ask better questions;
* explain your thought processes; or
* fill in the silences.

9. BE CAREFUL WITH DOCUMENTS AND PRIOR STATEMENTS

If you are asked a question about a document (or about something that is contained in a document), ask to see it. This includes a prior statement or transcript. If you are not allowed to see it, say so and don't guess about what it says. The document will speak for itself. If you are allowed to see it, read the entire document or statement carefully, as if it were your first time, consult with your counsel if it would be helpful, ask to have the question again, and then focus not just on the words the questioner may have picked out, but on the whole portion of the document related to that issue.

10. USE YOUR COUNSEL

Don't be shy about talking to your counsel for whatever reason, and however often. Whatever anyone might say, it doesn't "look bad" on the record, and it will not reflect badly on your testimony. Whether it's because you don't understand a question, aren't comfortable with a new issue, just thought of something, want to review a document, made a mistake, or just need a break, talk to counsel (outside the room, if necessary). Use your counsel in other ways, too:

* Do not agree to supply any information or documents requested by the examiner. Counsel will either answer the request or will take the request under advisement.
* If an objection is made to a question, listen to the objection very carefully. You may learn something about the question and how it could be handled from the objection.

Finally, treat the testimony seriously. Avoid any attempt at levity. Pomposity is the occupational disease of the legal profession: You will be hauled over the coals for not taking your solemn oath seriously if you make jokes or wisecrack. Avoid even the mildest obscenity and avoid absolutely any ethnic or sexual slurs or references that could be considered derogatory. There is no such thing as "off the record." If you have any conversation with anybody other than your counsel, be prepared for questions on that conversation.