

Preparing Plaintiffs for Depositions— A Top 10 List You Already Know

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I spent the first half of my career deposing plaintiffs and the second half of my career presenting plaintiffs for their depositions. I also get brought into cases late and review the plaintiffs' depositions. After all of this, I came to the realization that plaintiffs are often well prepared on how to answer case specific questions and underprepared on the general rules of depositions. I am not sure why this is the case, but it often causes the plaintiff to get herself into unnecessary trouble.

Let me be very clear, I am not saying that I know more than anyone on this subject or that anyone should rely on this list. Most of you can stop reading now because you likely know everything on this list, and much more. This is something I put together for myself after years of making mistakes. But if this helps one young plaintiff's lawyer prepare a client for her deposition, then it is worth writing.

The top ten list below is not exhaustive and does not deal with case specifics. If you use any part of this list, please supplement it with the issues that are important to you and important to your case.

The first part of each section is for the lawyer. The second part is a brief summary of the speech I give to my clients. Sometimes it's longer, sometimes it's shorter. It depends on the client and the case. Please use any part as you see fit.

1. **Tell the truth** – I know what you are thinking. Duh. I get it, everyone knows this rule. But if everyone knows this and teaches it to their clients then why are so many plaintiffs caught in lies? Why are so many plaintiffs impeached with their depositions at trial? Even if you think your witness knows this rule, it does you no harm to reinforce it during your deposition prep.

During your deposition, you are under oath, just like in court. So, the number one rule is to always tell the truth. No matter what happens during your deposition, I can fix it as long as you tell the truth. Even if you think the truth hurts your case, nothing hurts a case more than if the judge or the jury thinks you lied under oath. This means do not exaggerate, do not embellish, and do not tell white lies. The other side will not tell the jury you are an embellisher, they will call you a liar. Juries do not forgive liars. So please remember to always tell the truth.

2. **Do not guess** – This is the most unfollowed rule on the list, by the witness. No matter how many times you tell your client to never guess and never try to remember the answer, their natural instinct is to try to remember the answer and then try their best to answer. It is important that you stress this rule because it goes against the nature of a witness, especially when being questioned by lawyers who are conversational or nice.

Do not guess. Let me repeat that, do not guess. Unless you are completely sure, do not answer the question. Saying “I don’t remember” or “I don’t know” is a perfectly acceptable answer to almost any question. Do you know what happens if you guess at an answer and are wrong? The other side will say you are a liar. The other side will not say you simply got an answer wrong; they will say you lied under oath. If you are 95% sure your answer is correct, then there is a 5% chance you will get the answer wrong. It is better to say you don’t remember than to be accused of lying under oath. However, if you feel like you have to give an answer and you are not 100% sure, then please start the answer with a qualifier. For example, “I am not exactly sure, but I think . . .”, “Its been a long time so I might be wrong, but . . .”, or something like that. Keep in mind, the lawyer on the other side will try to get a definitive answer, but you must keep saying you aren’t completely sure unless you are 100% sure of the answer.

3. **Do not explain or elaborate** – This is the most unfollowed rule on the list, by the lawyer. What often happens during deposition prep is that the lawyer says “Don’t elaborate. Just answer the question. But, if they ask you about A, make sure you tell them B and C. And if they ask you about X make sure you tell them about Y and Z. But don’t elaborate about anything else.” This doesn’t work. Your client is nervous and likely has never been deposed. Your client is not going to remember which subjects to elaborate on and which ones to keep short. Lawyers also sometimes feel like short answers won’t get the full story out there and will make the case harder to settle. I understand this concern, but elaborating hurts more than it helps.

Do not elaborate, do not explain, and do not help the lawyer out by providing context. Just answer the question. That is all. If the question is “Do you know what time it is?” The answer is not “Yes, its 10:00am”. The answer is “Yes”. Make them ask the next question. Keep in mind that this is the other side’s chance to question you, not mine. If you elaborate or explain your answer, you are helping the other side. Your natural instinct will be to make sure the questioner understands why you gave an answer, or you might feel like your short answer is confusing and you need to elaborate. Fight that instinct. Just answer the question. If there is any confusion, I can clean it up later.

4. **Be nice, but the other lawyer isn't your friend** – When I was a defense lawyer, after every deposition I would write a status report about the witness's testimony. The very first thing I addressed was how the plaintiff presented herself and how the jury will view her. So, being nice and polite is very important. But often times the defense lawyer acts nice and lulls your client into a false sense of friendliness. This will cause her to let her guard down and break one of the other rules on this list. It is important that your client is polite, but she should not help the other side.

When you are testifying, you need to be nice. The number one thing the other side is assessing is how a jury will feel about you. If the jury doesn't like you, it makes it very difficult to win the case. So, try not to be rude or make snide comments. It is perfectly fine to express emotions. You do not ever need to try to suppress your feelings or emotions, but if you do express your feelings, please do so politely. However, please remember, that being polite does not mean helping the other side. Sometimes the lawyer will act like your friend to try to get you to drop your guard. The lawyer is not your friend and will happily do anything to dismiss your case, and not lose a minute of sleep about it. Please keep your guard up the entire time, no matter how nice the lawyer is during the deposition.

5. **This is a deposition, not a conversation** – I was lucky to be trained by lawyers who taught me to be conversational and not talk like a lawyer. As a result, I often get more from a witness than I should. But this ability can turn into a curse when the other side preps the witness properly. If the witness pauses and thinks about each answer before speaking, it causes me to lose my rhythm. This is exactly what you want your client to do. You do not want the defense lawyer to get into a conversation with your client. You want the deposition to be a slog for the other side.

Always remember that the lawyer who is asking you questions is the same lawyer who will try to get your case dismissed. He is not your friend. Do not let him get comfortable. I need you to think about every question before you answer. Every question. Even the easy ones. It may not feel like the lawyer is trying to trick you, but he could be. Every question is its own island, it does not relate to the previous questions. If the deposition feels awkward and stilted, then it is going well. Often times, the lawyer will look at you in silence after your answer and hope you will say more. Do not say more. Look at him back. Embrace the silence. This process is called a deposition, not a conversation.

6. Answer the question – Sometimes defense lawyers will ask really dumb questions. I hope it's a strategy, but I am not sure. When this happens, an untrained witness may look at you and ask, "Do I have to answer that?" All this does is make the deposition longer than it should be. Worse than that, it may make your client look like she is trying to hide something. It is important that unless you tell her otherwise, she should just answer the question and move on.

There may be times when the lawyer will ask you questions that seem weird or have nothing to do with the case. You may think to yourself, why do I have to answer that question. Just answer the question. The lawyer may be simply fishing around or trying to get you frustrated by asking irrelevant questions. Don't let it get to you. Don't ask me if you can answer, just answer. If there is ever a time that I don't want you to answer, don't worry, I will make it very clear that you should not answer. Unless I enthusiastically tell you otherwise, just go ahead and answer the question. This is also true if I make an objection. Sometimes, I will object, but you still need to answer unless I tell you not to.

7. Don't give the defense lawyer too much credit – There are times when the defense lawyer asks my client a question and it seems to throw off my client's rhythm and make her lose confidence for no reason. For example, in a TBI case, the defense lawyer asked: "You hurt your head in the past, right?" I sat there knowing she never hurt her head before this case. But my client hesitated for a while and sheepishly said "I don't think so". For the next few questions, my client was uncomfortable. At the break I asked her if she had ever hurt her head in the past. She said "No, of course not". Shocked, I asked her why she didn't say that to the lawyer. She told me that the lawyer asked the question with such confidence that she thought he must have seen something that she didn't remember. I explained that he didn't see anything; he was just fishing around. If I had prepped her properly, then none of this would have happened.

There may be times when the lawyer will ask you something in a way that makes you think he knows something about your past that you may not remember. He doesn't. Lawyers know that you can't possibly remember everything that happened in your life, so they ask questions in a way that makes you think they know something. Don't be fooled. They are likely just fishing around trying to see if they can confuse you. The likelihood of the defense lawyer knowing something I don't know and something you don't remember, is almost impossible. Just assume he is fishing around and answer the question. Remember; listen to the question, think about it, don't guess, and answer the question if you know the answer.

8. **Ask for the document** – You need to empower your client to always ask for any document the defense lawyer specifically references. This is common sense. But you also need to empower your client to ask for any underlying documents the lawyer may be relying on. For example, if the lawyer asks about a specific visit to a medical provider, you want your client to ask for the medical records for that visit. This does two things: it prevents the lawyer from misstating what the records say and it bogs down the lawyer. Finally, the lawyer may look at papers during questioning in a way that makes your client think he is reading from an important secret document. You need to empower your client to ask to see the documents so she can feel comfortable knowing he is not reading from anything important.

If the lawyer talks about a document during the questioning, you need to see the document. Please do not ever talk about a document that you are not looking at. But more than that, if the lawyer references something that relates to a document, you need to ask for the document. For example, if the lawyer asks you “Did you complain of head pain at the hospital on June 8?” You need to say, “Can I please see the June 8 record before I answer.” Even if you know the answer without looking at the record, you need to ask to see the record. Finally, if the lawyer acts like he is reading something while he is asking you questions, you have every right to ask to see what he is reading from. He may not show it to you, but you can ask to see anything you think he is referring to.

9. Documents can be wrong – Plaintiffs often feel like they can’t disagree with documents and records. You need to make sure your client knows that documents can be wrong, especially medical records.

Just because something is in a document or record doesn’t mean you have to agree with it. If you disagree with a record, please say so. Let me give you an example, I had a client named Bob who was in tremendous pain every day. One day he went to the doctor’s office and the nurse said “Hi Bob, how are you?”. Bob gave the offhanded response of “I am fine.”. In his medical records, that nurse wrote “Bob is fine today – no pain”. When the lawyer showed him the medical record, he asked Bob: “So you were not in pain that day, right?”. Bob looked at the record and said, “That’s what it says, so I guess that’s right.” At the break I asked Bob if he really had no pain on the day of the visit. Bob said: “No, I was in so much pain”. I asked him why he testified that he had no pain, and he told me he didn’t feel like he could disagree with an official medical record. Please remember that you don’t have to agree with any documents, especially medical records. They can be wrong.

10. **Nothing bad is going to happen** – This is probably your client’s first deposition. She is nervous and worried. In fact, she probably thinks she’s going to mess up the whole case if she doesn’t do a good job in her deposition. After hundreds or thousands of depositions, you as the lawyer may forget how scary depositions can be for your client. It’s your job to make sure she is comfortable. She is looking to you for help and support. Give it to her.

No matter what happens, everything is going to be okay. I know depositions are scary, but you are going to be great. Even if something bad happens, I can take care of it. Even if you don’t remember anything I tell you and you don’t follow any of the other rules, as long as you tell the truth, I can fix anything that happens. Just be you, and everything will be fine, I promise.