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What You Should Know About Testifying at a Trial or Deposition

Introduction

It's natural to feel somewhat nervous and upset about testifying as a witness at a deposition or trial. You may be worried that you will say the wrong thing. You may be concerned about having to say something that will hurt a friend's case. Or you may be annoyed that serving as a witness interferes with your duties at home or at work. This pamphlet should help make you more comfortable in your role as a witness before the lawyers start asking you questions.

You are more likely to be called to testify at a deposition than at a court hearing, since most cases are settled before trial. Your job as a witness is to provide truthful answers to questions asked by the lawyers. Your answers will be evaluated along with the other evidence gathered in the case.

You may be entitled to a fee for appearing as a witness at a deposition or trial. You may also be reimbursed for travel costs. If you are not a party to the case, you can determine your entitlement by asking the lawyer who issued the subpoena to you. If you are a party to the case, ask your own lawyer.

Receiving a Subpoena

A subpoena is a court order for you to appear as a witness at a deposition or in court. The subpoena may also require that you bring certain documents with you. A lawyer issues a subpoena to make sure that you appear and testify. Do not ignore a subpoena since your failure to appear could place you in contempt of court.

The subpoena should contain the name, address and telephone number of the lawyer who issued it. Read it carefully. If it requires documents, you must search your records to see if you have them. If you do not possess these documents, you ordinarily need not prepare new ones. Check your subpoena again before your deposition or day in court. Remember to bring any records that the subpoena requires. And take the subpoena with you, since it may be helpful if you have difficulty locating the office or courtroom where you are to appear.

Preparing to testify

If you are a party to the lawsuit, your attorney will help you prepare for your deposition or court appearance. If you are not a party, you should contact the lawyer who issued the subpoena to determine the subject of inquiry for your testimony.

You can also ask the lawyer for comments about what to expect from the opposing attorney and the length of the deposition or trial. If you are called to testify at a lengthy trial, the attorney who issued the subpoena may be able to arrange for you to make yourself available on a standby basis. If so, you may be able to wait at work or at home until the time that you are needed.

During the deposition or trial, you may be asked whether you have discussed your testimony with anyone. Such questions do not mean that it is wrong to talk to your lawyers about the case. You are allowed to discuss the facts of the case with the lawyers, the parties, their investigators, or others. It is common for lawyers to talk to witnesses in order to prepare for a trial. However, if you are a party to the lawsuit, you should not talk to the other party's lawyer without first contacting your own lawyer.

Giving Deposition Testimony

A deposition is one of the tools that lawyers use to investigate the strengths and weaknesses of both sides of a case. The deposition makes a record of your recollection of the facts at a time when they are relatively fresh in your mind.

If you receive a subpoena for a deposition, it will probably instruct you to go to a lawyer's office. Depositions usually take place in a conference room at a law office instead of a courthouse.

Testifying at a deposition is similar to giving testimony at a trial, except that no judge or jury is present, and objections to questions are less common. The lawyers representing each party to the case will be present at the deposition along with a court reporter hired to make a transcript of the proceedings.

At a deposition, you testify under oath, under penalty of perjury. If later testimony at trial conflicts with your deposition testimony, you will have to explain why. For these reasons, the testimony that you give at a deposition is just as important as the testimony that you give at a trial.

The court reporter will make a written record of the questions asked by the lawyers along with your responses. After the deposition, the court reporter will provide you with a copy of your deposition transcript so that you can read and sign it. You should correct those areas of the transcript where your testimony was incorrectly recorded. The answers you give in your deposition will be compared to the answers you give at trial, so it is important to make sure that the deposition transcript is accurate.

Testifying in Court

If the case goes to trial, you may have to testify before a judge and possibly a jury. If the lawyers determine that your testimony is essential, they will issue a subpoena directing you to testify in court. If you have given a written statement or deposition, you should review your statement or deposition transcript before the trial to refresh your memory and avoid contradictions. If necessary, call the clerk of the court or the lawyer that issued the subpoena to get directions to the courtroom.

Wear business attire when testifying in court. Avoid overly casual or very dressy clothing that would appear disrespectful or distracting to a judge or jury. Ask the lawyer what to wear, if you are in doubt.

The Oath

Before you testify at a deposition or trial, you will take an oath to tell the truth. You can be prosecuted for the crime of perjury if you lie when you testify. Don't let your personal judgment about the merits of the case or your connection with the parties affect your testimony.

Cross Examination

One of the parties to the case may dispute your re-collection of the facts. After the lawyer who issued your subpoena finishes questioning you, the opposing lawyer may try to undermine your credibility with questions that test whether your account of the facts is true and impartial. The lawyer who subpoenaed you cannot help you answer the questions during your cross-examination by the other attorney. You are on your own. A lawyer asking questions may try to agitate you, insult you or make you angry. Do not fall for these traps. Do your best to stay calm and rely on the truth of your testimony. If a question is improper, the other lawyer may object and the judge will rule on it. If you hear an objection, wait for the judge's ruling before answering.

Refusing to Answer

As a general rule, you must answer all questions asked when you are testifying. However, you may not have to answer questions that involve certain privileged communications or personal information that has no bearing on the case. Privileged communications are most commonly seen where the witness is a clergyman, physician, lawyer or a member of certain other professions. If your attorney knows that you possess privileged information it can be discussed before you testify. During testimony, your attorney may object to inquiry into such privileged information or to testimony that has no bearing on the case. If the opposing lawyer believes that the question is proper, the lawyer can ask a judge to order you to answer the question. If the judge decides that the question is proper, you will then have to answer it.

You can also refuse to answer a question if you reasonably believe that the answer might help to establish that you have engaged in criminal activity. You should consult a lawyer before testifying if you are concerned that your answers to some questions might provide evidence of your criminal activity.

Conclusion

Our legal system depends on the testimony of people like you. Judges and juries could not fairly decide the outcome of a case without the testimony of witnesses. Your own lawyer will help you prepare for your deposition or court appearance if you are a party to a lawsuit. If you are not a party and are being called for your knowledge of the facts, the lawyer who subpoenaed you will probably want to help you prepare. In either case, you can ready yourself by reviewing this brochure and the following checklist.

Checklist for Testifying at a Deposition or Trial

1. Review the Facts: Before you testify, try to picture the facts of the case in your mind, including people, objects, distances, and exactly what happened at the scene.
2. Listen Attentively and Speak Clearly: Listen carefully to each question and answer clearly, slowly, and loudly enough so that your answers can be heard and understood by all in the room.
3. Avoid Distractions: Avoid distracting mannerisms while testifying like chewing gum or tapping your fingers on the table.
4. Answer Truthfully and Directly: Answer questions to the best of your recollection and do not attempt to shape your answer to help or hinder either party to the lawsuit. If you can answer with a yes or no, you should do so.
5. Understand the Questions: If you do not hear a question, ask that it be repeated. If you do not understand a question, tell the lawyer, who may rephrase the question or explain it to you.
6. Do Not Volunteer: Answer only the question asked and do not volunteer information or guess. If you don't know the answer to a question, the proper answer is "I don't know." If you cannot remember, say so.
7. Be Courteous: Remain courteous at all times and keep your temper in check. Do not argue with the lawyers or the judge. Joking is not appropriate.
8. Give Oral Answers: Do not nod your head for a yes or no question and do not speak while someone else is talking. Remember that the court reporter must be able to hear your answers to each question.
9. Pause for Objections: If a lawyer raises an objection while you are answering, wait for the judge to decide whether you may continue your answer.
10. Stick to the Facts: Do not exaggerate or guess. If what you say is an estimate, be sure you say so.
11. Rely on the Truth: No matter what happens, remember you can always rely on the truth.