

Your day in court

How to prepare an effective deposition **Interviewed by Meredith McKenzie**

Your business has found itself in the middle of a lawsuit and the other side wants to take your deposition. The testimony you provide at deposition can make or break your case. The time and resources your company has invested into the lawsuit may be rendered useless as a result of a bad deposition. You also run the risk of damaging your business.

“Your deposition needs to be treated the same as your most important business transactions,” says Scott K. Behrendt, senior attorney with Theodora Oringher Miller & Richman PC. “It’s a critical step in the legal process. Up until this point, allegations have been thrown around by each side. But a deposition is when witnesses are pinned down and these allegations are tested.”

Smart Business spoke with Behrendt about how to prepare an effective deposition and what to expect during your deposition.

What is the purpose of the deposition?

A deposition is where witnesses are placed under oath and provide testimony, oftentimes videotaped, in response to questioning by an opposing attorney. It has the same force and effect as if provided in court before a judge. The opposing side will use it to evaluate the case’s strength and value. It can be used in resolving the case at mediation. It is unlikely that opposing parties will be willing to settle without first taking your deposition. It can be used as evidence during trial and as a tool by the opposing side to obtain additional information and documents from other sources identified during the deposition.

How should you prepare for a deposition?

You need to be willing to spend the time and effort to work closely with your attorney to prepare. The more prepared you are, the less anxious you’ll be and the less stressful the experience.

Trust your attorney. He or she has likely participated in dozens of depositions and can help guide you through the process. Your attorney will review the ins and outs of a deposition with you and tell you what to expect. He or she will also review the facts of the case, pertinent documents, the types of questions



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that will be asked, and how to give direct, concise and honest answers. This preparation is an opportunity for you and your attorney to discuss details in confidence and develop a game plan to deal with both the good and bad facts of the case.

What can you expect to happen at your deposition?

Expect a very thorough and tenacious attorney on the other side asking tough questions. Expect the unexpected — your deposition will focus on all aspects of the case as well as other information that may not be directly related to the case but still relevant. Don’t underestimate your opponent.

You need to listen carefully to the questions and stay focused. A deposition could last several hours or span several days, depending on the circumstances. Allow your attorney an opportunity to object before answering questions. Remember that a deposition is a legal record, and your attorney’s ability to object before you give an answer, or possibly instruct you not to answer, is crucial.

Remember to answer the question asked, not the question you may want

to answer. A deposition is not necessarily the time for you to tell your story. If you cannot answer a question because you don’t know the answer, make sure to state that instead of guessing or attempting to ‘wing it.’ Answer truthfully and don’t attempt to cover up bad facts that you believe may hurt your case.

Maintain your composure and control your emotions during the deposition. Also make sure not to argue with the opposing attorney. Your body language, tone, dress and attitude are all important, because the deposition may be videotaped and later played to a judge or jury.

Do you always need to prepare for a deposition?

Some attorneys may recommend that you not prepare, review important documents or refresh your memory on key facts so you can then testify that you ‘don’t remember’ anything. You have no legal obligation to prepare, and if you truthfully don’t recall something, that’s a correct answer.

Some attorneys believe pretrial discovery is about gamesmanship and keeping your cards face down on the table. They try to keep the other side in the dark as long as possible, which can happen if you don’t prepare for a deposition. Some clients prefer to prepare ‘on the cheap’ and will only meet with their attorney on deposition day to prepare. There are potential benefits to not fully preparing, but in my experience it is typically better to prepare when weighed against the downsides:

- You may look foolish and potentially untruthful regarding key issues.

- You will be less able to put context or spin on important documents, events or incriminatory circumstances.

- You may want to be specific in your testimony at trial and rebut allegations in the case, but a skillful attorney can crush your credibility when you try to change your testimony and explain why you couldn’t recall something at deposition. After all, if you couldn’t remember anything during deposition, how is it that years later at the trial you somehow remember everything? <<

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