

# Preparation for Testifying Guidelines

## Risk Management Division

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## **Preparation for Testifying**

If a State employee is involved in or witnesses an accident, there is the possibility that they may be called on to give testimony at either a deposition or trial. The better prepared, more professional and credible that employee is, the more weight their testimony will carry.

### **Depositions**

What is a deposition? A deposition is a question and answer session where the witness is questioned, under oath, by the attorney for the other party to the lawsuit. The attorney for the State employee is also present. There is no judge or jury present at a deposition, only a court reporter who records all testimony.

A deposition is the best advice for attorneys to use to determine the credibility of all witnesses and to evaluate what type of impact the witness would make on a jury. Appearance and demeanor of witnesses at the deposition stage of a lawsuit can play a large role in determining whether or not the case proceeds to trial.

### **Testimony**

When preparing to give testimony either for a deposition or at trial, remember:

- **Tell the truth.** Armed with the facts, your attorney can help provide you with the best defense possible, and opposing counsel can make it very uncomfortable for anyone trapped in a lie.
- **Tell it to the judge (or jury).** Remember the jury (or, if there is no jury, the judge) is your audience. Make sure they can hear and understand your responses.
- **Dress and speak conservatively.** Dress as if you were attending church. Your appearance gives added weight to the jury's evaluation of your credibility. Never curse nor speak derogatorily about others.
- **The opposing counsel is not your friend.** Opposing counsel may try to charm you or disarm you with small talk. Never forget that he or she has an ulterior motive. Don't join in even if your attorney banters with the opposing counsel.
- **Take the lawsuit seriously.** Even if the claim seems minor, treat it as if it were a million-dollar case. Before testifying, discuss with counsel what you should do to prepare yourself to testify.
- **Talk to your lawyer about what to bring with you.** Do not bring notes, books, etc., with you to the deposition or trial unless your lawyer has approved this during your pre-testimony preparation. If you relied on the notes, books, etc

in refreshing your recollection, they can be taken from you and the other side can cross-examine you about them.

- **Cooperate with your attorney.** Learn from your attorney what the potential defenses of the case are, what law is in your favor and the defense theme your attorney has adopted.
- **Never say never.** Words like “never,” “always,” “definitely,” “without a doubt,” or “absolutely” could come back to haunt you. Avoid them whenever possible. Opposing counsel can destroy your credibility by searching out the one inconsequential exception to your statement.
- **Strike a balance between making accurate statements and leaving yourself room to maneuver if information later changes.** Don’t say it happened on March 6 if you aren’t positive it did. Instead, say early March.
- **Don’t volunteer information.** “Just the facts” is the golden rule to remember when testifying. Say only “yes” or “no” if the question can be answered that way. If necessary, supplement with “to the best of my recollection.” Accidentally giving more information than necessary can turn a minor lawsuit into a nightmare.
- **Temper, temper!** This is probably the most important rule to remember. Avoid losing your temper at all costs. Politeness is a cardinal rule. Getting angry, sarcastic or argumentative can make you appear unprofessional.
- **Never answer a question you do not fully understand.** Put the burden on the opposing counsel to present a clean, understandable question. Simply state, “I’m sorry, but I don’t understand your question.”
- **Think before speaking.** Allow several seconds to elapse before answering any question to give your lawyer time to formulate objections and to give you time to think through your answer. Your testimony should not be at a “conversational” pace.
- **Never explain how you arrived at certain answers.** For instance, if you reflect aloud that a meeting had to have been held in January because such and such happened in December, prior to the meeting, that is volunteering potentially damaging information.
- **When testifying about conversations, make it clear whether you are quoting verbatim or paraphrasing.**
- **Never label you testimony.** Avoid phrases like “Honestly, I’m doing the best I can.” The jury may wonder if your other testimony has been less than honest.

- **Beware of the “tell-me-everything” question.** Especially in depositions, opposing counsel may ask you to tell them everything you remember about certain events. Respond by, “It is very difficult to remember absolutely everything at this time. I am sure there are other things that may have happened, but I can’t recall them right now.” This lets you add details later without having your previous testimony impeached.
- **Don’t refer to your state of mind.** Avoid referring to your reaction by saying things like “I was shocked to read...,” or “Yes, and I’m sure it was true.” Avoid characterizing people or events as “good” or “bad.”
- **When testifying about an exhibit, ask to see it before answering.** By looking at the exhibit you will be able to refresh your memory and be clear about what you are referring to and what it contains.
- **Don’t volunteer information about items that may exist in other documents.** Don’t refer specifically to documents not listed as exhibits because the other side may not be aware of their existence.
- **Don’t let opposing counsel put words in your mouth.** Rephrase his or her words into a sentence of your own. Correct any false statements the opposing counsel makes.
- **If the attorney appears confused about technical aspects of your business, don’t try to educate.** This is an attempt to get you to volunteer information.
- **Recess is “time out.”** Use recesses to confer with your attorney in private. If you feel upset, use this time to vent your anger.
- **Respond courteously to interruptions.** If opposing counsel interrupts you, wait for them to finish and then state courteously that you were interrupted before you could finish. Then answer the question completely. By the same token, do not interrupt opposing counsel.
- **Don’t agree with any summaries of your testimony.** If opposing counsel attempts to summarize your overall testimony state, “The record will show what I said.”
- **If your attorney objects to a question, don’t answer it unless your attorney instructs you to do so.** Listen closely to the objection to understand how the question should be handled. For example:

“Objection, compound question.” A warning the question has two parts and may be too complex to answer correctly.

“Objection, calls for speculation.” Your answer usually should be “I don’t know.”

“Objection, assumes facts not in evidence.” The question may contain facts not known by you.

“Objection, asked and answered.” You have already answered that or a similar question.

- **Avoid making jokes.** You will appear less credible if it appears you are not taking your solemn oath seriously.
- **Once you’ve answered the question, remain silent.** Sometimes the opposing counsel will look at you as if waiting for you to say more. Sit quietly, maintain eye contact with the attorney, and wait for the next question.
- **Discuss flashes of insight with your attorney first.** Don’t disclose any sudden recollections until you first confer with your legal representative.
- **Inconsistencies happen.** If you are caught in an inconsistency, don’t get upset. State the reason for the inconsistency if you are asked to. Discuss it with your attorney who can decide if it is necessary to rectify the mistake.
- **Preparation is the key to credible, professional testimony that will protect your interest and your agency’s.**
- **Always be on your best behavior.** Remember, when approaching or inside the courthouse, anyone you pass may be a judge, a juror, a hostile witness, or an opposing attorney. Always conduct yourself accordingly.
- **Be courteous.** Being courteous is one of the best ways to make a good impression on the court. Be sure to address the judge as “Your Honor.”
- **Avoid distracting mannerisms.** Avoid distracting your listeners from what you are saying by eating mints, chewing gum, rattling coins or keys, or fumbling through a file.
- **Talk like yourself.** Answer the questions with the words you normally use and feel comfortable with. Do not use someone else’s vocabulary or other stilted speech.
- **Try to avoid “bureaucratize” when testifying to a judge or jury.** Remember a judge or jury may not be familiar with state government and may not understand short-hand references – like initials – to programs or agencies.

- **Give an audible answer so the court reporter can hear it.** Don't nod your head yes or no. Don't say "uh-huh" or "unh-unh." Remember the court reporter is writing everything you say and may not understand or correctly record non-verbal answers.
- **Testify only about what YOU know.** You generally will be allowed to testify only to what you personally said, heard, or did. You usually cannot testify as to what others may know, or to conclusions, opinions, and speculations.
- **Be reluctant to express opinions in areas outside your expertise.** Be careful not to second-guess what other people did and why. It is easy to have 20/20 hindsight, but without knowing all the factors surrounding another person's actions, such retroactive analysis is speculative and you are not required to guess.