

Appearing as a Witness in Court or Deposition

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By John R. Riley, Esq.
Montgomery, Little & Soran, P.C.
5445 DTC Parkway, Suite 800
Greenwood Village, CO 80111
Jriley@montgomerylittle.com
303-779-2736

I am sometimes asked to provide help to architects and engineers on how to prepare for trial or deposition testimony. Other topics that are related to testimony include what are the rules for a deposition, what is the purpose of a deposition or a video deposition, what information is to be provided with a request for a project file, and what role does an expert witness play in a case. The following are my guidelines on these topics. Like all advice, these guidelines are based on watching the opposite happen.

A) Appearing as a Witness in a Civil Case

- a) Your only obligation is to Tell the Truth.
- b) Answer the question asked. (Don't answer a question that was not asked).
- c) Do not ramble. Do not volunteer information. Answer the question, stop and wait for the next question. Do not tell the lawyer how much you hate the lawyer or the lawyer's client. In the alternative, the lawyer asking you questions is not your Friend.
- d) Use complete sentences.
- e) Testimony should not be like pulling teeth. (It looks like you are hiding something). Do not be evasive. Speak precisely.
- f) You do not get to ask questions.
- g) Do not argue with the attorney who is cross-examining you. Answer the question. Let the jury observe the lawyer arguing and raising his voice compared to your patient and reasonable behavior. (i.e. "Wipe that smirk off your face Mr. Lawyer" is not tolerated by either the jury or the judge).

- h) If you lose your temper or control, then the lawyer has “won.” I think the idea about level-headedness is best symbolized by Oscar Wilde’s famous words, “Always forgive your enemies. Nothing annoys them so much.”
- i) Do not guess or speculate. Testify only about your own knowledge. Do not guess or estimate time, distance or other measurements unless you are sure your measurement is correct.
- j) If you do not know the answer, tell the lawyer that you do not know. “I don’t know” is an acceptable response.
- k) If the question is outside your area of knowledge, i.e. something done by another person, do not guess, speculate or otherwise offer your opinion.
- l) Sometimes offensive questions may be asked:
 - i) Have you ever been charged with a crime? convicted of a felony?
 - ii) Have you ever been disciplined by the Board of Architects, Professional Engineering, and Professional Land Surveying?
 - iii) How much money do you make? How much money do you make as an expert?
 - iv) How many times have you been sued?
 - v) Have you ever had an affair?
 - vi) You must answer these offensive questions because at the time of a deposition the information may either be relevant or lead to the admissibility of relevant evidence. The Judge may order you to reappear for a second deposition if you fail to answer a question.
- m) You may be asked, what is your habit, custom and routine? Answer this question as completely as possible.
- n) A lawyer may ask you the same question a different way five or six (or more) times. Do not lose your patience or argue. Answer the question. Your lawyer will object at some point in time.
- o) Take your time to respond. Pause after a question (but not too long) to make sure you understand it and know the answer before you respond.
- p) Correct mistakes. If you realize something you said was not accurate, interrupt the questioning and correct it.
- q) If you must look at a document in your file or some other document to answer a question, tell the lawyer that you need to look at a document.

- r) If you are provided a document and then are asked questions about it, analyze and understand the document before you answer any questions.
- s) Prepare for your testimony. It is reasonable to have reviewed documents prior to giving a deposition or trial testimony.
- t) If you make assumptions in your answer, state that they are assumptions in your response.
- u) Do not answer “yes” or “no” if a question cannot be answered accurately with a yes or no response. Speak for yourself – do not always agree to yes or no questions.
- v) If you have a lawyer representing you, do not look to your lawyer for answers or suggestions. The lawyer is not testifying. You are.

B) General Deposition Procedures

- a) Wait until the lawyer finishes asking the question before you respond. This allows the court reporter to get an accurate question and response. The court reporter can only transcribe one person talking at a time. It also allows you to time to phrase your response.
- b) If the lawyer interrupts your response by asking the next question, tell the lawyer you have not finished your response and then finish it.
- c) If you do not understand a question or do not hear it (because you are thinking about your last response, the work you are missing, or when will these questions stop), ask the lawyer to repeat the question or rephrase the question so that you know what is being asked.
- d) Do not answer a question by nodding or shaking your head or saying “uh-huh.” Provide a “yes” or “no” response so that a clear record is established. A lawyer is not being rude if a verbal response is requested. The lawyer simply wants a clear record.
- e) If you need to take a break, ask for a break.
- f) Try and take a break every hour to hour and a half. This break allows you to get up, move around, get some water, and generally clear your head. Consistent breaks should help you keep your focus and patience. Witnesses wear down after several hours and you will hold up better if you take consistent breaks.

- g) The rules may provide that the deposition is limited to one day of seven hours.
- h) If you are testifying as a fact witness in a deposition, most rules provide that the deposition is to be held in the county where you reside, where your business is located or at such other “convenient place” as is determined by court order.

C) **Use of Depositions**

- a) If you are a party to a lawsuit, any other party can use your deposition testimony at trial rather than calling you as a witness.
- b) Your deposition can be used to contradict or impeach your trial testimony if your testimony at trial is different than your deposition testimony.
 - i) You will be asked whether you recall being deposed, the date and place of the deposition, and who asked you the question.
 - ii) Then you will be asked to recall whether you made the inconsistent statement.

D) **Demeanor**

- a) Being nervous is natural. If you are nervous it probably means that you are concerned about the process, you are more focused, and you are more likely to anticipate questions that will be asked. A person who is not nervous has probably failed to think about questions that may be asked or the reason(s) why their testimony is relevant to a case. I think that people who are not nervous are more likely to guess, speculate, are less credible, and provide answers that are damaging.
- b) Determine whether you are more comfortable looking the lawyer in the eye who is asking questions or somewhere else. Sometimes looking at a lawyer is distracting because of the body language that lawyer may use such as rolling their eyes, hand gestures, raised voice or smirking.
- c) Wear clothes that show respect for the process. Do not wear a hat. Do not wear a shirt that a person can read unless it is your company logo. Do not chew gum. Do not get a beer during the lunch recess.

- d) Turn off your blackberry or i-phone. I have seen a witness on the stand at trial get a phone call. Coincidentally, one of the attorneys on the other side left the courtroom moments before that call was received.
- e) When you are an observer at a deposition or at a trial do not react to any statements by any other witnesses such as rolling your eyes, sighing, or pounding the table. Such a reaction draws attention to the other person's testimony and may give more importance to that testimony than it otherwise would have received.
- f) At trial, take notes and write questions or comments on a piece of paper and give it to your lawyer. Your lawyer cannot listen to you and hear the statements of a witness at the same time.

E) **Video Deposition**

- a) A lawyer can take your deposition by video.
- b) Ostensibly, the reason for a video deposition is to present your testimony at trial by video. The reasons for the presentation of a video at trial include a witness who resides out of state, a witness who later dies, a witness who is otherwise unavailable for trial, and a party to a case.
- c) I believe the purpose of a video deposition is (a) to try and show you are not a credible witness because most people are not comfortable on camera or (b) to create a "settlement video" to document inconsistent statements. Do not take it personally. The lawyer may be trying to get you to lose your temper and catch it on film.
- d) Try and look into the camera when answering the questions rather than looking at the lawyer who asked the question. Your audience becomes the camera, not the people who are in the room. A person who looks the audience in the eye – the camera- looks more credible to the audience.
- e) A clip of your video deposition may be used at trial to impeach you. That is, if you answer the same question differently at trial than what you said at your deposition, then the clip of your deposition response may be shown.

F) **Styles of Questions**

- a) "W" Questions: Who, What, Where, When, Why and How? These types of questions result in you doing most of the talking.

- b) Putting words in your mouth (leading question) – Typically the lawyer wants you to agree to how the lawyer characterizes the question.
- c) If a question begins with the word “Did,” it calls for a yes or no response. It is also a leading question.
- d) If a lawyer wants you to answer a question yes or no and you cannot, tell the lawyer you cannot and then provide your response.

G) Providing Your File

- a) Provide your entire file including any contract, notes, drawings, soil reports, emails, correspondence, photos, and billing records.
- b) Provide your file as soon as possible.
- c) If your file is subpoenaed and you are not a party to a case, most attorneys are looking for relevant records related to a project. Get in touch with the lawyer who has requested the records and make arrangements to have your file copied so that you do not have to show up for a records deposition. In other words, you can produce your records on your own schedule rather than the lawyer’s schedule if you are responsive to a subpoena by making contact with the lawyer who has requested the file.

H) Acting as an Expert Witness

- a) You are not an advocate for the person who hired you. Look at the facts provided to you and determine whether you can or cannot support the work that was performed by the engineer or architect. I believe too many experts act as an advocate and testify based on who is paying them rather than providing objective information.
- b) Objectivity gives you credibility. If you cannot support the work performed by the architect or engineer, tell the lawyer that the work does not meet the standard of care. If you can support the work, then tell the lawyer you believe the work meets the standard of care.
- c) The Standard of Care means you must compare the conduct of the engineer “with what an engineer having and using that knowledge and skill of engineers practicing engineering at the same time, would or would not have done under the same or similar circumstances.”
- d) The Standard of Care does not mean that engineering standards from 2011 should be applied to what was done in 2006 if the original design work was in

2006. The Standard of Care means what a reasonable engineer would have done in 2006 if that is the time period that the original work was done. In Colorado, there is no requirement for a “local standard” for engineers in a certain town, but instead what is the statewide standard for an engineer.

- e) Qualifying as an expert is based on your education, training and experience. The purpose of expert testimony is to provide testimony in the form of an opinion that will assist the trier of fact. If you have experience as an engineer for a custom house, then you should be qualified as an expert regarding the engineering standards for a custom house.
- f) Expert testimony means that you get to give an opinion rather than merely providing factual testimony. For example, do you have an opinion about whether the engineering design work for the residential condominium units performed by the engineer of record, met the standard of care? What is that opinion?
- g) You should be qualified as an expert witness for work that you performed that is at issue in a lawsuit. In other words, you should be able to offer opinion testimony about the work you created.
- h) An expert witness must provide a report regarding all of your opinions. The report must provide all data or information that you have considered.
- i) You also must provide a resume or C.V. (which identifies your qualifications), a list of all publications within the last 10 years, the amount you are charging for providing the report and your testimony, and a list of cases that you have testified in during the last four years. The list of cases must contain the name of the case, the attorney who hired you, and where the case was pending. If you do not provide this information, there is case law that allows the other side to disqualify you from testifying at the time of trial.