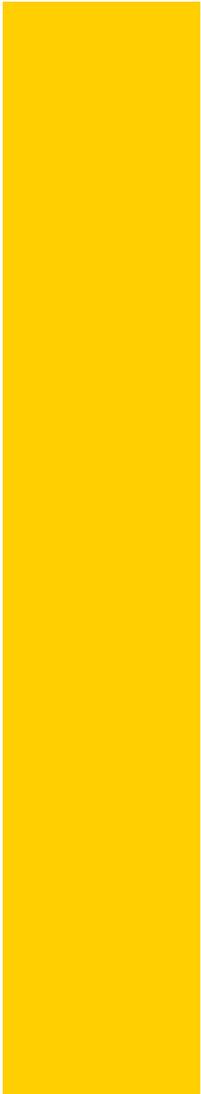
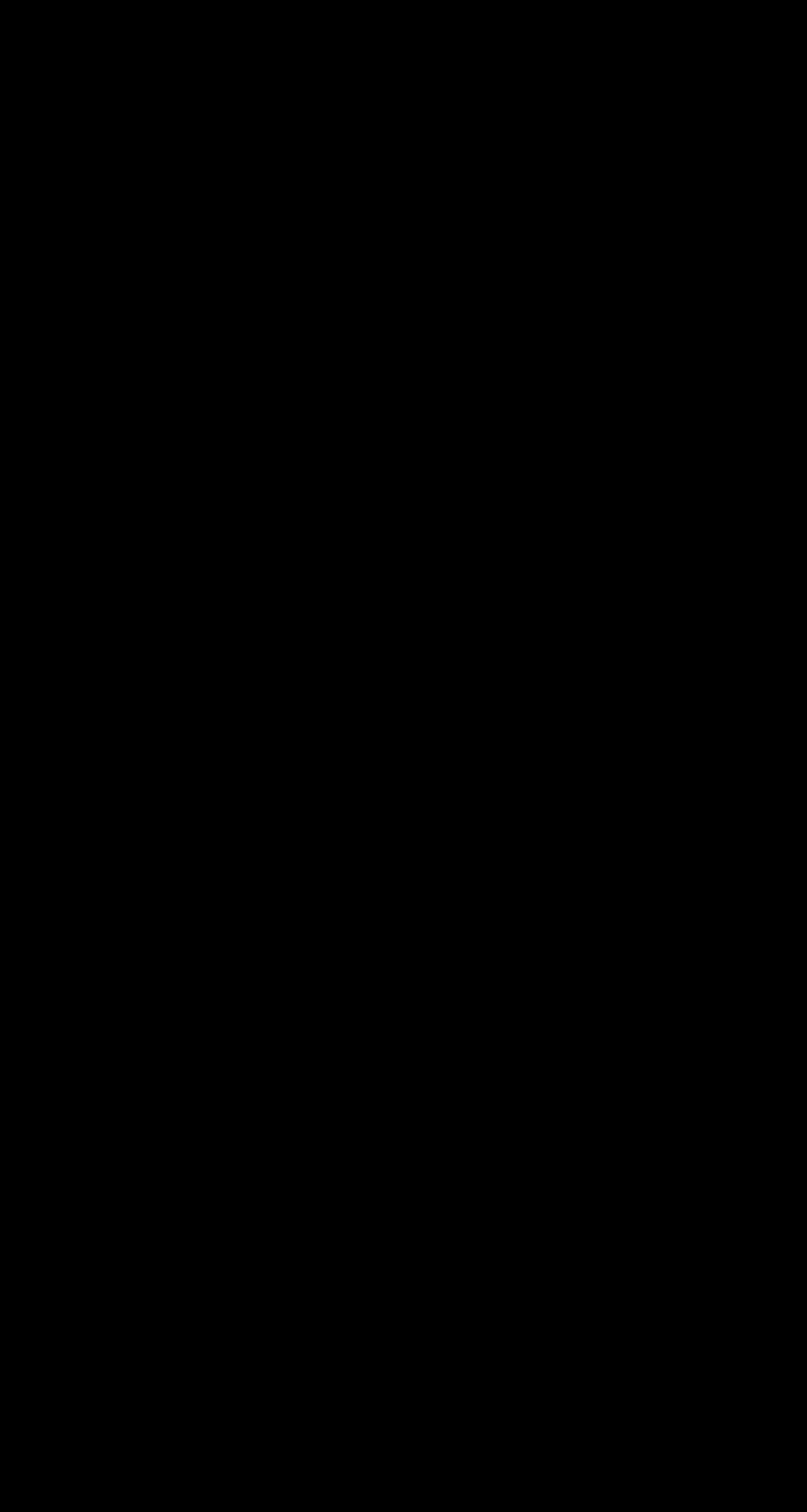


THE
EXECUTIVE
GUIDE TO

DEPOSITIONS

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EXECUTIVE DEPOSITION TIPS

Tip 1: Answer the Question

Do you know what time it is?

If you're like most people who are asked that question, you probably look at your watch and tell the questioner the time. But you didn't actually answer the question. You were asked if you knew what time it was. You inferred that he or she wanted to know the time.

In normal human conversation, inference is fine and expected. But in a deposition, your job isn't to infer the question you're being asked. Your job is to answer the question that's actually being asked.

The lesson here is that depositions are not normal conversations. They're not conversations at all, in fact. They're question-and-answer sessions in which your answers will be parsed and dissected by extremely capable technicians who have a very distinct agenda. Learning to answer questions in a deposition is a lesson in literalism.

Complicating matters is the fact that executives aren't accustomed to answering questions; they're accustomed to asking them, and they are generally uncomfortable being in the hot seat.

But being comfortable, or at least appearing to be comfortable, when answering questions is critical to a successful deposition. And depositions matter. They usually matter more than what is said at trial, mostly because what's said in a deposition can conceivably prevent a trial in the first place. If a trial does occur, and if there's even the slightest discrepancy between what's said at trial and what was said in a deposition, then you can be certain that the other side will try to make a convincing case that the interpretation least advantageous to you is the correct one. You want to do as little as possible to help your opponent accomplish that objective.

So, do you know what time it is?

EXECUTIVE DEPOSITION TIPS

Tip 2: You Control the Clock

If you're being deposed, you're trying to run out the shot clock. The opposing counsel, on the other hand, is running a fast-break offense to try to put you on edge. Don't let it happen. In order to properly answer, you must think about the question, and you can't do that if you allow the opposing counsel to rush you. The other side wants you to feel rushed so that you're not really thinking about each question before answering.

Sometimes, witnesses are in such a hurry to get through the deposition that they actually try to speed up the pace themselves. That is always a bad idea. As uncomfortable as it is to be deposed, it's even more uncomfortable to get something wrong in a deposition that hurts you or your company. Slow down and think. Within reason, you can take as long as you want or need to formulate a cogent, well-thought-out answer.

That simple truth can be easy to forget in the heat of a deposition – and it certainly can get hot in there. To help control the tempo and stay cool, use air and water.

Air, in the form of slow, deep breaths. Of course, you can't be too dramatic in the middle of a deposition, but making sure you're always breathing slowly and deeply is a very effective way of staying calm.

And, finally, always have a glass of water on hand. Pausing to take a drink of water is a great way to slow things down. But if you're so nervous that your hands are shaking, don't use this tactic. Any advantage you've gained by slowing down the deposition will be lost if you show your anxiety.

Remember: The other side in a deposition wants to throw you off and make you blow the game. Your job is to ignore LeBron James and make the best shot you possibly can.





EXECUTIVE DEPOSITION TIPS

Tip 3: Steer Clear of Innuendo

Executives might be tempted to aim disparaging comments at the opposing side during a deposition. Avoiding this urge can be difficult when opposing counsel is peppering an executive with questions designed to impugn his or her credibility, competency and intellect. But resisting the temptation can prevent depositions from careening into chaos.

When executives stray into the land of implication and scuttlebutt, they can open a Pandora's Box that might cause as much damage to their reputation and their case as they hope to inflict on the opposing side. Expect every snide comment and offhand remark launched against the opposing party to be hurled back, accompanied by demands of specific dates, times and locations of where these offenses occurred. If executives get too comfortable in depositions, these kinds of questions should jar them into wary discomfort.

The best advice in this circumstance is to take a deep breath before answering any deposition question, especially if the question is fraught with prejudice. If necessary, restate the question in a way you would like it to be fashioned. Then, simply state the facts as they would appear on any court record. After all, any answer given in a deposition is admissible in court.

EXECUTIVE DEPOSITION TIPS

Tip 4: Know Your Role in the Corporate Defense

If you work in the C-suite, it's assumed that you have a thorough understanding of the workings of your company. So it would make sense that executives would feel well-equipped to handle any questions regarding the operation of their company in just about any scenario. However, a wealth of institutional knowledge can give executives a false sense of security – especially if they're heading into a deposition related to company litigation.

If a company faces a lawsuit, the executives must understand the context in which they will be testifying and how their legal team wants them positioned in relation to the company's defense. Legal counsel can play an important role by making sure executives have key documents and by emphasizing which filings are especially important to the testimony that executives are being asked to provide. Further, company attorneys are invaluable in explaining the theory behind their legal defense, and exactly how executives fit into the defense strategy.

All too often, an executive will provide information through his or her testimony that fails to mesh with the corporate defense strategy. This may occur simply because the executive was unaware of exactly what areas were already covered in prior testimony or because the defense planned to make the information available through other witnesses.

Companies can avoid future legal headaches by requiring executives to work closely with legal counsel to determine exactly what information they will and will not be relied upon to provide during the deposition process, and by clearly defining each executive's role in the legal defense strategy well before they are called to testify.





EXECUTIVE DEPOSITION TIPS

Tip 5: Beware Ambiguities and Ventriloquism

Even though depositions often are held in run-of-the-mill conference rooms, they may as well be in courtrooms because what's said there has the same weight as testimony before a judge. And that's just the beginning of the differences between a deposition and a conversation.

When you're having a normal conversation, the person you're talking to probably isn't trying to get ammunition against you. But that's precisely what's happening in a deposition. The lawyer who's questioning you wants to use your words, either against you or against whatever side you're on.

The lawyer will use all the ambiguities in the English language, as well. Even words like "meeting" or "document" can be ambiguous. Is an informal chat in the hallway a "meeting"? Is an email a "document"?

Often during a deposition, the person being deposed will claim that the lawyer doing the questioning is "trying to put words in my mouth." But not even the most skilled ventriloquist can do that. If you remember nothing else, remember this: The witness controls the answer. And nobody can turn your testimony against you without using both the question and the answer.

The opposing lawyers also may try to get you to agree to their interpretation of what you're saying. But that's a very simple move to combat. Here's how:

Lawyer: "So, what you're saying is ABC?"

Witness: "I wouldn't say that. I would say XYZ."

Even if XYZ is only slightly different from ABC, if you're more comfortable with XYZ, then by all means say that and don't agree with ABC in any way.

EXECUTIVE DEPOSITION TIPS

Tip 6: Lose the Ego

Executives face many perils in a deposition, but perhaps none is more dangerous than their own egos. Few executives got where they are by being shy, retiring types. They probably achieved success the old-fashioned way: by being disciplined, demanding, type A workaholics.

That can be great for a company's bottom line, but it doesn't always play with juries. In the court's eyes, a high-level executive is no more or less important than a janitor. Reining in one's ego is sometimes the hardest part of witness preparation, but it pays off.

Attorneys know how prickly executives can be, and they use that to their advantage by trying to get under the executives' skin. They want the executives to forget all the good advice their lawyers have given them and lose their cool.

Smart executives don't fall for it. They put their egos aside, listen to the question, and give a well-thought-out answer. They don't try to come across as know-it-alls, and they're not afraid to say they don't know the answer to a question when they honestly don't.

Nor do they take potshots at the other side or the other side's attorney. Such remarks don't go over well with jurors. They prefer humility, honesty and sincerity – traits that some executives may find hard to demonstrate.

Most executives are accustomed to asking the questions, not answering them. But in a deposition, an attorney can (and will) follow up on an answer given by an executive. The attorney, not the executive, decides when to end the discussion about an issue, so the executive does not get the last word. Not having the final say causes many executives to be poor witnesses in a deposition simply because they just are not accustomed to the unique dynamic involved.





EXECUTIVE DEPOSITION TIPS

Tip 7: Practice Makes Perfect

The most important step in preparing for a deposition is a full-blown, video-recorded cross-examination dress rehearsal – minus opposing counsel, of course.

Video reveals whether you're listening to and understanding the question, and whether you fall for ambiguities and false premises. You also want to make sure you understand the theory of your company's case and can articulate the evidence to support your position. Depending on the circumstances, saying "I don't know" can be exactly the answer the other side wants.

Another important reason to record the dress rehearsal is purely cosmetic. Most people don't realize how they appear on camera. Are you sitting up straight? Does your striped tie look like a TV test pattern? Is your hairstyle distracting?

It's vitally important to watch yourself on video before the real deposition in order to correct what may very well be cosmetic impediments that can nevertheless prejudice a jury.

Finally, it's a good idea for you and your attorney to switch roles: Let your lawyer be you and you act as the opposing lawyer. This role play gives you the chance to pose your own false premises and inject ambiguities in order to see how your lawyer corrects them. This exercise is good on many levels and makes tangible and concrete what had previously been a fairly intangible and amorphous concept.

Depositions are difficult and, more often than not, at least a little unpleasant. But the better prepared you are before heading into one, the more likely you are to come off as trustworthy, honest and sincere.

The law firm Ahmad, Zavitsanos, Anaipakos, Alavi & Mensing P.C. frequently helps executives navigate depositions in complex commercial litigation, energy, intellectual property and other types of cases.

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