

WITNESS CHECKLIST

Provided by Snider & Horner, PLLC

Suggestions For Giving Accurate Testimony

These are useful pointers to assist you in giving accurate testimony in court or in your deposition. Even if you have testified many times already, these pointers will be helpful. While testifying is potentially stressful, you will comfortably provide accurate and truthful testimony if you carefully review and follow these suggestions. You can minimize anxiety, confusion, and other problems by remembering and following these rules.

The first and most fundamental rule is to TELL THE TRUTH. This sounds easy, but it is not. To tell the truth, you must follow many other rules.

1. *Understand the Question.*

Listen to the question. Pay attention. You cannot tell the truth if you have not heard and understood the question. If you do not understand the question, you must ask the questioner to make the question crystal clear before you answer it. Many problems arise from failure to listen to the question. This often happens when the witness assumes that he knows what the question is and stops listening before it is finished. Watch out for ambiguous references to “he/she,” “they,” “it” and vague time references in the question. Here’s an example.

Question: She says that you were there an hour later when she did this. Is that true?

To answer this truthfully, you must know what is meant by “she,” “there,” “this,” and “an hour later.”

It is not a sign of ignorance, weakness, or lack of cooperation to require reasonable clarification of questions. It is a sign of ignorance and a casual attitude to truth to answer questions that you do not understand. Know that lawyers often ask confusing questions because they are thinking ahead to the next question, are not using notes,

have confused or misstated the facts, have misunderstood your earlier answers, or are intentionally ignoring your earlier answers.

2. *Think before Answering.*

Do not say “no” if the true answer is “I do not recall.” “No” means absolutely not. “I do not recall” means what it says. The latter answer may well be more accurate than the former.

Question: Have you ever met a person named David Jackson?

This question refers to your entire life and is so broad that it is doubtful that you can truthfully say “no.” It is not the truth to say “no” if the correct answer is “I am not sure.”

Question: Have you ever seen this document before?

If your answer is not “yes,” the true answer is likely “I do not recall” or “I am not sure,” because, otherwise, you are stating, under oath, that you know absolutely that you have never seen that document in your life.

3. *Don’t Accept Opposing Counsel’s Statements.*

Do not accept a “fact” merely because the attorney questioning you says it. While the fact may be accurate, if you do not know that, you cannot truthfully accept it.

Question: You discussed the problem with Mr. Smith when you reviewed this letter with him, didn’t you?

While you may have discussed “the problem” with Mr. Smith, if you do not recall having reviewed *the letter* with him, say so.

WITNESS CHECKLIST

Provided by Snider & Horner, PLLC

4. *Do not “play lawyer.”*

Don't try to figure out why the attorney is asking you a particular question or set of questions if the reason is not immediately apparent. This distracts you from listening to the question and answering truthfully. Indeed, the lawyer may be confused. She may not even know why the line is being pursued and she may not know what she is talking about.

Do not assume, particularly in a deposition, that the line of questioning is relevant to anything. There is not necessarily a reason for every question. In a deposition, the lawyer may well ask a broad range of questions on subjects about which you know absolutely nothing simply to learn whether or not you know anything about those matters.

5. *Focus on the Question.*

Devote all of your energy to answering the question accurately and not worrying about why it was asked. Give *every* question your complete concentration and focused attention. There is no such thing as an unimportant, minor, or “throwaway” question. A careless answer to a casual, “unimportant” question is not the truth. If you are distracted, say so and pause to collect your thoughts. Never answer without complete focus on the question.

6. *Remember the First Rule.*

You are not required to know everything. Do not hesitate to answer “I don't know” when that is the truth. Do not react to counsel's disbelief or skepticism and decide that you know something which you do not. There are endless possible questions to which you do not know the answer. Do not let counsel make you feel that you are hopelessly uninformed or concealing something because you truthfully answer those questions “I don't know.”

If the true answer to a question is “no,” that is the truth no matter how many times and in how many different ways the question is asked. You can expect opposing counsel to repeat questions on points when he or she is not pleased with your answers. Do not feel that counsel's repetition somehow requires you to give a different answer unless, of course, you decide to change your testimony because it is not accurate.

When in doubt or in panic, remember the first rule, “Tell the truth.” If you are confronted with a surprise question, and you remember this rule, you cannot go wrong. Do not be concerned about whether you “should” say something that the question calls for. If the question requires an answer, give the true answer.

Be accurate in everything you say.

Understand that the best way to cause the jury to disbelieve *all* your testimony is to make an inaccurate, exaggerated, unfounded, or false statement. This is true of the most minor matters as well as major matters. The jury expects and deserves the truth you have sworn to give.

One answer shown to be untruthful can sink all of your testimony. The judge can instruct the jury that a witness who has falsely testified on a material matter may be regarded as having falsely testified on other matters as well, which is only common sense. It matters little to the jury whether the false or inaccurate testimony concerns a minor matter or an important one.

Since the jury cannot talk back to the witness or ask questions, some witnesses forget that every juror is listening to your every word and evaluating you constantly. The jury will welcome your candid, accurate testimony.

An attorney may ask you if anyone told you what to say in your testimony. Understand that the only thing I am telling you to say is to tell the truth. Everything else I am telling you is simply how to do that.

WITNESS CHECKLIST

Provided by Snider & Horner, PLLC

7. *Documents and Statements.*

Prior to testifying, you must review all statements or communications you have made about the matter, and you must know any factual allegations made in any complaint or answer filed in your behalf. You should be familiar with all answers which you have made to interrogatories, to requests for admissions, and you must review any documents which you have produced to the other side. You must review all of your own correspondence on the matter or written material that came to you, e.g., copies of letters authored by others. If other parties have given interrogatory responses or deposition testimony about you, you should know what they said.

Take all the time you need to review all such written material.

Unless you are required, by subpoena or by a notice to produce documents, to bring documents with you to your deposition or court testimony, it is not necessary to bring documents. If you want certain documents available to you for reference during your testimony, be sure to review them with us during your preparation.

8. *Analyze Documents Carefully before Answering Questions about Them.*

If a document is important enough for the attorney to use in questioning you, you should give it the same importance and scrutinize it carefully before you answer. Do not assume that you know the document already. You can easily confuse it with some other document. For example, if you are asked to “look at” a letter, before answering questions about it, do just that and take all the time you need. Look at:

- (a) the letterhead, if any;
- (b) the date;
- (c) the person to whom it was sent;

- (d) the recipient’s full address;
- (e) the name of the author of the letter; and
- (f) persons to whom copies are noted.

Only after examining these parts of the letter should you read - carefully - the content of the letter.

If you follow these rules, you will indeed have “looked at” the letter and you will be prepared to tell the truth in answering questions about it. You cannot do this if you simply glance at the letter and ask for the question.

If the document is lengthy, you are not required to review and absorb it instantly. You can request a recess from the deposition or the trial and take all the time you need or, if you can do so comfortably, you can simply and slowly review that document for as long as necessary while everyone waits. Do not be rushed.

9. *Do Not Argue.*

Lawyers argue. Witnesses testify. Answer questions truthfully without arguing with the attorney asking the questions. You will be distracted by argument. You will be diverted from telling the truth and you will not focus on the question.

Remember that the attorney may indeed be trying to upset and/or confuse you and that if you permit yourself to be confused or upset, you cannot tell the truth. If a pitcher in a baseball game permits himself to be upset, he cannot perform well, which is why the opposition tries to upset him. This does not mean that your answers must be devoid of emotion or conviction. It does mean that you do not want to let your emotions control you and cause you to say things you do not mean.

WITNESS CHECKLIST

Provided by Snider & Horner, PLLC

Let the questioner be the one who is upset. Know that if the questioner harasses or bullies you, it is because you are a strong witness and your testimony is frustrating the lawyer. Stay above the battle. Let the jury focus its anger on the lawyer by your contrasting patient and reasonable behavior.

10. *Harassment.*

Know that I can object if opposing counsel harasses you, but I will not necessarily object at every single opportunity. I want the jury to hear from you, and not me, as much as possible. If opposing counsel is argumentative, but you are handling that comfortably, I may not object, even though I can. The jury will identify with you and will not welcome the examiner's antagonism as long as you are testifying truthfully.

Do not be distracted if opposing counsel's sequence of questions seem to jump around in time, or if counsel is otherwise disorganized in presenting the sequence of events.

11. *Do Not Volunteer.*

Respond only to the question asked. Do not volunteer information not requested. If you are asked for your name, do not give your address, social security number, date of birth, and the names of all members of your family, as some people do through nervousness. None of those things were asked for and they are not responsive to the question. You need only answer the question asked. If the attorney asking the questions wants more information, he will ask another question. If you volunteer, you will needlessly prolong your testimony.

At trial, do not worry if the questioning by opposing counsel leaves an incomplete impression. We will deal with those matters with our own questioning to you if they are important.

12. *Cross-Examination.*

While being questioned by opposing counsel, pay no attention to: (a) the tone of voice of the questioner; (b) suggestions in the question that tell you what the answer is; or (c) the attitude of the person asking the question.

The questioner's attitude is irrelevant. All that counts is the question. Disregard sarcasm, skepticism, raised voice level, suggestions that the answer is obvious, and all other attempts by counsel to influence your answer. Be wary, also, of the attorney who is friendly and congenial as he quietly and subtly tries to discredit you. The lawyer cross-examining you is not your friend, whatever his or her style.

Know that if counsel cannot attack you on important points, he or she may attempt to magnify and emphasize some minor point. Thrashing around on some minor point will not make it important and the jury knows that. Do not cooperate in this tactic by denying the obvious or refusing to admit something that is true.

Look at the jury or, if there is no jury, look at the judge. You are testifying to the jury or the judge and not to the lawyer asking you the questions. While you will occasionally look at the examining attorney, do not forget the jury. It is important that you do this, even though your natural tendency is to watch the examining lawyer at all times. Your eye contact should be with the jury and not with the attorney. Speak up and speak clearly. You must be heard by every member of the jury.

Understand that you, not the examining attorney, are the centerpiece. You are there to tell the facts to the jury, not to convenience the lawyer. The jury wants to know what you have to say.

WITNESS CHECKLIST

Provided by Snider & Horner, PLLC

13. *Pay Attention.*

You must concentrate on the proceedings at all times while testifying. Do not relax and become inattentive after you have become comfortable in the witness chair. Pay attention to everything that occurs while you are testifying. Do not permit occasional boredom with familiar and irrelevant questions to affect your close attention. This is more often a problem in depositions than in court.

14. *Be Cooperative.*

The jury is anxious to hear the truth. The jury does not like the witness who acts too important to be bothered with having to answer questions, who resents that something she says is open to question, who is pompous, who is always right no matter what, who is sneering or disrespectful to anyone, including opposing counsel or who, worst of all, says things that insult the intelligence of the jury.

Cooperative does not mean meek or timid. When you are sure of something, let the jury know that that is the truth.

15. *Take Your Time.*

You are not subject to a time clock or a deadline, particularly in a deposition. If you need time to tell the truth, take the time. Pause after every question (a) to be sure you have heard and understood it, (b) to decide if you know the answer, and (c) to consider the accurate answer. Remember that if you were giving your testimony by writing your answers instead of orally, you would devote time and energy to writing accurate answers. Your oral answers require the same time and concentration.

In a deposition you can take all the time you need to consider the question before responding.

Do not let the examiner control the rhythm of

the testimony by giving quick, rapid answers to rapid questions. Take your time to answer even the simple questions so you will remember to take time with the more complex questions.

Do not be lulled by a sequence of quick short questions, e.g., four in a row to which the answer is a simple yes and a fifth throwaway question at the end to which the answer is *not a simple yes*.

Question: You told Mr. Smith to write this letter?

Answer: Yes.

Q: And you told him what to say?

A: Yes.

Q: And he wrote the letter?

A: Yes.

Q: And he sent the letter?

A: Yes.

Q: And you had approved it?

A: (Be alert not to give an automatic “yes” answer).

16. *Correct Mistakes.*

If you realize that you have said something that was not accurate, interrupt the questioning and correct your answer. Otherwise, you are not telling the truth. You should do this even if the inaccurate statement was given long before you realize your error. You should not finish your testimony without correcting testimony that must be corrected if you are to tell the truth. Everyone makes mistakes--and it is perfectly normal; but you do need to correct it. You are not telling the truth if you knowingly leave the mistake uncorrected. If you do not realize a mistake has been made until your deposition has finished or

WITNESS CHECKLIST

Provided by Snider & Horner, PLLC

you have left the witness stand at trial, inform us as soon as possible of this mistake.

17. *Preparation.*

Understand that it is perfectly proper for you to have reviewed these suggestions and to have met with counsel in preparation for your testimony. You will likely be asked to describe all documents which you reviewed in preparation for your testimony and to identify any persons, in addition to counsel, with whom you spoke as part of your preparation.

18. *Depositions.*

Your role at deposition is to answer only the questions asked. This is not the trial. The judge and jury are not present to hear your side of the matter. You will likely be asked no questions by me at your deposition unless, perhaps, a few questions are necessary to clarify some ambiguity. Do not be concerned that the “whole story” is not told at your deposition. The deposition is for the exclusive benefit of the party asking the questions and that party is entitled to learn only the information asked.

Just as you direct your answers at trial to the jury, and not to the lawyer asking the questions, at your deposition you can direct your answers to the court reporter who is taking down your testimony. This will remind you that everything you say is being recorded and that you must take your time to be accurate. Focusing your gaze on the court reporter will also help you to avoid looking at counsel asking the questions, if counsel is distracting you.

19. *Your Own Knowledge.*

Be sure to distinguish between what you know from your own knowledge and what you have *heard*. Assume your wife told you she came home at 10:00 p.m. on a certain night. You came home at 11:00 p.m.

Question: What time did your wife come home that night?

Answer: I don't know.

Q: Do you have any knowledge about when she came home?

A: I know that she was home when I came home at 11:00 p.m.

Q: Do you have any other information about when she came home?

A: Not of my own knowledge, but I know what she told me.

Q: What did she tell you?

At this point, there may or may not be an objection to what she told you. Note that each of these answers accurately responds to the question but does not volunteer information.

20. *Objections.*

Listen to the objections made during your testimony. If you do not immediately understand the objection, pay no attention to it. Do not get distracted by objections which are not clear to you. If the objections mean something to you, fine. If they are confusing, forget them.

21. *Refreshing Recollection.*

If the other attorney shows you a document or a photograph or tells you someone else's testimony, and asks if that refreshes your recollection, tell the truth. If your recollection is not refreshed, say so. Do not accept the lawyer's suggestion that your recollection *must* be refreshed by this material.

WITNESS CHECKLIST

Provided by Snider & Horner, PLLC

If your own lawyer tries to refresh your recollection with something, and your recollection is not refreshed, do not worry about this. If you do, you will not pay attention to the questioning.

expected that the question would be asked and that you have given the matter a lot of thought and that your best estimate is one hour. This shows that you did not make your estimate casually. That too, is the truth.

22. *Estimates.*

The jury is entitled to your reasonable estimates on matters, but you are not telling the truth if you *guess*. If, for example, you have a basis to give a reasonable estimate of a distance, date or time, do so, but do not guess.

Question: How long were you there?

Answer: About an hour.

Q: Could it have been two hours?

A: My best estimate is about an hour.

Q: Could it have been an hour and a half?

A: My best estimate is about an hour.

Q: But you are not absolutely certain, are you?

A: Not absolutely.

Q: Well, then it could have been about an hour and a quarter, couldn't it?

A: My best estimate is about an hour.

Q: So you won't change that, even though you are not absolutely certain.

A: An hour is my best estimate. Anything else would be a guess.

If you expect a question on an important matter concerning your recollection and you have carefully considered the matter, e.g., the time estimate in the foregoing sequence, you can truthfully state, when asked the question, that you

23. *Photographs and Diagrams.*

Do not acquire "new knowledge" from photographs and do not interpret diagrams you do not understand. Again, this is simply a matter of telling the truth. Photographs are notoriously unreliable for distances or measurements. Do not interpret diagrams which you did not prepare yourself or which are not familiar to you. There is a great difference between testifying about your own *knowledge* of something which happens to be shown in a photograph or diagram and attempting to *interpret* the photograph or diagram.

Question: Look at this photograph. The shut-off switch is about a foot away from the red button, isn't it?

Answer: I can't tell the distance from this photograph.

If you know the distance from your own knowledge, you can give it. If you do not know it, do not try to estimate it from the photograph. Do not agree that a photograph or diagram is "accurate" until you know what part or parts of the exhibit the lawyer is talking about.

Q: Does this photograph accurately depict the machine?

A: This is a front view of the machine. It looks generally accurate for a front view. I cannot tell if it is accurate as to specific details.

This answer assumes that you are sure that the machine in the photograph is the subject machine and not some other machine. If no serial number or other identifying marks appear, do not assume

WITNESS CHECKLIST

Provided by Snider & Horner, PLLC

that this is the same machine, in which case you might answer:

A: This looks like a front view of the machine in question, but I cannot tell if this is actually the same machine.

In answering specific questions about the machine, use the photograph only as it may refresh your recollection, but testify from your own knowledge and not from “new knowledge” gained from looking at the photograph, which will typically distort the relation between the objects shown.

24. *Assumptions.*

If you make assumptions in your answer, state them so your answer is understood.

Question: When the steam pressure goes above that level, this safety valve opens, doesn't it?

Answer: Yes, if the safety valve is properly set and working.

The question did not include the conditions that the valve was properly set and working so you must add them to make your answer true.

25. *Explanations.*

If your answer requires an explanation because otherwise a simple yes or no would be misleading, be sure to explain that to me before you testify and, when you testify, be sure to give the answer before the explanation.

26. *Depositions used at Trial.*

If an attorney is telling you what you said at your deposition, you should request a copy of the deposition to read along with the attorney do not take the attorney's word for what is in the deposition.

27. *Testimony of Other Witnesses.*

Testimony of other witnesses may refresh your recollection, but if it does not, do not testify to facts simply because someone else has done so and you believe them and are reluctant to contradict them. You must limit your testimony to your own knowledge. People very rarely all remember things the same. The jury understands that and would be quite skeptical if they did.

28. *Personal Behavior.*

Do not take medications before your deposition or trial testimony or, if you must, be sure to tell me what effect it may have on you. Do not chew gum or candy while testifying. Do not smoke at your deposition.

Use your own words and not someone else's. Avoid phrases like, “to tell you the truth,” or “to be honest.” Do not repeat the question before answering.

29. *Interruptions.*

If opposing counsel interrupts your answer before you have finished, politely ask to finish it and, if necessary, ask the judge if you may finish your answer. Expect interruptions from opposing counsel when she does not like your answer. If the truthful response requires your complete answer, you must resist the interruption.

Likewise, unless you are trying to correct prior testimony, do not interrupt the questioner, even when the question is misstating your testimony or the facts. Wait until the question is finished. The court reporter can only record the words of one person at a time and, at trial, the jury can only listen to one person at a time. So you must wait until the question is finished before answering, even when you think you know the complete question before it is finished.

WITNESS CHECKLIST

Provided by Snider & Horner, PLLC

30. *Testimony of Others.*

Unless you are excluded by order of the court at trial, I will arrange to have you hear one or more other witnesses testify before you do, so you may become familiar with the courtroom surroundings and the procedures. When in court, do not display any reaction to the testimony of any other witness. The judge and jury will not welcome signals of your opinions.

When you are on the witness stand, do not look at me for help in answering a question. The jury wants your answer, not mine, but if you need a document from me, ask for it.

31. *Questions by the Judge.*

The judge may ask you questions during your testimony. All of these guidelines apply to questions by the judge as well, including, in particular, the importance of being polite and cooperative.

32. *Called by Opposition.*

If you are a defendant, or a representative of a defendant company, plaintiff may call you as a witness as part of plaintiff's case before we call you. We will discuss this and you should not be surprised if this occurs.

33. *Videotape Deposition.*

If your deposition is to be videotaped, you must remember, at all times, that you are speaking to the judge and jury on videotape and not simply to the attorneys in the deposition room. Address your answers to the camera and act appropriately for court testimony. While attorneys at the depositions who are off-camera may act less formally, you are on-camera at all times. Avoid distracting mannerisms such as tapping your pen on the table or moving a water glass around because all sounds will be picked up by the microphone. *Never* assume that you are

off-camera until the camera operator so states.

34. *Recesses.*

If, at deposition or trial, you become tired or unwell, say so and request a recess. You cannot testify truthfully if you are distracted by fatigue or illness. Fatigue is more often a problem at depositions when there are fewer scheduled breaks than in court testimony. Know that it is not a sign of weakness to ask for a break in a deposition whenever you need it.

In a deposition, but not in court, you may be permitted to ask for a recess to confer with your counsel. The need to confer may arise, for example, if you suspect that a question calls for you to reveal privileged material such as communications with your attorney or trade secrets or testimony which is subject to a protective order. We will try to identify these areas during your preparation.

If you follow the rules listed above, you will testify confidently, comfortably, accurately, and patiently. The jury will know that you are doing your best to tell the truth and that will come from your general demeanor and body language as well as from your words.