

HOW TO GIVE EFFECTIVE TESTIMONY AT TRIAL AND IN DEPOSITION

Thomas H. Vidal

Abrams Garfinkel Margolis Bergson, LLP

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Introduction

If you are a party to a lawsuit or arbitration, you may be required to testify at trial or in a deposition. Even if you are not a party to a lawsuit, you may be subpoenaed to testify in a trial as a witness if you have personal knowledge about the events and circumstances involved in a civil or criminal case. **The purpose of this booklet is to take the sting out of giving testimony by teaching you ways to answer questions that will be helpful instead of harmful, and helping you steer clear of the traps that aggressive lawyers sometimes try to snare you with.** This booklet is not a recipe book of tricks. Tricks and deceptive practices do not win lawsuits, because skilled lawyers will expose them and judges and juries generally see through them. Truthful testimony married with effective lawyering will maximize the likelihood of prevailing in your case.

You may have some idea of what it means to testify at trial from watching movies or television shows that depict civil or criminal trials. But you might be unfamiliar with depositions. In law, a deposition is a pre-trial discovery tool used in civil litigation. Pre-trial discovery tools are procedures that can be used by one party to obtain facts and information about another party's case in order to assist that party's preparation for trial. A deposition allows one party to obtain sworn testimony from another party or witness under an oral (or sometimes written) examination. The deposition takes place out of court, but in the presence of a court reporter. A deposition is essentially like being cross-examined outside of court.

In both trial and at deposition, the court reporter transcribes every question you are asked, every answer you provide, and anything else that is spoken during your testimony (such as objections and arguments). After your deposition, the court reporter prints the transcript it into book form, which you will have an opportunity to review and even correct. (You do not have the luxury of making corrections to the transcript after you testify at trial.)

Most people do not relish the idea of giving a deposition or testifying at trial. There are lots of reasons for this. Some people feel—justifiably—that the lawyer examining (or cross-examining) them is trying to trip them up and trick them into admitting things they did not intend to say. Others are concerned that the lawyer is going to try to embarrass them and back them into a corner. Still, other people feel that they are going to be accused and attacked by the lawyer.

Some lawyers do try to use those tactics, and some are quite effective with them. With the assistance of a skilled lawyer to prepare and defend you, many of these tactics can be diffused. Still, if you are the plaintiff in the lawsuit, you will have to go through this process in order to prove your claim and obtain the relief you seek. Unfortunately, if you are the defendant, you must endure this process in order to defeat the accusations leveled against you.

Studying this booklet will not get you out of giving testimony at your deposition or in trial, but it will help take the sting out of getting through it. There are only two major concepts to understand along with a

series of simple guidelines that will light your path as you respond to the tough questions that are thrown at you.

The Two Fundamental Keys for Giving Effective Testimony

To answer questions effectively in a deposition or at trial, you need only grasp only two fundamentals. There are a number of “rules” that build on the fundamentals, but if you stay diligently focused on the fundamentals you will eliminate 90% of your problems. More importantly, the supplemental rules will come fairly easy.

The two fundamental keys to giving effective testimony at trial or in a deposition are the following: Preserve your credibility and demonstrate your confidence.

In every walk of life your credibility is crucial. But credibility takes on an even more important role in the media, in politics, and in trial. In those realms, credibility is currency. Without credibility you are broke. Without credibility you lose. According to the Meriam-Webster Unabridged Dictionary, “credibility” means “the quality or power of inspiring belief,” or “capacity for belief.”

There are two sides of credibility: truthfulness and expertise. The judge and/or jury’s perception of your capacity for truthfulness will determine whether you will be believed. You cannot win at trial if you are not believed. Expertise is your knowledge about the subject on which you are testifying. Establishing expertise will aide you in persuading the jury to accept your truthful testimony as correct.

Almost important as your credibility is your ability to deliver the answers on which you testify with confidence. The testimony of tentative witnesses is often rejected by juries, even when it is absolutely true and correct. Confidence has the power of “inspiring belief.”

The two main sections of this booklet address the issues of credibility and confidence. Study them and apply the guidelines carefully and you will do well when providing your testimony.

The Four Corollaries That Will Make Testifying Less Painful

Corollary 1: you will not win your case at deposition or on cross-examination.

Cross-examination at trial and depositions are not the place where you get to tell your story. You have to think defensively. Do not try to “sell” your case to opposing counsel. This is not your chance to convince opposing counsel. Deposition is not where you win your case. The deposition is nothing more than the opposing party’s chance to learn about your case. You win your case in front of the judge or jury at trial or by way of a dispositive motion.

Do not concern yourself with figuring out where the cross-examiner is going with a line of questioning. Sometimes attorneys at deposition are on fishing expeditions. They do not always know what they are looking for. They are just trolling around hoping to find something. Do not help them. Just answer the questions. Each question stands alone. Never forget that.

Corollary 2: you must trust your lawyer.

Your job is to provide testimony. Your lawyer's job is to (1) make sure the opposing lawyer does not exploit you, (2) make objections, (3) protect the record (i.e., make sure that the record correctly reflects the answers that you are providing), and (4) make arguments. If you trust your lawyer to do his or her job, then you can confidently do your job of testifying. Trust your lawyer to make objections. Follow your lawyer's lead. Pay attention to what your lawyer explains to you when he or she is preparing you to give your testimony.

The biggest part of trusting your lawyer is telling him or her about the skeletons in your closet. Your lawyer has an absolute duty of confidentiality. In California, for example, attorneys must maintain inviolable the secrets of their clients. Your lawyer is not going to gossip about you. But your lawyer cannot protect you if you have not entrusted him or her with all the information in advance of the deposition. If your lawyer is caught by surprise, it is you (and possibly your case) who will suffer.

Corollary 3: you must be precise and vigilant

One of the things about lawyers that frustrates non-lawyers is how precise lawyers insist on being in their communication. In fact, lawyers are often accused of being persnickety: "characterized by excessive precision and attention to trivial details." The reason lawyers are precise is because the law requires it. Cases are built on facts, and subtle distinctions in facts may determine whether or not you may prevail on a claim or defense. Take this hypothetical scenario: Victor Victim is violently attacked by Andrew Aggressor; Victor pulls out a gun, shoots Andrew, and Andrew dies. Can Victor defend a wrongful death action brought by Andrew's heirs by claiming he acted in self defense? It depends on a number of factors. For example, did Victor shoot during Andrew's attack, or several hours later when Andrew was at home sitting on his couch?

In litigation, the devil really is in the details. You must pay close attention to the questions you are being asked and the details that are being elicited. It is okay if you do not remember an answer or that you never knew an answer to the applicable question. But you must be accurate when you answer. You are testifying from memory, of course, about events that may have happened years earlier. Memories fade, but be as careful as you can when giving answers.

Corollary 4: you must prepare thoroughly and practice diligently.

Good lawyers work hard to make sure their clients and witnesses are prepared to provide testimony. But remember you are alone on the witness stand. You must take the initiative to practice, by reviewing the key documents regarding your case, reviewing your memory, thinking through your testimony, and role playing with your lawyer. Practice like your case depended on it, because it does.

Preserve Your Credibility

Credibility is currency. When you are deemed to be credible, the judge, jury, or even opposing counsel is more likely to believe your testimony and it will hold persuasive value—it will carry weight. If you lose your credibility, your testimony will not only be valueless to you, it will be toxic to you. Your not-credible testimony will have great persuasive value for your opponent's case.

If you are really lucky, the judge or jury will start your credibility account at 100%. Often times, however, because humans have biases, your credibility account may start off lower than 100%. Maybe it starts at 90%, maybe only 50%, or maybe it starts out closer to zero. With every answer you provide and every non-verbal “statement” you make (including tone of voice, hand gestures, eye contact, posture, facial expressions, and the like) you are depositing money in your credibility account or making withdrawals from it. If your account starts low, you will have to work extra hard to convince people that you are believable. If your account starts high, you have to work hard to maintain what you have. Applying the following guidelines will help you maintain and build your credibility.

❑ Always tell the truth, even if you think it might hurt. First, it is the right thing to do. A witness who tells the truth never has to worry about keeping the story straight. Second, it is the law. When you testify at deposition or in trial, you take an oath requiring you to tell the truth. Third, false testimony is frequently discovered, particularly in business cases where there is usually a thorough paper trail. Fourth, your lawyer can often do more with a truthful bad answer than a deceitful good answer.

❑ Speak in your own words. When you testify, strive for clarity. You do not need to make yourself sound smart. Your sole focus should be on providing clear, understandable testimony. Your case will not be won because you use five-dollar words or because you mimic the “magic” words your lawyer uses. Moreover, your credibility takes a hit when you do not use your own words because that is frequently a sign of deception. Lie detection research has discovered that there is fertile ground for detecting liars by the words they use. Often, people speaking deceitfully will use or repeat the questioner's exact words when answering a question, they will avoid using contractions and leave out pronouns, and they will speak in muddled sentences.

❑ Speak from personal knowledge. Your answers should come from those things you experienced directly with your senses: what you heard, saw, touched, tasted, and smelled. We refer to this as personal knowledge. Watch for hearsay, which is information that you learned from another rather than directly. (E.g., rumors.) You can give hearsay answers, but make sure you acknowledge where you obtained the information. If the hearsay information turns out to be wrong, you will not take a credibility hit if you identify that the information was hearsay. Try to keep your mind clear as to (1) what you know, (2) what people have told you, (3) what you learned from other sources (e.g., reports), and (4) what inferences you have drawn. Sometimes it is important to know when and how you learned certain pieces of information.

❑ Do Not Read Minds. You are not required to be a mind-reader: you cannot testify to what other people thought or felt, unless they told you how they thought or felt. You can, however, testify to things you saw that might indicate an emotion of another person. Instead of testifying that X was angry, you can testify that you saw an angry expression on his face or

that he slammed his fist on the conference table, etc.

❑ Give complete answers. Do not omit important details and relevant information that is responsive to the question or your credibility will take a hit. Remember, any response that leaves a misleading impression is inappropriate. A complete answer does not mean your answer has to be long. Answer the question completely, but favor short, succinct, and concise responses. Keep your answer strictly focused to the point of the question. Rambling responses with extraneous details and irrelevancies compromise your credibility because, according to lie detection experts, speaking excessively in an effort to convince is often a sign that someone is lying.

❑ Do not equivocate unless you must. Witnesses are often so afraid of being pinned down to their answers that they refuse to provide a straight answer. Instead they add qualifiers like “to the best of my recollection,” “possibly,” “probably,” “maybe,” and the like. You should use those qualifiers when they are appropriate, but strings of qualified answers make it appear that a witness is being evasive (which costs you credibility points) and also renders them meaningless. Be precise in your answers.

❑ Do not be afraid of “yes” and “no” answers. If a question can be answered with a “yes” or “no,” then answer it that way. Do not feel that you have to answer every question with paragraphs worth of words when a single word will do. Your job is not to explain the facts; that is your lawyer’s job. If, however, a “yes/no” question *requires* an explanation, please provide the yes/no answer first and then follow-up with the explanation. Failing to start with the yes/no answer makes it look like you are being evasive. If you cannot answer a yes/no question with a yes/no, then tell the questioner that you cannot answer with a yes or no.

❑ Admit what you must. Your credibility relies on you being forthright and candid. So,

admit what you have to admit. This does not require you to volunteer information, but if a question calls for you to admit a fact as true (and the fact is true), then admit it. The facts are the facts. No matter how good your case is, it will have bad facts. It is your lawyer’s job to exploit the good facts and minimize the bad ones, not yours. Also, be careful not to admit things that are not true.

❑ Do not be afraid to use “I don’t know,” and “I don’t remember,” but make sure to use them correctly. If you do not know something, it is okay to answer with an “I don’t know.” If you do not remember something, it is okay to answer with an “I don’t remember.” You should not be ashamed if you do not know or do not remember the answer to a question, even if you think that you “should” know the answer. Be mindful of the difference between “I don’t know” and “I don’t remember,” because that difference is often critical. If you do not know the answer to something that you may have once known, the proper response is “I don’t remember,” not “I don’t know.” If you do not recall something at the time of your deposition, you may remember by the time of trial. On the other hand, if you say you do not know the answer at the time of your deposition, but you suddenly know the answer at the time of trial, the cross-examiner will attempt to impeach your testimony.

❑ Avoid Absolutes. Answering with absolutes like “never” or “always,” is dangerous. Only use those absolutes if you are certain. If you answer something with an absolute and the opposing lawyer finds even one example where your answer is false, your credibility could be compromised. Yes, credibility is that fragile.

❑ Avoid Exaggeration. Do not exaggerate or overstate your answers. Lie detection experts advise that exaggerated details are a sign of deception. Too many details may signal your desperation to get someone to believe you. Additionally, witnesses often exaggerate or overstate when they are trying to sell their own case. Your job as a witness is to provide facts,

which are the raw materials that your lawyer uses to build your case. Let your lawyer characterize and shape the facts. Do not try to do that yourself. If you do, you will generally take a credibility hit and make your lawyer's job more difficult.

❑ Do not be defensive. If your response to a challenging question is defensive, you will lose credibility. Emotional responses are frequent signals of whether a person is testifying truthfully or dishonestly. A truth-teller's emotional response to a challenging question may be to respond with anger and "go on the offensive," while liar will often become defensive. You may become defensive and still be telling the truth, but people observing your behavior will perceive you to be lying.

❑ Do not be evasive. If your response to a challenging question is evasive, you will lose credibility. Evasion is generally perceived to be a sign of deception. In the lie detection literature, evasion is also referred to as "deflection." When people lie they frequently tell stories that are true but that do not answer the question. People—opposing counsel, judges, and juries—naturally pickup on this without having any formal training in lie detection. Do not risk it. Do not avoid the question, work with your lawyer to prepare for answering questions on tough subjects.

❑ Do not play dumb. This is a subset of evasiveness, but it deserves its own category. Playing dumb, of course, means to pretend (or appear to be pretending) that you do not know information that you should know. Opposing counsel, the judge, or jury will perceive you as playing dumb when you do not know routine information that someone in your position ought to know. Playing dumb feels good for a witness who does not want to answer a question, but opposing counsel and juries will see through it. The witness may feel good because he or she was able to dodge a tough question and did not go "on the record" answering a question that was bad for him or her. Unfortunately, the people judging your credibility will assume you are lying or hiding something.

❑ Do not be contentious. If your response to a challenging question is contentious, you will lose credibility.

❑ Never incorporate words or phrases such as "truthfully," "honestly," "frankly," or the like in your answers. Prefacing your answers with those words and phrases will call your credibility into question as to the other answers you provide. You are required to provide truthful answers to all of the questions that are asked on trial or in deposition. You should not have to preface an answer with truthfully. If you do, you are hurting yourself.

Demonstrate Your Confidence

When you testify in trial or at deposition, your every move is being observed by the judge and jury (in trial), opposing counsel, and even the other parties. How you appear is at least important as what you say. Moreover, your tone of voice and delivery is frequently more important than the substance of your testimony. Confident witnesses are perceived to be truthful and are often believed more than tentative witnesses. You can demonstrate your confidence by applying the following.

- ❑ Mind your manners. Sit and stand with good posture. Be a lady or gentlemen at all times: respectful, polite, and courteous. It is a sad commentary that this needs to be mentioned, but people often fail to get the message: cases are often won or lost on the demeanor of the witnesses. Hostility, arrogance, and airs of superiority will alienate you in front of the factfinder and jeopardize your believability. Be slow to anger. Maintain your calm and do not let surprises throw you off. If you maintain your calm, you maintain control. The side that loses its cool usually loses.
- ❑ Listen carefully to the question. Confident people are not afraid to hear a question. Listen carefully and resist all urges to interrupt. Hearing a question is not equivalent to accepting it as true. (Also, a question that starts out appearing to go one direction, may wind up different from what you expected.) You will get your turn to answer, so be patient and let the lawyer ask (and state) what he or she wants. Your lawyer will object if the questioning lawyer is abusing you or otherwise acting inappropriately. Also, remember that a deposition or your trial is not a race. Accuracy is more valuable than speed. Be patient. Pay attention to the question and focus on the specific subject that the questioner is inquiring about.
- ❑ Take the time to think before you answer. Pause and think before you answer. Keep in mind that most deposition transcripts do not enable readers to determine the time that elapsed between when a question is asked and when you responded. (Some transcripts are time-coded, but most are not.) So, concentrate on how you will answer for as long as you need.
- ❑ Be careful with delays in your answers. Pausing is important, but do not overdo it. This is especially important at trial, when the judge and jury are evaluating you in “real time.” Lie detection research reveals that subtle delays in responses to questions can signal deception. Honest answers usually come quickly from memory. Lies, on the other hand, require the deceiver to recall what he or she told others in order to avoid inconsistency and to make up new details if required by the question. Pauses resulting from a genuine effort to recall the answer to a question are different from pauses related to making up answers. For example, typically (but not always), when people pause to remember things, they look up and to the questioner’s right while trying to recall information (or the other way, if they are left handed).
- ❑ Think, but do not think out loud. Never think out loud. Never. You do not need to fill up the silence with words. Once you have

formulated your response then answer the question.

When you respond, do not comment on the questions. Avoid offering comments like “good question.” Do not tell the questioner that you are glad that he or she asked you the question. Often people editorialize when they are trying to think. Remember to think silently.

When you respond, do not ask questions about the question. If you do not understand the question, say “I don’t understand the question.” Do not ask the questioner questions about his or her questions.

When you respond, do not ask a question with another question. You are sworn in to provide testimony, not ask questions.

When you respond, do not apologize. Saying things like “my memory is bad,” or “I should know this,” or “I’m sorry I don’t remember,” adds nothing to your testimony. To the contrary, it weakens your testimony.

When you respond, do not argue with the attorney asking the questions. Your job is to provide testimony. Your lawyer’s job is to do the arguing. Do not do your lawyer’s job for him or her.

After your response, do not fill up the questioner’s silence with more words. Be comfortable with pauses and silences. It is not your job to fill them. Wait for the next question.

Maintain normal eye contact. Look the attorney in the eye while he or she asks questions. Look the attorney in the eye while you answer. Note that a liar does not always

avoid eye contact. People break eye contact and look at stationary objects to help them focus and remember. Deceivers who want to appear sincere intentionally make eye contact. Nevertheless, people can usually determine if someone is fabricating a lie or remembering information by picking up clues from the speaker’s eye movements.

Avoid the appearance of being coached. Do not look at your attorney or anyone else to supply answers for you. Do not look at your attorney *as if* you were expecting him or her to provide you an answer.

Answer questions with a loud, clear voice. Your answer has to be heard by the court reporter who has to take down your testimony. If you are in open court, your answer must also be heard by the judge, jury, and counsel. A loud voice conveys confidence. Quiet voices convey timidity. Factfinders tend to disbelieve timid witnesses.

When you answer, be clear and direct. Speaking in a monotonous tone, speaking with a jumpy tone, pausing at unusual times (such as in the middle of a sentence), or allowing pitch to rise and fall unnaturally tend to indicate deceitful testimony. So give your answers with confidence.

When you answer, be certain and precise. If you cannot be certain and precise, do not speak at all. It is better to say that you do not know the answer to a question than to be tentative.

When you answer, be assertive.

When you answer, be strong.

❑ Do not let the examiner bully you into answering a question if you do not know the answer. Opposing counsel will attempt to test your memory and your mettle. Do not speculate or guess an answer to a question because the attorney tries to make you feel that you “should” know the answer.

❑ Keep your answers consistent. The examining attorney may not be happy with the answers he or she gets from you and may try to ask the same question in several different ways. It is critical for you to remain consistent in your answers.

❑ Be sober minded. A trial or deposition is not a joking or trifling matter. Sometimes

people express nervousness with humor. Some people try to break the ice with humor or sarcasm. Avoid it. Period. Humor and sarcasm do not come across well in a written transcript. Sometimes sarcastic responses appear to be admissions when read in the cold light of a transcript. Moreover, lie detection research reveals that use of humor and sarcasm are often techniques to avoid a subject and are indicators of deception.

❑ Avoid profanity and obscene language. Profanity or offensive language has no place in your testimony. There is one exception, you may use profanity or offensive language if it is relevant to the case.

Answer with Ease

You have been answering questions your whole life; thus, while providing testimony at trial or in a deposition is stressful, it is not hard. Think of testifying as being interviewed. The stakes are a lot higher, of course, because the interview setting is formal, the style is adversarial, and the responses require a high degree of precision. But at its core, deposition or trial testimony is an interview. Moreover, what you will be doing while testifying is something you have been doing since you were a small child: telling stories. Giving testimony is not hard if you tell the truth, prepare thoroughly (your lawyer will help you do the preparing), and practice diligently.

Because the stakes are so high, however, you must be very thoughtful and precise in your answers. Remember that in law semantics are important and the tiniest shades of meaning will be analyzed in painstaking detail by the lawyers, the judge, other parties, witnesses, and the jury. Follow these simple guidelines, and you will handle the deposition with grace.

❑ Understand the question. Never answer a question that you do not understand. Never. Do not make assumptions about what the attorney examining you means by a question. Make sure you understand it. Only you can make sure you understand the question. If you do not, tell the examiner you do not understand his or her question. Ask the examiner to repeat the question, explain it, or restate it. Do not be afraid to ask about unfamiliar terminology and expressions in questions. (It bears repeating, that you must never answer until you have fully heard the question).

❑ Say exactly what you mean. This cannot be stressed enough. Stay on your guard. Your deposition or trial testimony is no place to speak carelessly. Once you say something “on the record,” it is very hard to undo it. What you say is cemented forever in black and white print. You have to live with what you say. So be clear and say what you mean.

❑ Answer questions as narrowly as possible. Do not ramble. Do not ramble. Do not ramble.

❑ Answer only the question asked. First, do not answer more than the question asked. If

someone asks you: “Do you know what time it is?” The answer is “yes” or “no,” not “10:30 A.M.” The question did not ask for the time, only whether you knew what the time was. Second, do not answer the question you wish you had gotten. Third, do not help the examining attorney by answering the question that should have been asked. More importantly, do not supply information to fix the question. In rare cases, though, it may be acceptable to fix a question. If you do “fix” the question, make sure you rephrase the question as part of your response: e.g., “It’s true my son was with me, but we were not in my office. We were in the large conference room.”

❑ In general, do not volunteer information. Do not offer information that you were not asked. In a deposition, it is not your opportunity to “tell your story.” Opposing counsel is trying to build his or her client’s case, not yours. At trial, the same is true when you are undergoing cross-examination. Discuss this issue carefully with your attorney during preparation. This is one of the deposition rules that you may wish to break for strategic reasons.

❑ Do not volunteer or promise during your deposition to do anything after your deposition.

During a deposition, the examining attorney will often ask a witness to gather some information (e.g., provide names, search for documents, etc.) and provide it later. Do not agree to do it. Tell the attorney to direct the request to your attorney.

❑ Pay attention to “when” questions.

“When” questions refer to time, not to sequence or context. If you are asked “when did you sign the contract,” the appropriate answer might be “July 17th.” The correct answer is not “July 17th, while I was in my office with my assistant.” Avoid volunteering contextual associations.

❑ Approximate if you cannot be precise.

Make sure you expressly state that you are approximating when you provide your response.

❑ Qualify your answer when necessary. If it is necessary, do not be afraid to qualify an “I don’t know” answer. For example, you could say you do not remember “at this moment,” or without consulting some kind of document.

❑ Do not give a yes/no answer if the question cannot be answered with a “yes” or “no.”

❑ Do not give a yes/no answer unless the question is completely true or completely false.

You must be vigilant about this. If the question is 99.999% or 00.001% accurate, do not provide the “yes” or “no” answer. When you answer a yes/no question, the question itself becomes your answer. You are adopting the question as your answer exactly as phrased. Every premise, fact, inference, or the like contained in that question is your sworn testimony after you answer. So you must make sure you are

satisfied that every part of the question is true for a “yes” answer, or false for a “no” answer.

❑ It is okay to refresh your memory. A deposition—no matter what the other side tries to make of it—is not a memory contest. If you cannot remember something, it is okay to ask for a document that will aid your memory.

❑ Do not speculate or guess, unless the questioner specifically asks you to speculate or guess. If the questioner asks you to speculate or guess, it is okay to answer – if you can – but make sure you qualify your answer as a such. If you cannot speculate or guess, that is okay. But explain why, if possible.

❑ Do not assume, unless the examining attorney asks you to assume. Be diligent about this. Assume if you are directed to make assumptions. If you are requested to make assumptions, be certain the assumptions are expressly (and clearly) stated. If it is impossible to make the assumption you are being requested to make, say so. When you respond to a question based on assumptions, expressly state the assumptions that you are making in your response.

❑ Never let the examining attorney put words in your mouth. Your lawyer cannot always protect you from this. You must be diligent and vigilant.

❑ Read any document that you are being examined about. Take your time. Let the examining attorney wait on you.

❑ Just because you are presented with a document does not mean the document is authentic. Check the document carefully, verify that all the pages are present, verify the signatures, and verify the dates. Do not identify the document unless you are positive about it. If you are not positive, say so and explain why.

❑ State for the record any qualifications regarding your answers about documents you have reviewed. “This is an 80 page operating agreement, and without having the time to study it, I cannot definitively answer questions about it. If you would like to go off the record, I will read it in its entirety but it could take a couple hours.”

Fearlessly Handle the Ten Killer Questions

There are ten “killer” types of questions that an attorney may ask in your deposition. These questions are sometimes intentionally imposed to try to extract admissions from you, or to get you to testify the way the examining attorney wants you to. Sometimes, they are just the result of sloppy thinking and sloppy framing by the questioner. You need not fear these questions, but you do need to be aware of them, so that you can handle them without difficulty.

❑ Do not answer vague questions. The lawyer asking you questions must pose them in a manner that is specific and clear enough that you reasonably know what information is being sought. If you do not know, insist the lawyer rephrase the question.

❑ Do not answer ambiguous questions. An ambiguous question is one that is susceptible to at least two different interpretations. If you answer an ambiguous question, it may not be clear to a later reader (judge, jury, opposing counsel, or the like) which interpretation you intended.

❑ Do not answer questions that assume facts you have not previously testified to. When a question “assumes” facts, the questioner is trying to get you to admit a fact that is buried within the question. The classic example is “When did you stop beating your wife.” The assumed fact is that you were beating your wife. You cannot answer this question without admitting that you were beating your wife. Your attorney should object to these types of questions, but remain vigilant yourself.

❑ You generally cannot answer a compound question with a single answer. A compound question is the legal term for the informal logical fallacy known as a “double-barreled” question. Such a question touches upon more than one issue, but allows for only one answer. The conjunction “and” is usually (but not always) a sign of a compound question. For

example, an entrepreneur may be asked in trial: “Did you think there was a good market for the product and that it would sell well?” The entrepreneur may not be able to answer “yes” or “no,” because there are two separate issues. Your attorney should object to these types of questions, but remain vigilant yourself. If your attorney does not object, you should either tell the questioning attorney that you cannot answer, or treat the question as two separate questions and provide two separate answers.

❑ Be wary of disjunctive questions. Disjunctive questions are those that express mutually exclusive alternatives joined by the word “or.” These questions attempt to force you to choose between alternatives selected by the cross-examiner. Watch for false alternatives. If none of the alternatives identified in the question is applicable, say so. Your attorney should object to these types of questions, but remain vigilant yourself.

❑ Pay careful attention to questions that summarize your testimony. Oftentimes, an attorney will ask a question that purports to summarize a series of answers you previously provided: “So, Mr. Jones, on the day of the incident, you went on your morning run, dropped off your daughter at school, visited one of your customers, and then went to the airport?” There is nothing inherently wrong with summary questions. But understand that once you agree to the examining attorney’s

summary, you have adopted it as yours. It is like the summary came from your own mouth. So, make sure it is both complete and accurate before you agree to it. If it is not, reject the summary or correct it.

❑ Rarely admit questions that use absolute terms. Absolute terms are those like “never” and “always.” For example: “Mr. Jones, isn’t it true that you checked the safe every single morning when you came into the office?” You may admit as true an absolute only if you are certain that there is no circumstance where the question is false.

❑ Answer indefinite or conditional questions with great care. Pay close attention to imprecise questions, that contain equivocal words like “maybe,” “probably,” “possibly,” “might have,” “could have,” “must have,” etc. Some of questions that use those words are what attorneys call “hypotheticals,” and your attorney will typically object if the hypothetical is incomplete (meaning it does not contain all the information necessary to answer it). Make sure you identify any and all conditions that must have existed in order for the question to be true. If you cannot answer it, or answering the question will present inaccurate information, say so.

❑ Do not let the examining attorney rephrase your testimony unless the rephrased testimony is accurate and does not compromise your case. In law, semantics are crucial. The difference between winning your case or losing it can turn on a single word or phrase. You may not fully understand the legal significance of the terms you use when you speak. When your lawyer prepares you, he or she may help you identify ways to characterize events, but the opposing lawyer may want to characterize the same events in another way. Be certain that any

rephrased testimony does not change the meaning of the facts.

❑ Exercise great caution when answering questions that “lock you in.” One of the primary goals of an attorney at a deposition is to learn everything you know, and “lock” the facts so that they cannot change. Lawyers do this because they do not want to be surprised at trial, which they would be if you changed your testimony or added new facts that you did not mention in your deposition. One of the ways lawyers do this is by asking you questions like “Have you told me everything about the circumstances leading up to your terminating the contract?” If you answer “yes,” you may be foreclosed from later recalling new facts. You should qualify your answer by saying you have stated everything that you can recall right now.

Always Remember the Transcript

Often the most difficult part of providing answers in a deposition or at trial is (1) remembering that everything you say is being taken down verbatim, and (2) understanding what your oral testimony and your colloquy with the examining attorney will look like when reduced to writing. Lawyers at trial often struggle with this, too, so do not feel bad. Making a good record is hard work, but is worth the effort. Remember: the importance of protecting the record cannot be stressed enough—if you are not careful, the written transcript may appear to provide answers different from what you intended. Here are some tips on how to make sure the record of your testimony accurately reflects the answers you intended to provide.

❑ Speak for the court reporter. Court reporters cannot take down hand gestures, body language, tone of voice, or “uh-huhs” and “unh-uhs.” Make sure you express your points with words and that you carefully annunciate those words. Watch the court reporter from time-to-time while answering. Help the court reporter with spellings, unusual words, and acronyms.

❑ Speak slow enough for the court reporter to take down everything you say. In the heat of hard interrogation, many witnesses (and attorneys) begin to speak fast. Remember that you are dictating to the court reporter. If you are talking so fast that she cannot capture everything you say, the testimony could be lost forever, or worse, it could appear that you answered the question differently from what you had intended.

❑ Remember, while in trial or at your deposition, nothing is “off the record.” Never discuss confidential matters in the restrooms,

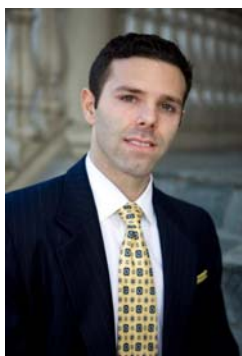
hallways, elevators, stairways, cafeterias, or anywhere else that you may be overheard.

❑ Do not let the examining attorney interrupt your answer. Be polite, but be firm. If it happens repeatedly, you may call attention to the fact. Whatever you do, make sure that your complete response to a question makes it into the transcript and that it is clear.

❑ Correct mistakes. If at any time during your testimony, you discover or realize you made an error in an earlier response, you were inaccurate in responding, or you provided an incomplete response, bring it up and then offer your correction on the record. (Remember, with a deposition, you will have an opportunity to correct your testimony after you receive the printed copy of the transcript. Nevertheless, it is always preferable to catch and correct mistakes during your deposition.)

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About the Author



Thomas H. Vidal works in the Los Angeles office of Abrams Garfinkel, Margolis, Bergson, LLP where he represents businesses, entertainment professionals, and individuals in a wide variety of litigation in federal and state courts. Mr. Vidal litigates corporate, commercial, and business disputes, which include director & officer liability, consumer class actions, securities fraud, purchases and sales of businesses, sales of goods, entertainment, intellectual property, first amendment, and complex contract matters.

Mr. Vidal has also litigated misappropriation of likeness, copyright infringement, and breach of contract actions for entertainment companies and professionals. He has litigated patent, trademark, and trade dress infringement cases for major manufacturers, developers, importers, and design companies in various industries that include clothing, toys, jewelry, media, and technology.

He recently prevailed in defending a defamation lawsuit after the United States District Court for the Central District of California granted his anti-SLAPP motion on First Amendment issues. The case is presently on appeal in the Ninth Circuit Court of Appeals. He also recently represented a film investor who was a victim of a fraud scheme and successfully recovered the entire the investment amount.

Mr. Vidal has litigated insurance coverage disputes for an international sports organization, litigated insurance fraud cases involving complex residential fraud schemes, and handled insurance coverage issues arising out of employment-related litigation. Mr. Vidal also has experience in federal and state court employment litigation, including sexual harassment, discrimination, and breach of contract matters involving executive-level employees.

Thomas is a competitive runner at 5k, 10k, half-marathon, and marathon distances, and a United States Masters swimmer. Mr. Vidal can be reached by email at tvidal@agmbllaw.com.

About the Firm

Abrams Garfinkel Margolis Bergson, LLP is a full-service law firm dedicated to smart, practical and cost-effective counsel. The firm takes pride in its diversity of experience, which enables AGMB to provide comprehensive and creative counsel to its clients. The firm's philosophy mirrors the values of its partners. AGMB partners strive to maintain an open and collegial atmosphere within the firm, which they believe fosters the exchange of ideas and teamwork necessary to achieve exceptional results for AGMB clients. The firm has offices in Los Angeles, New York, and New Jersey.

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