Examination for Discovery: 10 Things to Remember

October 7, 2015

Examination for Discovery is a pre-trial process which affords the other side the chance to learn about your case and you will need to spend adequate time to prepare. Whether you are appearing as a witness on your own behalf or as a representative of a company, you should review all the documents that pertain to the case. If you are appearing at the discovery as a representative of a company, you are obliged to acquaint yourself, as much as practically possible, with all of the facts known by the people who are now or were in the past employed by the company.

However, you should not worry about forgetting something while you are at the discovery. If you are asked something that you have forgotten, or don't know without looking up, you can, at the request of the examining lawyer, find out the answer later and advise of it by letter.

Your Discovery will take place in a special examiner's office at a conference table. You will be asked at the outset to swear an oath or affirm to tell the truth. The lawyers for the other side will have an opportunity to ask you questions and a court reporter will take down stenographically everything you say. Your lawyer will also be there to protect you from unfair questions and to make necessary objections.

All those who have been involved in civil litigation have a natural urge to tell their story. Resist this urge. The time to tell your story will be at trial when a judge and/or jury are there to hear you. The most important people listening to you at your Discovery are the lawyers for the other side. They are there to learn everything they can about your case. You must answer proper questions, but remember that revealing too much too easily may only help their case – and hurt yours.

The following are ten things to remember when testifying at a Discovery:

1. DISCOVERIES ARE NOT CONVERSATIONS. Discoveries are formal, legal proceedings. You are not there to make the other side understand your story. Be polite, but don't make small talk. If there is no question pending, don't say anything.

2. YOU CANNOT WIN YOUR CASE AT A DISCOVERY. Do not help the opposing lawyer understand your case. Give him as little information as possible while still telling the truth.

3. THINK BEFORE YOU ANSWER. Take your time. Make sure you understand the question. Do not tell the lawyer asking the question what you think he wants to know. Just answer the question he asks you.

4. KEEP YOUR ANSWERS SHORT. If you can answer a question with “yes” or “no”, then do so. If an explanation is required, give it briefly. When you give lengthy answers, you are revealing more information – and giving the other lawyer ideas for more questions.

5. NEVER GUESS. You might be wrong. If you do not know the answer, say you do not know. If you do not understand the question, say so. You may say, “What do you mean by that?” It is better to say “around” or “about” if you are estimating any time, date or distance.

6. DO NOT VOLUNTEER ANY INFORMATION. If there is a silence, do not fill it with talk. If you are asked to undertake to produce any document or thing don’t answer and let your lawyer answer on your behalf or say you will check to see if it is available.

7. DO NOT GET ANGRY. Becoming angry sometimes will make you reveal too much information, and will send the message that you are ill-prepared to be a witness and cannot control yourself. The lawyer for the other side will try to take advantage of that weakness in trial.

Also, do not make jokes. Your Discovery is a serious matter.

8. MAKE EYE CONTACT. Look at the lawyer asking you questions. Stay calm.

9. STOP TALKING WHEN YOUR LAWYER OBJECTS. Some questions are completely improper and should never get an answer. In such a situation, your lawyer will tell you not to answer the question. Follow the instructions. The other side must then obtain a court Order to get an answer.

10. DO NOT DISCLOSE ANYTHING YOUR LAWYERS HAVE TOLD YOU. It is proper for your lawyer to prepare you to give your Discovery, but everything your lawyer tells you is privileged. Their instructions are privileged; what other lawyers, paralegals, and consultants in the office have said verbally or in writing is subject to the lawyer-client privilege, and the other side should not inquire about it. Never volunteer such information. If a question calling for such information is asked, your lawyer should object and instruct you not to answer the question.

If you follow these ten rules, your Discovery will go well and not be excessively long.

Your comments will then be transcribed into a book. Before trial it will be your obligation to read and virtually memorize this book of your testimony so that you do not accidentally contradict yourself when you testify at trial – contradicting yourself will cast doubt on all your testimony and could lead the other side’s lawyer to accuse you of perjury. Obviously, the shorter the book, the less difficult your cross-examination at trial will be.

Lawsuits are frequently settled after discoveries have been completed because by then each party has had an opportunity to review the strengths and weaknesses of the case and that of the other party or parties. Even if there is no settlement, the discovery serves a very useful purpose

because it acquaints us with much of the evidence upon which the other side is going to rely at trial and it gives us an opportunity to obtain admissions from the other party which can be used against that party at trial.

Your Discovery is a valuable part of the litigation process and is well worth the effort involved.

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