

# How Attorneys Can Reduce Bad Behavior At Deposition

By **John Farrell** (July 11, 2024)

There has been a spate of recent reports of bad behavior at depositions, with either counsel, the witness or both acting out.

One way to reduce bad behavior is to take charge of the room by laying down the ground rules at the start. The second way is for you to model good behavior by acting professionally, as if you were in court.

Picture this: The court reporter has sworn the witness. It is time for you to start. You start by laying out the ground rules.



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There are a few reasons to begin this way. The first reason is that laying out the ground rules in a calm and professional voice helps to remind everyone that this deposition is an extension of the courtroom. People, including most lawyers, behave better in court.

The second reason for the ground rules is that they are designed to undercut excuses for changed testimony at trial. The ground rules are focused on the excuses that might be made at trial for the different testimony.

Limit your ground rules to ones of substance, and not of process. Process rules are those like: "We cannot talk over each other," or "you must say yes or no, instead of nodding or shaking your head." These process issues dilute the important ground rules. You can discuss those problems if they arise during the deposition.

The ground rules on substance can be broken down into seven categories:

1. You are under oath.
2. This is as important as testimony in court.
3. If you answer, that means you understood the question.
4. I will let you correct an answer if you want to change an answer.
5. I will give you breaks.
6. Errata does not excuse your obligation to give truthful testimony today.
7. You need to communicate if there is any reason you can't testify truthfully and completely today.

## Laying Down the Ground Rules

Let's take a closer look at how this looks in practice.

### ***1. You are under oath.***

In order to establish this ground rule with the witness, you should ask the following questions of the witness:

You understand that you are under oath. Right?

You understand that you must tell the truth. Right?

The whole truth. Understand?

And nothing but the truth. OK?

And you will do that. Right?

You want the entire oath in the transcript to show that it is the same oath that is administered at trial. Usually, the transcript just reads, "Witness sworn." With these questions in the transcript, the jury will know it was the same oath. And these questions remind everyone that the deposition is just like court — that it is an extension of court.

Rattling off the under-oath ground rule questions can be off-putting, but you can bring back rapport with the witness by saying, "And you will do that, right?" in a friendly, "of course you will" tone.

## ***2. The testimony here is just as important as testimony in court.***

To establish the next ground rule, ask the following questions:

You understand that the testimony you give here today is just as important as testimony in court, given before a judge and jury. Right?

You understand that the judge and the jury may well see and hear your deposition testimony. Right?

So, you understand that you must give truthful, complete and accurate testimony today. Right?

And you will do that. Right?

These questions remind the witness and opposing counsel that this deposition is as serious as court, and should be as dignified. The witness must give their best and fullest testimony today. Reminding the witness and opposing counsel that the judge may well see and hear how they behave is also helpful for controlling bad behavior.

You see the introduction here of "truthful, complete and accurate testimony." A key word there is "complete." A common move at trial is for the witness to add on to an answer given at deposition. This ground rule tells the jury that the testimony at deposition had to be complete, as well as truthful and accurate.

And note the verb "must." There is no wiggle room here. The witness must do this.

## ***3. If you answer, you understood the question.***

To make this point clear with the witness, ask:

If you don't understand, please let me know. OK?

That way, if you answer a question, it means that you understood it. Fair?

Often, the questioner says this:

If you don't understand a question, let me know. OK?

And I will change the question. OK?

That is not the way to go. You are not promising to change the question. The goal here is to establish a ground rule for the witness, not an obligation for you to change the question.

You should avoid saying, "So, I can assume that you understood the question." "Assume" is a weak verb — and who cares what the questioner assumes?

#### ***4. I will let you correct an answer if you want to change it.***

Make sure the witness understands this ground rule by asking the following questions:

If you ever want to take back, add to or change in any way an answer you already have given, let me know. OK?

And I will let you do that. OK?

This way, we can be sure to get truthful, complete and accurate testimony today. OK?

This ground rule helps to cut off an excuse at trial, where the witness says that they made a mistake at deposition and now want to correct it. The witness had the whole deposition, with their lawyer in tow, to correct the mistake.

The questions are another way in which you control the room. You are telling the witness that you will let them correct an answer.

And, you are reinforcing the requirement that the witness give truthful, complete and accurate testimony today.

#### ***5. I will give you breaks.***

Ensure the witness acknowledges this ground rule by asking the following questions:

We will take breaks about once an hour. OK?

If you need to take a break sooner than that, let me know. OK?

And I will let you take that break. OK?

The first point of the questions for this ground rule is to undercut an excuse at trial that the witness was tired or distracted when they gave an answer they later want to disavow.

The second point of this ground rule is that, again, it is part of you being in charge of the room. You are announcing that you will give breaks when the witness needs one.

Some lawyers add a caveat: "If you ever need a break sooner, let me know. All I ask is that, if there is a question pending, you answer the question, and then we will take that break."

### **6. Errata does not excuse your obligation to give your best testimony today.**

Get the witness's acknowledgment of this rule on the record with the following questions:

You understand that the court reporter is taking down everything that is being said. Right?

You understand that the court reporter will create a transcript of your testimony. OK?

And you understand that you get to read that transcript and make corrections and changes to your testimony. OK?

If you do make changes, though, I get to tell the judge and the jury that you changed your testimony. OK?

That is another reason why you must give truthful, complete and accurate testimony today. Understand?

And you will do that. Right?

The point of this ground rule and these questions is to drive home, again, the point that truthful, complete and accurate testimony is a requirement. The deposition is not just practice that someone gets to clean up later with an errata sheet — at least not without it being pointed out that they made changes.

### **7. Communicate if there is any reason you can't testify truthfully, completely and accurately today.**

Establish this rule with the witness by asking the following questions:

Is there any reason, medical or otherwise, why you can't give truthful, complete and accurate testimony today?

If that ever changes during the course of the deposition, you must tell me immediately. OK?

These two questions block excuses for changing testimony at trial, such as: "I was on medication," "I got a migraine," "I received some news during that deposition that distracted me" or "I became so tired after hours of questions."

You must include that second question, ensuring the witness commits to telling you immediately if any issue has come up. Too often, lawyers ask the first question without the second question. That omission allows the witness to say at trial that they were fine at the start of the deposition, but something happened during the deposition and they weren't told to tell the questioner if things had changed.

Avoid asking a number of questions that don't really reach the issue, like: "How much alcohol have you consumed in the past 24 hours?" "What medications are you on?" "Are you experiencing any depression, or do you have any other mental health issue?"

The witness may well be able to give truthful, complete and accurate testimony despite any

of that. The questions also are off-putting. You don't want to be on the wrong foot with the witness right as you begin substantive questioning.

### **Putting It All Together**

Let's put the whole thing together. The script should look something like this:

**Question:** Good morning. My name is [your name], and I have questions for you. I will begin by going over the ground rules for the deposition. OK?

**Answer:** OK.

**Q:** You understand that you are under oath?

**A:** I do.

**Q:** You understand that means you must tell the truth. Right?

**A:** Yes.

**Q:** The whole truth. Right?

**A:** Yes.

**Q:** And nothing but the truth. Right?

**A:** Understood.

**Q:** And you'll do that. Right?

**A:** Yes. Of course.

**Q:** You understand that the testimony you give here today is just as important as testimony given in court before a judge and jury. Right?

**A:** I do.

**Q:** You understand that the judge and the jury may well see and hear your testimony from today. OK?

**A:** OK.

**Q:** So, you understand that you must give truthful, complete and accurate testimony today.

**A:** Yes, I do.

**Q:** And you'll do that. Right?

**A:** Yes.

**Q:** If you do not understand a question, let me know. OK?

**A:** OK. I will.

**Q:** That means, if you answer a question, you understood it. Fair?

**A:** Fair.

**Q:** If you ever want to take back, add to or change in any way an answer you already have given, let me know. OK?

**A:** OK. I will.

**Q:** And I will let you do that. OK?

**A:** OK. Thank you.

**Q:** We will take breaks about every hour. OK?

**A:** OK.

**Q:** If you ever need a break sooner than that, let me know.

**A:** Alright, I will.

**Q:** And I will let you take that early break. OK?

**A:** OK. Thank you.

**Q:** You understand that the court reporter is taking down everything that is being said?

**A:** I do.

**Q:** And you understand that the court reporter will create a book or transcript of your testimony. Right?

**A:** OK.

**Q:** You understand that you will get to read that transcript and make corrections or changes to your testimony. OK?

**A:** OK.

**Q:** If you do make changes, though, I get to tell the judge and jury that you changed your testimony. Understand?

**A:** I do now.

**Q:** And so that is another reason why you must give truthful, complete and accurate testimony today. Right?

**A:** OK. Sure.

**Q:** Is there any reason, medical or otherwise, why you can't give truthful, complete and accurate testimony today?

**A:** No.

**Q:** If that ever changes during the course of the deposition, you must let me know immediately. OK?

**A:** OK. I will.

### **Behaving: Remaining Professional and Calm**

By taking charge of the room, you can avoid theatrics and unprofessional behavior by others.

As discussed above, part of taking charge is laying down the ground rules. You set a professional tone. You are in charge. You remind everyone in the room that this deposition is an extension of the courtroom, and that the judge and the jury will see their behavior. All that is good.

A second part of quelling unprofessional behavior by others is for you to behave — to always act professionally.

You must behave calmly; you must act as if you are in court. Responding to bad behavior with snarky behavior of your own is a wrongheaded move.

First, your acting unprofessionally will only result in an increase of bad behavior by the obnoxious witness or opposing counsel. For example, you are not going to reduce argumentative speaking objections and snarky asides by opposing counsel by engaging in heated debates with them. You are just going to make things worse.

You acting out also undercuts your case. When you get angry and respond in kind, you interfere with your goal of getting information and admissions. Long asides waste time instead of getting what you want from the witness. Your deposition is not a good one. That hurts your case and your client.

Be assured that opposing counsel will figure out some way to show your bad behavior to the judge and the jury. If the jury sees you acting unprofessionally and at odds with how you conduct yourself at trial, they will deem you an actor, and your credibility will be diminished.

That hurts your client. And, if your bad behavior is shown to the judge in a motion for sanctions, that is bad news for you.

So, in addition to taking charge of the room by laying down the ground rules, continue to be in charge of the room by modeling professional behavior throughout the deposition.

For example, if you are faced with obstreperous opposing counsel clogging the transcript with speaking objections and argumentative asides, at first ignore the behavior and continue with questions.

If the behavior continues and interferes with your questioning, call for a break and have a professional conversation off the record with opposing counsel, outside the presence of the witness.

If the behavior does not lessen after the break, calmly put on the record your request for the behavior to stop, and state that you had an off-the-record discussion about this in an

effort to have it stop.

Do not engage in back-and-forth, heated, snarky debate. If you ever start to get mad, take a break. Seldom do we do anything smart or good when we are mad.

A person I once knew was asked to what she attributed her remarkable success as a lawyer. Her answer was that she had learned that it always pays to be polite. That's good advice, too.

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