The following guidelines are not set in stone and depend upon the circumstances. They are intended to assist you in the giving of deposition and courtroom testimony by highlighting the differences and similarities and by pointing out the problems peculiar to both circumstances.

Depositions and Courtroom Testimony: Any Differences?

Depositions are Fishing Expeditions!

Depositions are conducted under the broad rubric that all questions, no matter how far-fetched, are permissible. "Discovery" in a civil case is defined as the gathering of information that is "relevant or likely to lead to relevant information." Thus, unlike in a trial, you may be asked to express an opinion, speculate, relate hearsay, or reveal rumors. Objections, such as "irrelevant, calls for speculation, is vague/compound" is not favored and usually not proffered. If you feel that the question is vague, calls for speculation, asks for hearsay, qualify your answer in those terms.

Depositions are "Controlled" by the Lawyers

In a deposition, no judge rules on objections. Most of you have been around enough to recognize a bad question when you hear it. The protections that are afforded to you by a knowledgeable judge is not present in a deposition. In many respects, a deposition is a feeling out of the process by all parties and counsel. This is an unfortunate, uncomfortable aspect to depositions that outstanding counsel preys upon and use to their advantage.

Confidentiality is Only A Word in a Deposition

For those of you who are current or former police officer/sworn personnel, be advised that the confidentiality protections normally afforded you may not exist in a civil setting. "Confidential" information protections are not absolute in civil proceedings. A good civil attorney, who knows of your police background, may have tried to get your personal package before deposing you. If not, he will attempt to get information that will "open the door" to getting it in a subsequent proceeding.

You may well have a concern that your police employment and history of arresting criminals requires that identifying information about you remain confidential. If a questioner insists upon your home address, college attended, high school attended, wife's name, etc. make sure that your refusal to answer is based upon "concern for your personal safety and the safety of your family due to the vindictive nature of the suspects that you have investigated." It is this writer's opinion that general (but not identifiable) information such as major in college, postgraduate courses, military service (but not the branch) hobbies, etc. should be provided to a questioner, but nothing should be revealed that could lead to identifiable information.

One of the purposes of a deposition is to learn about you, generally. You can appear to be reasonable by providing information in a general sense for that purpose but refuse to offer specifics to the protection of you and your family.

Who Will Be your Audience?

All parties may attend a deposition, and an attorney may designate an investigator. It is not a usual event to have a plaintiff present during all depositions taken relating to a lawsuit. They may be concerned about the course the litigation is taking or they may be particularly pitiful in their appearance to evoke sympathy. Therefore, if other members of your investigation team are available, or the client (who has seen this person pre-injury) is available, they can attend your deposition. As time-consuming and annoying as it may be to attend depositions, the value to you as the deponent cannot be understated. Others can observe how the other testimony has gone, how the attorneys interact, etc. and be in a better position to answer questions when their turn comes.

Moreover, they will be dramatically assisting in their own defense by providing you with investigative knowledge based upon related to the proceedings. This same advice holds true for you; ask the attorney handling the lawsuit if you can attend any on-going depositions related to the case prior to the time your deposition is taken. This preview can be invaluable for the time you have to assume the "hot seat."

General Rules and Guidelines

With these general observations in mind, the following comprise basic rules and guidelines applicable to both settings.

Rule Number 1

For both Courtroom and Deposition Testimony

Tell the Truth Absolutely nothing is gained by lying. Absolutely everything is lost by lying. You can lose your job, your reputation, your right to vote (if convicted of perjury), and your freedom. You are indeed only as good as your reputation. This writer assures you that there exists a network, formal or otherwise, wherein attorneys discuss how effective certain expert witnesses or investigators are in a courtroom. One day's loss of credibility can translate into a lifetime of anguish.

Rule Number 2

For both Courtroom and Deposition Testimony

Testify from your knowledge or observation unless asked otherwise. Most investigators have a very annoying habit of testifying in the "we" mode. This writer believes that this comes from police training and experiences with partner-related law enforcement details, i.e., we observed the vehicle, we arrested the suspect, we told him to turn around, etc. It is impossible for a "we" to do most events related to the investigation of a suspect. When you are the sole witness to a set of facts, testifying in this "we" mode confuses the jury, and especially in the case of re-read of a deposition in a court, it leads them to disregard your testimony in that it sounds made up, and generally, detracts from your overall effectiveness.
When you are assigned to investigate an incident, it is also important to avoid phrases such as "as directed by my supervisor/attorney, I did…" Your credibility should stand alone.

Rule Number 3

For both Courtroom and Deposition Testimony

Listen to the question. Sounds simple? This is the biggest mistake most witnesses make; active listening can avoid most of the pitfalls of testifying.

Rule Number 4

For both Courtroom and Deposition Testimony

Answer only the question that is asked of you; if you do not understand it, ask for the question to be rephrased. You do not get demerits for indicating, in a polite way, that you do not understand the question. A "pardon me, counsel, I do not understand your question, could you please rephrase it" or "I do not understand what you mean by _____" are perfectly acceptable questions to ask of the attorney.

Remember, in a deposition, no judge sits to rule on objections to questions. Therefore, you should assure yourself that you understand the question. Typically, in the admonishment given to a deponent, you will be told that if you answer a question, it is implied that you understood it.

Rule Number 5

For both Courtroom and Deposition Testimony

Remember, this is not a test. "right" or "wrong" answers do not play in this area; only the truth is important. Viewing the giving of testimony as a kind of test is a very common mentality of investigators who have been tested throughout their careers: academy training, military training, and promotional tests, and even, to some degree, the ego creates an inner fear of saying, "I don't know" or "I can't recall" when responding to a question in open court or a deposition attended by numerous lawyers in fancy suits. If the response is the truth, it is the appropriate response. If you find yourself truthfully stating throughout your testimony that you cannot recall or don't know when you can vary your verbal and non-verbal response to minimize the impact of an "I can't recall" line of questing. For instance, you can look thoughtful, pause, and then say, "I honestly can't remember." Instead of " I don't know," you can qualify the response to appear more honest: for example, say, " I wasn't in a position to observe the suspect then, therefore, I cannot answer your question asked."

Rule Number 6

For both Courtroom and Deposition Testimony

Unless you had a tape measure, tape recorder, ruler, calendar, or stopwatch, all distances, conversations, measurements, dates, and times are "approximately, something to the effect of, on or about, or estimated to be" when you are giving testimony. It is always a good idea to qualify the numerical and descriptive items in your testimony because they are the basis for fruitful cross-examination. For instance, you testify that the witness stated that the driver was wearing a red shirt. He testifies that he was wearing an orange shirt. If you had testified that to a "reddish" color, the discrepancy is easily explained, and the jury can feel comfortable that your witness indeed saw a shirt of a "reddish-orange" color on the driver. This is especially true when a deposition was taken in 1989, and the trial date was set in 1991. Your memory is likely to fade over time and you can hedge your bets with approximately vague answers.

This same analysis applies when giving distances; **Always give the minimum and maximum ranges.** For instance, if you think the car was speeding approximately 35 miles per hour, it would be appropriate to testify that the vehicle was traveling approximately 30 to 40 miles per hour. If you observed the suspect approximately 10 feet away, and you did not measure the distance, then it is appropriate to testify that you observed the suspect 5 to 15 feet from your location. It is not uncommon for attorneys to attempt to trip you up on minute details to discredit your testimony. These attempts can be easily defeated if you truthfully give approximations.
In depositions, you are obligated to give approximations if you feel that you can. Typically, the admonition at the beginning of a deposition will inform you of such an obligation. For instance, you will be told the following:
"I am entitled to what is called a best estimate. I do not (nor does your attorney want) you to guess. This is the difference between an estimate and a guess. Please look at this table; you could probably estimate its length within a few feet. However, if I asked you to estimate the length of the table in my kitchen. that you have never seen, that would be a guess."
Do not guess. when giving deposition testimony and approximate/estimating, say so. if you don't, it will come back to haunt you. For instance, say "I would estimate the time to be a couple of hours" instead of "two hours."

Rule Number 7

For both Courtroom and Deposition Testimony

Do not testify without refreshing yourself with the reports and depositions related to the incident. in other words, be prepared. Sometimes, the only thing a defense attorney has going for himself is the inadequacies in the investigative report; if you cannot remember the details in the report, it will make you look doubly bad. Memorize if you must but look the report over carefully. If you have time prior to testifying, ask the prosecutor if he/she sees any problems in the report; hopefully, they can pinpoint areas of confusion, misstatement, and possible cross-examination subjects so that you can be thinking of your responses. This is also true when you have been deposed in a civil suit and are now giving "fresh" testimony. Be sure that you have reviewed all the documents that you prepared, including your deposition transcript.

In the giving of deposition testimony

A common question asked in a deposition is the following: "Have you reviewed any documents, looked at any pictures, heard any tape recordings (audio/video), prior to coming here today to prepare yourself for this deposition?" If you did, the questioner is entitled to a copy of those documents/recordings/pictures in order to question you about them.
If you are provided documents to testify about, make sure that they are marked for the record and that you refer to them as a marked exhibit. It will keep your testimony clear and avoid confusion a few years later, when everyone's memory about the deposition is weak.
Finally, ask the attorney what documents have been turned over in discovery to date. This will avoid unnecessary surprise or consternation when the plaintiff's attorney whips out a document that you had no idea had been turned over.

Rule Number 8

For both Courtroom and Deposition Testimony

Remember the three c's: be calm, courteous, and consistent in your demeanor. In the giving of courtroom testimony, the best witnesses are those who treat each attorney asking the questions in the same manner. The best witnesses and deponents are those that act as helpful and concerned when questioned by the (Defense attorney as they did when questioned by the plaintiff's attorney, or in the case of a deposition, the plaintiff's attorney and cross-complainant's attorneys.
This is especially true in a deposition. Keep in mind that all the attorneys related to the action can ask questions, and there is no referee. Prior to testifying in a deposition, make sure that you know who the "players" are. For instance, ask your counsel to explain to you who represents who, not that your demeanor should change, but you would then be knowledgeable about where a certain attorney is coming from and look for the appropriate potholes in his/her questions. A deposition also is viewed as an opportunity to preview the witness for testimony, upset the witness, anger the witness, and generally frighten the witness about what trial will be like with this cantankerous attorney. In other words, gamesmanship is much more prevalent in a deposition that in the giving of courtroom testimony.
And they will try to wear you down. Moreover, they can wear you down because depositions are scheduled to continue from the time they are set until finished, excluding holidays, weekends, and nonbusiness hours. Further, they can rightfully ask you the same question repeatedly because "asked and answered" types of objections are rarely successful and no judge is there to rule upon them.

Rule Number 9

For both Courtroom and Deposition Testimony

Loose lips sink ships. Do not volunteer any unnecessary information. You can be courteous, calm, and consistent when providing a "yes" or "no" to a question. During the trial of a matter, particularly in cross examination, volunteering information has been the downfall of a witness. If you need to explain your answer, just make sure it is brief, thoughtful, and responsive to the question being asked.

In a deposition, you absolutely do not need to volunteer information. Occasionally, an attorney will ask at the end of a deposition, "Well, is there anything else you'd like to add?" Obviously, in court, this would be objected to as broad, vague, asking for a narrative, etc. Such objections are not made in depositions (usually). This is the classic time that you can pull one over on the attorney by simply stating, "No, counsel, I believe that I have answered your questions to the best of my ability at this time."

Rule Number 10

For both Courtroom and Deposition Testimony

Permit yourself to be protected; if in need of protection, do not hesitate to ask for it. This may sound simple enough; however, it is the dream of an attorney to railroad a witness. For example, the questions are fast, rhythmic, and innocent to a point, and you get on a roll. Before you know it, you have already answered a question that your attorney has objected to; the judge overrules the objection and lets the answer stand because you failed to wait a few seconds before responding. It will save you many headaches later. If the attorney does not object, but you have a problem with the question and feel that the opposing attorney will give you a hard time about not understanding the question, look to the judge and say "Your honor, I can't answer that question because; must I still respond?" Most of the time, a bench officer will assist you.

Rule Number 11

For both Courtroom and Deposition Testimony

Remember, depositions are your basic "free for all," and you must follow the instructions of your attorney and the dictates of your instincts. Contrary to the giving of courtroom testimony, you may take breaks at any time that you request during a deposition. If you are uncomfortable about a question or the way that questions are being asked, ask to take a break. Profess to have had too much coffee, a need to call your emergency number at the office, your beeper just went off, etc. and get out of the room. Try to avoid appearing panicked and asking to speak with your lawyer privately. If you request a break to talk with your attorney, the questioner can turn it back on you by asking the next question, "Now that you have had an opportunity to be coached by your lawyer, what is your response to the question that I just asked?" It may be unavoidable that you will need to express on the record a need to consult with your lawyer; just do it in order to save headaches later.

If your attorney instructs you not to answer, **Do not answer the question**. A plaintiff's attorney may well turn upon you and say, "Officer, do you realize that you may be hauled into court and compelled to respond to this question and that monetary sanctions could result against you personally? If you understand this, then are you still willing to follow the instructions of your attorney? **Simply, do not respond to these types of questions.**

In this writer's humble opinion, they are unethical in that they interfere with the attorney-client/investigator relationship, which is a violation of numerous ethical canons. Let your attorney take the heat. If he/she does not, then direct the attorney badgering you to your attorney by simply stating, "Counsel, I am represented by counsel here, I am following his/her instruction not to answer, and if you ask me such a question again, I will consider it to be unethical interference with the attorney/client relationship that we have established. " (This will make your average obnoxious plaintiff's attorney go nuts, so be prepared for some hysterics.)

Legal criteria for evaluating testimony

- Conduct, attitude, demeanor, and manner while testifying
- Ability to recollect, remember and relate that about which you are testifying
- Prior/subsequent consistent/inconsistent statements
- Consistent/inconsistent testimony with other witnesses

- Bias, interest, motive not to tell the truth
- Character for honesty, integrity, or dishonesty
- The admission that you did not tell the truth
- Prior conviction of a felony
- Expert Witness Guidelines

Depending upon the judge, a jury will be instructed as to emphasis to be given to an expert's testimony. Generally, a jury is told to examine the truth of the basis of the expert's opinions, i.e., is the foundation for the opinion of the expert witness sound. An instruction that distinguishes between a "lay" expert and a traditional expert may also impact upon the weight given to a professed expert's testimony.

Common areas of cross-examination

- Training and Experience
- Educational Background
- Specific Training re Field of Expertise
- Personal use/observation of That to Which You are an Expert
- Number of Investigations
- Details about this Particular Investigation Questions about your methodology
- Details about statements made to you
- Investigations Prior to this One
- Investigations After this One
- Report Writing Procedures
- The Report Itself
- How this Investigative Report Was Written
- Testimony on Direct
- Testimony of Others

"Illegal" criteria for the giving of testimony

Trials are plays. They should be directed and produced to have the most substantial dramatic effect and appeal. They should be powerful, precise, effective, and appealing. This is theater, so dress and act the part. Juries expect it and are disappointed when their expectations are not met.
So, rehearse, rehearse, and rehearse with the acceptable levels of good theater. If you are telling the truth, the manner and fashion in which you express yourself can only be enhanced to the benefit of your employer and your career.

Final remarks

If you are interested in becoming proficient as a witness, the following are suggestions for your education:

- Read books about trials, both fiction and non-fiction.
- Watch trials. Find out when a lawyer/expert/judge is "performing."
- Observations without the interference of butterflies are invaluable.
- Videotape your proposed testimony. Ask others to critique it.
- Take acting or speech classes.
- Take psychology classes
- Take improvement courses that focus on communication skills

Above all, relax and tell the truth!!

Observations on testifying

A. Review all reports thoroughly
B. Be appropriately dressed
C. This is not "Dragnet": don't talk like a cop
D. Listen to the question. Answer only what you have been asked. Do not volunteer anything that hasn't been asked. Testify truthfully.
E. Listen to your attorney.
F. Do not argue with the other attorney. If he wants to argue, let him do it. Do not get caught in a trap. You may lose.
G. If you truly do not know the answer to a question, say: "I don't know."
H. Do not play hide-the ball with the opposing attorney.
I. Do not let a lawyer put words in your mouth or change your statement around until he has you saying something different. Stick to what you know, no matter how many times you are asked.
J. Speak to your audience, i.e., Judge or Jury.
K. If asked to testify near a blackboard or exhibit, never turn your back on the jury.
L. Do not talk about your case in the hallway or the snack bar or anywhere where jurors or where witnesses may be present — answer in the same tone of voice. If asked an embarrassing question, do not change voice inflection or look down at your feet.
M. Know the elements of the crime for which suspects arrested.
N. Be yourself.
O. Get a good night's sleep.