

# You've Been Served: Surviving a Deposition

By Nan Wodarz, Ed.D.



**S**chool business managers are in the unique position of supervising the areas of the operation that present the greatest opportunities for legal issues to arise.

New construction and renovation projects are strewn with legal land mines. The possibility of lawsuits hovers like a black cloud over personnel issues. Opportunities for transportation or food service issues to crop up are continuous. And school business officials often are called on to weigh in on issues involving equal education and unhappy parents.

Our attorneys handle most of the issues related to any litigation pending against our schools or districts; yet there is one area in which we are on our own: depositions. During a deposition, the district's attorney

can offer advice and moral support, but little else. It is a stressful process and the best preparation is to learn a little bit about this portion of the legal process.

## Overview and Process

A deposition is one of the most important elements in a civil case. Specifically, it is a pretrial discovery device in which one party's lawyer questions another party or witness in the case in order to gather information. It's a game of Twenty Questions.

During the actual deposition, you are not there to defend your school or district; you are not in control; you are not there to clarify issues. It is definitely not a time to get on your soapbox. The goal of the deposition is simple from your perspective: answer the questions and do no harm.

By the time you are ready to start the deposition process, you will already have begun the litigation process by filing various documents. At some point, your attorney will notify you that opposing counsel wishes to depose you, to find out as much as possible about you and what you know related to the case.

The actual deposition usually takes place in the lawyer's office with several people in attendance, including the opposing party's attorneys and maybe the client. Your attorney should be with you to protect your rights. In addition, a court reporter will take down the conversation verbatim.

The opposing counsel will be gauging you as a witness, determining whether you will be credible at trial, whether a jury will like you and, more importantly, believe you. If the attorney concludes that you will make a good witness for the defense, he or she will likely want to avoid trial.

## Getting Ready

Depending on the complexity of the case, you may want to start preparing for your deposition about a week before the scheduled date. By preparing any earlier, you may risk forgetting the information that was covered; preparing closer to the date may significantly increase your anxiety level.

A good attorney will thoroughly review all documents related to the case: all the pleadings, the complaint, the answer, and any expert designations. This information will

help you fully understand the background of the case and why you were deposed.

Your testimony at the deposition must be consistent with all previous testimony and signed, sworn statements. If testimony is inconsistent, your credibility will suffer.

With the help of your attorney, try to anticipate the tough questions and prepare answers for them. Ask your attorney to question you in the same manner that opposing counsel would. Learning to respond under pressure, in a confrontational setting, will help you prepare for the stress you will experience on “game day.”

Although the actual deposition is less formal than a court appearance, it should still be treated with the same level of seriousness. Dress as you would for court or a job interview. Make sure to get a good night’s sleep and set up the necessary safety measures to ensure that you arrive at the designated location on time. Being late is not an option.

### Interacting with the Attorneys

Your attorney will remind you that you are “on” any time the opposing counsel is present. Make sure you are mentally prepared to begin. Then follow these tips.

- **Don’t be intimidated.** Clearly, the whole process is intimidating, but come in confident and ready. Remember, everyone is there to complete a business transaction.
- **Don’t tell little white lies.** This tip is especially important if you are prone to exaggeration. Your testimony must be correct. Any white lies will come back to haunt you. The deposition is conducted under oath and is the equivalent of court testimony. A person who doesn’t tell the truth during a deposition can be cited for perjury.
- **Follow your attorney’s advice.** Many people get into the heat of the situation and stop listening to their attorney. This is a time when you do *not* know best. So even if you disagree with your attorney’s advice, follow it anyway and then discuss the issue privately.
- **Don’t expect your attorney to do a lot of hand-holding.** Your attorney may interject to get clarification or to lead you to a more clear answer if he or she believes your answer was too vague. However, most of the time, he or she will be quiet.
- **Pause before answering.** After you are asked a question, wait several seconds before responding. This pause will allow your attorney to object to the question if appropriate and will give you time to gather your thoughts.
- **Speak clearly, using proper grammar.** Don’t say um, ah, yeah, or nope because all utterances will be transcribed exactly. Pauses are not recorded, so take your time answering.
- **Listen to the entire question.** Don’t try to anticipate the question or interrupt the attorney. Listen for categorical words like *always*, *never*, *all*, *every*, or *none*. Responding to questions with these words can be problematic.
- **Ask for clarification.** Never answer a question that is unclear. Ask the lawyer to rephrase the question or, if the question has multiple parts, to restate each part as a separate question.
- **Don’t guess at an answer.** If you have trouble answering a question, don’t guess. Rather, say, “I cannot recall” or “I do not remember.” There is a difference between these responses and “I don’t know.” This distinction is especially important when asked to estimate time or distance. If you must answer, use the phrase, “My best estimate is. . . .”
- **Answer only the question that was asked.** For a variety of reasons—like pent-up anger, a desire to be in command, nervousness, or a need to impress the lawyer—people who are being deposed often offer boundless information. Random information that does not directly address the question may lead to the discovery of additional information that is counterproductive to the case. Do not elaborate or volunteer information.
- **Don’t argue or use sarcasm or flippant remarks.** Opposing counsel may attempt to provoke you. Don’t play into his or her hands as it might indicate that you will behave the same way at trial, which could work in his or her favor.
- **Relax.** If coffee makes you jittery, skip it that day. Arrive comfortable and ready to go. A cordial, professional manner will go a long way toward helping your cause.
- **Don’t write or draw anything.** There are no rules that require you to draw a picture, diagram, or map, even if opposing counsel asks you to. Anything that is written during the deposition may become part of the permanent record. And unless you are a gifted artist, you will likely make errors in content or scale that could be problematic in the future.
- **Take a break.** As long as a question isn’t pending, ask for a 10-minute break. Sometimes it is a good idea to break once an hour so you can find out how you are doing and get advice from your attorney.
- **Don’t chat.** When taking a break at the beginning or end of the deposition, avoid chatting with the opposing parties or within their earshot. They are alert for any information that can help them, and your job is to give them as little information as possible. Remember, you are never “off the record.”

### Types of Questions

Attorneys have an arsenal of questions. An overview of the types of questions they may ask will be helpful.



## A cordial, professional manner will go a long way toward helping your cause.

- **Sandwich questions** are three-part queries consisting of a compliment, the actual question, and a closing compliment. For example, “Mr. Smith, I notice that you are the senior director of human resources and you are president of the local HR Association. Please give us an overview of the major objectives of your affirmative action program. Also identify how your program has served as a model for other firms.” Flattery and criticism are tools used to sway the answers based on emotion. When a general question is asked, give a general response.
- **Close-ended questions** limit the range of responses so the lawyer can obtain specific answers. For example, “Did you write this memo dated January 15, 2008?” Do not immediately answer the question, even if you know you wrote the memo. Ask to see it and read it before answering the question in its narrowest form. If you wrote it, dictated it, or composed it, you will simply answer “yes.” Say no more.
- **Open-ended questions** cannot be answered with a simple yes or no. This questioning strategy is effective because it takes advantage of people’s desire to talk, often revealing important information. For example, “Please describe the performance appraisal system.” This is a general question so the response should be general as well. A good response would be, “A written performance evaluation is conducted on each employee once a year. After the evaluation is made, it is discussed with the employee and the evaluation becomes part of the employee’s permanent record.” If more specific information is needed, you will be asked.
- **Machine-gun questions** are simple queries, fired in rapid succession, that require quick, simple answers. You get into a rhythm of question and answer and if you stop thinking before you answer, you may suddenly find yourself having to dig out of a hole.
- **Compound questions** require two-part answers. This type of query puts additional stress on you in that you will need to separate the questions and then answer each individually. Request that the attorney ask each question separately.
- **Probing questions** look for more details on something you said previously. For example, after answering a question you may be asked, “Why did you say that?” This type of question is like a fencer’s foil thrust forward in hope of drawing blood. The best defense is to deflect the thrust. Respond, “Because I thought it was important.”
- **Leading questions** are worded to elicit the desired answer. They may begin with, “Isn’t it true that . . .” or “Would it be fair to say. . . .” Think carefully before answering and give your attorney time to object.
- **Loaded questions** address key points in the lawsuit and may possibly damage your case. In fact, a loaded question is often preceded by a true comment so the implication of the answer is easy to recognize. You should ask your attorney to try to anticipate any loaded questions that may be asked and practice answering them.
- **Nonquestions** are actually statements followed by a pause. It is easy to presume that a question was asked and attempt to answer it. Always listen for the question; if the attorney makes a statement and pauses, ask, “What is the question?”
- **Hypothetical questions** speculate about a given condition or situation. These questions often begin with phrases like, “Let’s assume that you . . .” or “If you were in his position. . . .” These questions have no place at a deposition. If you allow the proper wait time, your lawyer will undoubtedly object. If there is no objection, try to deflect the question using a phrase like “I have too little information on which to make a decision.”

### After the Deposition

A few weeks after the deposition, your attorney will receive a copy of the transcript. You have the right to review and amend the transcript. The recorders are human and may have made an error, which you will want to correct. You should request a copy and read it carefully. If you notice any inconsistencies, let your attorney know right away.

You don’t “win” a deposition. The best you can hope for is to survive and do no harm.

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