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WITNESS GUIDELINES

TO: Witnesses

FROM: James F. Carr *JFC*
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The following presents useful and practical guidelines for witnesses who testify at deposition, hearing, or trial. These are general guidelines, you will be briefed individually and thoroughly prior to testifying. Most of the items in this memo apply to testimony at deposition, hearing or trial, but a few items refer specifically to testimony at deposition. If you have any questions, ask the attorney handling your testimony.

SOME RULES FOR WITNESSES:

All witnesses, regardless of the role they play in the case, need certain basic rules to understand and follow when testifying. These rules are primarily for cross-examination, but you should keep them in mind for all questioning whether by the opposing attorney or your attorney (the attorney questioning you will be called the examiner in these guidelines). The guidelines will help avoid a lot of problems in cross-examination and make it a less unpleasant experience for you. They will also help your attorney in questioning you and making objections. These are the basic rules:

1. Tell the truth. This is more than a good idea; it is a rule of self-preservation for witnesses. Assume that the examiner on cross-examination has the ability to make a witness who is not truthful very uncomfortable.

2. Think before you speak. You should allow a pause before answering the question. This allows your

attorney to make objections and further allows you to think through what your answer is going to be.

3. Answer only the question asked. The examiner is entitled to an answer to the specific question asked and only to that question.

4. Do not volunteer information. You are not there to educate the examiner.

5. Do not answer a question you do not understand. It is up to the examiner to ask understandable questions; do not help or assist. Do not explain to the examiner that the question is incomprehensible because he or she does not understand words of art in your business, trade or science. Do not help the examiner by saying "do you mean X," or "do you mean Y". You will then be asked about both X and Y.

6. Talk in full complete sentences. Answer yes or no if it is appropriate, but be careful of providing only a yes or no answer because questions are often more complicated than they seem. It is advisable to use full sentences to express what needs to be said to completely answer the question. However, keep in mind the rule about only answering the specific question asked and not volunteering information. Beware of questions with double negatives in them.

7. You only know what you have seen or heard. Questions are often phrased "do you know". A question in a deposition may legitimately ask for something you do not know, but it must specifically ask for information that is outside your direct knowledge. In a deposition questions are allowed if they might lead to discoverable evidence, in other words fishing for useful information may be allowable in a deposition. Remember, there is a difference between a question which asks whether you have any information related to a particular subject and one that asks something specific about the subject.

8. Do not guess. If you do not know or cannot recall something, say so. This rule becomes more important and more difficult to follow when the examiner is scoring points or making it seem that only an idiot does not know the answer to the question. Do not guess.

9. Be as specific or vague as your memory allows, but never testify contrary to your true recollection. If you are asked when something occurred and you remember that it occurred on January 15, state on January 15. If,

on the other hand, you cannot recall the exact date, state an approximate date if you can, but if you cannot recall a date at all, say so.

10. Do not explain the thought process you used in coming up with your answer to a question. In answering a question where your answer depends on your recollection of other facts not asked for in the question, do not refer to these other facts in answering the question. For example, if you are asked when a conversation with Jones occurred, and you recall that it had to be in December because you met Smith in January and you know you met Smith after your conversation with Jones, do not explain this thought process to the examiner. Just say the conversation occurred in December. If you are specifically asked how you remember that the conversation took place in December, then you would have to tell how you remember, but do not volunteer this information, only give it if asked.

11. In testifying on conversations, make it clear whether you are paraphrasing or quoting directly.

12. In answering questions calling for a complicated series of events or extensive conversations summarize where possible. The examiner, if he is doing his job properly, will ask for all the details. It is always possible, however, that the examiner will accept your summary and this is so much the better.

13. Never characterize your own testimony. Do not say things such as "In all candor", "honestly", "I'm doing the best I can" or similar phrases.

14. Avoid all adjectives and superlatives. I "never" or I "always" have a way of coming back to haunt you.

15. Do not testify as to what other people think unless you are specifically asked. If you have to answer such a question make it clear that it is only what you think the person knows or thinks.

16. Do not testify as to your state of mind unless you are specifically asked. In other words, if the question is: Did you read that document, the answer is: "Yes," not "Yes, and I believe every word in it."

17. If information is in a document which is an exhibit, always ask to see the document even if you are very certain of your answer.

18. If information is in a document which is not an exhibit, answer the question if you can remember without looking at the document. If you can not answer the question without looking at a document that is not an exhibit, you may answer the question by stating that you do not recall. Do not tell the examiner about the document since he or she may not know of its existence. After a witness states he or she does not recall a fact which the examiner believes the witness should know, the examiner should ask if there is a document which can refresh the witnesses recollection. Let the examiner do this, do not help the examiner.

19. Do not let the examiner put words in your mouth. Do not accept the examiner's characterization of time, distances, personalities, events, etc. Rephrase the question into a sentence of your own using your own words.

20. Do not answer a compound question. If it is a compound question you are entitled to have it broken into its parts to make sure you answer correctly. If it is too complex to be held in your mind, it is too complex and ambiguous to answer.

21. Pay particular attention to the introductory remarks preceding the guts of the question. Leading questions are often preceded by statements which are either half-true or contain facts which you do not know to be true. Do not let the examiner put you in the position of adopting these half-truths or unknown facts on which further questions will be based.

22. Use all breaks to consult with your attorney in a place where you can talk in private.

23. If you are interrupted, let the examiner finish the interruption and then firmly but courteously state that you were interrupted, that you had not finished your answer to the previous question and then fully answer that question.

24. If you are caught in an inconsistency do not collapse. What will happen next will depend on what questions are asked. State your present recollection, if asked. State the reason for the inconsistency only if you are asked. Rehabilitation is done later by your attorney, unless you are specifically asked the reason for the inconsistency.

25. Do not adopt an examiner's summary of your prior testimony.

26. If you are finished with an answer and the answer is complete and truthful remain quiet and do not expand upon it. Do not add to your answer because the examiner looks at you expectantly. If the examiner asks you if that is all you recollect, say yes, unless you have other specific recollections. Do not search for other recollections, even if you feel it is expected of you. Problems usually arise from a witness who searches too hard because they feel there must be something else that should be recalled. Most witnesses will experience this so always keep this rule in mind.

27. Do not agree to supply any information or documents requested by the examiner. If reference is made to documents or information, the request is made to your attorney. Your attorney will either answer the request or will take the request under advisement.

28. If an objection is made to a question, listen to the objection very carefully. You may learn something about the question and how it should be handled from hearing the objection.

29. Never express anger or argue with the examiner. If a deposition is to become unpleasant, that is what your attorney is there for.

30. Do not expect to testify without the other side scoring points. If the other side appears to you to be asking questions which call for answers that do not help your case, accept the fact that every lawsuit has two sides and sit back and take your lumps. Avoid the temptation to guess, expand on your answer where the expansion is not called for, or, even worse, be evasive or make something up.

31. Avoid any attempt at levity. Pomposity is the occupational disease of the legal profession; you will be hauled over the coals as not taking your solemn oath seriously if you make jokes or wisecracks.

32. Avoid even the mildest obscenity and absolutely avoid any ethnic slurs or references. Almost any obscenity or ethnic reference could and possibly will be considered as derogatory by someone involved in your case.

33. There is no such thing as "off the record". If you have any conversation with anybody in the deposition room, courtroom or elsewhere, be prepared for questions on that conversation.

34. If the examiner appears totally confused about your business and its technical aspects, do not attempt to educate the examiner or anyone working with the examiner.

35. If you do not remember something, say so. You may then be asked if a statement or document refreshes your recollection. If it does, say so. If it does not, the answer remains that you do not remember. You may be asked whether there exists a document which may help you refresh your recollection. If there is such a document and you are specifically asked this question, you must answer.

36. Numerous documents are marked as exhibits and used in a proceeding. If you are asked about a document read it before testifying. Do not make any comments whatsoever about the document except in answer to a direct question from the examiner.

37. If you are hit with a flash of insight or recollection while testifying and this has not been discussed with your attorney, keep it to yourself, if possible, until you have had an opportunity to discuss it with your attorney.

38. Every witness makes mistakes in testimony. Do not become upset if you think you made a mistake. If you realize you made a mistake during the testimony, the mistake should be corrected as soon as it is realized. Mistakes made in a deposition may be corrected after the deposition, when you review the transcript of your testimony. You should always have the opportunity to review the transcript of your deposition testimony, so be sure to ask about this if nobody mentions it. If you realize you made a mistake after you finish testifying, you should tell your attorney as soon as possible.

Use these guidelines and work with your attorney so that you can have a successful experience testifying. Should you have any questions regarding these guidelines or anything else about your testimony, write them down and talk about them with your attorney during preparation for your testimony.