

# Surviving a Deposition

Texas Association of Environmental Professionals  
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# SUMMARY OF TOPICS

- What is a deposition?
- What are the goals of depositions?
- Why is a deposition challenging and a departure from how we normally talk?
- The need for preparation
- The need to know the process, the substance and speak credibly.
- Issues associated with expert and videotaped depositions.



# WHAT IS A DEPOSITION?

- A deposition is the taking of an oral statement of a witness under oath, before trial.



- It has two purposes: To find out what the witness knows, and to preserve that witness' testimony.



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# DEPOSITIONS PREVENT SURPRISES

- The intent is to allow the parties to learn all of the facts before the trial, so that no one is surprised at trial.
- “Perry Mason” moments not common in civil trials because of depositions
- One deposition rarely makes or breaks a case.
- **But witness preparation is critical.** The witness should not be surprised by the deposition content or process with good preparation.



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# TYPES OF DEPOSITIONS

- **Fact Witness**
- **Corporate Representative**
- **Expert**



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## DEPOSITION EXPERIENCE?

- How many of you have given a deposition?
- How many of you have given a deposition more than once?
- How many of you have testified at trial?





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*"Do you have anything for deposition?"*



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# COMMON DEPOSITION CONCERNS

- The adversarial process
- Do I answer when the lawyers object?
- I might make a mistake
- I might not understand the question.
- My employer might get mad at me
- I could lose the case

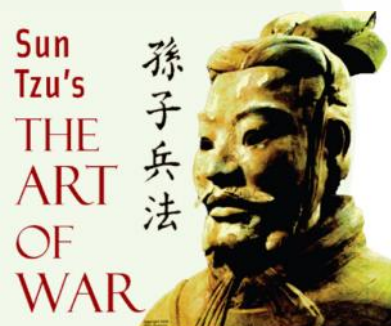




# PREPARATION COMBATS

## DEPOSITION ANXIETY

- “All things are difficult before they are easy.”  
-- Thomas Fuller
- “Victorious warriors win first and then go to war, while defeated warriors go to war first and then seek to win.”  
-- Sun Tzu



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# 3 PARTS TO DEPOSITION PREPARATION

- Know the process
  - Ask the attorney
  - Review transcripts
  - Watch depositions
- Know the substance
  - Review documents
  - Understand the claims in the lawsuit
- Know how to be effective and credible



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# KNOW THE PROCESS

- Date, time and place
- Whether or not you are being deposed as fact witness, an expert witness or a corporate representative
- What to wear, where to look
- Videotape or not?
- Ask questions and become comfortable with the process.



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# KNOW THE PROCESS

- Understand that the deposition is fundamentally different from ordinary conversation.
- Question and answer format.
- The court reporter takes down what is said verbatim.
- Defending and opposing lawyers.
- Opposing attorney will attempt to obtain commitments.
  - Example: “Tell me if you don’t understand my question. If you answer a question, I am going to assume you understand it.”



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## DEPOSITION PROCESS DETAILS

- The court reporter will swear in the witness.
- Examination and cross-examination can proceed as permitted at trial.
- Objections are noted, but generally, the witness will answer the questions.
- Objections will be ruled upon at a later time.



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# EXAMPLES OF DEPOSITION QUESTIONS

Q: Ms. Wilson, were you the person who investigated my client's claim of gender discrimination at the Acme Paper Company?

**A: Yes I was.**

Q: Did you prepare a report of your investigation for Acme's Vice President for Personnel?

**A: I did.**

Q: Let me show you a six-page document which we have marked as Exhibit 23 which appears to be a memorandum prepared by you on January 28, 2004 and sent to Joyce O'Toole. Do you recognize Exhibit 23?

**A: Yes that's the memorandum I just told you about that contains my report on your client's complaint.**



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# DEPOSITION PREPARATION/OBJECTIONS

- Even if a lawyer objects during a deposition, the witness will usually have to answer the question.
- The exception is privilege.
  - Example: What your lawyer told you; What your attorney explained to you regarding the issues that would be covered in the deposition.



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# DEPOSITION PREPARATION/OBJECTIONS

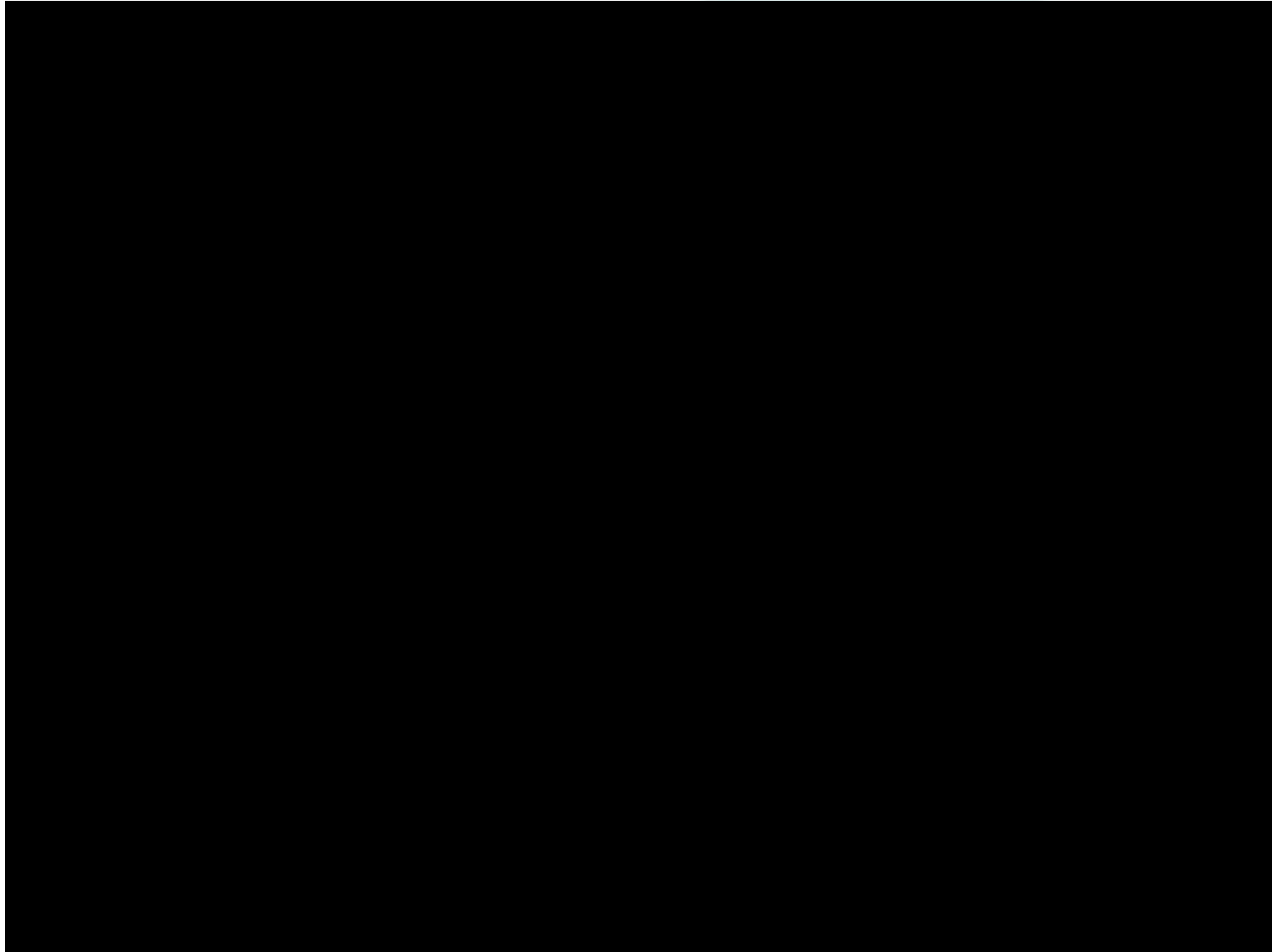
- Privilege objection may be followed by an instruction not to answer
- Opposing attorney may ask the witness directly whether he or she will answer the question.
- “On the advice of my counsel, I decline to answer the question.”





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# EXAMPLE: PHOTOCOPY DEPOSITION



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# KNOW THE SUBSTANCE

- Review key topics and issues.
- Review key documents.
- Review key substantive areas with the attorney preparing you.
- If you are an expert, you must fully understand your opinions and their foundation.
- BUT . . . No witness can know everything, and it is okay to say “I don’t know.”



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## EXAMPLE

Q: Does the computer program have the capability of printing out a master index of all the crash tests?

A: I don't know, but I would assume that some computer person set this system up and can go in and generate a list of all the data in there . . . .

**Lesson: Assuming is akin to guessing. The answer is “I don't know.”**



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# KNOW HOW TO BE EFFECTIVE AND CREDIBLE

- Give the shortest correct answer to each question.
- 7 Basic Answers:
  - “Yes”
  - “No.”
  - “Green,” “noon,” “in my office.”
  - “I don’t understand the question.”
  - “I don’t remember.”



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## EXAMPLE

Q: You would agree that placing an ad in the medical journal is an inexpensive way of ensuring all of the doctors in the area would know about your services?

A: *Well, quite frankly, I don't think many doctors read those ads or take them seriously. I have talked with lots of them and they don't bother to read them.*

**Lesson: Fight the natural inclination to explain yourself. The answer is "I don't agree."**



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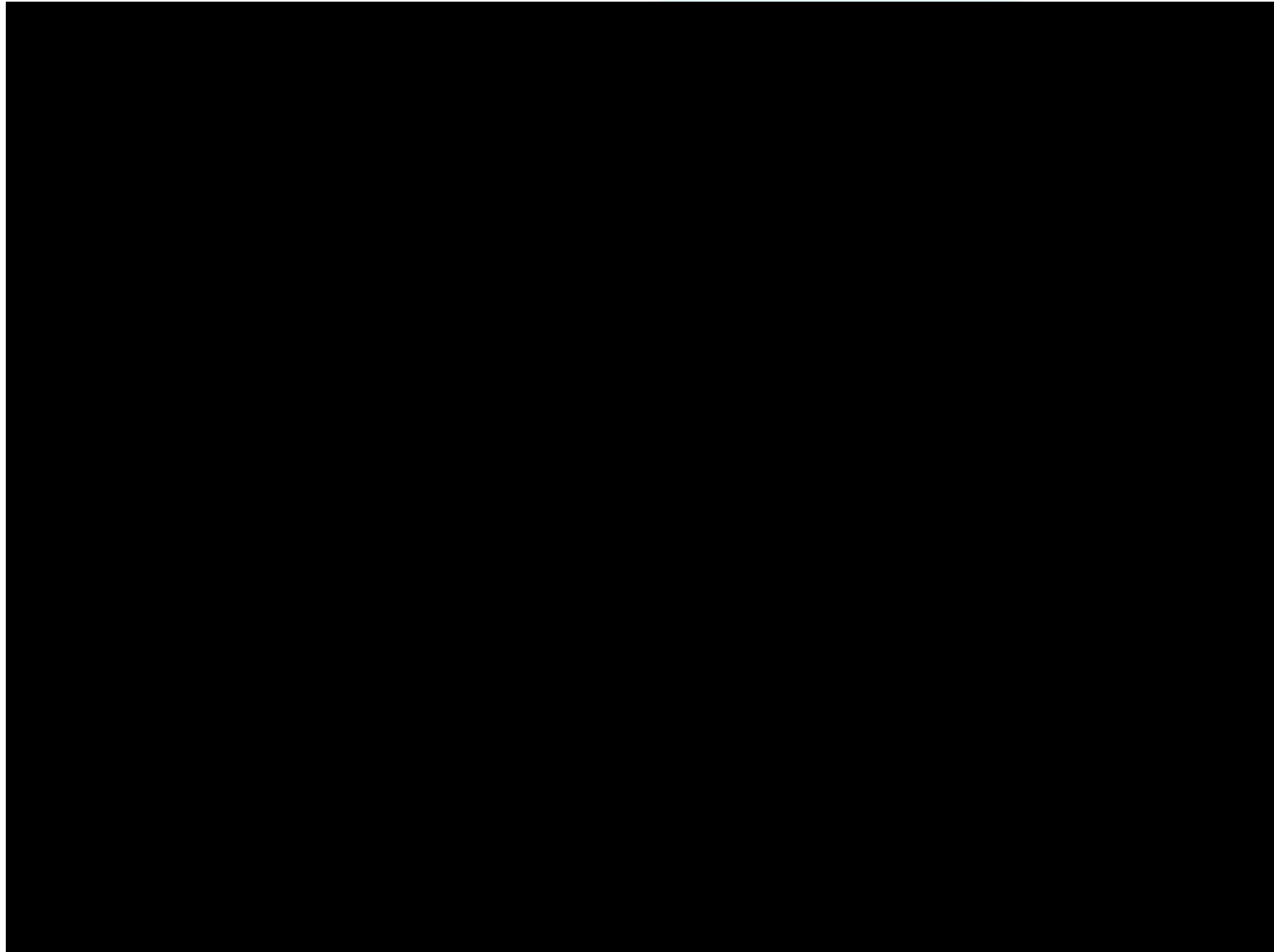
# LISTENING DURING A DEPOSITION

- The Questioning and Answering Process Has 5 Steps
  - Listen to the question being asked.
  - Think about what information the question seeks
  - Think about the answer
  - Formulate the answer
  - Answer the question



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# LISTENING EXAMPLE



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## **BE COMFORTABLE WITH SILENCE**

- Many people feel the need to fill in conversation gaps.
- Remember: Question and answer format.





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# **EXAMPLE: DISCOMFORT WITH SILENCE**



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## CORPORATE REPRESENTATIVE DEPOSITIONS

- **Fed. R. Civ. P. 30(b)(6):** an entity must designate “one or more officers, directors, or managing agents, or other person who consent to testify on its behalf.”
  - The designee is required to testify concerning “matters known or reasonably available to the organization.”
- **Notice:**
  - Fed. R. Civ. P. 30(b)(6) requires that the notice “describe with reasonable particularity the matters on which examination is requested.”



# EXPERT DEPOSITIONS



*The expert witness had to be tethered to the witness stand because of the “hot air” effect.*

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# EXPERT DEPOSITIONS

- Potential Pitfalls
  - Absolutes
  - Elaborating or volunteering
  - Hedge words
  - Defensiveness/Not conceding obvious points
  - Uncomfortable with the “I don’t know” answer
  - Open-ended questions and rambling
  - “Bumble and fumble” lawyer
  - “Possibility”
  - “I assume”



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# EXPERT DEPOSITIONS

- What are your opinions?
- What did you do?
- Why did you do that?
- How did you do that?
- What result did you get?
- What significance does that result have to your conclusions?



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## EXPERT DEPOSITIONS

- What are the reliable authorities in the field?
- What assumptions did you make?
- What tasks did you not do?
- Is this your current and accurate list of credentials?
- What are your qualifications?



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# EXPERT DEPOSITIONS

- Who in the field agrees with you?
- Who in the field disagrees with you?
- What did you review and choose not to rely on?
- Who selected the documents you reviewed?
- Did you ask for anything you did not receive?
- Peer reviewed publications



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# EXPERT DEPOSITIONS

- Error rate
- Acceptance in the field
- Testability
- Relevance (fit)
- Reliability (scientific foundation)
- Prior testimony (and rejections)
- Sources of income, percentages





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# EXPERT DEPOSITIONS - SUMMARY

## Opposing Counsel is Trying to Discover:

- Qualifications
- Link between Qualifications and Opinions
- Reliability of Method
- A Link Between Your Methodology and Results





*“I ask the witness to quit taking advantage of the fact that his deposition is not being videotaped.”*



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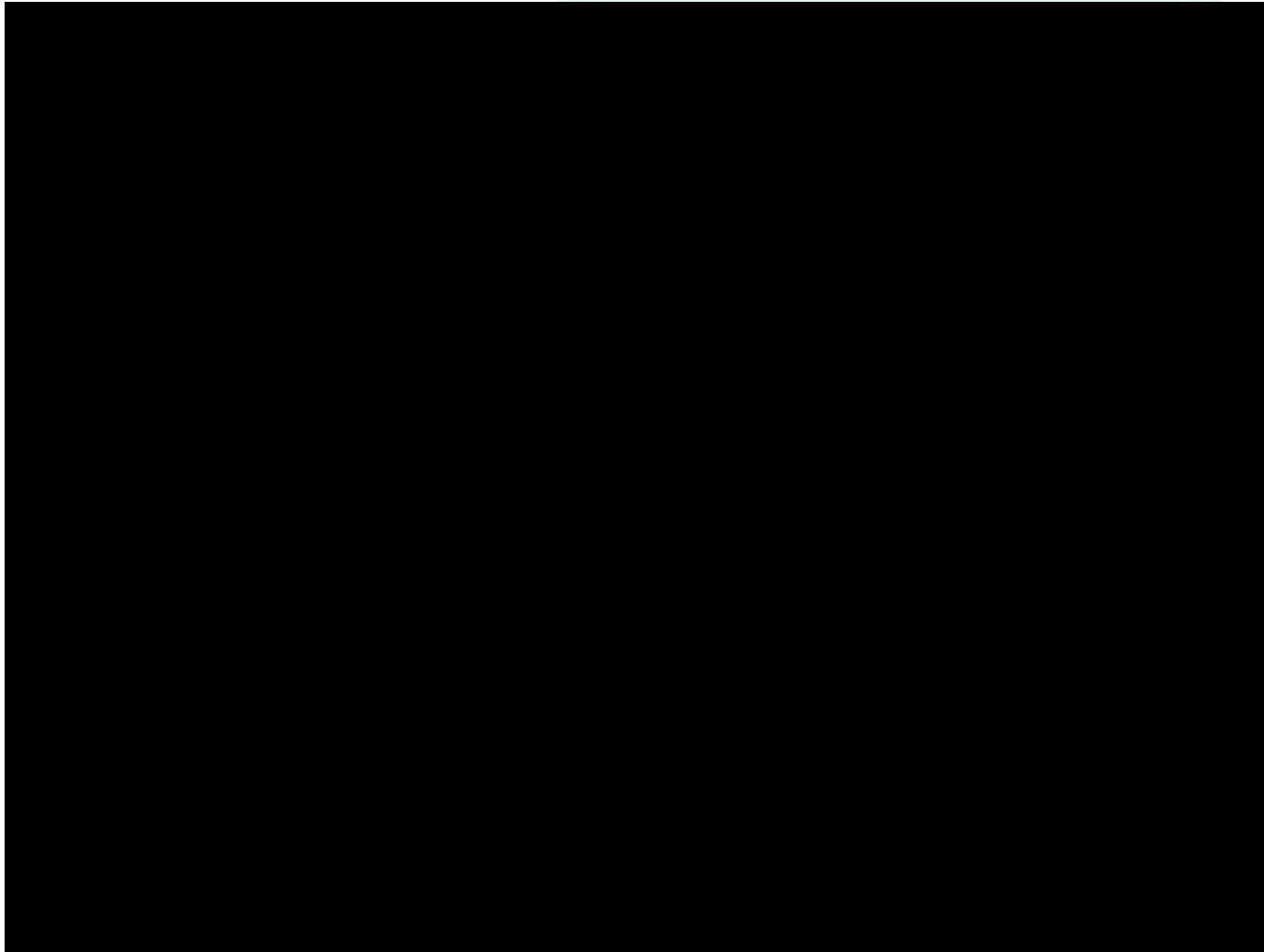
## VIDEOTAPED DEPOSITIONS

- The attorney defending you should see how you look on camera during the deposition.
- Evasive long pauses and other distracting behavior should be avoided.
- Dark clothes and pastel shirts film better. Avoid checks and small print that do not come across well on camera.



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# BE MINDFUL OF BODY LANGUAGE

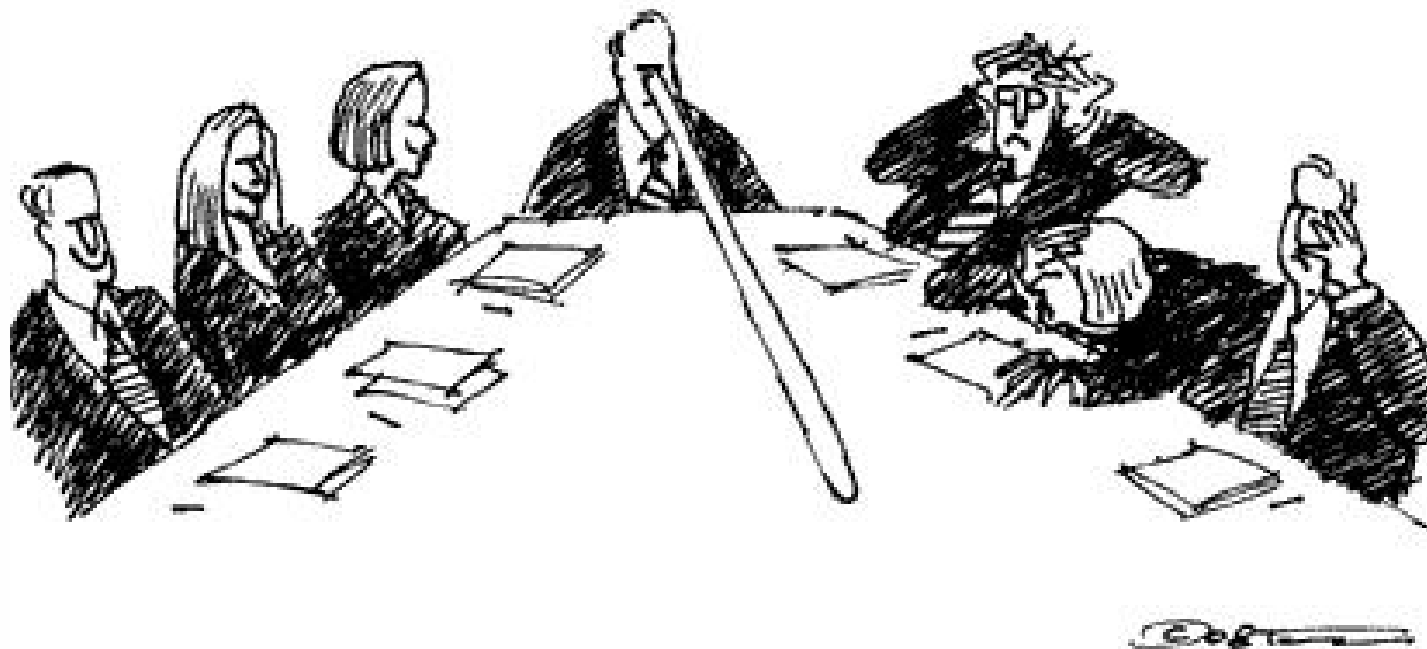


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## CONCLUSION

- Know the process, substance and be effective and credible.
- Tell the truth but answer the questions you are asked.





*The deposition was going either really, really good or really, really bad, depending on one's perspective.*

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