

witnesses in a case from hearing the testimony of other witnesses, prevents witnesses from knowing what is happening in the trial, and it is common to feel inconvenienced and “in the dark.” To avoid waiting unnecessarily, it is wise to ask the attorney who issued your subpoena if you can be on “standby” so that you do not have to leave your home or job until shortly before your testimony. In fact, it is always a good idea to check in with the lawyer who subpoenaed you because witnesses are often subpoenaed to appear for the first day of a trial that is expected to last several days even if it is not likely that the witness will be called until several days into the trial.

While it is important to testify only about what you know, there is no rule against refreshing your recollection to help you give better testimony. For example, if you anticipate or are told that you will be questioned regarding documents, you should review and familiarize yourself with the documents before testifying. Reviewing documents can help refresh your memory and help ensure that you give truthful testimony. Reviewing documents in advance also can help save time at trial because you will not have to familiarize yourself with documents while you are in the witness chair.

Similarly, if you were a witness to an accident, you may want to visit the scene of the accident to familiarize yourself with distances and locations. Finally, if you have given a written or recorded statement, ask for a copy and review it carefully before testifying.

Your Day as a Witness

- ▶ Witnesses are often unsure about what to wear to court. No special attire is required, but witnesses should be well-groomed and should dress neatly out of respect for the court and the justice system. Short pants, tank tops, flip flops and similarly casual attire are not appropriate for court where people are expected to dress in the manner they would dress for church, a job interview or an important business meeting.
- ▶ It is important to be able to find the courthouse and to appear on time. If you do not know where the courthouse is located, call the attorney who subpoenaed you or call the clerk of court or sheriff’s office and get a good set of directions. If you received a subpoena, bring it with you to help you know where and when you are supposed to testify.
- ▶ When you are called to the witness stand, stand tall and speak clearly and forcefully when you take the oath. Try not to be nervous. You should not be intimidated by the legal process. Your role is not to make or break either side’s case. If you confine yourself to the facts, testifying should be much easier. Do not guess at answers.
- ▶ You should not be intimidated if the lawyers ask you to speak up, to repeat an answer or to explain yourself. While your responsibility is to tell the truth, the lawyer’s job is to represent his or her client, and sometimes this requires the lawyer to be overly conscious of what you might consider petty details or insignificant trivia. Be patient and answer the questions being asked of you.
- ▶ Do not be afraid to ask for a short break if you need one, and do not hesitate to ask a lawyer to rephrase or clarify a question. One of the judge’s responsibilities is to protect you from being harassed. An appeal to the judge for a moment to relax or a glass of water will usually be met with approval.

- ▶ Remember, the court reporter is trying to record every question and answer, so wait for the lawyer who is asking you questions to finish his or her question before you begin to answer, even if you know the answer. Talking at the same time as the lawyer will only confuse the court reporter and will result in an inaccurate transcript of your testimony.
- ▶ When asked a question, always respond verbally. If you nod or shake your head or make other gestures, these may not be recordable by the court reporter or his/her equipment. The court reporter is best able to make a clear and accurate record of your testimony if you verbalize your responses.

Your Duty as a Witness

Your primary obligation is to tell the truth. The following tips might help make telling the truth easier.

- ▶ Do not guess. If you do not know an answer, simply admit that you do not know the answer.
- ▶ Be sure you understand the question before you attempt to answer. If you do not understand the question, ask the lawyer to repeat it or to explain what he or she means.
- ▶ If asked, do not hesitate to admit if you have spoken with any of the lawyers or other persons involved in the case.
- ▶ Do not lose your temper no matter how hard you are pressed. Do not argue with the lawyers. They have a duty to their clients to question you. Be courteous. Address the judge as “Your Honor,” and it never hurts to say “Yes, sir” and “Yes, ma’am” to the questions of counsel. Jokes are not appropriate. If you realize you have given an incorrect answer, say so. A judge will sympathize with an honest mistake if you are willing to admit making it.
- ▶ Take your time and speak clearly and in a tone that allows everyone to hear your testimony. Juries are easily distracted, and it is important for the members of the jury to hear your testimony.
- ▶ Never try to memorize your testimony. It will sound rehearsed, and you may become confused.
- ▶ Listening carefully when you are being questioned is as important as testifying. Listen to each question and make sure your answer is responsive to the question.
- ▶ You are usually not entitled to testify about what someone told you or what someone else may have seen. Competent evidence is what you have personally observed. In addition, you are not likely to be allowed to give opinions about the facts. Opinions and conclusions can only be expressed by witnesses designated by the court as experts in a particular field.
- ▶ Do not exaggerate. If you give an estimate, for example, distance, time or speed, be sure to explain that you are estimating.
- ▶ Do not try to anticipate where the question is leading, and do not try to slant your testimony to favor one side or the other.
- ▶ Stop testifying if the judge interrupts you or if one of the attorneys objects to a question asked by the attorney who is examining you. Wait until the judge rules and tells you to proceed before resuming your testimony.

- ▶ The scenes in movies and on television in which the examining attorney demands a “yes or no” answer are not representative of what happens in a real courtroom. You can always explain your answer if needed. If an attorney tries to prevent you from completing your answer, you may ask the judge for assistance.
- ▶ Never forget you are under oath.

Conclusion

The American legal system is one of the finest in the world, and it depends largely on the testimony of ordinary citizens. Our system allows those charged with a crime, or accused of having injured another, to confront their accusers, and all who give testimony are subject to having their testimony cross-examined by the other side. Your role as a witness is an important one and helps our system of justice to work as it was intended.

This brochure, prepared by the Public Information Committee of the Louisiana State Bar Association, is issued to inform and provide general information, not to advise. If you have a specific legal problem, you should not try to apply or interpret the law without the aid of an attorney who knows the facts because the facts may change the application of the law.



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**PREPARING
TO BE A
WITNESS**
*Including Deposition
and Trial Testimony*

The Importance of Witnesses

Witnesses, whether in trials, depositions or other sworn court proceedings, are quite possibly the most important players in the American system of justice. Judges and juries “find the facts” or determine “what really happened” by listening to, and evaluating, the testimony of the witnesses in a case. After hearing the testimony of the witnesses, the judge or jury renders a decision based upon the evidence presented at trial. Much of this evidence comes from the words spoken by the case’s witnesses.

While the pressures of work and daily life often make testifying in trials, depositions or other court proceedings difficult or inconvenient, each citizen owes a duty to the rest of society to serve as a witness when he or she has knowledge or facts that might help decide the outcome of a case. In many cases, a citizen’s life, freedom or property depends upon the quality of evidence heard by those responsible for deciding the case’s outcome, so it is important for every citizen to accept the responsibility of serving as a witness when subpoenaed or asked to testify.

The most important part of testifying is telling the truth. Witnesses are not required “to make or break the case.” All that is necessary is that the witness give honest, truthful testimony, and the facts, as weighed by the judge or jury, will determine the outcome.

Not all testimony is given before a judge or jury. Indeed, considering that fewer cases are being tried than in years past, it is perhaps more likely that a citizen will be called to testify in a deposition, pretrial hearing, before a grand jury, or in some other forum than in a trial before a judge or jury.

Considerations for Any Type of Testimony — Trial, Deposition or Other Proceedings Requiring Sworn Testimony

There are many ways in which a witness might provide testimony. People are probably most familiar with testimony provided in a trial setting because this is something commonly portrayed on television and in movies, but it is probably more common for witnesses to provide testimony in a deposition setting or in an administrative hearing before an administrative judge or hearing panel. Regardless of where the testimony is being provided, some considerations apply in almost every setting.

What Legal Issues Should You Be Aware of Before You Testify?

Before you provide testimony, it is important to understand that, as a witness, there are certain legal requirements that apply specifically to you.

- ▶ **Perjury.** Perjury is committed when you knowingly make a statement under oath that you know is not true. You can commit perjury any time you are providing testimony under oath — in a trial, a deposition or even in a written affidavit. Perjury is a crime punishable by fines and/or imprisonment. The best way to avoid perjury is to tell the truth.
- ▶ **Subpoenas.** Subpoenas are commands issued under the authority of a court to order that a witness appear at some specified place and time to give testimony. You

may be asked to appear voluntarily, without the issuance of a subpoena. If a subpoena is issued and you fail to appear without good cause, you may be held in contempt of court. Contempt of court is punishable by fines and/or imprisonment. A subpoena duces tecum is also an order issued pursuant to the court’s authority that requires the production of documents and other materials relevant to a particular case. If you are issued a subpoena and have questions about what is required, you should contact the attorney whose name and contact information will be reflected on the subpoena.

- ▶ **Right to Compensation.** In some instances, you will be entitled to compensation for your expenses in appearing to testify. Witnesses appearing in both Louisiana courts and federal courts are entitled to receive a nominal daily fee plus travel expenses or mileage. In federal cases, witnesses also are entitled to compensation in connection with appearance at a deposition. That is not the case in Louisiana state cases.
- ▶ **Fifth Amendment Right Against Self-Incrimination.** The Fifth Amendment to the United States Constitution provides, among other things, that no one will be compelled to be a witness against himself. Therefore, a witness is entitled to assert his or her Fifth Amendment rights instead of answering questions that will provide self-incriminating evidence of illegal conduct punishable by fines, penalties or forfeiture. While there should be no adverse effect from a witness’s assertion of his or her Fifth Amendment rights to avoid criminal prosecution, it is not clear whether silence may be used to impose civil liability against someone. If you believe you may need to assert your Fifth Amendment rights in connection with testimony you have been asked to provide, you should consult an attorney prior to providing testimony.

What Should You Keep in Mind as You Are Testifying?

- ▶ Be sure you understand the question. If you don’t, ask the lawyer to explain or state it another way.
- ▶ If you don’t know the answer to a question or can’t remember the answer, admit that you do not know or cannot remember. Such responses to questions are perfectly acceptable.
- ▶ Don’t speculate or guess if you don’t know the answer.
- ▶ It is always OK to qualify your answer. You should never exaggerate or overstate.
- ▶ Objections will be made during depositions and at trial. Nevertheless, you should respond to the question, even when an objection is made, unless ordered not to respond by counsel.
- ▶ Be serious and polite. Don’t argue.
- ▶ Answer in your own words and style. Your experience will be better if you relax and be yourself.
- ▶ Beware of absolute statements such as “always” and “never.”
- ▶ If you don’t have a lawyer, it is not necessary that you consult one prior to giving testimony.

Special Considerations When Giving Deposition Testimony

Discovery is the process used by lawyers to obtain facts and information about their case prior to trial. There are a variety of tools lawyers use to conduct discovery. A deposition is just one of those tools. In a deposition, the lawyer for one or more parties poses questions to either another party or a third party. The witness in a deposition is called the deponent. The deponent’s testimony is recorded by a court reporter who will administer an oath to the deponent — the same oath to tell the truth that the deponent would take if testifying as a witness before a judge or jury. When the deposition is complete, the court reporter will generate a transcript that is a word-for-word record of everything said during the deposition. While the deponent cannot change the substance of his or her testimony once the deposition is done, a deponent has the right to review the transcript for errors. This is referred to as “reading and signing” and the court reporter will ask the deponent during the deposition whether or not he or she wants to exercise the right to read and sign the transcript or waive that right.

If you are a party to the case where the deposition is being given, odds are you already have a lawyer who will prepare you for the deposition. If you are not a party to the lawsuit or are not represented by counsel, it is not necessary for you to consult a lawyer before appearing at a deposition. It is also not necessary for you to bring a lawyer with you to the deposition. With that said, you must keep in mind that the lawyers who are conducting the deposition are representing the interests of their clients and will not be able to advise you during your deposition. If you have questions about your rights, it would be wise to consult a lawyer before providing testimony.

A deposition is usually taken away from court, often in a lawyer’s office. The lawyers who are representing each party to the case will be present and possibly their clients as well. Prior to the deposition, if you are the deponent, you will get either a notice or a subpoena. If you have questions about the substance of the deposition, you should call the attorney who issued the notice or subpoena. The attorney should be able to provide you with more information regarding the topics that will be covered in your deposition. You should ask the attorney about who will be at the deposition and what documents might be reviewed in order to help you get ready for your deposition. You also should ask the attorney to provide you with copies of any documents which he or she will ask you to testify about since it will help things go smoothly at your deposition. You are free to take steps to refresh your memory in preparation for your deposition such as reviewing notes or speaking with other witnesses. In fact, the lawyers may ask what you have done to prepare for your deposition and you should share such information with them. It is possible that the lawyer who issued the notice or subpoena will not be able to speak with you due to ethical considerations. If that is the case, feel free to consult another attorney, but, by all means, honor the subpoena or notice.

Some witnesses bring notes or documents with them to the deposition. While this is perfectly appropriate, you should be aware that the attorneys conducting the deposition have the right to ask to review the documents you brought with you. If you don’t want to share this information, don’t bring the documents with you to the deposition.

Once the deposition begins, you should listen to the questions carefully to be sure that your answers provide the information being requested. If you don’t understand the question, ask the attorney to restate it. If you don’t know the answer to the question or if you don’t remember, you should say so. If at any time during the deposition you remember information that pertains to a topic previously covered, you should let the attorney conducting the deposition know. Keep in mind that the court reporter is trying to take down everything said during the deposition. You must speak clearly and slowly, and be sure you are not speaking at the same time as someone else. Wait until the question is finished before you start to answer. Regular breaks are typical in depositions. If at any time during the deposition you feel you need a break, feel free to ask for one.

The mere fact that a deposition is taken outside of a traditional courtroom does not mean that your testimony is any less important. As a result, you should take the procedure just as seriously as you would if it were in a courtroom. Depositions help the lawyers learn more about the facts of the case and often promote the settlement and resolution of those matters that ought to be settled. Therefore, deposition testimony is extremely valuable. For that reason, many of the rules that apply to testifying in court, discussed below, apply in a deposition setting.

Special Considerations When Giving Testimony in Court

Testifying in court can be intimidating, but, as with any sworn testimony, the most important thing to remember is to tell the truth. Often the nervousness or fear related to giving trial testimony comes from a lack of familiarity with the process or a lack of knowledge about what is likely to happen. Hopefully, these materials will provide information to make the process easier.

Before You Testify

Contact the attorney who scheduled your testimony or issued the subpoena requiring your presence in court, and ask what he or she plans to ask you at trial. It is appropriate for you to try and learn what will be asked of you during the trial.

If you have been subpoenaed to give testimony, the law may provide for certain small fees to be paid for mileage, meals, lodging and similar expenses. While these fees are often less than your actual costs if you are not a party to the case, you may want to ask the lawyer who subpoenaed you or the court about these fees before you testify. It is not appropriate, and may be illegal, to receive any other compensation for testifying; if any party offers you anything of value, other than mileage, travel, meal expenses or a similar reasonable and modest reimbursement, you should not accept it and you should bring the offer to the attention of the court.

Unfortunately, trial witnesses sometimes have to wait a long time, often in a hallway or similarly uncomfortable place, to give their testimony. It is common for the trial to stop and start while the court takes breaks to give the jurors a rest or lunch or so that the court can conduct business in the case being tried or in other cases. Often, the testimony of some witnesses may take longer than expected, causing the other witnesses to testify much later than they expected. Moreover, the “Rule of Sequestration,” which prevents most