



## Being a Witness

### What is a witness?

In almost all civil or criminal litigation, persons other than parties to the lawsuit are called on to testify by one of the parties in the case. These persons are called witnesses. Of course, parties in the case also may testify on their own behalf, and, in that respect, they are witnesses, too. After swearing or affirming they will tell the truth, witnesses testify to what they know about facts relating to lawsuits between parties. Those with specific expertise also may be called as witnesses to give expert opinions about issues involved in a lawsuit. Whether a witness testifies in open court or before the trial (for example, in a deposition), every party to the lawsuit must be allowed to question all witnesses to bring forth everything that might be favorable to the party's position.

### Can I be forced to be a witness?

A person called as a witness generally must give testimony when it is needed, whether it is convenient or not. In criminal cases, and sometimes in civil cases, witnesses can refuse to testify under the Fifth Amendment to the Constitution when doing so would implicate them in any type of criminal activity (not limited to the case being tried). Witnesses who refuse to answer questions they believe may incriminate them do *not* waive their rights, as defendants do, if they begin answering other questions. The court can, however, order a witness to testify through a "subpoena." In such a case, the witness must honor a properly issued and served subpoena, or risk being held in contempt of court, an offense punishable by a fine, imprisonment or both. Since a party to a lawsuit usually must rely on other individuals to testify to what they know, it is very important for witnesses to testify when called.

### What is a deposition?

In some cases, a party to a lawsuit may want to obtain a witness's testimony before trial. A "deposition" is the taking and recording of testimony before the actual trial. A deposition may be taken by the party calling the witness, or by the opposing party, to discover what the witness knows about the subject of the lawsuit. The deposition may be recorded by a court reporter or with an audio or video recording device.

### What are rules of evidence?

The rules of evidence have been developed over many years to control all courtroom proceedings. They ensure that credible evidence is presented and that unnecessary or unreliable evidence is kept out of the courtroom. For example, the "hearsay rule" prevents a witness from relating second-hand information. Second-hand ("hearsay") evidence is not accepted because it is not thought to be reliable and because it would be unfair if an opposing attorney could not directly question the person alleged to have made the statement.

An attorney in a case may object to a particular question asked of a witness. If the judge overrules the objection, the witness must answer the question. If the judge sustains the objection, the witness will not be permitted to answer. When an attorney objects to a question, the witness should wait for the judge's ruling before answering. During a deposition, the witness will usually be required to answer the question even *after* an attorney objects, because no judge is present at a deposition to rule on a possible objection. Eventually, if a party plans to use the deposition question and answer, the judge will rule on the objection before trial. The judge's ruling will determine whether or not the jury will hear the question and answer.

### How are witnesses questioned?

Since the trial's main purpose is to bring out the truth, both sides in a lawsuit must have a chance to question witnesses. This is done through "direct examination" and "cross-examination."

The lawyer who calls a witness to testify asks questions to bring out the facts (direct examination). Then, the opposing lawyer asks questions about that testimony (cross-examination). Both lawyers' questions should serve one purpose: to reveal the facts known by the witness.

Witnesses are sometimes concerned about being cross-examined, but they need not fear this process. The opposing lawyer must test a witness's memory and determine how it compares with the memories of others. It is natural for several persons to see and remember an event somewhat differently. A witness may remember some facts and forget others. A witness is expected to testify from memory as accurately as possible—no more and no less.

### What are my rights as a witness?

If you are serving as a witness, your own attorney probably will not be present when you testify. Whenever you are testifying, whether during a pretrial deposition or a trial, if you feel particular questions may tend to involve you in the lawsuit, you should exercise your right to speak with your own attorney before testifying. You have the right to have an attorney present during most legal proceedings. If the answer to a particular question would tend to incriminate you (implicate you in the commission of a crime), you have a constitutional right to refuse to answer and should consult with your attorney before responding. Otherwise, you must respond to all questions truthfully, even if you must answer, "I don't know" or "I don't remember."

### Should I discuss my testimony in advance?

Usually, lawyers for both parties will want to discuss the case with you before trial. It is not improper for a lawyer to review your testimony ahead of time. In fact, it is the lawyer's professional responsibility to find out in advance what you know about the case. You are not obligated to discuss the case with any lawyer, but you may find it helpful to learn from a lawyer exactly what questions you will be asked and about proper courtroom procedure. You also have the right to speak with your own attorney before speaking with the attorney for either party in the lawsuit.

## **Tips for witnesses:**

**Be truthful.** You are under oath when you testify in court or in a deposition. Testifying falsely under oath can subject you to criminal penalties for perjury. Sometimes being truthful means saying, "I don't know" or "I don't remember." There is nothing wrong with these answers if they are truthful. Your truthfulness will help the judge or jury reach the right decision. If you do not know the answer or cannot remember, say so.

**Never lose your temper.** A witness who gets angry is at the mercy of the cross-examiner. An angry witness appears to be prejudiced, and is less likely to be believed by judges and juries. If you keep your temper, your service as a witness will be more pleasant and your testimony more valuable.

**Be attentive.** You must be alert when in the witness chair so you can hear, understand and give an intelligent answer to each question. If the judge and/or members of the jury get the impression you are indifferent, they may not believe your story.

**Think before you speak.** Hasty or thoughtless answers may be incorrect and cause problems, especially when the opposing lawyer is cross-examining. The cross-examiner may ask you leading questions (questions that suggest only one answer). As a witness, you may be nervous or so eager to provide information that you speak before understanding the question. Take your time and, if you don't understand a question, ask that it be explained or rephrased until you do. Then answer the question as accurately as you can.

**Speak clearly.** A witness who does not speak clearly enough to be heard is annoying to judges, juries and lawyers. An inaudible voice not only detracts from the value of your testimony, but also tends to make the judge and jury think you are not certain of what you are saying. Everyone in the courtroom is entitled to know what you have to say, and the court reporter who is recording the proceedings must be able to hear all of your testimony. Wait to speak until after the lawyer has posed a question, since the court reporter cannot take down the lawyer's words and yours at the same time. Also, if the proceedings are being electronically recorded, the machine may not pick up both of your voices clearly. All responses must be given verbally and clearly. Head nods or grunts are difficult to record.

**If you don't understand a question, ask that it be explained.** Many times, a witness will not understand a question, but will try to answer it anyway. This confuses the court, jury and lawyers, and extends the time a witness will be testifying because the lawyers must go back and correct misinformation.

**Answer all questions directly.** Too often, a witness is anxious to tell the story and tries to explain everything in answer to the first question. Listen to the question. If you can answer it with a "yes" or "no," do so. *Never volunteer information.* The information you volunteer may have no bearing on the case and may delay the proceedings.

**Stick to the facts.** Don't guess or speculate. You are allowed to testify only to what you know personally. What you know is important; your speculation or guessing is not.

**Be helpful, not funny.** A trial is an important matter to the parties involved. Your testimony may jeopardize their money, property or freedom. Don't try to be a comedian.

**Be fair.** Though you may be testifying for a friend whom you would like to see win, don't color your testimony or try to overdo it. You will serve best by making your testimony as objective as possible.

## **Why is being a witness so important?**

Your obligation to serve as a witness is as essential to the equal administration of justice as your duty to serve as a juror. When called to be a witness, testify truthfully and fairly and leave with the satisfaction that you have helped to ensure that justice is done. Remember that you may have your own lawsuit or trial someday and will need and want witnesses to testify for you in a fair and impartial way.

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