

## DEPOSITIONS

In this memo, you will see notes marked by arrows like this: ⇒. Each note will tell you the court rule that supports the statement that comes before it. **CR** stands for the Washington State Civil Court Rules, which govern civil legal procedure for the entire state. **CrR** stands for the Washington State Criminal Court Rules, which govern the state’s criminal legal procedures. Your county may also have local civil and criminal rules of procedure, which you should check. Other notes refer to statutes (Revised Code of Washington – **RCW**) and case law.



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These notes will help you look up the relevant law, or to support your legal arguments. The references to the law are up-to-date as of the date this memo is published. The law sometimes changes before the memo can be updated.

See page 10 of this memo for websites where you can find court rules, statutes, and case law.

### **What is a party?**

A party is a person, corporation, or other legal entity that files a lawsuit (the plaintiff or petitioner) or defends against a lawsuit (the defendant or respondent).

### **What is a witness?**

A witness is a person who [testifies](#) under oath at a [deposition](#) or at trial and provides firsthand or expert testimony.

### **What is a deposition?**

In the months before trial, all parties in a lawsuit try to establish the facts central to the case, in a process known as “discovery”. Depositions are one tool that may be used in the discovery process. A deposition is a face-to-face session in which one party to the case asks questions of another party or witness in order to discover all the facts, whether they are helpful or hurtful. The person answering the questions is being “deposed” and is called the “**deponent**”. Testimony given in a deposition is sworn under oath just like testimony in a courtroom, and things said in a deposition may be used as evidence in court under some circumstances.

Typically depositions take place at an attorney's office or at some other mutually agreeable location. Once the deposition begins the attorney for the opposing party asks the deponent questions, and the deponent's attorney will "defend" by objecting to certain questions and instructing the deponent when to answer or when not to answer. If you do not have an attorney, you may ask the deponent questions; or, if you are the deponent, you may object to questions just as an attorney would.

Generally, the opposing parties will not speak to one another. Attorneys for each party may speak to one another about procedural matters (dates, deadlines, etc.). But usually an attorney will only speak directly to an opposing party about the substance (facts) of a case during the deposition testimony.

When you are acting as your own attorney, you may communicate with the opposing attorney about any procedural matters. In addition to deposing the opposing party, you have a right to depose third-party witnesses. If any opposing party is not represented by a lawyer, these rights apply to him or her too.

⇒ CR's 26-37 cover all types of discovery. CR 30 is the rule covering oral depositions and CR 32 covers how deposition testimony may be used in court.

### **How do I schedule a deposition?**

Depositions are usually scheduled as soon as the complaint has been filed with the court or as soon as the opposing party has been served.

In Washington State, whenever a deposition will be taken, the party taking the deposition must give 5 days'<sup>1</sup> notice of the deposition to every party to the action. The notice must be in writing and must state the name and address of the person being deposed. The notice also must state the time and place of the deposition and the general type of information that will be addressed. You can mail the notice to the parties or deliver it by any method that is reasonably likely to provide actual notice of the deposition to everyone who is a party to the case. If you mail notice to the opposing party you should probably do so by registered mail so you can prove you provided notice.

Even though you are only required to give 5 days' notice of a deposition, it is customary to talk to the deponent or their attorney to find a date that accommodates both schedules. If you are the party being deposed and you are not available on the date of the deposition, be sure to let the opposing side know immediately so your deposition can be rescheduled.

If the deponent is a party to the litigation, then the notice of the deposition is all that you need to require your deponent to appear. But if you would like to depose a person who is not a party to the litigation, you must use a subpoena to require his or her appearance. If you are representing yourself and you want to subpoena someone for a deposition, you must have a judge sign your subpoena before it can be sent out. The Northwest Justice Project packet "How to Subpoena

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<sup>1</sup> The 5 days do not include the day notice is actually served. The 5 days also do not include Saturday, Sunday, and holidays. CR 30(b)(1).

Witnesses and Documents” at [www.washingtonlawhelp.org](http://www.washingtonlawhelp.org) has information and forms that you can use.

⇒ CR 45 covers subpoenas for depositions and the requirements for service.

### **What if the person I want to depose refuses to come to a deposition?**

If the deponent refuses to come to the deposition and has no reasonable excuse, you may bring a motion for contempt of court. It is important for you to keep the original subpoena and to have proof the subpoena was served on the deponent in case this happens.

⇒ CR 37 explains the different sanctions a court may use to punish parties or attorneys who fail to cooperate in discovery.

### **What if I want the person to bring documents to the deposition?**

It is likely that you may want the deponent to bring certain documents to the deposition so they can be questioned about the contents. If you are deposing **a party** to the case, you can include a document request when you provide the notice of the deposition. CR 34 provides the guidelines for these requests. But if you are deposing **a third-party witness**, you must also use a subpoena to compel the deponent to bring these documents. CR 45 provides the rules for these subpoenas.

⇒ CR 34 covers requests for documents. Depositions which include requests for documents are covered by this rule and by CR 45.

### **Who will be at the deposition?**

People who will be present at the deposition are: the deponent, the parties to the action (one party may also be the deponent), the parties’ attorneys, and the court reporter. If you want someone else to be present, you will need the consent of the opposing party.

### **What happens at a deposition?**

The deposition will begin with every person present identifying themselves so the court reporter can record this information. The court reporter will ask the deponent to swear under oath that everything he or she says will be true. The attorney (or party, if unrepresented) who issued the subpoena will then begin to ask the deponent questions.

The court reporter’s role at the deposition is to transcribe the conversation between the questioning attorney (or party) and the deponent. Everything the court reporter transcribes is “on the record” and may be used as evidence. During the deposition it may be necessary to “go off the record” or to take a break. “Going off the record” simply means that the court reporter is no longer transcribing the conversation. Discussion that occurs off the record is not actual testimony and is not admissible in court or for any other evidentiary purpose.

## Does the deponent have to answer all the questions?

Any information that is even slightly related to the case is fair game for questioning. For example, questions may include, the deponent's knowledge about the facts of the case, relevant events the deponent has witnessed, the identities of other witnesses or parties, the content or location of documents or evidence, or the deponent's personal or professional background. The deponent is required to answer the questions truthfully unless the deponent has an **objection** to the question under the Rules of Evidence. Sometimes even if the objection to the question is valid the deponent must still answer the question. But because the objection is written in the transcript of the deposition the objection can again be raised at trial.

Unrepresented deponents may object to questions just as an attorney would. If you are representing yourself you should '**object to the form**' of questions that are ambiguous, compound, confusing, argumentative, or call for speculation. These questions could cause you to make a statement you do not intend to make. It is better to require your opponent to ask a clear, narrow question in order to avoid making misstatements. You can ask the opposing party's attorney to rephrase the question..

Additionally, unrepresented persons should object to questions that require discussion of **privileged material**. Privileged communication includes conversations between spouses, between lawyers and clients (including lawyers' advice), between doctors and patients, or between victims and sexual assault and domestic violence advocates, as well as confessions made to clergy or priests. The deponent should not answer questions that disclose privileged information.

⇒ R. C. W. 5.60.060 sets out a complete list of privileged communications.

Courts recognize a **right to privacy**, which may mean that information about sexuality, health, or private religious beliefs is also privileged. The laws on privacy rights are not clear-cut, however, so some of these matters may be fair game in a deposition depending on the type of lawsuit involved. Courts are careful to protect the privacy of witnesses who are not parties in the case. If you must reveal private or privileged information in a deposition you can ask that the court issue a protective order to prevent that information from being available to the public. Protective orders may also limit the scope of the questions so that only very specific information can be about privileged topics.

⇒ CR 26(c) explains the different types of protective orders that are available in a civil action.

You are allowed to object to questions if they are **improper** and meant only to embarrass or annoy you. You must say that you object and why. The deposing party will have to explain how the question is related to the case. If the two sides cannot agree on whether the question is acceptable, the parties can ask their judge or arbitrator to resolve the question. Usually, the deposition will stop until agreement is reached or the judge makes a decision.

⇒ CR 30(d) explains the procedure for making a motion to limit or terminate the deposition if the deposition is being used to harass, annoy, or embarrass the deponent.

## **What happens after the deposition?**

After the deposition, the court reporter will create a written record of everything that was said. This written record can be used as evidence in the case and that means a judge or jury may read what was said at the deposition. This transcript will be given to the deponent to read and the deponent may make corrections to the transcript. Once any corrections are made, the witness signs the transcript and both the original and corrected versions of the transcript will be available to be used as evidence in any future court actions.

The parties must pay the court reporter for a copy of the transcript.

At the trial, the deposition transcript may be used to “impeach” a witness. If a witness gives an answer at trial that is different from the answer that he or she gave at the deposition, the deposition may be quoted to try to show that the witness is lying.

## **Are depositions in criminal cases different?**

Depositions in criminal matters follow the rules for civil depositions, but there are some different rules also.

If you are a witness or a victim in a criminal case, and **if you will not be available to testify at the trial or if you refuse to discuss the case with either the prosecuting attorney or the defendant’s attorney**, that attorney can ask the court for an order requiring that you be deposed, and that you bring specific books, papers, or objects to the deposition. The attorney must show that your testimony is “material” and that it is necessary to take your deposition to prevent a failure of justice. The judge has discretion in deciding whether to grant such an order. The judge may put conditions on the order or deny such a request if there is a substantial risk that the disclosures you are asked to make may subject you to physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment -- provided that the negative effect of such a result outweighs the usefulness your disclosure would have for the defendant. If you object to being deposed, you can make a motion asking the court for a protective order that restricts or puts off your deposition. If you are deposed, and object to some of the answers you have given becoming a public record due to any of the risks identified above, you can ask the court for an order taking certain material out of your deposition record.

⇒ Washington State Rules of Criminal Procedure cover standards for depositions in criminal cases in CrR (Criminal Rule) 4.6 and in the general rule on criminal discovery, CrR 4.7.

If you are a **victim of domestic violence** and are working with a domestic violence advocate, communication with your advocate is confidential and may not be disclosed without your consent. However, the advocate is permitted to disclose confidential communications if a failure to disclose the information is likely to result in a clear, imminent risk of serious physical injury or death to you or another individual.

⇒R.C.W. 5.60.060 discusses privileged information with domestic violence advocates.

If you are a **rape victim**, and you are being deposed in the criminal prosecution of your alleged rapist, the court may be willing to prevent or limit questions about your past sexual behavior such as your marital history, your divorce history, or your general reputation for sexual activity or attitudes that are contrary to your community's standards. If such limitations are not contained in the order that requires you to be deposed, you can seek a court order before the deposition. The defendant will be permitted to ask such questions only if he can show that they are directly material to his case and that answering them will not subject you to the physical harm, intimidation, or the other negative effects identified above. Courts are quite sensitive to your privacy in such matters. Even if such questions are permitted in your deposition, you may be able to get an order taking them out of the public record. Furthermore, even if such questions are permitted in your deposition, they may be prohibited when you are examined at trial.

⇒ See CrR 4.6, CrR 4.7 and State v. Gonzales 110 Wn. 2d 738, 757 P.2d 925 (1988).

**Victims of sexual assault** have the right to have a support person that they choose accompany them to proceedings about the alleged assault, including police and prosecutor interviews and court proceedings.

⇒ See RCW 70.125.060

### **Tips for Answering Questions at a Deposition**

- 1. Listen.** Make sure you have heard the complete question and think carefully before answering. Take your time before answering the questions. Do not allow yourself to be pressured into answering before you are ready. If you do not understand the question, say so, and ask that it be rephrased in a way that enables you to understand exactly what is being asked of you.
- 2. Always tell the truth.** This is the most important thing to remember in a deposition. Even if you forget everything else, remember to tell the truth. All cases have good and bad sides and your case is no different. You will not help your case by trying to hide the bad things. In fact, trying to deceive the other side could hurt your case in the end. Your answers could be used to impeach your testimony later and discredit you. If you are not truthful, you are less likely to remember what you said at a deposition and when you have to tell your story in court you may become confused about what you said at your deposition and make mistakes in your story. The other side could use that to convince the judge that you are lying and everything you say after that will not be taken seriously.
- 3. Answer out loud.** Do not shake your head yes or no or use other gestures to answer questions. The court reporter needs to create a complete record and cannot record answers that are not spoken. Speak clearly and at a normal speed to make the job of the court reporter easier. This will also help you to think carefully about your answers.
- 4. Answer only the question asked of you.** Do not give more information than what is asked for. You may want to give more information or explain an answer fully, but do not do it unless you are asked! You may have some good facts on your side that will be

important to your case when you go to court. If you tell the other side all of those good facts in a deposition they will be better prepared to argue against you in court. Of course, you must answer the questions asked of you but listen very carefully and offer only what is necessary to answer the question. Here's an example of this strategy: if the attorney asks you, "Do you have the time?" If you have a watch, only answer, "Yes," not "Yes, it's 3:00." Wait for the attorney to follow up the first question with, "What time is it?"

5. **Ask for a break if you need one.** You can ask for a break at any time during the deposition. You may be tired and need to rest, or you may need to think about how to answer a difficult question. Usually, however, you will be expected to finish answering the current question before taking a break. Any time the parties take a break they should be sure to tell the court reporter that they are "off the record," so that the court reporter stops transcribing. When coming back from the break, the parties should be sure to tell the court reporter to go back "on the record".
6. **Do not make jokes.** Depositions can be tense, and you may be inclined to make a joke to lessen the tension. But remember that your statement may not appear to be a joke in the record. Also, jokes can be misunderstood and hurt your case.

⇒ CR 30(h) says that attorneys and parties should behave at depositions the same way they would if they were in court. In part, this means that everyone should be polite and respectful just as if a judge were present.

7. **Beware of inaccurate assumptions in the questions.** For example, an attorney might ask a question like, "Were you married on January 1, the date on which you stole the money?" It may be true that you married on January 1, but not true that you stole the money. You will need to be very clear in your answer that the assumption you stole the money is incorrect, but that you did marry on that date. This is a very simple and obvious example, but usually such questions will be more complicated, so you should think carefully before answering. Take your time in answering and don't be afraid to ask the attorney to rephrase the questions in a simpler manner.
8. **If you do not know the answer, do not guess.** If you do not know the answer simply respond that you do not know or that you do not remember. If you do know the answer, you must answer. But if you think you might know the answer, but you are not sure, give the answer and also say that you are not sure your answer is correct.
9. **Answer only based on what you personally know to be true.** You might believe that something someone else told you is true, but you do not know that for yourself. If you do not personally know it is true, say you do not know. Do not offer your opinion that you think it might be true.
10. **Do not argue with the attorney or party asking you questions.** Be calm and confident even if the attorney is trying to upset you or push your buttons. The attorney is doing this to try and figure out what kind of witness you will be in the courtroom. If you appear

overly emotional, afraid, or angry, the other side may decide to get you to act badly in front of the judge at trial.

11. **Be careful answering questions that are answers in disguise.** For example, you might be asked, “Do you still have a drinking problem?” If you answer, “No,” your answer implies that you did have a drinking problem in the past. Answer such questions very carefully so that you are clear about the truth of your situation.
12. **Never say never.** Try not to use words like “never” and “always”. You may have forgotten something and using absolutes may make it look like you lied.
13. **It’s OK to tell the other side that you prepared for the deposition.** The attorney may ask you if you looked at any documents to prepare for the deposition. If you did, the attorney has the right to ask you for copies of those documents. Tell the attorney to follow up with a subpoena to you requesting those documents. It is best not to bring anything with you to the deposition, unless your subpoena requires you to do so. Otherwise the other side is entitled to ask for copies of whatever you have with you.
14. **Be prepared.** Make sure you get plenty of rest prior to the deposition. Do not take any medications that might make you sleepy or make it harder for you to think and answer clearly.
15. **Use simple answers.** Keep your answers short and easy to understand. Give only as much information as you need to answer the question truthfully. If the attorney deposing you wants more information, make him or her ask for it.
16. **Make no excuses.** Even if the other side is being rude or sarcastic, keep calm and remain polite and truthful.
17. **Do not be too definite.** If you are required to provide a list in answer to a question, answer carefully. If you aren’t 100% sure that the list is complete, say there may be more to add to the list at a later time, but that this is everything you remember at that time.
18. **Be thorough.** During the deposition you may recall additional information to a previous question. It is a good idea to tell the questioning attorney this information as well, or to clarify your earlier statement. It is important that you make sure that your deposition cannot be used to discredit you.
19. **Don’t try and win the case at the deposition.** If you reveal your strategy in the deposition, it will only help the other side. Do not give in to the desire to tell your story. Each side has an idea about the truth of what happened. For example, you might believe that you agreed to pay the other party \$10 an hour to do a variety of tasks, but now you and the other party do not agree on what those tasks were. Do not give into the temptation to prove to the other side all the details of the agreement. Answer only those questions about the agreement that you are asked and be short and clear in your answers.

- 20. Think carefully about the question.** Know the difference between “know” and “surmise.” An attorney might ask you what you surmise about a situation. To surmise something is to make a guess, to infer from a set of facts, to make an assumption or to speculate what might be true. Again, do not guess. Answer only what you know. If you are asked to “surmise” something, say that you do not know.
- 21. Don’t assume the other side is correct.** If the other side gives you data or evidence to prove a point, don’t accept that it is accurate or true unless you personally know it to be true.

### Resources

You can find state **court rules** (CR and CrR) here: [http://www.courts.wa.gov/court\\_rules/](http://www.courts.wa.gov/court_rules/) Click on “Rules for Superior Courts.”

You can find state **statutes** (RCW) and **case law** (court decisions) here: <http://www.legalwa.org/>

“Privacy Information for Survivors of Sexual Assault” <http://www.wcsap.org/legal/>

“How to Subpoena Witnesses and Documents”  
<http://www.washingtonlawhelp.com> Click on “More Legal Information” and then “Representing Yourself – Additional Court Procedures

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