

**INSTRUCTIONS FOR EXPERT WITNESSES AT DEPOSITIONS IN MATTERS
RELATING TO GENERAL SAFETY OF VACCINES**

A deposition provides an opportunity for the questioning parties to discover the witness's knowledge of facts relevant or potentially relevant to the issues in the lawsuit. Attorneys accomplish this task by examining the witness regarding his or her knowledge, including his or her knowledge of documents and other tangible exhibits.

When an individual learns that he or she may be called as a witness for a deposition, he or she should begin to prepare immediately. A person's recollection of past events usually does not come back fully in a single, well-organized rush. Rather, it comes back in stages. A witness scheduled to be deposed should review pertinent documents, think back about the events and transactions at issue, and, if appropriate, discuss them with knowledgeable people. A witness should familiarize himself or herself in advance with the events about which he or she is expected to testify rather than hastily reconstructing his or her recollection while being questioned.

At least once before the deposition, the attorney defending the deposition will review with the witness the anticipated areas of questioning so that the witness will have a chance to give thoughtful, full, and accurate answers rather than hasty and inaccurate ones. In conducting this review, the counsel is not attempting to alter or sway the witness's testimony, but is instead working with the witness to ensure that his or her testimony is accurate and truthful. This review avoids confusion, eliminates unnecessary information, and saves hearing time and expense.

The deposition formally begins when the court reporter "swears in" the witness. If you are deposed, you will take the same oath that you would take at a trial or other hearing. The oath

calls for you to tell the truth, the whole truth, and nothing but the truth. That is the one indelible rule for answering questions: always tell the truth.

The court reporter will record both the questions and answers verbatim. Counsel for the party requesting the deposition will then question the witness. After that attorney has completed his or her initial examination, attorneys for other parties will have an opportunity to question the witness. Usually, your counsel will ask few questions, if any.

When a question is posed to you as a witness, you have three alternatives:

1. If you know the answer to a question, answer the question correctly in as few words as possible. Do not volunteer unnecessary information.
2. If you don't know the answer to the question, testify accordingly. If you don't know the answer to a question, the correct answer is, "I don't know." It is not "I think" or "I believe." Do not guess (speculate) at the answer to a question that is not within your knowledge. If you do guess or speculate, further questioning may well make you appear dishonest.
3. If you don't understand the question, respond that you do not understand the question. The attorney propounding the question can then restate the question or explain any vagueness.

Below are some additional general guidelines for testifying:

1. *Be truthful in all of your answers to the best of your knowledge.* This is the ultimate objective.
2. *Listen to each question carefully,* take time to think about it, and then provide a thoughtful, true answer. If you do not understand a question, say so and ask for clarification. Be

responsive and tell the truth. If counsel wants a fuller explanation or clarification, he or she will ask for it. Limit your testimony to the facts within your own personal knowledge.

3. *Do not rush to answer questions.* Before answering any question, no matter how trivial, pause briefly to ensure that you fully understand the question and its implications. In addition to helping you form an accurate answer, a brief pause gives your attorney a chance to object. Listen to your attorney's objections because they may alert you to a possible trap.

4. *Be certain that you understand the question before you answer it.* Do not undertake to answer any questions that you do not fully understand. If you don't fully understand the question, ask counsel to repeat it. You may ask what is meant by a particular word or phrase in a question. If you still do not understand the question, ask for a clarification.

5. *Keep your answers within the scope of your knowledge.* If you do not know the answer to a question, say so. If you know that something happened but cannot recall it, say, "I don't recall."

6. *Avoid speculation.* If at all possible, avoid saying, "I think," "I believe," and "in my opinion." If you feel compelled to use any of those constructions, you are not sure of the truth of your answer. For example, if you are asked, "When did X occur?" and you do not know the date, you should not guess. You may answer, for example, "It occurred during the spring of 2012." But don't say, "I think that it was May 8, 2012."

7. *Do not speak too quickly.* Answer slowly enough so that you can think in between the words. Answering slowly tends to ensure that you provide full and accurate answers, provides for better comprehension, and allows the reporter to record your answer correctly.

8. *Answer orally, not through gestures.* Do not answer questions by nods of your head or gestures. The reporter must hear your answer in order to record it.

9. *Correct errors in your statements.* It is not uncommon for a witness to give erroneous answers or use poorly chosen words. If you realize that you have given an erroneous answer to any question, clear it up as promptly as possible.

10. *Be brief in your answers.* Provide the shortest true answer possible. But do not allow yourself to be forced into a yes or no answer if an explanation is necessary.

11. *Ask for clarification of a question if necessary.* Never attempt to answer a question that you do not understand. If you do not hear the question or if the question is complex, ask that it be repeated or clarified. If a question is not phrased clearly. Do not assume that you know what counsel meant by it. Do not suggest to counsel what he or she meant or should have said.

12. *If a question contains assumptions that you cannot accept, say so.* Do not attempt to answer a question that contains false assumptions. As a corollary, you can refuse to answer incomplete hypotheticals.

13. *Watch for vague or general terminology.* Attorneys will sometimes ask a witness if he or she agrees with some broad proposition. Broad propositions are often the wide end of a funnel intended to lead the witness to damaging testimony. Such questions often take the form of “Would you agree that *X* is true?” The *X* may sound unobjectionable—but it is often phrased at such a broad level of generality that it cannot have any real application. Be on the lookout for questions that contain generalities or absolutes (*always, never, every time*).

14. *Do not try to rely on your memory for dates and other precise terms of which you are not absolutely sure.* If you don’t know the date when something occurred, don’t guess. It’s perfectly appropriate to say, “I don’t recall the date.” If asked further, and if you are able to do so, you can bracket the date or otherwise provide a general period—but don’t guess.

15. *Do not volunteer to provide documents.* If you do not know the answer to a question, it is better to say, “I don’t know,” rather than to say, “I don’t know, but there are letters in the file which would answer this question.” Of course, if you are asked directly whether a document would answer the question, you must answer the question truthfully.

16. *Do not attempt to explain or justify your answers.* Give the facts as you know them. You do not need to and should not apologize or attempt to justify those facts. To do so makes it appear that you doubt the accuracy or authenticity of your own testimony.

17. Where appropriate, *look at the examiner in answering questions.* He or she is the one who must understand and absorb the testimony. Do not look at your attorney when you answer questions. It will appear as though you are unsure of yourself and need to check to see if your answer is correct.

18. *Treat the opposing attorney courteously but impersonally.* You should not allow yourself to be affected either by any attempt at flattery or by any attempt to irritate or anger you. Some attorneys use one or both of these techniques to gain an advantage in questioning a witness. The attorney questioning you is doing his or her job. The witness should do his or her job of answering questions truthfully in as few words as possible.

19. *Do not argue with the opposing attorney.* Maintain a normal tone of voice and respond to questions in the manner that you would use in addressing your own attorney.

20. *Do not be evasive.* Do not frame your answers in ways that quibble silently with the question. Do not adopt different, essentially private definitions of terms. If you can answer the question directly, then do so. If the question is vague or contains assumptions with which you cannot agree, then make that point clear.

21. *Do not enter into conversations with the opposing attorney during or after the deposition.* Treat him or her with courtesy, but do not let a friendly manner cause you to drop your guard and unwittingly pass along information that may be helpful to the opposing party or may give opposing counsel ideas for a new line of questioning.

22. *Do not joke.* Humor usually disappears in the cold transcript, and an attempt to be humorous can wind up making you sound crude or cavalier about the truth.

23. *Do not try to ascertain before you answer whether a truthful answer will help or hinder the case.* The witness's job is always to tell the truth. The attorney's job is to deal with the truth elicited from your testimony, the testimony of other witnesses, and the relevant documents and other evidence in the case.

24. *Do not try to be an advocate.* Your task is simply to tell the truth. Resist any urge that you may feel to shape your testimony so that it supports one side or the other.

25. *Avoid emphatic language.* Try to keep your testimony neutral. If asked about your opinion of some other person or some event, you can provide that. For example, if you are asked whether you consider another person dishonest, you should, of course, answer truthfully. But the answer should be "Yes, I consider X to be dishonest"—not "X is lying scum."

26. *If you need a break, ask for one.* Attorneys will typically take a break every hour to 90 minutes. If you need a break before then, simply ask for one. The only rule is that you cannot take a break if a question is pending (unless the break is necessary to determine whether to interpose an instruction not to answer based on the existence of a privilege).

27. *Do not feel the need to supplement or correct the record simply because the attorney taking the deposition has not obtained all of the information that you have about an issue.* Sometimes, witnesses feel frustrated that opposing counsel has not asked all of the

questions that the witness wishes were asked. Do not try to answer those unasked questions. Instead, in a separate conversation off the record, let your attorney know that you feel that the record may be unclear or incomplete. Your attorney may decide to ask you additional questions on the record. Or he or she may decide not to do so to avoid giving the opposing counsel the opportunity to ask follow-up questions. Remember: If you have answered each question truthfully, then you have no further obligations.

28. Above all else: *Always provide the shortest true answer possible.*

Additional notes for experts appearing on the side of defendants in matters brought by vaccine opponents:

29. *Prepare a written report setting forth your opinions and the bases for those opinions.* The Federal Rules of Civil Procedure require experts to prepare such reports. *See* Fed. R. Civ. P. 26(a)(2)(B). Some state jurisdictions do not require an expert report. If you are retained, though, you should request that you be permitted to draft an expert report that would meet the requirements of Rule 26. Such a report will assist you in providing your testimony.

30. *Do not assume that anything is common knowledge.* Your report should include (among other things) all of the opinions that you intend to offer and your support for those opinions. You should cite authority for all of your claims. Do not assume that anything at all technical is common knowledge. Cite at least one work supporting everything that you offer.

31. *If at all possible, review the opposing expert's report before drafting your own report.* Sometimes, both the plaintiff and the defendant must disclose their expert reports at the same time. In such circumstances, you will be unable to review the opposing party's expert's report. But, if you do have the opportunity to do so, review the report carefully before and while

drafting your own. Make sure that your report clearly and succinctly addresses each point made by the opposing party with which you disagree.

32. *Ensure that your report is simply and clearly written.* Your report is not a journal article. You are writing for a lay audience—and, in particular, a lay audience with almost no understanding of the science. The trial court judge will (likely) read your report. Appellate court judges may also read your report. Further, although it is unusual, judges sometimes permit jurors to review expert reports. You should assume that none of these persons will have any background at all in science in general or in medical science or vaccinology in particular.

You should therefore draft your report as if you were speaking to an audience of average eighth-graders. Don't talk down to them; but do make sure that your report is written with absolute clarity. In particular, as you revise your report, keep asking yourself, "Is this entirely clear? Can I make it clearer?" Use short sections, short paragraphs, short sentences, and short words. Whenever possible, use clear photographs, figures, and tables to illustrate your points. But don't rely on those illustrations to make your point! Ensure that the text of your report sets forth all of your opinions.

33. *Keep your written report at hand during the deposition.* In contrast with fact witnesses, it is appropriate for an expert to ask to refer to his or her report when answering questions. Of course, try to have everything in mind—but an expert witness cannot be expected to have a precise memory of, say, every document that he or she consulted or every authority on which he or she relies.

34. *Familiarize yourself with antivaccine tropes.* Experts in the relevant fields of vaccinology, immunology, epidemiology, pediatric care, and the like will be familiar with the robust medical literature supporting the proposition that vaccines are safe and effective. But in

the world of those opposed to this safe and effective practice, many tropes circulate that are used as gotchas. It's important that an expert witness be familiar with these tropes and be prepared to respond to them.

But the first rule in responding to such tropes: *Do not attempt to respond to an antivaccine trope with which you're not familiar.* Do not attempt to formulate opinions on the spot. If asked to do so, you may reasonably respond that experts in your field do not form opinions off the cuff.

The following is a list of common antivaccine tropes and brief responses to them.

a. *Autism diagnoses have soared as the number of vaccinations has increased.*

Antivaccine advocates frequently claim that diagnoses of autism track very closely an increase in the number vaccinated. Correlation does not mean causation. Abundant evidence, including epidemiological studies, demonstrate that vaccines do not cause autism. *See, e.g.,* <https://www.cdc.gov/vaccinesafety/concerns/autism.html>. Experts should be prepared to refer to the information available from the Centers for Disease Control or similar authorities.

b. *In the Poling case, the vaccine court found that vaccination had caused autism.*

The short answer is that courts do not decide issues of scientific fact. Whatever may have happened in regard to the *Poling* case before the National Vaccine Injury Compensation Program, that result has no bearing on whether vaccines cause autism.

c. *Dr. Zimmerman, a pro-vaccine advocate, has admitted that vaccines cause autism.* Dr. Zimmerman's opinion in that regard—whatever it may be—does not comport with the large, robust literature showing that vaccines do not cause autism. Dr. Zimmerman has not published any paper setting forth his opinion (again, whatever it may be). And no one has replicated his results. Standing alone, the individual opinion of an individual scientist may be

interesting; but it is not dispositive, nor can it counterbalance the vast weight of contrary findings.

d. *Mercury in vaccines is dangerous.* Antivaccine advocates often complain about thimerosal (thiomersal; Merthiolate™), an organomercury compound formerly used as a preservative in the measles-mumps-rubella (MMR) vaccine and currently used in the United States as a preservative in some influenza vaccines. There is no evidence that thimerosal is dangerous in the quantities used presently in the influenza vaccine or in the MMR vaccines in which it was formerly used. If thimerosal were a cause of autism, one would have expected autism diagnoses to decline in numbers following the discontinuance of its use in MMR vaccines. Instead, the rates have continued to rise.

e. *Andrew Wakefield's paper on the MMR-autism link has not been disproved.*

f. *Andrew Wakefield was wrongly deregistered as a physician; had he appealed, the decision striking him from the register would have been overturned, as was the decision deregistering his colleague, Dr. John Walker-Smith.* The question is irrelevant. Wakefield's *Lancet* paper was withdrawn, and many subsequent studies showed that the MMR vaccine does not cause autism. Dr. Walker-Smith's exoneration did not exonerate Wakefield. And it doesn't matter whether or not Wakefield was deregistered: the evidence shows abundantly that his hypothesis was not supported.

g. *Aluminum used in vaccines is dangerous.* Vaccines do not use elemental aluminum. Some vaccines use aluminum salts as an adjuvant. Those aluminum salts have an excellent safety profile.

h. *Children are exposed to too many vaccines.* Antivaccine advocates also claim that children's immune systems are "overloaded" by the number of vaccinations that they receive.

The evidence does not support that claim. *See, e.g.*, Frank Stefano, Christopher S. Price, and Eric S. Weintraub, “Increasing Exposure to Antibody-Stimulating Proteins and Polysaccharides in Vaccines Is Not Associated with Risk of Autism,” 163 *J. Pediatrics* 561–67 (2013).

i. *Our immune systems need to be “exercised”; vaccines prevent our immune systems from obtaining the necessary “exercise.”* Actual studies do not support this claim. In any event, vaccines work by effectively teaching the immune system to recognize and respond to certain pathogens. Thus, vaccines would appear to be “exercising” the immune system.

j. *Our bodies can adapt only to a limited number of pathogens.* Actual studies do not support this claim. In any event, vaccines simply prepare the body to respond to certain pathogens that would predictably be encountered in the absence of vaccines.

k. *We can rely on Pap smears to prevent cervical cancer.* Pap smears do not prevent cervical cancer; at best, they can only identify precancerous lesions in cervical tissues, which lesions may be addressed through other medical interventions.

l. *Injection is different from ingestion.*

m. *Vaccines were developed from aborted fetuses.* This claim has nothing to do with the safety or efficacy of vaccines.

m. *The U.S. Supreme Court held that vaccines are “unavoidably unsafe.”* Opinions of courts, even the U.S. Supreme Court, are matters of law—not matters of science. An expert witness should avoid answering questions about the topic on the ground that the issue is beyond his or her expertise. As an expert, you should say simply that you’re not interested in the results of court cases, either one way or another. But be aware the Supreme Court did not rule that vaccines are “unavoidably unsafe.” *See Bruesewitz v. Wyeth LLC*, 562 U.S. (2011). Instead, the Court rejected that argument by the antivaccine petitioner. *See id.*

n. *The “vaccine court” proves that vaccines cause many injuries.* The Vaccine Injury Compensation Program is simply not part of the scientific enterprise. The special masters who serve as the triers of fact in that program are not scientists. Its findings, one way or another, are irrelevant to the actual working of science.

o. *The MMR vaccine causes “shedding” of the measles virus in the vaccinated.*
Even if this occurs, the measles virus in the MMR vaccine is attenuated; it cannot cause measles.

p. *Vaccination is causing “type replacement” of pathogens.*

q. *Vaccines are not adequately tested before being mandated for use.*

r. *Vaccines have not been tested adequately against placebos.*

s. *Vaccine safety isn’t monitored.* In the United States, four systems monitor vaccine safety.