

SRZ

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Business Enterprise | Business Litigation | Estate Management

Deposition Preparation The Basics

by Charles H. Cole

Litigation often results in the need for individuals to give deposition testimony. A deposition is a way of providing testimony under oath prior to the trial of a case. While attorneys are well-suited to handle depositions based upon their experience and training, parties and witnesses involved in litigation often have no training or experience with depositions. The process of testifying under oath in the presence of a court reporter can produce substantial anxiety and concern in many witnesses. This article will provide some simple pointers on how to reduce anxiety about the process and give effective deposition testimony.

The goal for any witness sitting for a deposition is to give truthful and credible testimony that cannot be distorted, misunderstood or impeached with other material. The witness must understand that the giving of testimony at a deposition may not end his or her involvement in the proceeding. Deposition testimony can be read at a trial or hearing. The witness can be impeached by inconsistent testimony given at a deposition when compared to that being given in open court.

Preparation is thus essential for any witness called upon to give a deposition. Some writers provide detailed rules for deponents which are not easily followed during the stress of a deposition. Other commentators have suggested the witness adopt a warrior mentality which is often counterproductive since it makes the witness appear evasive and contentious. A long list of rules will usually not serve to calm the witness.

The witness must understand the pertinent facts relevant to the claim or defense. The attorney will advise the witness how a jury or fact finder will operate to distill facts from the testimony of various witnesses. A witness will also be advised as to the theme of the attorney's case so that the choice or use of words in answering questions at a deposition can best advance the approach of counsel. However, being an obvious advocate for the argument often places the witness in the uncomfortable position of attempting to shade the facts or cover the truth in a manner that the witness believes will best serve his or her own interest. Such a perspective on the part of an inexperienced witness usually serves to make the testimony less credible and often provides less assistance in putting forth those facts most helpful to the case.

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Some attorneys rehearse testimony with witnesses before a deposition. A rehearsal can be either detrimental or beneficial, depending how it is handled. If a witness memorizes answers to certain questions based upon rehearsals, those answers come across sounding canned or stilted, thereby leaving the questioner with doubts regarding the credibility of the testimony. However, practice questions and answers can better prepare the witness for the type and kind of questions he or she may receive at a deposition. It is more important for the witness to have a sense of how the answer fits within the theme of the claim or defense than to be able to give a specifically rehearsed or staged answer.

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SRZ Highlights

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New Laws Impact Planning for Death

by Lauren Evans DeJong

THE DISPOSITION OF REMAINS ACT

The Disposition of Remains Act recognizes your right to control how your bodily remains should be disposed of (e.g., cremation) by providing written direction or by designating an agent to control the disposition of your remains following death. It further provides a statutory form for giving written direction. If you fail to give any direction or make a designation, the Act lists, in order of priority, those persons who have the power to determine the disposition of your remains.

As short and simple as the Act may be, it is remarkably useful for those who are unmarried, estranged from next-of-kin, or who know that someone other than a next-of-kin is more likely to follow their wishes. Moreover, the use of a written direction or designation under the Act may put a stop to (or at least limit) fights and disputes over a decedent's remains.

Prior to this law, the authority to dispose of a decedent's remains was given to the decedent's spouse, and if there was no spouse, to the decedent's next-of-kin. Disputes often arose among the next-of-kin or between the next-of-kin and a close friend of the decedent. In an effort to minimize conflict, some individuals began giving specific direction as to the disposition of their remains in their wills. However, those written directions often surfaced long after the individual's death because the will could not be located or retrieved. Individuals also attempted to control the disposition of their remains by naming an agent under a health care power of attorney and by giving the agent the power and authority to dispose of their remains. While this method worked better than others, the new law provides clear guidance as to how to give written direction and who can give the direction if a decedent has not done so.

The Act provides that you may provide written direction for the disposition, including cremation, of your remains by will, prepaid funeral or burial contract, cremation authorization form, or health care power of attorney, if such power of attorney specifically contains a power to direct the disposition of remains. Under the Act, if no written direction has been made, the following succession of individuals, in the priority listed, have the right to control the disposition of a decedent's remains:

- (1) The person designated in a properly executed written instrument in substantial compliance with the form provided in the Act;
- (2) Any person serving as executor or legal representative of the decedent's estate and acting according to the decedent's written instructions contained in the decedent's will;

- (3) The decedent's spouse;
- (4) A majority of the surviving competent adult children of the decedent;
- (5) The surviving competent parents of the decedent;
- (6) A majority of the surviving competent adult persons in the closest degree of kindred; and
- (7) Any other person or organization that is willing to assume legal and financial responsibility.

If the priority list leaves you shaking your head or grimacing in pain, consider reviewing your current estate plan. You may wish to create a will or codicil to an existing will that includes specific direction as to the disposition of your remains. Alternatively, you may desire to execute a health care power of attorney or separate instrument in compliance with the Act to appoint an agent to control the disposition of your remains.

FIRST-PERSON CONSENT LAW

The First-Person Consent Law amended the Illinois Vehicle Code to create the First-Person Consent Organ and Tissue Donor Registry. The purpose of the new registry is to make an individual's decision to be an organ or tissue donor legally binding, ensuring that a family member cannot reverse an organ donor's decision. The hope is that fewer usable organs will be discarded at a time when more and more people are in need of transplants.

Prior to 2006, the Illinois organ and tissue donor registry was the largest in the country with more than six million names. However, according to Gift of Hope Organ and Tissue Donor Network, the organization authorized to oversee organ and tissue donation for most of the State of Illinois, the registry was essentially ineffective. Family consent was required in order to complete the donation process and in nineteen percent (19%) of cases in which an individual had joined the registry, the family refused to give its consent to the donation—effectively nullifying the wishes of the deceased.

In order to join the new registry and become an organ or tissue donor, Illinois residents can telephone the Illinois Secretary of State Organ/Tissue Donor Program at (800) 210-2106, visit their local Secretary of State facility, mail a request or enroll online at www.LifeGoesOn.com. You may join the registry without family consent and without the presence or signature of witnesses. If you later decide to withdraw consent to be listed on the donor registry, you can do so by notifying the Illinois Secretary of State in writing of the decision to have the name removed. This can be done by mail or online.

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Another instruction often given to witnesses is to respond directly to questions in a short and concise fashion. Such a rule is sound so long as the witness does not waste an opportunity to expound on an answer that will favorably advance the cause. Once again, preparation for the witness should provide guidance regarding when a brief explanation of a fact or point would be more beneficial than a simple, direct response.

The most basic rule for all deponents is to tell the truth. This rule is paramount among all others; it will reduce anxiety and increase credibility. A witness who does not feel pressured to shape certain facts, but only to testify to truthful and accurate recollections, will appear far more credible than the cagey or deceptive witness who tries to make his or her version of the facts fit within a particular strategy. The lawyers are responsible for taking the facts and fashioning an argument that best advances the cause or the defense—the witness is not expected to do the work of the attorney in this regard.

The second simple rule for deponents is to listen to the question. Many witnesses only hear parts of the question because they are too busy thinking about the best way to answer the question. Answers that are provided in such a fashion appear nonsensical and disjointed. The witness must always listen carefully to the entire question and wait until the attorney has completed the question before offering a response.

In this regard, the corollary to the “listen” rule is to stop and think about the answer before giving a response. A witness will appear far more credible if a short pause takes place between the question and the answer. The pause will also help to reduce anxiety and stress by allowing the witness to calmly assess the question and carefully provide an answer. Once again, it is the responsibility of the attorney to prepare the witness for the potentially lengthy deposition procedure so that the witness does not appear hurried to move on to more important things in his or her life.

If you are faced with a request to give a deposition, you should consult with your attorney as quickly as possible. Preparation for the deposition is essential and will best serve your interests as well as the interests of the case. Ultimately, deposition testimony will serve to resolve disputes, which is the goal of our system of justice. We have all been faced with the uncomfortable notion of being forced to answer questions by a person in authority in an environment where we had little or no control. By recognizing that feeling when you prepare to give a deposition and working hard to gain some comfort with the process, you will be a more effective and credible witness.



CHARLES H. COLE is a Shareholder at Schuyler, Roche & Zwirner, P.C. He has extensive experience defending clients in professional liability and product liability litigation. Charles has represented clients from a wide variety of fields, including medical professionals, engineers and construction industry clients. He serves on the National Board of Directors of the Defense Research Institute.

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It is important to note that an individual listed on the previous registry will not automatically be transferred from the old registry to the new. For an individual listed on the previous registry, family consent will still be required prior to the completion of the donation process. Therefore, if you want to ensure that your decision to donate organs or tissue is legally binding and cannot be overturned or reversed, you should take the affirmative step of contacting the Illinois Secretary of State.

The Disposition of Remains Act and the First-Person Consent Law can give you additional control over your body following death. For many people this additional control may alleviate concerns they had about their wishes being followed when they are no longer here, and for

others it may be a comfort to know their family will not be burdened with making these decisions. In all cases, it allows each of us to make our own decisions and ensure that those decisions will be respected.



LAUREN EVANS DEJONG is a Shareholder at Schuyler, Roche & Zwirner, P.C. Her practice includes estate planning, trust administration and probate. Lauren prepares estate plans for clients from all walks of life, including planning for the succession of family-owned businesses. She serves on the Illinois State Bar Association's Committee on Law-Related Education for the Public.

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SRZ Highlights

SRZ WELCOMES NEW ATTORNEYS

SRZ is pleased to announce that **JEFFERY D. BARCLAY** has joined the firm as a partner specializing in transactional and regulatory work relating to securities and commodities futures. He brings to the firm a decade of legal service coupled with hands-on experience as a member of the Chicago Mercantile Exchange. Jeffrey also has extensive experience representing clients before the Securities and Exchange Commission, the Commodity Futures Trading Commission, the National Futures Association and the National Association of Securities Dealers.

While **BRIAN HORMOZI** is SRZ's newest associate, he is by no means new to the firm. For five years, he served as a legal intern at SRZ before graduating from Loyola University Chicago School of Law this spring. In his short tenure as an associate, Brian has already assisted lead counsel in a jury trial in the Circuit Court of Cook County and in arbitration before the National Association of Securities Dealers. We welcome Brian as a valuable addition to our business litigation group.

SRZ HOSTS ELITE CROWD AT CHICAGO'S SHEDD AQUARIUM

Some 8,000 aquatic creatures of the world's largest indoor aquarium set the backdrop as SRZ entertained nearly 200 distinguished guests on the evening of September 19, 2006 at the Shedd Aquarium. Coinciding with the annual International Bar Association meeting held in Chicago, the event attracted individuals from around the world. Attendees included representatives of foreign consulates, overseas corporations and their subsidiaries, foreign and local attorneys, U.S. corporations with overseas interests, as well as friends and clients from the Chicago area. Guests enjoyed the privilege of wandering the Shedd Aquarium after hours, free to view the venue's global habitats replicating the Amazon River, a Caribbean reef and the Pacific Northwest coast.

ROCHE CELEBRATES 40 YEARS AT SRZ

On June 1, 2006, **MICHAEL B. ROCHE** celebrated his 40th anniversary as a member of SRZ. More than 100 of Mike's current and former colleagues gathered to honor and recognize his achievements and the contributions that he has made to the legal profession. *Congratulations, Mike!*

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