

Why Am I Being Deposed?

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The unit owners in your condominium have been noticed for deposition in the pending transition litigation. Now they have come to you, the property management team, with questions. What should they expect at the deposition? What kinds of questions can they be asked? Did they do something wrong? Will they have to testify at trial? While these are all terrific questions, there is no reason for unit owners to stress over the fact that they will be deposed.

The first question in unit owners' minds is usually, 'Why am I being deposed?' The answer varies depending on the particular circumstance, but unit owners are typically deposed because they reported some issue in their unit, or with the common elements that the defendants wish to further explore. Most unit owners will not have been deposed before, and may be wondering what the process entails. Essentially, a deposition is a question-and-answer session between an individual and opposing counsel in a lawsuit before trial. Its primary purpose is to develop the factual record for trial. In a transition litigation, the attorney (or attorneys, depending how many parties there are in the case) will ask the unit owner a series of questions which she will need to answer to the best of her ability.

Although depositions often occur in attorney's offices or other locations outside the courtroom, everything the unit owner says is under oath as if she were sitting in a courtroom at trial. For that reason, it is extremely important that unit owners tell the truth at their depositions. The facts are the facts. Although unit owners may be tempted to exaggerate their testimony in a misguided attempt to help the association's case, the reality is that doing so can only hurt the association. Any inaccurate or contradictory testimony given during a deposition can be used to impeach that witness at trial, which will hurt that witness' credibility and ultimately undermine the association's case. The bottom line is that there is nothing for a unit owner to be stressed about, because their only obligation is to tell the truth.

It is important for unit owners to understand that in a transition litigation, the case typically comes down to a 'battle of the experts.' The association's expert will opine as to the cause of the construction defects being alleged, who is responsible for those defects, and how much repairs will cost. The defendants - meaning those responsible for the design and construction of the condominium - will have their own experts to refute the association's expert(s). The testimony of a unit owner, however, is typically limited to observing the symptom(s) of a defect, such as a leak or a crack. This could be compared to a medical malpractice case, where

an injured plaintiff may testify about the symptoms they're suffering from, but ultimately would not provide an opinion as to the cause of those symptoms. That testimony must come from an appropriately qualified expert.

The same holds true for construction defect claims. Because their lay observations of defects in their own units or in the common elements do not qualify as expert opinions, under normal circumstances a unit owner's testimony should not make or break the association's case, and offers little in the way of cause, responsibility or the appropriate manner in which those defects should be repaired. Thus, while a judge or jury, as the case may be, will have to consider and compare all of the testimony in ultimately deciding the case, the weight of the testimony considered is that of the experts.

Often times, unit owners may feel upset or even outraged at the issues they have had to deal with in their units as a result of deficient construction, and may want to volunteer information that they believe will help the association's case. While their frustration is certainly understandable, it's important to advise them that a deposition is not the correct forum in which to build the association's case. The association will have an opportunity to develop its own case-in-chief at trial. In a deposition, the deponent's responsibility is to truthfully answer the question that is asked; nothing more is required. We do not recommend that unit owners volunteer information - including attempting to explain their answers - if the attorney taking their deposition did not ask for an explanation. To the extent that unit owners wish to provide additional information, they should first seek the advice of their counsel. The association's counsel can then determine whether the deposition or some other forum is the appropriate time to elicit that information from the unit owner.

Another question unit owners often have is whether they need to obtain their own attorney to represent them in the deposition. This will of course depend on the association's retainer agreement with its counsel. That said, oftentimes the association's counsel will represent the unit owners during their deposition. If that is not the case, each unit owner would be well advised to obtain their own attorney to represent them in the deposition so that the attorney can protect that unit owner's interests and object to questions as appropriate.

In terms of the actual questions they will be asked, it is difficult to say exactly, as each litigation and each attorney is different. Furthermore, discovery in litigation is often relatively broad, and not necessarily limited to one or two possible topics. For example, opposing counsel may question the witness on things that seem irrelevant, like that person's educational background or occupation. They may also be interested in the unit owner's observations of construction defects in her unit and in the common elements, or information relayed from management or the board to the unit owners. Unit owners should not let these types of questions worry them; they should simply answer the questions truthfully, or if they don't know the answer, simply state that they do not know or cannot recall - provided that is the truthful response! It is important to remember that a deposition is not a test of memory. A unit owner should be aware that if reviewing a certain document would refresh their recollection and enhance their ability to answer a question, they can state that in answer to an attorney's question.

Given what is potentially at stake, it is important for each unit owner to be adequately prepared - not only by you as the management team, but by the association's counsel as well.

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