**PRIVILEGED ATTORNEY-CLIENT INFORMATION**

## Instructions for Plaintiff's Deposition

In the normal case, your deposition is the first and only time in which you will testify, under oath, about the facts of your case. It is a very important procedure that often forms the basis for settlement. It cannot be taken lightly. Thorough preparation on your part is essential. We are giving you this information to help you be prepared for this important occasion.

The opposing attorney has a right to take your deposition. The lawyer's purpose is generally to understand what you know about the subject matter of the case, so that he or she can prepare for trial and assess the strength or weakness of your position. The opposition may be using this technique to try to discover as much as possible about the facts. The opposition, however, may also be using the deposition as an occasion to have you testify under oath in a way that would make you uncomfortable at trial. If you make statements under oath at trial which are contrary to what you have said under oath at your deposition, your deposition may be used to "impeach your credibility." It is important, therefore, that you discuss with us any concerns you may have about possible problems or areas where you feel at all weak or unsure about your testimony. It is also important that you have fully disclosed to us any potential weaknesses or possible defenses which you believe the opposing party might know about in your case. If we have talked about the difficulties, we will have figured out how, consistent with the truth, you can deal with them. On the other hand, if we do not know about a possible problem or a harmful document, then we will have no way of reviewing it with you before your deposition and it is possible that, on that point or on that document, your deposition would go poorly.

You must assume that the opposing lawyers know all of the potential weaknesses in your case. If for any reason you have not told them to us so far, you must do so before your deposition so that we can adequately prepare your testimony if the subject comes up. If you are right that the other side has no knowledge about a potential weakness, then the subject will not come up and we don't have to worry about it. But if you are wrong in that assumption, then there can be significant problems. Full disclosure to us is always the best policy.

A deposition begins with a court reporter taking your oath that you will tell the truth. It is generally held in a conference

room in the opposing attorney's office. One of the attorneys from our office will always be present at the deposition. Because the opposing attorney has requested your deposition, he or she will ask questions and your answers will be taken down by the court reporter.

Unlike a court proceeding, in a deposition, objections to questions are generally few. There is no judge present at a deposition and there is no way to get a ruling on whether a question is objectionable. Thus, the lawyers enter into an agreement at the beginning of the deposition that any objections, except objections to the form of the question asked, are reserved for trial. This means that often there will be long stretches of time where we will be saying nothing. Generally, however, the less we say, the better your deposition is going, so don't be concerned if we have little participation.

At the end of the deposition, we will ask for your signature, which means you will have an opportunity to read the written transcript of your deposition and sign it, thus confirming its accuracy. Within approximately 2 - 4 weeks after your deposition is taken, you should expect to receive a copy of the transcript from us. When you do, you should review the text carefully. If you think there are any errors in the transcript, note all of them on the errata sheets that we will provide. Once you return the completed errata sheets and signature page, the transcript is a final document and will be used in court if your case goes to trial. Errors you may note in the transcript may be either typographical errors or substantive errors.

It is not your job at your deposition to tell the opposing attorney everything you know about your case. It is your job to answer the questions that the other side asks, as concisely as possible. "Volunteering information" is almost always a bad idea. Realistically, you should abandon any idea that you might convince the opposing party of your account by telling him or her everything you know. In fact, often the other side does not know some of the things that you know, and if you make a disclosure of an item not previously known to the other party, then you can expect the other party to follow up on that matter by trying to obtain witnesses or find documents opposing your view. So, if you are not asked about a matter, don't bring it up.

Although our role as your attorney will be limited at your deposition, if we do object to questions you should listen carefully to the objection we make. We may be trying to help you out on your answer. If, for example, we object that the question

would call for you to speculate or guess, that means we do not want you to be guessing at an answer while you are under oath. If you actually know what the answer is, you may go ahead and answer, but if you do not, and you would be required to guess, you are better off simply stating that you do not know the answer and are unwilling to guess under oath. In addition, we might object that you have already answered the question in previous deposition testimony, and we object to your having to answer it again. This objection usually means that we think that your previous answer was good and complete, and we don't want you to deviate from it. Under those circumstances, it would usually be best for you to insist that you have already given a full answer and you cannot recall anything else, unless in fact there is something important which you remember and you did not bring out in your initial answer.

It is also possible that we will make an objection and at the same time, instruct you not to answer the question. If we do that, do not answer the question.

With the above in mind, we will now turn to some specific instructions to help you do a good job in this important procedure.

**Instructions**

1. Tell the truth.

2. Listen to the questions. Answer that question and only that - no more, no less. Resist the temptation to be helpful, or get out your side of the story, or "fill in the blanks."

3. Do not answer a question that you have not heard completely; ask that it be repeated. Do not answer a question you do not understand, and do not be afraid to say that you do not understand. It is up to the examiner to frame intelligible questions; if he or she cannot do it, do not offer your help. Do not explain to the examiner that the question is incomprehensible because he or she has misunderstood words of art in your business, trade or science. Do not help the examiner by saying "do you mean X" or "I think you mean Y."

4. Think about your answer before you respond to the questions. This permits time for you to make sure that you understand the question and can prepare your answer properly. It also gives us time to object if we feel an objection is important. Do not be embarrassed about taking your time in

answering. No judge or jury is present. The transcript does not reflect how long you take to answer. If anyone comments that you are taking a long time to answer, just say you want to be sure your answer is accurate and complete. That is enough explanation for the opposing party.

5. Answer each question accurately, but as briefly as possible. Respond only to the question asked and do not, under any circumstances, volunteer information. The examiner is entitled to an answer to the question that is asked and only to that question. You are not there to educate the examiner. Do not make a speech. Do not try to explain why you did or said something. Do not try to appear friendly or helpful. This is not a social occasion, and it is not a game. The examiner's interests are often the exact opposite of your own; do not trust him or her, charming though he or she may be.

6. In connection with answering questions:

   (a) Do not make up an answer, even though you think that it is what the answer probably is, or ought to be;

   (b) Do not guess, speculate or assume;

   (c) Do not be afraid to say that you don't remember, if in fact you do not remember.

7. Do not argue with the examining attorney. Do not let him or her make you angry; anger can provoke people into saying things they do not mean. Do not try to make the examiner angry. If your attorney appears to be angry, that is not a signal for you to allow yourself to be angry. It may be just an act on his or her part.

8. Conversely, as already indicated, do not be taken in by the examining attorney. Be polite but not friendly. It is a good technique for the opposing lawyer to appear to be friendly to you. On the other hand, keep in mind that the opposing attorney will make the best possible impression on his or her client if your case is completely demolished. Thus, do not believe that the opposing attorney is your friend.

9. Often lawyers will act as if they know nothing about a particular subject matter. Almost always, this is not the case. Usually the lawyer has gone into the subject matter

carefully, and in fact knows quite a bit about it. Do not be deceived by the opposing attorney saying that he or she is really naive about your area of employment, or any other subject matter of your case. That kind of introduction is more likely a tip off that the other lawyer has done some serious studying about it, and should be a signal to you definitely not to volunteer information, and answer only what you are being asked.

10. When there is a silence - and this is very important - do not try to fill the silence. Answer the question. Then be quiet. Do not be embarrassed by the silence. Do not try to expand on your answer. Sit there for 40 minutes of silence if that is what it takes. Wait for the next question.

11. Do not try to memorize your testimony.

12. Be as specific or as vague as your memory allows, but do not be put in a position contrary to your true recollection. If you are asked when something occurred and you remember that it occurred on January 15, answer "on January 15." If, on the other hand, you cannot recall the exact date, state the approximate date <u>only</u> if you recall enough information to approximate a date. Otherwise, say you don't know.

13. Do not explain your thought processes as to how you reached the answer to a question. If your answer depends on your recollection of other facts not called for by the question, do not refer to those other facts in explaining how you answer the question. For example, if you are asked when a conversation with Jones occurred, and you recall that it had to be in December because you met Smith after Jones and that was in January, do not explain this thought process to the examiner. This is an example of volunteering information, which we generally discourage.

14. In testifying to conversations, make it clear whether you are paraphrasing or quoting directly.

15. In answering a question calling for a complicated series of events or extensive conversation, summarize these where possible. An examiner who is doing his or her job properly will ask for all the details. It is possible, however, that the examiner will accept your summary and this is so much the better.

16. Never characterize your own testimony. "In all candor," "honestly," "I'm doing the best I can," are out.

17. Avoid all adjectives and superlatives. "I never" or "I always" have a way of coming back to haunt you.

18. You only know what you have seen or heard. Questions are often phrased "do you know." A question in a deposition may legitimately call for something you do not know, but it must be so phrased. There is a difference between a question that asks "do you know," and a question that asks whether you have any information bearing on a particular subject.

19. Numerous documents may be marked as exhibits at a deposition. If you are asked about a document, read it before testifying. Do not make any comments whatsoever about the document, except in answer to a question that elicits your testimony.

20. If information is in a document that is an exhibit, ask to see the document before answering.

21. If information is in a document that is not an exhibit at the deposition, answer the question only if you can recall the answer. Do not tip off the examiner as to the existence of documents he or she does not know about. If you cannot answer the question without looking at a document that is not marked as an exhibit, you may simply answer the question by stating you do not recall. After a witness states he or she does not recall a fact that the examiner believes he or she should have knowledge of, the examiner may ask if there is a document that can refresh his or her recollection.

22. Sometimes an examining lawyer will ask you questions from a document but not let you see the document. It is dangerous to contradict what is stated in a document, unless the document is for some reason false. If you need the document to help you testify, ask for it. If the lawyer won't give it to you, make it clear that you feel you can't answer the question without having the document to refer to. If the lawyer still won't show it to you, tell the lawyer it's not fair for you to have to answer a question under oath without the document in front of you but that if he or she insists, you will do your best without it. Following this format insures that you will not later be impeached by contradictory statements in the document itself.

23. Do not let the examiner put words in your mouth. Do not accept the examiner's characterization of time, distance, personalities, events, etc. Rephrase the question into a sentence of your own, using your own words.

24. Pay particular attention to the introductory clauses preceding the main portion of the question. Leading questions are often preceded by statements that are either half-true or contain facts that you do not know to be true. Do not let the examiner put you in the position of adopting these half-truths or unknown facts on which he or she will then base further questions.

25. If you have a flash of insight or recollection while testifying and this has not been previously discussed with us, hold this to yourself, if possible, until you have had an opportunity to go over it with us.

26. If you are interrupted, let the examiner or other lawyer finish his or her interruption, and then firmly but courteously state that you were interrupted, that you had not finished your answer to the question, and then proceed with your answer.

27. Beware of any question that begins with "you have testified that..." Many witnesses simply assume that the attorney is repeating what was previously stated, and so they automatically agree with the characterization. But attorneys often use such an opportunity to recast your testimony in a light favorable to their side of the case. Accordingly, you should listen very carefully to any such summary. If it does not accord precisely with what you did in fact testify to, simply state that the summary is incorrect, and ask for the question to be rephrased.

28. If you are finished with an answer and the answer is complete and truthful, remain quiet and do not expand upon it. Do not add to your answer because the examiner looks at you expectantly. If the examiner asks you if that is all you recollect, say yes, if that is the case.

29. If we object to a question, listen to the objection very carefully. You may learn something about the question and how it should be handled from the objection.

30. Do not expect to testify without the other side scoring points. If the examiner asks questions that call for

answers that do not help your case, recognize that every lawsuit has two sides; sit back and accept the unavoidable. Resist the temptation to guess, expand on your answer where no expansion is called for, or, even worse, lie.

31. Avoid any attempt at humor or telling jokes. Jokes, sarcasm or irony simply do not come off well in a written transcript. Often the writing will look absolutely the opposite of what you expected.

32. Assume there is no such thing as "off the record." If you have any conversation with anybody in the deposition room, be prepared for questions on that conversation.

33. Every witness makes mistakes during a deposition. Do not become upset if you make one. If you make a mistake, you should correct it as soon as you realize it. If your correction would require new testimony on your part that you have not discussed previously with us, ask for a break at the earliest convenient time. The record can be corrected later in the deposition. Also, mistakes may be corrected when you sign the transcript.

34. If you are asked whether you talked to anyone about your testimony, you should testify truthfully including that you talked with us about it. You cannot be asked about the content of our discussions because those are subject to the attorney-client privilege. It would not be truthful, however, if you omitted stating that you had spoken with us to prepare for your deposition, and it would also make us look bad because lawyers are always supposed to prepare their clients for depositions.

35. Any documents that you refer to in the deposition that you have used to refresh your memory or prepare for the deposition probably will be required to be produced to the opposing party. This means that under no circumstances -- absolutely none -- should you bring a document. We may encourage you to bring some kinds of lists, such as dates referencing certain important events, places you have lived, jobs you have held, etc., but generally we discourage you from bringing any "home made" documents to the deposition. You must clear any document that you want to bring to the deposition with us, before you use it.

36. The opposing lawyer will ask you for names and addresses of witnesses to events. If there is any witness whose name you

are trying to protect, it is essential that we discuss this issue before you testify. If we know the witness exists, we can work on ways to preserve confidentiality. We can probably protect some witnesses but others we probably cannot. The rule, however, is that we must talk about them with you before your deposition.

37. You will probably be asked whether you have been involved in other lawsuits or ever been arrested or similar questions. Once again, you should prepare us for your answer. If it is something embarrassing for you, perhaps we can keep it out of your testimony. If you have not reviewed it with us and you are asked about something, then answer truthfully even if it is embarrassing. It is a lot less embarrassing to give a truthful answer then to be caught at trial with a lie or with covering up information.

38. It is essential that you re-read your complaint in your case before your deposition. You need to understand how you would prove all of the facts that you have alleged in your complaint. You also should understand the legal theories, even though you are not the lawyer and you are not really responsible for the theories. Finally, you should understand the damages that we are seeking in your complaint. Review those with us carefully and if you have any questions about them, please ask.

39. You may be asked about physical injuries or mental and emotional pain and suffering. You should not minimize the extent of your injuries when you are asked about them. Neither should you exaggerate as exaggeration probably works more against you than minimization. It is always good simply to be as descriptive as possible about injuries. The presentation of mental and emotional pain and suffering needs to be discussed with us before your deposition.

40. Certain things may be asked in your deposition which are personal, but which the opposing party is entitled to ask about. These may include:

    (a) Marital history;

    (b) educational background;

    (c) religious affiliation;

(d) employment history including reasons for changing employment;

(e) personal and family income;

(f) previous residences;

(g) any arrests or criminal convictions; and

(h) driving record, in some cases.

41. If something happened at a particular place, it may be useful for you to revisit that place before your deposition. Sometimes you may be asked to diagram where or how an incident happened, or you may be asked to diagram where some things were in relation to others. Viewing the place in question before the deposition often helps.

42. Most contracts and many parts of contracts are capable of several different interpretations. When asked, state your interpretation. The opposing lawyer may try to get you to admit that other interpretations are possible. This question simply requires you to guess, which you should refuse to do. Try to avoid admitting that other interpretations are possible or reasonable. Be prepared to support your own interpretations and do not deviate from it.

43. Usually a final question will be asked which is whether you know of anything else that has not been brought out on a particular subject matter. Unless you know of something specific, you should not answer this question any way other than to say you do not recall anything at this time but that if your are asked a specific question you will try to answer it.

44. Remember that you may ask for a break at any time you want one. If you want to consult with us during the deposition, just ask for a break and then adjourn to a place where you can confer in private. Normally, an examining attorney would not consider it acceptable for you to confer with your attorney while a question is pending. However, do not be intimidated if the examiner strenuously objects to you speaking with your attorney when you are asked a question you feel you simply cannot answer without conferring with your counsel. This situation may arise, for example, where you are asked about an aspect of your business that you deem to be trade secret or otherwise highly confidential and we

have not previously discussed this issue. In that case, merely state that you cannot answer the question without first conferring with counsel and we will take it from there. However, keep in mind that this is your deposition, and not your attorney's. You do not want the written record to make it appear as though we frequently were prompting your answers. Adequate preparation will generally avoid this problem, except for the occasional unforeseen instances, such as that described above.

We know that you will not be able to remember all of these instructions, but we hope that most of it will seem like common sense to you. We strongly encourage your reviewing these instructions as often as you need, so that your deposition will be a positive experience and allow us to pursue your case toward an adequate settlement or winning a trial.