DEFENDING DEPOSITIONS –
A MODEL LETTER TO WITNESSES

Although there is no substitute for a face-to-face meeting with your witness before a deposition, a letter reviewing deposition basics can help, particularly if you send it before the meeting. That way, you can use the meeting to review important points of the letter with the witness (as the Army adage goes, "tell them what you're going to tell them, then tell them, then tell them what you just told them"). And sending a letter before your meeting may save time. You can review the basics faster and move on to the important details of the case (but be careful not to assume that witnesses understand the letter simply because you've sent it).

The following sample letter covers deposition basics. It should, of course, be tailored to the witness – less sophisticated witnesses might be intimidated by a long letter, more sophisticated witnesses might not need a letter at all.

Dear Witness:

You will soon be a witness in a deposition, so now is the time to answer your questions about the deposition process and to discuss how you can become a better deposition witness.

Fortunately, there is no great mystery to being a good witness. It is a learned skill and depends on the conscientious application of certain techniques, some of which are listed below. Before I review specific techniques, however, I will discuss what depositions are and why they are taken.

What is a deposition?

A deposition is a question-and-answer session between the attorneys to a lawsuit and a witness. It is usually held in a lawyer's office. Those present are

1. you, the witness,
2. a court reporter to record your testimony,
3. lawyers for all parties to the lawsuit, and
4. the parties themselves or their representatives.

A judge does *not* attend the deposition and will not even review the deposition transcript unless called upon to do so by one of the parties.

The procedure itself is straightforward. After everyone is seated and ready, the court reporter will ask you to raise your right hand and take the oath. The lawyers in the room will then take turns asking you questions, but most will be from the lawyer calling the deposition (the "opposing attorney"). The court reporter will record everything said by the lawyers and by you. This record will later be made into a typed and bound, word-for-word transcript of the questions asked and answers given during the deposition.

Depositions can seem informal. The participants drink coffee, take off their jackets, and occasionally get up and move around the room. But don't let the informality mislead you. Depositions are vitally important, and what you say can be used against you.

Why depositions are taken?

Fundamentally, lawyers take depositions to discover what a witness knows and to preserve testimony for trial. You were deposed for some of the following reasons:

1. To discover what you know about the case – the opposing attorney is searching for evidence.

2. To find evidence favorable to the other side. To this end, the opposing attorney may attempt to maneuver you into making statements against your interest.

3. To commit you to statements under oath. If you testify under oath in your deposition that something occurred on June 1, 1994, and you attempt to change your testimony later, the opposing attorney can read that portion of the deposition at the trial, thereby using your deposition testimony against you.

4. To discredit your testimony or the testimony of other witnesses through you.

Your obligation as a witness, and how to deal with the opposing attorney

Your first duty as a witness is to tell the truth. This is your obligation even if the truth will hurt your case. Beforehand, we should review weak spots in the case so that we'll know how to address them if questions arise during the deposition. Most lawyers are skilled at taking depositions and will know how to make an untruthful witness very uncomfortable. If you find yourself reluctant to give a completely candid answer because it would damage your case, know that the damage is usually much smaller than that caused by a less-than-candid answer.

Having said that, you must be prepared for an opposing attorney who will emphasize the strong points of his or her client's case, ignore or try to explain away the weak points, and ridicule your story and contrive ways to suggest that you are not telling the truth or are in error. Therefore, although you must be accurate and candid, you also need to be on guard. The following 10 thoughts may help you be a good witness and avoid improper or "tricky" questions.

10 Deposition Tips

1. *Pause and think before answering.* Listen to the question. Concentrate on every word and wait until you hear the last word of the question before you answer. In ordinary conversation we cut one another off frequently. In a deposition, however, pause to think before you answer. That way, you will not inadvertently give away information that the opposing attorney never thought of asking for.

Following this rule may seem unnecessary when you are asked simple questions, but follow it anyway. The more the rule becomes second nature, the better able you are to concentrate on the substance of your testimony. Also, the rule permits you, rather than the opposing attorney, to dictate the tempo of the deposition. This will be important if you get tired or feel under pressure. Most important, the rule allows your attorneys to formulate and state objections to a question *before* you answer.

2. *Never volunteer information.* A lot of damage is done in a lawsuit by a "helpful" witness. We all like to be helpful, but it's unwise in a deposition to volunteer information of any kind. For example, if a friend or coworker asks you whether you know what time it is, you may say, "ten o'clock"; in a deposition, your answer to that question should be simply "yes" or "no." If your answer is "yes," let the opposing attorney follow up

with a question, such as "what time is it?" Generally, keep your answers short and to the point. Remember that every word is another target or the opposing attorney.

3. *Make sure you understand the question.* Never answer a question unless you fully understand it. It's up to the examiner to frame intelligible, unambiguous questions. If the opposing attorney can't do it, don't help.

You may not understand a question because the opposing attorney is imprecise. For example, he or she may ask you if a certain letter was sent after "that." If you're not sure what "that" refers to, say that you don't understand the question. Don't say, "if you mean this, then my answer would be such and such; if you mean that, then my answer would be so and so." You may give the opposing attorney ideas that hadn't occurred to him or her. Say only that you do not understand the question.

If something interferes with your ability to hear the question, insist that the full question be repeated to you. You have an absolute right to ask for clarification of a question at any time. This does not mean that you should be over-technical or picky about every question. But if a question is ambiguous or unintelligible, insist that it be repeated or restated in terms that you can understand.

4. *If you don't remember, say so.* Sometimes you won't remember important facts. If you don't remember the facts that would answer a particular question, say that. The deposition is not a test. If you are pretty sure of the anwer but not 100 percent sure, say that. It is extremely dangerous for a witness to testify from assumption rather than memory.

5. *Don't guess.* If you don't know an answer to a question, say so. "I do not know" is a totally proper deposition answer. Witnesses often feel that they "should know the answer" to a question, then conceal their lack of knowledge by guessing. Everyone – even the opposing attorney – knows that the memory of any witness will have limits.

6. *Always read the fine print*. Documents often form the central evidence of a lawsuit, and they can be a proper subject for questions in a deposition. You may be asked if you are familiar with a certain document; if you are, you may be asked detailed questions about its contents. The lawyer may also read a portion of a document to you and then ask you questions about it. If this occurs, a few rules may be helpful.

First, never testify about the content of a document you are not fully familiar with, unless the document is before you and you've been given an opportunity to read it. Second, refer to the document if necessary. If the opposing attorney needs the document to phrase a question, insist that the document be returned to you before you answer. Third, if the opposing attorney suggests that the document states a certain fact, always check to see whether it does before you answer. Sometimes inadvertently, sometimes intentionally, a lawyer may read too much or too little into a document.

7. *Silence and off-the-record comment*. Sometimes attorneys engage in a subtle ploy of suggesting, by silence, that you should give a different answer. You may become uncomfortable or assume that your answer is incomplete and feel compelled to explain. The opposing attorney may encourage you with silent signals (tilted head, raised eyebrows), or may stare at you with a look of disbelief.

Ignore the silent treatment. When you have answered a question, stop and wait for the next one. Sometimes, the opposing attorney is simply thinking about how to word the next question. You may be tempted to fill the silence with words – don't.

Sometimes, too, the attorney will "go off the record"; however, he or she can ask you about what you've said when you are back on the record. Never say anything in the presence of the opposing attorney that you would not want in the record.

8. *Stick to your answers.* You may hear the same question more than once. The opposing attorney may ask the same question 10 different ways and then ask it once more prefixed by, "I cannot remember if I have asked you this, but….." Attorneys usually use this tactic for one of two reasons: they're trying to get a different answer by changing the form of the question, or they're trying to emphasize something that they think strengthens their case.

If your original answer was accurate, stick to it. The fact that the opposing attorney keeps coming back to the question does not mean that you are not answering properly.

9. *Objections.* I may object to certain questions. Try not to be distracted by that. If I object, stop and wait for me to finish. The court reporter will note the objection for later ruling by the judge. You will usually be expected to answer. Occasionally, however, I may instruct you not to answer the question. In that instance, and only in that instance, do not answer.

10. *What happens after the deposition.* Under court rules, you have a right to read the transcript of your deposition and correct mistakes, and you will then be asked to sign the deposition on a separate form. Sometimes I recommend waiving this process. After a transcript is prepared, I will review the transcript and raise any concerns with you.

Generally, however, the best time to correct mistakes in your testimony is before the transcript has been prepared. There will be periods during the deposition when we can take a break. Raise any concerns you have during the break so we discuss how to correct an error in your testimony or how to raise an additional point that you believe is important.

I hope that these suggestions are helpful. As the deposition date nears, we can discuss in greater detail some of the suggestions offered in this letter.

Sincerely,
Your Lawyer, Esq.