

## **DEPOSITION LETTER**

Dear Client:

The attorney for the defendant has requested your deposition as part of the discovery which you must provide in your lawsuit. A deposition is the defense attorneys' opportunity to ask you questions about your background, your accident, and your injuries, and to explore your claim in detail. The defense attorneys have your answers to interrogatories, which provide a basic description of your claim but now want to obtain further information from you and evaluate you in person.

A deposition takes the form of a question and answer session. The attorneys for the opposing parties will ask you a series of questions and you will answer them. Everything that is said by anyone during the course of the deposition is transcribed by a court reporter, who is present at the proceeding. You will be sworn by the court reporter before being questioned and your answers are given under oath. Your testimony is preserved "on the record".

The deposition is a critical part of your lawsuit. The transcript can be shown to judges, who must determine whether your case may proceed to trial; to insurance adjusters, who must decide whether to offer you a settlement; and, if your case is tried, to the jury if the opposing attorneys want to create the impression that you are changing your story. Because most cases settle out of court, the deposition may be your only chance to testify in detail about your accident, aside from perhaps twenty minutes during an arbitration hearing. You should never forget, however, that a deposition is an adversarial proceeding and that the opposing attorney is probing for weaknesses in your case. The strength of your lawsuit will be displayed by your own attorneys when we ask you questions at an arbitration or trial, or obtain a pre-trial affidavit from you to show to a judge.

Because it is unlikely that you are a professional witness, you are probably apprehensive about being deposed. To make you a better witness, please keep a few basic rules in mind.

First, recognize that you are likely to be anxious. Make this work for you by being an inner reminder to say as little as possible. You are under oath and must give a truthful answer to every question asked of you. However, you need not volunteer information that is not necessary to answer a question. It is not your job to educate the opposing attorneys. If you are not asked an important question, it is your adversaries' problem and means only that your opponents will not be prepared for your answer when it comes out later in the litigation. You will only prolong your deposition by volunteering information and you will give the opposing attorneys ideas for questions which may not have occurred to them. Answer only the question asked of you, not some other question that you would prefer to answer. Most questions are open-ended, that is, they cannot be answered with a simple "yes" or "no". Do not be fooled by this into imparting more information than is necessary to answer the question.

Second, remember that the opposing attorneys will generally have more experience asking questions than you have answering them. Do not attempt to match wits with them. Moreover, though your answers are under oath and are evidence in the lawsuit, their questions are not. An obnoxious answer will hurt your case more than an obnoxious question. A sarcastic or facetious answer will not come across that way in the cold written transcript and can haunt you later on. Some attorneys may try to provoke you. If you fall for it, they will know they can get the same reaction at trial and make you lose your credibility in front of a judge or jury. Do not fall for such tricks. You can keep your cool for the few hours necessary to create the proper impression.

Third, remember that the opposing attorneys are your adversaries. No matter how nice some may seem, they are not your friends. They are ethically required to owe their loyalty to their own clients. At best, their purpose in deposing you is to commit you to a story on the record. More likely, they are trying to elicit damaging statements from you that they can use to negotiate a lower settlement or obtain a lower verdict from a jury. It is a natural human reaction to help someone you may like. A friendly opposing attorney can sometimes cause you to be sympathetic to your adversary by minimizing the wrongful act, or to downplay your injuries because you do not want to sound like a complainer. You may not realize the implications of something you say until it is too late. While you should always be courteous to the opposing attorneys, and expect in return that they act professionally towards you, never forget the purpose for which they are taking your deposition.

Fourth, some opposing attorneys can, unfortunately, be obnoxious when questioning you. Again, remember that it is your answers which count, not their questions. For example, many people have a difficult time conveying the effect of their injuries, and some defense attorneys will emphasize everything that you can do, despite being hurt, in such a manner that your injury may seem minor. Play it straight at all times, stick to the truth no matter how much they may try to ridicule your story, and do not let yourself become provoked. The more aggressive the opposing attorney becomes, the mellower you should become. You want an obnoxious attorney to know that if he acts that way in front of a jury, he will leave a worse impression than you. Do not be scared or intimidated by opposing attorneys. They can only ask you questions.

Fifth, do not guess at the answers to any questions. Do not speculate as to an answer just to be helpful to your adversary. Most witnesses do not know the answer to every question asked of them. Unless you are the only source of vital information, this will rarely hurt your case. For example, if you forget the dates when you saw a certain doctor, the doctor's office notes or bills can be used to establish this fact. One of the purposes for taking your deposition is to learn what you know and what you do not know so that the opposing attorney can predict your trial testimony and how we will prove certain facts. If later in the deposition, you recall the answer to a question which you initially did not know, you should interrupt the questioning and correct your previous response. If you recall the answer after your deposition is completed, be sure to tell us so that we can present the information to the adversaries so that you can testify at trial to that fact. You will be asked some questions which the opposing attorney knows you cannot answer with

certainly. For example, you will probably be asked questions that call for measurements of distance or time, even though your adversary realizes that you did not have a ruler or stopwatch out when your accident happened. If you can make a reasonably educated approximation, give your best answer, but make sure the opposing attorney knows that you are only approximating.

Sixth, listen very carefully to the question. You want to make sure that you answer only what is asked of you. More importantly, some are trick questions. Some questions may require that you assume a fact which is not true. If you are asked a question that paraphrases your answer, the opposing attorney may use words that subtly change your meaning. If you are uncomfortable with the way your answer has been restated, you are within your rights to say that you feel more comfortable with the way you put it. Beware of questions containing absolute terms such "always" or "never". Questions like these are designed to set you up because the opposing attorneys know of an exception.

Seventh, remember that your role in the deposition is limited to being a fact witness. Do not argue the case with the opposing attorneys. Do not try to sell your case. You will probably know your case better than some of the attorneys in the room, but a deposition is not the place to demonstrate this. For example, do not answer a question in a way that anticipates where you think the next question is going. Do not answer by saying, "Yes, but . . ." and then proceed to answer an anticipated follow-up question. Your job is to answer the questions asked of you by setting forth facts clearly.

The logistics of a deposition: It is up to your adversary to ask for your deposition. We cannot force them to do so. Some attorneys will request your deposition when your case is relatively young so that they can evaluate your claim early and plan accordingly. Some will request your deposition late in the case after they have had a chance to investigate your claim by, for example, getting all of your medical records through authorizations they have asked you to sign. Court rules require that a lawyer give an adversary ten days' advance notice for a deposition, though most attorneys give one to three months' notice.

Once scheduled, depositions are often adjourned because one of the attorneys is required to be in court at the last minute or has another conflict. We know that this can be frustrating, but because court appearance have a priority on any attorney's time, we often have very little say about this. Courts often call attorneys to appear before them on short notice. For the same reason, we often do not know which attorney from our office will be with you during your deposition, as this depends on which attorneys are not required to be in court on any given day. Make sure that you call our office between 11:00 a.m. and 1:00 p.m. on the work day immediately before your deposition and confirm that it has not been adjourned and that you are available to attend. Ask to speak to our Calendar Department. If you have not called to confirm that you can appear at your deposition, it will probably be adjourned. The opposing lawyers are not likely to appear if they do not know for sure that you will be present.

If a deposition is adjourned too many times, a court will sometimes order that it proceed on a specified date, at which time all of the attorneys must appear or else forfeit their

right to participate in the deposition. Failure to abide by a court's order can result in the dismissal of your case. If we send you a letter advising that your deposition has been ordered by the court, let us know immediately if you will not be available on that date so we can advise the court.

Depositions are usually held at the offices of one of the attorneys involved in your case, though sometimes they are held at a courthouse. Depositions are generally scheduled for either 10:00 a.m. or 2:00 p.m., though other times are sometimes selected. The setting is usually a conference room, though occasionally an office will be used. The persons present will be you, an attorney from our office, the attorneys for the other parties, and the court reporter. Often, someone else involved in the case will be deposed at the same time and you may find yourself in the same room as an adverse party. If more than one witness is to be deposed, the plaintiff usually goes last on the theory that it takes less time to depose someone who is a witness only to the accident than to depose someone who must also be questioned about injuries. Again, there are exceptions to this. A deposition of a plaintiff in a personal injury lawsuit usually lasts two to three hours, depending on the complexity of the accident or your medical history. Once again, this is not a hard and fast rule, and depositions in complicated cases involving products liability or medical malpractice may take longer.

Try to arrive a half hour early for your deposition so that you can meet your attorney and prepare yourself for your deposition. The purpose of this preparation will be to let you know the types of questions which you may expect, so that you will have the opportunity to think about the answers in advance. Because most people are anxious during a deposition, we have found that they make better witnesses if given the chance to think about the questions, even for a short period of time, rather than fumble for the answers while under pressure from cross-examination. It does you little good to think of the answer after the deposition has ended. If you want more time to prepare for your deposition or you prefer to discuss your case with a specific attorney in our office, feel free to make an appointment to discuss your deposition in the week or two before it is scheduled to take place.

Remember that a deposition is a formal legal proceeding in which your appearance is being assessed. Dress appropriately. The attorneys and court reporter will usually wear standard business clothing, and you may feel more comfortable if you are dressed neatly.

How is a deposition conducted: If the deposition is held around a conference table, the court reporter will sit at one end, with the witness being deposed on one side and the attorney doing the questioning on the other side. This arrangement makes it easier for the court reporter to take down everything that is being said. Your attorney will sit next to you. If there are several parties to your lawsuit, each will probably be represented by a separate attorney. The attorney who first asked for your deposition will probably begin the questioning. After that attorney is finished, any other attorney in the room can ask you questions which were omitted from your initial questioning or which may be of interest only to some of the parties to the lawsuit.

After you have been sworn by the court reporter, the opposing attorney will usually give you a few standard instructions. These include:

- \* Tell the opposing attorney if you do not understand a question asked of you. If you answer the question, the opposing attorney will have the right to assume that you understood it because you have given no indication to the contrary. It does you no good to guess at the intent of the question or answer a question other than the one asked of you.

- \* Keep your answers verbal and do not interrupt the question. This is necessary for the court reporter to make a readable transcript. The court-reporter can only take down spoken sounds. Non-verbal gestures such as shrugs, hand movements, or nodding cannot be transcribed. Sounds such as "uh-huh" (yes) or "uh-uh" (no) cannot be transcribed in a way that will make sense to someone reading a transcript later. Most persons forget this instruction at one point during a deposition and resort to more normal conversation, but, if you do, the court reporter will probably remind you to answer verbally

- \* If you need to take a break, speak up. A deposition is not a contest of physical endurance, and you are free to use the rest room or get a drink of water if necessary. Note, however, that once you have been placed under oath, you may not speak to your attorney about your testimony during such a break.

- \* If any attorney in the room objects to a question, say nothing until instructed by your own attorney how to proceed.

During the deposition: A deposition is not a trial. It is a discovery device and you will be asked many questions that you cannot be asked at trial. The types of objections that may be raised are also more limited than those available at trial. Because no judge is present in the deposition room, objections cannot immediately be ruled on and so are preserved for trial. If an objection is made, the questioning attorney can either rephrase the question or request that you answer it despite the objection. You cannot refuse to answer a question unless it calls for privileged information or is unreasonably harassing. Follow your own attorney's advice on how to proceed. If you hear an objection, listen carefully so that you will know what is going on. Sometimes the dialogue among the lawyers over an objection will give you a clue as to why the question was really asked. Resist the temptation to play lawyer and raise your own objections. The courts do not look kindly on disruptions of a deposition, and if you refuse to answer a question that a court feels is proper, monetary sanctions may be imposed. Some of the questions may seem strange to you, or unduly intrusive, but we can explain the reasons for such questions after the deposition is over.

Lastly, do not read from prepared notes or ask someone else in the room for help in answering a question. Though there is no rule against using prepared notes, the opposing attorney has the right to look at any materials which you used to prepare your testimony. Moreover, the opposing attorney has the right to test your recollection when you do not have your notes in front of you. You cannot ask anyone else in the room for help in answering a question. Only the person who is under oath can answer questions. If you

know that your spouse or your parent, sitting in the deposition room, has the answer to a question, you cannot turn to them for help. You should tell the opposing attorney that you have forgotten the answer but that the other person else may know. The opposing attorney can then decide whether to place that person under oath and ask them the question.

It is unlikely that your own attorney will ask you any questions. Generally, we do not want to reveal our case unnecessarily to our adversaries. There are exceptions to this, however, such as when we feel that one of your answers can be taken out of context or if you will not be available to give us an affidavit later in the case. If we ask you a question, listen carefully and try to figure out why we are asking it of you before you answer.

After the deposition: After the deposition is over, go home and put it out of your mind. Many people torture themselves second-guessing their answers. There is no point to this. Most likely, you did better than you think. Very few people get through a deposition without making a mistake, and you probably did no worse than anyone else. Though the idea of being cross-examined is scary, and this letter may have reinforced your worse fears, every one of our clients has survived the deposition process. The entire procedure will last only a few hours. Remember that you were the one who was wronged and was injured as a result. You need not be defensive about being deposed.

Sometimes, the questions asked of you during a deposition will suggest a potential weakness in your case for which you will later think of an answer. If you think of additional documentation or new witnesses that help you lawsuit, let us know as soon as possible. We are required to advise our adversaries well in advance of trial of the evidence and witnesses upon which we will rely, or else the court can bar us from using that information.

The transcript from your deposition will generally be available four to six weeks after the deposition. We generally do not give a copy to our clients unless we think the case is likely to be tried, but we will be glad to send you a copy upon request.

Remember, if you want to discuss your case at any time either before or after your deposition, do not hesitate to call for an appointment.

Very truly yours,

The attorneys and staff of  
Drazin and Warshaw

## **DEPOSITION SUMMARY**

- Call our office on the business day before your deposition is scheduled to confirm your availability for the deposition and that it has not been adjourned. (732-747-3730, Calendar Department)

- Prepare for your deposition by showing up a half hour early or coming into our office the week before it is scheduled to review with an attorney.
- Answer all questions honestly and accurately but answer only the question asked of you. Do not volunteer information that is not necessary to answer a question. Do not explain your case to the opposing attorneys.
- Do not be intimidated by an obnoxious opposing attorney or lulled by a friendly one. Your answers are the only thing that counts.
- Play it straight at all times and do not allow yourself to be provoked. Your deposition is a formal legal proceeding that is on the record.
- Do not guess at answers just to be helpful. Make approximations or estimations only if they are based on something you observed.
- Listen carefully to the question to make sure that you are answering only the question that is asked of you and that the question does not contain any tricks.
- Give verbal answers to the questions so that your gestures will not be misinterpreted.
- When an objection is made, listen carefully to what the attorneys say but follow your own attorney's instructions on how to proceed.