

PREPARING PLAINTIFFS FOR DEPOSITION

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I. INTRODUCTION

Defense counsel's deposition of your client is a critical event in every personal injury case. The plaintiff's deposition testimony may be one of the prime factors in determining whether a case settles or goes to trial. If the case is tried, the deposition transcript places important limitations on the scope of the plaintiff's trial testimony and is a potentially devastating cross-examination weapon. Thus, good litigation practice demands that you carefully and thoroughly prepare your client before they are deposed.

Most of the techniques that will be set forth in this paper are based upon general principles; accordingly, they are equally useful for preparing either a plaintiff or a defendant for deposition and are applicable to all types of litigation, not just personal injury cases. However, I will be giving particular attention to the special problems involved in preparing a personal injury plaintiff for deposition.

It is essential to remember that the personal injury plaintiff, unlike defendants in professional malpractice cases, officers of corporate defendants in product liability cases and commercial clients in general (both plaintiffs and defendants), has probably never been a party to a lawsuit, or even a witness at a trial, before this case. Your client is facing the unknown and therefore will naturally feel vulnerable, frightened, anxious and uncertain. The more thoroughly you prepare your client for deposition, the more you will help replace these demoralizing feelings with self-confidence and determination. Your goal is to produce a strong witness who will do well at the deposition; every bit of information you provide during the preparatory session serves that goal.

It is best to hold the preparatory session one or two days before the deposition, rather than on the day of the deposition. Preparing immediately before the deposition does not give your client enough time to absorb and comprehend your instructions; nor does it allow the client time to think about what you have said and come up with questions that may not have been thought of during the preparatory session. On the other hand, preparing the client more than two days in advance creates a risk that the client will forget some of your instructions and, if the client is the anxious type, may cause worries about the deposition for longer than necessary.

Allow plenty of time for the preparatory session, taking into account the complexity of the case, the client's level of intelligence and sophistication, and the likelihood that the client will have questions. The need for ample time is

another reason why it is important to schedule the session a day or two in advance: if it turns out that you cannot complete the preparation within the time originally allotted, you can finish it the next day. By comparison, if you wait until the day of the deposition to prepare your client, and the client is not fully prepared when the time for the deposition arrives, you are out of luck and so is your client.

What follows is a description of how I prepare personal injury plaintiffs for deposition. I can cite no authority for this method other than my years of experience as a plaintiff's attorney. Based on that experience, I am clear that this method is both efficient and effective. As with most advice about litigation practice, you will want to adopt the recommendations that feel comfortable to you, based on your personal style and preferences. For example, several companies are now marketing videotapes that purport to prepare clients for deposition. These companies claim that all you have to do is give your client the video to watch alone and then meet briefly with him or her to answer questions. I do not use such videos, but you may feel differently. In addition, there are many books and articles on this subject. If you read such materials, you will probably find many recommendations similar to those I am making here, and many other recommendations that differ from mine. Again, only you can decide what works best for you.

When I make the appointment for the preparatory session, I ask the client to read the following items (or as many of them as have been generated at that point in the litigation) before the session: the client's answers to the defendant's interrogatories, the defendant's answers to our interrogatories, and the transcript of the defendant's deposition. Reading (or rereading) these materials refreshes the client's memory as to the issues in the case. This helps the preparatory session run more smoothly and efficiently because it gets the client in the right frame of mind to listen to advice. It also helps the client come to the session with questions.

I begin the session by telling the client that I will first explain the deposition process in general and give instructions and advice that apply to every deposition. I then say that I will focus on the important issues in the case that are likely to arise at the deposition so that we can fully discuss how the client should handle questions about those issues and that I will then answer any questions the client may have. I also urge clients to feel free to interrupt my presentation with questions at any time if they are confused by anything I say.

It is both my belief and my experience that a client who understands the litigation process will be a better witness than one who is kept in ignorance. It is also my philosophy that our clients have the right to understand what is happening in their cases and that it is part of our function as attorneys to educate them about the litigation process and the judicial system. Accordingly, I

explain to my clients how the introduction of modern discovery rules replaced the old system of trial by ambush, and I disabuse them of any attachment they may have to the Perry Mason myth that a surprise witness or unexpected evidence will bring sudden victory in the courtroom. I explain the twofold advantage of broad discovery – that it promotes settlement because it gives each side a better understanding of the strengths and weaknesses of the other side’s case as well as its own and that properly conducted it prevents surprise at trial.

Next, I briefly explain the attorney-client privilege and the work product privilege and tell the client that essentially everything else is fair game for discovery. Usually there has been some paper discovery before the plaintiff is deposed, so I explain that the deposition is simply an additional method of discovery. I tell the client that the scope of questions that can be asked at a deposition is broader than the scope of questions that can be asked of a witness at trial, and I explain why. I also emphasize that discovery is a two-way street and that we have the same right to obtain information from the defendant as the defendant has to obtain information from us.

At this point I ask the client if there are any questions about anything I have said thus far. In general, it is a good idea to pause occasionally throughout the presentation and solicit questions in case the client is shy about asking them.

II. DEPOSITION INSTRUCTIONS

I then proceed to the general deposition instructions and advice that I give to all personal injury plaintiffs. This presentation runs more or less as follows:

A deposition has several purposes. One is to get some background information on the opposing party to find out what kind of person he or she is. Another is to size up your opponent’s qualities as a witness to see if the jury will like him or her. Another is to gain as much information as possible about your opponent’s case. And one of the most important is to pin down your opponent’s story, so that it can’t be changed at trial. You see, there will be a stenographer present. At the beginning of the deposition you will swear under oath to tell the truth, the same as you would at trial. The stenographer will take down the defense lawyer’s questions and your answers, and they will be typed up into a transcript like this [show a deposition transcript].

At trial, when the defense lawyer cross-examines you, you can be sure that this lawyer will ask you many of the same questions that were asked at the deposition. And if your answer is different, even

if the difference is slight, and even if the question relates to an unimportant issue, defense counsel will haul out your deposition transcript and ask you: "Mr. Smith, do you remember when I took your deposition at my office on such-and-such a date? And you swore an oath to tell the truth at that deposition, the same as you did today, didn't you? And do you remember my asking you this question?" The defense lawyer will read the question, which will be similar or identical to the one that was just asked on cross examination and ask, "And didn't you give the following answer?" At this point, defense counsel will quote your answer from the deposition transcript. Your answer to all of these questions will be yes. If you say no, the transcript will be shoved in your face and you will have to admit that you were indeed asked that question and you did indeed give that answer, which is different from your answer to the same question at trial.

From what I have just explained to you, you will understand that the first rule about being deposed is "Never volunteer anything". The less you say, the less you will have to worry about being impeached with at trial. The less you say, the more space you will give yourself for trial testimony.

You must remember that your deposition is not your day in court. If your case doesn't settle and goes to trial, you will be able to tell your story to the jury in full detail. But telling your story at the deposition in full detail will not help you and can only harm you. No matter what you say about [for example, in a medical negligence case] all the terrible things Dr. Jones did to you, the defense lawyer is not going to get down on his or her knees, beg you for forgiveness and offer to write you a settlement check then and there. And the more you say at your deposition, the bigger the transcript you will have to read and remember in order to avoid impeachment at trial, and the less room you will have to give fresh testimony at trial.

Defense counsel will do their best to hurt your case during this deposition. The defense is not trying to harm you personally, but is trying to damage your case. That is a defense lawyer's job, just as it's my job to advance your case and damage the defendant's case. Again, the less you say, the less ammunition you will give the defense with which to potentially hurt your case.

As I said, never volunteer anything. Listen carefully to the question, and give exactly the information requested by the question, nothing more. Don't go into a general discussion

concerning the subject matter of the question. For example, if defense counsel asks you how many children you have, answer, "I have three children." Do not go on to tell their names and ages, where they went to school, whether they are married, what they do for a living, and how many grandchildren you have. You should give all that additional information only if the defense lawyer specifically asks you for it. Another example: if asked whether you are married, just say "Yes" -- don't say when and where you were married, where you went on your honeymoon, whether you've ever been separated, and so on.

Of course, none of this information about your children and your marriage is of any importance to the case. But I want you to get into the habit of answering questions in this manner from the very beginning of the deposition, so that, when the defendant's lawyer gets to the important questions, you will continue to answer them properly. Very few really important questions get asked at a deposition, perhaps ten or a dozen on average. Voluntary information might inadvertently answer one of those important questions, one that the defendant's lawyer might otherwise have forgotten to ask. The idea is to make the lawyer work hard for every bit of information, make the defense do its job. If you make defense counsel work hard enough on the unimportant questions, there's a good chance that some of the important ones will be forgotten.

In addition, one of the most important things a lawyer has to do at a deposition is listen carefully to the answers and ask appropriate follow-up questions. If you answer questions the way I'm telling you to, the defendant's lawyer may have to ask a lot of follow-up questions before getting the desired answer. This will increase chances that defense counsel will not follow up adequately and therefore will not get complete answers to some of the important questions. But if you volunteer information, qualify your answers or wander off into a general discussion of the subject matter of the question, you are in effect answering follow-up questions that haven't been asked, and you may wind up giving a complete answer to an important question. Do not do defense counsel's work!

Please be clear that I am not telling you to be evasive, tell half-truths, get cute or engage in a battle of wits with the defendant's lawyer. Evasiveness shows up clearly in a transcript, and it looks awful; if you are evasive at your deposition, there's a good chance that it will wind up being used against you at trial. And don't get

into a verbal fencing match with the lawyer; if you do you will lose, because lawyers are trained and experienced in the art of question and answer and you aren't. Just listen carefully to the question, understand precisely what information the question is seeking and give precisely that information in your answer, no more and no less.

There are only two exceptions to the "Never volunteer anything" rule. The first is, use common sense. If you are absolutely convinced that an unqualified or unexplained answer to a question will damage your case, then go ahead and qualify or explain it. For example, if you are asked if you robbed a bank, and you answer "Yes", you'll go to jail. That answer has to be explained. So you say, "Yes, but I did it because Mark Mandell was holding a gun to my head the whole time and told me he would blow me away if I did not cooperate." Use this exception very cautiously and very sparingly. If you have the slightest doubt about whether you should qualify or explain an answer, then don't qualify or explain it. When I finish these general instructions and we discuss the issues in your case, one of the things I will go over with you are the problem areas in your case where you may have to explain or qualify an answer,

The second exception has to do with damages, the injuries sustained because of the defendant's negligence and how those injuries have affected your life. Here you need to be as complete as possible, because you don't want to claim damages at trial that you didn't talk about at your deposition. If you do, the defendant's lawyer will impeach you at trial by pointing out that you never mentioned those damages during your deposition, and will argue to the jury that your trial testimony about those damages is false. We will discuss your damages in detail in a few minutes. In addition, when you get home today I want you to make a list of your injuries and how they have affected you; and I want you to keep on adding to that list between now and your deposition, make it as extensive as possible, and bring it to my office when we meet on the day of your deposition.

When defense counsel questions you about damages and you have answered as fully and completely as you can, this lawyer will probably ask, "Is that all the damages you claim to have suffered as a result of the defendant's alleged negligence?" Your answer should be, "That is all I can think of at this time." That way, an opening is left for additional claims at trial, just in case you forgot something.

