DEPOSITIONS 101: WINNING YOUR CASE WITH DEPOSITIONS

Donald P. Moloney, II
Sturgill, Turner, Barker & Moloney, PLLC
333 West Vine Street, Suite 1500
Lexington, Kentucky 40507
patmoloney@sturgillturner.com

Even a perfect deposition will not win your case if the facts are not on your side. There are rarely perfect depositions. There are, however, many well-conducted depositions taken either on direct or cross-examination.

The topic of this discussion presumes that there are conflicting facts requiring a judge or jury to decide which facts are better supported by the evidence.

So, how can you prepare for a deposition that will improve your chances of winning the case for your client?

There is no single formula for taking depositions. Lawyers have different styles of taking a deposition. Personalities of lawyers and the parties are different. Temperaments are different. Backgrounds are different. Facts and legal issues are different.

Regardless, there are certain rules and goals for taking depositions that will help win your case.

At the beginning of your deposition, you should ask the plaintiff or plaintiff's witness:

- "Have you taken any medication or substances today that would affect your ability to recall events or testify about your accident and your claims for damages?"
- "If you don't understand a question that I ask, will you tell me so I may ask it differently?"
- "Do you understand that you are under oath when you give answers to the questions that I ask?"

- "It is important that we do not interrupt one another. Please let me complete my question before you give me your answer. I will do my best not to interrupt you so you can complete your answer. It is important that we each abide by these rules."

Remember, most plaintiffs and witnesses, except experts, have never given a deposition and will be far more uneasy and nervous than you will ever be.

If you are taking a plaintiff's deposition, or the deposition of a witness for the plaintiff, there are several basic rules that I recommend.

Rule No. 1 will always be **preparation**. Prepare, prepare and prepare some more.

This means that you should have a good outline which will be a guide for you to follow once you have determined what your goal is in taking that deposition.

In preparing for the deposition, you want to review plaintiff's complaint, answers to written discovery, any depositions that have been taken up to that point, medical records if personal injuries are being claimed, any documents relating to plaintiff's claims for monetary damages, including tax returns, employment records and so forth. Being well-prepared for a deposition allows you to explore every claim in the plaintiff's case, both liability and damages, and the defenses you will offer to defeat those claims.

As defense lawyers, we are all mindful of billing guidelines and the need to keep defense costs down. Nevertheless, I often spend as much as three times the hours that I expect a deposition to last in preparing for a deposition.

Depositions are taken to learn the facts of your case, both favorable and unfavorable, so you will not be surprised at trial. That is not to say that there won't be surprises at trial, but a well-prepared deposition carefully taken will hopefully minimize any surprises.

Being fully prepared to take a deposition will always improve your chances of obtaining a good result for your client.

Rule No. 2 is to **determine your goal** in deposing the plaintiff or the plaintiff's witness.

What do you realistically hope to accomplish by deposing this person? Once you determine the answer to that question, you will be able to prepare a good outline covering all of the legal issues, defenses and plaintiff's claims of negligence and damages.

Rule No. 3 is to **assess the credibility** of the plaintiff and the plaintiff's witnesses.

By assessing one's credibility during a deposition, you will have many opportunities to strategize how you will cross-examine that person at trial.

To do that you need to look and listen. If a plaintiff comes across as arrogant or obnoxious, do not cut the witness off. Let that person talk and do not react by acting arrogant or sarcastic. Otherwise, you may miss the opportunity to get all the information you are seeking. You will gather far more information when you are kind and respectful than by attacking the witness. You gain very little by acting hostile and disrespectful towards the witness. Therefore, be professional and use good civil manners to your advantage. This is true even when a witness comes across as truthful and polite. Since more and more depositions are being taken by video, always be polite. It will improve your credibility with the jury.

Rule No. 4: If this is a discovery deposition, **ask open-ended questions and listen**. Use follow-up questions you believe will lead to other information that may be relevant at trial.

Don't allow yourself to become so tied to your outline that you are not listening to the answers to your questions.

Use follow-up open-ended questions such as "Anything else?" You may want to repeat that one or more times, or ask "So, you have told me everything you know about how you fell?" or "… about your neck injury?" or "… about all of the doctors who have treated you?"

If you are deposing a plaintiff's expert, you will want to ask, "Have you given me all of the opinions you intend to discuss at trial?" Then follow-up with "Have I given you a fair

opportunity to disclose and explain all of your opinions that you have about this case?" "There is nothing else?" "Before trial, if you come up with any additional opinions, will you let me know through Attorney X so I can redepose you?" You have now asked this expert several times if there are any additional opinions.

If the expert identifies additional opinions close in time to the trial when it could have been done much earlier, you may be entitled to an order on a motion to strike those opinions or a motion in limine to exclude those opinions.

Impeaching a witness. If a trial deposition is being taken of the plaintiff's witness, expert or non-expert, you will have likely taken a discovery deposition of that witness. You must be prepared to impeach this witness if that person's testimony changes from what has been previously testified to.

This is why preparation is so important. You must be thoroughly familiar with that person's deposition. You should have a deposition summary with page and line references for your use in cross-examining the witness. You must be prepared to show that witness' deposition by having the witness to read the question and answer out loud that contradicts their testimony in their trial deposition.

You should not ask why the witness' testimony has changed. Don't give the witness a chance to explain. If the witness does try to explain, then have the witness to read the question and answer again, and acknowledge to you that the witness was under oath at the time the answer was given. This will give you the opportunity of playing that part of the trial deposition to the jury to show how the witness has testified inconsistently under oath. You will hopefully have impeached that witness and damaged that witness' credibility.

If your goal is to discredit the plaintiff's damages claims in a discovery deposition, then prepare to use whatever medical records or documents that would show the jury the plaintiff has not been truthful with all of the relevant facts. Consider having the witness to read that part of the medical records that will undermine the witness' credibility. Consider having the witness to initial the bottom of the page of the record or document so you can decide whether to use it as a trial exhibit. Some examples of when you would want to do this may be when there is evidence of opiate abuse, medications discontinued by a doctor because of suspected medication abuse, previous motor vehicle accidents, previous neck and back injuries, previous lawsuits and so forth.

How to deal with an evasive plaintiff or witness. An evasive plaintiff or witness in a deposition can be used to your advantage at trial. Rather than becoming argumentative or angry, remain calm and polite. If the witness claims to not understand an obvious simple question, ask the witness "What is it about my question you do not understand?" Ask the question in a different way, and if the witness again claims not to understand, then repeat "What is it about my question that you don't understand?"

If the plaintiff claims not to remember, then continue your line of questioning and break down the line of questions to get the witness to repeatedly claim "not to remember." A series of "I don't remember" responses will lock the witness into those responses. You may want to repeat those questions at trial to elicit as many "I don't remembers" as you can. All of those "I don't remembers" may ultimately undermine plaintiff's credibility at trial.

If you are questioning a witness regarding a medical issue as to current treatment or prior medical history and the plaintiff claims to not remember, then at the appropriate time show the witness the medical records and have the plaintiff to read and acknowledge the accuracy of what

you were trying to elicit from him or her. If the plaintiff claims that the doctor or nurse put down something inaccurately, you may want to ask "So, you are telling this jury that doctor X or nurse Y put down inaccurate medical information or treatment?'"

Now with the ability to access one's own medical information through online portals, ask the witness if he/she has a medical portal with Dr. X or hospital Y. Ask "How often do you access your medical information?" Ask, "Did you access your medical portal after your office visit with Dr. X? If you are claiming that the information was incorrect, did you place a call to the doctor's office or write a letter requesting the information be corrected?"

Speaking objections. You know that speaking objections are not allowed and those lawyers who choose to disregard the rules and engage in speaking objections run the risk of being sanctioned by the court. Furthermore, those lawyers will develop an unfavorable reputation of engaging in that type of conduct.

Conclusion

By virtue of our license to practice law, we are professionals. We have the privilege as trial lawyers to represent our clients to the best of our ability. We owe it to the Court and to the Bar to conduct ourselves in a professional and civil manner, even if the other side chooses not to do so.

Your reputation will always be important to you. You have an obligation to be a well-prepared lawyer who conducts him or herself in a professional and civil manner and who is always honest in your dealings with opposing counsel. Not only will this enhance your reputation, but hopefully give you the comfort of knowing that you are a very good trial lawyer.