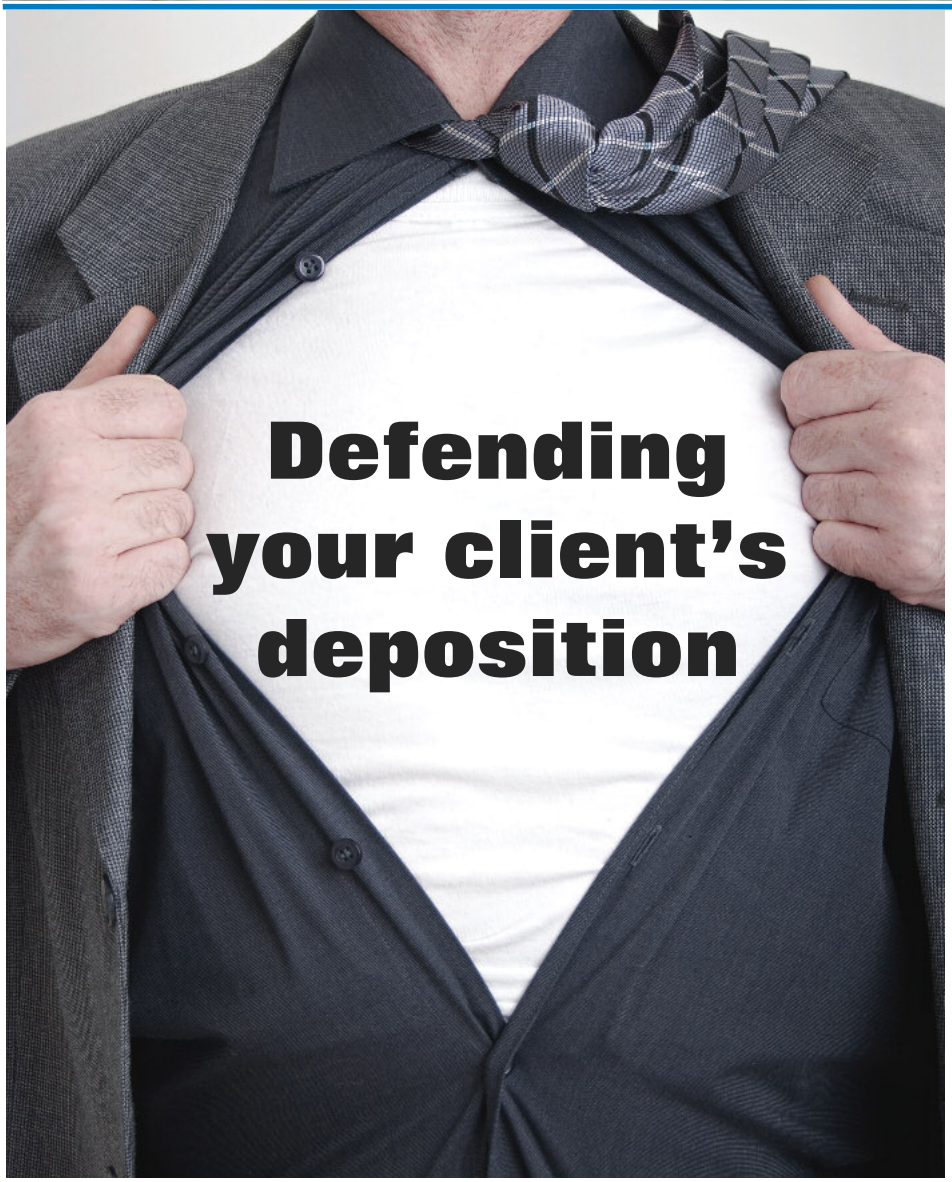

Defending your client's deposition

There's only one first impression, and you need to control it

By Andrew Wright

Good clients do make for good cases. The defense attorney (and perhaps the adjuster) will get to take the measure of your client for the first time in deposition. How your client presents at a deposition will tell an experienced defense lawyer a lot about how a trial will go. Since you never get a second chance to make a first impression, you want to do as much as you can to ensure that your client comes off as well as possible in the deposition. You also want to make sure you control the deposition process, keep an eye on the technical details, and make appropriate objections to prevent any discovery abuses and to keep the defense from poking holes in your case.

Avoid the last-minute scramble

There is no substitute for spending face time with your clients before their deposition. This seems axiomatic, but the majority of new attorneys working at personal-injury firms are told to appear at defense counsel's office 45 minutes before the deposition to "prep" the client. The clients invariably get lost and are late, and you meet in the hostile territory of the defense lawyer's firm. That is a bad way to start a deposition.

Clients are nervous, scared they will say the wrong thing, stressed out by their case already and unsure about the process. Only sufficient time alone with you will give your client the assurance and resolve they need to give a good deposition. And that time should be spent on the friendly turf of your office.

Don Keenan (and David Ball) in *Reptile* suggests a minimum of three full days of deposition preparation with your client. Given the type of cases Mr. Keenan's office takes to trial, that is sound advice. For the average personal-injury case, three days of preparation is impractical. Most attorneys will have to tailor the amount of time spent with their client; the more serious the injuries and difficult the case, the more time is needed.

An excellent tool for dealing with the basic mechanics of a deposition and how the client should dress for the deposition, listen to and answer questions, and comport themselves at deposition is a video provided by the Wisconsin State Bar. The video is available for purchase in English and Spanish on the Wisconsin Bar Web site. Get a copy of this video to your client weeks in advance of their meeting with you and tell them to watch it over and over.

A disclaimer: there are books written on the subject of defending your client's

deposition. This article is no substitute for reading them. I have picked a few of the highlights that I have found important in my practical experience over the past twenty years as a personal-injury trial lawyer.

Check the notice

When you get the notice of deposition for your client, check it for defects in the notice, especially if there is a demand to produce documents or other things at deposition. You must personally serve an objection three days before the deposition (plus 5 if by mail), otherwise the defect is waived. (Code Civ. Proc., § 2025.410(a),(b).

Typical defects to look for include: the notice is untimely; the deposition is set at an improper venue; and objections lie as to documents requested to be produced. Remember a deposition notice with request for documents is a second bite at the apple of document production. You may have properly objected to certain documents in a Request for Production of documents. You may waive that objection at the deposition. An RFP and a depo notice with RFP are two separate procedures; using one does not foreclose using the other. (*Carter v. Sup.Ct.* (CSAA Inter-Insurance Bureau) (1990) 218 Cal.App.3d 994, 997).

In addition to checking for defects in the notice, always check to see if the deposition notice correctly states the intent to videotape the deposition. (Code Civ. Proc., § 2025.220 (a)(5).) If your client is to be videotaped, it underscores the importance of why you told them in your office that they should dress as though they are attending the funeral of a Republican senator. No tube tops exposing more than should be, no bling, no wife-beaters displaying lightning-bolt biceps tattoos and backwards-turned ball caps. You get the picture.

Adjusters at depos

A common question among newer lawyers is: can the adjuster attend the deposition? As a practical matter, I like it when adjusters are interested enough in my client's case to attend. It gives them a first-hand opportunity to evaluate my client and me. From a legal standpoint, I think you would be hard pressed to convince a court that the defendant's adjuster does not have a good faith and compelling interest in attending the deposition. The adjuster must evaluate and place a monetary value on the plaintiff's claim on behalf of the insured defendant The only way to exclude the adjuster is to seek a protective order to keep the adjuster out. The court may exclude from a deposition "designated persons, other than the parties to the action and their officers and counsel ... (Code Civ. Proc., § 2025.420 (b)(12).) A showing will have to be made that allowing nonparties to attend would cause "unwarranted annoyance, embarrassment, or oppression ..." (Code Civ. Proc., § 2025.420(b).)

On the flip side of the coin, your client may need a comfort person to assist them at the deposition. A child will need a parent, an adult may need a friend, a service animal may be required. Address such issues well in advance of the deposition with opposing counsel and write really nice, polite meet and confer letters which may become exhibits in law and motion.

First noticed, first deposed?

Another common question concerns deposition priorities. Does first noticed invariably mean first deposed? It need not. There is no priority of depositions set forth in the Discovery Act based solely on who sent out notice first. "[T]he fact that a party is conducting discovery, whether by deposition or another method, shall not operate to delay the discovery of any other party." (Code Civ. Proc., § 2019.020(a). Counsel should cooperate to take depositions out of order if needed. Defense counsel may want to wait to depose your client until all medical treatment is finished, which may be several months. That should not keep you from deposing liability-only witnesses. With a trial date set one year from filing, there is no reason to delay the progress of the litigation until your client can be deposed. Again, be nice in those meet and confer letters. Look at the California State Bar Attorney Guidelines of Civility and Professionalism, Section 9, Discovery:

> An attorney should not use discovery to delay the resolution of a dispute.
>
> For example:
>
> As to Depositions:
>
> 1. When another party notices a deposition for the near future, absent unusual circumstances, an attorney should not schedule another deposition in the same case for an earlier date without opposing counsel's agreement.
> 2. An attorney should delay a scheduled deposition only when necessary to address scheduling problems and not in bad faith.

Your client's deposition begins

Because you spent sufficient time with your client in the calm and safe atmosphere of your office, they know how to respond to questions in the deposition. Inform them not to get chummy with defense counsel. Inform them that there is nothing they can say to help their case or to convince defense counsel that their claim is meritorious. They must not answer questions rapidly, as though it were a verbal tennis match. They must pause before answering to give you time to interpose an objection. Tell them that an objection can be a warning sign alerting them to a trick question or a problem area of the case.

If they are asked if they ***know*** the answer to a fact question, tell them there are only three possible answers and they must respond with either YES or NO or I DON'T REMEMBER, and then they must shut up. They must not elaborate, they must not verbalize their chain of thought as they search their memories in an effort to respond to the question. For example: Do you ***know*** where you were going? The "A" answer: (Moment of silence)...Yes. The "B" answer: Let's see...Hmmmm...where was I going.....I remember I had just stopped at the liquor store to get a fifth of Grandad and some smokes, I had been

trying to quit all week and my nerves were fried, I could hardly concentrate on traffic, well, anyways....YES! I know: my sister's house!" A bit of hyperbole for effect, but haven't we all been there? Advise your client not to do the defense lawyer's work for them.

Can you estimate?

When your client is asked the "estimate" question, they should bracket any response with appropriate adjectives and qualifiers and in the proper case, a reference to outside records. For example: What is your best estimate as to how many times you saw the chiropractor? Answer: "Hmmmm....Wow....I am not really sure, I am just not certain, you know, it has been quite a while, I don't know exactly....golly, sitting here today my best estimate is somewhere between 10 and 20 times, or something like that, it could be more or less. I'm sure the records would probably show a different number and that would be better than my recollection for sure."

In an auto-accident case, it is imperative that your client give wide estimates on time, speed and distance so the defense accident-reconstruction expert cannot pin them down. Imagine the day your client will be asked the same question in front of a jury. A properly worded "estimate" response will be useless to impeach them or to form the basis of a defense-expert opinion.

Use care in reviewing documents before depo

With respect to any records you review with your client before the deposition, be careful if you have your client review any documents that refresh their recollection about relevant issues in the case. If they testify that they reviewed the document(s) and it refreshed their recollection, you will have to produce the document and that could include otherwise privileged or non-discoverable documents. Just how far that goes is up to your judge. Who wants to find out? If a witness "either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced ... at the request of an adverse party ... "(Evid. Code, § 771. (See *Kerns Const. Co. v. Sup.Ct*. (Southern Calif. Gas Co.) (1968) 266 Cal.App.2d 405, 410; *Sporck v. Peil* (3rd Cir. 1985) 759 F2d 312, 316; *Shelton v. American Motors* (8th Cir. 1986) 805 F2d 1323, 1328.)

To empower your client a little and give them the feeling they have a little control over the proceedings, tell them they can always say, "I don't understand the question," and ask that it be rephrased. Also let them know they can ask for as many breaks as they want after they answer any pending question. Responding that they do not understand a question is helpful to the client who is afraid of being tricked by a slick defense lawyer. If they are getting tired, or if they want to speak with you in the hallway, they should ask for a break to steady their nerves and pull themselves together. This allows them to confer with you if they feel the need for guidance and to get reassurance on how they are doing. Tired clients who are nervous and anxious to get the ordeal over with tend to shoot themselves in the foot.

"I don't know"

Tell your client that just because a question is asked, it does not mean they have to answer it; responding "I don't know" is perfectly fine. Let them know that defense counsel is allowed some leeway to probe your client's memory by asking the same question in different ways. Let your client know you will prevent any abuse of this leeway and be alert to defense counsel trying to browbeat a response from your client. In some cases, responding "I don't know" can be a death knell, as in a slip-and-fall case in which your client does not know what they fell in or how they fell on it. In that example, you better have video of the incident and/or witnesses who do know what happened. If you do not, you can spend your depo prep time on explaining to your client why they should not pursue their case.

The case-killing questioning

Usually, defense counsel will get around to asking a variant of "Are there any things you can no longer do as a result of the injuries you suffered in the accident?" Really, unless your client is in a coma or a para- or quadriplegic, there is almost no activity under the shining sun that they can no longer perform due to their injuries. They can do 99.99 percent of everything they could do before the accident, but *just not like before*.

The difference is now it is harder, takes longer, and/or it hurts later. They pay for doing their pre-accident activities with discomfort, heating pads, pain medications, resting, etc., and typically later when no one else is there to see it. From the Alpha male fireman-peace officer-ironworker playing with their kids in the park to old ladies carrying groceries and over-worked soccer moms lugging lacrosse equipment, our clients are doing physical things out in the open that will destroy their case at trial when a surveillance videotape is juxtaposed with their deposition testimony about their physical limitations. When your client is asked about specific activities they can no longer do, always assume the defense has sub rosa surveillance of your client doing those activities with no apparent difficulty. Some examples from depositions of my clients include:

Can you fill a bird feeder set on a pole at shoulder height?

Can you raise your right hand above shoulder level and wave?

Can you kneel and pull weeds by hand in a rose garden?

Could you crush a beer can on your forehead if you wanted to?

Questions this specific are a tell-tale that the sub rosa is out there. If your client is not prepared to correctly respond, you are in for trouble at trial.

The death of a thousand cuts

To the greatest extent possible, you need to prepare your client to address every little ache and pain, every degenerative or pre-existing condition, every complaint to a doctor in the medical records going back to childhood which concern the injuries complained of. This will be fodder for the defense medical examiner and in the hands of skillful defense counsel will undermine your client's credibility with jurors just looking for a reason to blow your client out.

If your client says in depo "My [INSERT BODY PART] never hurt before this accident," that is your client's sworn deposition testimony. He or she either does not remember the time they tweaked their back, neck, shoulder five years ago and got some PT through their HMO or they don't think it is important because of the disparity in the magnitude of their injury and pain as a result of the accident. Worse, they think prior pains and injuries and conditions will hurt their case if it comes out! Take the time to read and explain to your client CACI 3927: Aggravation of Pre-existing Condition or Disability and CACI 3928: Unusually Susceptible Plaintiff.

When the waterfall of prior complaints, doctor visits, imaging studies, etc., comes spilling out of the records, your client will look like a liar. In the appropriate case, have all the medical records reviewed, indexed and summarized by a nurse and make sure your client covers it all in their testimony. If they forget anything, clean it up by asking a few questions at the end of the deposition. And, as with estimates, you client should qualify answers about prior complaints by stating they don't remember for sure (if that is the case), but their medical records would be the best place to look, especially going back many years.

The *Rifkind* laundry list

This is a good place to interpose a *Rifkind* objection also. *Rifkind v. Sup. Ct.* (*Good*) (1994) 22 Cal.App.4th 1255, 1259, stands for the proposition that it is improper to ask your client for legal contentions and the evidence supporting legal theories such as causation, damages, apportionment of fault. That is what written discovery, prepared with your help, is for. But *Rifkind* can be used for "laundry list" questions such as "Tell me all the doctors you saw....."; "Tell me every type of therapy you received from these various chiropractors....."; "Tell me everything you did that day after the accident....."; or "Tell me all the aches, pains, treatments, etc., you ever had to this part of your body before the accident.....".

This is an especially good objection when the lifetime medical history is inquired into. To really answer that question, your client would need to review all of their medical history as reflected in records from innumerable providers. I will interpose an objection like, "I object that the question violates *Rifkind v. Sup. Ct.* in that it asks my client to formulate a complete and exhaustive list from memory of all matters concerning their medical history from memory under the time constraints of the crucible of this adversary deposition process. That is a task more suited to written discovery after reviewing voluminous records. My client may answer, but she reserves the right to augment and amend her response when reviewing the deposition transcript." Sometimes defense counsel will kick up a fuss, but I will amend the deposition transcript via the errata sheet to add missing facts. That takes a lot of the sting out of old medical issues being used to impeach your client's deposition testimony.

Objections 101

Don't object to questions to your client based on relevance, hearsay, or foundation. That will just inform your opponent that you have not been reading your Rutter Group, Chapter 8, Discovery, Depositions. These are not proper deposition objections. The main objections are to the form of the question. Your objection must be timely and on the record or it is waived. (Code Civ. Proc., § 2025.460(b).) As Rutter will tell you, they are:

Ambiguous, uncertain or not readily understood;

Compound;

Calls for narration or lengthy explanation;

Calls for speculation and conjecture;

Argumentative;

Leading and suggestive to questioner's own client or witness.

The main proper substantive objections are privileged communications and attorney work product. Be careful that you do not waive the privilege and work product objections. The can be waived if a timely objection is not made. (Code Civ. Proc., § 2025.460(a); *International Ins. Co. v. Montrose Chemical Corp. of Calif.* (1991) 231 Cal.App.3d 1367, 1373.)

The California and United States Constitutions also provide a broad array of personal privacy rights that should be asserted at your client's deposition if overly broad and unnecessarily intrusive questioning occurs. For example, personal financial information comes within the zone of privacy protected by Article I, section 1 of the state Constitution. (See *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656.) Your client's financial affairs are privileged when there is no loss of earnings being asserted; if LOE is asserted, whether or not they filed a tax return is privileged, as is their net income after deductions and taxes. Other personal privacy matters include unduly intrusive questioning into your client's medical issues and history which are unrelated to the claims asserted.

Medical and psychological records are protected by an individual's constitutional "inalienable right of privacy." (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 855-856; *Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1019.) They are also protected by the physician/patient and/or psychotherapist/patient privileges. Evid. Code, §§990, et seq.; and 1010, et seq.

Where a party seeks discovery that infringes upon this "inalienable right of privacy," it bears the heavy burden of establishing a compelling need for the sought disclosure. *Davis*, 7 Cal.App.4th at 1017. Other protected areas of privacy include sexual orientation, extramarital affairs or intimate relations with one's significant other if no loss of consortium is claimed.

Don't close your own door

Be aware that instructing your client not to answer based on a privilege will foreclose your ability to introduce evidence regarding the matter inquired into later. "A party who asserts a privilege as to evidence essential to some element of his or her case will usually be obliged as a practical matter to forsake that element; his or her decision to do so will have been a necessary part of the decision to assert the privilege." (*Xebec Development Partners, Ltd. v. National Union Fire Ins. Co.*, (1993) 12 Cal.App.4th 501, at 569.) A litigant is barred from claiming privilege and then later providing evidence on which he had asserted privilege. "He cannot have his cake and eat it too." (See *Fremont Indemnity Co. v. Sup.Ct*. (Sharif) (1982) 137 Cal.App.3d 554 at 557; and *Southern Calif. Gas Co. v. Public Util. Comm'n* (1990) 50 C3d 31, at 43.)

Conclusion

In the vast majority of personal- injury cases, issues of privilege that will be detrimental to your client's case will be rare. What is common as pig tracks is the client who is not sufficiently prepared to deal with the pressures of a deposition and the common pitfalls discussed above. Spending the time with your client to prepare them for the arena of the deposition is the best way I have found to best defend their deposition.


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