Preparing your client to give a deposition that helps your case

Deposition is the opportunity for the client to "market" his case to the defense

By Gary Roth and Eric Scott Ritigstein

The deposition of your client by the defendant likely is one of the most important events in the client's case. It is the only opportunity for the defendant to obtain information directly from your client, without attorney intervention, and the best opportunity for the defendant to evaluate the credibility, honesty and trustworthiness of your client. Likewise for the client it is an opportunity to "market" his own case.

All too often, clients are improperly prepared to provide deposition testimony. It is critical that the attorney for plaintiff be cognizant of the fact that most clients have never been to a deposition and that this is an unfamiliar and intimidating process for most individuals. No matter how calm and relaxed the client may claim to be, he or she likely has no idea what they will soon endure.

In order to allow your client to present credible, honest and trustworthy testimony, it is important that your client understand the deposition process and the best manner in which to present testimony. Therefore, great care should be taken in preparing your client for deposition.

The setup

Your client has probably never participated in a deposition. He or she will be intimidated by the presence of attorneys and a court reporter who appear to speak a new language – "Waive reading and signing?" Your client will benefit from a brief description of the surroundings. Tell him or her that the deposition will take place in a conference room, that you will be present throughout the process and that a court reporter will transcribe all testimony. Even though this sounds elementary, most clients are unaware of these basic facts. This simple step will reduce a significant amount of stress for your client.

A day or two prior to the deposition, bring the client into a conference room, show them the layout of the deposition, explain the function of each of the people who will be attending the deposition and remind him that all words spoken in the deposition will be transcribed as testimony. Explain why the deposition is being taken, how the transcript can be used at trial,[1] and exactly what is expected at deposition.

As part of the preparation, we also remind the client that the attorney for the defendant is likely to be cordial, friendly and accommodating. The attorney for the defendant, however, is not his friend. His attempts to put your client at ease are usually a step in the process of allowing your client to open up regarding his personal or medical histories. For these reasons, the client should be reminded that any chit chat with the defendant is prohibited. When the proceedings are interrupted for a break, the client should leave the room to avoid any conversation with the defendant.

A deposition is not a conversation

All too often, attorneys prepare their client for deposition by instructing them to "tell the truth and you won't have any problems." This is not enough.

The client needs to understand that a deposition is not a cocktail party conversation. The client needs to listen carefully to the question being asked, obtain clarification before answering any question he or she does not understand, speak with precision and provide information which is based in fact, not speculation. The client should be instructed to take a moment or two to focus on the question being asked. This moment or two will allow the client to better digest the question and provide the simplest reasonable response to the question and the question only. Nothing more. This moment or two will also allow you, the attorney, to fully digest the question and interpose any appropriate objections.

If a client has been provided information from his doctor, co-worker or police officer, the client typically regards the information as fact. This is not true. This information is hearsay. The client should not be permitted to provide hearsay testimony and represent that hearsay as fact. This is probably the area in which a client most commonly provides misleading or inaccurate information at a deposition.

First-hand vs. Second-hand information

First-hand information is any information of which the client has personal knowledge.[2] Except where an expert gives an opinion in justifiable reliance on information from others, "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter." (Evid. Code, § 702(a).)

Examples of first-hand information would be the facts of the accident, the client's medical symptoms following the accident and his or her physical limitations following the accident. Each of these is an item of which the client has personal knowledge and is likely the most qualified person to provide testimony. First-hand information does not rely upon any information from a secondary source.

Second-hand information, on the other hand, is information which has been provided to the client by another source. Examples of this would be the findings, opinions and conclusions of the client's doctor, the statements of the defendant regarding the accident itself or the condition of the premises, and expert opinions. Too many clients believe that because they have been told information that they believe to be true that they may represent this information as fact. To the extent, however, that the client misstates the information, the client would be providing false or misleading testimony.

The client, therefore, should be permitted to testify regarding secondary information only if the client provides the source of the information. When discussing the client's injuries and medical treatment, it is perfectly acceptable for the client to say "I experience pain in my lower back, knee and foot." It is inappropriate, however, for the client to say "I sustained a herniated disc at the L4-L5 level which has caused nerve inflammation at the facets and radicular symptoms in the lower extremities." The client may make this statement only after he or she attributes the statement to the appropriate source of the information – "My doctor told me . . ."

An easy way to explain this to the client is to advise the client that they should provide the same information at their deposition as they would at the doctor's office. The client would not walk into an orthopaedic surgeon's office and state a medical diagnosis. Rather, the client would describe his symptoms – pain in the lower back and radiating pain into the knee and foot.

It is helpful to remind the client that he or she will not be the only witness testifying at trial. Doctors and other health-care providers will be called at trial to provide this testimony. It is not necessary for the client to provide every piece of the puzzle in his testimony. Other witnesses will be called to fill in the missing pieces.

"Where were you looking?"

In a personal injury case, a popular deposition question from the defendant is, "Where were you looking when the incident occurred?" Rest assured that no matter where the client was looking, the defendant will argue that the plaintiff was inattentive and the lack of attention caused the incident.

In reality, nobody focuses their vision exclusively on one spot. There are too many other variables. A person is generally scanning the scene and giving attention to several points. Do not permit the client to improperly state that his attention was focused on only one point. The defendant will twist any answer to the question, "Where were you looking?" to argue that the client was not paying attention. When a client is asked, "Where were you looking when you slipped?" the client should tell the truth: "I was looking forward, generally aware of my surroundings."

Yes, no, and I don't know

During the course of a deposition, the client will be asked certain questions to which he or she does not know or recall the answer. You should instruct the client during the pre-deposition meeting that "I don't know" and "I don't remember" are acceptable answers at deposition, but only when the client actually does not know or cannot remember.[3] Deponents too often fall into the habit of using "I don't know" and "I don't remember" as a crutch, and it could reflect poorly on their credibility. In certain situations, it might even cost them their case.[4]

As long as the client is prepared to provide substantive answers regarding the critical elements of the case, he or she should feel comfortable answering, "I don't know" and "I don't remember" when in fact he or she really does not know or cannot remember.

Testing to failure

The defendant will likely ask your client to provide listings to substantiate liability, causation, and damages. Such listings may include all witnesses to the event, all health-care providers who have treated the client and all people who have knowledge of the client's physical limitations due to the injuries. These are fair questions.

While it is always a good idea to review this information with your client prior to the deposition, your client will, most likely, be unable to recall all of the witnesses and health-care providers who will provide testimony at trial. What if the client was treated by multiple doctors at one clinic or simply cannot recall all of his family members who have assisted him while he was injured? The client is not expected to have a perfect memory.

The process of "testing to failure" involves the defendant repeatedly asking, "Anyone else?" "Anything else?" or "Can you recall anything more?" For certain questions, it is perfectly acceptable for the client to say "There is no one else." – for example, How many children do you have? But, for other questions it is highly unlikely that the client will be able to provide with 100 percent certainty a listing which provides every possible

answer to the question. In these circumstances, the client should not be permitted to say, "There is no one else." Instead, the client should provide his or her best recollection and then advise, "That is all I recall at this time."

If during the "testing to failure" process the client provides an answer that there is no one else, the defendant may be able to argue at trial that any other such witnesses were not disclosed in discovery and have been held back in an attempt to mislead the jury. If, however, the client merely states that he cannot recall any other names at this time, the defendant will have a more difficult time arguing that there has been an attempt to mislead.

When asked to provide a listing of witnesses, symptoms, or other evidence; the client, in most instances, should not be permitted to testify under oath that the listing is complete. The client should be advised to tell the truth and state all persons or evidence that her or she can recall at that time.

Avoid the absolutes

The defendant will attempt to get an exact list from your client as to what he can and cannot do as a consequence of the injuries sustained in the accident. Avoid providing an absolute list.

The client should not provide testimony saying that he can never lift more than 25 pounds, walk more than 500 yards or climb more than one flight of stairs. The client should be advised that such absolute statements may be problematic at trial. Were the defendant to obtain video surveillance of your client lifting 30 pounds, for example, the absolute statement that he could never lift more than 25 pounds may render your client a liar in the eyes of the jury.

A better course of action is for the client to advise that he typically cannot perform such tasks or participate in such activities. Because there may be exceptions, your client should avoid providing absolute statements as to what he can and cannot do.

Your client has been under surveillance

It is too cheap and too easy to obtain surveillance upon our clients. Surveillance may be through traditional methods of videotape or through monitoring Facebook pages. Either way, the defendant likely has information regarding your client's activities and physical limitations. The client should be aware that seemingly random questions regarding his or her physical abilities are not random. Were a defendant to ask your client, "Are you able to climb a 17-foot ladder and change fluorescent light bulbs in the ceiling?" it is highly unlikely that this is a random question. Assume that the defendant has surveillance of your client performing this activity.

As a codicil to avoiding the absolutes, the client should also be instructed to avoid stating with certainty whether he can or cannot perform a hypothetical task. The client should advise whether or not he recalls performing or attempting to perform such a task, and whether or not performance of the task caused him physical pain or other symptoms.

It is devastating evidence at trial for the client to state that he absolutely cannot perform a task and for the defendant to produce video surveillance which contradicts this testimony. The client, therefore, should be advised that he has likely been under surveillance and that questions regarding his physical activities are not random.

Objections

Attorneys are obligated to make objections during a deposition. Advise the client that the objections, likely, will come from you.

Explain to the client that the objections serve two purposes. The first purpose is to preserve the record so that the objection may be addressed by the court. Errors of any kind occurring at the deposition that could be cured if then objected to are waived unless a specific and timely objection is made during the deposition.[5] (Code Civ. Proc. § 2025.460(b). You also should remember that the protection of information from discovery on the ground that it is privileged or protected by the work product doctrine is waived unless a specific and timely objection is made. (Code Civ. Proc. § 2025.460(a).)

The second purpose is that the objection may serve to benefit the client, himself. For example, if your client is providing a detailed medical history of the mechanism of injury and the body parts affected, you may object to the responsiveness of the answer and to testimony in the form of an opinion. This objection will hopefully remind the client to limit his testimony to first-hand information and to not provide medical opinions.

Another objection which may be helpful to the client can be raised if the client is suddenly unable to recall specific facts. A simple reminder to your client that he may provide estimates but may not guess will ease your client's concerns and allow him to provide general testimony when he cannot recall the specific facts.

Conclusion

The deposition of your client is the only opportunity for defense counsel to evaluate the credibility, honesty and trustworthiness of your client. Most insurance companies will request, as part of the post-deposition report, an evaluation of the credibility of the plaintiff. By preparing your client for deposition, your client will be able to provide precise testimony that does not wander into areas of testimony for which he is not qualified. Limiting your client's testimony to appropriate and proper responses will enhance the credibility of your client and assist in settlement and/or trial.


Roth

Gary Roth's legal career spans more than 20 years, dedicated to personal injury law. A well-respected litigator and author of professional articles, he has a substantial track record of multi-million dollar verdicts. At Boxer & Gerson, LLP *in Oakland, California, he represents union members and others in the community that have sustained severe personal injuries as a consequence of the wrongful conduct of others.*

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Endnotes:

[1] If testimony is read into evidence from a deposition, jurors will likely be instructed that a "deposition is the testimony of a person taken before trial," that the person is sworn to tell the truth and is questioned by attorneys, and that they should consider the deposition testimony as if it had been given in court. Witkin, California Procedure (3rd Ed.) "Trial" § 293, p. 346-47, citing CACI, No. 208.2.

[2] "Personal knowledge" means "a present recollection of an impression derived from the exercise of the witness's own senses." Witkin, California Evidence (5th Ed.) "Witnesses" § 46, p. 329, citing Law Rev. Com. Comment to Evid. Code § 702.3.

[3] "A deponent is not required to speculate or guess . . . although he or she may be asked to give an estimate of matters upon which estimates are commonly made (e.g., distance, size, weight, etc.). Thus, "I don't know" and "I can't recall" are sufficient answers to deposition questions." Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2014) ¶ 8:705, p.108.1-109.

[4] Plaintiffs who provide "I don't know" answers on critical elements of their case, where the information sought is of a type that would be within their personal knowledge, risk losing the case before trial. Defendants may move for summary judgment on the ground that such answers show plaintiff's claims "cannot be established" as a matter of law. Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2014) ¶ 8:705.2, p.109, citing Code Civ. Proc. § 437c(p)(2).

Defendants may also object should plaintiff seek to *correct the deposition transcript* to provide the answers. If plaintiff *knew* the information at the time of the deposition, a court may treat the corrections as "sham." *Ibid*.

[5] Errors or irregularities that might be waived if not raised during the deposition include the manner of taking the deposition (e.g., by video where no notice given); the oath or affirmation administered; the conduct of any party, counsel, deponent or deposition officer; or the form of any question or answer (e.g., "leading," "argumentative," etc.). Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2014) ¶ 8:727.1, p.117, citing Code Civ. Proc. § 2025.460(b).

However, defects that are not easily curable are not waived by failure to object at the deposition hearing. Objections to the competency of the deponent, or to the relevancy, materiality, or admissibility at trial of the testimony or of the materials produced are unnecessary and are not waived by failure to make such objections before or during the deposition. Code Civ. Proc. § 2025.460(c).