

Dissecting the Deposition: More Than Just a Set of Questions

BY ROBERT A. GLICK

A deposition goes well beyond the scope of merely questions and answers. If conducted, evaluated and assessed carefully, the deposition will do more than yield an invaluable amount of discovery information for you and your client, it will also provide a foundation to foster, develop and strengthen your practice.

This article looks beyond effective deposition techniques and questioning skills for the litigator. It is designed to analyze the practical applications of the deposition process and suggest a self-introspection that can translate into an honest critique of yourself, together with some constructive and creative ideas to be more effective. In other words, the practical, everyday realities of taking or defending a deposition constitute a process that is interrelated with all aspects of your practice.

A deposition does much more than yield answers to questions. Each deposition provides a unique forum to learn new skills and perform meaningful evaluations that go way beyond assessing liability and damages. It is an opportunity to evaluate yourself, your practice and your skills as well as that of your adversaries. Likewise, it is also a chance for your client, your adversaries and their clients to assess your legal acumen and capabilities. Generally, the deposition is the only time you have before trial to assess the parties, the witnesses and others who may be called to give trial testimony. More often than not, the non-verbal information, observations and subtle cues you give or glean from others will be just as effective as any of the spoken words, and perhaps more so. Experienced litigators will learn to look for and provide such information at the deposition, and use it to their advantage for their clients and their practice.

Stop, Look and Listen

The deposition is usually the first opportunity for counsel, the parties and other witnesses to interact, observe and assess each other. Think of a deposition as the opening rounds of a boxing match . . . you get to feel each other out, determine each other's strengths and weaknesses, and prepare for what you hope will be a knockout punch at trial. But like a seasoned fighter, you

must prepare thoroughly, hone your skills and evaluate your opposition before entering the ring.

When you enter the deposition room, carefully observe everything, paying attention to detail, listening to each word as it's uttered and then silently asking questions of your adversary, the witness and yourself. Are you prepared? . . . Are you thorough? . . . Are you articulate? . . . Are you argumentative? Do you have a command of the witness, the proceedings and the law? Do you follow up after getting a response? Are you asking the right questions to elicit favorable testimony? Are you making supplemental discovery demands based on the testimony? Are your objections proper or obstreperous?

Does the witness come across as honest, credible, knowledgeable, educated, confident, sincere and empathetic? Or does the individual appear unsure, forgetful, deceptive, hostile, manipulative or sarcastic? Is the witness in control or easily intimidated, giving independent responses or being coddled by the attorney? And if the witness is being coddled, put a stop to it. A leopard never changes its spots. You can bet your bottom dollar the performance of counsel and witnesses at the deposition is a litmus test for how they will conduct themselves or be portrayed at trial.

The Unspoken Discovery

In a tort action, besides liability, the nature, extent and duration of the plaintiff's alleged injuries are usually contested. General questioning of the plaintiff regarding those injuries provides only limited data. The

unspoken discovery and information available (and there for the taking without a transcription charge) may often be more valuable than any words the witness speaks. Pay careful attention to your adversary and the deponent. Make note of the surroundings, the interactions, eye contact, subtle gestures, the tone and intonation of the questions posed and the respective responses. Evaluate the temperament and personality of your adversary and the witnesses. Does counsel come across as professional? Does he know the facts of his case? Does she appear sincere, disingenuous, condescending, manipulative or full of herself?

Make a thorough observation of the plaintiff who claims a bodily injury. How is the witness dressed? Did the plaintiff arrive at the deposition alone, with a friend or family member? Does the plaintiff appear to need assistance? What you observe in the deposition room will often not become part of the record unless you choose to make it part of the record. For example, in a back injury case, did the plaintiff arrive at the deposition wearing high heels, carrying a briefcase or pocketbook, using a crutch, wearing braces? Was the witness unable to sit for long periods of time? Does the plaintiff take breaks to stretch? In response to your questioning, does the plaintiff place outstretched arms over his head, behind his back, or in the air to point or make reference to another portion of his body? Did the plaintiff drop something on the floor and pick it up on her own volition?

Inquire of the plaintiff. Make a specific record: "Let the record reflect that plaintiff has testified that he is unable to sit for extended periods of time, but remained seated during the entire two hours of questioning without getting up or requesting a break." Or: "Let the record reflect that the plaintiff has raised his right arm over his head and then placed his right hand on the upper middle portion of his back, approximately 10 inches below his neck." If there are allegations of scarring, inspect the scars and describe them on the record. Likewise, note in your file (not on the record) that the plaintiff appears in earnest to have physical difficulty in walking, bending, sitting, standing, lifting or stretching during breaks.

Send a Message

Your performance at the deposition sends a message to your adversary, the plaintiff, other witnesses and your own client that this is the type of thoroughness and advocacy they should expect through the pendency of the litigation and at trial.

Your performance at the deposition sends a message to your adversary, the plaintiff, other witnesses and your own client that this is the type of thoroughness and advocacy they should expect.

Did you come to the depositions with a complete file? Do your actions and questions show that you are prepared? Did you have all of your exhibits pre-marked and did you have enough copies? Are you able to think on your feet? Do you make appropriate, well-founded objections, or are you just being obstreperous? Do you convey your knowledge of the law and procedural rules? By asking the plaintiff specific, detailed questions about the accident scene, you tell everyone that you are prepared, have conducted a thorough

investigation, have a full command of all the facts and circumstances in the case, and have been to the scene. For example:

Q. Ms. Jones, you tripped and fell on the broken glass somewhere in aisle 4 of the supermarket, correct?

A. Sort of in the middle, but closer to the shelves where the pickles are located, because I fell near that section.

Q. And directly across from the pickle section is the canned vegetables section, correct?

A. I don't recall.

Q. After you fell, you spoke with the manager, Mr. Steer. Correct?

A. Yes.

Q. Mr. Steer is a Hispanic male, approximately six feet tall, and has an earring in his left ear. Correct?

A. I believe so. In fact, I think he helped me up and sat me next to the frozen food section.

Q. The frozen food section is at the front of the store directly across from the customer service desk and he helped you sit on the blue newspaper rack in front of that area. Correct?

A. That's right.

Creative Questioning

Prepared witnesses who have repeatedly rehearsed their testimony will not easily give the answers you're trying to elicit. Generally, responses to systematic, canned and rote questions will not yield the powerful ammunition you are seeking for use at trial.

Ask yourself: How can I get the witness to provide meaningful testimony, information and possibly evidence without him or her (and counsel) realizing that those responses contain such intrinsic value? Invariably, certain responses may not require follow-up questioning or explanation, but will form the basis of post-deposition discovery, investigation or an expert's retention as

a way to test the veracity and credibility of the witnesses' testimony. The key is "creative questioning." Sometimes, it's not just the questions themselves that are key, but the sequence and the way in which they are asked.

The combination of testimony and non-verbal discovery can prove invaluable and may lead to an expeditious end to the litigation. The plaintiff on the day of the deposition who claims to have daily and continuous difficulty walking, running, climbing stairs, bending, lifting, dancing or carrying heavy objects, or requires the use of a cane or brace walking up and down stairs may be quite a different plaintiff after being shown a surveillance tape depicting physical activity that directly contradicts testimony.

In a recent case, a 30-year-old female plaintiff involved in an automobile accident said she had sustained severe disc herniations, with impingement. Her initial testimony (through rote questions), which was obviously well thought out and prepared, echoed the injuries listed in the bill of particulars. With empathetic eyes and tears running down her red cheeks, she testified in a very soft-spoken voice that, as a result of the injuries to her back, she had to quit her job as a waitress because she couldn't carry the plates or trays of food. She testified that she was no longer able to stand or sit for any length of time, had difficulty driving a car, walking up or down stairs, could no longer partake in any sports activities, do the laundry, go grocery shopping or pick up her 3-year-old daughter, cuddle her in her arms, caress her and give her a hug. When she finished, it was time for some creative questioning:

Q. Ms. Smith, after the automobile accident did you return to work?

A. No. I wasn't able to because of my injuries.

Q. Are you currently employed?

A. No.

Q. Have you attempted to seek employment in any capacity?

A. No. I'm not able to do very much.

Q. At any time after the accident were you prescribed any medications by any of your doctors?

A. Yes. I was given some painkillers by my doctor.

Q. Did you have that prescription filled at a pharmacy?

A. No. Because it was Tylenol and I also had some in the house.

Q. So you were actually never given a written prescription for any medications or had any prescriptions filled as a result of your injuries?

A. No. I don't believe so.

Q. You testified that you continue to have pain in your back, your activities and physical ability has been limited since the date of the accident and you underwent physical therapy that lasted for approximately three months. Can you tell me when was the last time you saw or consulted with a doctor or any health care provider concerning your injuries?

A. Over a year ago.

Q. Ms. Smith, in the last year, have you been to any nightclubs or bars and gone dancing?

A. No. I'm no longer able enjoy dancing because of my back.

Q. In the last year have you tried to dance at all?

A. No, I told you already, I'm no longer able to dance.

Q. Can you ride a bicycle, go swimming, work out in any way?

A. No. Not at all.

Q. Earlier when you said you had difficulty bending, could you explain in more detail what you meant?

A. I'm unable to pick things up, carry groceries, sweep. It hurts if I try and bend forward.

Q. In the last year have you attended any weddings, bar mitzvahs or any other social events?

A. My brother's wedding was last March. My husband and I were in the wedding party and my daughter was one of the flower girls.

Q. Was there a wedding reception that you attended?

A. Yes.

Q. Was there dancing at the wedding reception?

A. Of course there was dancing. It was a wedding.

Q. Did you dance at all? In any capacity?

A. No. Not at all.

Q. Are you sure?

A. Positive.

Q. O.K., Ms. Smith. Was there video taken of your brother's wedding and the reception?

A. Yes, I was given a copy.

Q. Have you seen the video of the reception?

A. Yes.

Q. Was there video taken of the dance floor?

A. Yes.

Q. If I were to view that video would you be depicted dancing at any time or in any capacity?

A. Well. . . . Uh . . . um . . . I wouldn't call it dancing.

Whereupon a record of the plaintiff's brother and sister-in-law's name, address and telephone number was

made. A demand was also placed on the record for production of a copy of the videotape. When plaintiff did not recall the videographer's information, I left a blank in the transcript for her to provide the information. The day after the deposition, the plaintiff was served with supplemental discovery demands that included a demand for the video. Not only did the video show the plaintiff on the conga line, but it showed that she remained standing along with the others in the wedding party for the entire 40-minute ceremony. It also showed her bending to the floor both before and after the ceremony to pick up her sister-in-law's train as they climbed and descended the stairs in front of the altar, and it showed her scurrying after her daughter, the flower girl, who was afraid to walk down the aisle. The case settled for less than nuisance value within a month after the deposition.

Corroborating the Veracity of the Witness's Answers

Ms. Smith's Q&A is also illustrative of creative questioning whereby you try to place the witness in various situations, surroundings, environments and circumstances so it becomes readily apparent that the veracity of the testimony may be challenged or contradicted by others (non-parties) or, best of all, by documentary evidence.

A witness will think twice about giving misleading or false testimony if he or she knows that friends, family members, colleagues, co-workers, health care providers, religious leaders, ex-girlfriends, neighbors or other innocuous acquaintances are likely to be called upon at trial, asked to place their hand on a bible, swear to tell the truth and provide testimony that will contradict what was said at the deposition. Based upon the plaintiff's responses to questions, are there any documents out there (discoverable) that when shown to a jury will establish that the plaintiff's testimony is not credible? Don't play all of your cards. Get what you want through the back door. As part of your defense, establish a line of questioning, a theory or a point that you'll save for use down the road in closing arguments. Then seek favorable or useful testimony by asking questions that place the plaintiffs in an environment where they will have to tell the truth or risk being caught in a lie.

Assume, again, that you believe the plaintiff's physical abilities are not restricted to the degree, certainty or extent that he or she hopes a jury will believe. After rote Q&A provides answers about what the plaintiff currently does for work or did for work at the time of the

accident, ask detailed follow-up questions: How many people are there in the company or on the job? Do you generally work alone or among others? What are the names and telephone numbers of your supervisor(s), co-workers or others business associates? Do you have to travel as part of your job? Ask questions that may establish that the plaintiff's job description, duties and responsibilities require physical activity, contrary to prior testimony, then continue

with step-by-step, detail-by-detail questions to elicit responses that will illustrate the witness's physical abilities. An actual sequence of testimony went something like this:

Q. Mr. Smith, you previously testified that you have great difficulty bending, lifting, walking and carrying heavy objects on a daily basis, is that correct?

A. Yes.

Q. What do you currently do for work?

A. For the past eight years I've been employed in the computer industry by a company called CRM Services, Inc., as a senior systems analyst. Pretty boring stuff. I sit at a desk working with computers all day long.

Q. What does CRM stand for?

A. Computer repair and maintenance.

Q. Currently, what are your day-to-day job responsibilities?

A. I repair computer hard drives and monitors that are under warranty.

Q. How many employees in the company?

A. About 50.

Q. Do you currently report to a particular supervisor?

A. Yes. Craig Mazzuchin.

Q. How many other people in the company have similar job responsibilities?

A. I would say around 15.

Q. Do you work in relatively close proximity to each other?

A. Yes, there are three people to each work station, we tend to share a set of tools and equipment.

Q. Do you normally share the same work station with the same people every day?

A. Generally. . . . Yes. But sometimes we switch for different reasons or if someone leaves the company or there's a new worker.

Seek favorable or useful testimony by asking questions that place the plaintiffs in an environment where they will have to tell the truth or risk being caught in a lie.

Q. How long have you been at your current station with the other two co-workers, and what are their names?

A. First there's Arnie Snell. He's been with the company for about four years, but we've been at our station together for only a little over a year. And then there's Steve Kang. He just joined the company in November.

Q. Can you tell me the names and addresses of all of your co-workers?

A. I don't recall all of their names right now, but let's see . . . there's Tim Silver . . . Bryan Klein . . . Susan Hyman . . . Kelly Sant-Maria and . . . Tank Connors, we call him Tank, because when you take a look at him . . . well . . . you'd understand. I really don't know his real name. I don't remember any others right now.

Q. O.K. we'll ask the court reporter to leave a blank in the transcript and I'll ask you to provide us with the correct spelling, address and telephone number of each of the co-workers you have just named as well as any other co-worker you recall after the deposition is completed.

A. I'll see what I can do.

Q. Now Mr. Smith, when you say that you repair hard drives and monitors, can you be more specific and tell me in more detail what you actually do on a day-to-day basis?

A. Well . . . when customers have problems with their computers, they are sent back to the manufacturer, who has a service contract with CRM. The hard drives or monitors are boxed by the manufacturer and sent to us for repair. When they arrive, one of the supervisors reviews the repair order and, depending on the repair needed, assigns the job order to one of us. We get a copy of the new job orders each night before we leave.

Q. When the computers arrive to CRM for repair where do they get stored until they're worked on?

A. They are kept on shelves in one of the back rooms, next to our parts department. We call it the property room.

Q. Can you describe the shelves, how many shelves, what they're made of, their height, their length?

A. They are three or four gray metal shelves about two to three feet apart . . . one on top of the other. I'd say the height of the top shelf is no more than seven feet. The computers, monitors, laptops and other components are left in their boxes and placed on any one of the shelves with a copy of the repair order taped to the outside of each box.

Q. How does the computer get from the property room to your work station?

A. Whoever is assigned to the repair order goes to the property room, removes the boxed hardware from the shelf and brings it to their station. Usually we have a dolly or hand truck to wheel some of the bigger boxes. When the job is done, I box the hardware back up, place a "repaired sticker" on the outside of the box, and bring

it back to the property room and place it back on the shelf.

Q. How far is the property room from your station?

A. Oh I don't know exactly . . . I would guess around 75 to 100 feet.

Q. When you bring the hardware back to your station, do you yourself actually remove it from the box and place it on your work station and when you are done remove it from your station and box it back up?

A. Yes.

Q. Generally speaking, on average how much do each of the boxes weigh?

A. I have no idea. I couldn't tell you. It really varies.

Q. Can you approximate?

A. I would say anywhere from 15 pounds to 50 pounds.

Q. Are you also responsible for taking the hardware out of the box, placing it on your station and then repackaging it once the job is completed?

A. Yes.

Q. How high is your work station from the ground?

A. I don't know . . . let me think . . . I would say around four feet or so.

Q. On average, how many pieces of hardware do you repair in any given day?

A. It also varies. It depends on what the job requires and if we have the parts in stock. Some days I may only work on one piece and there are other days I can fix six or seven pieces.

Q. Mr. Smith, as a result of your injuries, did you miss any time from work?

A. Yes, about a week or so.

Q. When you returned to work after the accident, did you at any time, or on any occasion ever tell Mr. Maz-zuchin or any supervisor that you might have difficulty carrying, lifting or removing or replacing the boxes to or from the shelves?

A. I'm not sure. I don't think so. Probably not.

Q. When you returned to work, at any time, or on any occasion did you ever ask any of the co-workers you mentioned before, like Tank or anyone you didn't yet identify for help in carrying or lifting any of the hardware?

A. Not generally. Sometimes if it's really heavy I'll ask someone to help me.

Q. And are you called upon at times to help a co-worker if a piece of hardware is particularly heavy?

A. Sure. That happens occasionally.

Q. Have you ever told any of your co-workers, when you've been asked for assistance, that you can't because you have problems with your back?

A. I don't recall. I don't remember the last time I was asked to help.

Q. Mr. Smith, when you were examined by any of your doctors after the accident, whether they be your treating physicians or any of your designated expert(s), did you ever tell them that your job entails lifting boxes of hardware on a regular basis?

A. They never asked.

Remember: You're a Professional

I can't tell you how many times I have deposed witnesses while their counsel were not concentrating, not paying attention to the questioning, busy scurrying through unrelated paperwork, or reading a newspaper or magazine. They were oblivious to the world around them. In fact, in one deposition co-defendant's counsel had to be nudged on the arm and wakened from a catnap.

Too often I've observed counsel leave the client's side, ask to be excused and attempt to leave the room, but who have told me to go ahead and continue my questioning. When this happens, I immediately stop the

Q&A and remind counsel that it is improper for me to continue questioning the client in counsel's absence.

Be mindful that your clients are with you. Your actions are constantly being monitored and observed. Your conduct at a deposition reflects upon you individually and professionally. No matter how heated the deposition gets, compose yourself and refrain from engaging in unrelated colloquy and personal attacks. They are not only improper, they also become part of the permanent record for which your client will be loathe to pay. Such petty antics can only come back to haunt you and diminish your effectiveness. As a general rule, consider that anything that you say will be published the next morning on the front page of the *New York Times*.

The definition of "deposition" in *Black's Law Dictionary* says, in part, that it is a discovery device that involves taking testimony "in answer to questions or interrogations," but that only scratches the surface. The deposition is there for the taking, but your actions and inactions bespeak volumes about your ability, integrity and professionalism.