Tips for Deposing a Personal Injury Plaintiff

By David A. Glazer

The most important piece of discovery is the deposition. Yet, it is often treated as only a necessary inconvenience. A successful deposition is not the same as a successful cross-examination at trial and should not be treated as such. In reality, the deposition of the plaintiff is the key to winning the case, because a proper deposition prevents surprise and enables you to fully prepare for the trial.

The purpose of the examination before trial is to gather information. According to the Appellate Division, the purpose of a deposition is to advance the function of a trial to ascertain truth and to accelerate disposition of suits, and thus, the better practice is to permit a witness to answer questions, reserving objections for trial.[1] For an attorney, it is used to prevent surprise at trial (or summary judgment motion); pin the witness down to a specific story, authenticate documents and potentially establish future impeachment possibilities. In other words, a good deposition sets up the trial.

Before one can conduct a useful deposition of a plaintiff, there are three basic things that every attorney must do before the deposition even starts. First, the attorney must know the file. Second, the attorney must know the law affecting the case, including valid objections in a deposition. Third, as much information as possible on the plaintiff must be obtained, including medical records, employment records and collateral source records.

Know the File First

Knowing the file is not always easy, but it is necessary. Even a simple auto accident has its own nuances that one can miss without reading the file. Frequently, correspondence with the client or the carrier will note an important issue to be explored at the deposition. An attorney who fails to ask the questions that were previously highlighted hurts the client, him or herself and the firm for which he works. Plus, when you know the file, you are able to determine not only the case strengths, but also the weaknesses. A smart plaintiff will tailor his testimony to focus on your client's perceived weaknesses. Thoroughly knowing the file will enable you to anticipate this tactic and frame your questions accordingly. Thus, you can truly pin the plaintiff down to a specific.

Know the Law of the Case

With knowledge of the basic facts from the file, make sure that you, the attorney, know what areas of the law apply. You cannot ask the proper questions if you do not know what the plaintiff has to prove. Remember, every plaintiff must prove cause and proximate cause. Without knowledge of the law, you will never get beyond the basics of the case and into the depths of the law where the case will be won or lost.

Knowing the objections is part of knowing the law. The primary objection in a personal injury deposition is to the form. CPLR 3115(b) reserves all objections to the time of trial except for those which can be cured at the time of trial. You must ask the question specifically in a proper form. Otherwise, as long as the question is related to the claims being asserted by the plaintiff, the question is proper. A plaintiff attorney can also object to the content of the question if it is beyond the scope of discovery. A witness at a deposition may not be compelled to answer questions of law, particularly those which relate to witnesses' understanding of contentions of lawsuit, and may not be compelled to answer questions seeking legal and factual conclusions or asking the witness to draw inferences from facts.[2] For instance, you cannot ask about a prior hand injury in a knee injury case because there is no relation to the claims being made.

Get and Know the Medical Records

Finally, as defense counsel, you need to obtain as much information on the plaintiff as possible prior to the deposition. Most important are the emergency room records. People are usually honest when they go to the emergency room because they are thinking about their own well-being instead of a lawsuit. The emergency room visit sets up the questions that need to be explored at the deposition. For instance, you can usually find out about prior injuries from the emergency room records and whether or not the plaintiff was on any medication. Also, these records sometimes relate a version of the accident that differs from later testimony. Cases can be won by a good defense attorney who can exploit this inconsistency.

Remember to Ask Enough Questions

Now that these three basics are covered, how can a defense attorney make the most of a deposition? First and foremost, don't be afraid to ask questions. We have all seen the attorney race through a deposition because it was assumed that the case was very simple and clear-cut. Even the simple case deserves to be properly explored. If the plaintiff never answers "I don't know" to a question, then you have not asked enough ques-

tions. This is your opportunity as defense counsel to probe the plaintiff's mind. Use it. Do not let the complaints of the other attorneys affect your quest for information. CPLR 3113(b) specifically prevents opposing counsel from unilaterally ending any deposition. Therefore, you can safely ignore any threat that the opposing counsel makes in seeking to end a deposition because you are asking too many questions. Ask as many questions as you need to get the specifics of the case. Do not stop at the generalities. Cases have been lost because the plaintiff left enough room in his answers to give himself an out. Your job is to eliminate the outs.

Deposition Tactics and Strategies

A very useful method of pinning the plaintiff firmly into a story is the bill of particulars. Every bill of particulars will list the alleged acts of negligence. Use it as a guide for your questions. It will also list the injuries. Ask about every injury listed, even in the boilerplate section. Plaintiff attorneys add the boilerplate to cover themselves in case they missed something. Use it against them. Make them withdraw allegations on the record, or allow your questions. A good plaintiff attorney will not hesitate to claim that an injury to one part of the body will affect another. Use that to justify questioning about areas of the body that are not specific to the case.

To obtain specific answers, you cannot accept simple answers to the important questions. Start out broad and narrow it down. If the plaintiff's attorney objects, then remind him or her of the usual stipulations, which allow your questions. As long as you are asking about allegations made in either the complaint, or the bill of particulars, then you have every right to ask the question. To protect yourself, bring the judge's phone number with you to the deposition. An attorney who knows that he is obstructing a legitimate question will not want to have to deal with the judge. If you are willing to fight for your rights, then your opponent will usually back down. Do *not* bother the judge if you have any doubts about whether or not you are right.

Most importantly, ask the plaintiff what caused the accident. You may get an objection, but it is a legitimate question since the plaintiff was there. Make sure that you force the plaintiff to name all of the causes of the accident. Let the plaintiff name as many as he thinks. The key is to make sure that you cannot be surprised later. After all, if the plaintiff contradicts himself, then you have the ability to attack his credibility. You will never lose the case by forcing the plaintiff to name the actual causes of the accident, but you can lose if he does not name them.

On damages, ask the plaintiff questions as if you were presenting the case for the plaintiff. Force the plaintiff to go over every last bit of treatment. Let the plaintiff exaggerate the injuries. Let him state that that pain was intolerable and that he could not work. Make the plaintiff be as specific as he can possibly be. Remember that a plaintiff who cannot remember his treatment basics looks insincere.

Do not forget to ask about the plaintiff's employment history. A plaintiff might have a varied employment history or a long stretch of unemployment. Either can affect the plaintiff's damages and is fair game. People spend more time at work than anywhere else. Cover the basics of the job and all of the physical actions related to the job. Do obtain the information of the plaintiff's supervisors and co-workers as possible sources of information. If the plaintiff has a desk job, ask about phone and computer work. If the job involves physical labor, ask about the tools used to perform the job and their weight. As a defense counsel, you will often argue that the alleged injury is pre-existing. Having evidence of physical activity that could have caused the alleged degeneration is necessary to prepare for trial.

Remember That It Is Your Deposition

Finally, remember that you are in control of the deposition. It can go as fast or as slow as you wish. After reviewing the file, if you think that the deposition will last a long time, be up front about the length before starting the deposition. The other attorneys might grumble, but at least you are being honest. You are there to represent your client and learn as much about the case as possible. Do not worry that plaintiff's testimony may ruin a motion for summary judgment. If the plaintiff's deposition testimony can defeat the motion, then you were not going to win anyway, because the plaintiff's attorney would have filled in the facts with an affidavit in the areas you did not question the plaintiff about in the first place. It is always better to know how the plaintiff might attack your defense than to guess as to how it might be done.

Endnotes

1. *Byork v. Carmer*, 109 A.D.2d 1087, 487 N.Y.S.2d 226 (4th Dep't 1985).
2. *Lobdell v. South Buffalo Ry. Co.*, 159 A.D.2d 958, 552 N.Y.S.2d 782 (4th Dep't 1990).

David A. Glazer is a partner at the firm of Shafer Glazer, LLP.

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