

A proactive approach to the plaintiff's deposition

Take advantage of the plaintiff's deposition to showcase the humanity of your client – so the defense sees it, too

By Alexis R. Gamliel

The plaintiff's deposition is a crucial turning point. It is the face-to-face moment in which the defense meets your client and makes critical judgments about the merits of your case, the credibility of the plaintiff, and several other important factors that may ultimately determine the fate of your case. For these reasons, the plaintiff's deposition should not be taken lightly. Simply advising your client to "tell the truth" is not enough. This potentially case-altering event warrants thoughtful and intensive preparation. A proactive approach will give you and your client the strength to make this landmark moment go favorably.

But first, prep yourself

Equally important as preparing your client is preparing yourself. Before you meet with your client (before the deposition), equip yourself with all of the data you need to successfully prepare the plaintiff. In a personal-injury case, this means reviewing all of the plaintiff's medical records, especially those which have been subpoenaed by the defense. Reading through a few "key" reports will not make the cut.

Reviewing the complete medical file from all the providers will allow you to identify potential pressure points in the deposition – concerning, for example, prior auto collisions, prior injuries, subsequent auto collision, and subsequent injuries. In addition, on occasion, you will find gems in the medical records that may be helpful to your case. You may identify advantageous information in the client's medical-intake forms or pain diagrams or a doctor's handwritten chart notes that might not make its way into a physician's final report.

Similarly, on the other side of the spectrum, you may also find damaging information in those sources, and it is much better to frontload learning about this – before you have a deposition prep meeting with your client and, of course, before the time of the deposition.

I recommend creating a medical binder containing all of your client's medical records. Cozy up with your binder, a cup of tea, and some post-its – you will want to mark, highlight, and tab any areas of concern, issues you want to discuss with your client before the deposition, and points worth emphasizing in the deposition.

I also recommend making a timeline to chart out the progression of your client's complaints of injury, pain, and/or

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physical limitations. If you are handling a lumbar-spine injury case, creating a timeline will allow you to identify whether the plaintiff complained of low-back pain at the scene when interviewed by investigating law enforcement, at the emergency room, and with other healthcare providers with the progression of evaluation and treatment.

Developing a visual timeline will also open your eyes to potential "gaps" in treatment, which you can later address with your client to determine the reasons behind any delay(s). With your timeline, you can also track multiple injuries as needed. For instance, if your client suffered both a knee and back injury in a collision, the timeline will allow you to pinpoint when the plaintiff first complained of each discrete injury. You may unveil that the plaintiff did not complain about her knee injury until later on. Spotting this issue will enable you to discuss the rationale with your client. Maybe she recalls complaining about her knee at the emergency room, but those complaints did not make their way into any report? Perhaps she was experiencing the most excruciating pain in her back at that time, so that is what she emphasized to the doctors? These are questions worth investigating, and you will only know to explore them by diving into the medical records.

Meet, greet, and prevent defeat

After you have prepared yourself, the next step is to meet with your client in advance of the deposition. During your meeting, you will discuss the overall process of the deposition, cover key topics, and discuss any questions your client may have. Meeting at a time close to the deposition is efficacious; the conversation and information remain fresh in your client's mind. I have found that two days before the deposition is the sweet spot for me, but you will find a time that is comfortable for you.

One of the first topics you will want to cover with your client is the sheer logistics of the deposition process. Take the edge off, and let the client know you will be by her side the entire time. Explain the positioning of the defense lawyer, the court reporter, the videographer, as well as the general layout of the room. Sharing this information alone will provide comfort to your client – she will know what to expect and will hopefully be less intimidated walking into the cold, sterile conference room.

I also typically recommend that my clients meet me at the deposition location a half-hour before the start time – this allows for time to exhale before stepping into the room. For those not intimately familiar with the litigation process, a deposition can be a daunting and unnatural process. It is our job to try to quell the fears that may be associated with this seemingly unnatural exercise.

During your deposition prep meeting, first and foremost, you will want to explain the purpose of the deposition, so your client understands the gravity of the event. Generally, the purpose of the plaintiff's deposition is two-fold – first, for the parties to obtain facts and information about the incident and injuries; and second, for the defense to assess the presentation of the plaintiff, including her credibility, appearance, and general "likeability." The second aspect is arguably just as important as the first. So, counsel your clients to present themselves as they would for a job interview – with a well-groomed, clean, and polished appearance. This type of presentation will keep the focus on the substance of the testimony and the impact that the incident has had (and continues to have) on your client's life.

With respect to substantive preparation with your client, you will want to discuss three essential topics: (1) the incident itself; (2) your client's injuries and treatment; and (3) the "before vs. after," or lifestyle changes, physical limitations, and general damages. You will also want to address those "pressure points" you have identified from the medical records. Unless your case calls for it, I do not recommend practicing specific questions. Sometimes this causes a client to overthink or seem rehearsed at the time of deposition.

The truth – and consistently, please

Undoubtedly, the most important rule in a deposition is that the client must tell the truth. Not only because she is under oath, under the penalty of perjury, but because the credibility of the plaintiff in any case is sacrosanct. As lawyers, we can do our best to frame harmful or damaging aspects of our case. An inconsistent statement (or a lie) is one of the most difficult issues to cure in a case, so preventing this ahead of time is key.

Instruct your clients to assume the defense knows everything and that there are no secrets. Along those lines, advise your client to admit to prior and/or subsequent incidents or injuries (to the extent they exist) and to admit to whatever truth about which they are asked in deposition. To be sure you are aware of any skeletons in your client's closet, probe into these issues in your deposition prep meeting. And do not be shy about this.

Another vital piece of advice to share with your client is to steer clear of using limiting terms like "never" or "always." (Example: "Because of my hand injury, I can never do the laundry." Or, "I always have to use a cane to walk.") Inevitably, the defense will manage to find an exception to your client's "never" or "always" statement and attempt to use this information to impeach the plaintiff and decimate her credibility at trial. This concept also raises concerns regarding *sub rosa* evidence. Because the defense may have private investigators following your client (and recording her doing the laundry at a laundromat or walking without a cane), it is imperative that the testimony at deposition does not box the plaintiff in. Phrases like, "most of the time" or "more often than not" become the plaintiff's friend in a deposition because they allow for some wiggle room.

Address known pressure points

Several issues are likely to come up in the course of a plaintiff's deposition:

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(1) ostensible "gaps" in treatment; (2) the various distinct injuries the plaintiff is alleging (if multiple physical injuries are alleged); and (3) attorney-referred treatment. Spending time and energy on these topics during your preparation meeting will strengthen the deposition testimony and, ultimately, the defense's impressions of the plaintiff.

First, with respect to gaps in treatment, prepare the client on how to explain the reason for any delay(s) between medical visits.

Second, if the client is claiming multiple body parts were injured, walk the client through when the pain first appeared as to each injury, and track the course of treatment for each body part.

Third, regarding attorney-referred treatment, the defense may ask your client how she found a doctor with whom she treated on a lien basis. Blurting out "My attorney sent me there!" is dramatically different from stating that she was not happy with her previous doctor (in-network through insurance), or from stating that the HMO was taking too long to approve an appointment, or stating that there was too long of a waitlist for an in-network physician, or stating that she had never seen a specialist like an orthopedic surgeon before so she asked her lawyer to help her find someone.

Again, so long as these answers are truthful, these are acceptable and more favorable ways to frame the issue; it goes without saying that we should strictly avoid telling clients to make facts up if they are not true – doing so is obviously unethical.

A picture is worth a thousand words

There is nothing wrong with refreshing your client's recollection of events; in fact, doing this through photos, videos, or other documents can be abundantly helpful in eliciting previously forgotten information. In some cases, the underlying incident may have occurred years before the time of your client's deposition. Reviewing photographs and surveillance video footage, for example, can bring clarity to the client about details of the incident itself. Perhaps, before viewing the photos or videos, the plaintiff remembered the incident differently. Putting the photos and videos in front of the client can help bring her back to the time of the incident, eliciting memories about statements made at the scene of the incident, the identities of persons with whom she spoke, and other important details that may have washed away with time.

In auto-collision cases, it is helpful to present the client with a satellite view or map of the area where the collision occurred. Then, you can ask the client more specific questions about the collision, such as to each party's direction of travel, lane, speed, and visual obstructions (if any). In a trip-and-fall case, you can also use a visual (a photo) to have the client mark the exact area on the sidewalk where she believes she tripped and fell. Similarly, in a case arising out of a slip-and-fall incident at a grocery store, have the client view the surveillance video footage before the deposition.

Prepping your client on explaining the mechanism of injury

It's plain and simple: No mechanism of injury = no causation.

Mechanism of injury is the "how" part of the way in which your client was injured, and the plaintiff should break this down in intricate detail. Make sure to prepare your client to precisely explain how the injury (or injuries) occurred. In an auto-collision case, this includes describing the force of the impact, the ways in which any body parts made contact with any portion of the inside of the vehicle, and any other specific movements of the plaintiff's body parts during the collision (such as the compression and twisting of a knee).

The positioning of the plaintiff's body matters – namely, whether your client braced for impact, gripped her hands on the steering wheel, swayed from side to side, or twisted in any way, for instance. In a slip- or trip-and-fall case, the plaintiff will need to explain how her foot or ankle moved, identify which body part(s) encountered the floor (or other surface) first, and indicate which body parts struck each surface (including when and how hard). Your client's explanation of the mechanism of injury should remain consistent throughout the case, from discovery responses, to deposition testimony, to trial testimony.

Investing in your client is investing in your case

Taking the time and energy to thoroughly prepare your plaintiff for deposition can make all the difference. The plaintiff's deposition is a special time in the litigation process because it's where the rubber hits the road – where the case comes to life. The defense moves from solely relying on paperwork to assessing your client in the flesh.

Because the plaintiff's deposition can make or break your case, give it the attention it deserves. Use this opportunity to analyze the strengths and weaknesses of your case. Take advantage of the plaintiff's deposition as a forum to showcase the humanity of your client – so the defense sees it, too.


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