Making the Record

Effective Deposition Techniques in Asbestos Litigation

By Todd J. Suddleson and Christopher B. Bruni

You need to prepare in advance and make an accurate and effective record—one that can ultimately be used at trial.

A well-thought-out deposition cross-examination can be one of the most effective tools in defending cases in asbestos litigation. But to succeed with this task, the attorney taking the deposition must thoroughly understand the facts of the case, must make a clear and concise record, and must ask questions that can ultimately be used at trial. You should view the opportunity to take the deposition as more than simply finding out what the witness will say at trial. The transcript that you create may be used to cross-examine the witness at trial, or it may be designated by your opponent if the witness is not available for trial. This article, which is geared toward the lawyer with less than five years of experience, will discuss how to prepare for a witness's deposition and how to conduct a model cross-examination—one that can be used "effectively" at trial.

Deposition Preparation

There is no substitute for preparation. Yes, that sounds like a cliché, but if ever there was a situation calling for preparation, the taking of an adverse witness's deposition is it.

Initially, you might feel a bit overwhelmed about where to begin. To make sure that you have all of the information about the case, the best approach is to start with the initial pleading and work up to the present date.

The Complaint

The complaint always contains useful information about the plaintiff. Typically the complaint will contain the names and the identities of all of the plaintiffs, the date or dates of the alleged injury, the names and the identities of all the defendants, and the theories of liability. Even if it is simply a form complaint, the mere date and the county of the filing of the complaint allows you to assess issues such as statutes of limitation and venue. As you prepare for the witness's deposition, find the complaint—*and read it.*

Interrogatories

Although it sounds simple enough, a great deal of information can be gathered through the use of interrogatories to

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a plaintiff. Many times this information is overlooked. Most jurisdictions have their own version of general order interrogatories. Typically, these general order interrogatories contain a series of questions that cover a plaintiff's social history, work history, and medical history, as well as issues regarding smoking and prior lawsuits. These interrogatories form a good foundation for developing background questions with regard to the plaintiff or the adverse witness.

The plaintiff's counsel may have also provided answers to special interrogatories from the defendants, including your client. These should be reviewed in detail to develop specific questions regarding your client. If necessary, you may want to have verified copies of the plaintiff's interrogatory responses with you at the deposition for cross-examination and impeachment purposes.

Medical Records

Medical records are another valuable source of information regarding the plaintiff. These records should be reviewed thoroughly before the witness's deposition. Treating physicians, in their roles as caregivers, generally note all relevant information obtained from the patient. This affords the practitioner an unfiltered view into the medical background of the plaintiff. Information contained in the medical records may reference plaintiff's symptoms (or lack of symptoms), work history, and other medical issues that may affect causation and damages. The records may contain warnings from the treating physician to stop smoking. Ailments related to smoking such as shortness of breath, emphysema, and bronchitis may also be noted in the records. Reference to other lung irritants, such a street drugs, may be uncovered, supporting a claim for alternate causation. As such, these entries may support grounds for additional questions for cross-examination of the witness.

Employment and Union Records

Employment and union records should also be reviewed before the deposition. These records may serve to confirm when and where the deponent actually worked. They may also provide information about training or warnings that the deponent received about potential hazards on the job, such as asbestos. Often employers will require a pre-employment health exam or physical. Some employers may require a health exam on a yearly basis. Frequently a series of questions with regard to respiratory issues will be included in the exam. This is particularly true for individuals who work in refineries, chemical plants, or other similar settings. Insulators may have had pulmonary function tests administered to measure their lung function. In addition, other medical conditions unrelated to asbestos exposure may be contained in these records.

Military Records

Similar to employment records, military records may contain detailed information about the individual's health background. A review of these records may lead to further sources of information such as Veter-

ans Administration or disability records. Illnesses or conditions, particularly those related to the lungs, which would prevent an individual from certain military activities, may also be noted in these records. All of these records may be helpful in forming a template for cross-examination of the witness with regard to the plaintiff's smoking history.

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Workers' Compensation Records

Workers' compensation records are often overlooked as a source of information regarding a deponent. Not only do these records contain reports from the applicant's physicians, they may also contain sworn deposition testimony helpful to your case.

Prior Testimony

Determine if the witness has had a prior deposition. You may already have 90 percent of what you need under oath.

Discovery Versus Trial Preservation

One of the first questions that the practitioner must ask is, "Will the deposition be used for discovery purposes, or will it be used for trial purposes, to preserve the testimony for a trial?"

If the proceeding is for discovery purposes, a discovery deposition, then all lines of questioning should be explored, subject to the caveats listed below. The purpose of the discovery deposition is to discover the facts of the case—both the good and the bad—and the use of that deposition at trial will be subject to admissibility as ruled upon by the trial judge. Additionally, many jurisdictions only require objections to the *form of the question,* preserving any admissibility objections for the time of trial.

In contrast, *a trial preservation deposition* is just that: the deposition testimony is to be taken as if it were elicited in the courtroom. Therefore, the practitioner has to proceed with the cross-examination as if a jury were present and has to take steps to ensure that unfavorable testimony is not elicited during the examination. Additionally, unless some stipulation can be reached related to trial admissibility objections, all such objections should be made on the record at the trial preservation deposition.

While this may sound complicated, many times the practitioner will have the benefit of a prior discovery deposition of the deponent, which would allow a more limited cross-examination at the trial preservation deposition.

Questioning the Witness

When questioning the witness, always keep in mind that the questions that you ask and the answers that you receive may eventually be read to a jury. Your goal is to elicit testimony that will be persuasive to a jury. For it to be persuasive, the testimony has to be clear and understandable. If the witness does testify live at trial, the deposition transcript can be used to impeach the witness if he or she testifies differently in trial. Impeachment is much more effective if the deposition testimony that you use to confront the witness is clear and direct. Below are some pointers to bear in mind to achieve these goals.

- When conducting the examination of the witness, it is important to ask short, clearly worded questions. Not only will this allow the reader to follow your examination clearly, it allows you to control the pace of the deposition and keep the witness on topic. Additionally, proceeding in such a manner ensures that the testimony will be much easier to designate for use in a motion for summary judgment or for use at trial if the witness is unavailable for live testimony.
- It is important to ask questions that are fair and not misleading. Your client will not be served by getting into an argument with the opposing counsel, or worse, with the deponent. More importantly, if a jury believes that a question is unfair or misleading, you can lose credibility with the jury.
- After you have set the foundation, zero in on the key issues. If you can, try to develop sound bites on these issues for use at trial or as page-line designations.
- In many cases, a product or a site identification can hinge on the credibility of the deponent's memory. Therefore, question the witness about unrelated matters: addresses, important dates, brands of non-asbestos products. These questions must be about things that a jury will expect the witness to know. If the witness can't recall something simple, a jury may view his or her product identification testimony with suspicion.
- Question the witness with regard to warnings. It is not enough simply to ask, "Did you see any warnings?" Question the witness about his or her efforts to identify whether a warning was present. Ask the deponent what signs were posted in his or her place of employment. If he or she did see a warning, ask what steps the deponent took to follow the warning.
- Make sure to get evidence into the record that is evident. For example, it may be evident from the testimony that the plaintiff is a bystander to the use of your product. Go the next step and get it on the record that the plaintiff did not personally work with your product.
- Do not make admissions regarding disputed issues.
- Do not ask questions that appear to admit exposure to your client's product or that appear to admit that the materials that the deponent used contained asbestos.
- Do not create evidence on the record that you do not need. Don't talk about plaintiff's chemotherapy treatment. Don't discuss how much plaintiff enjoyed hunting or fishing.
- Do question the witness (if the plaintiff) about all medical conditions that would affect life expectancy, or the ability to work or perform house-hold services.
- Do question the witness (if the plaintiff) about cigarette smoking history. Have your smoking outline ready to go and determine if the plaintiff saw Surgeon General warnings and continued to smoke.
- Do question the witness (if the plaintiff) about drug use.
- Do question the witness (if the plaintiff) about employment records, employer safety issues, training, warnings, and related work topics.

The Plaintiff's Counsel's Examination of the Deponent

During the plaintiff's counsel's direct examination, you must pay close attention to the types of questions being asked. You also need to understand the rules for making objections in the jurisdiction in which the deposition is being taken. In many jurisdictions objections other than to the form of the question are preserved until the trial. However, to be safe, it is recommended that objections be made to the following types of questions at the time of the deposition.

Always object to questions calling for the identification of your client's product. Proper foundation is rarely established, and the testimony is often based on hearsay or speculation. A decision can always be made to withdraw the objection at a later time. Failure to timely object waives the objection.

Always object to questions that ask the witness to identify products that allegedly contained asbestos. Proper foundation is rarely established, and the testimony is often based on hearsay or speculation.

Always object when the plaintiff's counsel attempts to lead the deponent to say that he or she was exposed to asbestos. Proper foundation is rarely established, and the testimony is often based on hearsay or speculation.

Always object when the plaintiff's counsel attempts to paint with a broad brush the time frame and the locations. These questions are always overbroad and compound.

The Most Important Person in the Room

If you want to take an effective deposition, you need make sure that your court reporter has everything that she or he needs, *and you have to ensure that you make an accurate record*. Here are some essential tips on how to make that happen.

- Arrive early and check in with your court reporter. Make sure that you bring a copy of the caption to the deposition. By doing so you make sure that the title on the record is clean and correct.
- If you plan on marking exhibits, make sure that you bring extra copies for your court reporter, as well as copies for the witness. When you introduce an exhibit, make sure that you identify it on the record. State the title of the document and then give the exhibit number; that way you ensure that the judge or a jury will be able to identify the document at trial.
- When making your record, you need to make sure that you give your court reporter all the spellings on those matters that are unusual or that might be unclear. Alternatively, you can give the spellings to your court reporter after the deposition, off the record.
- "Quote, Unquote": During a deposition, you might have the occasion to quote from citations, depositions, or other written materials. Keep in mind that if it is important enough to quote, it is worth doing so in a fashion that can be understood and heard by everyone. *Do not speed read!* When quoting, give the proper reference and indicate where the quote is beginning and ending by saying "quote" and "unquote." Also, when reading testimony into the record, include the words "question" and "answer."
- Interpreters: When you are questioning a witness through an interpreter, remember that the witness is being examined, not the interpreter. Address the questions directly to the witness.
- When conducting the deposition, make sure that you are not speaking too fast. This is a common mistake, and you may be surprised later if the record doesn't read exactly the way that you remember it.
- Make sure that you do not talk over the witness or other attorneys. Again, doing so can result in an unclear and perhaps inaccurate record. Overlapping can also affect the jury's ability to follow a line of questioning. If you have a witness who anticipates your questions before you ask them, remind the witness to wait until you have finished your question.
- Do not interrupt the witness before he or she has finished his or her answer.
- Make sure that you avoid nonverbal communication. Be aware of "uh-huhs" and "huh-uhs." They can look the same on the transcript. Also avoid nods and shakes of the head. It is difficult for a court reporter to decipher the difference. If necessary, politely remind the witness to answer by saying "yes" or "no."
- Be on the lookout for gestures used to illustrate phrases such as "over to about there," "about that long," or "to that man sitting there." These become meaningless when read in the transcript. You will need to clarify such gestures on the record. One way to do it is to say "Let the record reflect that the witness is holding his hands about three feet apart." Or you can simply say, "I note that you are holding your hands about three feet apart, correct?" By doing this you convert otherwise meaningless testimony into a coherent account.
- Technology: Learn the different technology available to help save you time. Examples of this include using mobile laptop video conferencing and real-time streaming to iPads and tablets. Also, there may be times when you can obtain a rough draft from a court reporter. These drafts are very useful when you are continuing into a second day and you want to verify exactly what testimony was placed on the record.
- Always check with your court reporter to see if the reporter needs an occasional break.

If you want to take an effective deposition, you need make sure that your court reporter has everything that she or he needs, and you have to ensure that you make an accurate record.

Conclusion

As stated at the outset, a well-thought-out deposition can be one of the most effective tools in defending cases in asbestos litigation. However, you need to prepare in advance and make an accurate and effective record—one that can ultimately be used at trial. Following these guidelines will help the practitioner achieve these goals. FD