THE ALFA INTERNATIONAL PROFESSIONAL LIABILITY GROUP MINI-SEMINAR

Triple Play: Three Strategies for Success in the Big Leagues of Professional Liability Defense

Scoring A Run: Making Sure You Can Get All Around the Bases And Back Home With Your Deposition Testimony

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"The purpose of a deposition is to memorialize testimony or to obtain information that can be used at trial or that eliminates the pursuit of issues or that inform decisions as to the future course of the litigation. One of the main purposes of the discovery rules, and the deposition rules in particular, is to elicit the facts before the trial and to memorialize witness testimony before the recollection of events fade or 'it has been altered by . . . helpful suggestions of lawyers.' *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993)…. *MGA Entertainment*, 2012 U.S. Dist. LEXIS 196273, 2012 WL 12886204, at *2 (*quoting E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 277 F.R.D. 286, 297 (E.D. Va. 2011))." *Ashcraft v. Welk Resort Grp., Corp.*, 2017 U.S. Dist. LEXIS 185470, at *15-16, 2017 WL 5180421 (D. Nv. 2017). The defense needs to be prepared to make all its helpful suggestions before the deposition so that the testimony that is memorialized advances the defense theory of the case.

When some of us began practicing law, the conventional wisdom was that your witnesses only needed to survive their depositions. They needed to pick "yes", "no", or "I don't know", but that should be the answer to almost every question. They were not to guess at what the other lawyer meant, so if they were not 100% sure of the meaning of the question, they were to say they did not understand. They were to answer only the question asked and not volunteer any information. Any information that needed to be added or telling the defense side of the story came later, at trial or with an affidavit for a motion. No more.

For many reasons, not the least of which is technology, preparing a witness this way for deposition is no longer useful. Juries are constantly bombarded by information and they want answers now. They are not going to wait three days until it is the defense's turn to make up their minds if the defense witness's testimony made sense. A long pause used to be invisible in a written transcript. Now the jury can hear on video deposition the coughs and scraping chair legs as the witness considers the question for an inordinate amount of time. We used to be able to insist that the following question be read with the first, but now the video is set up to play only the sound-bites that the plaintiff wants the jury to hear. For all these reasons and more, the witness needs to be prepared to and then should actually deliver his case, his story, his truth at the deposition. And he needs to be prepared to do it in response to value-loaded questions (questions that are weighted or biased in favor of certain values).

The value-loaded method of asking questions was honed to perfection in what is now referred to as "the reptile theory", because of a book written by David Ball and Don Keenan called, "*Reptile: The 2009 Manual of the Plaintiff's Revolution*." Using the reptile theory purportedly permits the lawyer to access that part of our brain that is still reptilian in nature and feels the need to protect from danger. The defendant is portrayed to the jury as the danger, so the reptilian-thinking jury punishes the defendant in order to keep itself and its environment safe. Whether the theory has merit or not, the method of questioning is effective.

In reptile theory, the lawyer asks a value-loaded question that is difficult for the witness to answer. For example, "You agree that truck drivers are not allowed to needlessly endanger the public?" Answering "yes" when the witness was speeding permits the plaintiff to argue that the defendant himself admitted the conduct was unacceptable. Answering "no" makes the witness look heartless, ridiculous, or both.

But the method's effectiveness is not limited to safety questions. Think about the question to Paula Deen, who grew up in the Deep South in the 1950s and 1960s: "Have you ever used the N-word yourself?" ("Yes, of course", she answered, instead of, "I'm not proud of it, and I'd never say it now, but, yes, that is how we all talked 50 years ago.") Or the question to a lawyer who is now the defendant in a legal malpractice case, "Did it satisfy you that what you were doing [when you were representing the plaintiff] was pursuing justice and you were…doing something that was based in truth and was a just cause?" ("Yes, of course", she answered, instead of "I was trying to do right by my client, but that doesn't mean my theory of the case was right or that the jury would agree with us.") Or the question to Kenneth Lay after the Enron debacle, "Have you contacted witnesses to get your story straight?" ("I – I – I don't know that I contacted witnesses," he answered instead of "I didn't need to get my story straight, but certainly I've talked to people about the subjects we are discussing.") All of these questions are value-loaded and, if answered with "yes", "no" or "I don't know" hurt the witness and the entire defense. The witness has to be prepared to fully, completely, and fairly respond to the actual question and the value-loaded implied question.

> *Restatement (Third) of the Law Governing Lawyers* §116 (2000) expressly provides that "[a] lawyer may interview a witness for the purpose of preparing the witness to testify." Comment b to *Restatement of Law Governing Lawyers, Section 116,* (2000) sets out further guidance on what a lawyer may do in preparing a witness to testify:
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> > a lawyer may invite the witness to provide truthful testimony favorable to the lawyer's client. Preparation consistent with the rule of this Section may include the following: discussing the role of the witness and effective courtroom demeanor; discussing the witness's recollection and probable testimony; revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light; discussing the applicability of law to the events in issue; reviewing the factual context into which the witness's observations or opinions will fit; reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross-examination that the witness should be prepared to meet. Witness preparation may include rehearsal of testimony. A lawyer may suggest choice of words that might be employed to make the witness's meaning clear. However, a lawyer may not assist the witness to testify falsely as to a material fact.

United States v. Malik, 2017 U.S. Dist. LEXIS 8439, *14, 15, 2017 WL 264544 (D. Ks. 2017).

To prepare the witness as these rules permit us to, you need to set aside a day or two—or more if circumstances warrant. The deposition is no longer just a pre-trial fact-gathering tool. It is one of the primary trial weapons. We will discuss below three of the activities in which the lawyer is permitted to engage when preparing witnesses to testify at deposition.

1) Explaining the Witness's Role in the Case

To be prepared to give a deposition, the witness needs to understand the entire case and her role within it. The detail the witness needs to know, of course, depends upon her role in the case and the individual witness. But do not think that bit players do not need to understand the whole case. In a mesothelioma wrongful death case, the plant in question had been demolished. That, combined with asbestos's 25 year or more incubation period, limited the pool of fact witnesses who could testify about what the plant was like at the time the decedent was there. A few were located, though, who would testify that there were warning signs at the plant about asbestos. That was the only part of the case that was discussed with them.

At depositions, the witnesses performed well on the areas of inquiry we had discussed. But then the Plaintiff's lawyer asked questions like, "Were you aware that there was asbestos in the tile in the cafeteria ceiling where you ate lunch every single day?" With this one value-loaded one question, the witness was thrown off substantively, having no idea how to answer, and personally, feeling like the defense team had hidden things from her. The witness was, therefore, effectively neutralized as a witness.

Because we had never discussed the overarching defense theme that the plant was built to code in the 1960s, complete with asbestos, and that the company owner had complied with all later codes and directives in managing the asbestos, the witness felt blindsided when she learned there was asbestos in areas where

there were no signs. And the witness would have difficulty after that trusting the defense lawyers. For the lawyers' part, they could never trust her as a trial witness because it was impossible to tell how she would respond to her feeling of being misled. Had the defense explained the entire case to the witness before the deposition, both her testimony and herself as a witness could have been salvaged. The witness could perhaps have responded something like this, "I know there was asbestos in a number of places in the plant. There were some signs in some places telling us there was asbestos. In others, there were no signs, but I didn't have any reason to believe it was dangerous."

2) Live with the Documents

To be prepared to testify at deposition, the witness needs to be familiar with all the documents in general and to have read the important documents multiple times. The documents are what they are and they won't go away because your witness does not like them or does not know them.

In a legal malpractice case, the Plaintiff was being examined. He had several times testified contrary to what a document said. When asked if he remembered visiting with the Defendant on a particular date for a particular purpose, he sighed and said, "No, but you probably have a document that says so." If his lawyer had prepared him by going over the documents in detail, the documents would neither have impeached nor frustrated him.

To be prepared, the witness needs to think about how to truthfully and believably explain the documents. Consider Bill Gates' testimony in a case where

Microsoft was accused of antitrust violations by targeting a particular competitor. The lawyer confronted Gates with an e-mail Gates wrote that said, "Winning Internet browser share is a very, very important goal for us." The lawyer asked Gates what companies he would include in the term "browser share".

> A: There's no companies included in that.
>
> Q: Well, if you're winning browser share, that must mean that some other company is producing browsers and you're comparing your share of browsers with somebody else's share of browsers. Is that not so, sir?
>
> A: You asked me if there are any companies included in that and now --- I'm very confused about what you're asking. … It doesn't appear I'm talking about any other companies in that sentence.

Had Mr. Gates been better prepared, he could perhaps have explained that winning internet share from all companies was important if one expected to remain the leader in the industry and, therefore, it is important to pay attention to the industry as a whole and not focus on any single competitor.

3) Rehearse with the Witness

To be prepared for deposition, the witness needs to practice. "Witness preparation may include rehearsal of testimony" and a "lawyer may suggest choice of words that might be employed to make the witness's meaning clear." *The Restatement of the Law (Third): The Law Governing Lawyers.* Testifying well is hard work and words often sound different when they are spoken out loud than when they are thought.

For example, "The company's employees have been generally aware of the causal connection between asbestos dust and various diseases since approximately

the mid-1970s based on reports in the news media" could have been so much improved by a slight modification. "The company's employees have been generally aware of the causal connection between asbestos dust and various diseases since approximately the mid-1970s based on reports in the news media. Although there were, of course, media reports about asbestos before that, it was not really an issue in our industry, so it was not something we focused on." The last piece would have been helpful since the resourceful plaintiff's lawyer had unearthed media reports dating back to the 1930s and 1940s discussing asbestos.

Work with your witness so he knows what your plan is and what your intentions are. For example, in a medical malpractice case, when the Plaintiff's lawyer asked if the expert had any opinions that had not yet been discussed, the witness truthfully answered, "No, but we haven't really talked about the ways I disagree with your expert's opinions." That answer permitted the witness to then list all the deficiencies of the opposite side's expert's opinions and cloak them with the imprimatur of medical expertise instead of leaving the arguments just to the lawyer. It also sets the case up to be settled at mediation, instead of trial, which was the goal in that case.

And in another medical malpractice case, the doctor knew to go beyond the question to give the full answer so the jury did not think the information was contrived when offered and because he did not want to wait for trial for the Plaintiff to understand his position.

> Q: Doctor, can you identify written evidence anywhere in the patient's chart that shows the decedent was checked every 15 minutes.
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> A: No. *That documentation is kept in a log kept at the nursing station in this hospital*.

Consider the difference if President Clinton had practiced this question and answer with his lawyer:

> Q: Do you know why she [Kathleen Willey] would tell a story like that [you kissed her and put her hand on your penis] if it weren't true?
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> A: No, sir, I don't. I don't know. She'd been through a lot, and apparently the, the financial difficulties were even greater than she thought they were at the time she talked to me. Her husband killed himself, she's been through a terrible time. I have – I can't say. All I can tell you is, in the first place, when she came to see me she was clearly upset. I did to her what I have done to scores and scores of men and women who have worked for me or been my friends over the years. I embraced her, I put my arms around her, I may have even kissed her on the forehead. There was nothing sexual about it. I was trying to help her calm down and trying to reassure her. She was in difficult condition. But I have no idea why she said what she did, or whether she now believes that actually happened. She's been through a terrible, terrible time in her life, and I have nothing else to say. I don't want to speculate about it.

How much more credible would Mr. Clinton have sounded if, after having practiced with his lawyer, he was able to say:

> A: No, sir, I really don't know. I know she had been through some terrible things and I know I tried to show her compassion, but I'm not really able to speculate about it.

"The purpose of a deposition is to memorialize testimony… and inform decisions as to the future course of the litigation." Helpful suggestions of lawyers should be used to "value load" the answers to deposition questions so they advance

the defense theory of the case. Directing the case for the defense from the beginning of depositions, instead of waiting until it is the defense's turn in the case, helps the cases resolve in a way that is much more favorable to the defendant in the long run.