Thinking Outside the Box: A Case for Deposing All 213 Witnesses

by G. Grant Dixon

In the representation of personal injury plaintiffs, I have had occasion to see many of my opinion witnesses wither during depositions taken by defense attorneys. It drove me crazy and, more importantly, lessened the value of many of my cases when those witnesses failed to give the opinions I needed, or they just simply said it all wrong.

But then I noticed that frequently, attorneys taking depositions were able to shape opinions in a manner that was most favorable to them. That was the day I changed my practice and decided that in nearly every case, I would depose my treating physicians and other opinion witnesses. That one decision has, in nearly every case, strengthened the opinions and helped my clients' causes.

Below I make the case for the plaintiff's attorney taking the deposition of every witness who might render an opinion in the case. Like any case, there are pros and cons that must be considered. However, as this article demonstrates, the pros generally far outweigh the cons.

Pro: The Opinions Are Better

The primary benefit of deposing opinion witnesses is that the opinions are much better. I have the ability – when asking the questions – to frame the opinions in the way that is most beneficial to my client's case.

One way this is most obvious is in positive/negative questioning. Good defense attorneys will ask opinions that are damaging to the defense case in the negative. Even if the point is only positive for the plaintiff, they will minimize the opinion with follow-up questions that limit that opinion.

When I am asking the questions, the good opinions are always asked in the positive. In this way, the opinions are phrased more strongly. Simply put, they sound better.

Pro: The End of the 213 Debate

Admit it: we all fear Illinois Supreme Court Rule 213. We all fear the motion to bar claiming we never properly disclosed the witness, or worse yet, we never disclosed the witness at all. We all hate the idea of being at trial and having to establish that we disclosed a specific opinion. We all fear the terrifying end result: the opinion we really need is barred.

By taking my own opinion witness depositions, I have nearly ended all debate about my 213 disclosures. I ask the opinions I want in the case. In many cases, I simply put together the best opinions and go out after those opinions in the deposition. In those cases where I have already disclosed the opinions in response to a 213(f) disclosure requirement, I use my disclosure as an outline for my questioning. I get the witnesses to agree with what is said in my disclosures. In doing so, I do not have to worry about whether a specific opinion has been properly disclosed. I know the opinions are going to come into evidence because the witness has agreed with each and every disclosure I want.

Pro: The Witnesses Rarely Move Off the Opinions

An ancillary benefit I have found from deposing my own opinion witnesses is that the opinions in the case are firmer. Once I get witnesses to agree with an opinion, they are rarely shaken from that opinion. This is true even in the light of strong adverse questioning. I am sure there is some psychological principle involved here that I simply cannot name, but this much I know: once I get witnesses to agree with the opinion, they almost never move from it.

Pro: Adverse Witnesses Are Not So Adverse

Not every opinion is favorable. We all have witnesses that, for whatever reason, are against us. But even these witnesses are better for me when I am taking the deposition than they are when the defense lawyer is asking the questions. I can phrase the bad opinions in the negative. By doing so, I can minimize the impact of the bad opinions and secure concessions to those bad opinions.

Let's not forget, the Illinois Supreme Court Rule 206(c) allows witnesses to be cross-examined in a deposition. That means, for most of my adverse witnesses, I lead during the deposition. I suggest the answer in the question and fight for each answer I want. That is powerful, powerful stuff when it is the first questioning a witness encounters in the case.

Rehabilitation is harder as well. The other side is not going to be able to take the time (and the rules do not

allow them (see Illinois Supreme Court Rule 201(a)) to re-ask all my questions. They are stuck with those questions I asked *and* the answers the opinion witness gave. My opponents will make a few points, but the damage is done for the most part.

Con: Cost

Yes, deposing all of my opinion witnesses costs more money. I have to pay for the court reporter. I have to pay the doctor/engineer/expert for her time. But this cost is more than exceeded by the benefit of the opinions. The value of the case is greater, and so the cost-benefit analysis weighs in favor of doing it. Never once has a client commented to me, "Why did you spend the money deposing those witnesses? You should have let the defense attorney do that."

Con: Preparation

The real issue for most of us is time. There are only so many hours in the day, week, month, and year. We think we cannot take the time to get ready to take every deposition in the case because there do not seem to be enough hours in the day.

First and foremost, you do have the time. The first step in this process is to find the time to send out a notice or subpoena for the deposition. Have your legal assistant prepare the notice or subpoena and send it out for a date that you are available. Most judges honor the "first in time" rule; if you were the first one to notice the deposition, you get to take the deposition. So get your notices out.

Second, you always have to prepare for depositions in some form, whether presenting a witness or actually taking the deposition. In taking the deposition, you do have to put forth more effort ahead of time to prepare. Sooner or later, you will have to put forth the effort to prepare the witness for trial. Isn't it better to put the effort in when it will do the most good? Force yourself now to take the time to get ready. Dream up the best opinions the witness can give and go out and get them. Instead of responding to the message, you can control it. That is not hard to do because the day you took the case, you knew what opinions you wanted.

Finally, the time it takes to prepare is a lousy excuse for not doing it. If you cannot make the time for preparing for the taking of depositions, maybe you have bigger issues in your practice that need your attention. The famous slogan is right, "Just do it."

Conclusion

Deposing your own opinion witnesses is a radical idea to many. As this article demonstrates, the effort, time, and money it will cost you is far outweighed by the benefits to your client, the case, and you. Make it happen, and your practice will improve.

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