

# How to Properly Prepare Your Personal Injury Client to Testify



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*"It's hard to live your life in color and tell the truth in black and white" — Gregg Allman<sup>1</sup>*

## THE PLAINTIFF'S DEPOSITION

Few cases go to trial. In virtually all serious injury cases, however, the plaintiff will have to give a deposition. As a result, for most personal injury plaintiffs, the deposition is the trial. A successful deposition can lead to a favorable resolution of the case, and is essential as the case proceeds to trial. Preparation begins with your intake questionnaires and the first interview with the client. Having a prospective client complete a detailed questionnaire concerning his or her medical history, prior claims, criminal offenses, and so forth, not only helps you determine whether or not to take the case. It also begins the process of preparing the client for a deposition and ultimately for trial.

"Client preparation of just ten or 15 minutes telling your client to listen to the question, tell the truth, not to volunteer anything, and 'don't screw up or you'll lose the case for us!!' is torture, not preparation. And it is irresponsible. Preparation takes several days. . . ."<sup>2</sup> Although we know that most cases will settle, the best lawyers prepare with an eye towards trial, not settlement. Prepare your client for his or her deposition on the assumption that the case will be tried and that the transcript will be used to cross-examine your client in front of a jury. An omission or misrepresentation can be fatal to your case. Do not allow that to happen.

Once the case is in litigation, ensure that all documentation necessary to prepare the client for cross-examination is in your possession. You and your client should be **more** prepared than defense counsel. Get all relevant medical records. Make sure you have copies of everything that defense counsel has obtained through the use of agreed orders or subpoenas to medical providers, employers or other third parties. The plaintiff is at a huge disadvantage if defense counsel asks questions about documents that your client has never seen. Reviewing the documents defense counsel has obtained through discovery is very important, but you also want to identify and obtain records, documents and information that defense counsel **may** obtain in the future.

For instance, suppose your client completed an application for life insurance after the incident in which he or she was injured. Assume that defense counsel will ask questions about insurance applications during the examination of your client. You must get that document before the deposition and find out what it says **before** defense counsel asks about it.

A good video explaining what takes place at a deposition is a great way to educate your client and is a time saver for you and your staff. Good videos are available where actors portray the participants, or you might do your own.<sup>3</sup> When you schedule depositions, give yourself plenty of time to prepare your client. At least 30 days before the deposition, have your client come in and watch the video. Then, you or your paralegal should review the following with the client:

1. Do we have a complete medical history?
2. When is the last time the client saw his or her doctor for treatment of the injuries?
3. Has the client seen any doctors, or been to the hospital, for any unrelated condition, illness or injury?
4. Is the client working currently? If so, where and what is he or she doing?
5. Has he or she applied for employment anywhere, since the injury?
6. Do we have a complete work history, including any periods of self-employment?
7. Do we have tax records, W-2's, or 1099's to document earnings history before the injury?
8. Do we have tax records, W-2's, and 1099's since the injury?
9. Has the client completed any insurance applications since the injury, where health information might have been required, such as life, medical or disability?
10. Has the client applied for any unemployment benefits since the injury?
11. Has the client applied for Social Security disability (SSDI or SSI) benefits at any time?
12. Has the client applied for any credit disability benefits due to the injury?
13. Has the client ever been injured on the job?
14. Has the client been in any other accidents, auto or otherwise, or suffered any falls or other trauma, other than the injury which is the subject of the case?
15. Has the client been involved in any other lawsuits?
16. Has the client ever given a deposition before?
17. Did the adjuster, or anyone else, take a written or recorded statement from the client?
18. Has the client ever been arrested for anything? When, where and for what?
19. Has the client ever filed for bankruptcy? When, and what type (Ch. 7 or Ch. 13)?

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Of course, many of these questions should have been asked when you took the case, and were probably addressed while answering interrogatories. Nevertheless, go through them again. Clients often forget, and they do things, such as changing jobs, without realizing the potential impact on their case. Use a checklist so nothing is overlooked. Do not forget to monitor and review any social media or other internet postings to make sure your client does not get ambushed with something unexpected at the deposition.

Other than watching the video, so the client understands what a deposition is, that initial meeting with the plaintiff should focus primarily on gathering information. The goal is to ensure that all documentation that might be the subject of questioning is available or obtained. It is also a good opportunity to give the client the documents you want him or her to review, such as the crash report, medical records, prior discovery responses, or a statement given to an adjuster.

Once that first meeting has been completed, you will probably realize that some medical records or other documents are missing. Track them down and order copies immediately:

1. Make sure your records from treating doctors or other providers are up-to-date.
2. Make sure you have the ambulance trip report, the emergency room record, and all hospital records.
3. Medical bills should be brought up-to-date, and a current list prepared (Check your list against any available EOB's).
4. Cross-check the bills against the records to make sure you have **everything!**
5. All prior medical/hospital records that are relevant and available should be reviewed or obtained.
6. All unrelated medical/hospital records since the injury should be obtained and/or reviewed.
7. If the client has given a statement do you have a copy?
8. If your client was given a traffic citation do you have a copy?
9. If the client has applied for employment since the injury, get a copy of the application.
10. Do you have records and/or confirmation of time lost due to the injury?
11. Do you have the client's tax records, for the current year, and for several years back as necessary to prove earning capacity and/or loss of earnings?
12. Get copies of any insurance applications, or applications for unemployment benefits.
13. Get copies of past workers' compensation claims or settlements.
14. Get reports of any prior or subsequent automobile wrecks.
15. Review or obtain the complaint, interrogatory answers, and depositions in any prior lawsuit, if even possibly relevant to your case.

16. Do you have copies of any potentially admissible criminal convictions?
17. Have you reviewed or obtained copies of any pending, active or post-accident bankruptcy? Is your case listed as an asset of the bankruptcy estate?
18. Has your client been placed under surveillance? File a motion to compel if necessary and try to force the defense provide a copy of the video.

To illustrate why such items are important, consider the following examples:

**Insurance Applications:** People and insurance salesmen often evade, hedge or even falsify answers to health questions on insurance applications. It can be devastating to a case involving a back injury to find out that the plaintiff denied having any spinal disorders on an application for medical insurance completed **after** his or her back injury. Assume the defense will eventually obtain such damaging documents. Be prepared to deal with the issue **before** your client's deposition is taken.

**Employment Applications:** People will also provide inaccurate information on employment applications, such as omitting a prior employer from their employment history. He or she might have been fired, or may have had an injury on the job and felt that full disclosure might keep him or her from getting the new job. In the courtroom, such an omission can be magnified and used to paint the plaintiff as a liar who will do or say anything for financial gain. At the deposition, the client may be asked whether he or she has ever been fired, and the client should be prepared to explain any such omissions.

**Unemployment Benefits:** If the plaintiff is making a claim for lost wages and has filed for unemployment, the application may state that the plaintiff is ready, willing and able to work. Hopefully, your client may have told them he or she was ready, willing and able to work **within** his or her limitations, but if you do not have a good explanation ready, a skillful defense attorney can make your client out to be a fraud or liar.

About two weeks before the deposition, schedule the client to meet with you.<sup>4</sup> You may want to send the client copies of additional documents to be reviewed before the preparation session. More than one session may be required. Waiting until the morning of the deposition to prepare the plaintiff is a big mistake.

Each client is different, and should be prepared depending upon the strengths and weaknesses of the case and the personality of the client. Regardless of the specific method used, never lose site of the fact that your "primary goal in preparation sessions should . . . be to take burdens off of the witness's shoulders so that he can focus only on the substance of his answers."<sup>5</sup>



Seemingly trivial matters may cause your client stress and could impact performance. Spend the time necessary to figure out what those matters are. Obviously, appearance, clothing, jewelry, being polite, and maintaining eye-contact need to be discussed. And, if your client is going to be videotaped such issues become even more important. Spending time with your client will help you to be a better advocate. Consider visiting your client at his or her home as part of the process. In cases of disputed liability, where your client's conduct is being called into question, a visit to the scene can also be very important for you and your client in preparing the client to testify.

Role play is an important part of preparation for deposition or trial testimony. Take the client through sessions where you or another attorney in your office plays the role of the defense attorney. Tell the client to pretend there is a court reporter in the room taking down every word he or she says. Swear the client to tell the truth, just as the court reporter will do. Ask the routine questions, as well as tough leading questions. Only by testing your client can you see how he or she will hold up under real cross-examination. When you subject your client to the kind of cross-examination he or she will encounter in a discovery deposition you may learn some new things about your case. Keep going over the difficult questions until the client can give satisfactory and truthful answers.<sup>6</sup> The client must tell the truth, but the choice of words used to convey the truth can make a big difference in the impact of the testimony.

There may be a few areas of inquiry that should not be rehearsed. If you see the client becoming very emotional you may want to back off and just let it come out naturally during his or her testimony. Spouses often require little direct preparation but can be terrific witnesses. Include the spouse in your preparation sessions so he or she can listen, and you can make sure they do not contradict their partner on a material issue.

Surveillance is dangerous, both before and after the deposition. If surveillance has taken place and you have the video, your client can be prepared with any necessary explanations. But, do not forget that surveillance may take place after the deposition, particularly after an innocent series of questions about activities. For instance, if your client testifies that he or she **never** cuts the grass due to severe back pain, you better make sure that he or she does not attempt to cut the grass at any time after the deposition or before trial. Caution your client against responses which include the words "never" or "always."

Remind your client that you cannot anticipate every possible question, and if something unexpected comes up, the guiding principal is simple: Just tell the truth.

Keep in mind that every deponent has the right to read and sign his or her deposition under Rule 30.05, TRCP and Rule

30(e) FRCP. A plaintiff gains nothing by waiving that right, as the rules allow for "changes in form or substance." And, court reporters do make mistakes. Reserving the right to read and sign requires that the plaintiff's lawyer send the transcript to his or her client shortly after it is received. The rules only allow thirty days to read and sign. However, this process forces the lawyer to pay attention and to make sure that the transcript is accurate.<sup>7</sup>

After the deposition, if your client tells you that you were tougher on him or her than defense counsel, you will know that you did a good job.

## THE PLAINTIFF AT TRIAL

*"The vast majority of attorneys relegate client preparation to low priority: an hour or two of rushed work just before trial, admonitions of "Don't do this! Don't do that! And for God's sake, if you say X, you will lose the case for us! . . . And there's nothing that can take a verdict down like a client who has not been properly prepared." <sup>8</sup>*

During a deposition, a primary goal for the plaintiff is defensive. You want to minimize mistakes, i.e., do not fumble the ball. Trial is a different matter altogether (you must advance the ball), but a client who was well prepared for a discovery deposition will be well on the way to being prepared for trial. Start trial preparation by going through a process similar to preparing for deposition. Make sure you have current medical records, bring the medical bills up to date, find out if your client has changed jobs or is doing something different at work, and so forth. Well in advance of the trial the client should be instructed to read and re-read his or her deposition until becoming very familiar with it, along with reviewing all relevant medical records. In reviewing medical records, the focus should be on what the records say the patient said (history, pain complaints, physical limitations, ability to work, and so forth).

On direct examination at trial, short answers like "Yes" or "No" or "I don't recall" will not go over very well with the jury. At trial you have to allow your client to talk and to develop some rapport with the jury. Role play is again critical. Make an outline of your questions, and go through them with the client a few days before trial, including all questions involving exhibits that will be identified by your client. It is embarrassing to offer a photograph of the wreck scene into evidence and have your client act like he has never seen it, or worse, to get the view point or directions mixed up.

Be careful with emotional testimony. You do not want it to become stale or jaded by too much rehearsal. Coach your client to maintain eye contact with jurors while answering your questions. A visit to the courtroom in advance of the

trial will help ease your client's anxiety. If you are going to use technology to display photos or documents to your client, turn the equipment on and do a dress rehearsal in the courtroom. While you are there, figure out how to position yourself close to the jury box during your direct examination, so the jurors are between you and your client on the witness stand.

While you need to invest a lot of time in preparation, remember that less is often more when it comes to the plaintiff's actual direct examination at trial, especially concerning damages. Use other witnesses to describe harms and losses.

Also, use role play to prepare your client for cross-examination at trial. Demonstrate what will happen if he or she testifies differently at trial from their deposition testimony. Do not just tell him or her what will happen. Get out the deposition transcript and show them exactly what will happen if the trial testimony is different from their deposition testimony. Show him or her what impeachment really means. Remind your client not to look at you for help during cross-examination. Instead, have him or her well prepared and ready to answer defense counsel's questions politely and directly, without any cues from you.

Good trial preparation includes not only preparing the plaintiff to testify, but also on how to conduct himself or herself during the entire trial. Emphasize that your client is on trial from the moment he or she parks at the courthouse parking lot until the jury leaves the courtroom following the verdict. Tell him or her to assume that everyone encountered in the hallway, the elevator or the restroom, is a potential juror and to behave accordingly. How your client acts or appears at all stages of the case, inside and outside of the courtroom, can be outcome determinative. Non-verbal communications are often far more powerful than words.

Jurors will be watching you and your client during the trial. Your client will be sitting at counsel table, just a few feet away from the jurors, for hours at a time. Discussions should be kept to a minimum. Facial expressions or animations must be avoided. Although this tactic has some risks, consider providing the plaintiff with paper and pen to take notes. Consider having another lawyer or paralegal sit at counsel table to observe and make sure your client is not doing anything inappropriate.

Pay attention to the little things. Does your client wear enough body spray to set off an asthma attack? Does your client smoke? About 25% of the public reacts to the fact that someone smokes by respecting that person less.<sup>9</sup> That means you probably have three jurors that respect your client less if he or she smokes. You must be aware of these types of issues and prepare accordingly. If family members will be watching the trial they must also be prepared to conduct themselves with decorum.

Keep in mind that the jurors may be checking you and your client out on the internet, despite all admonitions to the contrary.

Finally, during the trial preparation process ask your staff about their impressions of the client. Clients often act differently when they are around your staff than when they are around you. If you have spent meaningful time with your client, you will already know most of the appearance and conduct issues that need to be addressed, but you may be surprised at what your staff can add that you might have missed.

Although the modern trend in trial practice is to focus on public safety and the defendant's conduct, the importance of the plaintiff at trial must not be ignored. All other things being equal, a major factor in the jury's decision is the presentation of your client. From the moment you meet your client you should be preparing for deposition and for trial. Do not enter the courtroom with an unprepared client.

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<sup>1</sup> Gregg Allman, from the song: *Wolf's a' Howlin'*.

<sup>2</sup> David Ball and Don Keenan. *Reptile: The 2009 Manual of the Plaintiff's Revolution*. 190. (Balloon Press 2009).

<sup>3</sup> Examples: <https://marketplace.wisbar.org/Pages/Product.aspx?pid=ED0011>; <https://www.trialguides.com/product/preparing-for-deposition/>

<sup>4</sup> A series of reminders on your case management system is a good way to make sure you do not overlook something you need to get before the deposition. For example you might set up reminders for 14 days before the deposition, then again 3 days before the deposition to make sure you have all the necessary documents and records.

<sup>5</sup> David Malone and Peter Hoffman. *The Effective Deposition: Techniques and Strategies that Work*. 157. (NITA Revised 2nd Edition 2001).

<sup>6</sup> Be careful with this step in the process. If you push your client too hard, the approach could backfire.

<sup>7</sup> It is crucial to announce your intent to read and sign while on the record. Otherwise, many court reporters will automatically (and improperly) put a stipulation at the beginning of the transcript that said right has been waived.

<sup>8</sup> David Ball. *David Ball on Damages, Third Edition*. 37. (NITA 2011)

<sup>9</sup> <http://www.gallup.com/poll/1717/tobacco-smoking.aspx#3>

