Remember the Basics

By James M. Dedman IV

When deposing a plaintiff, a personal representative of the estate of a decedent, or other fact witnesses, remembering basic deposition-taking strategies is critical.

Over the years, many defense attorneys have found themselves playing a part in a plaintiff’s or the plaintiff’s co-worker’s deposition in an asbestos or other toxic tort case. Whether a deponent is a plaintiff claiming exposure to asbestos, a personal representative of the estate of an individual who allegedly died as a result of such exposure, or a former co-worker of a plaintiff or a decedent, such depositions are often different than typical depositions, if only due to the sheer number of attorneys in the room. It is not uncommon for a dozen—or dozens—of defense attorneys to be present representing numerous manufacturers of products alleged to have contained asbestos. In light of the number of competing interests, asbestos depositions can sometimes veer into unexpected territory, and as a result, important factual information and deposition basics may be overlooked. Considering the potential traps for the unwary, attorneys can sometimes lose sight of the forest for the trees. To guard against such a risk, defense attorneys must not forget the basics of deposition taking when confronted with an asbestos deposition. This lesson is particularly important for young lawyers, many of whom are dispatched such depositions, who may see many cases settle and few proceed to trial.

The number of attorneys involved generally requires a division of labor of sorts; one attorney typically volunteers to “take lead” and ask an extended series of questions related to a deponent’s background, work sites, and allegations of exposure to particular products. This initial examination requires many hours because the attorney taking lead must explore each work site and product in detail and then ascertain the nature of the exposure allegations for each work site and product at issue. Often, a deponent worked at multiple work sites for multiple employers over many years, further extending this line of questioning. Once the attorney taking lead has completed the initial examination of the deponents, counsel for other defendants take their turns, if they wish, and then the plaintiff’s attorney may ask additional questions. Frequently, a plaintiff’s attorney’s examination prompts additional questions from defense counsel.

Typically, the defense attorneys attending the deposition bide their time, waiting for a deponent to name their client’s products.
specifically or indirectly implicate them. There are other issues as well. Sometimes manufacturers of the same types of products may find themselves at odds when a deponent’s testimony is vague about which of those manufacturers’ products was present at a particular location at a particular time. Usually, each defense attorney follows a set of instructions from a client, often as a party named in the suit, and maintains certain client preferences about the best way to address specific exposure allegations. Some clients prefer that their attorneys ask no questions at all unless their product is referenced specifically by name, even if the specific type of product manufactured by that client is generally discussed. Other clients prefer that their attorneys clarify the nature of any allegations related to the general types of product that they may have manufactured. Still other clients prefer a bolder approach and require that their attorneys specifically ask a deponent whether he or she recalls working with their products. These client preferences are often generated by a client’s experience in similar litigation, concerns about costs and consistency, and even political considerations when the client may be a party in many cases brought by the same plaintiff’s firm.

As with other types of litigation, many of these cases resolve without a trial. But a defense attorney can never predict which specific case will be the one that does proceed to trial, so it is often best to assume that a case will and prepare accordingly. Thus, it is critical to remember the basics of depositions when deposing a plaintiff, a personal representative of the estate of a decedent, or other fact witnesses in the matter.

First and Foremost, Prepare a Deposition Outline

If you are experienced enough with such depositions, you may be able to conduct an examination, if necessary, off the cuff or without any notes. Don’t do it. Especially if there are multiple depositions in a day or voluminous file materials to review, you’ll want to include some case-specific information in an outline of issues potentially affecting your client. Plus you can use your outline as a checklist to ensure that certain background subjects have been covered by other attorneys during their own examinations of a witness.

Don’t Forget Background Witness Information

Sometimes in the rush to reach to the substantive exposure allegations in a case, the lawyer taking the lead may abbreviate the background section of the examination of a deponent. Certainly that lawyer will explore on the record a plaintiff or a decedent’s past employers and work sites in detail. But other questions may be skipped in the interests of time. If a witness is a co-worker or other fact witness, counsel should remember to ask about the witness’s connection to the plaintiff. At one asbestos deposition several years ago, it was not until well into the afternoon that testimony was elicited that the co-worker deponent was in fact a relative of the plaintiff. Obviously, the potential bias of a co-worker relative is extraordinarily relevant in an exposure case. By the same token, if a deponent is not a relative, you should still inquire into his or her social relationship to a plaintiff or a decedent. How many times would they see each other when not working on the job? Did they socialize outside of work? Did a deponent ever visit a plaintiff or a decedent’s home, and if so, how often? Such information can lay the foundation for bias arguments at trial.

Additionally, be certain to learn a deponent’s full name and date of birth. Such information on the deponent or the work sites at issue. Whereas just years ago, an attorney could make certain assumptions about a deponent’s potential online or social media presence based on demographic information, these days, you do so at your peril. In the asbestos context, Google, or your favorite search engine of choice, can lead you to evidence of past lawsuits, family connections of the deponent (sometimes listed in past obituary notices), business relationships, or even news articles reflecting numerous aspects of a deponent’s life. Sometimes, you’ll even locate news articles reporting the criminal history of a deponent. You may also wish to Google the former employers and work sites of a plaintiff or a decedent, as well. Depending upon the nature of the information uncovered, you may wish to alert the attorney taking lead of your discovery effort or save it for yourself as you see fit. Further, just as in any other case, you may want to spend a moment or two searching to see whether a deponent maintains any social media accounts. So many gems have been found over the years on Facebook or Twitter that you
should investigate these issues in asbestos cases, as well.

Explore the Past Connection of Any Witness to a Plaintiff’s Legal Firm

It is rare when a co-worker witness is not a former client of a plaintiff’s firm in the subsequent lawsuit at issue. Accordingly, defense counsel should explore that past connection and attempt to uncover the circumstances of the previous case, including the nature of the exposure allegations, the existence of any related deposition testimony or sworn discovery responses, and of course, the result. To the extent that a deponent previously testified about the same products and work sites, the previous testimony may be very helpful to defendants in a subsequent case, particularly if the deponent attempts to tailor his or her testimony to better serve the new plaintiff.

Use Exhibits When Necessary

Sometimes new lawyers are nervous about the prospect of introducing evidence into the record at a deposition, especially when there may be many other more experienced attorneys in the room. Overcome that fear. You should never assume that the voluminous documents produced by a plaintiff’s attorney before a deposition are necessarily helpful to the plaintiff. In fact, there may be helpful pieces of information buried in these documents that can discredit a deponent or augment a defendant’s affirmative defenses. After securing your client’s permission, be certain to review these documents, as well as any produced in conjunction with the plaintiff’s discovery responses, before the deposition. You might be surprised by what you find. On a related note, sometimes a plaintiff will fail to verify his or her previous answers to interrogatories. To the extent that previous answers to interrogatories have gone unverified, it may be advisable to introduce them into the record during a deposition and ask the deponent in your case to confirm that the factual information contained in them is true and correct to the best of his or her knowledge.

Finally, consider introducing the complaint itself and any attachments submitted with it when deposing a plaintiff, particularly if the complaint is verified. Usually, the complaint is a form maintained by the plaintiff’s firm, and it may be helpful to confirm the plaintiff’s lack of understanding of certain exposure allegations in the pleadings.

Prove a Plaintiff’s Lawyer’s Pre-Deposition Preparation Tactics

When a deponent reviewed any pictures or documents before the deposition with the plaintiff’s attorney, such documents should be explored during the deposition, subject to your jurisdiction’s attorney-client privilege jurisprudence. Certainly, if a deponent is not a client of the plaintiff’s attorney, no privilege concerns will be implicated. Odds are you will see pictures reviewed by a deponent late in the deposition when the plaintiff’s attorney begins his or her examination, so it is best to be prepared. To the extent that the photographs reviewed by a deponent or used later by the plaintiff’s attorney during his or her portion of the examination have not been produced, be certain to make a record of the previous failure to produce the records, another topic explored more below.

Make a Record

It is not uncommon for plaintiffs’ attorneys to play games with the documents produced in asbestos and other toxic tort cases. As we all know, plaintiff firms maintain their own private databases of information and share such information with other plaintiff firms. Such databases often include documents related to particular defendants, product literature and information, deposition transcripts, and other matters. Despite their obligations under the discovery rules, plaintiffs’ attorneys will produce, sometimes even just hours before a deposition is set to begin, voluminous documents related to the exposure allegations of a plaintiff or the work sites at issue. Unless your client is apprehensive about such things, defense counsel should not be timid about making a record during the deposition of the tardy production of such documents, particularly when the documents themselves may be responsive to discovery requests that may have been served months beforehand. Be prepared to establish on the record the dates of service of the original discovery requests, the original response deadlines, and the time of the tardy production of the new documents responsive to those previous requests. Additionally, if necessary, defense counsel should reserve the right to re-depose the witnesses if the documents at issue provide new information that could not have been gleaned beforehand. Defendants should not be prejudiced by such tactics. Although a plaintiff’s attorney may sigh and harrumph, it is always important to make such a record.

Object!

Many lawyers may be wary of objecting to a plaintiff’s attorney’s questions during an asbestos deposition for fear of making their client a greater target. Knowing this concern, plaintiff’s attorneys often ask particularly objectionable questions ranging from leading, to compound complex, to speculation, to name a few. Although many cases resolve, some still proceed to trials, and it is important to ensure that a plaintiff’s attorney’s questioning of a witness does not go unchecked. Additionally, to bolster the exposure allegations at issue, a plaintiff’s attorney may ask a series of leading product identification questions after the attorneys for the defendants have each had an opportunity to question a witness. It is not unusual for a plaintiff’s attorney’s product identification questioning to prompt other avenues of inquiry for the defendants because the plaintiff’s attorney will somehow manage to elicit testimony identifying products by name that the witness did not mention during his or her earlier testimony. Most attorneys do object to these types of questions, but it is important for each attorney to ensure that his or her individual objection is reflected on the record. This is sometimes accomplished at the outset with a stipulation that one objection by one defendant is considered to be made by all defendants. However, if the attorneys face many depositions during the course of a given week, this stipulation can easily be forgotten during a later deposition. Thus, it is important to ensure both that the initial stipulation is made but also for an attorney to consider making his or her own objections at the relevant times.

Don’t Be Bullied by a Plaintiff’s Attorney

During your examination, a plaintiff’s attorney may object to find out how you
will react. He or she may test you to find out how you respond to such tactics, particularly if he or she may be unfamiliar with you or your firm. If a plaintiff’s attorney realizes that he or she can successfully disrupt your line of questioning with frivolous objections or grandstanding, he or she will do so. Respond strongly at first, and most of the time, a plaintiff’s attorney will back off. Even if you believe that you maintain a cordial relationship with the plaintiff’s attorney, that friendliness will not necessarily deter the types of hijinks that are sometimes used in these cases.

Listen Carefully
Let’s be honest. Asbestos depositions can be quite tedious. It’s easy to become distracted and lose focus. However, you never know when the testimony will stray into an issue related to your product or otherwise important to your client. If you feel that you’ve missed something, be certain to consult with one of your fellow defense attorneys during a break.

Pay Attention So that the Record Isn’t Later Muddied
If each individual defense attorney is solely concerned with his or her own client’s immediate agenda, and not the record as a whole, there is a potential risk of muddying that record. For example, suppose that the attorney taking lead has questioned a deponent about a particular work site and the usage of particular products at that work site. It may be that the testimony that has been secured effectively “locks” that plaintiff into that line of testimony so that the deponent has no meaningful freedom to alter it later without impeaching him or herself. However, if a subsequent defense attorney returns to that topic and questions the deponent again on the same issues, the deponent may suddenly remember something that he or she previously forgot. Permitting the deponent to reopen that line of testimony through subsequent questioning may rob the defense attorneys of valuable impeachment material. Now it may be that revisiting such testimony is unavoidable. If so, it may be advisable to consider how reexploring the topic may affect the record for other defendants who may become miffed if their record is threatened.

Bring Your Rule Book and the Local Rules, if Any Exist
You’d be surprised by how often these depositions are potentially derailed by minor disputes over deposition rules and procedure. Accordingly, you may want to equip yourself with the applicable rules of civil procedure and the relevant local rules, as well. It wouldn’t be a bad idea to bring the scheduling order, either. That way, if a disagreement arises, you can cite the specific governing rule on the record.

If You’re Taking Lead, Don’t Forget the Other Defendants
There’s no doubt that taking lead is a difficult and occasionally thankless task; sometimes you are called upon to ask questions of a deponent for a full day. As noted above, the attorney taking lead is expected to survey a deponent’s general background, confirm all past work sites and potential sources of exposures, and generally explore the deponent’s experience with the types of products manufactured by the defendants in the case. With that said, remember to consider how your line of questioning may affect the attorneys representing the manufacturers of products that differ from your client’s.

Finally, Trust Your Judgment
Although these are some helpful suggestions to attorneys practicing in this area, there is no substitute for being in the room. Your observations of a deponent’s demeanor, familiarity with the underlying documents, and understanding of your client’s instructions make you the best individual to determine what and what not to ask. There is no one-size-fits-all approach to every deposition, but in the asbestos context, you should not lose sight of the key components of deposition preparation. If your case proceeds to trial, you’ll be glad that you protected your client’s interests and secured all of the relevant testimony.