# Five Techniques Plaintiffs' Attorneys Need to Know to Make the Most of Depositions

***By Steven M. Levin***

Time and again, the witness testimony my team collects during depositions becomes the most powerful element of our plaintiff personal injury cases and leads to a favorable resolution. The effective strategy we have developed allows us to anticipate what will happen and control the outcome of the deposition. Below is a brief overview of five central techniques in this process. My hope is to empower my colleagues to make the most of this often overlooked opportunity to strengthen a case.

**1. Define your purpose and align your approach with it.**
In order to maximize the effectiveness of the deposition, you must begin with a clear understanding of the purpose of this task. Despite the name, discovery depositions are not about discovery: this is not the time to learn about the case. And it's not the time to make an argument. Instead, the deposition offers you an opportunity to 1) anticipate the argument the defense plans to make—sometimes before they have articulated it—and 2) obtain testimony from the defendant's own employees to refute this argument. Whatever happens in that room, remain committed to these goals.

**2. Commit to vigorous preparation.**
It goes without saying that you should know your own case inside and out, but effective plaintiffs' attorneys devote just as much thought to understanding the case from the defense's perspective. In our nursing home cases, the patient's chart often contains a wealth of information that helps us anticipate what the defense will argue; so, beforehand, we review that material carefully. A second important piece of preparation is to know your witness before you enter the room. Think about what materials the witness has reviewed or not reviewed, and what opposing counsel has coached the witness to say. Is the witness a lower-level employee? The goal of prosecuting a personal injury case involving institutional conduct is to prove that what happened to your client was caused by a systemic problem that is the responsibility of the institution's owners—inadequate staffing, inadequate training, etc.—and not simply the action or inaction of a single care provider. An employee of that institution, though technically a witness for the defense, has little incentive to remain loyal if you are able to demonstrate that he or she was placed in an impossible situation by the employer. This makes it more likely you can get the witness to agree to your argument.

**3. Get the witness to acknowledge the standard of care.**
Since every injury, neglect and abuse case involves some kind of violation of the standard of care, or adequate and reasonable practices of the industry in question, the first step in proving that this violation occurred is to establish that a standard exists and that the people who were responsible for your client were aware of that standard. You might ask a series of questions about the standards or customs and practices of the institution, such as: "Would you agree that the standard of care requires every new patient to be thoroughly assessed? Would you agree that the standard of care requires that a care plan be created for each patient? Would you agree that this care plan must be communicated with the other staff members so that everyone is aware of this patient's needs?" As the defense witness agrees to each of these very reasonable statements, you are establishing that he or she understood how things were supposed to work in the institution.

**4. Get the witness to acknowledge that his or her conduct did not meet the standard of care.**
Now that the witness has acknowledged the existence of the standard of care, it's time to get him or her on record about the number of ways in which those standards were violated. These violations constitute proof that the facility did not follow the standard of care, and it is difficult to mount a successful defense in the face of that proof. This portion of the questioning is also an ideal opportunity to establish proximate cause by

getting the witness to 1) affirm the standard of care, 2) affirm what harm the standard of care was designed to prevent and 3) affirm that this harm occurred in your case; in other words: violating the standard caused the injury to occur.

**5. Anticipate and undermine common defenses.**

Let's dig in to some specifics by examining the common ways defense witnesses are prepared in a type of case we frequently prosecute, nursing home cases. Many of these defenses will echo familiar tropes in other areas of personal injury law. If you forget everything else in preparing to depose a nursing home employee, remember this simple model: assess, plan, implement and evaluate as a counter to any claim by the defense that an injury was unavoidable. A skilled plaintiff's attorney can use patient, methodical questioning to undermine these defenses and gain more advantageous testimony.

*"This injury was unavoidable. We can't watch residents 24 hours per day."*

It might be tempting to argue with a witness who says this, but on its face this statement is true: it is impossible to monitor every single resident every second of the day. But in order to be able to state conclusively that an injury occurred because it was unavoidable, a facility would have to be able to show that the injury did not happen for some other reason, such as a violation of the standard of care. In order to discern that fact, the facility would have had to assess the patient, make a care plan and implement it. If the standard of care was followed and injury still occurred, the facility might then be able to argue that the injury was unavoidable. The defendant cannot argue that an injury was unavoidable without being able to show that the institution followed the standard of care. In other words, if you have not assessed, planned, implemented and evaluated the care plan, you cannot claim that an injury was unavoidable.

*"Co-morbidities were to blame for the injury."*

Most patients come in to a facility with multiple health issues that complicate their care. We turn this fact to our client's advantage by asking, "Wouldn't you agree that a complex medical history makes it all the more crucial that the facility initiate an assessment, create and implement a customized care plan, and then evaluate its effectiveness?" The witness likely will agree with that reasonable statement, which helps make your case that the facility violated the standard of care, regardless of these other health issues.

*"I don't recall."*

Sometimes witnesses claim or have been coached to say that they do not recall the timeline or treatments around a patient's condition. It's hard to understand the aim behind claiming ignorance, but in this case the best course is to emphasize the absurdity of the defense by asking additional questions. For example, in a situation in which the witness claims not to recall whether a patient was checked regularly for pressure sores: Do you recall if you completed regular checks for pressure sores and turned the patient? Do you recall if anyone else completed those checks and periodic turns? Do you recall discussing the patient's condition or overhearing anyone else at the institution discussing it? This patient came into the facility with no wounds and left with wounds, but you are not able to offer an alternate explanation for how this happened, is that right? As this line of questioning progresses, the "I don't recall" defense falls apart.

*"The chart does not show any record of the patient being in pain."*

A care provider may try to claim that if there is no mention of pain in the chart, that means the patient was not in pain. Common sense, however, tells us that it is of course quite possible that pain was present and not recorded. Sometimes patients are very much in pain but unable to communicate this fact to care providers because of impaired mental status or other factors. Since the patient's cognitive issues were documented in her chart, any reasonable nurse would have known she couldn't rely on the patient to be able to communicate that she was in pain; therefore, making the pain-management aspect of her care plan—explicitly or by omission—contingent on self-reporting constitutes a violation of the standard of care.

*"Just because it wasn't documented, doesn't mean it wasn't done."*
Here's the inverse of the argument above. In this case, you should agree with the premise on its face: it's true that a care provider may indeed have given care and forgotten to document that care. But if that happened, then someone—the nursing assistant, the supervising nurse, the director of nursing—must be able to testify to having provided the care. If the witness is not able to produce the name of the person who provided the undocumented care, this weak excuse collapses.

A related defense is that poor documentation is not the same as poor care. It's possible a patient received poor documentation and good care. But, pursued to its logical conclusion, this argument also falls apart. Accurate documentation is, in fact, the backbone of good care because it facilitates communication about treatments and responses to care. How can providers possibly track a patient's condition if the reliability of documentation is in question? What's more, federal and state regulations explicitly require accurate documentation. A facility allowing poor documentation is in violation of both the standard of care and the law.

*"We did not have the capacity to provide the care this resident needed. Her family never should have placed her here."*
A favorite defense of long-term care facilities is to blame someone else for the harm that came to a resident. For instance, in the case of our client, an eighty-five-year-old woman who developed severe pressure wounds, the assisted living facility blamed the woman's son for her suffering, claiming that they were not equipped to care for her and told him so. And yet they took no action to find a more appropriate placement for her and instead watched her deteriorate. This denial of responsibility did not serve the defense very well. In addition, it's important to note that the act of blaming someone in and of itself constitutes an admission that there was a breakdown in the standard of care. Don't let that admission go by without turning it to your advantage.

*"Policies and procedures are just guidelines."*
It's true that a policy might be a guideline, and there might be a time when one would not follow it. In this case, ask the witness for an example. "Under what circumstances would you not follow policies and procedures?" This question, it turns out, is pretty hard for most witnesses to answer. "It would have to be an extraordinary situation, yes? And we can't even think of one right now, even just a hypothetical. In fact, you probably can't tell me of a single time in your career when you've deviated from policies and procedures on purpose, correct?" This line of questioning will quickly undermine this particular defense.

While any competent lawyer can make a strong argument based on his or her own client's testimony, it's been my experience that cases are more often won or lost based upon an attorney's ability to deal with evidence and testimony from the other side. Depositions offer a valuable opportunity to get witness testimony that makes your case, and, sometimes, a strong performance in deposition will even result in a pre-trial settlement offer. Depositions are as important as trial testimony, if not more so, and they merit the detailed preparation and strategy I've outlined here.

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