

1  **How to Survive a Deposition**

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5  **Objectives**

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- Recognize the opposing attorney's perspective
- Gain a better understanding of deposition basics
- Review what's a deposition is all about
- Identify common deposition problems
- Know what to expect and how to conduct yourself
- Discuss sneaky lawyer questions

6  **Surviving a deposition**

- When a chiropractic provider is subpoenaed or requested to participate in a deposition, what keeps him up at night is the prototypical second half of a Law & Order scenario
 - the imposing courtroom, the relentless attorney, the stone-faced judge and jury
- That may be good TV, but for most chiropractic providers, it's misplaced worry
- Since most cases never get to court, it makes more sense to worry about an impending deposition than a trial that may never occur


7  **Surviving a deposition – cont'd**

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- The deposition is a standard part of the "discovery" process that enables both attorneys to quiz their opponent's clients and witnesses
- While depositions may seem less threatening than a trial, chiropractic providers who aren't prepared tend to let down their guard and reveal incriminating details that provide ammunition for the other side

8  **Surviving a deposition – cont'd**

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- Or they'll display anger or arrogance that would alienate a jury
- These are bad mistakes, because the deposition process is designed not only to reveal the facts and the merit of the case, but also to test a defendant's credibility and how he'd perform

before a jury

9  **Surviving a deposition – cont'd**

- If a chiropractic provider performs well, the opposing attorney may decide to not proceed to trial and settle or drop the case
- If he does poorly, the attorney will be more eager to bring the case to court
- If that happens, the chiropractic provider has really shot himself in the foot
- All of his testimony from the deposition will become part of the court record, and can be used against him in court

10  **Surviving a deposition – cont'd**

Deposition Tips: The Opposing Attorney's Perspective

- Attorneys know that the legal process is foreign to anyone not trained as an attorney
- One of the many ways to learn about the world of depositions is to review the basics that are taught to attorneys
- In this manner the veil of secrecy is exposed hopefully making the deposition experience less stressful

11  **Surviving a deposition – cont'd**

Depo Tips: Opposing Attorney's Perspective – cont'd

Basics

- Taking depositions is easy, a wizened trial lawyer once told me, "just ask a lot of questions"
- In a loose sense, he's right
- But if you've never taken or attended a deposition there are some things that seem obvious to a veteran lawyer, but which the novice lawyer doesn't necessarily appreciate
- Even the process for getting a deposition started can trip up the young lawyer

12  **Depo Tips: Opposing Attorney's Perspective – cont'd**

Basics – cont'd

The Usual Stipulations

- The first thing that comes up right around the time the witness is sworn in is the ceremonial discussion of whether the deposition will be governed by "the usual stipulations"
- Very few people really discuss what the "usual stipulations" are
 - sometimes you'll hear someone say that "all objections, except as to the form of the question are reserved until trial"
 - but no one ever bothers to state for the record what constitutes an "objection as to the form"
- It's assumed that you know
 - Do you?

13  **Depo Tips: Opposing Attorney's Perspective – cont'd**

Basics – cont'd

Form objections








- If an alien from outer space were to come and observe a bunch of depositions and then try to figure out what a "form objection" is he would have to conclude that it's any question the attorney doesn't like
- Or it's a question the attorney wants the deponent to be very careful in answering
- In short, the "form objection" as it is used in everyday law practice is usually a verbal nudge in the deponent's rib cage

14  **Depo Tips: Opposing Attorney's Perspective – cont'd**

Basics – cont'd

Form objections – cont'd

- In reality (and it's good to know what the real rule is sometimes), a form objection is one that challenges the manner in which the question is posed. Examples of proper form objections include
 - leading question (not applicable to a hostile witness)
 - argumentative questions
 - compound questions
 - asking about two different things in one question

- 15  **Depo Tips: Opposing Attorney's Perspective – cont'd**
Basics – cont'd
Form objections – cont'd
- Examples – cont'd
 - ambiguous questions
 - assuming facts not yet established
 - some say "not in evidence" but trials are where 'evidence' is introduced
 - speculative
 - improperly characterizing the witness' earlier testimony
 - cumulative or repetitive questions
- 16  **Depo Tips: Opposing Attorney's Perspective – cont'd**
Basics – cont'd
Form objections – cont'd
- Form objections do not include hearsay, or objections that go to the admissibility of the testimony or evidence
 - It's stupid to make objections (without some really good reason) to the admissibility of testimony
 - it gives your opponent a free peek into your strategy at trial
- 17  **Depo Tips: Opposing Attorney's Perspective – cont'd**
Basics – cont'd
Form objections – cont'd
- The reason that the "usual stipulations" require that objections to the form of the question to be made at the deposition (lest the objection be forfeited) is that it gives the questioner a chance to rephrase the question to cure the objection
 - Obviously, that rationale doesn't apply to admissibility objections because there is no cure for most of those
 - the judge is either going to admit the testimony or document or she isn't
- 18  **Depo Tips: Opposing Attorney's Perspective – cont'd**
Basics – cont'd
Form objections – cont'd
- If your opponent makes a form objection that isn't really a proper form objection the best practice is to simply ignore it and instruct the witness that they are allowed to answer the question (assuming that they understand the question)
 - If, however, the form objection seems proper, but you need clarification from your opponent, it is advisable to ask exactly what the basis for the form objection is
 - And when you make form objections you should make it your practice to state briefly what the objection is (unless, you are using it to simply "nudge your own witness," which of course you aren't really supposed to do)
- 19  **Depo Tips: Opposing Attorney's Perspective – cont'd**
Basics – cont'd
Preparing to take a deposition
- Taking a deposition is easy, but taking a good deposition requires methodical preparation
 - First, figure out what your purposes are in taking the deposition (this is easy to do if you have trial experience and hard if you are inexperienced)
 - Here are some things to consider:
- 20  **Depo Tips: Opposing Attorney's Perspective – cont'd**
Basics – cont'd
Preparing to take a deposition – con't
- Is the deponent an adverse party, an unfavorable witness or a friendly witness?
 - Are you taking the deposition to gather information, or to perpetuate trial testimony?
 - What information are you looking for?
 - What documents do you need the witness to authenticate, or explain?
 - Can the witness help you obtain or defeat a summary judgment (or other pretrial) motion?
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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

Preparing to take a deposition – cont'd

- Outline your deposition questions
 - If you write out a series of questions you are going to be hampered in pursuing new topics that come up in the examination
 - If you have an outline you will be more flexible
 - So make an outline
 - yellow legal pad

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

Preparing to take a deposition – cont'd

- Outline your deposition questions – cont'd
 - Start with a heading for "Background" where you will ask the witness some questions about his personal and educational background
 - If the witness is an expert witness, and especially if his or her qualifications are an issue, you will want to go into detail about the educational background
 - Of course, you should have a detailed resume/CV, so you don't want to waste time just having the witness recite every step of his educational history

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

Preparing to take a deposition – cont'd

- Outline your deposition questions – cont'd
 - Other topics for your deposition outline might include documents to be identified, authenticated, or explained (you should have a chronological stack of all the documents that the witness authored or received), as well as key factual issues
 - Consider writing out elements of the various claims that are at issue in the lawsuit and see if the witness's testimony bears on any of those elements

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

Preparing to take a deposition – cont'd

- Outline your deposition questions – cont'd
 - Usually the deposition examination should proceed chronologically, that is, from a point early in time to more recent events
 - Proceeding in this way makes it easier for the witness to remember things, and cuts down on the number of objections where the opposing counsel asks you to "clarify the time frame of your question"

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

Preparing to take a deposition – cont'd

- Outline your deposition questions – cont'd
 - Sometimes you will want to deviate from a strict chronological progression
 - you may know that you will have to ask pointed questions that the witness will resent, and you might want to save those questions for the very end
 - Once you start asking a witness about unpleasant things they tend to become less inclined to volunteer information
 - So sometimes starting with the least controversial stuff first makes the most sense

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

Preparing to take a deposition – cont'd

- Outline your deposition questions – cont'd

- Remember to bring a copy of the deposition subpoena, and any witness fees that you might be obligated to give to the witness
- Also, bring a business card to give to the court reporter so that he or she can see how to spell your name, and so that they have contact information for you

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

Getting the deposition started

- If all goes well, the witness will show up and everything will proceed smoothly
- Usually, the court reporter will want a caption that describes the name of the case, the docket number and the name of the witness
- The subpoena should have all of this information, and often you will want to make the subpoena Exhibit 1 of the deposition (hopefully, you brought exhibit stickers, but if not the court reporter should have them)

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

Getting the deposition started – cont'd

- Swear the Witness and Get their Contact Information
 - First, tell them that they are simply being asked to give a truthful account of what happened so if they just say what they know they'll be fine
 - Then tell them that the only problem is that sometimes people think that they know more than they do and wind up speculating and assuming things that they don't really know

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

Getting the deposition started – cont'd

- What's a deposition all about?
 - Many lawyers have a whole harangue where they explain to the witness what a deposition is, and how they should tell the attorney if they don't understand a question etc
 - Very few lawyers reflect on what this preamble is designed to accomplish

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

Getting the deposition started – cont'd

- Think impeachment at trial
 - If the witness says something in the deposition that doesn't jibe with their testimony at trial you can use the deposition to impeach the witness
 - Assuming that the questions asked in the deposition and at the trial are sufficiently similar, you will succeed in impeaching the witness who changes their testimony

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

Getting the deposition started – cont'd

- Think impeachment at trial – cont'd
 - Sometimes, though, when you confront a trial witness with their deposition testimony they will weasel out of it by saying that they didn't really understand the question
 - So you need to "seal off that exit" by making sure that the deponent knows what the ground rules are

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

Getting the deposition started – cont'd

- Think impeachment at trial – cont'd
 - The ground rules are:
 - (1) they are under oath and have to give accurate answers to questions
 - (2) if they answer a question they will be assumed to understand it, so
 - (3) if they don't fully understand a question they should say so

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

Getting the deposition started – cont'd

- Think impeachment at trial – cont'd
 - Many attorneys spend so much time explaining how a deposition works, or do it in such a formal way, that the witness is taken aback, or made nervous
 - Your goal, for most deponents, is to put them at ease in the beginning of the deposition so that they give you information freely, without you having to browbeat them for every answer

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

Getting the deposition started – cont'd

- Think impeachment at trial – cont'd
 - So you need a stock way of starting the deposition that isn't too formal or intimidating, but yet still accomplishes the objective of committing the deponent to his or her answers
 - Here is a good way of doing it:

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

Getting the deposition started – cont'd

- Think impeachment at trial – cont'd
 - Q. Now, Dr. Tude have you ever been to a deposition before?
 - A. No.
 - Q. Well, do you know how a deposition works?
 - A. Not really.
 - Q. Well, Dr. Tude, I'm going to ask you a bunch of questions about the accident/event and you'll have to answer them under oath. The other lawyers here are allowed to ask you questions too if they so choose. The court reporter is taking everything down and will prepare a written record of everything that is said, which we lawyers refer to as "a transcript." If you want to you can review the transcript to check if it is accurate and make any corrections before signing it. Do you understand?
 - A. Yes.

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

Getting the deposition started – cont'd

- Think impeachment at trial – cont'd
 - Q. Mr. Tude it is very important that you understand the questions and give accurate answers. If there is anything that you don't understand, or anything that you don't know or aren't sure of, you let us know, okay?
 - A. Yes.

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Depo Tips: Opposing Attorney's Perspective – cont'd

Basics – cont'd

Getting the deposition started – cont'd

- Think impeachment at trial – cont'd
 - This simple preamble accomplishes all of the objectives discussed previously, except it does so in plain, unassuming language that isn't likely to make the witness nervous
 - It can be easily modified, so that even if the witness says they have given a deposition you can say, "well then you know that it works like this..."

38  **Depo Tips: Opposing Attorney's Perspective – cont'd**

Basics – cont'd

Getting the deposition started – cont'd

Starting to ask questions

- Remember you are more likely to get the witness to give you useful information freely if you ask broad questions in a casual manner
- If you start with broad questions, you can then zero in on things that you need to. Use follow up questions to tie down details
- Remember it doesn't matter if your questions violate some evidence rule
 - your goal is to gather information (unless it's a perpetuation deposition)

39  **Depo Tips: Opposing Attorney's Perspective – cont'd**

Basics – cont'd

Getting the deposition started – cont'd

Starting to ask questions – cont'd

- Remember that you usually have two purposes in a deposition
 - (1) gathering information and getting the witnesses version of events; and
 - (2) "sealing off the exits," or eliminating possible versions of the story that isn't in the witness's version now, but which might sneak in there later

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Depo Tips: Opposing Attorney's Perspective – cont'd

Basics – cont'd

On the record - Off the record

- During the deposition you are "on the record" and that means that unless the court reporter transcribes information it might as well not exist
- So be sure to speak slowly and methodically
- You can ask the court reporter to "strike" a question that you realize doesn't make sense after you utter it
- But it's best not to get into the habit of doing this too much

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Depo Tips: Opposing Attorney's Perspective – cont'd

Basics – cont'd

On the record - Off the record – cont'd

- Remember, also, that if you refer to a document you may need to make that document an exhibit to the deposition
- You don't need to make every document a part of the record
- If the document has a Bates number then you can use that to pin the document down
- Again, simplicity is best
- You should only make things part of the record if you need to

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Depo Tips: Opposing Attorney's Perspective – cont'd

Basics – cont'd

On the record - Off the record – cont'd

- If you need to go off the record for some reason don't hesitate to do so

- Remember, the court reporters charge by the page and they are only too happy to let you, and your legal brethren, wax eloquent on the record
- More blabbing means more money

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

On the record - Off the record – cont'd

- You should try to limit the deposition record to the witness's testimony and the important discussions between counsel
- A lot of what gets discussed on the record among attorneys is pure crap
- Don't be afraid to suggest that a discussion take place "off of the record"
- If your informal discussion with the other lawyers leads to some agreement that needs to be memorialized you can always go back on the record and state it concisely

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

On the record - Off the record – cont'd

- If you are asking pointed questions about a key issue that is in dispute don't let the opposing counsel suggest that you "go off the record" so she can confer with her client
- Insist that pending questions be answered before taking a break

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

Common problems

- Inexperienced lawyers often run into problems during a deposition
- First, they tend to underestimate the time it will take to conduct the deposition
- Even a simple deposition taken by an experienced lawyer will take at least an hour

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

Common problems – cont'd

- A second problem, and much more serious, is that the young lawyer will often not have a clear idea of what they are trying to accomplish in the deposition
- It often helps to consider if you are:
 - (1) trying to just gather information
 - (2) getting specific admissions of key facts
 - (3) preserving testimony for later use at trial

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

Common problems – cont'd

- Third, lawyers sometimes use an inadequate method of questioning the witness
- How you ask questions depends on what you are trying to accomplish
- If you are trying to simply find out things then asking informal, open-ended questions is best

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

Common problems – cont'd

- If you are trying to pin the witness down then use leading questions
- And if you are trying to preserve testimony then use the exact method that you would use in trial, which is likely a methodical approach that takes into account evidentiary issues

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Depo Tips: Opposing Attorney's Perspective – cont'd
Basics – cont'd

Common problems – cont'd

- Fourth, many young lawyers frequently get confused about how to handle documents
- As discussed before, if you have documents that the witness prepared or received you should have those documents assembled in chronological order

50  **Depo Tips: Opposing Attorney's Perspective – cont'd**

Basics – cont'd

Common problems – cont'd

- For the documents that you expect to go over with the witness you should have several sets available at the deposition: one set for you, one set for the witness, and one set for each of the lawyers that will be attending the deposition
- If you make a document an exhibit you should immediately mark your copy (which you will be giving to the court reporter), and you should keep a running tab of the exhibit numbers that you have used so that when you introduce the next document you don't get confused

51  **Depo Tips: Opposing Attorney's Perspective – cont'd**

Basics – cont'd

Common problems – cont'd

- Fifth, there is the tendency to get bogged down in minutiae, especially when covering background information
- Remember your purpose
 - what information do you absolutely have to get out of this witness?
- If the witness says something interesting, but which isn't helpful, go on to a more productive topic
- It's easy to waste time in depositions. It's a tendency you have to fight constantly, even as you grow more experienced

52  **Depo Tips: Opposing Attorney's Perspective – cont'd**

Basics – cont'd

Defending depositions

- Defending depositions is easier than taking them, but that doesn't mean it is so simple that you don't have to prepare
- First, if there are documents in the case; gather all of the documents that your deponent wrote or received and assemble them in chronological order
- Have the witness come in the day before the deposition, if possible or at least a couple of hours early, and put the witness in a room and ask them to go through the documents
- Let them do it alone

53  **Depo Tips: Opposing Attorney's Perspective – cont'd**

Basics – cont'd

Defending depositions – cont'd

- After they have reviewed the documents or other materials that will help them orient their memory you can sit down and ask questions about key documents to help focus their attention

54  **Depo Tips: Opposing Attorney's Perspective – cont'd**

Basics – cont'd

Defending depositions – cont'd

- A question that often comes up is the issue of how you prepare the deponent without suggesting what their testimony should be
- Obviously, you aren't going to be telling the witness what to say
- It is unethical and unlikely to help you (and probably very likely to backfire)

55  **Depo Tips: Opposing Attorney's Perspective – cont'd**

Basics – cont'd

Defending depositions – cont'd

- But what you can, and should do, is to explain to the witness what the case is about and how their testimony fits into the case
- If you have identified the key themes that support your case (and odds are you have, or should have, done so) then you can weave those themes into your explanation of the case
- Most witnesses have no trouble understanding your theme
- If you find witnesses having trouble grasping your themes then you are probably not using