Fact Witness Depositions:

The Forgetful Witness and Interfering Parties; Objections at a Plaintiff's Deposition; Building Defenses Through your Case

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I. Introduction

In many asbestos cases, the most significant product identification/exposure witness is the plaintiff himself (or herself). In others, however, the plaintiff is either deceased or has no meaningful memory concerning the products with which he or she worked or was around. In these cases, the plaintiff often develops the product identification and exposure evidence through either co-workers, family members or both. These witnesses are crucial and must be examined effectively and efficiently. This paper provides suggestions to assist in doing just that.

II. This Is Cross-Examination

Before attending one of these witness depositions, counsel will have received a copy of the deposition notice. If you generated the deposition notice, remember one thing; this is your deposition. It this is the deposition of an opposing party witness you must cross examine that witness and take this opportunity to discover any information that is pertinent to your case or and information that you may need to fully analyze your case. If the deposition notice is addressed to you – read it. At the end it will typically indicate that the deposition is scheduled to continue day-to-day until concluded. Then it will say the following: "You are invited to attend and cross-examine." This invitation expressly permits you to ask leading questions. Do not waste this opportunity. In this instance you will be examining after lead counsel has concluded the general examination. You will therefore have the basic testimony from which to ask your questions.

Use leading questions whenever appropriate. They are intended to, and should, provide you with much more control of the examination. This is especially important when witnesses are describing tasks performed on or with products. You know how a brake job is performed or how dry wall is put up. Tell the witness how it was done rather than having the witness tell you. It is also appropriate when dealing with dates and times; you frame them and can limit the witnesses' observation opportunities accordingly.

III. Know Your Product

A large portion of the product identification witnesses' testimony will concern work performed on asbestos-containing products. In order to effectively handle this testimony, you must know how the product you are defending works and is worked on. How does it function? How is it serviced or repaired, and how often? What tools are used? How long does it last? There are materials you can review, either from your client or that can be obtained independently. Review them. If the witness is convinced that you know what you are talking about, he or she will be much more likely to agree with your leading questions. At the end of your questioning, it should be apparent that you know the product as well as the witness, or better.

IV. Investigate Witness's Relationship to Plaintiff, Trade or Employment Position, and Jobsites

You should have a basic understanding of what the witness did for work so that you can more effectively cross examine that individual on his/her use of (or work in vicinity of) your product. You should also

try to learn something about Plaintiff's/Witness's employer and jobsites. Basic on-line research will likely provide you with enough background information to properly articulate your questions and to understand the responses to your questions. For example, if a Plaintiff served onboard a ship during service in the US Navy, there are histories, descriptions, websites, blogs and discussions on every ship commissioned for use in the US Navy available on-line. Similarly, detailed Naval job descriptions are also available online. Conduct on-line research regarding the witness as you may find something you'll want to use.

V. Study Your Case File (Even Though It May Be Thin)

It is imperative that you review any file materials that you have prior to your deposition, including plaintiff's deposition, if applicable. Look for and review any prior transcripts of depositions the witness may have given. Though you may already know what topics you need to cover in your questioning, the information provided in your file will provide you with additional leads; and you need to follow-up on all additional leads. For example, information regarding parents' employment, other potential sources of toxic exposures, pertinent medical history, employment history, smoking history and union memberships can provide you with additional leading questions. Remember that witnesses are usually very nervous and they may forget to mention something. It is important that you remind them of certain facts and ask appropriate follow-up questions. If the witness is a family member and not a co-worker, then be prepared to ask some of the same types of questions you would ask the Plaintiff (personal and family background information, medical history questions, smoking history questions, etc.). Since you may not have the opportunity to cross examine a Plaintiff, important information can be obtained from a family member. If the Plaintiff has been deposed, you can "test" some of Plaintiff's answers through your questioning of this witness – there may be conflicting testimony.

VI. Definitely Make an Outline, Maybe Use It

Before attending one of these depositions, you will likely be provided an outline of sample questions or topics. These may come from your client, or from other sources. Outlines may be helpful. There may well be information contained in them that is crucial to be included in your examination. They should be consulted and tailored to fit the specific case.

These outlines are, however, dangerous. It can be easy to become caught up in them when questioning witnesses. Worrying about missing something on the list of questions may cause you to miss something much more important – the answer to the last question you asked. The solution to this sounds easy, but can be difficult. Listen to each answer carefully. Be sure that you have understood the answer before moving on. If the answer raises questions or takes you in a new direction, go with it and explore. You can always pick up with the outline later, and you may develop helpful testimony before you do.

VII. Explore Witness Bias/Favorability/Conversations/Deposition Preparation

Unless he or she is appearing pursuant to a subpoena, the witness is testifying voluntarily, most often at the request of plaintiff's counsel. These witnesses are human beings. They have agendas. They are not taking time out of their schedules for no reason. You are entitled to explore these issues, and you should do so. In a professional way, the relationship between the witness and the plaintiff should be discussed.

The witness almost always has had conversations and meetings with plaintiff's counsel. The express and specific contents of those discussions are absolutely discoverable so long as the discussions relate to the

case at issue. If the Plaintiff's counsel represents the witness in his/her own case, then discussions related to the witnesses' case may be privileged. Photographs, catalogs and any other documents used during those conversations are likewise discoverable. The witness should describe each and every such meeting. You should ask the witness if he or she understands the nature of the case and his or her role in it. All comments by plaintiff's counsel should be covered. Were specific products mentioned? By Whom? In what context? Was the witness told to emphasize certain products or categories of products and deemphasize others? Were the implications of the various bankruptcies explained? Does the witness understand the significance of which products he or she describes and which ones he or she does not? These are difficult questions and require some nuance. Also ask if the witness reviewed any documents or spoke with anyone else, including the Plaintiff, prior to the deposition.

VIII. The Witness Is *Not* the Plaintiff

Most of these witnesses will be testifying about working with or around asbestos-containing products. They will provide details, often painstaking ones, about just what they did to, on or with pumps, valves, boilers, joint compound, friction products, etc. It is easy to get caught up in this detail. Never forget, however, that this witness is not the plaintiff. For the witnesses' testimony to be relevant it must describe the plaintiff's exposures, not the witness'. Your questions must focus on what the witness can or cannot say about what the plaintiff did to, on or with the products at issue and the plaintiff's alleged exposures to the products that you are defending. For each portion of the witnesses' testimony, you should be thinking, "and that exposed the plaintiff to my product, how?" If the answer to that question is "not at all," leave that area of the testimony alone.

IX. Minimize the Testimony

As noted, the witness is being produced for a reason – to credibly identify as many solvent defendants' products as possible and to describe how the plaintiff was sufficiently exposed to asbestos from all of them. Think in terms of the plaintiff's burden of proof on causation and exposure – frequency, duration and proximity – and relate it to your product. Put another way – How much? How often? How close? You have some of this testimony from the general lead examination. Your job is to take this testimony and make it either unbelievable on its face (unlikely) or to cast it as being as insignificant as possible. Three major subject areas for cross-examination on these issues consistently arise - memory, opportunity to observe and inaccurate work activity descriptions.

Given the nature of this type of testimony, memory is always fair game. The witness is often describing work that occurred more than 40 years ago. Despite this, he or she will without hesitation describe brands, logos, colors, labels and many other details about specific products. A witness will also insist, despite that the witness had his/her own work to do; the witness will have a clear memory of watching every minute of a Plaintiff's work down to the most minute of details. Moreover, distinctions will be made between very similar products, with the witness affirming that one product was used over the other. This is inevitable. It can, however, be questioned.

Most work situations in these cases involved the use of many products, some asbestos-containing, some not. If someone used an electric grinder or putty knife to remove asbestos-containing gaskets, and did it repeatedly, why can that person recall the brand of gaskets but not of the grinder or knife? Well-put questions about all of the products used may have the witness recalling only (or nearly only) brands of asbestos-containing products, and only those made by named defendants to boot.

As with any percipient witness, these witnesses may only testify about what they saw or heard. You will know about the dates, times, etc. from the general lead examination. Use those times to limit the witnesses' body of knowledge about the plaintiff's alleged exposures. Establish that the witness knows nothing about the exposure except for what happened during the times he or she actually observed the plaintiff (*i.e.*, you cannot testify about what the plaintiff did before or after the time you worked with him). Establish that the witness had his or her own responsibilities, and was not spending much time actually watching the plaintiff work with the products. After properly "bracketing" the periods of actual observation, you will likely have reduced the alleged exposure times.

Sometimes these witnesses just have it wrong. As noted, you know the product you are defending. You know how long a mechanic should use an air hose or how many times joint compound should be sanded. Likewise, you know what color package your product came in and when warnings were given and when.

If a witness is both unshakeable and mistaken, you are probably better off leaving the testimony as it is. There are times that a witness is wrong and you cannot persuade the witness to change his/her mind. The more you try, the more the witness digs his/her heals in. You need to know when to leave the testimony alone, confident in the knowledge that you will be able to offer the correct information through either corporate representative depositions or expert testimony.

After your examination, you should have from the witness a specific description of how the plaintiff was exposed through your product or products, how often it occurred and when it occurred. Hopefully, your questions will have fleshed out any memory problems and have limited the exposure frequencies, durations and proximities to the extent possible.

X. Interfering Attorneys

Addressing interfering attorneys is one of the most difficult obstacles to overcome during a deposition. Interference is a distraction and it is often the result of opposing counsel's attempts to throw you off-guard, to derail your questions, or to try to take control over a deposition that is not going as he/she had planned. The interference is not in the form of objections (discussed below), but typically in the form of interruptions, back-handed comments, attempts to take over questioning and sometimes general bad behavior. Here are a few suggestions on how to respond to these situations:

a) Take a break, go off the record, and discuss the issue quietly and calmly, away from the witness;

b) If the opposing counsel asks if he/she can "clarify" something in the middle of your questioning, then remind counsel that he/she will have an opportunity to question when you have completed your questions. If the "clarification" is an important one, advantageous to all of the parties, then offer to clarify a point for opposing counsel.

c) If inappropriate comments or bad behavior is exhibited during the deposition, then point out and describe the bad behavior on the record (explain what opposing counsel is doing – *i.e.* shouting, gesturing, etc.), state that counsel is interfering with your questioning, and move on. If the behavior is particularly appalling, then you may consider stating, on the record, that you will address the matter with the Court at a later time.

d) Do not engage, remain professional, ignore the side-show, and remember that your job is to question a witness and elicit favorable testimony.

XI. Dealing With Objections

Objections can range from appropriate, to excessive to "made-up". The tenor of the objections can be matter of fact and on rarer occasions, hostile. Consider the objections that are being lobbed at your questions and analyze them. First, consider agreements regarding objections in advance. In many cases, all objections, except as to form and all motions to strike are reserved until the time of trial. Where such an agreement is in place, counsel should only be objecting as to the form of the question or based on a claim of privilege. If the stipulation is not in place and on the record, then there is no agreement as to objections, and, counsel must make the appropriate objections on the record during the deposition and those objections must also be addressed during the deposition. Nevertheless, lawyers will often make objections that are improper and designed to interrupt the flow of discussion, which may also distract a witness. Where objections amount to bad behavior, see the above suggestions on how to respond.

Whether you are making or receiving objections, some improper objections include: Speaking Objections (where the objection appears to be more of a long drawn-out statement that is designed to allow the attorney to testify himself/herself or to instruct or coach the witness); Hearsay (appropriate at trial but not appropriate for a discovery deposition); Irrelevant (unless the deposition questions are completely off of the subject-matter of the lawsuit, then any discoverable matter is potentially relevant and relevance becomes an issue at trial); Opinion (unless the opinion calls for an expert opinion, it is permissible to inquire about someone's opinion); Assumes Facts Not In Evidence (another objection that is appropriate for trial and not for a discovery deposition unless the witness is being asked to speculate in his/her answer).

Privilege-Based Objections are appropriate depending upon the circumstances and depending upon the counsel's relationship to the witness (Attorney-Client; Work-Product, Spousal).

There are many "Form-Based Objections" that can be properly utilized and those objections should be articulated. If they are not articulated, you may be asked for the basis of your "Form" objection so that opposing counsel has the opportunity to cure the purported defective question. Some form based objections include: Vague; Unintelligible/Confusing; Mischaracterizes Earlier Testimony; Calls for a Legal Conclusion; Calls for Speculation; Ambiguous; Compound; Argumentative; Asked and Answered; Harassing; and Leading.

XII. The Take-Home Exposure Witness

In cases where the Plaintiff is alleging household exposures to asbestos, the take-home exposure witness ("worker") is one of the most important sources of information. You should be prepared to cross examine this witness on every aspect of his or her work with asbestos-containing products and exposure to asbestos-containing products. Remember that a Plaintiff needs to demonstrate that asbestos fibers were liberated from a product that was manipulated by the worker (or in the presence of that worker); the fibers somehow came to rest on his/her clothing; the worker brought the asbestos fibers home with him/her on the clothing; and the fibers were liberated into the Plaintiff's breathing zone. These are very difficult cases to prove, but your job just got harder. You need to cross examine the worker/witness to establish that the asbestos fibers did not reach the household and could not have caused an exposure to the Plaintiff. Therefore, your questioning must inquire about everything the witness/worker did from the workplace to (and in) the house. For example, try to demonstrate that there was no friable asbestos in the area of the worker; or try to demonstrate that the worker wore a uniform at work, he/she changed at work and the uniform was laundered at work or there were shower facilities at work; or try to demonstrate that the worker removed dust from his/her clothing with an air-hose before leaving the workplace to minimize the potential for dust on the clothing.

XIII. Defense Fact Witnesses – Witnesses That Will Assist in Defense of a Case

During the course of your case, always consider fact witnesses that will assist your client in his/her defense. It happens often that a Plaintiff's description of his/her work with asbestos-containing products is not accurate for a variety of reasons (*i.e.* wrong product, wrong application, no asbestos-containing product would have been used for the tasks described). Consider the possibility that an individual with specific industry experience may assist your client's case by simply explaining how he/she performed identical work and products/he she may have used. Your client may assist you in locating an individual with the specific workplace or product experience involved in the case. You may also locate co-workers that have not been offered by depositions by a plaintiff's lawyer and do not have the same biases or inclinations that such witnesses may have. If you locate any such witnesses, interview them informally and assess whether his/her testimony may be helpful to your case, and then determine whether to depose the witnesses you have located.

XIV. Conclusion

Examination of these witnesses is a challenge. The information they provide during depositions may well determine whether the case is a summary judgment candidate, a trial candidate or a case that should be settled. The suggestions above are just that, suggestions, and opportunities to expand or improve on them are unlimited.

Best of luck.