



A Litigation Tip a Minute

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Witness Statements

- Talk to witnesses before filing suit
 - Witnesses to car crash
 - Other employees in discrimination case
 - Customers in a fraud case
 - Former employees: fair game
- Only record statements after interviewing witnesses

Witness Preparation

- Deposition preparation videos
- Three basic rules:
 - Understand the question being asked
 - Listen to and answer only that question
 - “I don’t know” is a good answer
- Role-play with witnesses to work on the rules
 - Act like the other lawyer
 - Fix problems before going on the record

Witness Preparation

- Review docs
 - Interrogatories, petition, medical records
- Work chronologically with client
 - Timelines, dates of events, when things were said
- Better preparation = better performance
- “Everything is possible” - not in a deposition

Depositions

- Video tape your own depositions of parties and key witnesses
 - No certification needed – Rule 57.03
 - Sync video with transcript later
 - Play video at trial
- Who can attend? Anyone.

Depositions

- Form objections – call them out

24 Q Was there a reason why you didn't come downstairs to
25 look at the ice patch or talk to Leone or talk to Charlie

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1 **about this incident?**

2 MR. SNEAD: Obj- -- object to the form of
3 the question.

4 MR. BURGER: What's the form objection?

5 MR. SNEAD: Just to the form of the
6 question. It's argumentative, assumes facts.

7 MR. BURGER: What facts?

8 MR. SNEAD: Without foundation. I'll make
9 my record. I'm happy with my record, just fine.

10 MR. BURGER: Okay. I only ask because if
11 there's a form objection and I have a chance to
12 cure it, I don't want that to be stricken later.
13 So I don't know -- and if so, if I'm messing up
14 and I can say it a better way, that's why I
15 asked because I don't want you to sandbag me.

16 MR. SNEAD: I made my record, happy with
17 it.

18 MR. BURGER: All right.

Depositions

- Overly instructing/answering attorney – call them out
 - Too burdensome? Stop the deposition, go to court
 - OR: take out a second camera and point it at the offending attorney

Depositions

- Take breaks if client is not listening to advice
 - Continue teaching witness throughout
 - Start out nice, but get more aggressive and woodshed the witness if they refuse to listen
- Don't forget the little people
 - Physical therapists
 - Police officers

Trial

- Client must be truthful about **EVERYTHING**
- Simpler, shorter case wins. Always.
 - Every action in trial must have a purpose
 - Document, video, witness
 - Question the question
- Plaintiff cannot whine, exaggerate, malingering

Trial

- Defendants should take more responsibility
 - Especially when negligence, contract breach, rule violations obvious
- Jurors/judges see through the wiggle room
- Taking responsibility obviates unnecessary litigation

Trial

- Splice deposition parts to help your case
 - But DON'T mislead or take quotes out of context
- Use depositions for any purpose
 - No need to call hostile witnesses in case-in-chief
 - More effective, and more control

Trial

- Read important medical straight to the jury
 - Plaintiffs
 - Consistency, facts of incident, causation, procedures, pain complaints, time period, diagnosis/prognosis, future medical
 - Defendants
 - Prior symptoms/treatment, inconsistent pain, degenerative conditions, delays in treatment, trauma after the incident

Trial

- Always let jurors use notes
- No time period to subpoena witness for trial
 - Subpoena records custodian during trial if needed
 - Bring in the investigator who took the statement
- Plaintiff has the burden to bring jury instructions

Trial

- Make sure pictures and videos fully help you
 - Why did you take that picture of your injury in the hospital?
- Keep cross examinations short.
 - Don't be a bully

Trial

- R.S.Mo § 494.470 to strike venirepersons for cause
 - “No person who has formed or expressed an opinion concerning the matter or any material fact in the controversy in any case that may influence the judgment of such person ... shall be sworn as a juror in the same cause.
- Under-promise and over-perform

Question Techniques

- Essential questions right away
- On cross, witnesses should admit every clear principle in short answers – but stick to their guns
- Double down on preposterous positions

Social Media

- Tell clients to stay off of social media about their cases.
 - But also prepare for when they do not listen

17 Q. Do you have a practice of enjoying getting
18 drunk --
19 A. No.
20 Q. -- and drinking to intoxication?
21 MR. SANNER: Object to the form. I'm going
22 to instruct her not to answer.
23 Q. (By Mr. Burger) You joined the "I love getting
24 drunk" group on Facebook?
25 A. I don't remember.

3 Q. (By Mr. Burger) Did you join the "I love
4 getting drunk and why the fuck not" group on Facebook on
5 March 26, 2008, two weeks after this accident?
6 A. I guess so. I don't know.

- Jurors will use the internet to research your case. Beware what is out there.

Social Media

- Get your client's Facebook page, and see what is on the other guy's
- Early juror list? Go to every juror's Facebook page, case.net.
 - See what they like, what they do.
- Facebook objection

Rules

- Establish legal obligations and breaches
- Establish what the contract or custom and practice required, and show how violated
- DFT: Establish what rules the plaintiff violated
 - e.g., must mitigate damages, can't exaggerate symptoms

Rules for Hotels and Ice

7 Q Okay. So does the, uh -- does the -- any of the
8 branch standards from the Days Inn talk about, um, having a
9 safe walking environment?

10 A Yes.

11 Q Okay. What do they say? What do they say?

12 A That it would be the responsibility of the company to
13 keep the property safe for the arriving and departing guests.

4 **this one. That's Exhibit 11. Now, if you don't have gutter**
5 **problems, how come you have a bowl underneath the gutter in**
6 **the bottom picture on Exhibit 11?**

7 A I don't know.

8 **Q Is that because water was coming out of the gutter**
9 **into the bowl?**

10 A I don't know. I'm not aware.

11 **Q Any other reason to collect water with a bowl under a**
12 **gutter other than a gutter problem?**

13 A I don't know.

16 **Q Okay. How often does it occur that water comes off**
17 **the roof in the area near the pillar that I showed you in 13,**
18 **collects at the base of the pillar as we see in Exhibit 6 and**
19 **freezes?**

20 A I don't know about freezing, no. I don't -- I don't
21 have the exact.

22 **Q Is it something that occurs a lot, maybe once or twice**
23 **a year?**

24 A Probably once or twice a year.

25 **Q All right. And it happens -- and when does that tend**
1 **to happen?**

2 A Um, after, you know, like after it collects and
3 temperature goes down, it will refreeze in that area.

4 **Q** Do they talk about how to train your housekeepers to
5 mop up spills or managers or anything?
6 A Yes.
7 **Q** And do they talk about how to keep the, um -- do they
8 talk about that you need to have safe walking surfaces?
9 A Yes.
10 **Q** All right. And do you agree that you need to have
11 safe walking surfaces?
12 A Yes.
13 **Q** And let me restate that because I stopped talking. I
14 got tongue-tied.
15 Do you agree that you need to have safe walking
16 surfaces --
17 A Yes.
18 **Q** -- for your guests?
19 A Yes.
20 **Q** Why?
21 A It's liability for the hotel, and we have to care for
22 the guests' health, too.
23 **Q** Someone could get hurt if you don't --
24 A Sure.
25 **Q** -- right?

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1 And so do you endeavor to have safe walking
2 surfaces for your guests?
3 A Yes. It's my priority when the weather is bad
4 outside, absolutely.
5 **Q** Okay. And you need to have those safe walking
6 surfaces both inside and outside the hotel?
7 A That is correct.
8 **Q** All right. And so these -- um, and the Days Inn
9 branch standards talk about that, right?
10 A Yes.

Rules from Insurance Companies

17 Q EMC puts out risk assessments and how to help your
18 business reduce risk of slips, trips and falls. Have you ever
19 seen any of that?

20 A No.

21 Q Have you ever inquired with anyone in the company
22 whether they got any of that stuff?

23 A No, I have not.

Rules in Auto Crashes

16 Q. So you looked away from in front of you and you
17 knew there was a car in front of you. You moved the
18 bucket of keys away from your foot, and you drove your
19 van into the back of my client's car?

20 A. I thought I had enough time, yes, sir.
21 Normally I would have if it wouldn't have stopped.

22 Q. Okay. So is the answer to my question yes?

23 A. Yes, sorry.

--

22 Q. (By Mr. Burger) And you know that when you're
23 traveling, vehicles in front of you can stop at any time?

24 A. Yes.

25 Q. Vehicles stop -- and you've driven in your

1 life. Vehicles stop for stalled cars in the roadway?

2 A. Yes.

3 Q. Vehicles stop for pedestrians crossing the
4 roadway?

5 A. Yes.

6 Q. Bicycles, right?

7 A. Yes.

8 Q. Aren't you counseled in driving for Hoppy's to
9 be a very careful and prudent driver?

10 A. Absolutely.

11 Q. And that's what you try to do?

12 A. Yes, sir.

16 Q. The only reason was the not looking in front
17 of you, fair?

18 A. Right. Yes.

22 Q. You knew that as you were driving that you
23 could encounter cars slower than you?

24 A. I think you can -- you know that anywhere.

25 Q. Right.

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1 A. Yes.

2 Q. So that's a yes?

3 A. Yes.

4 Q. You can encounter stopped cars?

5 A. Yes.

6 Q. You can encounter kids, right?

7 A. Yes.

8 Q. So is there anything that you could have
9 done differently to avoid the car crash?

10 MR. LANDER: I'm going to object. It calls
11 for her to speculate. You can answer it, if you can.
12 If you can't, just tell him.

13 A. You can stare straight ahead at all times.

14 Q. (By Mr. Burger) Or certainly earlier than
15 you did?

16 A. Right. But part of your driving is checking
17 your rearview mirror, and checking things going on
18 behind you as well.

19 Q. But you have no reason to think that that
20 was what you were doing?

21 A. I very well could have.

22 Q. But you don't remember?

23 A. I don't remember. That's correct.

Rules in Trip and Fall

1 A Yes, sir.

2 Q Aren't you trained to make sure that there
3 aren't low carts in walkways so that customers
4 don't fall over them?

5 A Yes, sir.

6 Q And do you disagree with that?

7 A No, sir.

8 Q And don't you have customers who are old people
9 or who are blind, or who are in walkers and
0 wheelchairs, that can't navigate stuff like you
1 can?

2 A I'm sure.

3 Q How old are you?

4 A I'm 47.

5 Q You have great vision?

6 A No, I don't.

Rules

- Get to the simple truth of every proposition.
 - Don't overly complicate simple ideas
- Ask the defendant in a tort case or in a breach of contract case what they could do differently

20	Q. All right. So anything else you would
21	have changed in your treatment even with -- in
22	the light of hindsight other than what you've
23	told me?
24	A. I would have given the antibiotic sooner.

Investigation

- Did DFT investigate this incident?
 - Yes: Great! What did you do/what did you find?
 - No: So this kind of thing has never happened before, and it's a strange occurrence, but you never looked into it?
- Always investigate subsequent remedial measures
 - DFT: Admit a measure was made because of this incident, and it won't come in against you

Doctors

- Always talk about the money the doctor makes from testifying

6 Q. (By Mr. Burger) You've had a chance, is it fact, to
7 review that deposition transcript, isn't it accurate that
8 ballpark you've made \$3 million in your career from
9 medical-legal work as -- the type of which we've been discussing
10 here?

11 A. Yes, sir, I think that's correct.

12 Q. And we've had that number in the last four years of
13 over \$700,000, we already did that math?

14 A. We went through that math, yes.

15 Q. All right. Now, and that's -- you do two or three
16 IMEs a week?

17 A. Yes.

18 Q. And you do three or four depositions a month?

19 A. Yes.

20 Q. So in this case, and an IME is when you actually see
21 someone; is that correct?

22 A. Yes.

23 Q. You did not see Mr. Thomason in this case?

24 A. No, I did not.

Doctors

- In PI cases, establish whether the doctor has an independent recollection of events (outside of the records)
 - Often, very little recollection
- Did the lawyer provide the doctor his opinions?

Miscellaneous

- Write letters immediately demanding videotapes and photographs be preserved
- Focus groups – valuable tools
 - Outside view of the case
 - Non-lawyers, unfamiliar with facts, etc.
 - Your client's case should never win a focus group
 - Learn how your jury will hear your case

Miscellaneous

- ERISA – not a lien, but a subrogation interest
- Use MO lien statute if needed (R.S.Mo § 430.225)
- Cannot promise to pay lien out of trust account (Formal Opinion 125)
 - Client can protect/indemnify, but you cannot
 - May be in your client's best interest to take money and run, not pay liens, and have further litigation down the road

Miscellaneous

- Confidentiality provisions – bogus
 - Expose client to future litigation
 - May expose client to tax liability
 - Can't pay someone to get hurt, but can certainly pay someone to keep quiet