

DEPOSITIONS

PHARMACEUTICALS

Videotaped depositions, involving witnesses at their most vulnerable, often present different challenges than the usual videotaped depositions of opposing witnesses, attorneys Carole W. Nimaroff and David Shimonov say. The authors provide practical advice on conducting a trial preservation deposition of a sympathetic plaintiff in pharmaceutical and medical device actions, and urge defense counsel to proceed as if the jury is present and observing the process.

Underestimating Visual Impact of a Videotaped Deposition Of a Sympathetic Plaintiff Can Be a Costly Mistake



BY CAROLE W. NIMAROFF AND DAVID SHIMONOV

In many product liability pharmaceutical and medical device actions, plaintiffs assert that declining physical health or the risk of possible death of the plaintiff requires a trial preservation deposition before trial.

Videotaped depositions, involving witnesses at their most vulnerable, often present different challenges than the usual videotaped depositions of opposing witnesses. When conducting a trial preservation deposition of a sympathetic plaintiff, defense counsel should proceed as if the jury is present at the deposition, observing the process.

The objectives of the traditional fact gathering discovery deposition are replaced with the singular objective of highlighting favorable facts for the jury so a compelling story can be presented at closing argument, while also exhibiting the appropriate civility throughout the process to avoid offending the jury's sensibilities.

Throughout preparation, (i) confirm compliance of statutory requirements; (ii) demand documents prior to the deposition; (iii) elicit favorable facts; (iv) keep it short and simple; and (v) prepare to show the witness respect. Defense counsel should not underestimate the potential impact the sympathetic plaintiff will have on the jury in contrast to a combative defense lawyer. Thus, tactical planning is critical to success.

Though there is no exclusive approach for every case, below are practical pointers to consider irrespective of individual style.

Confirm Compliance of Statutory Requirements

Upon receipt of a notice to conduct a trial preservation deposition, defense counsel must first ensure compliance with the applicable federal and/or state rules.

Federal Rule of Civil Procedure 30 delineates the notice requirements before taking a deposition.¹ Likewise, there are state-specific procedural rules for noticing a videotaped deposition for use at trial. Nevertheless, even when the opposing counsel has failed to comply with the applicable rules, defense counsel should be prepared for the admission of the videotape because plaintiff will likely be unavailable at trial as a consequence of declining health or death. Generally, the format and details of the deposition are coordinated between the parties, so it is beneficial to establish a good working relationship early on.²

Demand Documents Prior to Deposition

Without a thorough review of the facts, conducting the most effective trial deposition is compromised. Thus, defense counsel should exhaust all efforts to gather the most robust evidence in advance. Demand production of all of plaintiff's medical records, the best objective evidence of alternative medical causation and statute of limitation defenses. Mine the documents and draft helpful questions to ask, while identifying damaging facts. Additionally, consider requesting a discovery deposition in advance of the preservation examination to explore plaintiff's memory of events, and lock in testimony. Previewing plaintiff's testimony at a discovery deposition allows the defense to narrow the issues and ask more focused questions at the preservation deposition. Finally, be prepared to seek court intervention if opposing counsel is non-compliant with production. Striking a balance to accommodate plaintiff's health without depriving counsel the right to mount a defense is paramount and the failure to do so may alter the outcome of the case.

In a recent pharmaceutical product liability action involving a claim that plaintiff's use of diet drugs caused a fatal lung condition, opposing counsel noticed a videotape deposition to preserve plaintiff's testimony for use at trial. The parties agreed to initially conduct a discovery deposition followed by a preservation deposition. Plaintiff's medical history and providers, his product usage story, the identity of persons with relevant knowledge, his discussions with prescribing physicians, his knowledge of the risks, and his current health condition were topics thoroughly explored during the discovery deposition. This eliminated the uncertainty regarding plaintiff's conduct and recollection of events, and allowed for a more effective, efficient cross-examination during the trial preservation deposition. *Lesson learned:* defense counsel must take control, and set the stage to take the most effective deposition for the jury to evaluate.

¹ Fed. R. Civ. P. 32 enumerates the requirements necessary to use a deposition at trial.

² Defense counsel should be prepared to seek a protective order if plaintiff's counsel insists on conducting the videotaping in a potentially prejudicial manner or if the plaintiff's condition appears critical.

Elicit Favorable Facts

Counsel must elicit favorable evidence to provide the jury with an alternative perspective to evaluate plaintiff's story. Indiscriminately addressing every single point the witness said on direct serves no purpose other than to rehash testimony that is most likely harmful to the case. At the preservation deposition referenced above, the cross examination was limited to exposing helpful evidence that: (i) obesity caused plaintiff's multiple life threatening health conditions; and (ii) obesity severely diminished his quality of life. Below are some exemplar questions and responses:

Theme: Deadly Co-Morbid Conditions

- Q. You've told us that you have always suffered from being overweight; is that right?
A. That's correct.
- Q. And you understand the seriousness of some of these health effects that can result from being obese; is that right?
A. Yes, ma'am, I think so.
- Q. And in particular, you understand that obesity can cause high blood pressure, right?
A. Yes.
- Q. And you understand that high blood pressure can cause cardiovascular disease, right?
A. Yes, ma'am.
- Q. And you understand cardiovascular disease can lead to death; is that right?
A. It sure can.
- Q. [I] n addition to hypertension, you understand that obesity can cause diabetes; is that right?
A. Yes.
- Q. And you understand diabetes, if uncontrolled, can also be life-threatening, right?
A. Yes, sure do.
- Q. And as you've been diagnosed with high blood pressure, you've also been diagnosed with diabetes; is that right?

Carole W. Nimaroff is a counsel in Hughes Hubbard & Reed's Product Liability and Toxic Torts Practice Group. Nimaroff has over thirty years' experience representing a broad spectrum of pharmaceutical and medical device manufacturers in the coordination of high stakes mass tort products liability litigations in both multidistrict and state coordinated proceedings. David Shimonov, an associate in Hughes Hubbard litigation department, assisted with this article.

To request permission to reuse or share this document, please contact permissions@bna.com. In your request, be sure to include the following information: (1) your name, company, mailing address, email and telephone number; (2) name of the document and/or a link to the document PDF; (3) reason for request (what you want to do with the document); and (4) the approximate number of copies to be made or URL address (if posting to a website).

A. Yes.

■ Q. Now, in addition to consequences of obesity, such as diabetes and hypertension that we've talked about, you also talked about obstructive sleep apnea, right?

A. Yes, ma'am.

■ Q. Now, you've been diagnosed with that since the 1990s, right?

A. Yes, ma'am.

■ Q. And obstructive sleep apnea, if untreated, can be life-threatening, right?

A. Yes

Theme: Quality of Life Suffered

■ Q. Now, in addition to the high blood pressure, the diabetes and the obstructive sleep apnea, you'd agree with me also, that carrying around excess weight can cause undue stress on your joints and your back? Is that fair to say?

A. Fair to say.

■ Q. And you've had joint problems for years, correct?

A. Yes, ma'am.

■ Q. You've been diagnosed with arthritis, right?

A. Yes, ma'am.

■ Q. And that's long before you ever used diet drugs, right?

A. Yes, ma'am.

■ Q. You had two knee surgeries, right?

A. Yes, ma'am.

■ Q. You also had some ablations to your back, right?

A. I did, yes.

■ Q. You also had injections in your back and your hip; is that right?

A. That's correct.

■ Q. And you use morphine; is that right?

A. I've used that.

■ Q. And you continue to use morphine today; is that right?

A. That's true.

Also, be prepared with prior testimony and records to lock in plaintiff's testimony on pivotal issues that can affect the verdict. Firmly controlling the witness to clarify an important favorable fact, without being perceived as bullying the witness is essential. A respectful cross-examination of plaintiff can be effective and simultaneously not be perceived by a jury as rude or overly aggressive if properly conducted. But, a lengthy and confrontational cross-examination of a seriously ill plaintiff may invoke the jury's sympathy and potentially impact the verdict. The last thing defense counsel wants is to appear as anything other than solicitous of the plaintiff's condition.

Each defense counsel must find the balance to most effectively communicate the favorable facts to the jury, while contemporaneously avoiding being perceived as

confrontational and insensitive. *Bottom line:* conducting an effective videotaped preservation deposition requires strategic focus on defense themes and a command of the favorable facts.

Keep it Short and Simple

Like any other cross-examination in the courtroom, elicit terse "yes" or "no" responses.

The sole purpose of the preservation deposition is to underscore the few, most impactful, helpful facts for the jury.

Cross-examination should *not* provide plaintiff with a second chance to tell his or her sad story. Also, relentlessly questioning a plaintiff in a precarious physical state can be interpreted by the jury as exhibiting insensitivity towards the plaintiff and harm your case.

Be Respectful

Counsel must at all times be singularly focused on how the jury will not only interpret the evidence, but also react to counsel's demeanor. Their sympathies will generally gravitate *towards* the individual who has been injured, and *away* from the combative attorney. Any action that could conceivably alienate the jury should be avoided. Displaying respect for the plaintiff and family is paramount. This includes counsel's tone of voice, physical movements, and small overtures of kindness, such as inquiring if the witness needs a break or water. These seemingly insignificant gestures are noticed by jurors, and counsel would be wise to avoid conducting a contentious, aggressive examination. Set the stage with a tone of respect before commencing cross-examination to demonstrate concern for the plaintiff as follows:

■ Q. Mr. [-], good morning.

A. Good morning.

■ Q. You feeling okay?

A. Yes, ma'am.

■ Q. Okay. I want to make sure that you're okay to continue.

A. Yes, ma'am.

Also, avoid asking gratuitous questions that might be perceived as having no connection with the claims made, because jurors may interpret that line of questioning as pure harassment and offensive conduct. Tread cautiously when questioning about irrelevant personal details that are not pertinent to the case, such as a party's unrelated criminal or sexual past, since merely asking these questions may turn the jury against the defense. Defense counsel's sole focus must be on the sensibilities of the jurors.

There is no uniform approach in conducting a videotaped deposition of a sympathetic plaintiff for trial. However, the objective is to elicit favorable facts to support the most effective presentation to the jury at closing. Given the powerful visual impression the sympathetic plaintiff may bestow upon the jury, it is axiomatic that counsel's every action should convey respect during the trial preservation deposition or risk alienating the jury. If the cross-examination is not conducted with the appropriate level of civility, the consequences may cost the defense the verdict.