PRACTICAL EVIDENCE FOR LITIGATORS

CONDUCTING DISCOVERY

By

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I. Purposes of Discovery

A. Discovery is important to eliminate concealment and surprise and as a method to determine what the real issues are in order that trial preparation can be limited to only those issues which are truly contested. It should not be used to harass or intimidate or force an adversary to capitulate under economic pressure. See *State ex. rel. Anheuser vs. Noland*, 692 S.W.2d 325 (Mo. App. 1985).

B. Scope of Discovery. The general scope of discovery is set forth in Rule 56.01(b)(1) and is identical to the Federal Rule 26(b)(1). It basically provides that except for privileged matter, discovery may be had concerning any matter relevant to the subject matter involved in the pending action if it appears reasonably calculated to lead to the discovery of admissible evidence. That may include:

1. Information concerning the existence, description, nature, custody, condition and location of any book, document, or other tangible thing.
2. Identity and location of persons having knowledge of any discoverable matter.
3. Information concerning insurance.
4. Facts and opinions held by experts.

C. Cases on Discovery.

1. *State ex. rel. Hackler vs. Dierker*, 987 S.W.2d 337 (Mo. App. 1998). Identity of witnesses from whom statements have been taken constitutes intangible work product.
2. *State ex. rel. McConahan vs. Allen*, 979 S.W.2d 188 (Mo. Banc. 1998). Surveillance video of workers' compensation claimant taken by employer was a statement of the claimant that was discoverable without a showing of undue hardship. Production of surveillance video could be compelled by use of a subpoena pursuant to Section 287.560 which provides that discovery may be compelled in accordance with Rules of Civil Procedure.
3. *State ex. rel. Crowden vs. Dandurand*, 970 S.W.2d 340 (Mo. Banc. 1998). A patient waives physician/patient privilege by placing physical condition in issue under the pleadings, but the waiver extends only to medical records bearing on parts of the body referenced by the petition. See also *Fierstein vs. DePaul Health Center*, 949 S.W.2d 90 (Mo. App. 1997), where a medical provider that reveals privileged information by mailing records to opposing counsel in lieu of attending a deposition may be sued in tort for breach of fiduciary duty and confidentiality. Likewise, it is a professional misconduct for opposing counsel to review or otherwise use privileged materials that a health care provider mails to that attorney contrary to a subpoena requiring a production of documents at a deposition.

4. *State ex. rel. Madlock vs. O'Malley*, 8 S.W.3d 890 (Mo. Banc. 1999). Personal injury automobile accident. Defense wage and personnel authorization form allowing release of "any and all information" concerning personnel records, wage records, workers' compensation, disability claims, and other information – overbroad and impermissible. The trial court had no authority to compel parties to enter into stipulated, protective order limiting production. A protective order limiting disclosure of records to parties, witnesses, attorneys and staff, and litigation is inadequate since it allows disclosure of irrelevant personal information to adverse parties.
5. *State ex. rel. Justice vs. O'Malley*, 36 S.W.3d 9 (Mo. App. W.D. 2000). Prohibition action relating to discovery of medical records and underlying medical malpractice case. Where the petition alleged mis-diagnosis of appendicitis, caused appendix to rupture. Defendant served subpoena for a deposition on a hospital purported to require production of any and all records without limitation. The trial court denied the motion to quash and ordered the hospital produce all records relating to any condition for nine years. Held the trial court abused discretion.
6. *State ex. rel. Stecher vs. Dowd*, 912 S.W.2d 462, revisited. Defendant is not entitled to any and all medical records, but only those records that relate to the physical condition at issue in the pleadings. Waiver of physician patient privilege codified in 491.060(5) should have been limited to the allegations of injury set forth in the petition.
7. *State ex. rel. Tracy vs. Dandurand*, 30 S.W.3d 831 (Mo. Banc. 2000). With respect to retained expert, all materials that expert has reviewed are required to be produced at deposition pursuant to a subpoena duces tecum. See also *State ex. rel. Seitrich vs. Franklin*, 761 S.W.2d 756. Materials given to an expert cannot be withheld from disclosure even if the expert did not rely upon them in formulating opinions.
8. Rule 56.01(b)(4) should be read to require production of all materials provided to the expert. Removing the privilege from the documents does not necessarily make the documents admissible at trial. Rules of evidence apply.
9. *Giddens vs. Kansas City Southern Ry. Co.*, 29 S.W.3d 813 (Mo. Banc. 2000). Surveillance video tape made of plaintiff. Video tape of a party constitutes a statement under Rule 56.01(b)(3).
10. *Fierstein vs. DePaul Health Center*, 24 S.W.3d 220 (Mo. App. E.D. 2000). Child custody action. Hospital was subpoenaed by husband's attorney to produce wife's medical records at a deposition. Without the consent of wife, hospital prematurely sent medical records to husband's attorney before deposition. Wife

brought separation action against the hospital for breach of fiduciary duty and breach of physician/patient privilege. Premature release of records without patient permission deprived wife of opportunity to quash subpoena or otherwise object to the production of records. Also designation of expert witness 19 days before trial, where trial date had been set for nine months justified trial court's refusal to allow experts to testify. See Legg vs. Lloyd's of London, 18 S.W.3d 379 (Mo. App. W.D. 1999).

11. State ex. rel. Newman vs. O'Malley, 54 S.W.3d 695 (Mo. App. W.D. 2001). Probation action arising out of protective order entered by circuit court in defamation suit. Trial court ordered defendant's financial records sealed until plaintiff established a submissible case for punitive damages at trial. Held. Party claiming punitive damages entitled to discovery of the opposing party's financial status and must be afforded an adequate opportunity to examine those materials prior to trial. The trial court could not delay production of reasonable discovery of defendant's financial status until plaintiff made a submissible case in trial. See also State ex. rel. Helt vs. O'Malley, 53 S.W.3d 623 (Mo. App. W.D. 2001).
12. Herman vs. Andrews, 50 S.W.3d 836 (Mo. App. E.D. 2001). In the discovery in a products liability action, plaintiff had requested prior complaints and lawsuits, and those with similar designs of the weapon in question. The trial court permitted discovery only with respect to precise model involved in accident and only for five years. Plaintiff was entitled to discovery of substantially similar product types.

D. Rule 56.01 is not without limitation, however, and there are certain limitations on the scope of discovery.
   1. Privileged matters are not discoverable.
   2. There must be a showing of substantial need and inability without undue hardship to obtain substantial equivalent in order to discover trial preparation materials.
   3. The scope of discovery may be limited in appropriate cases through protective orders.
   4. Good cause must be shown to obtain mental or physical examinations and can only be obtained concerning conditions in controversy.
   5. The courts continue to exercise discretion in weighing the need for the information against the burden in obtaining or producing it.

E. The Relevant Standard. Rule 56.01(b)(1) requires that the matter be relevant to the subject matter of the action before it is discoverable. Determination of the relevancy issues primarily is for the trial court. See State ex. rel. Litton Business Systems, Inc. vs. Bondurant, 523 S.W.2d 587 (Mo. App. 1975), where the burden of establishing relevancy and materiality is upon the party seeking the discovery.

II. Having a Discovery Plan
    A. What are you trying to gather and what are you trying to prove?
    B. Local Court Rules.
        1. Number of Interrogatories.
    C. Plan for every discovery device.
        1. Interrogatories
        2. Depositions

III. Interrogatories.
    A. Interrogatories are written questions which may only be served upon other parties to the action.
    B. Rule 57.01. Service for number of Interrogatories.
        1. Parties only.
        2. Scope and use at trial.
    C. Option to Produce Pertinent Records.
    D. Advantages and Disadvantages. The disadvantages of interrogatories are that the actual answers are usually framed by the party's attorney, and control of evasive or incomplete answers is more burdensome and less effective, and the element of spontaneity is lost. There is no opportunity to promptly pursue follow up interrogatories, and no opportunity to observe the response and judge the credibility and effectiveness of the party as a witness. They are not as effective in committing a person to a definite set of facts or on issues of liability. They are, however, useful for obtaining factual, technical, and background information of prior claims, medical history, items of special damages, identity of persons having possession of information or materials, names of witnesses, existence of relevant documents.
    E. Duty to Supplement. It is the only method of discovery for which the Rule imposes a duty to supplement responses. Responses may be deemed more dependable because the party has sufficient time to gather the information necessary for a complete response. Seasonally supplement prior responses to interrogatories when the question has been directly addressed to:
        1. The identity and location of persons having knowledge of discoverable matters;
        2. The identity of each expert witness expected to be called at trial;
        3. That the initial response was incorrect when made; or
        4. That the initial response, although correct when made, is no longer true.
    F. Exclusive Means for Expert Witness. It is the exclusive method for determining the identity of expert witnesses. It is effective for obtaining sufficient information to frame a request for production of documents.
    G. Expense. The expense of interrogatories are less than by deposition. They are often helpful in determining some areas which should be then more fully developed in depositions providing information which will permit a party to conduct a more complete investigation before depositions are

taken. They are generally served early in the litigation so that the responses may be received before the depositions are taken.

H. Scope of the Interrogatories.
   1. Interrogatories may not be utilized to obtain the opinions of expert witnesses.
   2. Interrogatories may be utilized to obtain the identity of health care providers even though the party has not waived the physician patient privilege.
   3. Interrogatories may be utilized to obtain the identity and location of persons having knowledge of relevant facts and obtaining the identity of persons with knowledge concerning relevant matters.
   4. An interrogatory is proper which seeks the identity of anyone who has knowledge of the material conduct of the parties.
   5. In a case involving a claim for punitive damages, interrogatories may be appropriate even though they seek information concerning only assets not liabilities and involve past rather than current financial worth.

I. Answers to Interrogatories. Rule 57.01(a). The person to execute the answers must be executed by the person making them. This will be the party himself, unless the party is a corporation or organization. The answers must be under oath, and each interrogatory must be answered separately and fully. Full disclosure requires not only the information known to the answering party, but also the knowledge possessed by his attorneys, investigators, insurers, agents, or representatives.

J. Objections to Interrogatories. Rule 57.01(a) contains the basic requirements for objections to interrogatories. You may seek a protective order under Rule 56.01(c). The party seeks to protect a trade secret or obtain reimbursement for exceptional expenses requiring the answering the interrogatory a protective order would be proper. Unless time is altered, the objections must be filed within the same time requirement for answers to interrogatories. The objections are to be signed by the attorney making them. Some of the grounds for objections are:
   1. Information sought is not relevant to the subject matter.
   2. The information is privileged.
   3. It is not reasonably calculated to lead to the discovery of admissible evidence.
   4. Seeks information concerning insurance agreements beyond the scope of Rule 56.01.
   5. Seeks information concerning expert witness beyond the scope of Rule 56.01.
   6. Beyond the scope of interrogatories requiring the attachment of documents, including those protected as trial preparation.
   7. Would require speculation or conjecture about what information is sought by the question.
   8. Seeks conclusions of law.

9. Seeks information not reasonably available to the party.
10. The question is too broad or all inclusive.
11. Seeks information which would include mental impression, theories, or conclusions of the attorney.

K. Contention Interrogatories. Rule 57.01(c) applies to matters contention interrogatories. *State ex. rel. Krigbaum vs. Lemon*, 854 S.W.2d 72 (Mo. App. S.D. 1993), overruling *State ex. rel. Papin Building vs. Litz*, 437 S.W.2d 853 (Mo. App. E.D. 1987).

L. Determinations of Objections. If objections are filed, the party propounded the interrogatories may either abandon the questions objected to, or may call the objections up for a hearing.

M. Use and Effect of Answers to Interrogatories.
1. Impeachment, admissions against interest.
2. Using answers to limit opponent's evidence.

IV. Depositions.

A. Unlike interrogatories, depositions may be taken of any person, including non-parties.

B. Rule 57.02. Depositions before action.

C. Rule 57.07. Use of depositions.

D. Rule 57.03 permits depositions at any time after an action is commenced, except leave of court must be obtained in the following situations:
1. When the deponent is confined in prison.
2. When the plaintiff desire to take a deposition sooner than 30 days after service of summons and petition upon any defendant.
3. At least seven (7) days notice is required for the taking of a deposition by reason of Rule 57.03(b)(1).
4. The court has the ability to enlarge or shorten the time for the notice.

E. Irregularities and Defects of Notice.
1. Compelling attendance of deponents.
2. Deponents compelling production of documents and things.
3. Persons before any depositions are taken.

F. Methods of Taking Depositions.
1. Either stenographic or videotape.

G. Objections During the Taking of Depositions.
1. Speaking objections.
2. Objections not waived.
3. Commissioner

H. Procedures Following Taking of Depositions.
1. Signature

I. Objections During Trial.
1. Taken up during trial.

J. The Use of Depositions. Rule 57.07.
1. New Rule, different from Federal Rule.

K. Depositions of Corporate Representatives. Rule 57.03(b)(4)
   1. Very important way to inquire information.
   2. Make them designate areas of inquiry.

V. Preparing the Client for their Deposition and Use of Depositions.

A. While it can be said that a picture is worth a thousand words, a deposition is surely worth a thousand interrogatories. Depositions are the crucial stages of the litigation process because they are the first opportunity for the other side to see your case from something other than mere typewritten words on paper, such as a preview of trial. A properly prepared deposition will go a long way in bringing the case to a successful resolution on behalf of your client.

While the importance of the deposition cannot be understated, it can be used to develop and present your case for trial.

   1. Present your case. A deposition is your opportunity by your witnesses, particularly your plaintiff or defendant, to present your case to the other side in a way other than letters and pleadings. Here they see the real thing, the live person.
   2. Size up the client. A deposition may very well be the first instance in which the other side can size up your client and evaluate them. Their believability and demeanor, the credibility and likeability are all front and center, as are you as the lawyer. As most cases are settled, how you look and the client looks and acts at the deposition can make a tremendous impression on the other side.
   3. Facilitate settlement. It is hard to say that cases are won and lost in a deposition, but certainly the settlement value of a case changes depending upon the taking of a deposition. The value of a deposition is that afterward, both sides are able to size up the case so settlement is ripe.
   4. Evaluate witnesses. Other than the parties, a deposition is an opportune time to evaluate witnesses for their potential use at trial. Their demeanor and likeability, their credibility can all be examined and evaluated through the deposition process.
   5. Open lines of communication. Sometimes the first meeting with the opposing attorney and defendant is at a deposition. Just by being at a deposition together in the same room begins to open lines of communication that can lead toward either successful settlement or certainly better working arrangements when the case is tried.

B. In preparing the client for their deposition, reducing the anxiety of the client is the most important thing to do. Proper preparation can perhaps have the most important effect on your client by reducing their anxiety they have for their deposition. That is extremely important because a client that is prepared and has a reduced sense of anxiety is more likely to be self-assured in the deposition and less likely to make mental mistakes in terms of testifying. Therefore, it is extremely important in preparation of

the deposition to reduce the anxiety of the client by preparation and instilling in them confidence in their ability to perform at the deposition.

C. The worst time to prepare a client for their deposition is one-half hour before the deposition starts. Any case worth taking is worth trying. Therefore, if it is worth taking and trying, certainly it is worth preparing the witness for the most important first step of the process. Too often lawyers think they can merely have their client show up a half hour before the deposition starts, go over a few ground rules, and tell them to just tell their story, and everything will be ok. Regardless of the case, whether it be a simple car wreck or a more sophisticated malpractice or products liability claim, preparing the client for their deposition should have the same importance that you would take in preparing the client or any witness for their testimony at trial. The first session should be well in advance of the deposition, one to two weeks before the deposition depending upon the applicable time availability. Allow yourself plenty of time to begin the process of relieving the anxiety that your client is undergoing in anticipation of their deposition. Most clients will never have had a lawsuit before, never have had their deposition taken before. So, the whole process is foreign, and with that, provides a high level of anxiety. Your job in the first stage of preparation is to eliminate that anxiety, to assure your client of their ability to testify, and to do so makes the witness much more self-assured and less likely to commit a mistake that can seriously affect the outcome of the case.

The first session should generally begin with an overview of the deposition process: who will be there, what are their roles, where the deposition will take place, and how it will be conducted. Assure the client that being nervous is natural, but that your job is to lower their anxiety and make them feel at ease.

In doing so, don't prepare a client for their deposition like a lecture. Don't sit and talk to your clients for 35 or 40 minutes about the ground rules, what the case is about, what they need to say and how they need to say it, and then at the end, say, "Do you have any questions?" Instead, at the first session, work with the client not in a lecture form, but in a way in which they become part of the process. You can do so by:

1. Interacting with them. Asking questions of them, whether it is reviewing the facts, talking about the case development, the theme of the case, getting them to share information and relating it to the whole process that they are about to endure.
2. Questions. Answer questions that they have during the interacting process to calm their concerns.
3. Repeat general principles that are important. Repeat for emphasis such principles as give short concise answers, avoid being boxed in, give audible responses, and don't answer unless you understand the question. Repeat and discuss, repeat and discuss, and repeat again the important elements of the case.

4. Illustrate. Showing to the client is an important tool to entrench in the client's mind the importance of a deposition and what their role is. Show them documents that are crucial. Show them the room where the deposition will be taken. Show them what a deposition will look like when it is completed, and what a signature page will look like.

D. The first session should leave the client with a relieved sense of anxiety about what a deposition is and what their role is. Allowing them a day or two to consider those issues and thoughts then provides the setting for a second session, a final preparation session, before the deposition takes place.

The second or final session is more specific in terms of factual review and case theories. Discussing with the client areas of questions that will be asked, documents that will be examined. Some general rules of questioning and answering should be gone over with the client for general suggestions and preparation.

1. Yes or no. If possible, always answer yes or no. It is unbelievable the number of responses at a deposition that can be answered with either a yes or a no response. If the question doesn't require more, don't say more.
2. I don't understand. Instill in your client that "I don't understand" is a proper answer. Never answer a question if you do not understand the question.
3. I don't know. Don't be afraid to say the words "I don't know." No one wants to appear ignorant, or that we do not know something, but a deposition is not the time to be saying things that you don't know or you are not absolutely sure of. If you do not know the answer, don't be afraid to say, "I don't know."
4. I don't remember. A deposition is not a memory test. It is not something in which at the end you are going to get a grade for the number of questions that you responded positively. If you don't remember, say you don't remember. It is better your memory is questioned rather than your credibility.
5. I need a break. Depositions also are not marathon sessions. Instill in the client that if they feel that they need a break or if the attorney says, "Would you like a break," probably a break should be taken.
6. Red light/green light – dry/wet. Instill in the client the importance of telling the truth, and telling it in as short and concise an answer as possible. Do not elaborate or give additional information. Answer the question truthfully in as short a version as possible. If the question is: What color was the intersection light? The answer is red, not a two-minute description of the surrounding circumstances of the intersection, how it looked, and when the light changed. Answer the question and let them move on to the next question.

E. Special areas that always seem to develop in depositions are ones that need a certain amount of preparation in anticipation.

1. Pleadings. Many lawyers will attempt to inquire of witnesses their knowledge of the pleadings and why they said what they said in the pleadings. Clients need to be aware that lawyers prepare the pleadings. Their job is to answer questions at a deposition, not answer as a lawyer. So, having the clients mindful of that is important.
2. Damages. Many times attorneys will ask clients how much money they want, what are they seeking, what kind of damages they are asking for. These responses are better left to the lawyer, rather than a client at a deposition.
3. Money damages. How much money you are seeking, why are you seeking that amount of money, or how much you are claiming are also answers that are better left to the lawyer, rather than a client at a deposition.
4. Documents. It is important to review documents that may be a part of the deposition. Pleadings, medical records, interrogatory responses, accident reports, pictures, are all documents that are best reviewed beforehand if it is believed that they will be presented at a deposition for questioning.

F. With two preparation sessions, witnesses should be adequately prepared to handle any deposition and respond accordingly. The more preparation, the less their anxiety. Some general suggestions that should be given to witnesses and clients are as follows:

1. Dress. Always go over dress with your client. You may not have control over a witness, but certainly your client you do, as to how they are going to dress. Knowing that a deposition is as important as testifying in trial should be drilled in your client. They may not need to wear a three-piece suit, but by the same token, they probably should not appear in a pair of shorts and tank top wearing sandals. Use common sense in how best to present your client as they really are and how their dress would best accent that.
2. Respect. Clients should always learn to treat everyone in a deposition with respect. Whether it's the court reporter or the lawyer on the other side who they may think is there to destroy them, and never give them any money, and to do whatever they can to make them lose their case, they should nonetheless be treated with respect.
3. Don't be bitter. Don't walk into a deposition with a chip on your shoulder, looking for a fight, just waiting to get at the other lawyer who is representing the insurance company that is denying your claim.
4. Listen to the question and think. Ninety-nine percent of all problems in a deposition could be avoided if the client would merely

listen and think before talking. Probably the same principle all of us could use. Instill in the client to tell the truth and tell it in as short a version as possible and think, keeping focused and sharp.

5. Don't elaborate or volunteer. This is an extension of the green light/red light – wet/dry principle. Don't elaborate or volunteer any information.
6. Demeanor. How the client looks, acts, responds, is very important. Sometimes not only what is said, but how they act is equally as important. Always remember that the other side is evaluating your client and how they will appear in front of a jury. Therefore, the client's demeanor is of paramount importance in a deposition. Granted, sometimes people cannot be changed from what they are. So, we take clients as they are, but certainly with preparation and reducing levels of anxiety can help to enhance the demeanor of any person.
7. Don't exaggerate or underestimate. Bold statements should be avoided. Don't say anything unless you are absolutely certain of its truthfulness.
8. Don't argue with the lawyer. Most witnesses won't win arguments with lawyers. It is not that lawyers are more brilliant. It is just that the nature of a deposition where the lawyer is asking the questions and the witness is giving the answer, leads to an unfair advantage for the lawyer. So, don't argue. Don't try to impress the other side with how smart you are or to sell your case to them. Most lawyers may not care how smart the you are. Don't try to win the case in a deposition. Be yourself, sell yourself, and let the facts sell your case.
9. Don't be offended by personal questions. Depositions are broad and a lot of questions are asked that may seem unimportant, irrelevant, and personal. Understand that's part of the process. Don't be offended by it.
10. Don't explain. One should generally never try to explain an answer unless it is determined to be wrong, and then do explain your answer.
11. Avoid being boxed in. Many lawyers will ask questions such as: "Tell us everything you know. Tell us everything that was said." Always instill in clients a phrase, "That is all that I can recall at this time." It allows the client some leeway if their memory becomes refreshed and more facts are recalled.
12. Control of the deposition. Know where you are going to sit, where the court reporter sits, and where the witness will sit. If it is your client there for a deposition, don't always let the court reporter or the defense lawyer control where everybody sits. To maintain control of the deposition process instills in your client that you are in charge and, again, relieve their anxiety.

G. For a final review, always go over with your client what to wear, where to meet, and what time the deposition is. Always, always, be on time, never late. While cases are not won or lost in a deposition, certainly, the case is never the same after a deposition is taken. Telling clients to say focused, and keeping their eye on the ball is important. Depositions can be long, and they can be tedious. Clients need to stay on top, stay sharp, and stay focused. Preparation will help. As the old line goes, you can't hit the ball unless you see it, is true with a deposition. Do the preparation and make sure the client is aware of the importance and the need to stay focused.

There is no such thing as a perfect deposition. At no time does a witness or client do a perfect job. So, live with it and what you have and view the deposition as one step in the process. Cases are generally never the same after a deposition is taken. They may get better; they may get worse. But certainly, whatever is done at a deposition can be improved, and addressed.

VI. Conducting the Deposition.

A. Before you undertake to conduct the deposition, the purpose for which the deposition is being taken should be considered. There are a number of reasons why one would want to take a deposition.

1. Discover facts that are favorable and can lead to favorable testimony. Look upon a deposition as a means to discover what you need to know to fully pursue and defend the case, as well as to find out what you don't know and simply confirm what you do know.
2. Pin down witnesses to their story. A deposition is a means by which you can have a witness, under oath, pinned down as to their position. Acquiring admissions of a witness, whether a party or witness, is very important.
3. Narrow the issues. A deposition is a prime opportunity to narrow the issues that the case really consists of.
4. Identify your opponent's theories and themes. Learn what your opponent's theories are and what then they are attempting to prove and discover what the theme of their case is.
5. Lay the foundation and authentication for documents. Use this means to authenticate documents and establish their foundation. This can be used for trial or merely to discover facts and lead you to more witnesses that will know something.
6. Evaluate the witness and the attorney. Look at the witnesses; how they react, how they act under questioning, what sets them off, and how the attorney acts and responds.
7. Purpose. In thinking of a deposition, always ask yourself whether or not the deposition is really necessary. If it isn't, don't take it. If the deposition is taken, however, take only what you need. More is not necessarily better.

B. Before you conduct the deposition, plan for what you want and need. This allows you to plan for what you need to prove, and how you will prove it. Who are the sources of the proof, and how can you get the witness to say

what you want them to say, to prove the facts that you believe are in issue. The fact, the proof needed, and the source is a simple discovery plan that should be looked at with every witness. For every deposition, have a plan as to what you want to get out of it and how you will do it. A discovery plan is essential before conducting the deposition.

The technique in conducting a deposition will vary with your style and with what your discovery plan is. Some general techniques in conducting the deposition are:

1. Information gathering. Here you try to learn as much as possible about each witness. This can be conducted by:
    a. Open-ended questions. What were you doing before the collision? What was the traffic like? Describe the vehicle. When did you see the plaintiff's car?
    b. Clarification. Here you seek details. What was your speed? How long did you watch the car? How do you know what your speed was? How fast was the car going?
    c. Closing off. The importance of closing off is to prevent any surprise at a later point. Here, you ask questions such as: What else? Anything else? Is that all? Have you told me everything you know about the collision? Tell me the names of all the witnesses who were there. Closing off eliminates the future surprises and attempts by the witness to change their story.
2. Eliciting conversations. The technique here is to get the witness to respond through conversation what was said and what they heard. What did the driver say? What did the witness say? What did the passenger say?
3. Listen. Listen to what the witness says and follow up questions based upon what the answer was. Hearing and listening are different. Don't be so tied to a script or an outline that you don't listen to what the witness says. Always follow up from what the witness says.
4. Summarize. An important technique here is to get the witness to agree to a summary of statements that you state. Let me see if I've got this right. Is it fair to say? What you're saying is. There are means by which you can summarize what the witness has said favorably to you and then get the witness to agree to it.

C. The manner in which you approach a subject can vary. It is important, though, to exhaust the subject.
    1. Chronology. In this instance you start out conducting the deposition by asking the witness to go over the collision scene or their medical treatment all in a chronological order. What they were doing immediately before the collision, taking them all the way through the accident, their medical treatment, up to the present date.

2. Subject matter. Take each subject separately with signposts to inquire of that subject matter by questions.
3. Documents. Conduct a deposition based upon a review of documents and what the witness knows about each document that is in issue, including its foundation, authenticity, and the witness' knowledge.
4. Hop, skip, and a jump. Sometimes this is effective because it doesn't allow the witness to anticipate what the next question is. Although it can appear unorganized and choppy, it allows the interrogator to move from subject to subject, in a sense one step ahead of where the witness is.

D. In beginning the deposition, introductory questions vary with the style of the attorney, but are very important. The importance is that it can set up a record if you are using the deposition for impeachment purposes, and it boxes the witness in to areas. Beginning questions are:
1. Have you ever had your deposition taken before?
2. Do you understand what a deposition is?
3. Do you understand you need to give an audible response?
4. Have you had an opportunity to talk to your lawyer?
5. Is it fair to say that if I ask you a question you don't understand, you'll ask me to rephrase it?
6. Is it fair to say that if you answer a question, you will have understood the question?
7. If you need a break, feel free to ask me.
8. If you want to talk to your lawyer, feel free to ask me.
9. If you want some refreshments, feel free to ask me.
10. You understand you're under oath?
11. You understand a court reporter has given you an oath?
12. You understand that you have an obligation to tell the truth?
13. You understand your testimony here is the same as testifying in Court?
14. Do you have any questions for me?

E. All of these introductory questions and answers are simple and standard, but they can help to box the witness in and limit the ability of the witness to backtrack or change their testimony.

Another approach, however, is that once the person identifies himself in the deposition, to jump right into what the issues of the case are. I have done that many times in depositions and foregone the introductory phase and start out immediately with questions such as: You ran a red light, didn't you? Why did you drink before you got behind the wheel? Do you have any idea of the injuries that you caused Mrs. Smith? Sometimes the direct approach, the forceful approach, can be an unnerving means of interrogation and can be very fruitful in getting what you need in a deposition.

In concluding the deposition, it is always a good idea to ask several general questions to the witness such as:

1. Did you understand all of my questions?
2. Are there any answers you would like to change?
3. Is there anything you would like to add or make more complete?
4. Is there anything you recall about a subject now that you didn't remember earlier?

When the deposition is concluded, a record should be made as to the exhibits that were introduced, who has possession of them, and what about signatures of the depositions.

VII. Deposing the Medical Expert.

A. Live testimony is preferred, but experts are expensive.

B. Rule 57.07, Missouri Rule of Civil Procedure - Be sure that the witness is identified as an expert.

> "(a) **Use of Depositions.** Any part of a deposition that is admissible under the rules of evidence applied as though the deponent were testifying in court may be used against any party who was present or represented at the taking of the deposition or who had proper notice thereof. Depositions may be used in court:
>
> (1) to impeach the deponent and
>
> (2) for any purpose if the deponent is not in court or if the deponent is an adverse party; except, a deponent who is a party may not use such party's deposition as evidence unless such party deponent is dead or incompetent or not able safely to testify in court because of the party deponent's sickness, bodily infirmity or imprisonment.
>
> The term "party" as used in this Rule 57.07(a) includes a deponent who at the time of taking the deposition was an officer, director, or managing agent of a party, or a person designated under Rule 57.03(b)(4) or Rule 57.04(a) to testify on behalf of a public or private corporation, partnership, limited liability company or association or governmental agency that is a party."
>
> Rule 57.07(a), Missouri Rule of Civil Procedure

C. Scheduling of the expert's deposition

D. Preparation of yourself for the expert's deposition

1. Have a plan as to what you expect to get out of the expert witness, whether you are intending to use the deposition as a means to present at the trial of the case, or if the deposition is means to communicate to the other side the extent of your client's injuries and the damages that your client has sustained.

2. Determine whether you want a stenographic deposition or a videotaped deposition. Consider the advantages and disadvantages of using videotape of your expert witness if you plan on playing the deposition at trial.

E. Prepare your expert for the deposition.

1. Probably the signal most crucial aspect in preparing the expert for his deposition is the quality of information that you are able to provide to him. Where the expert is a treating physician, be sure that the expert has all the information necessary to analyze the full extent of your client's injuries and reach an opinion that is helpful to the case and persuasive to the opposing side and to the jury. If your client has a past medical history that complicates the issue, presenting those medical records to the treating physician is essential to the case and necessary for the expert to be prepared in responding to not only your questions, but for any questions on cross-examination regarding your client's condition.
2. Remember that an expert can reasonably rely on the testimony of others in formulating an opinion. Other facts the expert can rely on include photographs, photographs of damage to the vehicle, witnesses' statements, diagrams, or other information can be helpful to the expert in analyzing the medical condition of the client from the standpoint of injuries and damages. While one would certainly not want to provide superfluous information to the expert, it would probably be best to err on the side of caution and provide more information rather than less information.
3. Many experts, due to the constraints of their time, find it hard to provide or want to provide sufficient time for the attorney to prepare with before the actual deposition takes place. It is not uncommon to merely have the expert's staff allow the attorney to show up 30 minutes ahead of time to allow you to talk to the doctor. Certainly, any case that is worth pursuing and any case that is worth pursuing with a deposition is worth the effort of attempting to meet with the doctor well ahead of time to go over what a deposition is, what you are attempting to elicit, and what the extent of the testimony is going to be, all done well before the date of the deposition.
4. In preparing the expert, after you have reviewed all the material that the expert has reviewed and the chart, if feasible, be able to ask the expert all the questions that you anticipate that they would be asked at the deposition and review the expert's proposed responses. Remember that the use of a deposition, if that witness is not present in court, can be used by any party. If you are attempting to use this deposition at trial, you want to be well aware of what this doctor's opinions are well before the date of the deposition.

5. Attempt to try to humanize the expert and use plain language in your questions.

F. General areas that would be covered in a deposition include:
   1. Background
      a. Name
      b. Address
      c. Occupation
      d. Medical training
      e. Licenses
      f. Board certifications
      g. Hospital privileges
      h. Hospital committees
      i. Honors
      j. Articles authored or co-authored
   2. Visits
      a. First visit
      b. History – the importance of the history and treatment before seen by this doctor
      c. Treatment following the injury
      d. Nature of the injury
      e. Complaints
      f. Pain
      g. Initial diagnosis
   3. Course of treatment
      a. Physical therapy
      b. Radiology
      c. MRI
      d. EMG
      e. Surgery
      f. Plateau
      g. Referral for additional treatment
      h. Review of the subsequent treatment, i.e. physical therapy
      i. All of the above reasonable and necessary
   4. Mechanics of Injury
      a. Physical limitations
      b. Degenerative changes
      c. Future problems
      d. Permanency
   5. Pre-existing conditions
      a. Unrelated
      b. Aggravation
      c. Laid dormant but triggered pain
   6. Loss of earnings capacity or wage loss
      a. Obtain work history
      b. Opinion as to disability

c. Recommendation to return to work with or without limitations

7. Medical Expenses
   a. Familiar with the costs of health care in the community
   b. Previous opportunity to review similar medical expenses
   c. Are they reasonable and necessary?
   d. Caused by the collision?
   e. Introduce the medical expenses

G. All opinions should be based upon a reasonable degree of medical certainty as to the diagnosis, prognosis, future treatment, causation, etc.
   1. You could consider asking: Doctor, I would ask you to assume when I ask you to express an opinion, that I am asking you to express the opinion in terms of reasonable medical probabilities or reasonable medical certainty.

H. Other opinions
   1. The doctor should explain the anatomy of the injured part. The doctor should be explain why the part was injured. The doctor can explain the mechanics of pain and relate them to the injury. The doctor should explain why the injury is permanent and will have pain off and on. The doctor should explain the affect of the pain on the ability to perform work. The doctor why at times, the client feels fairly well and other times, feels terrible. The doctor should explain exacerbation and remission. The doctor should explain how on one day of the examination there may be no muscle spasm, while another time, muscle spasms will exist. The doctor should show that the loss of work, if any, was a result of the injuries received, and the injuries received will affect his ability to work overtime in the future and perform his job. The doctor must prove the necessity of his hospital, medical, and pharmaceutical bills, and their reasonableness, and establish that the injury will affect the client's ability to labor and earn in the future.
   2. Doctor, do you have an opinion whether he had aggravated diabetes as a result of the accident? Do you have an opinion, yes or no?
   3. Doctor, do you have an opinion based on a reasonable degree of medical certainty whether or not the injuries which you found are permanent?
   4. Doctor, do you have an opinion based on a reasonable degree of medical certainty will he ever be able to return to work that requires stooping, bending, and twisting?
   5. Doctor, have all of the opinions that you have expressed here today been based upon a reasonable degree of medical certainty?

I. The expert should understand the legal causation is established by a preponderance of the evidence, meaning that the opinion can be based upon a 51% probability, rather than a 75% or 90%.

J. Experts should be prepared to support opinions with specific entries in the plaintiff's medical and hospital records and diagnostic tests, results, and literature.

K. Use demonstrative exhibits, photographs, models, etc., for the doctor to explain the plaintiff's condition and the resulting injuries.

VIII. Use of Video Depositions

A. Rule 57.03(c), Missouri Rule of Civil Procedure.

> **"(c) Non-stenographic Recording – Video Tape.** Depositions may be recorded by the use of video tape or similar methods. The recording of the deposition by video tape shall be in addition to a usual recording and transcription method unless the parties otherwise agree.
>
> (1) If the deposition is to be recorded by video tape, every notice or subpoena for the taking of the deposition shall state that it is to be video taped and shall state the name, address and employer of the recording technician. If a party upon whom notice for the taking of a deposition has been served desires to have the testimony additionally recorded by other than stenographic means, that party shall serve notice on the opposing party and the witness that the proceedings are to be video taped. Such notice must be served not less than three days prior to the date designated in the original notice for the taking of the depositions and shall state the name, address and employer of the recording technician.
>
> (2) Where the deposition has been recorded only by video tape and if the witness and parties do not waive signature, a written transcription of the audio shall be prepared to be submitted to the witness for signature as provided in Rule 57.03(f).
>
> (3) The witness being deposed shall be sworn as a witness on camera by an authorized person.
>
> (4) More than one camera may be used, either in sequence or simultaneously.
>
> (5) The attorney for the party requesting the video taping of the deposition shall take custody of and be responsible for the safeguarding of the video tape and shall, upon request, permit the viewing thereof by the opposing party and if requested, shall provide a copy of the video tape at the cost of the requesting party.
>
> (6) Unless otherwise stipulated to by the parties, the expense of video taping is to be borne by the party utilizing it and shall not be taxed as costs."

Rule 57.03(c), Missouri Rule of Civil Procedure

B. Notice - must contain a name, address, and employment of technician.
C. Must be sworn on the camera
D. Attorney requesting the video is charged with the custody of the tape.
E. Expenses as to the taking of the deposition are not deemed to be court costs, therefore, they are born by the party taking the same.
F. Strategies as for the use of the depositions, whether you want to use it for trial or mediation.
G. Be sure the witness knows it is going to be video taped.
H. Consider the hiring of a video technician or use someone within your own staff.
I. Be sure to tell your witness if they are going to be videotaped, especially ahead of time, to prepare for proper dress.
J. Use of a back-drop, as opposed to a picture, bookcase, or a cluttered desk.
K. Try to make the deposition flow as smoothly as possible and hopefully minimizing objections.
L. Does affect the behavior of adversaries
M. Can affect the behavior of witnesses
N. Record for motion for sanctions
O. At the beginning of the deposition, be sure to clarify who is there, and then conclude at the end of the deposition.
P. Advantages
    1. Allows you to see the witness' demeanor. A stenographic deposition deprives the Judge or jury of this opportunity.
    2. They are more entertaining and easier to follow. You get to watch and listen as opposed to just listening.
    3. You get to see the witness' condition.
    4. Allows for better presentation of exhibits
    5. Can be used for impeachment purposes
        a. Can highlight the witness' pauses, evasiveness, or fumbling, but by the same token, can highlight those as well, if they are your witness.
        b. Can be used to impeach with prior testimony.
    6. Also a means to control the behavior of disruptive witnesses and counsel.
    7. Once the deposition is taken, it can be used on VHS or DVD.
Q. Disadvantages
    1. More expensive, harder to arrange and edit, and more likely to have technical problems.
    2. Special equipment is required to be used in court.
    3. More cumbersome to use for impeachment purposes.
    4. Some witnesses just do not look very good on film.
    5. Problem with objections and editing.
    6. Technical problems in playing the deposition at trial.
    7. Most will not appear broadcast quality.

IX. Deposing the Adverse Expert

A. Some main goals in trying to depose the adverse medical expert are:
   1. Laying the ground work for your cross-examination at trial
   2. Showing the expert's bias
   3. Undermining the expert's credibility
   4. Showing the expert's interest in the case
   5. Showing that the expert only had one occasion to view and examine the plaintiff
   6. Getting as much information as possible regarding the expert's opinions and the basis for them
   7. Gaining concessions from the expert to help prove points you wish to make through the use of leading questions
   8. Attempting to get the expert to support even a small portion of your case.
   9. Discover weakness in your client's case.
   10. Judging the demeanor of the expert.

B. First step in taking an effective expert deposition is taking a thorough deposition of the defendant

C. Next is preparation for your own client's chart and medical condition.

D. Areas to cover:
   1. Whether the witness has prior experience with the attorney or company requesting the examination.
   2. Number of cases he/she has reviewed
   3. Number in which he/she has given depositions
   4. Number in which he/she has testified at trial
   5. Number of times he/she has provided expert opinion for the attorney representing the defendant in the case
   6. Ask if the expert has ever been sued and what the circumstances were and whether they were similar to this case
   7. Whether the expert has authored literature

E. The means of deposing the expert and asking the expert
   1. What they reviewed
   2. All the information that they considered
   3. The amount of time they spent
   4. Each opinion they arrived at
   5. Each fact which you believe supported their opinion
   6. Any treatise, article or medical evidence which supports their opinion

F. Be sure to serve subpoena duces tecum to bring
   1. All preparatory materials
   2. Whole content of file
   3. All records reviewed
   4. Curriculum vitae
   5. List of publications

G. The deposition should thoroughly explore qualifications and professional background, education, board certification, area of speciality, experience with the medical issue involved
H. Define the expert's relationship with the defendant or defendant's counsel
I. Determine what steps the expert took in reviewing the case
J. Determine what opinions expert has reached, and if they are final, and the basis of each opinion
K. Define the expert's opinion on causation
L. Possible areas on inquiry
    1. Only one occasion to examine the plaintiff
    2. Will you admit that a treating physician who has examined the plaintiff on many occasions is in a better position to give an opinion regarding the plaintiff's prognosis and diagnosis?
    3. That the examiner often treats his own patients on the basis of subjective complaints
    4. That the absence of objective findings at the time of the examination does not establish that the plaintiff did not have an injury, but only at the time of the examination found no objective findings.
    5. That the history is important, and he relies on the history in treating his own patients, and causes his own patients' complaints of pain, and then takes them as true.
    6. Show financial interest.
    7. Show bias
    8. Show no treatment would be given
    9. How long was the exam? How many exams? The results of such exam(s)? Meaning, did the exam take place in your office? Did you take a history? Did you take any diagnostic tests? Was that done by you or your staff?
    10. Let's talk about the examination: What did you do? How long did that take? Did you then prepare a report? What was the cost of the report? Was the report made with the idea that there would be no treatment that would be provided to the plaintiff?
    11. Go through each test. If a patient rests and takes their usual medication, he will feel much better than at another time. Did not know if the plaintiff's muscle relaxing medications that day could account for feeling better? You treat people based on subjective complaints. You prescribe medicine to patients when you can't find objective signs?
    12. When you conducted the exam, you knew it was the purpose of writing this report? You knew that you were not going to be treating the patient?
    13. Can't hit a home run every time, but enough line drives to make an effective cross-examination.
    14. Goal is to show why expert is not believable, but your expert is.

X. Request for Production of Documents
    A. Rule 58.01
        1. Scope.
            a. Inspect
            b. Copy documents
            c. Permit entry on land
        2. Available only to parties
            a. Independent action against a person, not a party.
        3. Procedure
            a. Served on party
            b. 30 days
    B. Objections
        1. Relevance or privilege
        2. “Any and all”
    C. Medical Authorizations
    D. Work Product
XI. Request for Admissions
    A. Rule 59.01
    B. On a party
        1. Genuineness of documents or truth of matters under Rule 56.01.
    C. Effect
        a. Deemed admitted
XII. Physical and Mental Examination
    A. Rule 60.01
XIII. Sanctions
    A. Rule 61
        1. Failure to act
        2. Answer interrogatories, requests for production of documents, admissions
        3. Failure on depositions
XIV. Privileges
    A. Attorney/Client Privilege
        1. Section 491.060 RSMo
        2. Concerning any communication made to him by his client in that relationship, or his advice to them or without consent of such client.
        3. Must be attorney/client relationship
        4. Does not extend if:
            a. Litigation between attorney and client
            b. Fraud or crime
    B. Physician/Patient Privilege
        1. Section 491.060(5) RSMo
        2. Extends to “any information which a physician or surgeon may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon.”

3. Extends to nurses
4. Extends to hospital records
    a. *State ex. rel. Benoit vs. Randall*, 431 S.W.2d 107 (Mo. Banc. 1968).
5. Extends to doctor observations.
6. Can be waived by making medical condition an issue.

C. Priest/Penitent Privilege
1. Section 491.060
    a. "Any communication made to any person practicing as a minister of the gospel, priest, rabbi, or other person serving in a similar capacity for any organized religion in his professional capacity as a spiritual advisor, confessor, counselor, or comforter."

D. Husband/Wife Privilege
1. Old law of statutory privilege in civil cases repealed.

E. Accountant/Client Privilege
1. Section 326.151 RSMo
    a. Protects communications between an accountant and his client.