

**STRATEGIES FOR EFFECTIVE DEPOSITIONS
OF EXPERT WITNESSES**

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1. DEPOSING THE MEDICAL EXPERT FOR TRIAL

- 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.

2. 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.

3. 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.