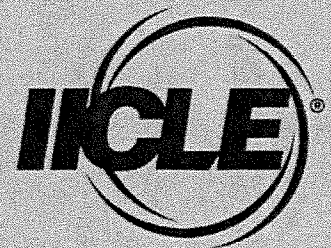


# Party Depositions

*Francis J. Lynch, Wolter Beeman & Lynch  
Rex Linder, Heyl Royster Voelker & Allen, P.C.*





# Deposing the Plaintiff

## I. Objective of a Deposition

- A. The obvious reason for deposing the plaintiff is to determine his or her version of the events. In so doing, you want to pin plaintiff down on specific facts to control and limit plaintiff's trial testimony. You also want to find out the nature and extent of injuries seeking information which will be helpful during cross-examination at trial.
- B. A deposition can be used to obtain admissions concerning important facts. Assertions made in a deposition constitute binding judicial admissions if they are unequivocal. *Hansen v. Ruby Construction Co.*, 155 Ill. App. 3d 475, 508 N.E.2d 301, 108 Ill. Dec. 140 (1<sup>st</sup> Dist. 1987)
- C. You may also want to consider using the deposition to lay a foundation for the introduction of evidence at trial. For example, you may have medical records of prior injuries but could have difficulty getting that evidence before the jury if treating doctors are no longer available or similar problems. Consider confronting the plaintiff with the medical record to obtain an admission that the injury occurred and that medical treatment was necessary.
- D. Being human, jurors interpret evidence based upon the demeanor and believability of a witness. Consequently, you want to be able to evaluate the credibility and effectiveness of the plaintiff. If the deponent is nervous, sympathetic, has poor communication skills or similar characteristics, it will have an effect on their credibility.

## II. Applicable State and Federal Rules

### A. Illinois State Court – Supreme court Rules 201 through 212

- 1. Discovery depositions vs. evidence depositions (S. Ct. Rule 212)
  - (a) Very important not to waive objections in an evidence deposition
  - (b) "In an evidence deposition, the examination and cross-examination shall be the same as though the deponent were testifying at the trial." (S. Ct. Rule 206(c)(2))
  - (c) If *both* are desired for the same plaintiff, "they shall be taken separately, unless the parties stipulate otherwise of the court orders otherwise upon notice and motion." (S. Ct. Rule 202)
- 2. When may commence: Without leave of court for "good cause shown," no depositions may be noticed until all parties have appeared or have been required to appear. (S. Ct. Rule 201(d))

*From a practical perspective, you should not (unless specific circumstances warrant it) depose the plaintiff until you have received complete written discovery, relevant medical records and other pertinent materials.*

3. Notice: To properly notice up a plaintiff's deposition, coordinate scheduling with plaintiff's counsel and send a notice. No subpoena is required for a party's deposition. (S. Ct. Rule 204(a)(3))
4. Location: Generally in the county in which the plaintiff resides, is employed, personally transacts business, or in the county in which the action is pending. (S. Ct. Rule 203)
5. Duration: 3 hours, "regardless of the number of parties involved in the case, except by stipulation of all parties or by order upon showing that good cause warrants a lengthier examination." (S. Ct. Rule 206(d))
6. Objections: Objections at depositions "shall be concise, stating the exact legal nature of the objection." (S. Ct. Rule 206(c)(3)) The purpose of this rule is to avoid speaking objections that are meant to coach a witness.
7. Termination: An attorney or the deponent can move to terminate and seek relief of the court. In the context of taking the plaintiff's deposition, a Motion to Terminate would only make sense if you can successfully allege bad faith on the plaintiff's part. (S. Ct. Rule 206(e))
8. Videotaped depositions: May be requested by any party for either discovery or evidence. The party who requests that it be video is responsible for the related charges. (S. Ct. Rule 206(g))
9. Remote electronic depositions: May be taken by telephone, video conferencing or other remote electronic means. The deponent is to be in the presence of the officer administering the oath and recording the deposition. The party requesting the remote electronic means is responsible for the associated costs. (S. Ct. Rule 206(h))

**B. Differences in Federal District Court (Fed. R. Civ. P. 26-32)**

1. There is *no distinction* between discovery and evidence depositions (questioning proceeds as if at trial, and you must preserve your objections to avoid waiving them) (Fed. R. Civ. P. 30(c))
2. When may commence: A party is prohibited from seeking oral discovery from any source prior to the Fed. R. Civ. P. 26(f) conference, unless "by stipulation, or by court order." (Fed. R. Civ. P. 26(d)(1))
3. Notice: In the Central District of Illinois, Local Rule 30.1 dictates that "counsel must make a good faith effort to coordinate with all opposing

counsel," and "[t]he signing and serving of a Notice of Deposition shall constitute a certification . . . that the attorney has complied with this rule."

4. Duration: "Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours." (Fed. R. Civ. P. 30(d)(1))
5. Objections: An objection during a deposition shall be stated "concisely and in a non-argumentative and non-suggestive manner." (Fed. R. Civ. P. 30(c)(2))
6. Termination: May be done at any time the deponent or a party believes a deposition is being conducted in bad faith or unreasonably annoys, embarrasses the deponent. (Fed. R. Civ. P. 30(d)(3))

### **III. Preparation**

- A.** It is critical for defense counsel to know as much as possible about the case prior to deposing plaintiff. You should also be familiar with applicable law and know the elements the plaintiff must prove to establish a *prima facie* case. Items which should be reviewed may include:
  - (a) Pleadings
  - (b) Written discovery responses
  - (c) Other statements by plaintiff to witnesses, investigators, treating physicians, etc.
  - (d) Previous deposition testimony
  - (e) Police reports and statements of others
  - (f) Accident scene photos
  - (g) Pre and post accident medical records (especially post-accident hospital emergency department records)
  - (h) Pre and post accident employment records
  - (i) Income tax records
- B.** You will also want to visit the accident scene. For example, if it involves an auto accident, there will be things that become apparent to you by driving through the accident scene which may not be realized from only reading accident reports and reviewing photographs. In doing so, remember that things about the accident scene may change due to foliage, sun, traffic volume or similar matters. If a premises liability case, understanding the layout and configuration of the area will be helpful.
- C.** You should analyze photographs, medical records or other potential exhibits and determine which ones you want to use at the deposition. Make a copy for each attorney and the witness. Consider the sequence in which you want to use the exhibits.

- D. Prepare a deposition outline. No one's memory is perfect, and a good deposition outline is essential. The detail in the outline will differ depending upon the nature of the case and its complexity. On occasion, you may want to write out particularly important questions. However, do not let your deposition notes prevent you from listening to the plaintiff's responses.

#### IV. Questioning the Plaintiff

##### A. Style

1. We all have different styles. However, an easy and comfortable manner is usually preferred as it relaxes the plaintiff and usually gets them in a conversational mind set. They often will volunteer things which you may find helpful. Being friendly and courteous can be the best way to obtain desired testimony.
- B. Questioning the plaintiff in a sequential order allows plaintiff to understand the direction of the questions. Occasionally asking questions that are not in a logical or sequential order may make it difficult for plaintiff to give what he or she thinks is the right answer.
  - C. Wait until the end of the deposition to ask questions about convictions of felonies or crimes involving dishonesty. To do so at the beginning of the deposition often sets a tone reminding plaintiff that you are an adversary.
  - D. Do not stop plaintiff in mid-answer. Generally, it is better to let plaintiff ramble through a long narrative and go back asking specific questions to which plaintiff should answer yes or no. Remember, one of your goals is to get as much information as you can.
  - E. Try to avoid phrasing questions beginning with, "You don't remember." It is better to begin saying, "You don't know..." The reason is at trial, plaintiff may have miraculously remembered something that will be damaging to your case. The inability to remember a fact in a deposition is not inconsistent with later recall at trial, and the court could exclude the use of a deposition concerning the prior inconsistent statement if the jury is allowed to know that memory has improved at trial. *Grabner v. American Airlines, Inc.*, 81 Ill. App. 3d 894, 401 N.E.2d 1196, 37 Ill. Dec. 103 (1<sup>st</sup> Dist. 1980); *Keller v. State Farm Ins. Co.*, 180 Ill. App. 3d 539, 536 N.E.2d 194, 129 Ill. Dec. 510 (5<sup>th</sup> Dist. 1989).
  - F. At the end of the deposition, take a short break and review your outline to be sure you have covered the important points and consider whether you need to go back to any issue to clarify the plaintiff's response.

# **DEPOSITION OUTLINE**

## **(Vehicle Accident)**

### **I. General**

#### **A. Prior Deposition Experience**

1. Have you ever given a deposition before? How many times, what was your role and what did the case involve?

#### **B. Materials Reviewed**

1. Have you reviewed any materials in preparation for this deposition?
2. When did you review them?

### **II. Background**

#### **A. Personal**

1. Full name
2. Date of birth
3. Residence (current and prior)
4. Education

#### **B. Family**

1. Names, ages and locations of spouse, children, parents
2. Marital history – maiden name
3. Identity of present and former spouses and whereabouts
4. Location and dates of prior marriages and divorces

#### **C. Criminal Record**

1. Misdemeanors involving dishonesty and felonies
2. State and county where convicted

#### **D. Prior Employment**

1. Dates of employment
2. Nature of work
3. Immediate supervisor
4. Why terminated
5. Pay

#### **E. Military Service**

1. Branch and dates
2. Military occupational specialty (MOS)
3. Rank at discharge
4. Type of discharge

5. Injuries in service
6. See active combat?

**F. Medical History**

1. Prior accidents of any kind, whether in home, on job, in a car, etc. and how they happened
2. Prior injuries, whether in home, on job, on streets, in car or wherever and how they occurred
3. All doctors and hospitals seen as result of each significant accident or injury
4. Injuries and complaints as a result of each accident or injury
5. All prior personal injury lawsuits or claims
6. Family doctor prior to accident
7. Identity of all doctors, osteopaths, chiropractors and hospitals or clinics seen in given period of years before accident

**III. Accident Facts**

**A. Setting**

1. Date and time
2. Where did accident occur?
3. Where and when did you leave, any stops, where were you going?
4. Describe accident location – direction of travel
5. Weather, roadway conditions
6. Autos involved
  - (a) kind each driving, defects or malfunctions
  - (b) other vehicles involved or at scene
7. All occupants each auto
8. Describe site of accident – directions, lanes, lights, signs, signals
9. Restraint systems utilized

**B. Acts and Omissions Before Realized Accident Would Occur**

1. How or why did accident happen
2. When was first time you realized there might be an accident
3. Speed, times, distances, etc.
  - (a) location of cars at first realization (i.e., lookout) –(1) yours, (2) defendant's and (3) others
  - (b) speed – (1) between last stop and realization (2) at realization
  - (c) distance from defendant at realization
  - (d) distance from defendant when first applied brakes
  - (e) speed at impact
  - (f) skid marks – (1) before impact, yours, defendant's, (2) after impact, yours, defendant's and (3) distance both cars traveled after impact
  - (g) time elapse between realization and impact



**C. Reactions After Realization**

1. What did you do
  - (a) if brakes applied, was application light, firm, hard, sliding, and did it have effect
  - (b) if turn, where, did it have effect
  - (c) if horn
2. Anything in front seat with you
3. Exclamation of passengers
4. What happened to each occupant on impact
5. Point of impact (in street and to autos)

**D. Conversations**

1. Have any with officer, passengers, witnesses (get details)
2. Hear statements or conversations of anyone (get details)
3. Conversations since the accident

**E. Witnesses**

1. To accident
2. Arrived after the accident
3. Did you know any witnesses prior to the accident?

**F. Damages to Cars**

1. Parts of both cars damaged
2. Repair estimates
3. Driven from scene?
4. Air bag deployment?

**G. Tickets and court action**

1. Identify specific violations
2. Disposition of ticket – guilty plea?

**IV. Injuries and Medical**

**A. What parts of your body were hurt in accident?**

**B. Doctors and Hospitals**

1. When first go to doctor/hospital
2. What complained of
3. When hire lawyer
4. All doctors/hospitals
5. Who referred to each
6. Complaints to each
7. Treatment each gave

8. Number visits and amount bill
9. Prognosis each
10. Plans to return
11. Medications taken as a result of the injuries and who prescribed
12. Casts, braces, crutches or other medical devices and how long they were used
13. Medical bills paid and unpaid

**C. Subsequent accidents and re-injuries, claims or suits**

**V. Disability**

**A. Activity Since Accident**

1. Sports, fishing, hunting, dancing, picnics, bowling
2. Trips
3. Around home – housework, yardwork, repairs

**B. Work Since Accident**

1. Can do your tasks at work?
2. Earning your pay
3. Nobody else doing your work for you
4. Part-time, full-time, half days, etc.

**C. Lost Wages**

1. Employer
2. Immediate supervisor
3. Description of job duties
4. Dates off work
5. Rate of pay
6. Get total wage loss claim

**D. Applications for Jobs**

1. Workers' compensation
2. Unemployment compensation
3. Social Security
4. Other job applications

**E. Present Complaints**

1. Describe pain or injury
2. Frequency of problems and to what extent
3. Problems brought on by any particular activity
4. Minimize all can't do now that could before accident
5. Currently taking any medication for injury?
6. Did you ever complain of same or similar pains, problems to anyone before accident?

RKL/pb/dcf  
18332732

