



Lawyer in the hot seat: Taking the deposition of the attorney-defendant in a legal malpractice action



Kunstler

By Peter Kunstler

Despite the chorus of invective from anti-consumer forces in corporate America, the insurance industry and their minions in Congress and state legislatures, the plaintiffs' bar has been extremely effective in defending the competence and integrity of our profession. CAALA contributes to that effort by demanding that its members adhere to high standards of professionalism.

Not all lawyers comply with those standards, however. Sometimes, good lawyers make costly mistakes. When that happens, the remedy for their unfortunate clients is a lawsuit for legal malpractice and breach of fiduciary duty.

Taking the deposition of the defendant attorney, not surprisingly, is critical to the process. On the other hand, the defendant's deposition in a legal malpractice action has a number of characteristics that distinguish it from most others, as to both the content and the style of the deposition. The content distinction

arises because the action must be pursued at more than one level, in that the *incident* is itself another legal proceeding. The contrast in style results from the fact that the defendant, even if represented by counsel, approaches the deposition as both party and lawyer. As we will see, this can work to your advantage.

Before the deposition

Legal malpractice cases require two levels of inquiry, usually described as the "case within a case." In effect, you will be

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applying the “rules of the road”¹ to winning the underlying case, and then contrasting them with the defendant attorney’s approach. Your outline and selection of exhibits for use at the deposition must reflect this.

Because legal malpractice actions involve a broad variety of underlying cases, you must familiarize yourself with the rules for the specific type of practice in which the defendant represented your client — carefully avoiding the same traps that the defendant may already have fallen into. Your preparation will range from the relatively straightforward, perhaps proving an untimely-filed personal injury case with clear liability and damages, to a complex demonstration of how drafting or acceptance of incorrect jury instructions lost the underlying case.

As we all know, cases can be lost through poor judgment or mistakes at various stages of the underlying litigation — pleading, discovery, preparation of experts, all the way through settlement and appeal. Cases where your client contends she was coerced into settlement require particular attention to the details of how the defendant handled her representation, because the defendant will generally refer to the claim dismissively as mere “settler’s remorse.”

Regardless of the nature of the underlying case, by the time of the deposition you should already have reviewed the file thoroughly. There you will find the jury instructions that the defendant failed to object to; the untimely or incomplete responses to discovery; the inadvertent waivers of your client’s rights and contentions; the tardy designations and preparation of expert witnesses. From these documents, you can develop a portfolio of exhibits for use in your examination. You can flesh out the story told by the file with discovery whose responses will serve as a springboard for deposition questions.

You also will already have a general idea whether the defendant’s conduct was *merely* negligent, or whether you have, in addition, a strong case for deliberate misconduct, i.e. breach of fiduciary duty. Frequently, legal malpractice plaintiffs will tell their lawyers about a shocking

lack of communication from their former counsel. Failure to communicate, aside from constituting a violation of Rule of Professional Conduct 3-500, more often than not masks a desire by the defendant to conceal a serious mistake or even intentional wrongdoing on his part. Even under the best of circumstances, it creates an atmosphere of mistrust.

Your initial review should indicate to you whether the attorney properly made all appropriate disclosures, provided an adequate retainer agreement in compliance with the Business and Professions Code, and appropriately dealt with any conflict of interest situations. Bear in mind that, in order to obtain additional recovery for your client over and above damages for negligence, you will have to treat breach of fiduciary duty as a separate tort with separate categories of damages.

Focusing the deposition

As plaintiff’s counsel, part of your preparation will involve determining the most economical use of your time. More than most defendants, attorneys resist multiple days of deposition so, while you may obtain reluctant agreement to a second day, a third day or more will be unlikely without a motion. It thus pays to ask the salient questions early on — during the first or certainly within the second day of testimony. In any event, if you cannot finish in two days, you are probably delving unnecessarily into minutiae — and affording the defendant additional opportunities to explain his or her decisions and actions in the underlying case. You are better off getting most such details from the file and thereby avoid divulging to your opponent the focus of your investigation, at least any more than is strictly necessary.

It helps in this regard to decide where that focus is. Is overall competence an issue? Do you want to try to impugn the skills and experience of a seasoned attorney — whose response to your attack may undermine your credibility rather than hers? Or, rather, take the position that a good attorney made a costly mistake? Even if you believe that the defendant’s level of professional ability is substandard, decide whether your challenge

needs to encompass the entirety of his practice. Perhaps a talented business litigator stumbled in trying to accommodate a long-term client in a personal injury or real estate case outside his practice area.

Once you are comfortable with the focus of your deposition, as well as its scope and timeframe, you should assemble an initial package of exhibits from your review of the file and the defendant’s document production. It is often wise to add another request for documents to the deposition notice. This document request may include documents that have already been responded to and/or new ones you have determined that you are likely to need. Among the new ones, be sure to ask for the deponent’s résumé. Asking for previously sought documents enables you to explore the search process at the deposition, and may uncover some previously undisclosed correspondence, notes or drafts — especially if the prior requests were addressed to the lawyer’s law firm rather than just to him as an individual.

Do not forget the notice under Code of Civil Procedure sections 2025.220(a)(5) that you intend to, or may, videotape the defendant’s deposition. While, arguably, not all depositions warrant videotaping, the videos of attorney depositions can be extremely revealing. If the case is worth taking, it is probably worth videotaping the defendant lawyer’s deposition.

Many a legal malpractice client wants to sue his former counsel because the lawyer has filed or threatened to file a lawsuit for fees. Similarly, legal malpractice defendants often consider it opportune to counterattack with a (possibly fabricated) fee dispute. Fee disputes provide a rich terrain for discovery. If fees are an issue in your client’s case, your review of the attorney’s retainer agreement and bills is a very important aspect of deposition preparation.

Getting the deposition under way

An attorney-defendant is more likely than other defendants to arrive at her deposition with a chip on her

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shoulder. She may urge the examining attorney to “get started,” and repeatedly ask plaintiff’s counsel “at what time do you think we’ll get out of here?” Although to save a few minutes you can waive the admonitions usually given to the deponent at the outset of the deposition, be sure that the record reflects the defendant’s (and his counsel’s) express waiver. Otherwise, resist the urge to rush at any point during the proceedings just because the defendant thinks she has better things to do – it’s not your fault she’s there!

Before you get to the main theme of the deposition, it helps to ask the deponent with whom, other than malpractice defense counsel, she has discussed the case. This is particularly important if the deponent is a member of a law firm that is also a named defendant. Conversations with colleagues about the case – outside the presence of defense counsel – are discoverable.

Economical use of your time permitting, a thorough examination of the defendant’s background and of her resumé often produces valuable information. Has she written articles bearing on the subject matter of the underlying case? Is she a certified specialist; has she attended pertinent continuing education? Has she taught classes or conducted seminars on the subject? Before your client’s case, had she handled any similar matters? These questions also serve a second purpose – making the deponent feel comfortable reeling off her accomplishments.

Areas of inquiry

Begin at the beginning – the inception of the representation plays an essential role regardless of the nature of the malpractice claim or the underlying case. How was the initial contact made? Was the plaintiff already a client in another matter? Did the client respond to the lawyer’s advertisement or commercial? What did the advertisement or commercial represent to potential clients? Did the lawyer have an arrangement for a referral fee, and if so, what was the arrangement and with whom?

Find out how the lawyer defined the scope of the representation so that you can compare it with the client’s definition. Similarly, ask the defendant to describe his view of the client’s expectations, and how he responded. Did he assign a value to the client’s claims, or give the client an estimate of the chances of success? Frequently, the defendant’s answers to these questions will be contradicted not only by the lawyer’s statements showing that he oversold the case, but also by the way he conducted the representation overall.

What were the defendant’s first impressions of the underlying case? If she thought the matter had only limited merit, why did she take the case? Did she document her dim view of the case in a letter to the client? Indeed, these questions constitute the opening move in a much broader inquiry into the defendant’s communications with the client. If the lawyer began the representation with coyness or deception about the client’s case, as the deposition proceeds you are likely to discover other examples of lack of candor, outright lies and repeated failures to put into writing important matters that – if true – required documentation.

Inquire carefully into the terms of the retainer agreement and the manner in which it was presented to and accepted by the client. (Of course, if the attorney did not require the client to enter into a retainer agreement required by Bus. and Prof. Code, §§ 6147 or 6148, a brand new area of examination opens up.) Does the retainer clearly and fairly set forth the terms and scope of the representation and the structure of fees? Equally important, did the attorney give his new client time to read the retainer, discuss it with other counsel and request changes?

Particularly where the underlying matter concerns business or legal transactions, you must ask about the defendant’s methods for determining and dealing with conflicts of interest. This area of inquiry is of particular importance where the defendant is a large firm with many business clients. What are the firm’s rules and how does it enforce them? Unfortunately, many legal malpractice claimants

discover that laxity or venality on the firm’s or the individual attorney’s part has led to a damaging conflict situation from which neither counsel nor the client can extricate themselves. Often, defendants then respond to this situation with measures that protect counsel to the detriment of the client. Think “breach of fiduciary duty” when your examination produces this kind of testimony.

Another area of examination common to many legal malpractice cases, even if the defendant does not claim fees, resides in the defendant’s time-keeping and billing practices. Incomplete, vague, inaccurate or infrequent time and billing records may help you to establish that the attorney-defendant ignored your client’s case, missed deadlines or failed to make sufficient effort to oppose dispositive motions. If fees are an issue, failure to keep complete records may enable you to obtain a significant reduction, especially in a case where the attorney seeking fees bases the claim in quantum meruit.

If the fees in dispute were calculated hourly, not infrequently your client will describe a situation in which he received no bills for a period of time, asked for assurances that his fees remained within the parameters he told his lawyer he could afford, and then was presented with a bill that had skyrocketed while the lawyers or the firm kept the client in the dark. Get the defendant’s side of this story: how he recorded time, where time records were kept, who reviewed his pre-bills or bills, what he told the client. The responses will often be helpfully vague and contradictory, and demonstrate the lawyer’s inability to defend his billing.

While the above matters may seem “preliminary” in nature, they have a material function in establishing the “rules of the road” as those rules relate to the practice of law. Aside from the fact that you may have discovered some information permitting you to void an oppressive retainer agreement, discount a fee bill or establish the existence of a detrimental conflict of interest for your client, you will have gained insight into the care, or lack thereof, that the defendant

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brought to the practice of law in your client's case.

With the above in mind, you can now go where the devil resides: in the details. Primarily, you want the deponent to agree with you on the rules of the road for the underlying matter, whether in a garden-variety personal injury case, a complicated real-estate transaction or a business deal gone sour. Keep the rules simple, straightforward and difficult to disagree with; bear in mind that the more complex the rules, the more room for the defendant to assert that his actions constituted a "judgment call."

Next, proceed to the questions that apply the particular rules of the road to the particular case. Take the defendant through each step of the representation, identify each act or omission that deviates from the rules; obtain the defendant's explanation for the deviation. Find out if the defendant delegated any tasks, and to what extent she supervised the work she did not do herself. Explore the defendant's research methods and results, and ask if the results are reflected in written memoranda or other documents.

Inquire about the client's involvement in the case generally, and particularly in preparing or opposing dispositive motions, and the degree to which the client was kept informed of the manner in which the case was being pursued. Does the defendant repeatedly refer to the client as "bossy" or "demanding," or blame the client for insisting on tactics and strategies that the defendant claims to disagree with? Ask for the letter he wrote to the client confirming the advice and her refusal to heed it. What, no letter, although you claim your client put you in an impossible position? Sorry, that doesn't ring true.

Litigation involves a great many decisions on matters that can make or break the client's case, and lends itself to an almost textbook "rules of the road" analysis. Accordingly, frame questions pertaining to each major juncture in the underlying action. How well did the attorney relate discovery to the issues at

trial, contact witnesses, prepare exhibits and a trial notebook, and generally understand where he intended the trial to go. How did the attorney handle jury instructions and verdict forms?

Expert witnesses pose a whole raft of problems. Because experts charge such high fees, the client may have balked at hiring all the experts necessary to cover each aspect of the underlying case where expert testimony was required. Did the attorney try to find and then discuss alternatives with the client — and then document his advice? Did the defendant define the scope of expert testimony appropriately so as to render it effective both in terms of value to the case and cost? Or, was the defendant "penny wise and pound foolish" in choosing less pricey — but less convincing and prepared — expert witnesses?

If the claim arises from an allegedly unfair, insufficient or coerced settlement, ask the defendant to describe all the circumstances of the settlement in as much detail as possible. Who was there? How long did it take to reach an agreement? Did the attorney have to urge his client to accept a settlement significantly below the client's expectations? Did the client want or try to leave? How did matters reach a crisis point? Prior to the settlement, did the defendant explain to the client that her expectations were unreasonable? Was this a change of tune, or had the attorney genuinely tried to keep expectations under control? If your client's view of the settlement proceedings was accurate, the defendant may reveal himself as overbearing and controlling, and perhaps as having realized, too late, that he was unprepared to try the plaintiff's case.²

The lecturer, the liar and the amnesiac

Regardless of the subject matter of the underlying case and the nature of the malpractice, attorney-defendants tend to ignore their counsel's advice. ("Be quiet, Bert, you've answered the question.") Instead they provide lengthy explanations for their answers, and often lecture

plaintiff's counsel about how to ask a proper question to boot.

Wonderful. Let them.

Altogether too often, perhaps because they feel cornered, attorney-defendants, loquacious or not, resort to lies. Assuming you have carefully prepared the deposition (and discussed the underlying case with your client), you will be able to identify the lies as you proceed. Thus, especially if you have in hand a document that contradicts the deponent's verbal statements, you can transform adverse testimony into advantageous impeachment.

Somewhat more problematic is the defendant suffering from an acute case of amnesia during the deposition. There are a couple of ways to deal with this, first by presenting the deponent with documents that will remind him of forgotten details of the underlying representation; second, go into elaborate detail about matters where the defendant is only too willing to testify at length — then impeach him with this demonstration of his selective memory processes.

The deposition of the defendant in a legal malpractice case, with all its potential pitfalls, provides a valuable, albeit occasionally disturbing, perspective not only of the matter in which it is taken but also of the practice of law as a whole. Take the deposition with pride in our profession for insisting on the best standards of practice.

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Endnotes:

¹ Friedman, Rick and Malone, Patrick, *The Rules of the Road, A Plaintiff's Lawyer's Guide to Proving Liability* (Trial Guides, 2006).

² If your legal malpractice case involves issues arising from a mediation proceeding in the underlying case, be prepared for objections to questions about what transpired at the mediation based upon *Wimsatt v Superior Court* (2007) 152 Cal.App.4th 137.