

# **Depositions of Product Identification Witnesses in Asbestos Cases**

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Product identification witnesses come in various forms – it may be the plaintiff’s husband/wife, child, aunt/uncle or nephew/niece, it may be a co-worker or supervisor, it may be a friend, or it may be someone who does not know the plaintiff. It is important to know the witness’s relationship to the plaintiff before the deposition in order to know of any potential biases and then asks questions about the bias. Further, if the witness has a close relationship to the plaintiff, you may be able to learn valuable information about alternative exposures, smoking history, or other pertinent facts about the plaintiff. Depending on the witness, not asking questions may be the best strategy.

This article discusses what should be considered prior to the deposition and topics you should consider covering at the deposition. This article does not cover product identification topics as the questions that you should ask are specific to each type of product and to each client.

## **Court Rules**

Before the deposition, it is critical to know the local procedural rules relating to depositions and how depositions can be used at trial. In some jurisdictions, the discovery deposition may be used at trial and is not considered hearsay. Depending on whether the deposition may be used at trial, you may want to ask trial questions that you would not usually ask in a discovery deposition. You will want to be prepared to ask the questions you would ask if the witness was on the stand testifying at trial in front of the jury. This presents a difficult challenge as you may not know what the witness is going to testify to. You will want to rely on witness disclosures about the witness’s testimony and even consider discussing with opposing counsel what the witness will testify to.

You will also need to know what objections need to be made on the record at the deposition and what objections are reserved for trial. As rules vary by jurisdiction, you should check the rules for the jurisdiction in which the case is pending before the deposition if you are not familiar with the rules. In many jurisdictions, objections to the form of the question (e.g. leading) must be made at the time of the deposition or the objection is waived, but trial objections (e.g. hearsay) usually do not need to be made. As the deposition may be used at trial, you should be diligent in making form objections. At trial when the admissibility of the testimony is challenged, trial judges and opposing counsel do raise the issue of whether the form objections were made on the record at the deposition and objections have been overruled for failure to make them on the record.

## **Investigation Prior to the Deposition**

For high exposure cases, you should consider whether to conduct an investigation of the witness and alleged exposure before the deposition. Although the time and expense is not justified in every case, some cases do justify the time and expense of the investigation before the deposition. Examples of such cases include those in which your client will likely be a target defendant, high damages cases or living mesothelioma cases.

Pre-deposition investigation of permitting records can be helpful in obtaining favorable testimony that can be used in support of a motion for summary judgment. Permitting records may narrow the time that the plaintiff used the product or show that the product was asbestos free when used. With the permitting records knowledge, you can then ask the witness questions relating to the permit, for example, they did not start work until after they obtained the permit or the work with joint compound did not occur immediately after obtaining the permit as there are several steps in the construction process before the joint compound work. Obtaining the permits and asking the witness questions has been successful in obtaining summary judgment.

You should consider investigating the following:

- *Address(es) of alleged exposure site*

- *History of alleged exposure site*

Year built, square footage, ownership, title history

- *Permitting history of alleged exposure site*

- *Medical records of plaintiff*

Alternative exposures, work history

- *Employment records of plaintiff*

Alternative exposures, work history

- *Criminal history of witness*

### **Alternative Exposures**

Product identification witnesses can be a great source of information regarding alternative exposures. Knowing the witness's relationship to the plaintiff before the deposition will help you in determining what information the witness may have regarding alternative exposures. For example, a spouse or child may have information about where the plaintiff lived during his/her life, work history, or hobbies; or a co-worker may have information about the plaintiff working with other asbestos containing products. It is important to not simply ask whether plaintiff had any other asbestos exposures because the witness may not know whether there was asbestos in the product. The better approach is to ask specific questions about the alternative exposures, such as whether the plaintiff ever worked with insulation or did the plaintiff garden.

Although the witness may not have specific information about alternative exposure, you can use the information provided by the witness to investigate alternative exposures. Former addresses can be used to determine whether the plaintiff lived near a super fund site. Former employers can be used to locate and interview co-workers.

### **Whether to Ask Questions**

Depending on the rules of the jurisdiction, the best strategic approach may be to not ask any questions. This is a strategic decision that needs to be made on a case by case basis and depends on the witness, the facts of the case, and your client's guidelines. You should consider what would be gained by asking questions and what you risk by asking questions, and also what would be gained by not asking questions and what you risk by not asking questions. This analysis should be made in every case, even when your client has been identified. Some witnesses know what answers to give to support the plaintiff's case, and any question you ask will only help the plaintiff's case. You should also consider whether the witness's testimony may be used in future cases as any questions you ask may only create great evidence for plaintiff's counsel to use in future cases. Not asking questions is a very difficult decision to make but it may be the best option for your client.