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WHEN AND WHY TO DEPOSE YOUR OWN CLIENT
The Pros, Cons & Mechanics

I. INTRODUCTION

"There are no rules here--we're trying to accomplish something."
-Thomas Edison

The idea of deposing your own client may seem unorthodox. Conventional wisdom suggests that you should avoid offering your client's deposition, which has largely been followed without question or second thought by Plaintiffs' attorneys. This paper and ultimately the presentation to follow aims to change this mentality and at a minimum challenge attorneys, especially representing survivors of sexual and physical assault to consider the idea and potential benefits of deposing your own client(s).

II. WHY WOULD YOU DO THIS?

a. **Benefit to Client**:

Your client's narrative, in many ways, is going to drive the course of the litigation. They are going to be deposed one way or another and, if the case proceeds to trial, are most likely going to have to testify. By allowing them the opportunity of being deposed first by their own lawyers you can minimize the anxiety and help them by having a friendly voice to get their complete story out, in a linear fashion, before they are subject to the more dangerous and potentially damaging questioning by defense counsel. No one should know your client's case better than you do. By using that knowledge to extract the information needed to support every aspect of the case directly from the client on the record, you are able to control the vital information in an environment that is more conducive to doing so than through the pressure of cross-examination, or waiting until trial.

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This is of particular benefit in cases involving abuse and/or assault survivors who are suffering from various mental health consequences due to the horrific trauma inflicted upon them. One of the most difficult things they will ever do is to recount to a group of strangers in a legal setting the atrocities they went through. You will (presumably) know their conditions and be in a position to manage and control the order of their testimony to help them get through the things that are extremely difficult to say without having an aggressive cross-examiner trying to trip up their every word during a retelling of what is likely the worst moments of their life.

Further, often times these cases involve multiple victims of the same perpetrators or institution. By taking these depositions first, you are getting information from one client that might be beneficial to another client's case. In many cases, multiple plaintiffs could be witnesses in each other's cases and by taking the testimony first you are setting the stage for the following witnesses and adding to the credibility of each client's case.

b. <u>Expert Reports and Testimony</u>:

Often times the experts in your case must rely on the facts that have been filtered through police reports, witness statements, medical records, or other means. When you have an organized and detailed deposition transcript for the expert directly from the client's account it can help the expert truly hone in on the facts as they happened to your client. This is helpful in multiple ways.

First, the expert is not left to filter the information from the other sources and can view the video deposition to see exactly how the plaintiff reacts to questions, especially when being asked about the abuse/assault. This allows the expert to have an account directly from the victim without necessarily having to conduct the same level of examination and without unnecessary reliance on any filtered information.

Second, you are able to focus the client through your examination in a way that you could not during the client's meeting with the expert. In most cases your client is likely only meeting with the damages expert once, maybe twice. The client often times has never met with or even spoken to the expert prior to the meeting. As we all know, clients of all ages, open up in different ways and on their on time. The meeting with the expert can feel forced and it can be nerve racking, which often times leaves to an incomplete narrative. In every instance where we have deposed our own client the experts involved in the case are blown away about how much more thorough and informed their report and ultimate opinions can be. Several forensic psychiatric/psychological experts have shared similar sentiments such as, "is there a way we can insist on this before being retained," "why doesn't everyone do this." Even for standard of care experts the detailed accounts can be extremely helpful as they are not left to speculate as to what occurred or in what manner. Essentially you are able as counsel to frame the narrative even for your own experts who can then utilize the information you have obtained through the depositions in a manner that makes the most sense to their roles.

Additionally, while it may still be preferable for an expert, depending on their field, to meet with the client, there may be cost saving benefits by allowing the expert to familiarize themselves with the client's account prior to the meeting/examination. Conversely, some experts

prefer to interview the client and then read the transcript/watch the video to make sure they have a full account of what happened and how it has affected the Plaintiff.

c. Motion Practice (SOL / DISCOVERY):

As we all know fully appreciating the law and what you need to prove in any given case is critical to having a "game plan" in terms of the discovery process. Moreover, we all know that Defense firms love to pepper us in motion practice, which ultimately culminates in a motion for summary judgment. Knowing these issues and exploring them with your client, when appropriate, can make all the difference in assuring the motions filed by defense (especially the MSJ) are denied. Having your client testify in a "friendly" non adversarial environment most times will create a genuine issue of material fact that must be decided by a jury, and you are getting precisely the factual basis from them in the record that you can then use to defeat these motions when responding before the Court. This is true whether it involves what the defendant knew or should have known, issues concerning vicarious liability/respondeat superior, negligent supervision/hiring/retention, or statute of limitations issues, to name a few.

Many of our cases may implicate tricky statute issues and often times we are relying on a particular State's discovery rule (assuming the State has an applicable discovery rule for sexual assault cases). In these cases, it is our belief that deposing your client first is critical. It allows you to explore the necessary law surrounding the specific discovery rule and elicit testimony that supports your contention that the statute was tolled given that the Plaintiff did not know and/or discover that the abuse they suffered from caused long term and persistent mental health issues.You are then able to quote directly from the testimony in your responses providing a factual basis for the discovery rule to be applied by the Court. This has been immensely helpful in defeating motions to dismiss or motions for summary judgment where the statute is the primary defense. We have seen that where we cannot out right win on the statute issues we have been able to persuade judges, based on the testimony from our client, that the question is at least one for a jury to resolve. Obviously, while we can never predict what a jury will do, it is our belief that most jurors will not deny a sexual assault survivor justice because of the statute of limitations where you have evidence that the statute should be tolled, but you most get to the jury.

d. Mediation/Foster Resolution:

In our cases we prepare a traditional mediation memo but also provide a video, which is a compilation of the testimony and evidence adduced throughout the discovery process. The video watches like a documentary. We will narrate over the video to highlight the relevant testimony, documents, exhibits and other forms of evidence to make clear for the mediator, arbitrator, judge, and/or focus group to persuade them as viewers to adopt our position, factual assertions and/or legal arguments. The impact of having the testimony from your client, through your direct, where the client is describing what happened and how it has affected him/her cannot be understated. It is one thing to read about, through a couple of lines of text, the abuse and damages the Plaintiff has and continues to suffer from. It is an entirely other thing to watch as the Plaintiff, in painstaking detail describes the abuse.

It is even more impactful to watch as the Plaintiff answers, what sounds like simple questions that are rarely if ever asked by defense counsel, such as, "how did that make you feel," "do you remember what you were thinking as this was happening to you," "how has this affected you up and until this very day?" Watching the often-emotional responses to these questions make it incredibly difficult for a mediator, judge, arbitrator or ultimately a juror to find in favor of the defendant.

The testimony, if utilized correctly, can foster early resolution or resolution that is a multiplier in terms of what you expected or what the jurisdiction you are in normally resolves a case similar to your case for. This is why, if you are going to depose your client, it must be videoed. If you use the video properly, ideally by creating a compilation or "documentary" as described above and will be described below, make sure that this compilation/"documentary" finds its way to the trial judge (perhaps as an exhibit to pending motion), mediator, defense counsel/insurance adjusters and anyone else of import to the case.

In terms of getting the video before the judge most defense attorneys cannot help themselves and will do the work for you by filing some motion that begs for you to respond with facts from the record of the case, and you can use the video as an exhibit. This was done recently in a complex case involving dozens of Plaintiffs to the utter detriment of the defendants. The judge was provided a copy of our motion with our "documentary" attached prior to the hearing. At the hearing the judge, almost immediately, made it crystal clear to defense that they had seen what was in the video and based on that, "you need to stop focusing on litigation and start focusing on resolution because there is no circumstance where you can try this case in front of a jury."

III. DEFENSE REACTION / RESPONSE WHEN ATTEMPTING TO DO THIS

When you notice your client's deposition defense counsel will be perplexed. Quite frankly they will likely think you do not know what you are doing as a Plaintiff's attorney. This is exactly what you want them to think. After the confusion wears off the defense will potentially file a motion to preclude you from doing this. There is absolutely no law that we are aware of that prevents this, at least not in the jurisdictions that we have practiced in. The beauty of this is watching defense counsel inarticulately argue why you should not be permitted to do this. They, from what we have seen, cannot point to a single body of law or statute that prohibits this so it sounds like defense counsel is complaining for the sake of complaining. Instead, at best they will complain that they don't have sufficient other discovery in the form of records, etc., to begin the Plaintiff's deposition.

Bear in mind, if you take the full day with your client the defense portion of the deposition can take place at a later date so that argument should not prevent the deposition. Additionally, in multi-plaintiff cases, often each Plaintiff will be a witness in each other's cases, and this makes it even more challenging for a defendant to articulate a reason why one plaintiff could not depose another that is a witness in their own case. Moreover, when defendants oppose this, it allows you to argue that their opposition is nothing more than a delay tactic to drag the case out while the Plaintiffs are attempting to move the case along and complete the necessary discovery in

accordance with the Court's scheduling order. This sets you up nicely for the inevitable defense motion to continue the case and push back the discovery end date.

When we first started doing this several defense counsel approached us afterwards to share similar sentiments, such as "when you first noticed your client we thought you were crazy but after it was all done I realized we got [screwed[2]]!" In one case that involved multiple clients, we deposed each of them (there were 27 Plaintiffs in total) for a full day. Thereafter, defense counsel started to notice the clients for defense to have the ability to question the clients. After deposing only four of the plaintiffs we received an email indicating defense will no longer be deposing any additional plaintiffs. We believe this was in part due to the fact that they were not getting anywhere with the plaintiffs and every area they attempted to go into the plaintiff had already addressed it, was prepared for it, and was not thrown off or flustered by it. There is no doubt that the insurance carrier played a part in this as they were not going to pay for another 23 depositions, plus prep time, when defense counsel was not able to advance the proverbial ball in their case through any of the four they had already taken.

IV. MECHANICS / TIPS

a. Know Your Case!

As discussed above, before deciding to depose your client you must have a complete, or as close thereto as possible, understanding of the legal and factual issues, problems, landmines, etc… in your case. You will want the structure of the deposition to anticipate as many of the defense theories/defenses as possible and attack them head on. Getting ahead of the pitfalls of your case and the defenses takes the wind out of defense counsel's sails and puts you in the position of framing the issues in the most positive light possible to your case. If your client is one of the first witnesses and you exhaust all areas that need to be covered you will be in a much better position in all aspects of your case – including motion practice, focus groups, negotiations, future deposition preparation, and ultimately trial if it comes to that.

b. Depose First, as Early as Possible, and Use the Entire Day

This strategic maneuver only works if you depose your client first, as in before defense, and as early as possible. Inevitably your client will be one of the first people the defense wants to depose so you will need to get the notice out before they do. We do not believe it would make sense to depose your client after the defense has taken their deposition. The entire point is to control the narrative, make your client comfortable with the process, provide a linear and historically accurate account for your experts, defeat defenses, and position the case in the best light, among other things. In a perfect world, if it is done right and defending on defense counsel they may not even take your client's deposition, which is an absolute win for your client on so many levels.

Another important strategy for this to work in the most effective way is to use the entire day when possible. The pushback you will receive from defense is that you are precluding them from asking questions. What we have done to take away this argument is to concede that the client will come back for a second deposition on a later date. We advise against having the deposition(s)

[2] The actual expletive used was more graphic and we will leave that to your imagination.

scheduled over two consecutive days. By having the defense (if they chose to) depose at a later date it allows time for your client to receive a copy of the transcript before they are deposed by defense so the plaintiff can fully prepare and remembers what and how they testified previously. This helps the client not be tripped up or confused by defense counsel during their cross examination. This also gives the plaintiff a tremendous amount of confidence. As we all know a deposition is anxiety provoking for many clients because, among other things, it is the unknown as majority of our clients have never been deposed before. Going through the process with you, as their attorney, allows them to go through the experience in the least intrusive and traumatic way while also being able to understand the mechanics of a deposition.

The clients who have been deposed by defense after we went gave a much better deposition than many of our clients who were not first deposed by us. You will be able to see it in the prep, in their demeanor and the way in which they answer the defense attorney(s) questions. We understand that most people do not want their client deposed twice as the thinking is to get the client in and out of the deposition seat as fast as possible, and avoid giving the defense time to analyze the client's answers and try to come up with ways impeach or otherwise negate their prior testimony. This mentality may be true in certain circumstances but in cases with fragile clients, multiple plaintiffs, aggressive defense attorneys, and/or a complicated set of facts, deposing your client may be the ideal situation even with the understanding that they may be deposed a second time.

c. Make the Client as Comfortable as Possible

As we all do before a client's deposition – preparation is key. We treat the preparation of our client when we are taking the deposition very similar to how we would prepare a client for their direct examination before trial. We certainly appreciate trying to limit the client's exposure to having to retell the abuse/assault over and over again but it needs to happen in preparation especially if this testimony is tied to legal issues, whether those issues concern the statute of limitations, vicarious liability, or otherwise. We do not coach, of course, but instead make sure our clients are not leaving out salient details that they may deem innocuous (or may otherwise overlook due to nerves, forgetfulness, etc.) when in reality they are crucial. This level of preparation – essentially deposing your client before the deposition – allows the client to organize his/her thoughts and be keep on track while retelling their life's story. We make it clear to the client that we are going to break the deposition up into parts and we need to stay within those with little to no deviation.

For example, in a case that will be discussed below (and this will make more sense when you get to the case example) the deposition was broken down (with many subparts) to (a) their life before the institution (Miracle Meadows) (which includes family background, mental health issues/treatment, medical treatment, prior trauma, educational background etc…); (b) their life at the institution (Miracle Meadows) (which includes various categories of abuse and neglect, which includes sexual and physical abuse, solitary confinement, child labor violations, educational, medical and nutritional neglect among other things) – we make it clear that when describing one category of abuse we need to stay on that category prior to moving on and have to exhaust that category; (c) their life after the institution (Miracle Meadows) (which includes any treatment they

have received, work history, drug/alcohol issues, arrests, living situation, intimacy issues, overall damages and anything else that is relevant and specific to your case.)

The deposition needs to be very structured and methodical. (This will especially help with fragile clients). After every deposition where we deposed our client – while it was certainly taxing and emotional to say the least – each client had a cathartic moment. The sentiment almost across the board from the clients is that they finally were able to tell their truth on the record to the people who did this to them and they truly feel like they have been able to confront those responsible even if the case never proceeds to trial. They were able to tell it without interruption and since we were taking it they felt believed in while they were recounting, essentially, their life story and the worst experiences they ever suffered.

d. <u>Take Breaks</u>

We recognize that all of you take breaks during a deposition and do not want to insult anyone by making this a subtopic. However, when deposing our clients I make it a point to put the time on the record when we are starting and not go more than an hour without taking a break. Often times our clients will not tell us they need a break. If you are deposing your client taking a break every hour not only gives your client an opportunity to stretch, use the restroom, and just take a breather, it allows you to give the client positive reinforcement about how well they are doing. Also, it allows from some carefully worded constructive feedback. The other benefit to a break is that even with an horrific case, after a long time of discussion answers can become somewhat monotonous and you want to keep the emotional edge in place. The clients after each break on the hour, almost always, go back in with a renewed sense of confidence and the feeling that they can do this!

V. CASE EXAMPLE (L.B. *et al.* v. Miracle Meadows School *et al.*)

The above case is what prompted us, four years ago when the suit was filed, to first entertain the idea of deposing our own clients. The decision was not an easy one but by far the decision to depose our clients was the most critical decision we made. Moreover, it may be the best decision we made in the case.

To understand our decision it is crucial to have a brief understanding of the case. We represented 27 Plaintiffs, all former children who were sent to Miracle Meadows School, a West Virginia boarding school and self-described facility for "at risk youth" that could supposedly cure children of any mental health issues they may have, correct any behavioral issues, and among other things, provide these children with an unparalleled education. To say this facility failed in every aspect of their stated mission would be a gross understatement. During his deposition, the lead police investigator described the treatment of the children and the condition of the facility with tears in his eyes at the disbelief that children were being treated this way in his County. He even stated, "I wouldn't put my dog in there."

Not only did we have a large group of diverse plaintiffs in terms of age, gender, race, and socio-economic backgrounds – these plaintiffs were situated across the entire country. These plaintiffs, like all of the children who attended this institution had issues ranging from severe

mental health issues, educational deficits, behavioral problems and/or parents who just did not want them anymore. The vast majority were adopted, some from outside of the country. The age of the children Miracle Meadows accepted ranged from 7 to 17 years old.

The type of abuses that these children suffered from once arriving at Miracle Meadows is unlike anything we have ever seen. The children were sexually assaulted, including anal and vaginal rape, forced oral sex in exchange for being fed, and forced to rape other children while staff watched for pleasure. The children were savagely beaten, including having their limbs broken, jaws broken, handcuffed, chained to objects, whipped with whatever staff could get their hands on, beaten with blunt objects and choked to the point of unconsciousness. Many of the plaintiffs will forever bare the physical (let alone the psychological) scars from their abuse. Miracle Meadows used an especially horrific form of abuse they titled "quarantine."

The facility had eight quarantine rooms (four in the girls' dorm and four in the boys' dorm). The rooms were 5 x 8 (at best) with no windows, clocks and little to no furniture. At times the children were permitted to have a thin, urine-soaked mattress but more often than not the children were forced to sleep on the concrete floor. The rooms did not have heating or air conditioning – so in the summer the rooms were blazing hot and in the winter they were freezing cold. The children would often be stripped completely naked while in quarantine. In terms of using the restroom the children were given a coffee can to urinate and defecate in, which they were "allowed" to clean once every 24 hours. The time these children had to spend in quarantine was arbitrarily decided by staff. There were some children who spent over 3 months consecutively in these rooms. When the children were not being physically and/or sexually abused and/or placed in quarantine, they were forced to perform hard labor for 8 to 12 hours per day – in all weather conditions and never with the appropriate clothing for the conditions.

Additionally, the children were denied medical attention regardless of whether the child was sick or had a serious injury. No mental health treatment was provided. In fact, the children who came there with pre-existing mental health conditions, such as bi-polar disorder or schizophrenia, were immediately removed from their necessary medication without medical approval or supervision. As far as education, the children, when permitted were all placed in one large room and forced to teach themselves using a system called Pace Packets. There were no teachers at the facility.

The facts indicated above do not even capture the magnitude of what these young children went through. The defendants in this case did everything in their power to delay the case. After almost two years of them fighting us on jurisdiction we finally were able to proceed to substantive discovery – or so we thought. It became immediately clear that the defendants were not going to do anything in the case to comply with the Court's scheduling order. After 6 months of an 18-month period given to complete all discovery, the defense had not taken a single deposition, nor ordered a single record, and they fought us every time we noticed a defendant's deposition. It was at this point that we made the decision to advance the ball, and to do that we began deposing our own clients.

The decision to do this allowed the case to move forward. It allowed for the Plaintiffs to tell their stories in a clear, clean, organized and linear fashion. It allowed the experts in the case to

focus on the key issues and have a clear picture of the atrocities that occurred. It allowed the Court to have a full understanding of the magnitude of this case. Finally, it allowed for a stunning resolution for these plaintiffs. After all of the Plaintiffs (as well as many other witnesses) were deposed by us, the defense finally began to notice the Plaintiffs for their second round of depositions. After taking only four plaintiffs depositions the defense let us know that they would not be taking any other depositions of plaintiffs. Thereafter, all of the defendants one by one began to resolve these cases globally.

All of the plaintiffs, although emotional, after the deposition was over felt heard, listened to and understood for the first time in their lives. They have lived their entire lives with "adults"/people of authority telling them they are worthless, not worthy of being believed, and that they will never amount to anything. This process and especially the deposition changed that for them.

We will be speaking more about this case during the presentation but I am confident in saying that had we not taken their depositions when we did, and how we did, this case would not be resolved today.