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THE IN EXTREMIS CLIENT

Trial[®]

July 2017 - Danielle W. Mason

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Representing a dying or seriously ill plaintiff—and getting the case ready for trial—presents challenges that require patience, planning, and compassion.

Preparing your client for deposition or trial is usually a difficult task. Most clients are not familiar with the inner workings of the legal system, and some are unable to - withstand scrutiny or grueling interrogation from aggressive defense counsel. But throughout my legal career, I have never met a greater challenge than preparing a dying client to testify.

I joined my firm's hormone replacement therapy litigation team early in my career. We represented many women who developed breast cancer after years of taking the very popular drug Prempro to alleviate menopause symptoms. During this litigation, I took my first trial preservation deposition on behalf of a woman whose cancer had progressed to the point where she would likely not live to see trial. Soon after being deposed, she passed away. That experience was followed by many other clients who fought for as long as they could before succumbing to their diseases.

These women were remarkable. Despite their constant pain and suffering—including the horrifying side effects of chemotherapy—they all wanted to tell their story, no matter how difficult it was to do so. I have deposed women in hospital beds, in nursing homes, and in their bedrooms. I have held their hands, cried with them, and encouraged them to be strong.

I am now part of the team that handles litigation against Johnson & Johnson and Imerys Talc America—companies that failed to warn consumers about the increased risk of ovarian cancer associated with using talc powder for personal hygiene. The lack of warning on talc-based body powders is particularly egregious given the poor prognosis associated with ovarian cancer.



According to the American Cancer Society, only about 20 percent of ovarian cancer cases are detected early because symptoms—such as bloating and abdominal pressure or pain—are usually mistaken for less serious issues.¹ As a result, many women are not diagnosed until the cancer has spread beyond the ovaries. Survival rates associated with Stage III and Stage IV ovarian cancer are 39 percent and 17 percent, respectively, within the first five years.² Given these dire statistics, the number of dying clients I represent has far surpassed that of any previous litigation I have handled. And it seems like the number increases every day.

Preparing a dying client to testify—whether for a deposition or for trial preservation—takes careful planning and even more patience. It's important to monitor the client's condition daily—in cancer cases, decline can be quick and severe. Once you are aware of any change, it is vital to begin the process of noticing and taking the deposition. Jacqueline Fox, whose talc powder case was the first to be tried in St. Louis, was a tragic example of how quickly a client's situation can deteriorate. She was doing well in May 2015 when I represented her during her defense discovery deposition, but she died five months later.

Have a system in place to monitor your clients. In cancer cases, evidence of metastasis to major organs, renewed chemotherapy treatments, recurrence of cancer, or the implementation of hospice care are all signs that time could be of the essence. Send your client update letters every 60 to 90 days. Make sure these letters ask that you be called if your client's medical condition changes or deteriorates, even if it's a family member who contacts you.

Similarly, tell your staff to ask for an update on the client's medical condition—including any new treatment or health providers—any time they speak to the client. When you receive medical records, review them carefully for any health provider notations, particularly those that suggest the client's condition is declining. Call all clients every six months if you have not received an update about their medical condition.

Request a life expectancy letter from the treating physician if your client's health declines. A life expectancy letter (LEL), completed by the treating physician who is the most familiar with the client's health condition, can help determine how long a client is expected to live by denoting a specific range of time. A word of warning—LELs are only a guide, and you should not rely on them for accuracy. It is not uncommon to receive an LEL from a physician predicting a life expectancy of six months or one year, only to have the client pass away in a much shorter time frame.

It is very important to establish a relationship with the client and become intimately familiar with his or her condition beyond simply what's in the medical records. Use your own judgment, and always err on behalf of the client's best interests.

Alert defense counsel to the situation. Provide defense counsel with updated medical records or an updated plaintiff fact sheet detailing the change in health as soon as possible. If you have ordered medical records, inform defense counsel that you will provide them as soon as you receive them. And if the case is not filed, check the rules in your jurisdiction to determine whether the court allows preservation depositions without filing.

Schedule the deposition for a reasonable time. Work with defense counsel to set a mutually agreeable date, but advocate for your client's needs. If the judge has a formal protocol for depositions—as is the case in the talc powder multidistrict litigation—follow it to avoid potential pushback from defense counsel. Formal protocols set a time frame for notice and the production of records, time limits for questioning, and other procedural issues—but should always allow some wiggle room for special circumstances.

Inform defense counsel of your client's health status—initially resistant counsel will usually comply if you communicate the gravity of the circumstances. If defense counsel refuses to cooperate, you will need to get court assistance to resolve the issue. Have the judge's number on hand throughout the deposition as a precaution.

Consider your client's energy and stamina. Remember that your client cannot withstand a marathon session. Prepare your client by phone in small increments of time every day leading up to the deposition. How you do this—and how far in advance you start—will depend on how much time you have. After you receive the LEL, order updated medical records, and speak with the client and his or her family. You may learn new information—such as a round of chemotherapy or a recurrence of cancer—that makes the case a priority, even if the LEL indicates a longer life expectancy. Break the testimony down into topics, reviewing only one a day. Meet your client in person a day or two before the deposition to review the most important topics.

Remember the importance of the preservation deposition. A preservation deposition is essentially a videotaped direct examination that will play at trial in place of your client's live testimony—so ask the same questions you would ask if your client was on the stand.

For example, in the talc powder litigation, we would—at a minimum—briefly discuss the client's background, education, and work history; her use of talc powder (how she applied it, how often, and for how long); when she stopped using the powder; her medical condition before and after cancer; whether she would have read or heeded a warning; and her pain and suffering.

Always videotape the deposition so the jury can both see and hear your client. Although videotaping the deposition should be the rule rather than the exception, look for alternative ways to preserve your client's voice and image for the jury in case your client passes away before the deposition.

Jacqueline Fox, for example, passed away from ovarian cancer before we could take a preservation deposition. But we obtained the certified audiotape the court reporter made during the defense discovery deposition, and we played it during trial. The sound of her voice had a profound effect on jurors.

Make sure your client is comfortable during the deposition. The deposition should be located wherever your client is most comfortable—not where defense counsel wants to have it. During the deposition, take as many breaks as necessary. Do not hesitate to end the deposition if your client cannot go on. Ask defense counsel to remain cognizant of the client's condition and to avoid unnecessary repetition. Most will comply—but if not, contact the judge.

While you may be representing someone who is dying or gravely ill, that isn't the defining characteristic of your client. Gather photos of the many decades of his or her life, including photos from before and after the injury. Produce these photos at the deposition so they can be used at trial. Remember, you are not just preserving evidence—you are preserving a life. Give that life the justice it deserves.

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Notes

1. Am. Cancer Soc'y, *Can Ovarian Cancer Be Found Early?*, www.cancer.org/cancer/ovarian-cancer/detection-diagnosis-staging/detection.html.

2. Am. Cancer Soc'y, *Survival Rates for Ovarian Cancer, by Stage*, www.cancer.org/cancer/ovarian-cancer/detection-diagnosis-staging/survival-rates.html.

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