

# A New Approach to Depositions: Catching Flies with Honey

by

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# Being a Trial Lawyer is a unique job.

- Other than professional sports, what other job involves working against someone else whose job it is to defeat you?
- The key to success is overcoming adversity.
- Reach out for help.
- Do not be pessimistic.

“The basic difference between an ordinary man and a warrior is that a warrior takes everything as a challenge while an ordinary man takes everything as a blessing or a curse.”

Tales of Power by Carlos Castaneda

THE EXCELLENCE ISSUE

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## WHAT IT TAKES TO BE GREAT

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James McNerney,  
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*"I have this idea  
in mind. All of us  
get 15% better  
each year."*

—JAMES McNERNEY



- Research now shows that lack of natural talent is irrelevant to great success.
- The secret? Painful and demanding practice and hard work.
- No one is a born trial lawyer.
- There is no such thing as a natural gift for a certain job.
- You will achieve greatness only through an enormous amount of hard work over many years.
- You can make yourself great.
- Great verdicts are about preparation not oratory.

# Assumptions

- Litigation is adversarial.
- Therefore, every aspect of litigation is adversarial.
- I hate defense counsel.
- Therefore everyone will hate defense counsel.

# Problems with Assumptions.

- Not everyone you depose is your adversary.
- Not everyone you depose is a Defendant.
- Not everyone you depose is guilty of wrongdoing.
- The jury may not hate defense counsel.

# Juries do not like conflict.

- It is a jury trial – but it does not have to be an unpleasant experience.
- The jury is there involuntarily.
- You should try to make their experience enjoyable.
- They will reward you if you do.
- Bucket and Juice Glass.
- They will punish you if you do not.
- One bad question can determine the outcome of the trial.



# FORMERS

- Find them early.
- This is a race.
- You have the advantage because you are the Plaintiff.
- Your client retains you long before the Defendant Nursing Home or its lawyer even knows there is a case.

# Step 1. Find the formers.

- Talk with your family during the intake. Can they identify any employees – good or bad?
- Scour the records. Some charts have a signature log.
- Identify all relevant employees; Nurses, Aids etc.
- Find them.
- Use the Internet.
- Use a Private Investigator.
- Ask other formers.

## Step 2. Contact the formers.

- Call them.
- Verify they no longer work at the Nursing Home.
- Check your state's ethical rules.
- See if they will talk with you.
- Meet with them.
- I like to do this myself.
- Unless they are represented by the Nursing Home's lawyer, you can call a former after their deposition. So if you could not find them or they would not talk with you before the deposition, you can still call them after the deposition.

## **RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL**

In representing a client, a lawyer shall not communicate **about the subject of the representation** with a person the lawyer **knows to be represented by another lawyer in the matter**, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

### **Official Comment**

[2] This rule applies to communications with any person who is represented by counsel **concerning the matter to which the communication relates**.

[4] This rule does not prohibit communication with a represented person, or an **employee or agent of such a person**, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. **A lawyer may not make a communication prohibited by this rule through the acts of another.** See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[7] **In the case of a represented organization**, this rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. **Consent of the organization's lawyer is not required for communication with a former constituent.** If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.

[8] The prohibition on communications with a represented person applies only in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(g). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

**Comparison to ABA Model Rules of Professional Conduct. Rule 4.2 is identical to Model Rule 4.2.**

## Step 3. Meet with the Formers.

- Meet with the former by yourself.
- Draft an Affidavit and have them sign it.
- Record their statement with an audio recorder.
- Record their statement with a video recorder.
- Take a Court Reporter and take a recorded statement.

## Step 4. Deposing current employees and formers who will not talk with you pre-suit.

- Defense counsel often does not prepare the deponents.
- Schedule as many depositions in a row on the first day as possible.
- The more people you depose on the first day, the less prepared they will be.
- Start with STNA's or with the DON? Top to bottom or bottom to top.

- Just because you are talking with the employee during a deposition does not mean you cannot learn everything you need.
- Be polite.
- Explain the process. Defense counsel may not have.
- Often Defense counsel has not talked with the witness at all.
- Ask them who they talked with.
- Determine how much they prepared.
- Ask them what they reviewed.
- Explain that they are not a Defendant, just a witness. They are not liable.
- Ask them about their relationship with the home.
- Do they still work there?
- If they no longer work there, were they fired?
- Ask them about their background.
- Maintain an employee database.
- If you have to ask a personal question, apologize, explain the need for the question.
- Take a break if they need it.



# Training.

- Ask the employees about their training.
- They want to tell you about their training.
- This is a great way to establish standard of care.
- You were taught that if you had a resident who was at risk for bed sores you needed to turn them every two hours, right?
- They want to tell you they had good training.
- They want to tell you they knew how to care for the resident properly.
- Ask them what they were taught about protocols relative to patient care.
- They want to tell you that they were taught properly so they want to tell you that they know the applicable protocols.
- They want to appear smart.
- They want to appear good at their job.

# Do they remember the resident?

- If they do not remember the resident, they are locked to the records and they cannot speculate that they probably did this or that.
- Do you remember the resident?
- Tell me everything you remember?
- Do you remember their family?
- What do you remember.

# Protocols relative to patient care.

- These are essential. I get them in every case.
- I often have to file a Motion to Compel.
- Keep track of trial court decisions ordering the production of these protocols to use in future Motions to Compel. Seek sanctions.
- There is no justification for the Defendant Nursing Home to refuse to produce all protocols, procedures and policies relative to patient care.
- Don't let the Defendant define your case.
- Seek sanctions.
- We see the same Defendants and the same defense counsel. We should only have to beat them once on this issue.
- Nursing Home work is a long term process. It is not just about one case.
- Ask the employees what they know about the protocols. Where are they kept? How often do they review the protocols?
- I usually ask them what the rules are first and then later confront them with the rules.

# Other Employees

- I always ask each person I depose about every other employee who treated the resident.
- Do they still work there.
- What do they know about them.
- I do not think the Nursing Home tries very hard to find employees that will help your case.
- You have to dig. You have to persevere.

# 42 CFR § 483.25(c)

- Based on the comprehensive assessment of a resident, the facility must ensure that
- (1) A resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable; and
- (2) A resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing.
- This is the Code of Federal Regulation that applies to decubitus ulcers correct?
- Are you familiar with it?
- Even if they will not acknowledge it as a section from the Code of Federal Regulations, they will usually acknowledge it as a description of proper care.
- They will usually acknowledge that that is how they care for residents at their facility.

# Nutrition and Hydration

- Is there a correlation between nutrition and pressure sores?
- Is there a correlation between hydration and pressure sores?
- A pressure sore can occur wherever pressure has impaired circulation to the tissue, correct?
- At Andover do you try to make sure that your residents receive proper nutrition?
- You try to avoid allowing any of your residents to become malnourished?
- Do you also try to ensure proper hydration?
- You try to prevent any of your residents from becoming dehydrated?
- Adequate Nutrition is essential to avoiding pressure sores and to healing pressure sores, agreed?
- Adequate hydration is essential to avoiding pressure sores and to healing pressure sores. agreed?
- If someone is malnourished it increases their risk of developing pressure sores?
- If someone is malnourished it makes it difficult to heal a pressure sore?
- If someone is dehydrated it increases their risk of developing a pressure sore?
- If someone is dehydrated it makes it more difficult to heal a pressure sore?

# It doesn't hurt to ask.

- Have you ever heard the phrase, “If you didn't chart it you didn't do it.”?
- Were there enough nurses at the facility to properly care for the residents?
- Were there enough aids to properly care for the residents?
- Did you ever see a resident suffer an injury?

# Experts.

- If I study my craft for the next 60 years and I practice law until I am over 100 years old, I will likely never be Chief of Orthopedic Surgery at University Hospitals. I will also likely never know as much about orthopedic surgery. Therefore, confronting the Chief of Orthopedic surgery at University Hospitals on the medicine is a mistake in my opinion.
- Confront him on the law.
- Do it with a smile.
- I doubt you will move a doctor on the medicine.
- You can move them on the law.
- Reasonable degree of medical certainty.
- If what they say is absurd take them as far as they will go.