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Lessons from my first PMQ deposition for a government premises-liability case

SIX RECENTLY LEARNED PRACTICAL TIPS

As a newer attorney, I have come to learn that there can be a significant difference between litigation in theory and litigation in practice. For me, one of those moments came when I took my first deposition of a Person Most Qualified (“PMQ”) for a government entity in a premises-liability case.

I had taken depositions before and understood the basic mechanics. But depositing a government entity through its PMQ presented a different challenge. I was not simply trying to learn what one witness remembered. I needed testimony about the public entity itself: what it knew, what it did, what it failed to do, and how it inspected and maintained the property at issue.

Like every deposition I had taken up to that point, I prepared extensively. I researched the applicable law, reviewed the written discovery and documents produced in the case, and built an extensive outline for my deposition.

Although the preparation was invaluable, the most important lesson I learned during the deposition was one I could not have put into an outline beforehand. The outline was only a starting point. A PMQ in a premises-liability case, particularly an experienced one, is not necessarily going to answer questions the way you expect. The PMQ may resist your terminology, qualify seemingly simple propositions, or answer a slightly different question than the one you asked. When that happens, preparation means more than knowing your next question. It means understanding *why* you are asking the question well enough to find another route to the testimony you need.

That lesson changed the way I approached the deposition as it was happening.

Lesson One – Research the elements you need to prove at trial

One of the first things I did to prepare for my deposition was research exactly what I would need to prove to establish liability against a public entity. I started with the CACI Jury Instructions, specifically CACI Nos. 1100 and 1103.

Government Code section 835 provides the framework for imposing liability on a public entity for an injury caused by a dangerous condition of its property. CACI No. 1100 breaks that framework down into the essential factual elements a plaintiff must prove at trial.

Under CACI No. 1100, a plaintiff generally must prove: 1) The defendant owned or controlled the property, 2) the property was in a dangerous condition at the time of the injury, 3) the dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred, 4) either the negligent or wrongful conduct of Defendant’s employee acting within the scope of employment created the dangerous condition, or the defendant had notice of the dangerous condition for a long enough time to have protected against it, 5) the plaintiff was harmed, and 6) the dangerous condition was a substantial factor in causing plaintiff’s harm.

My case involved an uplift in a pedestrian walkway, and there was no indication that an employee of the public entity created the uplift. Notice was therefore a central issue. This led me to CACI No. 1103, which addresses actual and constructive notice. In general, actual notice may be established where the public entity knew of the condition and knew or should have known of its dangerous character. Constructive notice may be established where the condition

existed for a sufficient period of time and was sufficiently obvious that the entity, in the exercise of due care, should have discovered the condition and its dangerous character.

The jury instructions helped me identify the testimony I needed from the PMQ. Because constructive notice was central to my case, I needed testimony concerning how long the uplift may have existed, whether the area was inspected, who was responsible for those inspections, how often inspections occurred, what those inspections involved, how dangerous conditions were documented, and what happened when a condition requiring repair was discovered.

The nature and use of the walkway were also important. A dangerous condition is not evaluated in a vacuum. The surrounding circumstances and the way the property is expected to be used matter. I therefore wanted testimony about the purpose of the walkway, who used it, how often it was used, whether the entity expected pedestrians to travel through the area, and what the entity knew about that use.

I also researched evidentiary issues I expected to come up during the deposition. One of those was subsequent remedial measures. The uplift had been repaired after the incident, so I knew I wanted to ask the PMQ about the repair and why it was made. Evidence Code section 1151 generally prevents evidence of a subsequent repair from being used to prove negligence or culpable conduct. However, if the PMQ testified that the repair was not done to remediate the uplift, that testimony could become important later in determining whether evidence of the repair could be used. I therefore wanted to understand the issue before the deposition and be prepared to

lock in the PMQ's testimony about why the repair was made.

Working backward from the law gave me the framework for my outline. Constructive notice became questions about inspections, employees, policies, complaints, work orders, and how long the uplift existed. Dangerous condition became questions about the walkway itself, its use, pedestrian traffic, and the entity's practices concerning similar conditions. From there, I could start building the actual deposition outline.

Lesson Two – Turn the elements into an outline

Once I understood the elements I needed to establish, I organized my outline around them. I covered ownership and control, the nature and use of the walkway, inspection practices, maintenance responsibilities, notice, prior complaints, repairs, policies and procedures, and the entity's investigation of the incident.

I also prepared exhibits and reviewed the entity's written discovery responses so I could use them during the deposition when appropriate. The result was a detailed outline that covered the issues I expected to address and anticipated different ways the testimony could develop.

A detailed outline is useful because it forces you to think through the case before the deposition begins. But an adverse deposition is not a questionnaire. An answer early in the deposition may open an issue you planned to address much later. An unexpected admission may lead to an entirely new area of questioning. A topic you expected to cover in two minutes may become the most important 20 minutes of the deposition. For that reason, the outline should be a roadmap, not a script. The important part is knowing what you are trying to establish and why it matters. If you understand the purpose behind each section of your outline, you can follow the testimony when necessary and return to your outline later.

The danger of relying too heavily on the outline is that you start thinking about your next prepared question instead of listening to the answer you just received. As the deposition went on, that became particularly important.

Lesson Three – Who is the PMQ?

Around the beginning of the deposition, I learned that the PMQ had been deposed over a dozen times before. In retrospect, that should have been a warning. I was taking my first government-entity premises-liability PMQ deposition. He was not giving his first.

An experienced PMQ understands how depositions work. They recognize when an attorney is looking for a particular admission or using a characterization they may not want to accept. That does not mean the witness will testify improperly, but it does mean you should expect them to be careful with their answers.

I encountered this when I began asking about the nature and use of the walkway. I wanted to establish what seemed like a straightforward point about who primarily used it. Instead of answering directly, the PMQ responded with answers to the effect that "many people used many walkways in the vicinity" and that there were other ways to access the property.

So, I tried again. I changed the wording. I clarified what I was asking. I approached the issue from a different angle. Each time, I received an answer that circled around the point I was trying to establish without ever accepting it.

At first, I considered whether the problem was my question. Was my wording unclear? Was I using a term the witness understood differently? After several attempts, it became clear that the question was not the problem. The PMQ understood what I was asking. He simply was not going to adopt my characterization. Once I recognized that, I changed my approach.

Lesson Four – Focus on getting the

testimony you need

It is easy to go into a deposition with the answer you want already in mind. But adverse witnesses rarely cooperate that neatly. I realized I was spending too much time trying to get the PMQ to accept a particular characterization instead of focusing on the facts I actually needed.

Once I recognized that, I broke the issue into smaller pieces: Who used the walkway? Was it intended for pedestrian travel? Did employees use it? Who was responsible for maintaining it? Who inspected it? The PMQ might refuse to describe the walkway as "primary" or "heavily traveled," but I did not necessarily need him to. I needed the facts underneath those labels.

That was one of the most useful lessons I took from the deposition: when a witness will not give you the conclusion, build it yourself. Several smaller admissions may ultimately be more useful than one broad characterization.

Lesson Five – The outline is a roadmap, not a script

Moving away from the sequence of my outline did not mean the outline had failed me. The preparation was what allowed me to do it. Because I knew the elements I needed to establish and why I was asking each question, I knew which answers were worth pursuing and which fights were not.

When the deposition moved away from the sequence of my outline, I began treating the outline as a checklist rather than a script. If the PMQ gave me an admission earlier than expected, I moved on. If an answer opened a new area of questioning, I followed it. If he resisted a particular characterization, I looked for another way to establish the underlying facts.

Most importantly, I started listening more carefully. Instead of thinking about the next question on my outline, I focused on what the PMQ had just said and where his answer could take me.

Lesson Six – Know when to lock down the testimony and move on

Persistence is important. If a PMQ gives a nonresponsive answer, rephrase the question, remove any ambiguity, or break it into smaller parts. But there comes a point when asking the same question six different ways is not getting you anywhere. Once the question is clear and the witness has had a fair opportunity to answer, lock in the testimony and move on.

The same applies when the answer is, “I don’t know.” A PMQ has been designated to testify on behalf of the entity about specific topics. If the PMQ does not know how often the property was inspected, find out why. Did the PMQ review the inspection records? Did he speak with the employees responsible for inspections? Is there someone else at the entity who would know?

That testimony may become useful later. If the entity’s designated witness cannot answer basic questions about its inspection practices, or repeatedly avoids a clear question, the transcript preserves that testimony. If the defense later takes a more definite position at summary judgment or trial, you have the PMQ’s

testimony to come back to.

Not every useful answer is an admission. Sometimes the useful answer is that the entity’s designated witness did not know. Once you have made that record, lock it down and move on.

Conclusion

I entered the deposition believing that the key to handling my first PMQ for a government entity in a premises-liability case was extensive preparation. I still believe that. What changed was my understanding of what that preparation was supposed to accomplish.

Preparation cannot control the witness’s answers. It should give you enough command of the case to respond when the deposition does not go as planned. For my next PMQ deposition, I will be less concerned with following the precise sequence of my questions and more focused on listening to the witness and adjusting as necessary.

My first government premises-liability PMQ deposition did not go exactly as I had outlined it. When the witness became evasive, I had to decide whether the admission I was pursuing actually mattered or whether I could establish

the same point another way. When a line of questioning stopped being productive, I had to know when to lock down the testimony and move on. And when an unexpected answer opened another avenue of questioning, I had to be willing to leave my outline and follow it.

My biggest takeaway is simple: Prepare for the deposition, not for your outline. Know the law, know the evidence you need, and know why you are asking each question. If you know what you need to establish, you can find another way to get there when the deposition does not follow the path you expected. ♦

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