6. FUNDAMENTALS OF DEPOSITIONS

DEPOSITIONS

W. Russell Corker
rcorker@corkerlaw.com

INTRODUCTION

I. Oral depositions are usually the most powerful discovery weapon available to the litigator.

II. With only a small percentage of cases actually going to trial, the real battleground for most litigation is the deposition room.

III. Effective depositions can have a dramatic impact on the outcome of the litigation.

IV. Proper deposition skills are essential for every litigator, regardless of what area of the law you practice; at some time, most lawyers will be required to take a deposition.

V. Creating a good "Discovery Plan" should be part of every case opened in your office.

VI. While interrogatories and discovery demands are efficient for identifying documents and individuals, only depositions provide the opportunity for follow-up questions, which usually yield more important information about events.

A. CPLR § 3130 prohibits both depositions and interrogatories in personal injury, property and wrongful death actions predicated solely on a cause or causes of action for negligence.

B. In a Products Liability case, for instance, interrogatories and

depositions are available.

VII. CPLR Article 31 contains the rules governing disclosure in general, and depositions in particular (CPLR §3106 -3117).

VIII. The popular name for depositions is “EBT” (Examination Before Trial) but depositions can be taken, by Court Order, before an action has been commenced, during trial and even after trial (see, CPLR 3102(c), (d) and CPLR 5229).

PURPOSE AND GOALS

I. Depositions can be used for many purposes:

A. Trial testimony

B. Admissions

C. Impeachment at trial

D. Refreshing recollection

E. Learning new facts

F. Confirming facts already known

II. Assessing the opposition

A. Demeanor

B. Credibility

III. Narrowing the issues

IV. Fully exploring issues

V. Locking in the facts

A. Get answers that are not favorable to your case, do not wait for trial.

B. It is better to know the weaknesses of the case as early as possible.

VI. To discover a broad range of facts

VII. Settlement

SCOPE

I. CPLR §3101(a) provides that "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action..."

II. Test: "usefulness and reason" (*Allen v. Crowell-Collier Pub. Co.*, 21 NY2d 403, 406)

III. Liberally construed

A. What is material and necessary is left to the sound discretion of the trial court See, *Andon ex rel Andon v. 302-304 Mott Street Associates*, 94 NY2d 740 (2000).

B. Permits a *broader range of questioning* than would be permitted at trial, such as hearsay.

C. The question must be answered if the information sought could lead to relevant, otherwise admissible evidence at trial.

IV. Limited exceptions

A. Can not be unduly burdensome

B. Or lack specificity

C. Or seek privileged material

D. Or irrelevant information

V. CPLR § 3113 [c] examination and cross-examination of deponents shall proceed *as permitted in the trial* of the actions in open court

A. If you can do it at trial, you can do it at a deposition, and a lot more.

B. Cross examination of a witness is permitted

C. Having the witness mark exhibits is also permitted

VI. Depositions do have limits:

A. No depositions of experts

B. Fact witnesses only (except medical malpractice actions)

C. Cannot depose Independent Medical Examination Doctor or treating doctors, in the absence of special circumstances.

1. If the patient gave a version of the accident to the hospital or doctor that varies from his deposition testimony, may be able to apply to the court for a fact deposition of a doctor.

CPLR: DEPOSITIONS

I. CPLR §3106-3117 contain the rules.

II. CPLR § 3106: any party may serve a notice to take a deposition after the responsive pleadings, effectively giving the defendant the first opportunity to serve a notice.

A. This provision is not as critical now that Preliminary Conferences routinely set deposition schedules.

B. If the defendant does not serve a notice, the plaintiff may get priority of deposition if they are the first to serve a notice.

III. CPLR §3111 permits the production of books, papers, or other things in the witness' possession by so stating in the notice or subpoena.

A. This should be incorporated into the Preliminary Conference Order.

IV. CPLR §3113 proscribes the conduct of a deposition: "examination. . . of deponents shall proceed as permitted in the trial of actions in open court"

A. This means that anything that you can do at trial can be done at a deposition, such as using exhibits and cross-examination.

B. See, New Court Rules, infra.

LOCATION

I. CPLR § 3110 (1)

A. County where party resides

B. Or, where has an office

C. In the county where the action is pending. *Slater v. Adamo*, 92 NY2d 1100 (4th Dept. 1995).

II. Actions against *municipalities or public authorities* must be in the county in which they are located (CPLR § 504 and 505)

III. New York City is considered one county

IV. Statute does not say where within the county the deposition is to be held

V. Non-party: county where person served or resides (CPLR §3110(2)

VI. Special Circumstances:

A. In *Zilken v. Leader*, 23 AD2d 645 (1st Dept. 1965), Special Term granted the motion of plaintiff, a resident of West Germany, to have his deposition taken on written questions and denied defendant's application to have him deposed on oral questions in New York County.

B. In *Rogovin v. Rogovin*, 3 AD3d 353 (1st Dept. 2004), a video conference deposition was permitted where the defendant-deponent was the sole care giver for her ailing nonagenarian mother and had a special needs 10-year-old daughter.

C. In *Kirama v. New York Hospital*, 13 Misc.3d 1246(A), 831 NYS2d 360 (Sup. Ct., NY County, 2006), the court allowed a video teleconferencing deposition of plaintiff, over the objection of defendant. The plaintiff was a resident of Morocco, whose visa had expired, and despite attempts, could not get a visa to return to the U.S. Although CPLR 3113(d) restricts video teleconferencing to cases in which both sides stipulate to the procedure, the court found this argument unconvincing.

D. In *Gartner v. Unified Windows, Doors & Siding, Inc.*, 68 AD3d 815 (2nd Dept. 2009), where the Columbian residents were unable to

come to New York for depositions, the court approved three choices for defendant's counsel: take the deposition, at plaintiff's expense, in Columbia; retain local Columbian counsel; use written questions; or video conference the deposition (CPLR 3113(d) at plaintiff's expense.

E. In *Chen v. Zhi*, 2011 NY Slip Op 01267 (2nd Dept 2011), the Court held that the lower court improvidently exercised its discretion in denying the plaintiff's cross motion for a protective order, where the plaintiff demonstrated that traveling from China to the US for the deposition would cause undue hardship, and therefore permitted it to be conducted by remote electronic means. The Court also lifted the stay of proceedings until the plaintiff returned to the US.

SETTING UP DEPOSITIONS

I. Rules of Notice

A. Subpoena: CPLR § 3106(b)

1. 20 days prior to examination

B. Notice CPLR § 3107 (scheduling depositions)

1. 20 days prior to examination (plus 5 days if mailed)

2. Notice must be served on all parties who are not being deposed

3. CPLR §3112: objections to notice

II. Prior to commencement of action (CPLR § 3102)

A. By Court Order only.

B. "To aid in bringing an action, to preserve information.

C. To assist in identifying proper parties to sue.

Telephone Depositions

I. CPLR §3113(d) (effective 1/1/05) parties may **stipulate** that a deposition be taken by telephone

II. Oath should be administered by a person present at the deposition

III. The cost is borne by the party requesting the deposition.

IV. CPLR §3115: Objections to qualifications of person taking deposition.

V. *Washington v. Montefiore Hospital*, 7 AD3d 945 (3rd Dept. 2004)

A. Telephone deposition, where expert being deposed was sworn in by court reporter in different state, where the attorneys were.

B. The failure to object was waived.

Preliminary Conference

I. Most depositions are set up at this time.

II. Identify the witnesses to be deposed and put it in the Order

III. Identify and specify documents to be produced.

IV. This is a stipulation and Court Order

A. It is hard to change once agreed to.

B. If the Judge pressures to sign the PCO make certain to preserve

your rights by noting in the Order that you are specifically not agreeing to a certain portion of the Order.

Adjournments

I. Depositions are supposed to proceed from day to day until completed, but this rarely is the case.

II. Make certain that if one of the defendants cannot go forward, that the other defendants will be produced, regardless of the order in the caption (again, the practice is for co-defendants to insist that the order in the caption be strictly complied with; seek the Court's help to proceed with depositions of parties where one party is unable to go forward).

III. Seeking sanctions where the party's failure to appear is willful

A. CPLR §3124: motion to compel compliance

B. CPLR §3126, which should be read in conjunction with CPLR §3124, authorizes the imposition of penalties or sanctions for the failure to comply with disclosure in certain instances.

C. In extreme cases, the offending party's pleadings can be stricken (*Pierre v. Delish Bakery & Rest*., 294 AD2d 417 (2nd Dept 2002)

PREPARING FOR THE DEPOSITION

I. The more you know going into the deposition, the more you will learn when you conduct the deposition.

A. Be prepared.

B. Go to the scene

C. Review all documents

D. Research technical issues

E. Review the case law for valuable theories and even suggested questions.

F. Review the PJI for elements of a ***prima facia*** case.

G. Review the pleadings and question allegations or defenses raised.

II. Outline the essential facts and documents involved in the case.

A. List the facts and who or what will establish it, and whether the deponent can provide testimony on the point.

B. List the necessary documents and whether this witness can provide the necessary foundation for its introduction at trial.

C. List the elements of your case, and whether the witness can help establish it.

D. Can you obtain an admission from the deponent.

III. List your “goals” for the deposition.

IV. List the topics to be covered.

A. Prepare an outline, do not read every question.

1. Specific information seeking to obtain

2. Subjects and documents covered

B. Essential questions can be written out, particularly technical questions; on balance, an outline is better than writing out every question.

C. The outline permits better follow-up questions, which is usually

where the important information is obtained.

V. Organize the documents that will be used during the deposition.

A. It usually saves time to make copies for the attorneys and witness of any documents used during the deposition

B. Pre-mark them to save time.

VI. Review the law, case law and Pattern Jury Instruction.

A. It is just as important to know the law that is favorable to the defense as it is to know the law necessary to your case.

B. Reading the cases is an invaluable source of theories, questions and ideas.

1. Anticipate potential Motions for Summary Judgment, and incorporate language into questions know to have been found legally sufficient by prior case law.

C. Know the elements necessary to establish a case.

VII. Learn something about the witness in advance, if possible.

VIII. If essential, write out only the most important questions if the language is critical to the case

IX. Interrogatory Form Books can be useful for ideas for questions.

X. Scrutinize transcripts of prior depositions conducted by others.

XI. Outline Rules of the Road

A. Formulate questions that require witnesses to answer questions that establish rules of conduct or standards of care.

B. Research professional literature, where appropriate, or formulate

common sense rules, such as it is the duty of a shop keeper to keep his place of business free from hazards that may injure a customer (every case has built in rules: find them and lock them in at the deposition).

USUAL STIPULATIONS

I. CPLR §3115(b)

II. Court reporter usually asks if “usual stipulations” apply

III. Errors which might be obviated if timely made known

A. Waived unless reasonable objection made at deposition

B. Otherwise, all other objections are preserved for trial

C. Errors as to form of the question

1. Compound questions

2. Argumentative questions

3. Assuming a fact that has not been testified to or proven

D. Relevance and hearsay are preserved for trial

CONDUCTING THE DEPOSITION: TECHNIQUES

I. Think of a deposition as the opposite of cross-examination.

A. Ask open ended questions.

B. Ask the witness to explain.

C. Ask why questions.

D. Keep the atmosphere friendly and warm.

II. Think in paragraphs (announce a new topic before beginning questioning)

A. Identify a topic

B. Ask a general question

C. Who, what, where, when, why and how

D. “Anything else you can think of?”

III. Think of broad questions first, followed by directed questions, followed by narrow questions to nail down specific facts.

IV. Remember, the purpose is to discover what the witness will say at trial, and how they will say it

V. Always be on guard for conclusions and opinions, and always request details.

VI. Be sensitive to non-responsive answers, and repeat the question as often as necessary to get an answer to “your question.”

VII. Take notes only to remind you to ask a question, not to preserve the testimony.

VIII. In motor vehicle cases, liability always involves questions of three matters (physics)

A. Speed

B. Time

C. Distance

IX. Encourage the witness to open up and testify.

A. Always be polite: you want the witness to be relaxed so that they will open up and volunteer information.

B. Get the witness to tell his story completely.

1. Avoid surprises up at trial.

2. Lock the witness in.

X. **Boxing**: exhaust the subject so that the witness cannot improve the answer at trial.

XI. Ask short questions containing only one fact.

A. Always ask simple, clear questions, avoiding compound and complicated questions and language.

B. Use nouns and verbs when possible.

C. Avoid adjectives and adverbs.

XII. Recapitulating and summarizing (**Laundering**)

A. Sometimes important facts are buried in the middle of an otherwise useless answer

B. To use the information at trial, the usable portion must be recapitulated, pulled out of otherwise harmful or useless testimony.

C. Always think about how the answer will sound if read at trial.

1. If the important part is buried in explanation, recapitulate it only using the important part.

XIII. Ask lots of follow-up questions.

A. Clearly, the greatest deficiency of most examiners.

B. A question elicits either a good response or an ambiguous response, and the questioner moves on to the next question without getting the next level.

C. “Tell me about that” is one of my favorite follow-up questions.

XIV. Always find out what the witness reviewed or was shown to prepare for the deposition.

XV. Establish facts necessary for your case.

A. Lawyers suffer from the “curse of knowledge”

B. We have lived with our cases so long, and know them so well, we assume the jury will as well.

C. Many important predicate facts are overlooked when proper foundation questions are not thought through in advance.

XVI. Get and explain documents.

A. Where are the documents?

B. What are they called, or how can they be identified.

C. If someone needed to find the answer to this question, where would they look?

D. Establish the foundation at the deposition for the ultimate admission as a business record at trial

1. Was it kept in the regular course of the business?

2. Was it the regular course of the business to keep such documents?

XVII. Eliminate defenses or claims, which requires review of the pleadings.

A. If the witness verified the pleadings, then the witness can be examined concerning the contents.

XVIII. Attempt to obtain admissions when possible.

A. Make admissions simple and direct.

B. One fact per question.

C. Break down compound answers and pull out the good response.

XIX. Identify potential witnesses.

A. Cases often go in different directions than originally conceived, so it is important to identify people, documents and items in the event they are needed in the future.

XX. Eliciting the witnesses' perspective.

A. Many descriptions, when read back, are less than clear because the perspective of the witness was not clearly established.

B. Use landmarks and photographs when possible.

XXI. Evaluate the witness.

A. Will the witness favorably impress the jury?

B. How credible was the witness?

C. Will he hold up under cross-examination?

XXII. Bad techniques:

A. Asking long, complicated questions.

B. Arguing with witnesses.

C. Not resolving ambiguous answers.

D. Not asking follow-up questions.

E. Using too much legal language in your questions.

XXIII. Follow-up questions to answers are usually more important than the original question

A. You must listen carefully to the witnesses response for clues to the next follow-up question.

B. Always try to find out where the witness got the information

C. “Why” questions should be asked frequently.

D. It is not enough to find out “what happened,” always try to find out “why” it happened. (even though lawyers may not be interested in motive, jurors almost always are)

XXIV. Types of questions

A. Information gathering questions

1. Open ended questions

2. Clarifying questions

3. Closing off questions

a. Is there anything else?

b. Have you now told me everything you know about the incident?

B. Questions seeking admissions

XXV. Difficult questions

A. Was there anything that you could have done that would have prevented the accident?

B. If you had it to do over, would you do it the same way?

C. Are you doing anything to keep this from happening again?

XXVI. Hypothetical questions are permitted

A. In ***Bubar v. Brodman***, 908 N.Y.S.2d 864 (Erie Co., 2010), the court

specially found hypothetical questions proper.

XXVII. Chronological Questioning Versus Skipping Around

A. The leap frog method may keep the witness off guard, but may cause the witness to close down

B. Still need to follow up with questions, so the advantage of surprise may be lost after the first question

C. Difficult to keep track of topics

XXVIII. Do not ask questions in the negative.

A. A yes or no response is almost always ambiguous.

XXIX. Pause after important questions.

A. It encourages the witness to keep talking.

B. Look at the witness as if to suggest: “Is there anything else?”

XXX. Always ask questions that the witness can answer clearly.

A. Many questions are phrased so poorly that the answer can be ambiguous

XXXI. Always be sensitive to “unresponsive answers”

A. Ask the question again, or as many times as it takes to insure that you get your answer.

B. Do not accept non-responsive answers.

C. This is particularly true when it comes to time, speed and distance.

XXXII. Separate facts from opinions

XXXIII. If an admission is obtained, move on, do not give the witness an opportunity to clarify (care must be taken not to loose a fragile admission)

NON-PARTY DEPOSITIONS

I. Whether to depose

A. Is witness in poor health?

B. Is the witness leaving the jurisdiction?

C. Is the witness cooperative?

D. If the witness is favorable, generally better not to depose the witness

II. Deposing experts

A. Generally, not permitted (fact witnesses only)

B. Exception: special circumstances or exclusive knowledge of the fact (*220-52 Associates v. Edelman*, 241 AD2d 365 (1st Dept. 1997)

1. If plaintiff's version of the accident differs from the history in a treating doctor's office records, a factual deposition may be permitted (*Schroder v. Consolidated Edison Co.*, 249 AD2d 69 (1st Dept. 1998)

2. Vehicle destroyed, and only one expert had the opportunity to examine the vehicle.

C. Can not compel non-party expert to answer questions which seek expert opinion; can only ask "fact" questions (*Piervinanzi v Bronx Cross County Medical Group,* 244 A.D.2d 396 (2nd Dept. 1997); *Jones v. Cummings,* 55 A.D.3d 677 (2nd Dept. 2008).

III. Counsel for non-party physicians was precluded from objection during or otherwise participating in videotaped depositions. (*Thompson v. Mather*,

70 A.D.3d 1436 (4th Dept. 2010).

A. The court reasoned that CPLR 3113(c) provides that the examination and cross-examination of deposition witnesses "shall proceed as permitted in the trial of actions in open court."

IV. Procedure

A. CPLR §3106(b): subpoena

1. 20 days notice

B. Standard: whether "the information sought bears on the controversy and will assist in the preparation for trial; the ultimate test is one of 'usefulness and reason.'" (see, *Schroder v. Consolidation Edison Co. of New York Inc.*, 249 AD2d 69 (1st Dept. 1998)

1. The First Department has long held that CPLR §3101(a)(4) eliminated the requirement to show "special circumstances." (see, also *Catalano v. Moreland,* 299 A.D.2d 881(4th Dept 2002)

2. *Matter of Troy Sand & Gravel v. Town of Nassau*, 80 A.D.3d 199 (3rd Dept. 2010): CPLR 3101[a][4] now only requires that the party seeking discovery provide "notice stating the circumstances or reasons such disclosure is sought or required", but rejected an argument that the statute only requires a showing that the nonparty possesses "material and necessary—i.e., relevant—information useful to a party

in preparing for trial. Holding that discovery from a nonparty is to be judged by a different standard, more stringent, than that of a party, there must be a showing that the information could not otherwise be obtained from other sources.

3. *Velez v Hunts Point Multi-Serv. Ctr.,* 29 A.D.3d 104, 108 (2006) the First Department requires a showing of "special circumstances or that the information sought was relevant and could not be obtained from other sources.

4. The Second Department, however, continued to require the showing of "special circumstances" (see, *Koramblyum v. Medvedovsky,* 19 A.D.3d 651 (2nd Dept 2005). (see, also *Ruthman, Mercadante & Hadjis v. Nardiello*, 288 A.D.2d 593 (3rd Dept 2001)

5. The Second Department, however, in *Kooper v. Kooper*,74 A.D.3d 6 (2nd Dept 2010), in a case governing the discovery of documents from nonparties, the Court specially disapproved of the further application of the "special circumstances" standard.

    a. However, the Court went on to note that: "A motion to quash is, thus, properly granted where the party issuing the subpoena has failed to show that the disclosure sought cannot be obtained from sources other than the nonparty."

b. The Court declined to set forth a comprehensive list of circumstances or reasons which would be deemed sufficient to warrant discovery from a nonparty in every case.

C. Deposition of treating physician not permitted by the defendant (*Patterson v. St. Francis Center*, 249 AD2d 457 (2nd Dept. 1998)

V. CPLR §3108 permits written depositions when the examining party and the deponent so stipulate or when the testimony is to be taken without the state

A. Deposition hearing officer reads the questions

B. Answers are transcribed

VI. CPLR 3108: Commissions for out of state depositions: Court lacks authority to compel appearance of out of state non-party for deposition absent compliance with CPLR § 3108 (*Lewis v. Baker*, 720 NYS2d 26 (1st Dept. 2001)

A. Non-party resident not served with a notice of deposition or subpoena

B. Plaintiff did not move for a commission or letters rogaroty

C. Must include "allegations that the proposed out-of-state deponents would not cooperate with…notice of deposition, and would not voluntarily come within this state, or that the judicial imprimatur accompanying a commission was necessary or would be helpful."

MBIA Insurance v. Credit Suisse Securities, 103 A.D.3d 486 (1st Dept. 2013)

VII. Commission to take deposition denied where no right to disclosure is shown (*Cornfeld v. Urfirer*, 741 NYS2d 699 (1st Dept. 2002).

VIII. CPLR § 3113: cost of out-of-state deposition to be borne by the party incurring the expense and can be charged as a taxable disbursement at the end of the case (*Gehen v. Consolidated Rail Corp.*, 735 NYS2d 701 (4th Dept. 2001)

IX. An interesting issue arises when a nonparty witness subpoena is served on a former employee of one of the parties.

A. In *Rivera v. Lutheran Medical Center*, 73 A.D.3d 891 (2nd Dept 2010), the attorneys for defendant contacted former employee witnesses and advised them that they would represent them, without fee, in pending nonparty depositions.

B. Most of the witnesses were not in a position to bind Lutheran (see, *Neisig v. Team I*, 76 N.Y.2d 363 (1990)

C. There, the Court disapproved of the attorneys "soliciting" the clients, in violation of Rules of Professional Conduct, 22 NYCRR 1200, Rule 7.3, and disqualified the firm from representing the witnesses.

D. The Court held that the law firm was attempting to get a tactical advantage to prevent informal interviews of the employees by representing them, without fee.

X. CPLR§3119 (a newly enacted provision, effective Jan. 1, 2011) now makes it easier to seek discovery in New York for cases pending outside of New York.

A. Old procedure required compliance with CPLR§3102(e), which required commencement of a special proceeding.

B. Now, the subpoena can be submitted to either the clerk of the court where the discovery is to take place, or an attorney licensed to practice law in NY.

C. The subpoena is then issued here, in New York.

D. Standard of review for proceeding under the Uniform Interstate Depositions and Discovery Act (CPLR 3119): Petitioners brought a proceeding to quash out of state deposition subpoenas issued in aid of a California action, which was denied. The court held that the standards relation to depositions under CPLR article 31 apply, and that petitioner failed to establish that the discovery was not "material and necessary" to the prosecution or defense of the California action.

E. All the protections contained in CPLR article 31 apply.

1. The question remains open if the out of state discovery is broader than New York, such as permitting depositions of experts, which state's rules would apply.

XI. Non party depositions post Note of Issue

A. *Audiovov v. Benyamini*, 265 A.D.2d 135 (2nd Dept. 2000), the Court

addressed Post Note of Issue discovery, as set forth in 22 NYCRR 202.21, as follows:

1. Vacate the Note of Issue within 20 days of its service pursuant to 22 NYCRR 202.21(e), by merely showing that discovery is incomplete and the matter is not ready for trial.

2. Beyond the 20 days (method two): requires the movant, pursuant to 22 NYCRR 202.21(d), meet a more stringent standard and demonstrate "*unusual or unanticipated circumstances* ***and*** *substantial prejudice*" absent the additional discovery.

B. See, also *Tirado v. Miller*, 901 N.Y.S.2d 358 (2nd Dept. 2010)

C. In opposition to a timely post-note of issue summary judgment motion, plaintiff submitted the affidavit of a previously undisclosed eyewitness. Following the denial of the motion, defendant served deposition subpoenas, without leave of court, on the three nonparty witnesses. Plaintiff moved to quash the subpoenas, which resulted in an Order for protection being granted. In affirming , it was noted that defendant did not comply with the following mandate procedures: a) moving, pursuant to 22 NYCRR 202.21(e) to vacate the note of issue within 20 days of its service on the ground that the case was not ready for trial; or b) moving, pursuant to 22 NYCRR 202.21(d) for permission to conduct post-note of issue discovery on the ground that "unusual or unanticipated circumstances"

developed since the filing of the note of issue. *Singh v. Finneran,* 100 A.D.3d 735 (2nd Dept. 2012).

D. See, also *Sereda v. Sounds of Cuba, Inc.,* 100 A.D.3d 735 (2nd Dept. 2012), where defendant was denied the right to take post-note of issue depositions, even though he had served a demand for witness which had never been complied with until a plaintiff complied in response to a post-note of issue pretrial conference; held, where defendant failed to raise the matter during pretrial discovery or moving to vacate the Note of Issue, defendant waived its right to conduct a post-note of issue deposition.

VIDEO TAPED DEPOSITIONS

I. CPLR § 3113(b) and 22 N.Y.C.R.R. §202.159 permit testimony to be perpetuated on videotape or any other mechanical or electronic mode of transcription.

II. Prior court permission is not required.

III. Simultaneous stenographic transcription is not required, however, a party may obtain a transcript at his or her own expense.

A. My preference is to always have a simultaneous transcription made in order to have written depositions necessary for any motion practice.

IV. Notice should include intention to videotape, as well as the name of the video tape operator (the operator may be an employee of the attorney taking the deposition).

V. Attempt to keep the deposition under an hour.

VI. Refer to exhibits as often as possible, which tends to keep the viewers more involved.

VII. Care must be taken with the questions because objections raised at trial might keep out necessary testimony.

VIII. When to use

A. When the witness will be unavailable for trial, a video is preferred to reading a transcript to the jury

B. Many treating doctors will not appear at the trial

1. Always check early in the case whether a treating doctor will testify

2. Most will give a video taped deposition in their office

C. Collateral witnesses

IX. Video taped depositions of the opposition party

A. I now video tape all adversary depositions

1. I use clips when I focus group the case

2. A camera tends to make witnesses more responsive

B. There are services that will sync the video to a typed transcript

1. This is effective, but not really necessary, if the video is to be used at trial

2. The transcript permits you to find a critical point in the video so that it can be found quickly

UNIFORM RULES FOR THE CONDUCT OF DEPOSITIONS PART 221

I. After years of abusive deposition practice, the Courts finally stepped in to make the basic rules clear.

II. By Administrative Order of the Chief Administrative Judge of the Courts, a new Part 221 of the Uniform Rule for the Trial Courts relating to the conduct of depositions became effective October 1, 2006.

III. There are three rules, which apply in al courts.

A. Objections at depositions (221.1)

B. Refusal to answer when objections made (221.2)

C. Communication with the deponent (221.3)

IV. The new rules merely codify the prior law on the subject, except that it inverts the CPLR rule and directs lawyers and their clients to answer all of the questions they are asked, so that beyond the protection that the CPLR provides (objections are not waived), objections cannot be raised at all in the depositions.

V. Unfortunately, there are no specific sanctions set forth in the new rules.

VI. 221.1 Objections at Depositions

A. (a) Objections in General: no objections shall be made at a deposition except those which, pursuant to subdivision (b), (c), (d) all of Rule 3115 of the CPLR would be waived if not interposed, and except in compliance with subdivision (a) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given at the

deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.

B. (b) Speaking objections restricted: every objection raised during a deposition shall be stated **succinctly** and framed so as not to suggest an answer to the deponent and, at the **request** of the questioning attorney, shall include a **clear statement** as to any defect in form or other basis of error or a regularity. Except to the extent permitted by CPLR §3115 or by this rule, during the course of the examination, persons in attendance shall not make statements or comments that interfere with the questioning.

VII. 221.2 Refusal to answer when objection is made:

A. A deponent shall answer all questions at a deposition, except (I) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order by the court, or (iii) when the question is ***plainly improper*** and would, if answered, cause ***significant prejudice*** to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, examining party shall have the right to complete the remainder of the deposition.

1. This section has not been interpreted by the Courts yet, and its import is less than clear.

2. Plainly improper is certainly subject to perspective.

3. In a false arrest case, the police officer was not permitted to be questioned concerning his marital status was deemed to be "palpably improper."

4. Significant prejudice: what does that mean?

VIII. 221.3 Communication with the deponent

A. An attorney shall not interrupt the deposition for the purpose of communicating with deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

IMPROPER QUESTIONS, OBJECTIONS AND DIRECTIONS NOT TO ANSWER

I. Interposing and responding to objections are skills that take time and practice to master.

II. There is a fair amount of disagreement over what constitutes a proper objection under particular circumstances, and what effect interposing an objection has on the witness's obligation to answer the question.

A. Many of the old cases, which pre-date the new Uniform Rules, are arguably no longer good law.

III. Questions may be improper as to the form of the question itself or as to the substance of the testimony the question seeks to elicit.

IV. Misleading, argumentative, ambiguous or multiple questions are improper as to form.

A. Objections as to form are generally waived unless made when the question is asked.

V. A court may not rule on the propriety of a particular question in advance of a deposition. (*Eliali v. Aztec Metal Maint. Corp.*, 287 AD2d 682 (2nd Dept 2001)

VI. CPLR §3115: allows objections to be raised at trial to the use of any part of a deposition just "as if the witness were then present and testifying.

A. Preserves the right to make general, substantive objections, even where the court has previously ruled that the question must be answered at the deposition.

B. Objection may be raised even though not made at the deposition.

1. Hearsay is probably the best example.

VII. "Unless a question is clearly violative of the witness' constitutional rights, or some privilege recognized in law, or is palpably irrelevant, questions should be freely permitted and answered, since all objection other than as to form are preserved for the trial and may be raised at that time." (*Freedo Prods. v. New York Tel. Co.*, 47 AD2d 654)

A. Need not answer palpably or grossly irrelevant questions (*Ferraro v. New York Telephone Co.*, 94 AD2d 784, 785 (2nd Dept. 1983)

VIII. There is no authority in the CPLR to direct one's witness not to answer a question; so states *Spatz v. Wide World Travel Service Inc.,* 70 AD2d 835 (1st Dept 1979)

A. Did not involve questions concerning privilege or attorney work product

B. "The proper procedure is to permit the witness to answer all questions subject to objections in accordance with CPLR 3115" (*Orner v. Mount Sinai Hosp.*, 305 AD 2d 603 (1st Dept 2003)

1. "The evidentiary scope of an examination before trial is at least as broad as that applicable at the trial itself."

IX. When confronted with an "obstreperous" attorney, instruct the court reporter that everything is on the record.

X. Raising objections that must be made at deposition

A. CPLR § 3115(b) provides that errors in the form of question or answers, and other errors that might be obviated if objections were promptly made, are waived.

1. Should be made promptly, before the answer.

2. Questioner then has choice:

a. reformulating the question

b. standing by the question and demanding an answer

B. Qualifications of person before whom deposition taken.

C. Competency of witness

D. Failure to object to unresponsive answers at the deposition, which

would have permitted the objection to be cured with a proper answer, may result in the admission of the otherwise objectionable testimony (*Saturno v. Yanow,* 58 AD2d 968 (4th Dept 1977)

XI. Improper objections:

A. Improper speaking objections

1. "If you know"

2. Suggests to witness to respond: "I don't know"

B. Objections designed to coach the witness

C. Objections to impede or break up the questioning

D. Objections designed to harass or embarrass the questioning attorney

E. *Simmons v. Minerly*, NYLJ, Sept. 25, 2007, p. 29, col. 1 (Sup. Ct. Dutchess Co.) imposed $2,500 fine on attorney who repeatedly directed his witness not to testify at a deposition.

XII. Where there is a clear pattern on the part of the attorney to intentionally disrupt the natural flow of the questioning, or obstruct, the court may order the party to "appear for another deposition, at the party's own expense, and to answer those questions objected to (*Lewis v. Brunswick*)

XIII. Not all questions concerning the plaintiff's medical history are proper (*Iseman v. Delmar Medical-Dental Bldg. Inc.*, 113 AD 276 (3rd Dept. 1985)

A. The waiver does not permit discovery of information involving unrelated illnesses and treatments

B. Fishing expeditions regarding any and all prior medical conditions

are not permitted (*Carter v. Fantauzzo*, 684 NYS2d 384 (4th Dept. 1998)

C. Examples:

1. Have you ever been treated for any psychological conditions?

2. Have you ever been treated by an orthopedist before?

XIV. Questions that seek answers to issues of law or legal conclusions are improper (*Lobdell v. South Buffalo Railroad Co.*, 159 AD2d 958 (4th Dept. 1990; see, also, *Blitz v. Guardian Life Ins. Co. of America*, 99 AD2d 404 (1st Dept. 1984)

XV. Right against self-incrimination is preserved at depositions: (*State of New York v. Care Resources, Inc*, 97 AD2d 508 (2nd Dept.1983)

XVI. Do not permit the opposing counsel to use "speaking objections"

A. The objection coaches the witness.

B. It is improper to suggest answers to the witness.

XVII. Do not permit conferences between the witness and his attorney while there is an open question.

XVIII. Objections to the "form" of the question

A. Compound

B. Ambiguous

C. Vague

D. Confusing or unintelligible

E. Argumentative

F. Repetitive or asked and answered

G. Assumes facts not in evidence

H. Misstates facts

I. Excessive broad

XIX. Privileged communication

A. Waived unless objection is timely made during the deposition (*Riccardi v. Tampax, Inc.*, 113 AD2d 880 (2nd Dept. 1985).

XX. Attorney work product/reports prepared for litigation/privilege: In *Beach v Touradadji Capital*, 99 AD3d 167 (1st Dept 2012), an expert had prepared a report at the direction of his attorney and reviewed it in preparation for his deposition. The Court analyzed the difference between attorney work product, which refers to facts or observations disclosed by the attorney to the expert, and therefore are excludable, and contrasted other material prepared by the expert and used to refresh his recollection at the deposition, thereby making it discoverable, citing *Hudson Ins. Co. v. Oppenheim,* 72 A.D.3d 489 (2010); *Fernekes v Catskill Regional Med. Ctr*., 75 A.D.3d 959, 961 [2010], for the proposition that to the extent any portion of the report prepared by the expert is attorney work product, it would be protected notwithstanding that the expert reviewed the report prior to his deposition. The court also closely analyzed *Herrmann v. General Tire & Rubber Co.,* 79 A.D.2d 955 [1981], often cited for the proposition that if a witness, expert or not, uses a report to refresh his recollection for the deposition, it is discoverable, by pointing out that the

case involved a tape recorded interview of a witness made by an insurance company employee and not an attorney, as well as other departments not following the holding of the case.

XXI. Improper opinion testimony

XXII. CPLR § 3102(a); CPLR 3113; CPLR 3124 (Motion seeking Order for further deposition of the witness)

A. If the deponent's attorney directs the witness not to answer a proper question, a motion can be made to compel the witness to return for another deposition.

XXIII. Rulings on questions at depositions only proper when the answer is refused (*Eliali v. Aztec Metal Maintenance Corp*., 732 NYS2d (2nd Dept. 2001)

A. Court order regarding interrogatory and document request does not rule in advance on propriety of questions at later EBT.

XXIV. Second deposition ordered, with costs, due to interruptions and groundless objections (*Lewis v. Brunswick Hosp.*, 2001 WL 856434 (Sup. Ct., Queens Cty. May 10, 2001)

A. "Unless a question is clearly violative of the witness' constitutional rights, or some privilege recognized in law, or is palpably irrelevant, questions should be freely permitted and answered, since all objections other than as to form are preserved for the trial and may be raised at that time: (*Freedco Prods. v. New York Tel. Co.*, 47 AD2d 654.

XXV. Questions posed to Plaintiff regarding whether she had ever been diagnosed with a psychological disorder are permitted when:

A. Plaintiff seeks to recover for any specie of emotional or psychological damage.

B. If Plaintiff's claim for loss of enjoyment of life is limited solely to the physical effects of the Defendant's alleged malpractice, then questioning regarding the Plaintiff's mental state would be improper. (*L.S. v. Harouche*, 260 AD2d 250 (1st Dept. 1997).

XXVI. Questions permitted of doctor at deposition (*Palmeri v. Island Medical Care, P.C.*, 2002 WL 1677701 (Sup. Ct. Suffolk Co., 2002) concerning testimony in:

A. Malpractice cases as an expert

B. Deposition testimony

C. Courtroom testimony

DIFFICULT WITNESSES

I. Keep asking the question until you get an appropriate response

II. Do not accept half answers, evasive answers or answers to a different question

A. Always be sensitive to ambiguous answers

B. Be a "critical listener"

III. If witness does not know or cannot remember

A. "Did you once know the answer?"

B. “Did you tell anyone?”

C. “Are there any documents that might help you remember?”

D. “Do you understand that if you find the answer that you are under an obligation to bring it to our attention?”

IV. Challenge conclusions and inferences

A. Ask for the basis or source of the information

V. Do not accept “I do not know” answers unless it helps your case

A. A series of “I don’t know” answers is certainly better than a direct contradiction, particularly if there are other favorable witnesses who do know.

1. Attempt to string a series of “I don’t know answers together”

2. When read, one after another at trial, it can have a significant impact

B. Is there someone who does know the answer to this question?

C. Are there any documents that you could review that would help you to answer the question?

D. Where would you look to find the answer?

VI. Hostile witnesses who volunteer self-serving information beyond the scope of the question

A. If the answer could hurt the case, an objection should be interposed as “non-responsive”

B. CPLR § 3115(b) may create a waiver if not made timely.

DEPOSING EXPERTS:

I. The approach to deposing experts is different in the State Courts and the Federal Courts.

II. State practice:

A. With the exception provided in CPLR 3101(d)(iii), which provides for the "voluntary" written offer of any party in medical, dental and podiatric cases (I have never heard of or read of such a deposition being held), depositions of experts in State Court are not permitted.

B. Under "special circumstances", CPLR 3101(d)(iii), the Court could direct the deposition of an expert, but this is a rare occurrence, such as where evidence has been lost, destroyed or changed after one side had examined it but the other side did not. (*Mass. Bay Ins. Co. v. Stamm*, 237 A.D.2d 145 (1st Dept. 1977)

C. Even in those situations noted above, the depositions are usually limited to the factual observations of the expert, and not their opinions. (*Flex-O-Vit USA, Inc. v. Niagara Mohawk Power Corp* , 281 A.D.2d 980 (4th Dept 2001)

III. Federal practice:

A. FRCP 26 requires a party to disclose the identity of any person who may be used as an expert at trial.

B. FRCP 26(b)(4)(A) permits a party to depose anyone identified as an expert whose opinions may be presented at trial.

C. FRCP 35(b) also permits, upon a showing of special

circumstances, a deposition of a non-testifying expert.

D. Although there is authority to the contrary, the prevailing opinion holds that FRCP 26(a)(2)(B) requires full disclosure of materials "considered", although perhaps not "relied" upon by the expert in arriving at an opinion, even where there is a probable attorney-client or work product privilege involved. (see, 8 Charles Alan Wright et al., Federal Practice and Procedure § 2016.2, at 252).

E. The Advisory Committee on the 1993 Amendments to FRCP 26 wrote that there no longer should be an argument "that materials furnished to their experts tobe used in forming their opinions-whether or not ultimately relied upon by the expert-are privileged or otherwise protected from disclosure when such persons are testifying or being deposed."

IV. When deposing an expert, the following should be done

A. Learn the expert's theory and factual basis

B. Inquire about other respected theories or approaches

C. Test the witnesses's ability to handle cross-examination

D. Find out what the witness was shown or did in preparation for the deposition

E. What does the expert read or consult when he has a question

F. Find out if the expert regards another individual as a recognized expert in the field

G. Ask lots of "WHY" questions; ask the witness to help you

understand difficult concepts.

MEDICAL MALPRACTICE DEPOSITIONS OF DOCTORS

I. *McDermott v. Manhattan Eye, Ear & Throat Hosp*, 15 N.Y.2d 20 (1964) held that a plaintiff in a medical malpractice action is entitled to call the defendant doctor to the stand and question him both as to his factual knowledge of the case and as an expert for the purpose of establishing the standard of care.

II. In *Johnson v. New York City Health & Hospitals Corp.,* 49 A.D.2d 234 (2nd Dept 1975), the Court extended the *McDermott* holding to depositions.

III. *Carvalho v. New Rochelle Hosp.*, 53 A.D.2d 635 (2nd Dept 1976) qualified the rule somewhat, by holding that one defendant physician may not be examined before trial about the professional quality of another defendant physician if the questions "*bear solely on the alleged negligence of the co-defendant and not on the practice of the witness.*"

IV. But, see *Bubar v. Brodman,* supra, for a good discussion of the *Carvalho* decision in light of the new "Uniform Rules for the Conduct of Depositions passed in 2006.

A. A close analysis of the prior decisions, so reasons the judge, in light of the current law, suggests that the holding is no longer valid, and the questions and answers should be permitted.

B. If the deponent knows the standard of care, whether or not if bears on the treatment of another doctor, he should be required to state it.

CONCLUDING QUESTIONS

I. Have you understood all the questions asked?

II. Would you like to change any of your prior answers?

III. Have you told me everything about the incident?

IV. Is there any document you could review or look at that would provide you with more information about ___?

V. Is there anything else about the incident that you have not yet told me about?

ASKING YOUR OWN CLIENT QUESTIONS

I. Usually not done.

II. If needed to explain an answer that, if left as is in the deposition, would create issues at trial.

III. Usually better to correct it at the deposition than to wait for the trial or the correction sheet, which might lead to an additional deposition.

PREPARING THE CLIENT FOR THE DEPOSITION

I. For most clients, the deposition is a frightening prospect.

II. The deposition is also the most important event in most cases, frequently having a great influence on the outcome of the case.

III. Always allow enough time to prepare for the deposition, and do not wait until the morning of the deposition to prepare the witness.

A. Do not do it too far in advance; usually the week of the deposition is best.

B. Consider videotaping the deposition rehearsal.

IV. You cannot change a lifetime of speaking in a certain way in only an hour

A. Do not have the witness memorize testimony, which will probably elude them under the tension of a deposition.

B. Work with the witnesses' natural way of speaking.

V. General instructions

A. Depositions are not conversations.

B. Depositions do involve "questions and answers"

C. Tell the truth

D. Never answer a question that is not understood

E. Never guess

1. Meaning of question

2. Response to question

F. "I do not know" is a perfectly acceptable answer to most questions

G. Listen to the questions and only respond to the question asked (most people are bad listeners).

H. Do no volunteer information

I. Do not editorialize

J. Concentrate, and do not let your attention wander

1. It only takes about 15-20% of your attention to listen to questions.

2. Make certain that all of your attention is devoted to the question and the answer.

K. Avoid absolutes, such as “I can never lift anything over 10 pounds”

L. Do not adopt the language of the question if it is misleading or inappropriate.

M. If necessary, ask to take a break, the deposition is not an endurance contest.

N. Answer only what is known to be factually correct

O. You do not need to know the answer to every question.

P. There will be a tendency to want to answer certain questions because you think, on a sub-conscious level, that you should know the answer. Resist this temptation.

VI. Medical review

A. Always carefully review all of the medical records with the client to insure that there are no contradictions in the testimony and the records

B. Discuss pre-existing conditions

1. Nothing is worse then having a client deny a prior injury when the opposing counsel has medical records or a history to the contrary

VII. Make certain to verify all claims for lost wages, lost time from work and any other claim that can be verified by the opposition.

VIII. Last, remind the client that anything which is used to “refresh” a witness’ recollection, even if it was prepared at the attorneys direction, is discoverable, so do not review items which you do not want the other side

to see.

A. Lists are OK if they are complete, such as difficult activities.

B. If necessary, give documents to the lawyer, and have the lawyer ask questions which will refresh the witness' recollection.

IX. Video taping a deposition prep is more effective than asking questions from across the desk

A. The situation more closely resembles a real deposition

B. Providing a copy of the video to the client can help them prepare for the deposition.

ETHICAL CONSIDERATIONS AND DEPOSITIONS

I. Disciplinary Rule 7-102 (4) [22 NYCRR 1200.33] provides that: "a lawyer shall not...'knowingly use perjured testimony or false evidence'"

USE OF DEPOSITIONS

I. Trial testimony

A. If witness is unavailable for trial, it can be used as evidence.

1. You do not need to read the entire deposition.

2. Consider having someone from your office stand in for the witness if the reading is lengthy.

3. Consider using a video-taped deposition if you know in advance the witness is not going to be available.

4. CPLR § 3117 (a) (3) sets forth five requirements to use a

deposition at trial

a. death

b. witness is greater distance than one hundred miles

c. out of state (unless voluntary by proponent)

d. unable: age, sickness, infirmity or imprisonment

e. exceptional circumstances

5. See, *Barnes v. City of New York*, 44 AD3d 39 (1st Dept. 2007)

6. CPLR 3117(a)(2) addresses the situation where one defendant settles prior to trial. If adversity existed between the two co-defendants at the time one of them was deposed, the deposition may still be used in full by the remaining party.

B. CPLR §3117(a)(4) deposition of a doctor may be used by any party without the necessity of showing unavailability or special circumstances

1. CPLR §3101(d)(iii) permits deposition, without court order, of treating doctor.

II. Admissions

A. Can be read to the jury even without a witness.

III. Impeachment [CPLR §3117(a)]

A. Any party can use a deposition to impeach a witness.

B. Deposition may be used “for any purpose” by any party who was

adversely interested when the deposition testimony was given.

C. However, in *Cheathem v Ostrow*, 100 AD3d 819 (2nd Dept 2012) a trial court's discretionary decision to preclude the defendant from using the plaintiff's deposition testimony to impeach a portion of her trial testimony was upheld. The plaintiff had not mentioned a particular act of sexual harassment at her deposition, but did so at the trial. The court found that the plaintiff was not asked in her deposition whether she testified to every alleged instance of sexual harassment (i.e., the defense did not exhaust the subject) and therefore concluded that the impeachment would have been confusing and unfairly prejudicial.[1]

D. But see, *Feldsberg v. Nitschke*, 49 N.Y.2d 636 (1980), where plaintiff called defendant during his case, and was then precluded from reading three questions from defendant's deposition at a later time, after defendant had left the stand.

1. The Court held that the trial court did not abuse its discretion, under the circumstances of this case.

2. That there is not an absolute and unqualified right to use the deposition at any time during eh course of trial, since the

[1] It is not uncommon for a witness at trial, who testifies to something not mentioned in the deposition, to be asked: "But you didn't testify to that at your deposition, did you?" If the witness answers, "You did not ask me that question at the deposition" the questioner must be ready to confront the witness with the section of the deposition transcript he thinks addresses the point. There are many trial judges, however, who will rule that such is an improper question and not the proper way to impeach a witness with a deposition transcript.

order of introducing evidence and the time when it may be introduced are matters generally resting within the sound discretion of the trial court.

3. CPLR 3117 confers upon the deposition no special qualities rendering its use immune to ordinary rules of trial practice.

I. Use of part of a deposition [CPRL § 3117(b)]

A. If part of deposition read at trial, other party may read any other part of the deposition which ought in fairness to be considered in connection with the part read.

B. Under most circumstance where the deposition is read as evidence in chief, the other side must wait until their case to cross-read another portion of the deposition. (see, *Villa v. Vetuskey,* 50 A.D.2d 1093 (4th Dept 1975).

II. Refreshing recollection of deponent.

OTHER TOPICS

I. CPLR §3116: If deposition is not reviewed and signed within 60 days, it is deemed so.

II. Electronic transcripts

A. Stored in computer for access any time.

B. Cut and past (transfer) to other programs, such as CaseMap

C. ASCII

D. LiveNote

E. Summation

F. Textmap

CASES OF INTEREST

I. Deposition of medical witness permitted disclosure of the names of medical malpractice cases in which he testified as a defendant or an expert (this is not the direct holding in the case). (*Brandes v North Shore University Hospital, et al*, 1 AD3d 549 (2nd Dept. 2003)

II. Improper directions to not answer requires a second deposition. (*Orner v. The Mount Sinai Hospital*, 305 AD2d 307 (1st Dept. 2003)

III. Employer (party) not required to use "best efforts" to produce former employee for deposition. (*Doomes v. Best Transit Corp.*, 303 AD2d 322 (1st Dept. 2003)

IV. Failure to correct transcript within 60 days (CPLR § 3116(a) results in disallowance of late changes. (*Zamir v. Hilton Hotels Corp.*,304 AD2d 493 (1st Dept. 2003)

V. Deposition testimony not usable as of right where party left the state on own accord. (*Dailey v. Keith*, 1 NY3d 586 (2004)

VI. Deposition of treating doctor permitted, post Note of Issue (not in the nature of discovery) where he leaves the state. (*Jones v. Sherpa*, 5 AD3d 634 (2nd Dept. 2004)

VII. Errata sheet furnished with requisite explanation does not warrant further deposition (*Cillo V. Resjefal Corp.*, 743 NYS2d 860 (1st Dept. 2002)

A. Motion to strike errata sheet or for further depositions not warranted when accompanied by such a statement.

VIII. Plaintiff's action was dismissed when the plaintiff's attorney failed to appear at the deposition. *Hall v. Penas*, 5 AD3d 549 (2nd Dept. 2004)

IX. Deposition of an engineer retained by the defendant was proper as to his factual observations when he was the only person to ever inspect the vehicle ignition system on the vehicle which was at the core of the dispute and which was subsequently scrapped. The plaintiff was not entitled to depose the engineer on his expert opinion. *Coello v. Progressive Insurance Co*. 6 AD 3d 282 (1st Dept. 2004)

X. The plaintiff at trial sought to introduce an unsigned certified deposition transcript which they had never sent to the defendant for signature. The transcript allegedly contained admissions of an engineer employed by the defendant. The lower court precluded the plaintiff from using the transcript at trial and denied plaintiffs motion post trial for a retrial and to reverse the preclusion in the new trial. The Appellate Division affirmed. *Lattimore v. Port Authority of New York and New Jersey*, 305 AD2d 639 (2nd Dept. 2003)

XI. Error for the deposition transcript of the defendant driver to be put into evidence by the defendant's own attorney. *Depena v. Metropolitan Ambulance and First Aid Corp., et. al*. 1 Misc.3d 13 (Appellate Term, 2004)

XII. Attorney sanctioned for "obstinate and egregious" conduct at a deposition

in violation of the Uniform Rules for Conduct of Depositions. The attorney's behavior was found to be "unprofessional, condescending, rude, insulting and obstructive." There, the offending attorney instructed the witness to answer over the objection of counsel, constantly interrupted the witness, and insulted the opposing counsel. *Cioffi v. Habberstad*, 22 Misc.3d 839 (Sup. Ct. Nassau Co., 2008).

XIII. In *Bumpus v. N.Y. City Transit Auth*, 23 Misc.3d 1118A (Sup. Ct. Kings Co., 2009), the Court held "the filing of a civil lawsuit is not a passport which allows exploration or invasion of the most intimate beliefs a person may have based on half-baked psychology or timeless stereotypes." Questions were asked about his sexual identity (this witness was the partner of the plaintiff, a transgender woman who claimed a violation of her human rights.) The court weighed the probative value of the evidence against the privacy issues, and disallowed the line of questions.

XIV. In *Garcia v. Stickel*, 37 AD3d 368 (1st Dept. 2007), Plaintiff's errata sheets were stricken because of a failure to timely submit a statement of the reasons for the numerous changes in his deposition testimony (CPLR 3113(a).

XV. Legal malpractice permits both interrogatories and depositions. (See, *Buxton v. Ruden*, 12 AD3d 475 (2d Dept. 2004); see, also, CPLR 3130(1).

XVI. Errata sheet: in a summary judgment motion, plaintiff submitted in opposition his deposition transcript with an errata sheet containing substantive changes to his testimony about how the accident occurred,

with the stated reason for the changes being “he was nervous” at the deposition. The court held the reasons for the changes were inadequate, citing CPLR 3116(a), and therefore could not be considered on the motion, and granted summary judgment in favor of the defendant. *Ashford v. Tannenahuser,* 108 A.D.3d 735 (2nd Dept. 2013).

XVII. Defendant was able to overturn a default judgment for failure to appear for her court ordered deposition where she submitted an affidavit from her psychiatrist attesting that she was emotionally unable to attend, and where she learned that her prior lawyer had neglected the case and therefore she obtained new counsel immediately to pursue the motion. *Gross v. Johnson,* 102 A.D.3d 921 (2nd Dept. 2013).

XVIII. SCPA 1404 gives any party to a probate proceeding, either before or after filing objections, an unconditional right to examine the attesting witnesses and the person who prepared the will. *Matter of LaMotta*, 101 A.D.3d 1009 (2nd Dept. 2012).

XIX. Lawyer sanctioned $10,000 [22 NYCRR 130-1.1(a)] based upon defense counsel’s conduct which included interrupting questioning during a deposition, conferring with the defendant in mid-answer, and insulting plaintiff’s cousel. *Cadlerock Joint Venture, L.P. v. Sol Greenberg & Sons Intl., Inc.,* 94 A.D.3d 580 (1st Dept. 2012).

XX. Defendant’s initial summary judgment motion was denied because the deposition transcript upon which the motion was based were unsigned. Defendant then had the transcripts executed, made a motion to renew,

and his motion was then granted. *Schwelnus v. Urological Assoc. of LI, PC,* 94 A.D.3d 971 (2nd Dept. 2012).

XXI. In a medical malpractice action, the Court permitted the infant daughter of the plaintiff to answer interrogatories in lieu of a deposition on the ground that her psychologist that it would be detrimental to her health. *Ceron v. Belilovsky,* 92 A.D.3d 714 (2nd Dept. 2012).

XXII. There is not right to appeal an order granting a motion to compel a further deposition of a nonparty witness; rather, a motion for leave to appeal must be made. *Taylor v. NYCHA,* 83 A.D.3d 929 (2nd Dept. 2011).