

TIPS FOR YOUR 1st DEPOSITION



by

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WHAT IS A DEPOSITION?



Black's Law Dictionary defines a deposition as:

☞ A pre-trial discovery device by which one party (through their attorney) asks oral questions of the other party or a witness for the other party... under oath outside of the Courtroom.

A deposition can also be taken of a non party witness.

PURPOSE OF DEPOSITION



- ∞ Assess the witness (i.e. are they likable, credible, articulate, how do they hold up under pressure, etc...);
- ∞ Lock in witness testimony to use in support of a Summary Judgment Motion or at the time of trial;
- ∞ Preserve testimony of a witness who may be potentially unavailable at the time of trial; and
- ∞ Identify information not learned through other discovery devices (i.e. degenerative pre-existing conditions, physical limitations, etc...).

Party Depositions



- ∞ The priority of depositions
- ∞ How is priority determined?
- ∞ When must you serve your Notice of Deposition?

Non-Party Depositions



- ⌘ Service?
 - ⌘ How to effectuate?
- ⌘ Notice?
 - ⌘ Who gets notice?
- ⌘ Where?
 - ⌘ How is the location determined?



Tips for Your First Deposition



⌘ Before the deposition



Tip 1: Create A Theme



- ☞ Think of the case as though it's going to trial. What would you tell a jury if the case were being tried today?
 - ☞ The theme is the story that you would tell the jury so they'll see things from your side.
 - ☞ Begin thinking about the theme of your case as soon as you get it. You should definitely have a theme in place prior to the deposition.

Tip 2: WHAT YOU NEED TO PROVE AND THE DISCOVERY YOU NEED TO DO IT



- ☞ In order to conduct a successful deposition, a thorough investigation of the claim needs to be done including procuring all necessary evidence/information through the discovery process.
- ☞ In order to develop an effective discovery/investigation strategy, you need to understand the elements of the claim(s) being made.
- ☞ Therefore, at the outset of the case, you should review the applicable sections of the Pattern Jury Instructions.
- ☞ You should be seeking to obtain all information that is:
 - Relevant to proving or disproving the claim; and
 - Relevant to establishing or mitigating damages.

LIABILITY DISCOVERY



- ☞ Identity of witnesses and witness statements;
- ☞ Accident Reports;
- ☞ Video recordings of the accident;
- ☞ Photographs (i.e. of the accident scene, vehicles, product, depicting injuries, etc...);
- ☞ Contracts;
- ☞ Party statements; and
- ☞ Any other identifiable item that will assist in the prosecution or defense of the claim.



DAMAGES DISCOVERY



- ☞ Medical/health care provider records for the subject accident;
- ☞ Any relevant pre-accident medical/health care provider records;
- ☞ Legal pleadings/non privileged file material in connection with other bodily injury lawsuits;
- ☞ Employment, tax and wage records;
- ☞ School records;
- ☞ Gym/health club records;
- ☞ Records from recreational sports leagues;
- ☞ Video recordings of vacations, weddings, etc...
- ☞ Any other identifiable item that will assist in the prosecution or defense of the claim.

PRE-DEPOSITION INVESTIGATION

- ⌘ Site/vehicle/product inspection;
- ⌘ Written statements from all known witnesses;
- ⌘ ISO Claims Search;
- ⌘ Search of State and Federal Court databases;
- ⌘ Criminal background checks;
- ⌘ Internet searches;
- ⌘ Surveillance. CAVEAT: Although a party has a right to conduct surveillance pre-deposition, a plaintiff is entitled to surveillance tapes on demand. As a result, you would have to turn the surveillance over pre-deposition. See Tran v. New Rochelle Hospital Medical Center, 99 N.Y.2d 383 (2003); and
- ⌘ Expert retention.



Tip 3: Prepare Your Witness

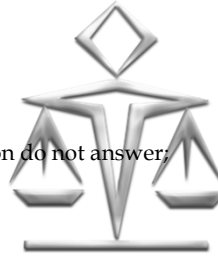
⌘ GOALS

- ⌘ Relieve your client's anxiety;
- ⌘ Familiarize your client with the process;
- ⌘ Refresh your client's recollection of the facts;
- ⌘ Prepare your client for the type of questions they will be asked;
- ⌘ Prepare your witness to deal with difficult questions in the best possible way; and
- ⌘ Prepare your client to avoid mistakes.

Tip 3 Continued: Prepare your witness



- ☞ When to meet with your witness?
 - ☞ General advice to the witness:
 - ☞ ALWAYS TELL THE TRUTH!!!!;
 - ☞ Listen to the question;
 - ☞ If you do not understand the question do not answer;
 - ☞ Think before your answer;
 - ☞ If your lawyer objects stop talking;
 - ☞ Answer only the question asked;
 - ☞ Do not guess or speculate;
 - ☞ It is okay to say I don't remember or know if true;
 - ☞ Do NOT volunteer any information.
 - ☞ Correct mistakes as soon as possible;
- ☞ Role playing - good or bad?



GENERAL ADVICE TO THE WITNESS



- ☞ If a document is given to you, read it;
- ☞ Listen to the question being asked;
- ☞ Do not answer the question before the attorney is done asking it;
- ☞ Understand what refresh your recollection means;
- ☞ Do not adopt the answer of a witness who testified before you;
- ☞ You are allowed to take breaks to go to the bathroom, have a drink, get fresh air, etc...
- ☞ You may speak to your attorney so long as there is not a question pending; and
- ☞ There are no right or wrong answers only truthful ones.

WHAT TO SHOW THE WITNESS

☞ Anything the your client reviews in preparation for his/her testimony is discoverable. Accordingly, do not show your client anything that you are not required and do not intend to turn over in discovery, such as a witness statement.

☞ You should show your client any document that they have verified or affirmed as well as any documents or photographs that have been exchanged in discovery and they are likely to be questioned on.

Tip 4: Research, Research, Research

☞ Social media can be a valuable tool in investigating a claim. Often times, social media postings contradict the position the party is taking in the litigation.

☞ Example: Plaintiff alleges that he/she is unable to engage in any type of athletic competition due to their injuries. However, on their Facebook page, they post photos of themselves playing softball after the date of the accident.

Tip 4: Research, Research, Research



⌘ A lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network (i.e. public information) and the lawyer neither "friends" the other party nor directs someone else to do so. See New York State Bar Association Opinion 843 (2010).

⌘ "If you post a tweet, just like you scream it out the window, there is no reasonable expectation of privacy. People v. Harris, 36 Misc.3d 868 (Crim. Ct. New York County, June 30, 2102).

Tip 4: Research, Research, Research



⌘ "The postings on plaintiff's online Facebook account, if relevant, are not shielded from discovery merely because the plaintiff used the service's privacy settings to restrict access." Patterson v. Turner Construction Company, et. AL, 88 A.D.3d 617 (1st Dept. 2011).

⌘ An attorney cannot "friend" a represented party or request someone else do so in order to access the private portions of that party's social media account. New York State Bar Association Opinion 843 (2010).

⌘ Accordingly, in order to access postings on the private portion of a party's social media account, you must utilize the formal discovery process.

Tip 4: Research, Research, Research



œ Many Courts employ a two part test to determine if discovery of the non-public contents of a social media account should be compelled:

- œ Is it material and necessary; and
- œ Would the production violate the account holder's privacy rights?

œ Access to a social media account should not be granted to conduct a "fishing expedition". Tapp v. New York State Urban Development Corporation, et. AL, 102 A.D.3d 620 (1st Dept. 2013) and McCann v. Harleysville Insurance Co., 78 A.D.3d 1524 (4th Dept. 2010).

Tip 4: Research, Research, Research



œ Courts have held that the contents of a social media account are material and necessary **when the information contained in them contradicts or conflicts with the plaintiff's claims.**

- œ Accordingly, the party seeking disclosure must demonstrate a **factual predicate** for the disclosure (i.e. that the account may contain information that is contradictory to their claims).

œ This factual predicate can be established by postings on the public portion of the account or through careful questioning at the deposition.

- œ Romano v. Steelcase, Inc., et. AL, 30 Misc.3d. 426 (Sup Ct. Suffolk County 2010).

Tip 5: Know the rules of evidence and ethical rules regarding conduct at a deposition



- œ Documents - authentication
- œ What are the relevant privileges?
- œ How to deal with objections



Tip 6: Have your exhibits ready

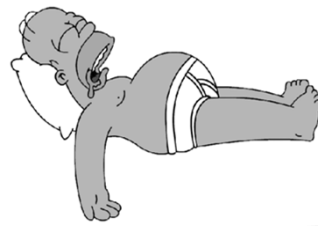


- œ Prepare your exhibits the day before.
- œ Know the order you will use them.
- œ Highlight or mark up your copy, so you know what questions to ask.
- œ Have extra copies ready for the witness, the court reporter and opposing counsel.
- œ Not being prepared wastes your time and everyone else's

Tip 7: Take Care of Your Physical Needs



- œ Be well-rested, fed, hydrated, etc.
- œ If something is off physically, you won't be at your best mentally.



During the deposition



- œ Tips to bear in mind while you're at the deposition
- ...



Tip 8: Ease the witness into the testimony



- ☞ Giving testimony is nerve-wracking. Use the housekeeping details to get the witness to relax.
- ☞ Remind the witness that all answers must be verbal. People want to nod or gesture, which will not appear on the record.
- ☞ Find out if the witness has taken any medication that would impair his/her ability to tell the truth or to recall information.
- ☞ Ask about illicit drug use within 24 hours of the deposition (likely to get an objection from counsel, but should do it anyway and preserve the record if the witness is directed not to answer).


Tip 9: Be an active listener



- ☞ **Use an outline, instead of scripted questions, so you can be an active listener.**
- ☞ Be prepared to follow up on questions, even if the new line of question is not on your outline.




Tip 10: Preserve the Record & Stand Up for Yourself



- ☞ Assume that the deposition testimony will be read to a jury someday.
- ☞ Make your questions clear and concise; NO compound questions.
- ☞ It's okay to ask to have questions read back by the court reporter.
- ☞ Anything goes at a deposition (information gathering)
- ☞ Objections as to admissibility, relevance, form, etc. should be reserved for the time of trial.
 - ☞ If there is an objection as to "form," or for pretty much any other reason, the witness can still answer.
- ☞ Do not allow yourself to be bullied by an older/more experienced attorney.
 - ☞ When in doubt, you can call the judge or threaten to call the judge; especially if the other attorney is being obstructionist.
- ☞ If an attorney or witness becomes angry, abusive or disruptive, it is okay to ask for a break.
 - ☞ It is also okay to put on the record questionable non-verbal behavior.

Tip 10: Preserving the record continued



- ☞ Attorneys like to lobby the "this is not a fishing expedition" talking objection, but CPLR 3101(a) states:
 - ☞ "There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof..."
 - ☞ What is material and necessary is left to the sound discretion of the Court and the party seeking the discovery has the burden of proving the same.
 - ☞ Discovery of inadmissible items may be permitted so long as the request is reasonably calculated to lead to the discovery of admissible evidence.

Tip 11: Use Human Nature to Your Advantage



- œ People want to be liked and they want to please.
- œ People do not like awkward silence.
- œ People want to appear smart.
- œ People respond to authority.
- œ People get tired after hours of questioning.
- œ People can be combative.

Tip 12: Take requests under advisement



- œ An experienced attorney will attempt to use the testimony – no matter how innocuous – to gather more discovery and/or argue an entitlement to such discovery.



SOME ETHICAL CONSIDERATIONS



- A lawyer may not suborn perjury;
- A lawyer may not direct a witness how to answer a question;
- A lawyer may not communicate with a represented party; and
- A lawyer should not friend or follow a non-represented person under a false name on a social media website.

After the Deposition



- Remember that opposing counsel is not the enemy; s/he's doing a job, just like you are.
- Remember that, per the CPLR, there are time frames to make corrections to the testimony and sign the transcript. If you do not adhere to those timeframes, your client is stuck with that testimony and it may be used against them in motions and at trial.

Questions?

