TAKING A MEANINGFUL DEPOSITION IN AN AUTO ACCIDENT CASE

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INTRODUCTION

I Oral depositions are typically the most powerful discovery tool available in an auto case.

II Well taken depositions can have a dramatic impact on the outcome of an auto case.

III Good deposition skills are important in order to take a meaningful deposition.

IV It is important to have a good discovery plan as soon as you take case into your office.

V CPLR Article 31 set forth the rules governing disclosure and deposition sections are set forth in CPLR §3106-3117.

DEPOSITIONS - AUTO CASES EFFECTIVE TOOLS

I PREPARATION

A. Know Your File ⟩ Depositions are typically the most powerful discovery tool available in an auto case.

1. Review Pleadings
2. Review Discovery Responses
3. Review Police Report, Photographs, Witness Statement
4. Visit the Accident Scene
5. Review the Pattern Jury Instructions as they apply to your case. (Know the law as it applies to each side.)
6. Review the defenses raised and question allegations

B. Understand the theory of your case

1. Review all reports and notes from experts
2. Consider and prepare a list of information and testimony necessary as a predicate for expert review and opinion testimony.

C. Develop a deposition strategy for each witness.

D. Prepare an outline for the deposition/know the essential facts and documents involved in the case.

1. Can you obtain an admission from the deponent?
2. List the facts including who or what will establish it and determine how the deposition can provide testimony on various facts or issues.
3. Present documents to witnesses who can establish a foundation for its introduction into evidence at trial.
4. Prepare copies of documents you intend to use at the deposition in advance for opposing counsel and the witness.

E. Outline Rules of the Road

1. Prepare questions that require witnesses to answer questions related to rules of conduct and standards of care.

2. In an auto case, formulate questions regarding common sense rules such as a driver's duty to keep right, to keep his or her vehicle under control, to keep a proper lookout.

F. Stipulations

1. Understand what the term "usual stipulations" means.
2. See CPLR §3115(b).
3. If a timely objection was made known, errors might be obviated.

    a). Errors are waived unless reasonable objection is made at deposition.
    b). Otherwise, all other objections are preserved for trial.

        i. Errors as to form are preserved for trial.
        ii. Errors as to argumentative questions are preserved for trial.
        iii. Errors as to compound questions are preserved for trial.
        iv. Relevance and hearsay are preserved for trial.

G. Deposing The Adverse Party - Techniques

1. Obtain background information of the deponent.
2. Consider the deposition as the complete opposite of cross examination.
3. Ask open ended questions.
4. Ask the witness to explain.
5. Ask "why" questions.
6. Ask who, what, where, when and how questions.
7. Think first of broad questions, follow with directed questions, and then follow with narrow questions to nail down specific facts.

H. Ask the witness what he or she reviewed in preparation for the deposition.

1. Question the witness about what unaided independent recollection and exhaust their recollection before using any records.

2. Request witnesses to mark photos and/or diagrams.

I. Motor vehicle cases usually involve questions related to:

1. Speed
2. Time
3. Distance

PREPARING YOUR CLIENT FOR A DEPOSITION

1. You must prepare your client in advance on one or more occasion. With some clients, regardless of how much you prepare, every answer may be a new experience. All you can do is your best to prepare them and try to make them comfortable and at ease.

2. Most clients think there must be something wrong if they are questioned by opposing counsel and asked if they spoke with their attorney in preparation for the deposition.

a. Instruct the client to tell the truth. If you did not speak with them in preparation, you can tell them you would be considered the worst attorney in New York State.

3. Prepare the witness to know if they reviewed photographs, statements, medical records, or any personal notes or diary they may have kept that anything they reviewed is discoverable by the other party.

4. Instruct your client to tell the truth and not to exaggerate or volunteer information.

They should simply answer each individual question.

5. This is not the time to tell your story. The client will have the opportunity to this later,
if necessary.

6. Always instruct your client not to guess at an answer but let them know that responses like "I cannot remember that right now" or "I don't remember" or "I am not comfortable guessing at that" are acceptable answers.

7. If you are estimating at something, make sure the record is clear that you are estimating or approximating.

8. Make sure you discuss the bill of particulars and how it may be used as a road map by the defense attorney.

9. Give your client instructions on how to dress for the deposition.

10. It is important to review a medical outline regarding physical complaints and treatment over the course of the claim. Review any crucial statements provided to
EMT's, emergency room health providers and the physicians and physical therapists.

11. Stress how important it is for clients to be truthful with regard to prior and subsequent accidents involving the same body parts and/or criminal convictions.

12. Most clients have not testified before and they are afraid.

13. The deposition is the most important event in most cases. Do not wait until the morning of the deposition to attempt to prepare your witness.

14. Allow enough time to prepare for the deposition.

A. Best practice is to prepare the week of the deposition.

15. General Instructions

A. Listen to the questions
B. Only answer the question
C. Do not volunteer information.
D. Depositions are not conversations.
E. Tell the truth.
F. Do not answer a question that is not understood.

G. Answer only what is known to be factually correct.

H. Avoid absolutes "I can never climb more than five stairs."

I. If necessary, take a break, or stand up if you have difficulty sitting for any length of time.

J. Review the medical records and make sure to discuss any pre-existing conditions or injuries.

K. Make sure to review all claims for lost wages and lost time from work.

QUESTIONING YOUR WITNESS AT A DEPOSITION

1. Usually not done.

2. Before questioning your witness, ask yourself these questions.

a. Will my client make it worse?

b. Can an errata sheet be used to set things right?

3. May ask a question if you think if the answer is left as is, it will create issues.

SCOPE OF THE DEPOSITION

1. CPLR §3101(a) permits and provides for broad discovery and states, "There shall be full disclosure of all matters material and necessary in the prosecution and/or defense of an action..."

2. Test: "Usefulness and reason" Allen v. Cromwell-Collier Pub. Co., 21 N.Y.2d 403, 406).

3. 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 N.Y.2d 740 (2000).

B. If the question seeks information that could lead to relevant admissible evidence at trial, it must be answered.

C. A broader range of questioning than would be permitted at a trial is permitted, including hearsay.

4. Limited exceptions

A. Privileged material
B. Irrelevant information
C. Cannot be unduly burdensome

5. CPLR §3113(c) examination and cross examination of deponents shall proceed as permitted in a trial.

A. If you can do it at a trial, it can be done at a deposition.
B. Cross examination of a witness is permitted.
C. You are permitted to have the witness mark exhibits.

6. Deposition limitations

A. No depositions of experts
B. Fact witnesses only in auto cases
C. Cannot depose IME doctor or treating doctors in absence of special circumstances.

i. May be able to depose physician by applying to the Court if patient gave a version of the accident that varies from his deposition testimony.

UNIFORM RULES FOR THE CONDUCT OF DEPOSITIONS - PART 221

1. On October 1, 2006 a rule was enacted - Part 221 of the Uniform Rules for Trial Courts relating to the conduct of depositions.

2. There are three rules that apply in all courts.

A. Objections at depositions (221.1)
B. Refusal to answer when objections are made (221.2)
C. Communication with the deponent (221.3)

3. The rule directs lawyers and their clients to answer all questions that are asked, so that beyond the protection the CPLR provides (objections are not waived), objections cannot be raised at all in a deposition.

4. There are no specific sanctions set forth in the rules.

5. 221.1 Objections at Depositions.

A. Objections in General: No objections shall be made at a deposition except those which, pursuant to Subdivision (b)(c) and (d) of CPLR §3115 would be waived if not interposed, and except in compliance with subdivision (e) of such rule. Objections shall be noted and the answer shall be given and the deposition shall proceed subject to the objections and the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.

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 §3315 or by this, during the course of the examination, persons in attendance shall not make statements or comments that interfere with the questioning.

6. 221.2 Refusal to answer when objection is made.

A. A deponent shall answer all questions at a deposition, except (1) to preserve a privilege or right of confidentiality; (2) to enforce a limitation set forth in an order of the Court; or (3) when the question is plainly improper and would, if answered, cause significant prejudice to a person. An attorney shall not direct a deponent not to answer except as provided in CPLR §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 thereof. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of his deposition.

7. 221.3 Communication with the deponent.

A. An attorney shall not interrupt the deposition for the purpose of communicating with the 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 of the communication shall be stated for the record succinctly and clearly.

IMPROPER QUESTIONS, OBJECTIONS AND DIRECTIONS NOT TO ANSWER

I. Argumentative, misleading, ambiguous or multiple questions are improper as to form.

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

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

III. A witness does not have to answer palpably or grossly irrelevant questions. (Ferraro v. New York Telephone Co., 94 A.D.2d 784, 785 (2d Dept. 1983)).

IV. Raising objections that must be made at a deposition

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

i. Objections should be made promptly.
ii. Questioner then has the choice:

a. Reformulating the question
b. Standing by the question and demanding an answer

B. Competency of witness

C. 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 otherwise objectionable testimony. (Saturno v. Yanow, 58 A.D. 2d 968 (4th Dept. 1977)).

V. Improper Objections

1. Objections designed to harass or embarrass the questioning attorney

2. Objections to impede or break up the questioning

3. Improper speaking objections

a. "If you know"
b. Suggests to witness to respond, "I don't know."

4. Not all questions regarding the plaintiff's medical history are proper. (Iseman v. Delmar Medical - Dental Bldg., Inc., 113 A.D.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 N.Y.S.3d 384 (4th Dept. 1998)).

C. Examples:

a. Have you ever been treated by an orthopedist before?
b. Have you ever been treated for any neurological condition?

VI. Questions that require answers to issues of law or legal conclusions are improper. (Lobdell v. South Buffalo Railroad Co., 159 A.D.2d 958 (4th Dept. 1990); Blitz v. Guardian Life Ins. Co. of America, 99 A.D.2d 404 (1st Dept. 1984)).

VII. Do not permit opposing counsel to use "speaking objections".

A. These types of objections coach a witness, and it is improper to suggest answers to the witness.

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

IX. Objections to the form of a question

A. Confusing or unintelligible
B. Vague
C. Ambiguous
D. Compound
E. Argumentative

F. Repetitive or asked and answered
G. Misstates facts

X. Privileged communication.

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

XI. CPLR §3102(a), CPLR §3113, CPLR §3124 (Motion seeking order for a 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 attend another deposition.

B. Second deposition ordered, with costs, due to interrogatories and groundless objections (Lewis v. Brunswick Hosp., 2001 W.L. 856434 (Sup. Ct. Queens County May 10, 2001).

DIFFICULT WITNESSES

1. Keep asking the question until you get an appropriate answer.

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

A. Do not accept ambiguous answers.

3. If the witness does not know or cannot remember

A. Did you once know the answer?

B. Are there any documents that might assist you to remember?

C. Do not accept "I do not know" answers unless it helps your case.

Example: Q: What was the speed of your vehicle at the time of the contact?
A: I do not know.
Q: You have no estimate at all of your speed upon impact?

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

E. Where would you look to find the answer?

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

A. If the answer might hurt your case, an objection should be made that the answer was nonresponsive.

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

CONCLUDING QUESTIONS

1. Have you understood all the questions asked?

2. Have you told me everything about the incident?

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

ELIMINATE DEFENSES OR CLAIMS

1. If the defendant verified pleadings, then he or she can be examined concerning the contents.

2. Very often bills of particulars will be sworn to that indicate the plaintiff was negligent and careless for driving at too fast a speed under the circumstances or failed to keep right, among other things.

A. Under those circumstances, a defendant should be questioned regarding all of his observations and how he claims the plaintiff was comparatively at fault and why he made that type of claim.