PREPARING FOR AND TAKING DEPOSITIONS IN A PERSONAL INJURY CASE

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I. Introduction

- The deposition ("Examination Before Trial" under the Civil Practice Law and Rules), is the **single most important discovery device** available to the practitioner.
- It is the **only time, before** the case reaches **trial**, that **the attorney for a party has an opportunity to confront** his adversary, or employee/agent of the business or corporate adversary, **and assess** his demeanor, credibility and the extent of his knowledge of information bearing on the claim or defense asserted.
- The deposition is a **pivotal discovery device** that enables the practitioner to determine whether **settlement** might be achievable, and if not, the prospects for success at **trial**.

II. Goals of the Deposition

1. to determine whether there is a **basis** for an underlying cause of action or defense.
2. to establish as many of the **elements** of the cause of action or defense as possible.
3. to determine whether there are **grounds for a dispositive motion** on one or more issues and to **provide evidence** for motion practice.
4. to obtain **information** necessary for **further discovery**.
5. to **learn new facts** or to **confirm facts** already known.

"Goals", con't.

6. to **authenticate** and **determine relevancy** of evidence.
7. to **"nail down" the position** of the party or non-party.
8. to **"size up" the credibility** of the party or non-party.
9. to **obtain admissions**.
10. to obtain testimony for **impeachment** of witness testimony at trial.

III. Scope of the Deposition

- CPLR §3101(a) provides that "there shall be **full disclosure** of all matter **material and necessary** in the prosecution or defense of an action…" What is "material and necessary" is within the sound of discretion of the trial court (*Andon ex rel. Andon v. 302-304 Mott St. Associates*, 94 NY2d 740 [2000]). "The test is one of "usefulness and reason" (*Allen v. Crowell-Collier PUB CO.*, 21 NY 2d 403 [1968]).

- Questioning is **broader than is permitted at trial**, as the scope is testimony that may lead to the discovery of relevant evidence, **even if the information is hearsay or otherwise inadmissible** under the rules of evidence at trial. The test is whether the information is sought in **good faith** and **may lead to the discovery of admissible evidence**.

"Scope," con't.

However, there are **limits**, and the following are **not permissible**:

1. questions violative of the witness' **constitutional rights** (eg. self-incrimination);
2. testimony that falls within a **privilege** recognized in law (eg. spousal, attorney-client);
3. questions seeking information **"palpably irrelevant"** (*Ferraro v. New York Telephone Co.*, 94 AD2d 784 [2nd Dept. 1983]);
4. deposition of an **expert** (except under limited circumstances); and
5. deposition of a **treating doctor** or of a physician who performed an **independent medical examination**, in the absence of special circumstances.

IV. CPLR: "Mechanics" of the Deposition

A. CPLR §3106 – 3117: The Rules

- **CPLR §3106** gives the **defendant's attorney priority** to notice the plaintiff's deposition.
- **CPLR §3107** requires that at least **20 days notice be given by the initiating party**.
- at least **10 days notice by any cross-moving party**.
- in federal court there is no priority but **Federal Rules of Civil Procedure 26(d)** precludes initiating discovery before the **Rule 26(f) Conference**, unless a local rule or court order provides otherwise.
- **CPLR §3106(b)** provides that a **non-party witness** must be served by **subpoena** at least 20 days before the examination. In addition, a copy of the subpoena and a deposition notice must be served (as any other paper is served during litigation) on the adversary's attorney.

"Mechanics", con't.

- The party deposition notice may request the deposition of **a named individual**. If the defendant is a **corporation**, you may specify the individual or notice the corporation for a **"knowledgeable representative"** (the statute specifies "identity, description or title"), pursuant to **CPLR §3106(d)**.
- **FRCP 30(b)** is the federal equivalent.
- Depositions are also permitted **prior to the commencement of an action** pursuant to **CPLR §3102(c)**.
  - to **aid in bringing an action** (ie. to identify proper party or parties) **or to preserve information** or **aid in arbitration**.
  - **not permissible** to utilize this provision to determine whether **a viable claim** or cause of action exists.
  - a motion must be brought by **order to show cause**.
- **CPLR §3108** "a **commission or letters rogatory** may be issued where necessary or convenient for the taking of a deposition **outside** of the state."

"Mechanics", con't.

Location:

- **CPLR §3110** if the deposition is within the state it should be taken **in the county** in which the officer, director, member or employee of a **party resides** or has an **office** or where the action is **pending**. With respect to any other person who is a resident, within the county in which he resides, is regularly employed or has an office for the regular transaction of business.
- if the person is **not a resident**, it is to be taken in the county in which he is served, is regularly employed, or has an office for the regular transaction of business.
- if the party is a **corporation**, the deposition is to be taken where the action is pending at the office of any party's attorney.

"Mechanics", con't.

- in **federal court**, the deposition of the plaintiff is generally taken in the **district where the action is pending**, whether or not the plaintiff resides there. The deposition of the defendant is sometimes taken in the district in which the action is pending, sometimes in the district where the defendant resides or has a place of business.
- counsel **may stipulate** to a location to take the deposition other than that provided by the CPLR or FRCP.

"Mechanics", con't.

Document Production:

- **CPLR §3111** provides that the deposition notice or subpoena may require the production of "books, papers and other things in the possession, custody or control of the person to be examined to be marked as exhibits, and used on the examination."

  - **do not use this as the principle device** for document production. Instead, utilize **CPLR §3120**.

  - document requests contained within the CPLR §3106 notice are often paid little attention to, or ignored.

  - CPLR §3111 document production notices is **typically used** in **automobile accident cases** to request production of vehicle and scene photographs, repair bills and the accident report filed by the opposing driver.

V. Preparing for the Deposition

A. Preparation Should Begin Well in Advance

- preparation **should not** simply involve taking the file home on the night before the deposition to read it and make some notes.

- preparation **should** begin with review of pertinent charges within the **New York Pattern Jury Instructions**, and case law following the charges, as to the necessary legal requirements to establish a claim or defense.

- deposition of the lay party witness.

- deposition of the corporate "knowledgeable witness."

- deposition of the medical provider.

"Preparation", con't.

B. Make an Outline

- create an outline to provide a **blueprint** for questioning of the witness.
- it should **organize** the essential **goals** of the deposition into a list of the **subjects**, **topics, subtopics and issues** to be covered.
- it is highly recommended that you **do not write out each intended question**.

C. Exhibits at the Deposition

1. What Can You Use?

- there is **no limitation as to either the nature or number of "things"** that you may mark and use as exhibits at a deposition.

"Preparation", con't.

- There is **no CPLR requirement** that you provide your adversary **in advance** of the deposition with documents that you intend to question his client or client's representative with.

2. Organize and Integrate Exhibits with your Outline

- **reference them** in the outline that you prepare.
- **make copies** for your adversaries ahead of time and consider having them pre-marked by the stenographer at the beginning of the deposition.

D. Preparing your Client

- the witness most likely has never been deposed before. As a result, the deposition presents at least a **stressful**, if not frightening process.
- for the plaintiff's deposition, a **pamphlet** providing general information should be sent when the deposition of the client is first noticed.
- **meeting** with the witness in advance of the deposition is **crucial**, and **prior to the day of the deposition** is strongly recommended.
- the pre-deposition conference should **allow as much time as is necessary** to educate the client about the format of the process, and the "rules", how to dress and interact with counsel, and the areas of questioning to expect.

"Preparing Your Client", con't.

Important areas to cover with your client:

1. **dress** appropriately.
2. be **pleasant and cordial, make eye contact** and let the questioning attorney know that he is there to answer his questions and provide information.
3. **work with what you have** and help the witness to be as comfortable with the process as possible.
4. **answer** every question **honestly**.
5. make sure he expects to be asked the question "**Have you reviewed anything in preparation for your testimony today?**"
6. a witness may be asked if he was ever **convicted** of a crime or **pled guilty** to a crime.

"Preparing Your Client", con't.

7. a question that is **not understood** should never be answered.
8. answer **only the question** that is asked.
9. a **guess** is not recollection.
10. **"I don't know" or "I don't remember"** is entirely acceptable.
11. the witness is **not there to "vent"**, "tell his story" or "educate" the questioning attorney.
12. the witness should listen carefully to each question that is asked and **respond to that question**, and not one that the witness would rather respond to.
13. the witness **should not volunteer information** even if he thinks it will be "helpful.

"Preparing Your Client", con't.

14. the witness should **not express opinions or characterize** (except, as to each, under limited circumstances when asked to do so).
15. the witness should **take a break** if he is losing focus.
16. the witness should **avoid statements that exaggerate** or constitute hyperbole.
17. alert the witness **not to fall into the trap** that he **"should know"** the answer to a particular question and thereby provide an answer that is not truly recollection.
18. the witness should **not adopt the particular language** within the question if it is not accurate.
19. the witness should **not criticize a treating medical provider**.

What Will He Be Asked?

Prepare an **outline**, or **notes** to give you a **guide** as to the areas of questioning that you expect of your client by the opposing attorney.

- for the plaintiff's attorney, **consider breaking the deposition process** into three general areas: **background**, the **accident**, and **injuries/damages**.

- similarly, the defense attorney should prepare notes or an outline to ensure that his client also has a "roadmap" of what to expect from opposing counsel. Typically this involves the witnesses' **educational/employment background, and nature and extent of relevant knowledge about the claim or defense**.

VI. Conducting the Deposition

A. Stipulations and Objections

- **CPLR §3115(b)** covers objections to the qualification of the person taking the deposition, describes what objections are waived unless made at the time of the deposition and which objections are preserved for trial even if not made at the time of the deposition.

- the **most frequently made objection** during a deposition is as to the **"form of the question."** The Rule is clear, if this objection is not made when the question is asked, it cannot be made at trial.
  - typically involves one that the objecting attorney believes is **compound, confusing, assumes facts not in evidence or is otherwise not clear**.
  - the questioning attorney is **not under any obligation to rephrase** the question. However, if he doesn't do so, he risks being unable to utilize the witness' answer at the time of trial if the presiding judge agrees that the question was improper in form.

B. Speaking Objections, Direction Not to Answer and Communication with the Witness: Uniform Rules for the Conduct of Depositions (22 NYCRR Part 221)

- effective October 1, 2006, intended **to limit the witness' attorney from interfering** with the deposition process. The excessive **"speaking objections" and directions by the witness' attorney not to answer** a question were at the core of the perceived problem the rule was designed to address.

- actually provides three rules:

1. **objections** at depositions (221.1);
2. **refusal to answer** when objection is made (221.2); and
3. **communication** with the witness (221.3).

1. Subpart 221.1

- 221.1(b) deals with "**speaking objections**", which requires that an objection raised be "stated succinctly and framed so as not to suggest an answer to the deponent" and the requirement that if the questioning attorney requests, the defending attorney will make "a clear statement as to any defect in form or other basis of error or irregularity."

- the new rule was designed to end the all too frequent statements by the witness' attorney such as "only if you understand the question", "don't guess if you don't know the answer", "do you understand the question?", etc.

2. Subpart 221.2

- requires that **all questions at a deposition be answered**, with the **exception** of those where the witness asserts a privilege or right of confidentiality, to enforce limitations set forth in an order of a court, or when the question "is plainly improper and would, if answered, cause significant prejudice to any person."

  - if the witness' attorney directs the deponent not to answer, the direction to do so "shall be accompanied by a succinct and clear statement of the basis therefor."

3. Subpart 221.3

- speaks to communication by the attorney with his witness during the deposition. It states that the attorney shall **not interrupt the deposition to communicate with the witness** "unless all parties **consent or** the communication is made for the purpose of determining **whether the questions 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."

C. Deposition Techniques

What are your goals?

- is the purpose to acquire disclosure of both **favorable and unfavorable** facts?

- is it to **assess the demeanor and credibility** of the witness to determine how he would appear to a jury at trial?

- is it to conduct a courtroom like **cross-examination**?

- is it simply **to preserve testimony** because of the concern of the potential unavailability of the witness at the time of trial?

- or, is it a **combination** of some or all of these?

"Deposition Techniques", con't.

Preliminary questioning and statements should involve **"ground rules"** including:

- getting the witness to agree that **if he doesn't understand** any question **he will let you know** so that you can rephrase it.
- **that if he answers a question**, he agrees that he did so because he understands it.
- tell him that **you do not want a guess or speculation**.
- ask him to be sure to **wait until he believes you have finished asking** the question before he begins answering it.

"Deposition Techniques", con't.

- tell him that **if he wants to take a break at any time**, you would be glad to accommodate his request; but that he should answer a pending question before taking a break.
- **prepare for the unexpected** by anticipating that a witness may be hostile, uncooperative, evasive, claim to know little when he actually knows a lot. Be willing and prepared to adapt to the unexpected.

Techniques applicable to most depositions:

1. ask **open-ended questions** – who, where, why, when, how.

2. consider **identifying a topic** that you are going to discuss, as if introducing a thought for a new paragraph in a writing. Start with general questions, followed by more directed questioning, progressively narrowing the focus of the questions to nail down specific facts and other information.

3. "**box**" the witness by **persisting** in obtaining the witness' best recollection and the most concise and unequivocal responses to your questions:

    a. ask short, simple and clearly worded questions.

"Techniques", con't.

b. **if the witness' answer is lengthy**, look for favorable information within the response and "extract it" to frame the next question.

- "when you say…., can you tell me what you mean by that?"
- "tell me more about…"
- "what do you mean when you say…?"

c. if the witness answers a *different question* than you asked, ask the question again.

d. if you can't get a responsive, clear answer after making good efforts to exhaust the witness' knowledge, consider **"circling back."**

"Techniques", con't.

4. **chronological questioning versus jumping around** – While there is much to be said about the "element of surprise", starting with the "nuts and bolts" questions and developing topics in a predictable fashion (chronological, logical, "linear"), is most likely to put the witness at ease, and obtaining the most and best quality information.
5. **don't ask** questions in the negative.
6. allow a **"pregnant pause"** after a good answer.
7. if the witness responds that he **doesn't know or can't remember**, try the following:
    - did you ever know the answer?
    - are there any documents that might help you to remember?

"Techniques", con't.

- you told me earlier that you didn't recall…, did…help to refresh your memory about…?
- is there someone within the company who you believe might know the answer to this question?
- where would you go to find the answer (or document)?
- where are these type of documents stored, who is the custodian of the documents and what is the file called, etc.?

8. **if the answer is nonresponsive and could be harmful** voice the objection as "nonresponsive" and rephrase the question, attempting to make it "tighter" to see if you can obtain an answer without the objectionable part.

D. Using the Deposition as a Cross-Examination Tool

- **CPLR §3113(c)** provides that "…examination and cross-examination of deponents shall proceed as permitted in the trial of actions in open court…"

E. Documents

- **foundational questions** involve, after giving the witness an opportunity to review or visualize the document, whether he recognizes what is shown, and if so, to ask him to describe what he sees. Does the photograph fairly and accurately represent what the witness has said it shows?

- If the document is believed to be a **business record**, establish the two key foundational requirements to its admission at trial:
    1. was it kept in the regular course of the business, and
    2. was it the regular course of the business to create and maintain such records.

- The goal, as with any aspect of the deponent's knowledge, is to **exhaust his knowledge** about the document.

F. Deposition of the Non-Party Witness

Should you depose the individual?

- **careful consideration** should be given before taking the deposition of a non-party witness.

- **certain circumstances** where it may be **necessary** to do so, such as where the witness is in poor health, may be leaving the jurisdiction, or has critical information that might be lost if the witness becomes unavailable by the time of trial.

- obtaining **a signed Statement** from the witness is almost always a good idea before making a decision to take his testimony.

"Deposition of the Non-Party Witness", con't.

- the **rules** relating to representation of a person not a party to the action by an attorney at a deposition **have changed**.

  - prior rule was that an attorney for a non-party witness had no right to direct a witness not to answer, assert privileges or protections, or otherwise "manage" the deposition of the non-party witness.

  - **CPLR §3113(c)** : "…a **non-party's counsel may participate** in the deposition and make objections on behalf of his or her client in the same manner as counsel for a party."

  - became effective September 23, 2014.

  - ended the prior practice, where an attorney was almost powerless to guard against improper questioning and was relegated to an almost meaningless role.

G. After the Depositions

- capture impressions of the witnesses.

- deposition summaries.