II. How To Take The Deposition: Practice Pointers

Preparing your witness

Crafting questions

Understanding when to object and preserving objections

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HANDLING and TAKING DEPOSITIONS

II. How to Take The Deposition: Practice Pointers

Preparing Your Witness

As with most things in life preparation is the key to success. Preparing your witness for deposition is no exception. So the first rule of preparation is not to wait until to the day of the deposition to prepare your witness. You need time to get to know your witness, to measure the witness's communication skills, your witness's recollection of the facts, and the witness's ability to think on his/her feet. And one preparation session may not be enough for you and your witness. Your witness needs time to become comfortable with the procedure, which you will explain, and needs time to reflect and revisit the facts of his/her case. They may also need time to adjust to the fact that "yes, they are going to asked those type of questions." Hopefully you were able to meet with your client at the time of intake, because preparation for deposition starts right at that time. And you need to let your client know right then at intake what to expect down the road, the deposition, the physical exam etc.

Also, don't break attorney-client privilege by preparing your client with non-parties in the room with your client during preparation. It is fair for your adversary to ask your client who was present during preparation, and then subpoena the non-party for deposition and ask what they heard during the client-attorney meeting! In the same context it is important to know the good as

well as the bad about your client and your client's case – your client should be made aware that your conversations/preparations are confidential as well as privileged, and that it will better serve the client to be 100% truthful with you during preparation.

Law suit economics and time management all factor into witness preparation so some, all, or none of the following points may be of use to you in the preparation of your witness:

EXPLAIN THE PURPOSE OF A DEPOSITION AND WHERE IT FITS INTO THE OVERALL LAWSUIT

1. Summary Judgment
2. Trial

STYLISTIC ISSUES:

1. Determine what language is most comfortable for your witness. Realize that your witness not only needs to understand the question, but also needs to be able to adequately and effectively construct answers to the questions.

2. Discuss how to dress at the deposition; to sit up straight, to show self-confidence and energy when answering questions, and to look the questioner in the eye if your witness is comfortable with doing so. Remember, your adversary will use the deposition to evaluate how he/she thinks your witness will come across at trial. The client/deponent needs to be aware that the deposition will take as long as necessary, possibly the whole day; that there is no time limit, so the client/deponent should make prior arrangements for child care, doctor's appointments etc., get a good night's sleep and ask for a break as needed.

2. Advise the client/deponent not to volunteer anything at the deposition, but to be truthful, and to answer each question directly and to the point. That if the lead-in to the client's answer begins with "it had to be", or 'it must have been", or "it could have been", then probably the better

answer is “I don’t know” or “I don’t remember”. Explain the 6 acceptable ways of answering questions under oath: “yes”, “no”, “I don’t know”, “I don’t remember”, “I don’t understand the question”; and that if a narrative answer is called for make the answer brief and succinct. Explain that if the client does not recall something at deposition, for instance the street address of his/her doctor, that CPLR R. 3116 permits the client to provide the information when the transcript is presented for signature. Try to disconnect the client from phrasing answers with the prepatory “to tell you the truth...”, or “to be frank with you…”.

3. The witness/client needs to be comfortable with answering “I don’t know”, or “I don’t remember”, when appropriate, but not to answer in such a way in order to avoid answering a question, or as a way of giving up on a question in frustration. That if asked the question when the client last treated with a particular doctor, and if the client does not recall the exact date, if is perfectly acceptable to reference a month and year, or season of the year, such as “…the fall of 2014”.

4. If you suggest to your client that a question not be answered, that the client not answer the question.

5. That questions calling for a date and time, or distance, etc., are better answered using an approximation, such as “approximately 10 feet”.

6. Explain the difference between an answer to a question that is based on an “estimate” as opposed to a wild guess.

7. That you, as your client’s attorney, have the right to question the client at the deposition (CPLR R. 3113(c)), but that you will only do so sparingly and then most likely, only to repair damage done on direct.

SUBSTANTIVE ISSUES (most issues that follow apply to both plaintiffs and defendants as

deponents)

8. The client must be made aware of the fact that his/her testimony will be taken under oath, and also informed, very tenderly, that any knowingly false statements made by the client can potentially subject the client to criminal charges for perjury.

9. The client must be made aware that his/her adversary has available to them internet access to search engines such as “CIB”, “DMV”, “Criminal Background Check”, “Board of Regents Records/Licensing Records”, “Plaintiff/Defendant History Records”, “Bankruptcy Filings”, and that these sources can be used to look into the client’s background in order to undermine the client’s case.

10. Go over the contents of the pleadings, notice of claim and bill of particulars with the client, especially so if the client verified the documents.

11. Go over all discovery exchanged by defendant, including opposing party statements, names of witnesses, and photographs.

12. Obtain and *read* the medical records and collateral source records of your client. Go over the parts that pertain to “history” and “prior medical history” attributable to your client, and be prepared to object to questions about non-relevant past medicals.

13. Obtain and analyze Police Reports, OSHA/NIOSH, Worker’s Compensation records, and go over the content of the same with your client. Look for statements/admissions attributable to your

client and discuss.

14. Challenge your client about past employment applications and reasons for leaving a job, military discharge documents and the type of discharge awarded. Same for pensions from prior jobs and the conditions for the same. Obtain all such documents before deposition if you

can. (Law suit economics and time management).

15. Determine if your client testified under oath in any previous proceeding, civil or criminal or job related. Obtain and analyze and discuss. Discuss any criminal convictions pertaining to your client, be specific as to the conviction or what was pled-to, and explain why and how this can be a proper subject for the deposition and how said conviction/plea can be used at trial.

16. SOCIAL MEDIA. The "Black Hole" of the practice. You have to know what social media your client has and what has been aired on social media by your client about the case. You also need to know what social media has said about your client/deponent. Be aware of Blogs that your client (or adversary) is involved in. Cell phone and text messages made about the case are also important to go into with the client. And then the wedding/vacation photos and videos post accident!

17. And when possible, visit the scene preferably with the client. Look for surveillance cameras And, if present, obtain the video before deposition. Review applicable sections of the PJI to become familiar with the elements of proof in your case and discuss with client. For medical deponents, review medical standards of care, and discuss both elements of proof and defenses.

18. In preparing witnesses for testimony in products liability and labor law cases, learn the language peculiar to the case. You can learn a lot on-line. Go over with your expert the elements of the case and discuss the same with your deponent.

Crafting Questions

Understand your goals at deposition

Whether defending or conducting a deposition, knowing what you need and want to accomplish is paramount. So create an outline of your goals and draft up questions, bullet points or whatever is your style. Just be sure to cover at deposition all the goals in your outline. This is

another way of saying know the theory of your case, the elements of the claim, and what is necessary to prove or defend your case.

If you are examining a medical expert in a medical malpractice case or personal injury case, or an engineer involved with product design, manufacture or labeling issues, or a construction witness regarding safety policies and procedures, work with your expert to craft questions covering areas your expert needs information on. Review applicable statutes and laws and fold their substance into your questions, such as: "Were safety meetings held?", "Were records kept?" "Where are the documents presently located?", "How are the documents titled", "Was there a policy of the contractor concerning storage of materials on the job?", "What was the policy?", etc.

Documents

A deposition is an opportunity to lay the foundation for the admissibility of a document obtained in discovery, or during your investigation. The deposition questions necessary to lay the evidentiary foundation for admissibility of the document include whether the deponent recognizes the document, whether the document is a fair and accurate copy of the original, and whether the document was made and kept in the regular course of business of the person or company creating the document. Questions concerning the content of the document may illicit answers identifying the source of the information provided (your deponent?), witnesses spoken to, remedial actions recommended/taken, and where other vital evidence is located. Also, questions about where the document was sent after it was created, and how it was used within the corporation, may open other doors for additional questions and discovery.

Understanding When To Object And Preserving Objections

22 NYCRR Part 221 (Uniform Rules for the Conduct of Depositions), read with

CPLR R. 3113 (Conduct of the examination), and CPLR R. 3115(d) (Competency of Witnesses or Admissibility of Testimony).

Part 221 of the "Uniform Rules For The Conduct Of Depositions" sets forth the rules pertaining to objections permitted at depositions.

Section 221.1(a) pertains to the scope of the objections in general (*objections to the form of the question or answer, objections to the manner in which the deposition is taken, or by whom it is taken, errors in the oath or affirmation, or in the conduct of persons).* And Rule 221.1(b) details how the objection is to be made. Rule 221.1(b) prohibits "speaking" objections intended to instruct the witness how to answer the question. Rule 221.1(b) also prohibits conduct that interferes with the questioning at the deposition (*profanity, inflammatory comments, personal attacks in the questions).*

Section 221.2 focuses on when it is proper for an attorney to direct his/her witness not to answer a question (*to preserve a privilege (physician/patient, attorney/client) or right of confidentiality, to enforce a limitation set forth in an order of a court, or when the question is plainly improper and would, if answered, cause a significant prejudice to any person).* This section also provides that an attorney shall set forth a "succinct and clear statement of the basis…" for directing his/her witness not to answer a question. *Tardibuono v. County of Nassau,* 181 A.D.2d 879 (2nd Dept 1992) (all questions posed at depositions should be fully answered unless they invade a recognized privilege or are palpably irrelevant). All other questions must be answered.

Section 221.3 permits an attorney to interrupt the deposition to speak with his/her deponent mid-question if his/her adversaries agree, or if the attorney needs to speak to the deponent to determine if the question should not be answered for the reasons set forth in Section 221.2.

Again the attorney is required to state succinctly and clearly the reasons for the interruption.

The general philosophy of 22 NYCRR Part 221 is fair play and practicality. If a question is "improper" under the Rules and objected to by the adverse attorney, a questioner is provided with the opportunity at the deposition to "fix" his/her question to the satisfaction of the questioner. Such as: "I object to the question", "What is wrong with the question?", "The form of the question is improper". Thus the questioner now has the opportunity to "fix" or to rephrase the question in a form that is not objectionable, although the questioner may choose not to exercise the option and will stand on the question creating an impasse that may require court intervention (a/k/a – a motion) to resolve.

> "Errors and irregularities occurring at the oral examination in the …*form* of the questions or answers…which might be obviated or removed if objection were promptly presented, *are waived* unless reasonable objection thereto is made at the taking of the deposition". (CPLR R. 3115 (b)).

(*If you don't object to the FORM of a question or answer during deposition, you waive your right to object to the same at trial. As noted the goal of this rule is to allow the questioner/answerer to simply clean up the question/answer when challenged at the time of the deposition.)*

Practice tip: Object to compound questions, questions based on incorrect assumptions of fact or lack of foundation.

> "Objections to the…admissibility of testimony *are not* waived by failure to make them before or during the deposition, *unless* the ground of the objection is one which might have been obviated or removed if objection had been made at that time". (CPLR R. 3115 (d)).

If a motion is necessary move pursuant to 22 NYCRR Part 221, CPLR Section 3103 and/or Section 3104 for a further deposition or for sanctions or costs.

Violation of 22 NYCRR Part 221.1 and/or CPLR R. 3115 may result in a monetary sanction against the violator pursuant to 22 NYCRR 130-1.1), *O'Neill v. Ho,* 28 A.D.3d 626 (2nd Dept. 2006), and/or an order for a further deposition of the obstructed witness, *Friedman v. Fayenson*, 41 Misc.3d 1236(a), 983 N.Y.S.2d 203 (Sup. Ct. NY County 2013); *Yoshida v. Hsueh-Chin Chin*, 111 A.D. 3d 704 (2nd Dept 2013); *Grisante v. Kurss*, 28 Misc.3d 1233(A), 958 N.Y.S.2d 60 (Sup. Ct. Erie County 2010).

Practice tip: Remember to go forward and complete your obstructed deposition. Don't stop mid-deposition, throw up your hands and walk out threatening a motion. Thereafter, if you deem it to be necessary, move for a continued deposition with/or without supervision regarding the obstructed questions (and follow-ups). As your motion may be denied, you or run the risk of not being allowed to reconvene and to finish your deposition, so finish your obstructed deposition. *White v. Martins*, 100 A.D.2d 805 (1st Dept 1984) (the proper procedure is to permit the witness to answer all questions subject to objections in accordance with CPLR R. 3115). And petitions to court for "advance rulings" on propriety of questions are improper, *Eliali v. Aztec Metal Maintenance Corp.*, 287 A.D.2d 682 (2nd Dept 2001).

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One final point, before leaving the deposition table thank the Court Reporter for his/her patience. Sometimes, we make it very difficult for them to do their job.