WBASNY
WOMEN'S BAR ASSOCIATION of the STATE OF NEW YORK

Presents

Demystifying Depositions: Tips and Trick for a More Effective Deposition

March 19, 2024

6:30 pm – 7:30 pm

CLE Credit: 1.0

Presenter: Seth I. Fields, Esq.
Facilitator: Melissa A. Cavaliere, Esq.

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THE QUEENS COUNTY WOMEN'S BAR ASSOCIATION

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DEMYSTIFYING DEPOSITIONS

Oral depositions are usually the most powerful discovery weapon available to a litigator. With only a small percentage of cases actually going to trial, the deposition is truly the real battleground for litigation. Proper deposition skills are essential for every attorney who desires expediency and maximum recovery. This lecture is going to focus on the taking of depositions of a party or non-party witness.

Understanding what the transcript is for and how your deposition should be composed.

RULES OF GENERAL APPLICATION → Rights and obligations

1. CPLR § 3113(3)(c): Examination and cross-examination: Examination and cross examination of deponents shall proceed as permitted in the trial of the actions in open court. When the deposition of a party is taken at the instance of an adverse party, the deponent may be cross-examined by his own attorney. Cross-examination need not be limited to the subject matter of the examination in chief.

2. Pattern Jury Instruction 1:94 - At some point in time before this trial began the |(plaintiff, defendant, witness), under oath, answered certain questions put to him or her by the lawyers for (plaintiff, defendant, all parties). A stenographer recorded the questions and answers and transcribed them into a document which the (plaintiff, defendant, witness) later signed before a notary public. *The portions of the transcript of the examination before trial that you will hear are to be considered as if (plaintiff, defendant, witness) were testifying from the witness stand.*

3. NYCRR Section 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) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) 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 and 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) 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 irregularity. Except to the extent permitted by CPLR Rule 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.

→ Why is this important? Because you want a clean record, or your adversary may actually be right!!

4. NYCRR Section 221.2 - Refusal to answer when objection is made

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 of a 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, the examining party shall have the right to complete the remainder of the deposition.

5. NYCRR Section 221.3 - Communication with the deponent

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 for the communication shall be stated for the record succinctly and clearly.

6. CPLR § 3115 – Objections to

- qualification of person taking the deposition
- Form objections
- Competency of the witness –
- Written questions.

7. CPLR § 3117 (a) Impeachment of witnesses; parties; unavailable witness. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used in accordance with any of the following provisions:

1. any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness;

2. the deposition testimony of a party or of any person who was a party when the testimony was given or of any person who at the time the testimony was given was an officer, director, member, employee or managing or authorized agent of a party, may be used for any purpose by any party who was adversely interested when the deposition testimony was given or who is adversely interested when the deposition testimony is offered in evidence → deposition can be used for impeachment or as read-in.

3. the deposition of any person may be used by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under these rules, provided the court finds: **(Unavailability)**

(i) that the witness is dead; or

(ii) that the witness is at a greater distance than one hundred miles from the place of trial or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or

(iv) that the party offering the deposition has been unable to procure the attendance of the witness by diligent efforts; or

(v) upon motion or notice, that such exceptional circumstances exist as to make its use desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court;

4. the deposition of a person authorized to practice medicine may be used by any party without the necessity of showing unavailability or special circumstances, subject to the right of any party to move pursuant to section 3103 to prevent abuse. (protective order)

(b) Use of part of deposition. If only part of a deposition is read at the trial by a party, any other party may read any other part of the deposition which ought in fairness to be considered in connection with the part read.

PRIMARY FUNCTIONS FOR DEPOSITIONS

- To collect information to prepare for trial
- To collect information to obtain additional discovery and witness
- To impeach the witness*****
- To send a message to the carrier*****
- To create pause or concern with the witness and attorney***

THE TRIAL

Given the language set forth in CPLR § 3113, it is essential to understand how and when witnesses are called at the time of trial.

The calling of witnesses at trial involves a direct examination, cross examination and re-direct. Direct examinations are conducted by the party who calls that witness. Cross examination is conducted by the party who did not. When a party calls witnesses for direct examination, the attorney is not permitted to lead that witness with certain exception subject to the discretion of the court. More specifically, while an adverse party or non-party witness who is called as a witness may be viewed as a hostile witness and direct examination may assume the nature of cross-examination by the use of leading questions, whether to permit such questions over objection is a matter which rests in the discretion of the trial court. *Jordan v. Parrinello*, 144 A.D.2d 540 [2nd Dept. 1988]. In light of such, the Court will routinely permit leading questions on direct where the witness qualifies as adverse or hostile.

Adverse Witness = The opposing party is an adverse witness but can also be someone who is unified in interest or so aligned with the defendant by nature of

their relationship. For example, an employee of the defendant, or a family member or close friend. A witness who is adverse is routinely declared as such prior to testifying

A hostile witness = One who is deemed to be hostile by motion to the judge seeking to declare the witness so based upon the fact that the witness has become so aligned with the other side during the course of his or her testimony thus allowing for leading questions. To declare a witness hostile, a motion is made to the trial judge during the questions to deem a witness as such.

An attorney who is offering evidence in furtherance of its case will almost always call his or her own client (the party). As well, an attorney may elect to call the opposing party to offer evidence in his or her own case. When to call a defendant in plaintiff's case often requires that an assessment be made as to whether it is necessary and/or strategically warranted. So, in accordance with the aforementioned, when calling one's own client in his or her own case, the attorney cannot lead. But when calling the opposing party during its case, that attorney **may** lead since the opposing party is adverse as a matter of law. When calling a non-party witness, the attorney cannot lead unless and until such time that the court declares the witness hostile or adverse. Conversely, when an adversary calls a witness on direct, you may "cross examine" or ask leading questions to elicit information from said witness. This is true even when your adversary calls your client.

THE READ-IN

Keeping in line with the rules stated above, a party may seek to conduct what is called a "read-in" of a deposition. This is in lieu of live testimony and is the functional equivalent of calling the witness to the witness stand. The best practice for the "read-in" of a deposition transcript should include another person sitting in the witness box reading the answers in response to the attorney who is reading the questions. An attorney may not read his or her own client's deposition transcript in lieu of calling his or her own client, but rather, may only read-in the testimony of the opposing party or that of an unavailable witness. Moreover, the transcript cannot be used to supplement his or her own client's testimony in any way unless opposing counsel has used the deposition transcript and the attorney wishes to read in relevant portions. See CPLR 3117(b). The deposition of an opposing party may be read into the record in lieu of calling the party opponent witness or may be used

to supplement testimony as to matters not been previously covered by live questioning. For example, if I have called the defendant and after my questioning and I realize I have forgotten something, if it is in the transcript I will read it to the jury.

When to read in testimony of the opposing party versus calling that witness is a strategic decision predicated on a number of factors. I typically call the defendant in my case as opposed to conducting a read-in, but, will conduct a read-in instead where I do not need the defendant to make a prima facie case and where I want to make it more difficult for opposing counsel and his or her client who must now be called in their own case. By so doing, they cannot lead which often results in some gratuitous testimony that can be used against the witness.

OBJECTIONS

When a deposition is being read into the record in any way and there are objections noted in the record, those objections need be ruled on prior to the introduction of the read-in testimony. The only objections that are required to be made at the time of the deposition are form objections. Examples of common form objections are as follows:

1. Unclear, ambiguous
2. Leading
3. Compound
4. Argumentative
   Ex:
   Q: How often did you look left and right before crossing?
   A: I looked 5 times
   Q: Do you expect a jury to believe that you looked 5 times?

5. Calls for a Narrative *** Sets up for inconsistent statement
   Ex: And what happened after you got in your vehicle that day?

6. Asked and Answered

Non-Form Objections

7. Speculation – calls for an answer that would not be within the knowledge of the witness.

   Ex:

   Q: Why do you think Mr. Jones was crossing the road where he did?

8. Privilege - exception where a non-client is in the room.
9. Constitutional objections – 5th amendment
10. Hearsay

If a party fails to make a form objection at the time of the deposition, the objection is waived at the time of trial and thus, when a read-in is being offered and the question is improper, the objection cannot be made and the question and answer may be read. If it is properly preserved and the Court rules that the question was improper, the question AND THE ANSWER are not admissible and cannot be read. This is also true for questions sought to be used for impeachment. All other objections do not have to be preserved and can be made at the time of trial when the read-in is being offered. This is why form objections need to be made when appropriate. As will be explained, the use of a form objection at the time of a non-party deposition is essential as it can result in the preclusion material testimony essential to a party's case.

NON-PARTY WITNESS DEPOSITIONS

A non-party deposition cannot be read into the record unless the Court deems the witness "unavailable". This is why questioning a non-party witness should always include inquiry into whether the witness has plans or anticipates relocating or whether the witness is suffering from any health conditions for which he or she anticipates a future inability to testify.

1. Unavailability is defined under CPLR §3117. For all intents and purposes, this analysis shall apply to situations where the non-party witness is to be deemed unavailable thus availing the parties use of the transcript to read in the testimony. Keeping in mind that the examination and cross-examination of deponents at a deposition shall proceed as permitted in the trial of actions in open court, a non-party deposition has to be conducted with a little more nuance than a party deposition. This is because at a party deposition, the examining party is

always adverse to the witness and thus may lead. And I urge you to do so whenever you can!!!

2. Favorable Testimony To Be Expected - If you have subpoenaed a witness who is favorable, it is technically proper to ask only non-leading questions. This despite the fact that you get away with this all of the time. I do not suggest that you stop doing it unless you are objected to based upon the fact that you are leading. Why is this? Because the testimony will be offered at trial in your case in chief and thus you will not be permitted to lead. Ex. The witness is unavailable and you wish to read-in the testimony. Your read-in is the functional equivalent of direct examination and therefore you may not lead.

3. Defending Against Adverse Non-Party Testimony – If the subpoenaed non-party witness testimony is expected to be adverse, you must make every form objection which includes "leading".

Be mindful that there are limited instances in which an attorney can lead during direct examination/deposition. These include:

1. Introductory matters
2. Examination of a child
3. Expediting a proceeding as to matters that are not in dispute
4. When necessary to clarify a witness's testimony or when examining a witness about a prior inconsistent statement.
5. Non-material matters.

Since this is at the discretion of the trial court, do not take any chances by leading. In sum, do not be lazy about objecting to leading questions when the witness is being produced pursuant to the adverse party's subpoena.

USE OF THE TRANSCRIPT AT TRIAL

1. Read In – At any time in a party's case in chief, the transcript of the opposing party may be read into evidence in lieu of calling the witness to the stand to give live testimony. Reasons for this:

a. Make prima facie case.

b. Party is unavailable and the transcript contains corroborative testimony

c. To be able to introduce testimony twice assuming the Defendant will be called in his or her own case

d. To ensure that Defendant will have to be called in his own case thus requiring the other side to ask non-leading questions

e. Allow for the introduction of collateral evidence to attack credibility of Defendant using same. Ex. Crimes or prior bad acts. That is, you cannot attach the credibility of a witness you have called using extrinsic evidence. So you read the transcript and force the other side to call his or own client

2. Cross Examination of adverse party or hostile witness - Impeachment
3. Refresh Recollection of Defendant

Breaking the Ice – Your presentation prior to the start of the deposition is key to avoiding resistance from a witness who is suspicious of your efforts, adverse to your client, nervous and whom has previously received instruction to say as little as possible.

- Smile
- Say “hello”
- Converse with the court reporter and attorneys
- Tell a joke / Be funny during instructions

-Sympathize with the witness/Ensure witness you ae not interested in holding them up

DON’T BE SO SERIOUS!!

PREPAREDNESS - Being prepared and knowing facts before the start of the deposition displaces the witness of confidence or inclination to be less than truthful. This is because there are typically materials and facts already available to the examiner prior to the deposition.

**DO NOT CONDUCT A DEPOSITION OF A WITNESS WITHOUT THE NECESSARY DISCOVERY HAVING BEEN RECEIVED.

1. Police Report
2. MV-104
3. Damage Photos
4. Photos from Accident Scene

5. Google Street View CPLR 4532-B
   - Include the date appropriate view (you can the "history" mode- Road conditions and sidewalk conditions change!!)
6. Knowledge of the Rules of the Road – VTL, Jury Charges, NYC Traffic Rules.
   a. Speed limit
   b. Road markings
   c. Bicycles – City versus non-city rules.
7. Previously held depositions → provide ability to pit adversarial witnesses against each other. Example:

   Q: So if Witness, X, testified that your vehicle was entering the second lane of traffic at the time of the contact, given your testimony here today, would you say he was being less than truthful?

8. Contracts
   a. Define responsibility to maintain and repair
   b. Define responsibility to oversee worksite and offer site safety

USUAL STIPULATIONS

S T I P U L A T I O N S:

IT IS STIPULATED AND AGREED by and between the attorneys for the respective parties herein and in compliance with Rule 221 of the Uniform Rules for the Trial Courts:

THAT the parties recognize the provision of Rule 3115 subdivisions (b), (c) and/or (d). All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and 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 C.P.L.R.;
THAT 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 irregularity. Except to the extent permitted by CPLR Rule 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.
THAT 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 of a 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 on the basis therefore. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

THAT 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 for the communication shall be stated for the record succinctly and clearly.

THAT the failure to object to any question or to move to strike any testimony at this examination shall not be a bar or waiver to make such objection or motion at the time of the trial of this action, and is hereby reserved; and

THAT this examination may be signed and sworn to by the witness examined herein before any Notary Public, but the failure to do so or to return the original of the examination to the attorney on whose behalf the examination is taken, shall not be deemed a waiver of the rights provided by Rule 3116 and 3117 of the C.P.L.R, and shall be controlled thereby; and

THAT the certification and filing of the original of this examination are hereby waived; and

THAT the questioning attorney shall provide counsel for the witness examined herein with a copy of this examination at no charge.

Let's highlight the following provisions:

1. ***"That every objection raised during a deposition shall be stated succinctly and framed so as to not 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 irregularity."***
    - Keeping control over the deposition → you are in charge and it is your examination
    - Maintains a clean and smooth transcript.

2. ***That a deponent shall answer all questions at a deposition, except..***
   (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 expect 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 on the basis therefore.

3. ***That an attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communications is made of 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.***
   -Rule 212.2:
      a. Privilege
      b. Preserve right of confidentiality
      c. Enforce limitation set by prior Court Order
      d. Palpably improper and would cause prejudice

➔ When your adversary or the witness wants to take a break during an intense exchange. DO NOT ALLOW IT!!

INSTRUCTIONS PRIOR TO THE START OF THE DEPOSITION

This is the most underutilized portion of any defendant deposition. This holds true in all cases. Understanding what should be instructed and why it is important requires an understanding of how these instructions may come into play at the time of trial.

- Can be used to make the witness appear disorganized and therefore less than credible
- Can be used to make the witness appear as if the lawsuit is unimportant to them.
- Can be used to demonstrate that the witness was careless and thus is a careless person.

Sample Instruction

My name is Seth Fields. I am with the law firm of Bergman, Bergman,Fields & Lamonsoff, attorneys for the plaintiffs in this lawsuit. Purpose of today's deposition is to obtain any information that you may have with regards to the underlying circumstances that give rise to this lawsuit, particularly a car accident that took place on April 20, 2015, for which it was alleged you were involved in. As you can see, we have a court reporter and she is taking down everything we are saying. So it's really, really important that we follow a certain set of rules to keep it running continuously and get you out of here as soon as possible, and so that we keep our court reporter happy. Our court reporter is the most important person at this deposition. He/She is typing things down as we are speaking and if she is unable to record something it is as if it did not happen. So it's really important that we don't speak over each other. I know it can be difficult because in normal conversation people have a tendency, especially at a dinner table or over lunch, to talk over each other or interrupt, but we really can't do that here today. So as much as we would like to maintain some degree of conversation back and forth, I am going to ask that you just allow me to finish any question I have before you give your answer. Even if you already anticipate what that answer may be, just let me finish the question so the court reporter can take all of that information that is being communicated. As well, if you hear the word “objection” at any time, I am going to ask that you take a pause before answering so that the attorneys can confer with each other and so that you can receive instructions from your attorney, and so

that our court reporter can record the objection and any discussion had between the attorneys concerning that objection.

You must keep all of your responses verbal as gestures of the hand or nods of the head will not suffice. This is because our court reporter does not have license to interpret non-verbal responses and will, at best, be recorded as "indicating". So if you are going answer "yes" or "no" you cannot nod your head up and down to indicate "yes" or left and right to indicate a "no" answer. As well, you cannot use sounds like "aha" or "uh uh" to indicate "yes" or "no" answers as our court reporter will be required to record such answers phonetically. In such form they have no true meaning.

Weaponization of the Instructions –

WITNESS DOES NOT UNDERSTAND QUESTION →

If you don't understand a question I have asked…. Whether it is a word that I have used, the question itself, or the question in context of previous questions, it is necessary that you tell me that. You are at liberty at any time to indicate so and I will rephrase my question or confer with your attorney with regards to the form of the question. Do not answer any question that you do not fully understand for if you do, it will be assumed that you fully understood the question that is being asked and you will be bound by your answer. **DO YOU UNDERSTAND THIS INSTRUCTION? DO YOU HAVE ANY QUESTIONS WITH REGARDS TO THIS INSTRUCTION?**

CHANGES TO THE TRANSCRIPT→

At some point in time after today, you are going to receive a copy of this transcript, and it is important that you obtain a copy of that through your attorney. So, if you don't get one in short time, I am going to ask that you follow up with your attorney and request it. The reason I would like you to obtain a copy of the transcript is so that you have a chance to read through the transcript and make any changes that you deem necessary. Those changes should be made in accordance with a set of instructions which should accompany the transcript. If you do not make any changes, it will be assumed that the answers you provided and as recorded in the transcript are accurate. **DO YOU UNDERSTAND THIS INSTRUCTION? DO YOU HAVE ANY QUESTIONS WITH REGARDS TO THIS INSTRUCTION?**

In addition to changes to the transcript following today's depositions, you may also make changes to your testimony at any time while the court reporter is still here and taking testimony. So, if at any point in time you realize that you previously answered something in error or want to clarify something you previously testified to, you may do so at any point. Even if we have moved onto another question, you can go back and change a previous answer that you have given and I implore you to do so without hesitation. If you do not exercise this right, I will assume that you did not wish to make any changes to your testimony at this time. The only thing I am going to ask is that if there is an open question pending, you complete answering that questions and then indicate that you wish to go back and change a previous answer. **DO YOU UNDERSTAND THIS INSTRUCTION? DO YOU HAVE ANY QUESTIONS WITH REGARDS TO THIS INSTRUCTION?**

Do you have any questions with regards to the instructions I have giving you today? Did you understand all of the instructions that I have given you?

i. Answer question – understood the question… take it a step further - The witness is free at any time to say that he or she does not understand all or part of the question

ii. THEY MUST raise the issue or it will be assumed for purposes of the record that the question was "completely" understood

iii. THEY ARE FREE to change any answer made while the record is still open – avail the witness of opportunity to change answer while deposition is under way. Even if the question and answer is far behind, witness is advised that he or she can interject at ANY TIME!!

iv. § 3116 – signing the deposition – instruction to request copy, review it and make corrections on the Errata sheet → another opportunity to change answers
    - Insist that they obtain it a return it so that they can be sure they had another opportunity to ensure accuracy in their answers

SO HOW DOES THIS COME INTO PLAY AT TRIAL?

EXAMPLE:

Trial: MVA involving left turn across intersection and into path of pedestrian Plaintiff

Q: Sir, before you entered the intersection, your looked into the direction of oncoming traffic in order to determine whether it was safe to make your left turn?

A: Yes

Q: As you entered the intersection you continued to look towards oncoming to ensure that it was safe to make your left turn?

A: Yes

Q: From the time you first began to look in the direction of oncoming traffic until the time of there was contact, you maintained a "constant observation" of the roadway in front of you?

A: Yes

Q: And so, while you were making your left-hand turn, you kept your attention on the roadway in front of you?

A: Yes,

Q: And so as your vehicle turned, so did the direction for which you were paying attention, correct?

A: Correct.

Q: You never turned around and looked behind you during that time, correct?

A: Yes

Q: Never looked down at the seat during that time, is that correct?

A: Yes

Q: Not looking at your phone, correct?

A: Yes

Q: You were looking straight ahead until there was contact with the pedestrian?

A: Yes

Q: And it is your testimony today that while you were in the process of turning, you could also see my client approaching from the sidewalk at the far side of the intersection?

A: Yes

Q: And is it your testimony here today that when while you were turning through the intersection, you saw her approaching the intersection and she was running?

A: Yes

Use of the Deposition →

Q: Sir, do you recall giving a deposition in this case or something we call an examination before trial on 1/1/18 at the location known as 88-00 Sutphin Blvd?

A: Yes

Q: You answered questions concerning how this accident happened?

A: Yes

Q: Present with an attorney?

A: Yes.

Q: Took an oath?

A: Yes

Q: Understood that the oath that you gave required that you tell the truth?

A: Yes

Q: And you did just that and told the truth

(This can be extrapolated further in instances where you are going to use the deposition transcript to impeach)

A: Yes

Q: I am going to read from your deposition transcript and ask whether you recall having the following question asked and having given the following answer in response?

Read:

Q: From the time you entered the intersection until the time of contact, did you make observation of the far sidewalk approaching East Street

A: I could not because there was a truck making a left turn in front of me and it was blocking my view of the sidewalk as I turned.

Do you recall having that question asked of you and having given that answer at the time of your deposition?

A: Yes

Q: When you testified to that answer at the time of your deposition, were you telling the truth?

A: Yes….. but I was able to see the pedestrian after the truck passed through the intersection.

Q: But that is not what you testified to at the time of your deposition was it?

A: I didn't understand the question entirely at that time. I was confused.

NOW→ Go to the instructions:

Q: Now sir, isn't it true that you were given certain instructions prior to the start of your deposition?

A: Yes

Q: You were told what to do if you did not understand the question being asked, isn't that correct?

Q: You were told not to answer any question that you did not fully understand, isn't that correct?

Q: You did not mention at the time of your deposition that you did not understand that question did you?

Q: You understood you were free to say something whenever you didn't understand a question?

Q: Nobody prevented you from saying that you did not understand that question at that time, isn't that correct?

Q: Rather than saying you did not understand the question, you chose to answer the question, didn't you?

Q: And that's the question and answer that I read to the jury?

For a witness who has reviewed/signed the transcript →

Q: Sir, at some point in time prior to today, did you receive a copy of the transcript and sign it?

A: Yes.

Q: Your signature appears here at the end of the transcript?

A: Yes

Q: You understood when you signed the transcript that the information contained within was part of this lawsuit?

A: Yes

Q: So you understood that the transcript was something of importance in this case, is that correct?

Q: Yes.

Q: And by signing the transcript, you understood that you were verifying that the information contained in the transcript was true and accurate?

A: Yes

Q: Now in review of the transcript, it appears that you did not make any corrections to the transcript at that time did you?

A: *I did not know I was able to make changes to the transcript.*

Now you can go back to the instructions:

Q: Do you remember having been instructed prior to the deposition that you should review the transcript and make changes that you deem necessary?

A: No.

Q: I would like to read a portion of the instructions that you were given prior to the start of the deposition which states in part:

> At some point in time after today, you are going to receive a copy of this transcript, and it is important that you obtain a copy of that through your attorney. So, if you don't get one in short time, I am going to ask that you follow up with your attorney and request it. The reason I would like you to obtain a copy of the transcript is so that you have a chance to read through the transcript and make any changes that you deem necessary. Those changes should be made in accordance with a set of instructions which should accompany the transcript. If you do not make any changes, it will be assumed that the answers you provided and as recorded in the transcript are accurate. DO YOU UNDERSTAND THIS INSTRUCTION? DO YOU HAVE ANY QUESTIONS WITH REGARDS TO THIS INSTRUCTION?

Does that refresh your recollection, that you were, in fact, instructed to make changes if necessary?

Q: Despite the fact that you received my instructions and you knew your testimony was a part of this lawsuit and that it was important, you did not follow my instructions, did you?

Q: Nothing prevented you from following my instructions, correct?

→Death by a 1000 cuts

LEAD, LEAD, LEAD and LEAD : we are going to talk about leading… and the need to lead, lead, and lead….. ….

a. Parties is adverse to each other
b. Employee of Defendant is adverse
c. Materials are usually previously available to the attorney and therefore we usually already know what we want from the witness
    i. MV-104
    ii. Police Report
    iii. Damage Photos
    iv. Photos from Accident Scene
    v. Google Street View – Premise and MVA
    vi. Knowledge of the Rules of the Road
    vii. Medical records

e. Break each point down to small parts and establish a pattern of "Yes" or "No" so as to get the witness to go into "auto mode".

- Start off with the obvious and undisputed information. Then segway into leading questions regarding matters which you want to "extract" information.

f. Use of leading terms: eliciting "Yes" or "No"
    Q: Isn't it true?
    Q: Do you agree?
    Q: Would it be fair to say?

Q: Is that correct?

g. Where the question is more important than the answer: By setting a witness up asking leading questions, the answer is irrelevant. It is the question that forces the listener to infer that the answer is or should be.

Example line of questioning:

Q: On the DOA, you woke up at 6 am?
A:
Q: You then went to work?

Q: You worked 5 hours driving your taxi until; you took a break?

Q: That 5 hour period of driving was continuous

Q: You drove the entire time, correct?
Q: After you took a 30 min lunch break you resumed driving your car?

Q: And you continued to drive your car picking up and dropping off fairs until the time of the accident?

Q: The accident occurred at 11 pm, correct?

Q: So you drove another 5 ½ hours until the accident, correct?

Q: That 5 ½ hour period was continuous, was it not?

Q: So you drove a total of 10 ½ hours having taken only a 30 min break from driving on the DOA prior to the accident having occurred?

Q: If my math is correct, having woken up at 6 am that same day, you had been awake for 17 hours at the time of the accident, correct?

Q: Sir, at the time of this accident, you had been awake for 17 hours straight, and that within that time you had driven your taxi for 10 ½ hours with only a 30 min break, isn't it true that you were exhausted?

A: No

Q: Fair to say you were impaired to some degree due to fatigue?

A: No

Q: Fair to say that you were less than 100% in your abilities to operate your taxi at the time of the accident?

Q: Well, can we agree that you were fresher when you started driving your taxi 10 ½ hours prior to the accident then at the time of the accident?

Q: Can we agree sir, that by driving your vehicle after having been awake and working for that much time, that you put earning money over the safety of your passenger, Jane Doe?

*** At a trial, it is often the case that your cross is being effectuated by the questions you have asked and not the answers that you have elicited. This can be an effective tool at the time of the deposition as well.

SHUT UP, SHUT UP and SHUT UP

There is nothing worse than a lawyer who follows an answer which is favorable to their position with a question that paves the way for rehabilitation. STAY AWAY!! And by leading and only accepting "yes" or "no", you can prevent a witness from changing his or her answer.

EXAMPLE:

Q: Do you see the other vehicle that you had the accident with at any time prior to contact between the two vehicles?

A: NO.

SHUT UP!!!! Do not ask anything about time at this point. Now you want to put the witness in check mate.

Q: Road flat as it approached location where ax occurred?

Q: Road straight as it approaches location where ax occurred?

Q: No obstructions of view of the road and traffic conditions in front of you?

Q: Maintaining a constant view of road conditions?

Q: Maintaining a constant view of traffic conditions?

Q: Keeping a look out for approaching traffic?

Q: As you were driving towards the location where the ax happened, you were looking straight ahead?

Q: Nothing took your attention away from the road in front of you as you were approaching the location where the accident occurred?

Q: No difficulties with your vision?

EXAMPLE: (real case)

Q At any time before the accident occurred, did you see that pedestrian?

A No.

Q So before the contact, you never saw the pedestrian?

A: No

Q: Did you see where the pedestrian was coming from prior to the contact?

A: When I observed him he was running into the roadway from the sidewalk.

Q: When you said before that you didn't see him before the contact, what did you mean?

A: I thought the contact included him running into the street in front of my car.. it was all one event.

Lessons Learned:

YOU have just given the deposition back to the witness and given him an opportunity to rehabilitate himself. Impeachment may not be permitted because it is no longer inconsistent.

EXAMPLE: Pedestrian approaching from far sidewalk with left turning vehicle.

Q: When you made your left turn, did you look down the sidewalk of Old Country Road to see if there were any pedestrians walking in the direction of the path of your vehicle?

A: **I didn't look at the sidewalk**. I looked at the intersection.

(here is where we go wrong)

Q: When you looked, you looked only in the roadway, not at the sidewalk?

A: **I looked at the sidewalk**. As you turn, you see the southwest corner section of the sidewalk. And the roadway, it's the direction I'm heading.

EXAMPLE: - Where Done Correctly:

MVA – left turn across traffic. Plaintiff proceeding from opposite direction. Prior questioning established that roadway is straight and had unobstructed view of opposing lanes of traffic

Q: Can you approximate how far from the intersection you were able to see south beyond the intersection in the opposite direction of travel?

A: You can see fairly far south but there will be a portion of the hill you would not be able to see. I would say when you can start to see a car coming over the top of the hill, my guess is probably one hundred to one hundred fifty feet.

Later in the deposition→

Q: Can you approximate what distance your vehicle was from the intersection itself when you first saw the other vehicle?

A: Approximately twenty-five feet.

SHUT UP!! Do not reiterate or identify that the witness has previously testified that he said he could see 100 to 150 feet but only saw the witness at 25 feet. SAVE IT FOR TRIAL!!!!!!! This is where the deposition is used to lock the witness in at trial when he tries to escape the dire consequences of his EBT testimony….

THIS is the "failure to see that which was there to be seen" → Easiest way to prove negligence in an MVA

At trial, it now reads:

Q: Sir, isn't it true that you had an unobstructed view of opposing traffic from the intersection?

A: Yes

Q: That view allowed u to see a distance of 100 to 150 feet beyond the intersection?

A: Yes

Q: That would include any vehicle that would be approaching within that 100 to 50 feet from the intersection?

A: Yes

Q: Isn't it true, sir, that you saw my client's vehicle for the 1st time at a distance of 25 ft?

ADMISSION IN A POLICE REPORT – HOW TO USE

Page 1 of 1 Pages

New York State Department of Motor Vehicles

POLICE ACCIDENT REPORT (NYC)

MV-104AN (11/13)

☐ AMENDED REPORT

CPPR

Precinct 102 | Accident No. 0091 | Complaint Number | 1-9-16 2302

Accident Date Month	Day	Year	Day of Week	Military Time	No. of Vehicles	No. Injured	No. Killed	Not Investigated at Scene ☐ / Reconstructed ☐	Left Scene ☐	Police Photos ☐Yes ☒No
1	9	2016	SAT	1310	2	5	0			

[redacted]

	Vehicle 1	Vehicle 2
Ticket/Arrest Number(s)	X	X
Violation Section(s)	X	X

Check if involved vehicle is: ☐ more than 95 inches wide; ☐ more than 34 feet long; ☐ operated with an overweight permit; ☐ operated with an overdimension permit.

VEHICLE 1 DAMAGE CODES				
Box 1 - Point of Impact / Box 2 - Most Damage			1	2
			12	11
Enter up to three more Damage Codes	3	4	5	
	12	10		

Vehicle Towed: By — To: No Tow

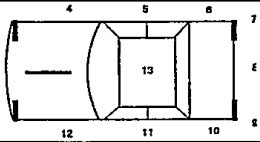
VEHICLE 2 DAMAGE CODES				
Box 1 - Point of Impact / Box 2 - Most Damage			2	2
Enter up to three more Damage Codes	3	4	5	
	1	7		

Vehicle Towed: By 85 collision corp — To 28-31 linden blvd

VEHICLE DAMAGE CODING:

1-13. SEE DIAGRAM ON RIGHT.

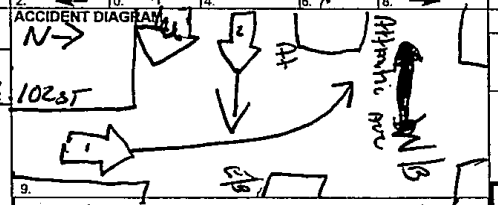
14. UNDERCARRIAGE 17. DEMOLISHED
15. TRAILER 18. NO DAMAGE
16. OVERTURNED 19. OTHER



Circle the diagram below that describes the accident, or draw your own diagram in space #9. Number the vehicles.

Rear End 1. | Left Turn 3. | Right Angle | Right Turn 5. | Head On 7.
Sideswipe (same direction) 2. | Left Turn 0. | 4. | Right Turn 6. | Sideswipe (opposite direction) 8.

ACCIDENT DIAGRAM



Cost of repairs to any one vehicle will be more than $1000. ☐ Unknown/Unable to Determine ☒ Yes ☐ No

Reference Marker | Coordinates (if available) Latitude/Northing: Longitude/Easting:

Place Where Accident Occurred: ☐ BRONX ☐ KINGS ☐ NEW YORK ☒ QUEENS ☐ RICHMOND

Road on which accident occurred E/B Atlantic Ave (Route Number or Street Name)

at 1) intersecting street 102 ST (Route Number or Street Name)

or 2) ____ Feet ____ Miles ☐N ☐S ☐E ☐W of _____ (Milepost, Nearest Intersecting Route Number or Street Name)

Accident Description/Officer's Notes: Vehicle #1 traveling N/W from 102 ST to E/B Atlantic Ave was struck by vehicle #2 causing inj and damage. Both operators agreed that vehicle #1 had the green light - Unrelated Ambulance was Responding to job @ time of accident but NOT involved in MVA.

ALL INVOLVED

	8	9	10	11	12	13	14	15	16	17 BY	TO	18 Names of all involved	Date of Death Only
A	1	1	4	1	26	F	4	12	6	FHSV	7321	Rivera, Lissamarie	
B	2	1	4	1	20	F	4	12	6	JHMC	7311	Skelly, Lacy	
C	2	3	4	1	19	F	4	12	6	JHMC	7311	Acosta-Cuevas, Michelle	
D	2	4	4	1	20	M	11	12	6	FDNY	7311	Fernandez, Joshua	
E	2	6	5	1	2	M	12	12	6	JHMC	7311	Skelly, Giovanni	
F	/	/	/	/	/	/	/	/	/	/	/	/	

Officer's Rank and Signature	Tax ID No.	NCIC No.	Precinct	Post/Sector	Reviewing Officer	Date/Time Reviewed
Amph	921054	03030	102	C		

Print Name In Full: Amph

Accident Description

"BOTH OPERATORS AGREED THAT VEHICLE #1 HAD THE GREEN LIGHT"

Almost always, a party confronted with an admission against interest in a police report will deny having stated what was cited in the police report. While calling the police officer to testify as to the information he or she recorded will give great credence to the statement, the outright denial of the admission can be dealt with effectively at the time of the deposition.

Q: I want to direct your attention to that portion of the police report that identifies the accident description/officer's notes. Do you see that?

A: Yes

Q: I now want to direct your attention to the second sentence which reads as follows: Both operators agreed that vehicle #1 had the green light, do you see that?

A: Yes

Q: Now we can agree that if the other driver had the green light, you would have had a red light?

A: Yes

Q: Did you ever tell a responding police officer after the accident that the other driver you had the accident with had the green light?

A. No

Q: Now you did speak to the police while at the scene of the accident?

A: Yes

Q: Did you know the police officer who issued this police report as of the day of the accident?

A: No.

Q: Since then have you had any contact with that officer?

A: No.

Q: You didn't have any issues with that officer while at the scene that may have caused the officer to quote you incorrectly?

A: No.

Q: Are you aware of any reason why the responding police officer would have issued a report containing that information if it was not true?

A: No

Q: After leaving the scene, you never filed a complaint against that officer did you?

A: No

Q: Now looking at the police report, you name and address appears there?

A: Yes

Q: Your name and address has been recorded correctly?

A: Yes

Q: The date and time appears on the police report?

A: Yes

Q: They appear to be correct?

A: Yes

Q: There are a list of passengers for your vehicle as identified?

A: Yes

Q: That list is accurate?

A: Yes

Q: The locations of the accident is identified?

A: Yes

Q: The accident locations is accurate?

A: Yes

Q: Everything else from what you can tell is accurate except that portion which cites you as having stated that the other driver had a green light?

A: Yes

Q: Given that it is your claim that the police officer quoted you incorrectly as having stated that the other driver had the green light, did you ever request that an amended police report be issued?

A: No (there is a place on the report where it identifies "amended report", which can be used if the witness claims that he or she did not know).

Q: Do you ever go down to the precinct to point out the fact that the police report contains this error as you allege?

A: No

Q: Did anything physically prevent you from going down to the precinct to point out this error?

A: No

Q: Did anyone ever tell you that you could not do that?

A: No. Well, nobody ever told me that I could.

Q: Did you ever ask?

A: No

Q: Did anything prevent you from asking whether you could make changes to the police report?

A: No.

SPEED TIME DISTANCE – Court takes judicial notice

Distance = Speed x Time

Time = Distance / Speed

Speed = Distance / Time

USE OF GOOGLE STREET VIEW IMAGES– CPLR 4532-b

- You must make sure that the date the image was captured in show in the photo.
-

FOUNDATIONS - Foundations you MUST know for EBTS - need to lay foundation in event the witness is unavailable and the only one who can lay foundation. Although new amendment to the C.P.L.R. 4540:

> Materials Authored or Otherwise Created by a Party and Produced by the Party (CPLR 4540-a). Material produced by a party in response to a demand pursuant to article thirty-one of the Civil Practice Law and Rules for material authored or otherwise created by such party shall be presumed authentic when offered into evidence by an adverse party. Such presumption may be rebutted by a preponderance of evidence proving such material is not authentic, and shall not preclude any other objection to admissibility.

a. Photographs Fair and Accurate

1. Location/Roadways = For Layout and orientation

2. Damage to vehicles – Fair and accurate **AND** any damage shown that was present on the vehicle prior to the accident?

b. Business Records

1. Prepared and maintained in ordinary course

2. Prepared by someone whose responsibility was to prepare such a record for the business it relates to / Duty of person to create such a document.

3. Made when still fresh in mind
   - This can be key when a witness statement given does not have the date or time and the witness cannot remember how long after the event being reported was reduced to a writing.

Example: Defendant issues a report stating that he inspected the area where the customer fell and did not see any water. Employee testifies that he does not remember when he wrote the report and therefor cannot say that it "was generated at a time when it was still fresh in his mind"

Q: Sir, since you do not remember when you created this report, you could not say that this report was created on the same day of the incident reported?

Q: Since you do not remember when you created this report, you could not say that this report was created within the first week that followed the incident reported could you?

Q: Since you do not remember when you created this report, you could not say whether this report was created even within the first two weeks that followed the incident could you?

A: That is correct

→ You have just neutralized the statement by rendering it inadmissible.

c. Prior Written Statements–

- In handwriting and/or signed by the witness after having reviewed its contents for accuracy AND

- Eliminate the potential for changes made at a later date- A complete document or copy →no addendums, modifications, amendments, subsequently drafted documents which changed anything stated

- No request for any changes to be issued?

Example: If MV-104 is document that has an adverse statement -- Lock the witness in to having signed it and reviewed it prior to signing it.

Q: signed doc (1 day, 1 week) following the accident?

Q: would not have signed the statement if it was not true would you?

Q: sufficient opportunity to have reviewed the document?

Q: understood the importance of making sure the document was accurate since it was being filed with the DMV of State?

d. Past Recollection Recorded - A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately

1. A matter that witness cannot remember the contents even after reviewing the document to refresh recollection;

2. Record was made to document event and was done when fresh in Mind

3. Record or document correctly represented the witnesses' knowledge and recollection when made

3. Ambiguous, Compound, Narrative; Form objections:

Example:

Q: Was it your observation, were they good friends, did they see each other a lot?

ID the problems?

- "good"
- Compound
- "a lot"

Example:

Q: How many car lengths was there between the front of your vehicle and the other vehicle involved in the accident?

ID the problem

- A car length is not a unit of measure

Q: How would you describe JANE in terms of stature, is she a small woman, a large woman?

ID the problems

- vague and ambiguous (what is small and what is large?)

Example (location):

Q: Do you know what the speed limit was on Long Beach Road?

ID the problems:

- Compound; asking speed limit in past and present tense
- Ambiguous- "Was" without identifying a relevant time or place since Long Beach Road may have more than one speed zone.

Correct-

Q: Do you know what the speed limit was on Long Beach road in the area where the accident occurred as of the date of the accident?

Example (time):

Q: Are there any painted arrows on the road identifying a left turning lane?

ID the problem

- Speaking in the present and not at the time of the accident… You may lose your answer and context for furture questions you asked with this information in mind…. The read in will not work.

Example OF CLOGGING:

Q: What was the highest rate of speed that you had attained while traveling on Long Beach Road?

WHY WHY WHY→ what relevance does this have if the defendant was doing 100 mph 2 miles prior to the accident… this will not get into evidence. It is irrelevant and CLOGS THE TRANSCRIPT.

It is only relevant what the defendant was doing within a

relevant time period prior to the accident…

- If doing 100 mph just prior to entering an intersection = Good
- If going over the speed limit at time of contact – Good
- If doing the speed limit at the time of contact and testimony was that he hit his brake before contact. Therefore, he was speeding - Good.

STAND ALONE QUESTIONING: Each question should be able to stand on it own. This is most advantageous when necessary to do a read in as it prevents having to read in related portions of the transcript to provide definition and context.

To wit: Street names, location of accident, street directions, accident date, statements given, traffic controls. Everything should provide all necessary information without having to look at prior questions or answers for context. This is good habit!!!

Example:

Q: At the time of the accident were there 2 lanes of moving traffic occupying the eastbound direction on East Meadow Road at its intersection with Hempstead Turnpike?

Q: At the time of the accident, was there a traffic light controlling traffic for the eastbound direction of travel on East Meadow Road at its intersection with Hempstead Tpke?

Q: What were the traffic conditions like on southbound East Meadow Road as it approaches its intersection with Hempstead Tpke as you traveled it immediately prior to the accident of March 13, 2018?

CPLR §3101(a) provides that "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action. That is, the question is not "palpably improper" if it may lead to relevant, otherwise admissible evidence at trial. If there is some logical nexus between the question and potential information being sought, the question is proper. ITS RELEVANCY AT A DEPOSITION DOES NOT SERVE AS A BASIS TO PREVENT THE QUESTION.

Examples:

a. Subsequent remedial measures – this is typically inadmissible at trial but there is nothing that prevents you from asking questions regarding such at the deposition.

b. Criminal Convictions

- Do not allow attorney to block questions. If he or she does, there is something there and you best do a criminal search.
- Conviction are felonies and misdemeanors reached by jury trial OR plea deal
- Get the charge convicted of BUT ALSO the underlying circumstances leading to that charge… Q: what happened that led to your conviction?
- When possible, obtain the certificate of disposition, criminal complaint and any plea allocution. These are public records and can be obtained from the County Clerks Office
- 10 years is usually the benchmark

c. Materials Reviewed to Prepare For the EBT – it may become discoverable if reviewed by the witness to refresh recollection for purposes of prepping for the pre-trial EBT.

MISCELLANEOUS

a. USE OF CLOCKS AND PERCENTAGES – Jurors love this because it applies everyday thinking

   Q: Using a clock to describe the angle of your vehicle, what angle was your vehicle facing when you came into contact with the other vehicle?

   Q: And what percentage of the left turn would you say you had completed at the time your vehicle was in contact with the pedestrian?

b. Use of Notes and List Questioning

c. Reference to EBT – include date and location where depo was taken and time – This is necessary for record purposes at trial

d. Move to Strike those portions non-responsive. To exclude non-responsive answers so that your read-in or impeachment is clean.

e. Take risks and lead. Know what you want and work your way to get it. This is evident in Jury Selection process as you question prospective jurors and wish to get someone excused for cause without exercising a peremptory challenge.

f. Eliminate Affirmative Defenses and DKI and D's at the EBT → Attorney verified pleadings are imputed to the Defendant.

   Q: In your Answer, Mr. James, you have alleged that my client was responsible for the happening of the accident, can you tell me what happened that day that you leads you to say that? (Hit-in-rear)

   Q: In your Answer, Mr. James, you have alleged that my client was not wearing her seatbelt at the time of the accident, what observations did you make while at the scene of the accident that leads you to say that if you did not see my client prior to the accident?

g. Assessing the character and demeanor of the witness prior to trial

h. "The document speaks for itself" → NO IT DOES NOT. THE DOCUMENT DOES NOT SPEAK and referring to a document and the information contained within is part of an examination of a witness who has knowledge of the document.

Presenter: Seth I. Fields, Esq.
Facilitator: Melissa A. Cavaliere, Esq.

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