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HEADLINE: **Trial Advocacy, The Deposition as a Tool for Trial**

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BODY:

While most lawyers use a deposition as a routine discovery device, few use it as a strategic tool for use at trial. Too often attorneys prepare for a deposition by reviewing a checklist from other cases or depositions, without thinking through its specific value at trial. Witnesses are then questioned in the same format, regardless of the witness' age, health, availability, competency or ability to articulate. Moreover, even when a witness is likely to be available at trial, where he is an opposing party or otherwise adversarial to your case, the deposition is the time to not only gather information about the witness' testimony, but also to set up your cross-examination at trial. Frequently, the strategic value of the deposition is overlooked, with potentially devastating results to your own case.

Like all aspects of trial work, the deposition must be conducted with an eye toward summation. The question, how can this line of inquiry be useful at trial, is a good start. The better question though, is to continually ask yourself while taking the deposition, how can this line of inquiry support a cogent and logical argument for summation? To put it simply, a well-thought-out, strategically planned deposition can be crushing to your adversary. Conversely, following a line of questions taken from a different case with a different theory, without strategic planning, can destroy your own client.

Age and Health of the Witness

Imagine first the scenario in which you are questioning a defendant in a personal injury case who is 85 years old and in poor health. In fact, his health is so bad that you wonder whether he is going to be living when the case comes up for trial. These facts -- the age and health of the witness -- must be considered by you before you ever begin to question the witness at the deposition. If, in fact, the witness is articulate and you believe that he will have a strong memory of the events, going down a routine checklist will help you bury your own client.

For example, suppose an accident takes place at an intersection governed by four-way stop signs. You know there are no witnesses to this accident. Your client insists he stopped and that the defendant's negligence was the cause of the accident. You know from your investigation that the defendant will likely claim he stopped and that your client blew the stop sign, thereby causing the accident. By questioning in routine format, you will undoubtedly permit the defendant to tell his own well-prepared story:

Q: Did you see the stop sign?

Q: Tell us what you did as you approached the stop sign?

Q: Did you come to a complete stop?

Q: For how long were you stopped?

Q: What did you observe the plaintiff do?

The problem with questioning in this manner is that it allows the defendant to fully and completely explain his position. Pursuant to the CPLR 3117(3), if he is dead or unable to come to court at the time of trial, his deposition can be read into evidence by his own attorney. The effect is that you have successfully conducted a strong direct examination of your own adversary during your deposition.

This is why strategic planning at the outset may have avoided this problem. Imagine these questions instead of the routine ones:

Q: When you were 100 feet from the intersection you never saw (my client) true?

Q: You had no idea where he was from your own personal observation -- correct?

Q: There is no question that you entered the intersection?

Q: There is also no question that the accident occurred when you were in the intersection.

Q: There is no question that your car was moving at the time of impact?

Q: The impact was a heavy one true?

Here, the plaintiff's attorney chooses not to allow the defendant to explain his position. This decision is based on the frail health of the defendant. Strategic planning such as this, forces your adversary to do something he is not used to doing -- questioning his own client at the deposition. If the defense lawyer is not prepared, and elects not to question his client, your strategy has worked. You have allowed yourself an opportunity to sum up at trial by pointing out that the only proof, which is uncontradicted, supports your position. If, however, the defense lawyer chooses to question his own client, you can then conduct further inquiry on those facts elicited by your adversary as you would during any planned cross examination.

The same factors must be considered when you are defending a deposition. Imagine that you represent a plaintiff whom you know is ill and will likely die prior to trial. Here, the defense lawyer might conduct a thorough deposition on the liability aspects of the case; however, she may purposely fail to elicit all of the pain and suffering endured by your client since the date of the accident or malpractice. The same strategic evaluation that goes into taking a deposition of a frail witness must now be used to protect the potential estate in the lawsuit. Rarely will a defense lawyer explore the suffering endured by your client in sufficient detail to allow you an opportunity to sum up on his questions alone. Here you must be prepared to question your own client at the conclusion of the defense lawyer's questioning:

Q: How did you feel immediately following the accident (malpractice)?

Q: For how long were you in pain?

Q: Had you ever experienced that type of pain in the past?

Q: How did that pain affect your ability to sleep?

Q: How did that pain affect your ability to (perform your activities of daily life?)

Q: What adjustments or changes have you had to make as a result of this pain?

Q: Has there been one day since the (accident or malpractice) that you haven't suffered?

Moreover, in the event you know your client has endured a significant amount of pain and suffering and loss of enjoyment of life as a result of the (accident or malpractice) you may want to consider videotaping the deposition for use at trial. Videotaping is permissible pursuant to CPLR 3113(b) and Uniform Rule For The New York State Trial Court §202.15. Before doing this, however, you must determine whether your client is sufficiently articulate to communicate these damages to the jurors. If she is, allowing the jurors to see and hear your client detail her own pain and suffering can be far more powerful than an oral recitation read from a transcript.

Even when a witness is likely to be present at trial, this does not mean that the skilled deposition taker should be content to simply elicit an adverse witness' story and do no more. Indeed, under these circumstances, a lawyer

must be able to combine two techniques effectively: first, using open-ended questions to get a witness talking and to flesh out all of the information that the witness possesses, combined with appropriately timed leading cross-examination style questions that effectively set up the cross-examination of the witness at trial.

The Witness as a Young Man

Return to the above-mentioned scenario, in which the defendant driver appears at his deposition poised and ready to deliver a version of the events that is contradictory to your claims in the case. This time, assume the witness is a young man, in apparent good health. Here, your risk in permitting the witness to detail his whole story is minimal; whether or not he tells his side of the story at the deposition, he is likely to have the opportunity to tell it to the jury at trial.

Thus, one of your functions at the deposition is to make sure you bring out the entirety of the story. Obviously, this entails asking the "who, what, where, when, how, describe, explain" open-ended questions that will force the witness to reveal his version of the events in question. Here, there is no such thing as asking one question too many: better to learn at the deposition anything that the witness will claim, than to avoid asking any critical question and be surprised or hurt by the testimony at trial.

While ascertaining the witness' story, however, by use of open-ended questions, the questioner still should avoid the "checklist approach," simply getting the witness' story and going home. Sharp, detailed questions must be asked to reveal any inconsistencies or improbabilities of the testimony. In a car accident case, for example, specific questions regarding speed of the vehicles, the distance they traveled, and the time such travel took should always be asked.

Thus, in addition to the pat deposition questions set forth earlier in the article, more details must be elicited:

Q. What was the speed of your vehicle when you first saw the stop sign in front of you?

Q. How far was your vehicle from the stop sign at that time?

Q. How long did it take you to reach the stop sign?

Q. Where was the other vehicle when you first saw it?

Q. How far from the intersection was that car at that time?

Q. How fast was it going?

Q. Did its speed increase, decrease or remain the same up until the impact?

Q. How much time went by from the time you first saw it to the impact?

If a witness cannot even give an estimate to some or all of these questions, his evasiveness will surely undermine his credibility at trial. If the witness does answer these questions, you may discover that, by breaking down his story in this manner, the physical laws of time and space simply do not support the witness' claim. If this is the case, this clearly presents a fertile area for cross-examination at trial.

In other contexts, make sure to learn not just what a witness saw, heard and did, but also, all that she should have done but failed to do. Imagine, for example, you are deposing an insurance company claims manager who you must prove improperly disclaimed on your client's claim. Before reaching the specifics of what the witness did and said in this case, you must first question the witness regarding how such a claim is approached, things she must do, forms to be filled out, documents that must be read and people who must be spoken to, before a decision on the claim is made. Your deposition will thus include both what was done, and perhaps more importantly, what should have been done but was not.

While it is essential to learn the entirety of the witness' story at the deposition when you anticipate that they will testify at trial, this does not mean that leading, cross-examination questions cannot be properly interspersed at the deposition of an opposing party. Initially, it should be noted that any objection seeking to prohibit you from asking leading questions of an adverse party at a deposition should be rejected as the fallacy that it is. Under New York law, anything permissible at trial is allowable at the deposition, including a "hostile" direct examination of an adverse party. [FN1]

Leading Questions

Once you have established inconsistencies or vulnerabilities in the witness' story, the use of leading questions can serve to lock in an effective cross-examination at trial long before the jury is picked. If, for example, the aforementioned claims adjuster sets forth a list of things that she should have done, but then her testimony shows that she failed to perform several of those tasks, you can spring into cross-examination mode:

Q. You testified earlier that reviewing the policy was something important to you prior to reaching a final decision, correct?

Q. You needed to request that policy from the underwriting department, true?

Q. That was something that you knew you could do in this case, correct?

Q. That policy provided information that you needed?

Q. It would have been useful to you?

Q. Failure to get the policy before making a final recommendation would not be in accordance with the way you do things, correct?

Q. In fact, it would be a departure from acceptable practice at your company, right?

Q. In this case, there's no doubt that you made a final decision before you ever got the policy, true?

By first getting a detailed story, you are then in a position to strategically utilize those trial skills at a deposition to great effect.

Game Plan

In all cases, you must enter a deposition with a game plan, based on the factors discussed herein. By viewing the deposition as an opportunity to win the case, rather than just a chance to learn about a witness' story, you will ultimately have greater success when the trial actually comes to pass.

FN1. See, e.g., Johnson v. New York City Health & Hospitals Corp., 49 AD2d 234 (2d Dept. 1975), stating that CPLR 3115 "necessarily bars the notion that something which has been accorded evidentiary welcome at the trial itself requires exclusion at the deposition.'