A Primer on the Basic Rules and Guidelines for Defending Depositions

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A deposition is often the single most important discovery device. Depositions provide each side the opportunity to evaluate the credibility of a witness and the merits of a case. The deposition has several practical applications: the testimony may be used in support of a motion for summary judgment, may preserve the testimony of a witness who may be unavailable for trial, and/or maybe used to impeach a witness at trial. The deposition is also often used to "lock" a party into a story, or version of events.

Although much attention is given to strategy and tactics for taking depositions, ethical and effective defense of depositions can be equally important. Moreover, a strong understanding of the rules governing a defending attorney's conduct can be equally beneficial to the questioning attorney. As most experienced practitioners are all too familiar, some defending attorneys may use excessive objections and other interruptions as a means for disrupting the questioning attorney's examination and subtly (or not so subtly) influencing the witness' testimony. Understanding the limits placed on defending attorneys will better equip those taking depositions to challenge defending attorney's objections and proceed to gather the broad discovery that they are entitled to.

What follows is a primer on the basic rules and guidelines for defending depositions, which should be equally helpful for defending and examining attorneys alike.

Scope of Allowable Questions at Deposition

New York adheres to a philosophy of broad discovery. However, not all discoverable material will be admissible at trial. Accordingly, the range of permissible questions at a deposition is more expansive than questions or evidence that may be admissible evidence at trial. In short, "all questions posed at depositions should be fully answered unless they invade a recognized privilege or are palpably irrelevant."[1]

In *Hertz Corp. v. Avis, Inc.*,[2] the First Department articulated the parameters of deposition questioning, stating:

> [A]t an examination before trial, questions should be freely permitted and answered, unless violative of a witness' constitutional rights or a privilege recognized in law, or are palpably irrelevant, since all objections other than as to form are preserved for trial and may be raised at that time. Implicit in this formulation is the recognition that questions answered at an examination before trial, even though not "palpably" improper or irrelevant, may still appropriately be excluded upon timely objection, in the exercise of discretion. The true test is one of usefulness and reason. Thus, even information "reasonably calculated to lead to relevant evidence may be beyond the scope of disclosure because it is more trouble to gather than it is worth."

Understanding and asserting proper, timely objections is a critical component of the defending attorney's role at the deposition.

Objections under CLPR 3115

CPLR 3115 provides that, with certain exceptions, objections other than as to form are preserved for trial, without the necessity of interposing an objection at the deposition. The preservation rule is generally incorporated into the "usual stipulations," which the parties ordinarily agree to at the beginning of the deposition. While the "usual stipulations" ordinarily preserves the parties right to object at trial, certain objections to form will be waived if not interposed at the deposition.

A. Objections and the Immediate Cure

CPLR 3115(b) addresses objections at the deposition that can be immediately cured, such as objections to form that may be cured by rephrasing or narrowing the question, or the order in which depositions will be conducted. Any objection to form or other irregularity that may be immediately cured must be made at the deposition, or it will be waived.

Proper Objections to form include:

- Questions which are ambiguous/do not make sense
- Questions which are argumentative
- Questions which assume facts
- The mischaracterization of prior testimony
- Compound questions
- Harassing/vexatious questions
- Questions which have been asked and answered

B. No "Speaking Objections"

The Uniform Rules for the Conduct of Depositions, enacted in 2006 (often, informally referred to as the "New

Rules"),[3] do not permit the defending attorney to make "speaking objections." In other words, if any objection to form is made, the objection must be succinctly stated 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 of as to any defect..."

Specifically, Section 221.1 of the "new rules" provides:

> (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.
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> (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.

Along the same lines, Section 221.3 of the "new rules" provides restrictions on when an attorney may communicate with a deponent while a question is pending. Specifically, Section 221.3 provides:

> 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.

In light of the amendment to the rules, the defending attorney must be judicious in making speaking objections. While making speaking objections is technically inappropriate, it may be tolerated if done sparingly. However, making an excessive number of speaking objections may be construed as coaching the witness. The restriction on speaking objections makes witness preparation all that more important, as the defending attorney is limited in her ability to vocalize her objection to a question.

Objections under Federal Rules

The Federal Rules of Civil Procedure contain similar restrictions on objections in depositions. The commentary to the Federal Rules provides:

> Objections must be stated in a non-suggestive manner. Some objections to questions must be raised at the time of the deposition or they are waived, others are reserved until trial. The way to determine whether an objection must be made is to determine whether the examiner could rephrase the question to cure the objection. Thus, parties must object to leading questions in order to give the examiner an opportunity to ask the question in a non-leading fashion. Conversely, parties do not need to raise objections such as relevancy or competency that cannot be cured.

The Federal Rules (Federal Rule Civ. Pro. 30 (d)) commentary provides further instruction on the scope and method of objections:

> **Stating Objections**: Objections must be stated in a non-suggestive manner. Attorneys should not use an objection to instruct the witnesses how to answer (or not to answer) a question. However, the specific nature of the objection should be stated so that the court later can rule on the objections (i.e., "objection, leading" or "objection, lack of foundation").
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> **Instruction Not to Answer**: Directions to a witness not to answer a question are only allowed in three narrow circumstances: to claim a privilege (i.e., attorney client communication); to enforce a court directive limiting the scope or length of the deposition; or to suspend the deposition for purposes of a motion under Rule 30(d)(4) relating to improper harassing conduct. Thus, it is inappropriate for counsel to instruct a witness not to answer a question on the basis of relevance, on the basis that the question has been asked and answered, is harassing, or on the basis that the question is outside the areas of inquiry identified in the notice of deposition for a Rule 30(b)(6) deposition of a party representative.

Instances When a Witness Should Be Instructed Not to Answer

Practically speaking, a witness should be instructed not to answer in four instances: (1) to assert the attorney-client privilege; (2) to assert the doctor-patient privilege; (3) to assert the Fifth Amendment privilege; or (4) when a question is palpably irrelevant or unduly burdensome.

1. Attorney-Client Privilege

The attorney-client privilege attaches "(1) where legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except if the protection is waived." Privileged material is given absolute immunity to discovery. The party claiming the privilege bears the burden of establishing the right, the protection must be narrowly construed, and its application must be consistent with the purposes underlying the immunity.[4]

2. Doctor-Patient

CPLR 4504 provides that "unless the patient waives the privilege, a person authorized to practice medicine... shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity."[5] While the question of privilege may be "raised by any party to the action," as with the attorney-client privilege, the party asserting the privilege has the burden to show the existence of circumstances justifying its recognition.[6] To meet this burden it must be established that (1) the person whose testimony sought to be excluded was authorized to practice medicine or dentistry or was a registered professional or licensed practical nurse, (2) the information to be excluded was acquired by such person while attending the patient in a professional capacity, (3) the information was necessary to enable such person to act in that capacity, and (4) the information was intended to be confidential.[7] Also like the attorney-client privilege, the doctor-patient privilege belongs to the patient and applies unless waived in some manner. *See* CPLR 4504(a). A person waives the doctor-patient privilege when he commences an action in which his physical condition is in controversy.

3. Fifth Amendment Right

In general, the Fifth Amendment privilege against self-incrimination "may only be asserted where there is reasonable cause to apprehend danger from a direct answer" and "a blanket refusal to answer questions based upon the Fifth Amendment privilege against self-incrimination cannot be sustained absent unique circumstances."[8] Moreover, "[w]hile the witness is generally the best judge of whether an answer may tend to be incriminating...when the danger of incrimination is not readily apparent, the witness may be required to establish a factual predicate."[9] In such a case, "in order to effectively invoke the protections of the Fifth Amendment, a party must make a particularized objection to each discovery request."[10]

4. Palpably Irrelevant/Unduly Burdensome

As previously addressed, generally a deposed witness is required to answer all questions posed unless the question is palpably irrelevant or improper.[11] Information is palpably irrelevant when it does not directly relate to the opposing party's claim.[12] Likewise, discovery is improper when a party's request is overly broad and unduly burdensome.[13]

Improper Conduct in Depositions

New York Jurisprudence[14] provides that a lawyer may be subject to sanction for engaging in improper conduct during depositions. Such sanctionable conduct includes *inter alia* ordering a client not to respond to questioning in areas which counsel unilaterally deems irrelevant, continually objecting to matters other than form, failing to turn over documents requested during a deposition, filing unnecessary motions to compel depositions, and using disruptive behavior or improper language towards opposing counsel during the deposition.

New Developments in Rules for Non-Party Depositions

In 2013, the Fourth Department in *Scia v. Surgical Association*[15] affirmed its prior holding in *Thompson v. Mather*[16] establishing that "counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pretrial deposition." The decisions, which were based on a "plain reading" of CPLR 3113(c),[17] were widely criticized for causing inconsistencies among the Departments of the Appellate Divisions, and for consigning the role of non-party counsel in a deposition to that of a "potted plant."

In response to the Fourth Department's decisions, the Legislature recently enacted (and the Governor signed into law on September 23, 2014) "[a]n act to amend the civil practice law and rules, in relation to conduct of the examination before trial." The new law specifically overrules the Fourth Department's holdings in *Scia* and *Thompson* by amending CPLR § 3113(c) to provide that that "examination of deponents shall proceed as permitted in the trial of actions in open court, *EXCEPT THAT A NON-PARTY DEPONENT'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.*"

The new law took effect immediately (i.e., on September 23, 2014) and "shall apply to all actions pending on such effective date or commenced on or after such effective date."

Endnotes

1. *Tardibuono v. County of Nassau*, 181 A.D.2d 879, 881, 581 N.Y.S.2d 443, 445 (2d Dept. 1992).
2. 106 A.D.2d 246, 249, 485 N.Y.S.2d 51 (1st Dept. 1985).
3. 22 NYCRR § 221.1–221.3.
4. *See generally United States v. Bein*, 728 F.2d 107, 112 (2d Cir. 1984); *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 377, 575 N.Y.S.2d 809 (1991); CPLR 3101(b).
5. *Mayer v. Albany Medical Center Hospital*, 56 Misc.2d 239, 288 N.Y.S.2d 771 (Sup. Ct. Albany Co. 1968).
6. *Koump v. Smith*, 25 N.Y.2d 287, 303 N.Y.S.2d 858 (1969).
7. CPLR 4504(4).
8. *Chase Manhattan Bank, Natl. Assn. v. Federal Chandros*, 148 A.D.2d 567, 568, 539 N.Y.S.2d 36 (2d Dept. 1989).
9. *State of New York v. Carey Resources, Inc.*, 97 A.D.2d 508, 509, 467 N.Y.S.2d 876 (2d Dept. 1983).
10. *Chase Manhattan Bank Natl. Assn.*, 148 A.D.2d at 568, 539 N.Y.S.2d at 37.
11. *Mora v. Saint Vincent's Catholic Med. Ctr.*, 8 Misc.3d 868, 800 N.Y.S.2d 298 (Sup. Ct. N.Y. Co. 2005).
12. *Hertz Corp. v. Avis*, 106 A.D.2d 246, 485 N.Y.S.2d 485 (1st Dept. 1985) (erred in requiring a large corporation to compile and reveal confidential financial documents in the absence of a claim that defendant's alleged misappropriation of plaintiff's trade secrets by recruiting plaintiff's management personnel resulted in a loss of profits to plaintiff).
13. *Brandes v. North Shore Univ. Hosp.*, 1 A.D.3d 550, 767 N.Y.S.2d 666 (2d Dept. 2003) (plaintiff's demands for bylaws of the hospital and its medical staff, as well as the rules, regulations, policies, and procedures for nine separate departments is overly broad and unduly burdensome).
14. 24 N.Y. Jur.2d Costs in Civil Actions § 76.
15. 104 A.D.3d 1256, 961 N.Y.S.2d 640 (4th Dept. 2013).
16. 70 A.D.3d 1436, 894 N.Y.S.2d 671 (4th Dept. 2010).
17. CPLR 3113(c) provides that that questioning in pre-trial examinations "shall proceed as permitted in the trial of action in open court."

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