# LITIGATION: BACK TO BASICS

## Part 1: Preparing and Conducting Depositions

New York State
ACADEMY
OF TRIAL LAWYERS

Materials By
Andrew Smiley

PRESENTED LIVE
OCTOBER 4, 2023
1PM VIA ZOOM

New York State ACADEMY OF TRIAL LAWYERS

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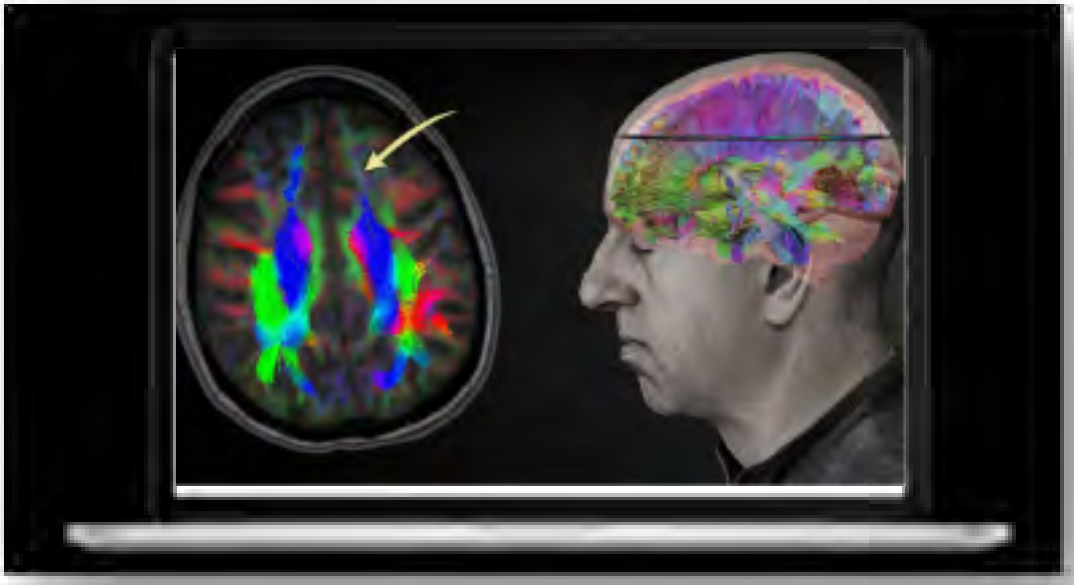

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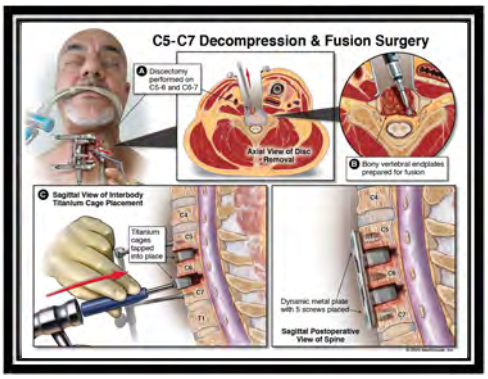


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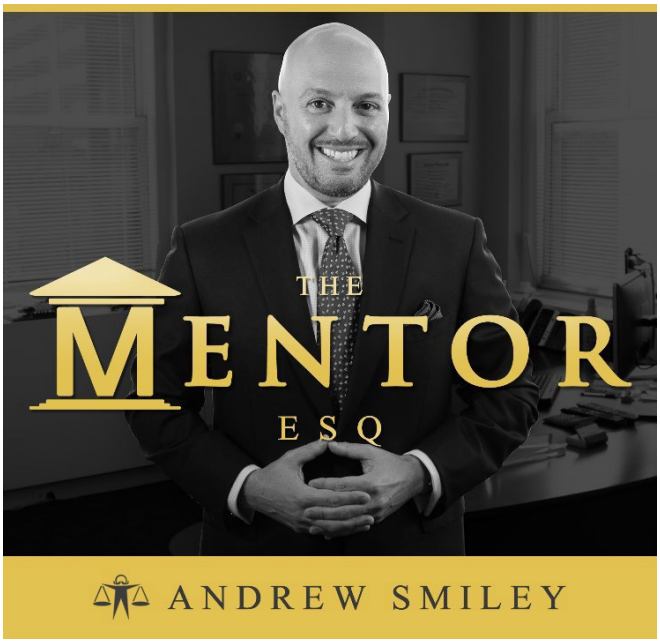


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***CURRICULUM VITAE***

Education:

·Brooklyn Law School - Juris Doctorate 1996

Moot Court Honor Society - Vice President/Executive Board (Chair of Trial Division)
Moot Court Honor Society - Competitor - National Appellate Trademark Competition
Moot Court Honor Society – Coach, National Trial Team – Regional Champions
CALI Excellence For The Future Award - Advanced Legal Research
Judge Edward and Doris A. Thompson Award for Excellence in Trial Advocacy

·Tulane University, New Orleans, LA - Bachelor of Arts (Honors, Psychology) 1993

Professional:
· *Smiley & Smiley, LLP*
Managing Partner & Senior Trial Attorney, January 2001 - present
Associate, June 1996 - December 2000
Law Clerk, September 1993 - June 1996
Major verdicts and settlements in plaintiffs' personal injury, medical malpractice and wrongful death litigation

· *Adjunct Clinical Instructor of Law - Brooklyn Law School*, Trial Advocacy Program (1998-2004)

· *The Mentor Esq. Podcast – A Podcast for Lawyers*

- Founder & Host (2019 – Present)

· *New York "Super Lawyer"*
2010, 2011,2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023

·Bar Admissions:
- The United States Supreme Court
- New York State Courts
- United States Eastern District, Southern District & Northern District of New York
- United State District Court of Vermont

Organizations/Affiliations:

·New York State Academy of Trial Lawyers
-Immediate Past President (May 2018- May 2019)
-President (May 2017 – May 2018)
-President-Elect – (April 2016- May 2017)
-Vice President – 1st Dept. (July 2013-May 2016)
-Executive Committee (May 2019 – present)
- Board of Directors (2013- present)
- Judicial Screening Committee (2013- present)
- Master CLE Instructor (2020 – present)
- CLE Instructor (2013 – present)

· New York City Trial Lawyers Alliance
-Chairman of Board of Governors (July 2017 – July 2019)
-President (July 2015 – July 2017)
-Vice President (June 2013 – July 2015)
-Treasurer (June 2011 – June 2013)
-Secretary (June 2009- June 2011)
-Board of Directors (2000-present)

- Judicial Screening Committee, Kings County Democratic Party (2013)
- New York State Bar Association
- Brooklyn Bar Association
  Medical Malpractice Committee
  Supreme Courts Committee
- American Bar Association
- The American Association for Justice

- Brooklyn Law School Alumni Association
- National Order of Barristers
- Porsche Club of America (Connecticut Valley Region)
- Porsche Sim Racing League
- Sports Car Driving Association (SCDA)
- Just Hands Racing Foundation – Board of Directors

Publications

Smiley, Andrew J. *How to Successfully Litigate a Personal Injury Case – A Practical Guide* 2022, The Mentor Esq. Handbook Series – Available on Amazon

Continuing Legal Education (CLE) Presentations:

(66) *Litigation Back to Basics – Part 1: Preparing and Conducting Depositions*, New York State Academy of Trial Lawyers, October 4, 2023

(65) *Depositions*, Office of The New York State Attorney General – Legal Education and Professional Development, September 28, 2023

(64) *How to Litigate a Medical Malpractice Case – Part 6: The Trial*, New York State Academy of Trial Lawyers, June 7, 2023

(63) *How to Litigate a Medical Malpractice Case – Part 5: Pre-Trial Preparation*, New York State Academy of Trial Lawyers, May 3, 2023

(62) *How to Litigate a Medical Malpractice Case – Part 4: Discovery & Depositions*, New York State Academy of Trial Lawyers, April 4, 2023

(61) *How to Litigate a Medical Malpractice Case – Part 3: Commencing the Action*, New York State Academy of Trial Lawyers, February 28, 2023

(60) *How to Litigate a Medical Malpractice Case – Part 2: Expert Selection*, New York State Academy of Trial Lawyers, February 1, 2023

(59) *How to Litigate a Medical Malpractice Case – Part 1: The Initial Screening*, New York State Academy of Trial Lawyers, January 4, 2023

(58) *How to Litigate a Construction Accident Case – Part 4:* Motion Practice, New York State Academy of Trial Lawyers, December 7, 2022

(57) *Preparing for Depositions: Best Practices for Asking and Answering Questions,* Office of The New York State Attorney General, 2022 Legislature Program, December 6, 2022

(56) *How to Litigate a Construction Accident Case – Part 3: Depositions*, New York State Academy of Trial Lawyers, November 2, 2022

Continuing Legal Education (CLE) Presentations Continued:

(55) *How to Litigate a Construction Accident Case – Part 2: Commencing The Action*, New York State Academy of Trial Lawyers, October 3, 2022

(54) *Trial Series: Part 2 - Opening Statement Webinar,* Queens County Bar Association, September 22, 2022

(53) *How to Litigate a Construction Accident Case – Part 1: An Overview of New York Labor Law,* New York State Academy of Trial Lawyers, September 7, 2022

(52) *How to Litigate a Catastrophic Automobile Accident Case – Part 6: The Trial,* New York State Academy of Trial Lawyers, July 6, 2022

(51) *How to Litigate a Catastrophic Automobile Accident Case – Part 5: Mediation and Settlement,* New York State Academy of Trial Lawyers, June 2, 2022

(50) *How to Litigate a Catastrophic Automobile Accident Case – Part 4: Expert Depositions,* New York State Academy of Trial Lawyers, May 4, 2022

(49) *How to Litigate a Catastrophic Automobile Accident Case – Part 3: Liability and Damages Experts,* New York State Academy of Trial Lawyers, April 6, 2022

(48) *How to Litigate a Catastrophic Automobile Accident Case – Part 2: Commencing the Action,* New York State Academy of Trial Lawyers, March 2, 2022

(47) *How to Litigate a Catastrophic Automobile Accident Case – Part 1: The Investigation,* New York State Academy of Trial Lawyers, February 4, 2022

(46) *Anatomy of a Trial, a Trial Skills Series – Part 5: Summations,* New York State Academy of Trial Lawyers, January 5, 2022

(45) *Anatomy of a Trial, a Trial Skills Series – Part 4: Cross-Examination,* New York State Academy of Trial Lawyers, December 1, 2021

(44) *Anatomy of a Trial, a Trial Skills Series – Part 3: Direct Examination,* New York State Academy of Trial Lawyers, November 3, 2021

(43) *Anatomy of a Trial, a Trial Skills Series – Part 2: Opening Statements,* New York State Academy of Trial Lawyers, October 6, 2021

(42) *Anatomy of a Trial, a Trial Skills Series – Part 1: Jury Selection,* New York State Academy of Trial Lawyers, September 10, 2021

(41) *How to Successfully Litigate a Personal Injury Case Series - Part 7: It's a Wrap!,* New York State Academy of Trial Lawyers, July 7, 2021

(40) *How to Successfully Litigate a Personal Injury Case Series - Part 6: The Trial,* New York State Academy of Trial Lawyers, June 2, 2021

Continuing Legal Education (CLE) Presentations Continued:

(39) *How to Successfully Litigate a Personal Injury Case Series - Part 5:Pre-Trial Disclosures and Gearing up for Trial,* New York State Academy of Trial Lawyers, May 5, 2021

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(36) *How to Successfully Litigate a Personal Injury Case Series - Part 2: Early Settlement, Jurisdiction, Venue & Commencing The Lawsuit,* New York State Academy of Trial Lawyers, February 3, 2021

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(32) *Fitness Industry Liability: Gyms, Trainers and Waivers*, The Mentor Esq. Podcast, September 8, 2020

(31) *Let's Make a Federal Case Out of It: Litigating Personal Injury Cases in Federal Court,* New York State Academy of Trial Lawyers, June 9, 2020

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(29) *Do You Have a Federal Tort Claims Act Case in Your Office,* New York State Academy of Trial Lawyers, December 10, 2019

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(26) *Trial Techniques: Lessons on Dealing with Millennial Jurors; Summations; Requests to Charge and Post-Trial Motions*, The Defense Association of New York, January 31, 2019

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(24) *Punitive Damages – What to Plead, What to Prove: Medical Malpractice*, New York State Academy of Trial Lawyers, June 8, 2017 & June 21, 2017

Continuing Legal Education (CLE) Presentations Continued*:*

(23) Presenter on Evidence, *2016 Annual Update, Precedents & Statutes for Personal Injury Litigators*, New York State Academy of Trial Lawyers, September 30, 2016

(22) *Medical Malpractice in New York: A View from All Sides: The Bench, The Bar and OCA,* New York State Bar Association, October 11, 2015

(21) *Effectively Using Experts in Personal Injury Cases,* Lawline, October 8, 2015

(20) *Killer Cross Examination Strategies,* Clear Law Institute, April 21, 2015

(19) *Powerful Opening Statements,* Clear Law Institute, January 13, 2015

(18) *The Dram Shop Law: New York Liquor Liability,* Lawline.com, November 20, 2014

(17) *Killer Cross Examination Strategies,* Lawline.com, November 20, 2014

(16) *Trial Techniques: Tricks of the Trade Update,* Lawline.com, October 14, 2014

(15) *Personal Trainer Negligence Update,* Lawline.com, October 14, 2014

(14) *Trial Techniques – Part 2: Cross- Examination & Closing Arguments*, Brooklyn Bar Association, May 15, 2014

(13) *Trial Techniques – Part 1: Jury Selection, Opening Statements & Direct Examination*, Brooklyn Bar Association, May 7, 2014

(12) *Health, Fitness & Adventure Sports Liability*, New York State Bar Association, August 1, 2013

(11) *Direct Exams: How To Make Your Witnesses Shine*, New York State Academy of Trial Lawyers, May 6, 2013

(10) *Opening Statements: A Recipe for Success*, Lawline.com, August 7, 2012

(9)*"You Had Me at Hello": Delivering an Effective and Powerful Opening Statement*, New York State Academy of Trial Lawyers, April 1, 2012

(8) *Preparing the Construction Accident Case*, New York County Lawyers Association, March 26, 2012

(7) *The Nults and Bolts of a Trial*, New York State Academy of Trial Lawyers, October 24, 2011

(6) *Personal Trainer Negligence*, Lawline.com, March 22, 2011

(5) *Trial Effectively Using Experts in Personal Injury Cases*, Lawline.com, May 4, 2011

*Techniques: The Tricks of the Trade*, Lawline.com, February 16, 2011

Continuing Legal Education (CLE) Presentations Continued*:*

(4) *Practice Makes Perfect: Learn to Practice Like a Pro*, Lawline.com, January 18, 2011

(3) *Jury Selection 101, New York State Academy of Trial Lawyers*, December 14, 2010

(2) *Practical Guidelines for Getting Items into Evidence*, Lawline.com, March, 2010

(1) *Winning Your Case: Trial Skills that Count*, Lawline.com, August 21, 2009

Television Appearances

*Fox News Channel*

-The O'Reilly Factor
-What's Happening Now with Martha McCallum
- America's News Room
- Fox & Friends
-Fox Business Channel
-Neil Cavuto
-Money with Melissa Francis

*CNN* -Anderson Cooper 360
*ET – Entertainment Tonight*
*Bloomberg TV*
*Headline News*
*Tru TV*
*Court TV*
*The Morning Show with Mike and Juliet*

Interests, Hobbies:

Lime Rock Drivers Club, Porsche Drivers Council, Porsche Club of America, High Performance Driving Events, Sim Racing, Tennis, Lego, Cooking

# DEPOSITIONS

By Andrew J. Smiley, Esq.

www.TheMentorEsq.com

In this chapter, we are going to focus on preparing for the deposition; how to handle yourself during the deposition; and things to think about while questioning or defending a witness during the deposition. Like everything else we do as lawyers, preparation is key. Preparation, preparation, preparation! To be a successful attorney you must always (1) be prepared and (2) inform your clients. That is woven through everything that we do as attorneys. Being prepared for the deposition is as important as being prepared for the trial.

Every personal injury lawyer engages in depositions as part of the discovery process. Even if you are not trying cases, chances are you are handling depositions. After all the paperwork, the discovery, and the other issues that have been addressed in previous chapters, now is the time in a personal injury case where you really feel like you are litigating. You are engaged. You have a witness. You have an adversary in person or on Zoom, and there is a real-time back and forth. There is a confrontation, or perhaps an adversarial environment. You must get geared up for it. You must be prepared so that it goes as smoothly as possible, just like a trial. It is the behind-the-scenes preparatory work that will make your deposition go as smoothly and as effectively as possible.

## *Preparation*

Let's talk about preparation. There are two roles you may find yourself in during a deposition. You will either be questioning a witness or defending a witness. Defending a witness occurs when someone is questioning your client. If you are a plaintiff's attorney, you will be defending the deposition of your client as they are questioned by defense counsel. If you are defense counsel, you will be defending a corporate witness, a driver of a vehicle who is being sued, or a witness in your case. When defending a witness at a deposition, it is your responsibility to make sure the questions being asked of the witness by your adversary are relevant. If the question is not relevant, in improper form, or if it invades a privilege, it is your job to make an objection.

The two areas of preparation we will cover in this chapter are (1) preparing your witness and yourself to properly defend the witness and (2) preparing yourself to question an adverse witness, whether it is a layperson or an expert witness.

### *Defending a Witness*

You will likely be called upon to defend the injured party if you are a plaintiff's lawyer, or a layperson if you're representing someone who is being sued. My first tip: NEVER leave the preparation of a witness to the day of – or the morning of – the deposition. I see it happen all the time; especially before the Covid pandemic when many depositions were conducted in courthouses. A lawyer would meet with a client that morning, sit outside or sit in a room and prepare their witness right before the deposition commences. Do not do that. You should schedule a time in advance to prepare your witness. It is a standard rule in my law firm that the minute we know a deposition is scheduled, we notify our client(s) and arrange a time to prepare them *in advance* for the deposition. Why is it important to prepare in advance? First, it gives you the ability to really flush out everything with your client so that if an issue comes up, you can process the issue and deal with it. You can strategize and pull together a game plan. You do the homework you need to do before the actual deposition. You never want to be in a situation where you run into an issue during the preparation and then immediately head into the deposition. Secondly, it gives you time. You are not on the clock. You can spend as much time as needed to address issues. And those issues could be the information itself that comes up, or it could be an issue with regards to how your witness is going to respond to certain liability or damages questions.

Many times, when I am preparing a witness, he/she has a hard time articulating how their injuries have impacted their life, so I work with them during the preparation. I ask them to think about it and ask their loved ones if and how their injuries have changed them. Explain to them why it is important to be able to speak about it at the deposition. I explain to my clients the importance of giving details about the effects of the injury on their life so that the defense attorney and the claims adjuster will be able to read about it when they receive the transcript. It is difficult to argue that a client has suffered if the client fails to talk about their suffering in a deposition. Timing is important, and preparation gives you and your client that buffer zone. You allow time for the

witness to absorb what comes out of the preparation in advance of the deposition. Sometimes you will have witnesses who may need more than one preparation session, and it is good to find out in advance if that is the case. I have had clients go through multiple preparation sessions; I correct them when they give a poor response to a question and I help them practice how to answer anticipated questions. If they still need help, we schedule another session to go over everything again. If you have a client or a witness that may be a little bit more difficult to prepare, you will want that extra time. So, plan your preparation of your witness in advance.

Let me share with you what goes on behind the scenes when I prepare my client for a deposition. The first thing I like to do is ask them if they have ever been deposed. I explain what a deposition is and what the process is, and I get granular. This is the "informing" part of "informing your client." I explain to them where the deposition will be held, whether it will be in the conference room next door to my office or over Zoom. I let them know if there is going to be one or more lawyers in attendance. I explain that there will be a court reporter who is going to take down everything that is said and that they will get a copy of the typed transcript after the deposition is completed. I let the client know if the deposition will be videotaped. If there is going to be more than one lawyer adversary, I explain they are not going to be firing questions at back and forth, but that one will take the lead and ask the majority of the questions and the other lawyer(s) will follow in turn. Clients and witnesses will take comfort and be better prepared when they know what to expect. You do not want to simply walk them into a room where they are facing lawyers and a court reporter. Explain to them that although it is a formal proceeding, it is not court. There is no judge. If they need to take breaks, they can. If they need to use the bathroom or stretch their legs, they can. Explain all of that to them so they are comfortable and understand what a deposition is. This is second nature to us, but it goes a long way for clients and witnesses who may not be familiar with how this process works.

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*The Ground Rules*

Next, I like to go over "ground rules" with my client. We should all have our own ground rules that we explain to the witness; these can include things like how you prefer depositions to run and how you advise witnesses to handle themselves. This enables you to be a unified team

when you get into that room and your witness is about to be questioned for several hours. Here are my ground rules:

(1) **Keep your answers short.** If you give long-winded answers, the lawyer is going to pick up on something you say and run with it. Just answer the question. I like to give an example: I ask them what time they got up this morning. If they reply with, 'I normally get up at 6 AM but I did not want to be late because it is a long commute to get to your office, so I got up at 5 AM today.'" That is the *wrong* answer. The right answer is, "6 AM." Short answers!

(2) **The exception.** One exception to this rule must be explained to the client: when a question relates to your pain and suffering or the effects of the injuries on your life, give long and detailed responses. Open the floodgates. Tell everything. I explain the importance of talking about the impact that their injuries have on their lives and giving examples of it. They must know that that question is coming and be prepared to give a good answer. Tell them not to be stoic or machismo. Sometimes I have big construction macho clients who do not want to complain, even if it is the worst injury you could imagine, but it is so important to stress vulnerability in this scenario. This is where they must let it all out, because when the insurance representative or defense counsel is reviewing the transcript or writing a report, it makes it difficult for me when I go to negotiate a settlement and my adversary says, 'Listen, your client said they are fine now.' Your client needs to fill pages with the problems that have arisen since the injury, their hardships, and life changes. This is their time. It is their day in court. If they can properly express themselves, they most likely will not have to go to court because that helps you get their case resolved. Many clients have a hard time talking about the impact the injuries have had on their life. If they are uncomfortable, you can give them some ideas on how to articulate what they want to say. It is helpful if a spouse, parent, or friend can give them some feedback if they need an outside perspective on how they may have changed as a result of the injuries they sustained in the accident.

(3) **Listen to the question and pause before you answer.** Think it over. I explain to my clients that a pause is important; it keeps a clean record so the court reporter can get

the question and the answer, and it allows the witness and client to think before answering, which is always important. Equally important, it allows me, the lawyer, the opportunity to jump in and object if there is a reason to object. Work on this with your client during the preparation. Explain to them that while people talk over each other in normal life, it is different in a deposition. So, pause, then answer.

**(4) Tell your clients your philosophy on objecting.** Personally, I do not like to object during my client's deposition. It interrupts the flow. Ninety-nine percent of questions are appropriately asked. The questions may not be the best, they may be improper technically, but as your client's lawyer, your main goal is to get in and out of there with a clean and appropriate record of testimony. You do not want to argue with your adversary. You do not want to mess up the record or increase your transcript page count, because it ends up costing you more. Save your objections for when you really need them. Sometimes lawyers want to show their clients that they are fighting for them by objecting and being obstructive. I can only tell you how I choose to act in my depositions. I think my system of not objecting unless really necessary makes for a much smoother and more professional environment.

**(5) "The Hand."** When I do object, I have a method, called "The Hand." I did not originate this; I learned this as a young lawyer. I was thrown into a medical malpractice deposition where I was doing the questioning and an old school defense medical malpractice lawyer was doing "The Hand" with his witness; I would ask a question, and he would put his hand right up in front of the the doctor seated next to him, and he would say, "objection" - along with a concise basis for the objection. He would not drop his hand until everything was sorted out. It frustrated the hell out of me. Every time I saw the hand go up before I even said anything, I was thinking, "Ugh! Again, with the hand"! It threw me off my game a little bit, to be honest. However, I thought it was effective, and now I use it. If I am going to object, I put up my hand directly in front of my client. I tell them ahead of time that this may happen and let them know that if they see my hand go up, they need to stay quiet until my hand goes down. I explain that the hand gives me an opportunity to object and say everything that I need

to and that once the hand goes down, they are free to speak again. It is an effective technique. Use it.

After I discuss the ground rules with my clients, they understand my philosophy when we go into the deposition, and they are not wondering why I am not objecting more. They feel comfortable and have a good idea of when they should or should not speak. I also like to explain what I expect will be the natural flow and order of questions. For those of us who have done many depositions, you know there is generally a natural flow to them, right? Whether it is a plaintiff in an accident case or a witness on the defense side being questioned, it is usually chronological. It starts with background about the person, their education and continues up to the time of the accident, covers what happened at the accident, and what happened after the accident, and then works through damages and questions about treatment, pain and suffering, and impact on daily activities. It helps to explain that flow to the client. It also helps to give the client an approximate timeframe for how long they can expect the deposition to last. I will tell a plaintiff that their deposition will usually last about 2 or 3 hours. It could be longer, it could be shorter, but it is good for them to know. Again, inform your client. This is all part of the preparation process. Have that conversation. Let them know what to expect. After you go over the ground rules and what the client can expect at the deposition, you get into the meat and potatoes of the accident and issues specifically related to the liability and damages of your client's case.

However, before you prepare your client, you must prepare yourself. You need to thoroughly evaluate the case. Review all the paper discovery that you have received or exchanged. Review all your client's medical records. You need to be fully familiar with the case so that you can focus on what you think is important for this witness and this deposition. Once you know the details of the case forward and backward, talk about your approach with the client and go over what they are going to be asked. Go through the photos, if there are any, and any exhibits that you anticipate may be shown to the witness. I like to tell my clients, "Listen, you cannot does anything wrong. All I need you to remember is that you saw what caused you to fall," or "all I need you to remember is that you stopped at the stop sign, and you looked both ways." You need to say that. "*All I need you to remember is* … (fill in the blank)." In most cases, there is something crucial either on liability or damages, and that is what you want to zero in on when you are prepping this

witness. You want to zero in on potential weaknesses or problems, either in the record or in prior statements, or in what you found in the discovery or photographs. This is their chance to explain themselves, and you need to prepare them to explain it in the best way possible.

To be clear, you can never suggest something for your client to say that is not true. That is not ethical. You cannot let your client lie at a deposition or perjure themselves. You cannot be a part of anything like that. If you have a situation that is tough to deal with, you tell the client to be truthful but that they do not need to volunteer questionable information. What happens when you run into a situation that you are worried about… a prior crime, for example? You need to ask every witness during preparation if they have ever been convicted of a crime. Even if your client is a sweet little old lady who you could not imagine doing the smallest thing wrong, you need to ask her if she has ever been convicted of a crime, because that question will likely be asked at the deposition, and you do not want to be surprised. If you do not prepare for this and your client is asked that question and they say, "Yes," you are going to start sweating before the follow-up questions even start. You need to know if it is a misdemeanor. Misdemeanors do not count, and they are not allowed to ask about them. Was it a felony? If it was, you need to know what they are allowed to ask your client about that felony. In short, you need to find out the bad stuff so when the question is asked, you can prepare the witness for how to handle it, and you can be prepared for how to handle it. Ask your client if there is anything that they are worried about that could come out in questioning. Reiterate that now is the time for them to tell you so you can deal with it: bankruptcy, court litigation, all those touchy subjects. You need to know. Go over any weak spots, liabilities, causation issues and damages, or prior injuries. These are the things you really want to focus on during preparation.

Note that there is a difference between preparing a witness and impermissible coaching. Tell your client they cannot lie. Tell your client that if they do not know something, they can give themselves the benefit of the doubt if they think they know what happened. Try and be as creative as you can without suggesting something wrong. Never lie. Never ask them to lie. And just work on it as best as you can. Find the weaknesses in their answers and figure out how to get around them. Ultimately, if it is something really hard, then you want to prepare them for how to handle it when they are asked about it. Tell them to just keep the answer short. You may want to object,

or sometimes a lawyer may not follow up on it and it can slide right by. That takes experience. If you run into an issue during preparation, reach out to colleagues to talk it out if there's a specific issue that is giving you cause for concern.

When preparing your client to answer questions about medical treatment, tell them that they do not need to memorize their treatment history or know the dates of every doctor's appointment. Explain that the defense has all the records. Tell them to do the best they can, and that they can approximate. Essentially, put them at ease and focus the client on the important parts, and they will be prepared.

Finally, ask your client if they have any questions for you. It should take you a minimum of one hour to do a proper preparation of your client and likely longer than one hour if the case is more complex or if there are issues that need extra work. Take as much time as needed. Sometimes that means having another preparation session before the deposition. Whatever it takes, your client should be prepared. It is going to make their deposition go more smoothly, it is going to be better for your case, and everyone will feel at ease.

### *Questioning a Witness*

There are two types of witnesses you will question at a deposition. A "lay" witness is a person with no specialized knowledge or expertise. Examples of lay witnesses include a driver in an automobile accident or a person who witnessed an accident, or a family member of a party to the litigation. Lay witnesses have probably not been questioned at a deposition before. An "expert" witness is one with specialized knowledge or expertise, such as a physician or a hired professional expert, professional engineer, biomechanical engineer, economist, etc. There is a higher level of preparation that will go into preparing to question an expert witness.

The first thing I do before preparing for a deposition is to have the right notice served for that deposition. When you are suing a company that is a defendant, you do not want to let your adversary pick whom to produce, because it is possible to show up to a deposition and have your adversary produce a witness from the corporate office who knows little or nothing about the circumstances of the accident. This is a huge waste of time; you need to go through the process of finding another witness. How do you deal with this?

In federal court, there is Rule 30(b)(6) to rely upon and there may be similar statutes or rules in your state of practice. In New York State, the equivalent for serving a notice on a specific defendant corporate witness is a Uniform Rule of the Court, Rule 202.20-d. In these notices, you put detailed point by point, number by number areas to which you want answers. Then, the burden shifts to the corporate defendant to produce however many witnesses are necessary to answer the questions that you have raised in your notice. If they do not have personal knowledge, it is their responsibility to do homework and speak to the appropriate people in their company to find and provide that information upon questioning at the deposition. If the defendant fails to comply with that notice and produces a witness that does not have knowledge of the points that you have listed or has not looked into getting the answer to those questions, then the defendant or the defense counsel could be sanctioned for failing to properly comply with that notice. Take the time to prepare a proper notice that specifies the topics of inquiry that matter. As in any deposition you are preparing for, you need to review your case to determine what information is needed. You need to workshop it, either by yourself, with colleagues, your partners, or your associates.

At the outset, you need to know *why* you are choosing to question each witness. For every witness, there is a reason (or multiple reasons) that you want to question that witness. You want to get more discovery. Depositions can help peel away the layers to get more information that you want to find out in your case, so you want to ask questions that will lead to more discovery. You may want to "knock out" the witness because this witness may have said something bad for your case in a statement. Understandably, you want to grill them on it and either knock it out or weaken it by asking them questions about why they have said things or what they really observed. Sometimes we call that a "knock out" witness. An example of a knock witness could be a witness listed on a police report who is quoted as saying about your client that "I saw him run the light." You will want to take the deposition of that witness to (1) see if they show up and (2) test their perceptions of what they observed. If the witness fails to show up at the deposition you can move to preclude them from the case and thereby eliminate this potential bad evidence from coming in at trial. If the witness shows up, you may be able to cast doubt on what they claim to have seen. Maybe they were not actually in the line of sight of the accident. Maybe they were drinking all night and intoxicated. The ultimate goal is to knock out this witness from hurting your case and taking away your adversary's argument that they have a witness that can hurt your claim.

Alternatively, you may want to "lock them in" to testimony that can help you at trial. If you know you have certain elements in your case that you need to prove and you could satisfy those elements from one of these witnesses, then "lock them in." Then go into that deposition with the goal of getting an answer to that question that will give you the element to meet your burden at the time of trial. Whatever it is that you may need or want, you must identify it and go into your deposition of that witness with a game plan. Do not just go in and ask questions; *have a plan*. Start by reviewing your case and all the records. Sit down with all the discovery you have received, go through every page, highlight key passages, put in question marks, and make notes. A lot of homework takes place before a deposition, even in a simple auto case, but do not skip it. Find out what you are going to need to prove or disprove at trial and be prepared.

### *Prepare an Outline and Organize Exhibits*

Once you have a plan for the deposition *make an outline*. I recommend having an outline to know what to talk about and where you want to go. I use a legal pad or create a Word document for my outlines. I have point headings: background, resume, curriculum vitae – which is the resume of a professional witness – education, and employment. You may want to identify defendants and ownership and ask about who owns what, who supervises whom, and who the client's supervisor is at work. Have different headings and write/type bullet points of what you want to ask, then go through all the documents and the topics that are important to review with that witness and have those ready and organized. You can even pre-mark exhibits to show the witness. When I get to something that I want to show the witness as an exhibit, I write it in red on my legal pad (or type in red font on the Word document). "Go to Exhibit 1, photograph of intersection." Then later on, "Go to photo 2, exhibit of damaged vehicle," or whatever your information may be. Your outline should be organized by what you want to ask. You should highlight the exhibits. Point arrows to them.

Your exhibits should be in a nice pile for in-person depositions or, for Zoom, scan them as PDFs[1]. In terms of Zoom depositions: if you organize properly, everything I am talking about can

[1] PDF is an abbreviation that stands for Portable Document Format. It is a versatile file format created by Adobe that gives people an easy, reliable way to present and exchange documents - regardless of the software, hardware, or operating systems being used by anyone who views the document.

be done successfully in video depositions. And frankly, I have been finding it better over Zoom because I organize everything, I make sure the exhibits I plan to use are saved as PDFs, and I will highlight what I want to focus on within the PDF. When I am questioning the witness, I share my screen. I have my PDFs organized on my computer and ready to be shared; I click on the one that I need at the moment, go to the right page number. Everybody on the Zoom conference sees it, instead of having to have multiple copies to pass around to everybody, which is the practice for in-person depositions. By way of example, I recently conducted the deposition of a defendant physician in a very serious medical malpractice case. The medical record that I needed to go through was about 2,500 pages of an inpatient hospital chart; amongst other things, what I did to prepare for that deposition was create an Excel spreadsheet that had the PDF page number of the chart with the date, the time of the entry, and a column of relevant quotes from either this witness or other important entries. I shared my screen and put the whole chart up. Then I referenced my excel chart to identify which page to go to and state "All right, I'd like to draw your attention to PDF page 1,252." I would click to pull it up on the screen, "Do you recognize this? I want you to see in this hospital chart the highlighted paragraph. Is that your note?"

For in-person depositions, make copies of all your exhibits before you show up, and ensure that you have a set for the court reporter and for every attorney who will be there and pass them around. Not having enough copies delays the case, as some people will need to wait to reference a neighbor's copy. There are ways to get organized in advance that will help things go smoothly and allow you to focus on your questioning. And this takes time. You just must plan well in advance. For expert depositions, you must plan further in advance than for some of the simpler lay depositions. But whichever it is, get your exhibits organized, have your outline laying out your questions, and make sure that you have a smooth presentation to your deposition. It has to be smooth, like a beautifully choreographed synchronized performance; that is what allows you to focus on the questions you ask, and the answers given by the witness.

## Attending the Deposition

Let's talk about being at the actual deposition. You have prepared yourself. You have your notes for the questioning. You are ready to defend your client, and the big day comes. You may be nervous, although you should not be nervous if you are well-prepared. The deposition is the

first adversarial setting you encounter in a case, and it is often the first time that you get to see and communicate with your adversary in person. This is where the case takes on its life. You can feel out your adversary, whether you think you will work well together and can begin to build some camaraderie. Being adversarial does not mean you have to be abrupt or rude or difficult; you could be as sweet as pie and still do a good job. It is events like depositions where we as a profession need to work to be more cordial with each other and understand that we are all in that room to do our job—to represent our clients—and be respectful of that. The vast majority of the time, the plaintiff's lawyer is not the greedy lawyer who is going to be difficult until the plaintiff gets paid. And the defense lawyer is not necessarily the cold-hearted lawyer who is just sticking up for the insurance company and trying to make the plaintiff out to be a bad guy. Those are extreme cases. The reality is, that most lawyers on both sides realize it is a case that will be resolved somehow, and we all can help each other get to that point in many ways. One of the ways to do that is in a deposition. So, make it easier for your adversary by ensuring they have the materials in advance that you will be covering so they can look at them. Don not surprise them unless you really need to. If they want time to look at something, give them time. Give courtesies to each other; the courtesies and rapport between adversaries in litigation usually starts at these depositions, either over Zoom or in person.

My law partner and life-long friend, Jason Friedman, always reminds me, "You can never read tone into emails." Sometimes you are exchanging emails or phone calls and the lawyer seems to be difficult on the other side, but then you are at a deposition, and you realize he or she is not that bad. So have conversations. Take some time during the breaks or when you step outside to meet your adversary(s), ask their view on the case, and share how you see it going. Those quick moments are a really good time to meet and be cordial. I always advise you to be nice until you are pushed to where you cannot be, but you need to go in with the attitude that you are going to be cordial at the deposition. Try not to be obstructive for the sake of it, because I see that all the time, and it rarely helps anyone.

*"The Usual Stips"*

In a deposition, you need to be aware of what we call "the usual stips." Let's talk for a moment about the rules of engagement at a deposition. I guarantee you, that less than half of lawyers have ever actually read through the usual stipulations ("stips") that parties agree to at the start of every deposition. If you do read them, however, you will see that the most important thing in these stips is that ***objections are preserved***. If you don not object, you are not waiving anything at trial, and you do not have to object during the deposition just to be difficult. The only thing that is not preserved is an objection to the "form" of the question. It does not mean you lose the right to object to the question for bad form; you just lose the right to stand up at court and say, "objection to form." You preserve the right to everything else. Thus, the only thing you need to object to is to form, and the reason for that is to make a clean record when there is an improperly formed question. For example, asking "what time did you wake up and what did you have for breakfast" could spark an objection, because it is two questions in one. That is improper form; they two questions need to be broken up. Other than that, all your objections are preserved. You do not need to worry if you miss something and fail to object. The usual stips say it; most state and federal statutes specify it as well. Thus, most of the time, objections during a deposition should just be to make sure there is clean form. The record may not be as clear because the way the question was asked improperly, but otherwise, you do not need to object all the time. I once had a federal court case where I was questioning an expert witness and defense counsel objected to probably 95% of my questions. And every objection was, "Objection, form. Irrelevant. Argumentative. Objection, form. Argument. Irrelevant." I said to the guy, "We have stipulated that all your objections are preserved. I am saying on the record now and on videotape, I will waive any objection I have at the time of trial to your failure to object to something. You do not need to object to every question of mine. Let's move on." He said, "No, I'd like to object." There was not much I could do. Nevertheless, the usual stips say you do not need to object.

As far as rules of engagement go, you are not supposed to have speaking objections or coach your witness. When I ask a witness the question, my adversary is not allowed to jump in and advise the witness on what they can and cannot say, or put parameters on their answer (i.e., "only if you remember it!"). That behavior is impermissible under almost all of the rules in federal and state court. You cannot direct a witness to not answer a question except under extremely rare circumstances such as privilege. They do not have to answer questions that are privileged, such as

attorney-client communications. The content of privileged discussions also includes spousal privileges, work product, and self-incrimination. Since these come up only rarely, it is uncommon to be justified in directing a witness not to answer. If you are in a deposition where your adversary is being obstructive and keeps asking you to rephrase, or directing the witness not to answer, you make a clear and concise statement on the record stating that their objections are inappropriate, and they are improperly directing their witness not to answer your question. Follow up and ask them on the record if they are aware that that is against the rules and stipulations. See what they want to say. Whatever it is, make them say on the record that they stand by their choice to direct a witness not to answer. When you run into a situation where someone runs afoul of the rules or usual stips, I encourage you to be brief in your statement on the record and be brief in your argument with counsel. You are never going to agree. You need to agree to disagree, so be respectful. Make it known that you interpret the rules differently. If you have an adversary that is jumping in, ask respectfully if they can stop giving speaking objections, and state that it is against the rules. Let your adversary say whatever he/she wants but you know that your interpretation of the rules is on the record. Usually, challenging difficult adversaries will stop the bad behavior, but if not, always make a record.

### *Instant Rulings*

If you do not get the answer you want due to your adversary being obstructive, or directing a witness not to answer, mark it for a ruling, and don not be afraid to get a ruling right then and there. Always bring the phone number of the judge on your case, his/her chamber's phone number, and the courtroom's phone number with you, and be ready to use it. Do not bluff about marking for a ruling. Do not wait. Tell the lawyer that you will get the judge on the phone if they continue being obstructive, wait for a break, and then make the call. You can even take a break right then and there to call the judge. Sometimes just the threat of calling the judge will curb bad behavior. What I like to do sometimes is mark everything for a ruling and then towards the end of the deposition or at a lunch break, I will say, "All right. I am going to call the judge now to get a ruling on all the questions you blocked or refused to let the witness answer. I would ask if you want to re-consider your prior objections before we call the judge." Sometimes defense counsel will reconsider when they see you are about to call the judge, but if not, call the judge. You will usually

get the judge or the law secretary on the phone. Ninety-nine percent of the time I will get somebody on the phone, and they will admonish your adversary and make them let the witness answer the question. Do it. Do not be shy. You must be familiar with all the rules. My partners and I bring copies of court deposition rules of engagement and prior court orders.

That said, you can always bend the rules a little bit when defending a witness; there is some gamesmanship to these situations. Your job is ultimately to defend and protect your case and your client. If I have a client that likes to talk and who keeps giving long-winded answers despite all the preparation we have done, sometimes I will pull that client out of the room. And if my adversary wants to put a statement on the record, saying that taking the client out of the room is not allowed and asking me not to do it again, I will thank them and say I understand, then move on. Sometimes you must use your judgment and take one for the team if you see there is a real problem. You may have to face the wrath of a judge or law secretary, and it is up to you to find that line. Again, when extreme measures need to be taken, you must be prepared to take them if it is important enough for your case.

## *Questioning the Witness*

*Listen*. When you are questioning a witness, listen, *really listen*, to the answer. Do not just blindly follow your outline and script; you need to be flexible enough to go off-script if you need to. Many times, an answer will contain something worth following up on, so pay attention. If you are losing focus and you are having a difficult time trying to muscle through it, take a break. Have a sip of water. Regroup. You need to be in the right mindset to truly listen to the answers being presented. I cannot stress this enough.

*Get your answer*. Whatever your question is, make sure you get the answer. I cannot tell you how many times a witness either will not answer you or think they did, especially expert witnesses. They think they can sneak by with a vague answer. Your adversary may object that the question was "asked and answered", but if that is the case you can reply that your question was not answered and that you will keep asking until you are given an answer to your question. You should ask for read backs from the court reporter, if need be, but you do not leave your deposition until you get the answers to your questions.

*Let the witness answer your question.* It is important to let your witness finish their answer. Do not talk over them. If they want to ramble, sit back, and let them ramble; you can get some good stuff from witnesses who like to talk too much. Do not cut them off and move on as soon as they have answered your initial question. Let them talk, see if you get lucky. Believe me, it happens. I have had many witnesses volunteer information that proved to be helpful in the case.

*Ask all the "W" questions*: Who, What, Why, Where, When. When you are questioning a witness, it can almost seem like you are a curious fifth grader: "Oh really? You spoke with that person? *When* did you speak with them? *Why* did you speak with them? *Where* did this conversation take place? And *what* did you talk about? *Who* was with you?" Just be curious; that is important. Go into depositions being curious and satiate your curiosity. That is when you will know you have conducted a good deposition.

Do not be embarrassed to not know something or to ask a question that you do not know an answer to. It is equally important not to hide from questions where you are afraid of the answer; that is more of a cross-examination tactic. Those are the answers that you do not want to be surprised by at trial. That is another reason to conduct a deposition, to find out the bad stuff, to question experts and hear their opinions, and see if there is the potential for damage to your case. You want to find everything out at a deposition so you can better understand how to deal with it in your case and at trial. It may affect the settlement posture. It may affect how you approach the witness at trial in your questioning. It may affect future depositions or discovery that you need, so ask away. Ask open-ended questions. Ask questions until you feel you have obtained the answer that you want. At heart, the deposition is when you want to ask things you do not know. If the witness says a term or a phrase that you are unfamiliar with, do not just nod and pretend you understand because you are afraid of looking stupid if you make it known that you are not sure what it means. They witness has no idea you do not know what it means; you could just be asking anyway for their definition or for the benefit of others in the room. I will often ask witnesses to define things that I think I know because I am curious how they define them, since we may not have the same understanding. Do not be embarrassed.

When you have completed your deposition, do not expect to have hit a home run. Do not expect the witness to say, "It was my fault. You're right, Mr. Smiley. I know. I know. You have

me. You wore me down. I did it. I blew through the red light. I wasn't watching where I was going. Yes, I operated on the wrong limb." It just doesn't happen. I think once in the almost 60-year history of my firm, we had a doctor admit that they departed from the accepted standard of care, and that was the only time we got such a fortunate answer in a deposition. You are most likely not going to get a confession. Properly prepared witnesses are not going to give you exactly what you are hoping for, so do not be deflated if that does not happen. Instead, feel good about the fact that you have done a thorough deposition, because you have explored every area, closed up loose ends, and received the answers that you wanted. You have learned more than you knew beforehand. That is when you should feel satisfied that you have done a good job. If you are an associate and you have to report back to your senior partner, feel good. You covered all the bases, you have explanations. The witness may not have admitted why he ran a red light, but you know what he did say. Just make sure you get the information that you went into the deposition hoping to get. That is a successful deposition. A good deposition will have meant that you covered all your points and that you tied up all your loose ends, and it is going to help you prepare for trial better, evaluate your case better, or lead to future discovery.

STIPULATIONS

IT IS HEREBY STIPULATED AND AGREED by and between (among) counsel for the respective parties hereto, that:

All rights provided by the C.P.L.R., including the right to object to any question, except as to form, or to move to strike any testimony at this (these) examination(s), are reserved, and, in addition, the failure to object to any question or to move to strike any testimony at this (these) examination(s) shall not be a bar or waiver to make such motion at, and is reserved for the trial of this action;

IT IS FURTHER STIPULATED AND AGREED by and between (among) counsel for the respective parties hereto, that this (these) examination(s) may be sworn to by the witness(es) being examined, before a Notary Public other than the Notary Public before whom this (these) examination(s) was

(were) begun; but the failure to do so, or to return the original of this (these) examination(s)to counsel, shall not be deemed a waiver of the rights provided by Rules 3116 and 3117 of the C.P.L.R., and shall be controlled thereby;

IT IS FURTHER STIPULATED AND AGREED by and between(among) counsel for the respective parties hereto, that this (these) examination(s) may be utilized for all purposes as provided by the C.P.L.R.;

IT IS FURTHER STIPULATED AND AGREED by and between (among) counsel for the respective parties hereto, that the filing and certification of the original of this (these) examination(s) shall be and the same hereby are waived;

IT IS FURTHER STIPULATED AND AGREED by and between (among) counsel for the respective parties hereto, that a copy of the within examination(s) shall be

furnished to counsel representing the witness(es) testifying, without charge.

IT IS FURTHER STIPULATED AND AGREED by and between(among) counsel for the respective parties hereto, that all rights provided by the C.P.L.R., and Part 221 of the Uniform Rules for the Conduct of Depositions, including the right to object to any question, except as to form, or to move to strike any testimony at this examination is reserved; and in addition, 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 motion at, and is reserved to, the trial of this action.

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STIPULATIONS

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties herein, that filing and sealing be and the same are hereby waived.

IT IS FURTHER STIPULATED AND AGREED that all objections, except as to the form of the question, shall be reserved to the time of the trial.

IT IS FURTHER STIPULATED AND AGREED that the within deposition may be sworn to and signed before any officer authorized to administer an oath, with the same force and effect as if signed and sworn to before the Court.

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VIDEOCONFERENCE STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between counsel for all parties present that pursuant to the CPLR section 3113(d) this deposition is to be conducted by video conference, that the court reporter, all counsel, and the witness are all in separate remote locations and participating via videoconference (LegalView/Zoom) meeting under the control of Lexitas Court Reporting Service, that the officer administering the oath to the witness need not be in the place of the deposition and the witness shall be sworn in remotely by the court reporter after confirming the witnesses identity, that this videoconference will not be recorded in any manner and that any recording without the express written consent of all parties shall be considered unauthorized, in violation of law, and shall not be used for any purpose in this litigation or otherwise.

IT IS FURTHER STIPULATED that exhibits may be marked by the attorney presenting the exhibit to the witness, and that a copy of any

exhibit presented to a witness shall be e-mailed to or otherwise in possession of all counsel prior to any questioning of a witness regarding the exhibit in question. All parties shall bear their own costs in the conduct of this deposition by videoconference, notwithstanding the obligation by CPLR to supply a copy of the transcript to the deposed party by the taking party in civil litigation matters.

# Rule 30. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

(1) *Without Leave.* A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

(B) if the deponent is confined in prison.

(b) Notice of the Deposition; Other Formal Requirements.

(1) *Notice in General.* A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) *Producing Documents.* If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

(3) *Method of Recording.*

(A) *Method Stated in the Notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless

the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) *Additional Method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) *By Remote Means.* The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

(5) *Officer's Duties.*

(A) *Before the Deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

(i) the officer's name and business address;

(ii) the date, time, and place of the deposition;

(iii) the deponent's name;

(iv) the officer's administration of the oath or affirmation to the deponent; and

(v) the identity of all persons present.

(B) *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)–(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) *After the Deposition.* At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must designate one or more

officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(c) EXAMINATION AND CROSS-EXAMINATION; RECORD OF THE EXAMINATION; OBJECTIONS; WRITTEN QUESTIONS.

(1) *Examination and Cross-Examination.* The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) *Objections.* An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(3) *Participating Through Written Questions.* Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) DURATION; SANCTION; MOTION TO TERMINATE OR LIMIT.

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) *Sanction.* The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) *Motion to Terminate or Limit.*

(A) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order.* The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) *Award of Expenses.* Rule 37(a)(5) applies to the award of expenses.

(e) REVIEW BY THE WITNESS; CHANGES.

(1) *Review; Statement of Changes.* On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) *Changes Indicated in the Officer's Certificate.* The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) CERTIFICATION AND DELIVERY; EXHIBITS; COPIES OF THE TRANSCRIPT OR RECORDING; FILING.

(1) *Certification and Delivery.* The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked “Deposition of [witness's name]” and must promptly send it to the

attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) *Documents and Tangible Things.*

(A) *Originals and Copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.

(B) *Order Regarding the Originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) *Copies of the Transcript or Recording.* Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) *Notice of Filing.* A party who files the deposition must promptly notify all other parties of the filing.

(g) FAILURE TO ATTEND A DEPOSITION OR SERVE A SUBPOENA; EXPENSES. A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

SARAH WILLIAMS, As Guardian of the Person and Property of STANLEY WILLIAMS,

Plaintiff,

-against-

RIVERBAY CORPORATION, DOUGLAS ELLIMAN PROPERTY MANAGEMENT and DOUGLAS ELLIMAN REALTY, LLC,

Defendants.

----------x

RIVERBAY CORPORATION, DOUGLAS ELLIMAN PROPERTY MANAGEMENT and DOUGLAS ELLIMAN REALTY, LLC,

Third-Party Plaintiff,

-against-

JERMAINE B. WILLIAMS, as Administrator of the Estate of RENNA WILLIAMS,

Third-Party Defendant.

----------x

RIVERBAY CORPORATION, DOUGLAS ELLIMAN PROPERTY MANAGEMENT AND DOUGLAS ELLIMAN REALTY, LLC,

Second Third-Party Plaintiffs,

-against-

WALTER KIDDE & COMPANY, INC., WALTER KIDDE FIRE SUPPRESSION, INC., KIDDE FIRE PROTECTION, INC., UNITED TECHNOLOGIES CORPORATION, UTC FIRE & SECURITY CORPORATION, UTC FIRE & SECURITY AMERICAS CORPORATION, INC., THE HOME DEPOT, INC., AND HOME DEPOT, U.S.A., INC., AND WALTER KIDDE PORTABLE EQUIPMENT INC.

Second Third-Party Defendants

----------X

17-CV-4397 (LAK)

RULE 30(b)(6) NOTICE TO TAKE DEPOSITIONS OF DEFENDANTS/THIRD PARTY PLAINTIFFS BY THEIR DESIGNEE(S)

RIVERBAY CORPORATION, DOUGLAS ELLIMAN PROPERTY MANAGEMENT AND DOUGLAS ELLIMAN REALTY, LLC.,

Third Third-Party Plaintiffs,

-against-

MARION SCOTT REAL ESTATE INC.,

Third Third-Party Defendant.

----------X

MARION SCOTT REAL ESTATE INC.,

Fourth Third-Party Plaintiffs,

-against-

SOUTHSIDE ELECTRIC INC. OF NY,

Fourth Third-Party Defendant.

----------X

TO:

*Via Mail and Email*

[redacted]

Attorneys for Defendants/Third-Party Plaintiffs/Second Third-Party Plaintiffs and Third Third-Party Plaintiffs Riverbay Corporation, Douglas Elliman Property Management and Douglas Elliman Realty, LLC

*Via Email only*

[redacted]

Attorneys for Third-Party Defendant
Jermaine Williams, As Administrator of the Estate of Renna Williams

*Via Email only*

[redacted]

Attorneys for Third Third-Party Defendant
Marion Scott Real Estate, Inc.

*Via Email only*

[redacted]

Attorneys for Second Third-Party Defendants
Walter Kiddie Portable Equipment, Home Depot Inc. and Home Depot USA Inc.

*Via Email only*

[redacted]

Attorneys for Fourth-Party Defendant
Southside Electric Inc. of NY

PLEASE TAKE NOTICE that pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, the testimony, upon oral examination, of the Defendants/Third Party Plaintiffs Riverbay Corporation and Douglas Elliman Property Management (hereinafter referred to as "Defendants/Third Party Plaintiffs") will be taken before a Notary Public, who is not an attorney, or employee of an attorney, for any party or prospective party herein and is not a person who would be disqualified to act as a juror because of interest or because of consanguinity or affinity to any party herein, at the offices of Smiley & Smiley, LLP, 122 East 42nd Street, New York, NY 10168 on **January 30th, at 10:00 a.m.** of that day with respect to evidence material and necessary to the

prosecution of this action.

As prescribed in Rule 30(b)(6), Defendants/Third Party Plaintiffs must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on their behalf, with regard to each of the topics identified below and the persons so designated must testify about information known or reasonably available to Defendants/Third Party Plaintiffs.

Accordingly, Plaintiff demands that Defendants/Third Party Plaintiffs produce a witness with knowledge of the issues involved in this litigation, including but not limited to the following matters:

1. Defendants/Third Party Plaintiffs' obligation to conduct specific "Critical Repairs" in accordance with a Building Loan Agreement, dated November 28, 2012 between Wells Fargo Bank, National Association and Riverbay Corporation in the amount of $621,500,000 with knowledge of measures taken to complete items in "Table 1 – Critical Repairs" Sections 3.1 and 7.6.;

2. Overall knowledge of the design, implementation and execution of the "program" to install Kidde smoke detectors and GFI outlets in the buildings and apartments (including Building 33 and Apartment 14J) of CO-OP City in 2013 and 2014;

3. Defendants/Third Party Plaintiffs' directive to maintenance staff to install Kidde smoke detectors in *only* the bedrooms in apartments within Building 33 including Apartment 14J in January 2014;

4. Defendants/Third Party Plaintiffs' directive to disregard Kidde installation instructions and mount Kidde smoke detectors with double sided tape throughout Building 33 including Apartment 14J in January 2014;

5. Defendants/Third Party Plaintiffs' failure to provide residents of Building 33 with the Kidde Smoke Alarm User guide for the Kidde smoke alarms placed within the apartments in January 2014;

6. Defendants/Third Party Plaintiffs' knowledge of the maintenance and installation history of the smoke detectors throughout Building 33 including apartment 14J prior to January 2017;

7. Defendants/Third Party Plaintiffs' knowledge of the date(s) and circumstances of the installation of the Kidde smoke detectors throughout Building 33 including Apartment 14J prior to January 2017;

8. Defendants/Third Party Plaintiffs' purchase from HOME DEPOT of the Kidde smoke detectors installed in CO-OP City (including Building 33 and Apartment 14J) in 2013 and 2014;

9. Defendants/Third Party Plaintiffs' knowledge of EMG Corp.'s inspection of CO-OP City in April 2012 and its findings and recommendations regarding fire codes, building codes, smoke alarms and carbon monoxide detectors;

10. Defendants/Third Party Plaintiffs' knowledge of the handling and decision not to install new Carbon Monoxide detectors throughout Building 33 including Apartment 14J from April 2012 through January 2017;

11. Defendants/Third Party Plaintiffs' knowledge of the handling and decision not to install smoke alarms outside of the bedrooms or in living areas of the apartments in Building 33 including Apartment 14J from April 2012 through January 2017;

12. The identity(ies) of all persons with relevant knowledge and information concerning the Kidde smoke detector purchase and installation throughout CO-OP City, including Building 33 including Apartment 14J from April 2012 through January 2017;

13. Communications with employees, agents or other representatives of the City of New York concerning applicable fire/building codes and rules for the installation of smoke and carbon monoxide detectors throughout the CO-OP City including Building 33 and Apartment 14J from April 2012 through January 2017;

14. Complaints, if any, made by residents of CO-OP City following the installation of Kidde smoke alarms from 2014 through January 2017;

15. All plans, specifications, drawings and other documents concerning the condition, repair, renovation, reconstruction, remediation and providing of fire safety throughout Building 33 from April 2012 through January 2017;

16. The training and/or communications with employees, agents or other representatives of Defendants/Third Party Plaintiff with respect to the installation of smoke detectors throughout Building 33 including Apartment 14J from April 2012 through January 2017;

17. Defendants/Third Party Plaintiffs' knowledge of CO-OP City apartment fires resulting in serious injuries or fatality from April 2012 through January 2017, including the October 25, 2016 fire in Apartment 13F at 4120 Hutchinson River Pkwy, and whether smoke detectors activated or failed to activate in such prior fire(s); and

18. The identity(ies) of all documents and physical evidence upon which Defendants/Third Party Plaintiff's rely in support of any of the above information.

Dated: December 10, 2019

By: /s/ Andrew J. Smiley

Andrew J. Smiley, Esq.
SMILEY & SMILEY, LLP
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New York, New York 10168
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212-986-2022
Attorneys for Plaintiff, Sarah Williams, as Guardian of the Person and Property of Stanley Williams

# *PART 202. Uniform Civil Rules For The Supreme Court & The County Court*

**Section 202.20-d Depositions of Entities; Identification of Matters.**

(a) A notice or subpoena may name as a deponent a corporation, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(b) Notices and subpoenas directed to an entity may enumerate the matters upon which the person is to be examined, and if so enumerated, the matters must be described with reasonable particularity.

(c) If the notice or subpoena to an entity does not identify a particular officer, director, member or employee of the entity, but elects to set forth the matters for examination as contemplated in section (b) of this Rule, then no later than ten days prior to the scheduled deposition:

(1) the named entity must designate one or more officers, directors, members or employees, or other individual(s) who consent to testify on its behalf;

(2) such designation must include the identity, description or title of such individual(s); and

(3) if the named entity designates more than one individual, it must set out the matters on which each individual will testify.

(d) If the notice or subpoena to an entity does identify a particular officer, director, member or employee of the entity, but elects to set forth the matters for examination as contemplated in section (b) of this Rule, then: (1) pursuant to CPLR 3106(d), the named entity shall produce the individual so designated unless it shall have, no later than ten days prior to the scheduled deposition, notified the requesting party that another individual would instead be produced and the identity, description or title of such individual is specified. If timely notification has been so given, such other individual shall instead be produced;

(2) pursuant to CPLR 3106(d), a notice or subpoena that names a particular officer, director, member, or employee of the entity shall include in the notice or subpoena served upon such entity the identity, description or title of such individual; and

(3) if the named entity, pursuant to subsection (d)(1) of this Rule, cross-designates more than one individual, it must set out the matters on which each individual will testify.

(e) A subpoena must advise a nonparty entity of its duty to make the designations discussed in this Rule.

(f) The individual(s) designated must testify about information known or reasonably available to the entity.

(g) Deposition testimony given pursuant to this Rule shall be usable against the entity on whose behalf the testimony is given to the same extent provided in CPLR 3117(2) and the applicable rules of evidence.

(h) This Rule does not preclude a deposition by any other procedure allowed by the CPLR.

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