BY DAVID PAUL HOROWITZ

David Paul Horowitz (david@newyorkpractice.org) is a member of Geringer, McNamara & Horowitz in New York City. He has represented parties in personal injury, professional negligence, and commercial cases for over 26 years. In addition to his litigation practice, he acts as a private arbitrator, mediator and discovery referee, and is now affiliated with JAMS. He is the author of *Bender's New York Evidence* and *New York Civil Disclosure* (LexisNexis), as well as the most recent supplement to *Fisch on New York Evidence* (Lond Publications). Mr. Horowitz teaches New York Practice at Columbia Law School and lectured on that topic, on behalf of the New York State Board of Bar Examiners, to candidates for the July 2016 bar exam. He serves as an expert witness and is a frequent lecturer and writer on civil practice, evidence, ethics, and alternative dispute resolution issues. He serves on the Office of Court Administration's Civil Practice Advisory Committee, is active in a number of bar associations, and served as Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee.

What I Learned at Deposition Boot Camp

Introduction

In the fall I participated in NYSBA's CLE "Deposition Boot Camp" held in eight locations throughout the state. I went into the program confident in my knowledge of deposition rules and practice, yet at each location I learned something about deposition practice I did not know before, often in response to pointed questions from the audience. I share some of what I learned below.

"To Enforce a Limitation Set Forth in an Order of a Court"

One of the main goals of the deposition rules (22 N.Y.C.R.R. 202.21) was to curb improper directions to a witness not to answer a question.

The rules provide, in part:

> § 221.2. Refusal to answer when objection is made
>
> A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person.

At the same time, one of the most beneficial aspects of the deposition rules was the clarification that there are circumstances, albeit limited, where a deponent may be directed not to answer a question.

Audiences always ask for examples of the second provision, "to enforce a limitation set forth in an order of a court," and I have always had but a single example to offer. When one party to a litigation has had an opportunity to have an expert examine certain real evidence in the action, and that evidence is thereafter lost, destroyed, or altered, courts often fashion relief by ordering that the expert who examined the evidence be deposed, while limiting the deposition to the expert's factual findings (measurements, photographs, diagrams, etc.) and specifically baring questions to the expert about her opinions. The idea is that once the expert who did not examine the real evidence has access to all of the facts the examining expert memorialized, the non-examining expert is able to form his own opinions.

Thus, my example has always utilized this scenario, stating that the attorney can direct the expert not to answer any questions calling for an opinion based upon the prior order of the court.

At the program in Syracuse, an audience member offered the scenario where a party is granted partial summary judgment on one or more claim or item of damages, and thereafter a deposition is conducted. If the questioning attorney questions the witness about the claim(s) or damage(s) which are no longer part of the case because partial summary judgment has been granted, the defending attorney can, and should, object to those questions unless there is a surviving claim or item of damages to which the question applies.

At the Melville program an attorney raised the scenario where there is a

> One of the most beneficial aspects of the deposition rules was the clarification that there are circumstances, albeit limited, where a deponent may be directed not to answer a question.

confidentiality order in place and the questioning of the witness veers into areas covered by the order. Once again, a situation where the deponent may be instructed by the defending attorney not to answer the question. This is also a scenario where an attorney other than the one defending the deposition may need to take action "to enforce a limitation set forth in an order of a court" where the defending attorney is unaware of, or unwilling to act to enforce, the confidentiality order. In that case, it may be necessary to immediately contact the court or suspend the deposition to permit a motion for a protective order to be made pursuant to CPLR 3103.

"An Attorney Shall Not Interrupt the Deposition"

Another of the major goals of the deposition rules was to address improper communications between deponent and witness after commencement of the deposition.

The rules provide:

> § 221.3. Communication with the deponent
>
> An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

At the program in Westchester an attendee asked a question so simple and straightforward that I (having read the rules countless times) was completely flummoxed: "The rule reads '[a]n attorney shall not interrupt the deposition for the purpose of communicating with the deponent.' Is there any limitation on the witness's ability to interrupt the deposition to communicate with her attorney?"

This caused a "humunah, humunah" moment on my part (though I did not take the easy way out by turning to my co-panelists and asking "which one of you wants to tackle this?"). I candidly said I did not know the answer, had not seen a case where this scenario occurred, but based upon CPLR 3113(c), I thought not.

> The deposition rules and relevant CPLR provisions cover most eventualities, and are not things you want to waive, or even tamper with.

CPLR 3113(c) provides:

> **(c) Examination and cross-examination.** Examination and cross-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. When the deposition of a party is taken at the instance of an adverse party, the deponent may be cross-examined by his or her own attorney. Cross-examination need not be limited to the subject matter of the examination in chief.

Because a witness at trial does not have the right to simply walk off the stand to confer privately with her attorney, and questioning "shall proceed as permitted in the trial of actions in open court," I feel comfortable in my answer. Of course, nothing prevents the witness saying to her attorney "can I talk to you for a minute," and then having the attorney make a determination as to whether or not he will take a break to talk to the witness.

I offer one aspect of my own deposition practice I changed some time ago with regard to the instructions I give a witness prior to my beginning questioning. For most of my career I would say something along the lines of:

> This is not meant to be a marathon, so if at any point you need to take a break, let me know and I will do my best to accommodate you. The only request I make is that you not make that request for a break while there is a question pending and you have not yet answered.

I then encountered the situation where I was in the middle of a critical line of questioning, the witness would answer a question, and then ask for a break. I would explain that I was in the middle of a line of questioning, and the witness would say, "but you told me I could take a break if I answered your question."

Now, I modify my instruction to "the only request I make is that you not make that request for a break while there is a question pending and you have not yet answered, or while I am in the middle of a line of questioning."

"The Usual Stipulations"

Every attorney, in every deposition, hears (often while stirring sugar in her coffee or perusing his newspaper) the court reporter ask, "Usual stipulations?" And all somnambulistically nod their heads affirmatively.

However, at a number of seminars in Western New York (no, Manhattan dwellers, that is not everything west of the West Side Highway) program attendees pointed out that the "usual stipulations" in their world include a provision that signing (and hence reviewing) of the deposition is waived by the deponent. Agreeing to this means that the provision of CPLR 3116(a) allowing the witness to review and make corrections to the deposition is waived. Not something I would consciously agree to.

So what exactly are we getting by agreeing to the "usual stipulations?" Most today parrot some version of the deposition rules and a number of CPLR provisions. However, you do not see the "usual stipulations" until

you get the transcript, at which point you have already agreed to them.

Asking the court reporter to read out the "usual stipulations" before stipulating is a possibility, but assumes that all of the attorneys are conversant with all of the depositions rules and relevant CPLR provisions (the triumph of hope over experience) and will catch something in that reporter's version of the "usual stipulations" that is unacceptable. So what to do?

I believe that the only CPLR provision that affirmatively requires waiver (so as not to drive court reporters or courts crazy) is the portion of CPLR 3116 (b) dealing with sealing and filing the transcript:

CPLR Rule 3116. Signing deposition; physical preparation; copies

> **(b) Certification and filing by officer.** The officer before whom the deposition was taken shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall list all appearances by the parties and attorneys. If the deposition was taken on written questions, he shall attach to it the copy of the notice and written questions received by him. *He shall then securely seal the deposition in an envelope endorsed with the title of the action and the index number of the action, if one has been assigned, and marked "Deposition of (here insert name of witness)" and shall promptly file it with, or send it by registered or certified mail to, the clerk of the court where the case is to be tried.* The deposition shall always be open to the inspection of the parties, each of whom is entitled to make copies thereof. If a copy of the deposition is furnished to each party or if the parties stipulate to waive filing, the officer need not file the original but may deliver it to the party taking the deposition. (Emphasis added).

With this single exception, the deposition rules and relevant CPLR provisions cover most eventualities, and are not things you want to waive, or even tamper with. So I plan, going forward, to make something along the lines of the following statement at depositions:

> I agree to waive the sealing and filing of the deposition transcript required by CPLR 3116(b), and otherwise acknowledge the application of the CPLR, deposition rules, and relevant case law.

I will then sit back and watch everyone else in the room go "humunah, humunah."

Conclusion

When the deposition rules were enacted in October 2006 the title of this column was *Can an Old Dog Learn New Tricks?* Well, this old dog has learned a few new tricks to use in 2018, courtesy of Deposition Boot Camp participants.

Speaking of 2018, I hope yours is off to a good start, and wish everyone a happy, healthy, and professionally satisfying New Year. ■