

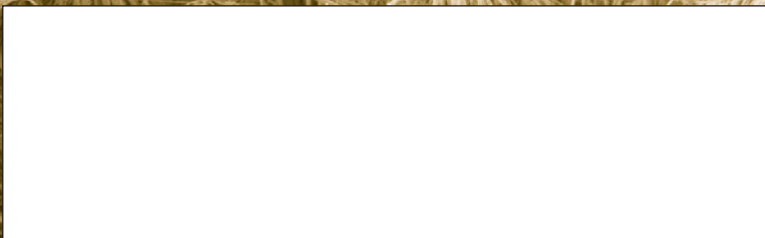
# TRIAL TALK

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# A Radically New Approach to the Taking of the Deposition of the Defendant in an Auto Case

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## A. Introduction

Experienced auto litigators often give short shrift to the taking of the defendant driver's deposition because they have done dozens or even hundreds of them. Some attorneys don't even take the defendant's deposition when liability is admitted or when liability is not admitted but beyond doubt. When liability is at issue, many attorneys follow a checklist or outline. And some attorneys totally wing it because they have taken so many depositions. The purpose of this article is to encourage plaintiff attorneys to utilize a radically new approach to the taking of defendant drivers' depositions - in large part to depose the defendant as if he or she were a plaintiff, to stay on theory and theme, and to spend much more time and effort on the early "housekeeping" details.

## B. Theory and Theme

Suppose that you are taking the deposition of the defendant in a rear end collision case. You can do that in your sleep, right?

Not necessarily. Suppose the defendant driver was a delivery driver for Dominique's Pizza. What difference does that make? Would it make a dif-

ference if Dominique's Pizza did not charge for pizzas that were not delivered within thirty minutes of being ordered? You bet. Would it make a difference if the delivery driver receives bonuses based upon on-time and early deliveries? Absolutely.

If you follow the usual script with the Dominique's Pizza's delivery driver then you would be woefully derelict in your duties. Why? Because the theory of your case would not be the driver's failure to pay attention, it would be the driver's intentional speeding in order to deliver pizzas early in order to earn bonuses.

The theory of your case determines much of the structure, strategy and substance of the deposition - especially when motivation is involved in the defendant's conduct. If motivation is involved, then intentional conduct is usually present. In the Dominique's Pizza example, the driver is motivated to speed and thus his speeding is probably intentional. Your questions must delve deeply into the driver's motivations and intentions so that the case is not about simple carelessness but about intentional or reckless driving. And you must delve even deeper. The issue is not simply the driver's motivation, but Dominique's Pizza's motivation. Why

is Dominique's Pizza paying bonuses to its drivers to deliver pizzas within thirty minutes? So it can advertise fast delivery and increase sales and make more money. The theory of your case, then, is not just the delivery driver's motivation and intentions, but Dominique's Pizza's motivations and intentions as well. Now consider the fact that Dominique's Pizza has 200 delivery drivers in the state. What potential impact does that have upon the public?

The deposition of Dominique's Pizza will be separate from the deposition of the delivery driver but it must be kept in mind in the preparation of the delivery driver's deposition. Further, there first must be extensive interrogatories and requests for production to Dominique's Pizza in order to obtain documents and information about its bonus and incentive programs and practices as well as the driving history of not only the delivery driver but all of its drivers as well.

After developing the theory of the case, you must develop the theme of the case. It's not "The delivery driver didn't pay attention and slammed into the back of my client's car and injured him." It's not, "Haste makes waste," although that's a lot better. The theme must capture the underlying motivation and ideally will contain language from the defendant.

Developing the theme requires playing around with sample opening and closing snippets:

“My client John Doe will be paying for Dominique’s Pizza’s fast free delivery for the rest of his life. It was fast but it wasn’t free. It was fast free reckless delivery. It cost John his health, his job and much of his family and social life. Yet Dominique’s Pizza rakes in millions of dollars through their legions of speeding and reckless delivery drivers. Dominique’s Pizza consciously, deliberately and affirmatively chose to motivate their drivers to speed in order to rake in the profits, and their delivery driver Billy Smith consciously, deliberately and affirmatively chose to speed in order to earn a \$200 bonus for the month. You’ve probably heard the saying, ‘Haste makes waste,’ but in this case it’s ‘Greed makes speed.’”

After development of the theory of the case and the theme (and maybe subthemes), you are ready to determine the objective of the deposition and to plan and prepare the deposition structure, substance and strategy.

## C. The Objective of the Deposition

The objective of a deposition is not to discover information. The discovery of information is **an** objective of a deposition but it is not usually **the** objective.

What do I mean by this? When I was a brand new attorney working on a building fire case, I did most of the grunt work for the senior partner including preparing a deposition outline for the deposition of the owner of the building in which our client was a tenant. Our client’s restaurant was severely damaged by a fire that started in another part of the building and our client was put out of business. The senior partner’s deposition questioning started off like this:

That’s a nice watch. That a Rolex?  
Is that your Mercedes in the parking

lot? How much did that set you back?

How many cars do you have? What kinds?

Jimmy tells me you got a place on Hilton Head. That must be nice.

And so on.

The senior partner did not ask him one single question about the building or anything else about the case. The case settled a couple of days later. I guess the building owner got the message about excess liability.

## D. Structure: Chapters

Instead of making long outlines, try using chapters instead. There should be one chapter to a page. Each chapter is limited to one topic. For example, there may be a chapter on driving history, a chapter on pay, a chapter on bonuses, etc. and the topic should be the title at the top of each page. The chapter pages should be contained in a three ring binder so you can access them easily and move them around as you are determining the sequence of questioning.

The chapter (part of a chapter) on pay may look like this:

### PAY

Do you get paid for working for Dominique’s Pizza?

Why?

But why is it important to get paid?

Why is it important to have money?

So you have to pay rent?

You have to make car payments?

You have to pay the utility bills?

You have to pay for food?

Do you ever eat out?

Go to the movies?

These are seemingly strange questions to ask a defendant driver, but remember – the objective of a deposi-

tion is not to get information; it is an objective. The significance of these questions will become apparent later in this article.

## E. Housekeeping and Rules

Most attorneys do a perfunctory job on housekeeping details. By housekeeping details, I mean the instructions about verbal answers, only one person talking at a time, etc. I recommend that you do a thorough job. Why? To set up the rules. I also recommend that you don’t explain all the housekeeping details, but make the deponent explain some of them to you.

For example, don’t say this:

*It is important for you to give verbal answers to the questions because the court reporter is typing everything that is said and if you nod or shake your head then she will have to type that you are nodding or shaking your head, etc.*

After a short intro, try this:

Now I’m going to go over the ground rules for this deposition. I am going to be asking you questions and I would like for you to give me verbal answers instead of shaking or nodding your head. Why do you think that’s important?

I ask that you wait until I finish my question before you begin answering it. Why is that important?

Do you understand that you are testifying under oath? Why do you think that this testimony is under oath?

[Continue with the ground rules.]

Do you understand that this case is governed by the Colorado Rules of Civil Procedure? Why should we follow rules of procedure?

Do you understand that the trial in this case will be governed by the Colorado Rules of evidence? Why should we follow rules of evidence?

There are a lot of rules we have to follow.

Do you have to follow any rules in your life?

At work? What rules?

Yeah, what specific rules do you have to follow at work?

Why does that rule exist?

Why is it important to be safe?

What would happen if you broke that rule?

Do you have to follow any rules at home? What rules?

Do you have any children?

Do you make rules for them to follow? Why?

What do you do when they break the rules?

Do you belong to any organizations? Do they have rules?

Are you familiar with the "Pottery Barn Rule?" "You break it you pay for it."

What do you think about that rule?

Etc.

[You now have demonstrated that rules are pervasive, that rules are important, that there are good reasons for rules, that people get hurt when rules are broken, and that there are consequences for breaking rules. You can go into the rules of the road now if you like, but I like to go to injuries and damages before getting into liability.]

## F. Injuries and Damages

By now, after going through all the rules, the defense attorney thinks I'm a little odd and maybe obsessive-compulsive, but this next section is really going to drive him or her bonkers. This is when I depose the defendant kind of like he was the plaintiff.

Do you own a car? Did you drive it here?

It's parked outside?

If somebody comes in here and says

that they backed into your car, what would you say to them?

What would you do about your smashed-in fender?

Why would you ask them to pay for it?

But it was an accident, wasn't it?

How much would you want them to pay?

Why 100%?

What if they didn't tell you that they had backed into your car but somebody else told you that they did? Would you still ask them to pay for the damage? Why?

But if they didn't tell you themselves and you didn't see it, then how would you know they did it?

But you couldn't be 100% certain that they did it?

Why would you still insist that they pay for it?

What if you were only 75% sure that they did it, how much would you ask them to pay?

100%? Why not 75%.

What if you were only 60% sure? 50% sure?

If they refused to pay, what would you do?

Would you sue them?

[Now, a change of pace to injury.]

What do you think about people suing for personal injuries?

People shouldn't sue for injuries?

Only severe ones?

What if your child was in the parking lot standing beside your car and



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somebody backed into your car and also hit your child breaking his leg?

You would not ask that person to pay for your child's medical bills?

How much of the medical bills should the person pay?

Why all of it? But it was an accident, right?

What if you didn't see it and you were only 60% sure that they did it, how much would you ask them to pay?

But you wouldn't sue them if they refused to pay for the medical bills?

Why would you sue them?

[If the deponent says he would not sue the at-fault driver for his child's injuries after having said that he would sue the at-fault driver for his car damage, then the deponent is in a bad place.]

Suppose that your child missed a week of work because of the broken leg. Would you ask the at-fault driver to pay the lost wages for that week?

How much? Why all of it?

Does your child play sports? Good at it?

What if your child lost her soccer scholarship? How would she feel about that? How would you feel about that?

Do you enjoy watching her play soccer? Why? Why is that important?

What else does she enjoy to do?

Is that important? Is that valuable?

[The defense attorney thinks you're an idiot for asking all these ridiculous questions – until. . . Until he or she starts imagining these answers coming from the defendant's mouth from the witness stand at trial. That's when the objections and arguing starts. But stay with it until you finish all the elements of damages. Then you can go to the traditional deposition questioning.]

## G. Traditional Deposition Questioning

You can do the traditional deposition questioning but be much more detailed than usual. And when you get to the plaintiff's injuries in the crash, ask about the defendant's injuries as well. This will almost certainly trigger an objection. If it does and the defendant refuses to testify about his or her crash injuries, then switch to asking the defendant about his observations and personal knowledge of injuries suffered by family members and friends.

Has anyone in your family ever been injured?

Your wife? Tell me about her injuries.

She had neck and back pain from a rear end collision?

How much property damage? Only \$600?

Did your wife make a claim for her injuries?

How much did the insurance company offer her? \$500?

What did your wife feel about that? How did you feel about that?

[Depending upon the injuries and damages, you might be able to have the defendant vouch for injury from low speed impacts, injury and pain from invisible injuries, persistence of injuries and pain, restriction of activities of daily living, etc.]

## H. Stay on Theory and Theme

If the theory is reckless driving due to bonus pay, then you should seek support for that theory and theme.

For example:

If you delivered all pizzas on time for the month, would you get any recognition or benefits? What?

Did you always obey the speed limit while delivering pizzas?

Did you get any speeding tickets?

You got two within one year while working at Dominique's Pizza?

How many in the year before that? None?

Year before that? None?

## I. Conclusion

Remember, the objective of a deposition is not to discover information. The discovery of information is **an** objective of a deposition but it is not usually **the** objective. Put time and thought into determining the prime objective of the deposition as well as the secondary objectives. Stay on theory and theme and use the defendant to prove the plaintiff's damages. And most of all, turn off the auto pilot and get creative.

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