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Two important and medically related depositions

THE *MORADI* DEPOSITION AND THE UNDERINSURED DEFENDANT; THE TREATING DOCTOR

I am coming up on my eight-year anniversary of being a plaintiff's personal-injury trial attorney, and every year that passes, I am more confident about this: Medical care through insurance is better than treating on a lien. It is better for a variety of reasons, but some of the main ones are: (1) the insurance companies value the injury – not the medical bills; (2) if you present your case correctly, the jury should also value the injury – not the medical bills; and (3) treatment through insurance is "clean" and does not subject your client to harsh cross-examination questions by the defense (attorney-referred care, how many other times the physician has worked with your firm, etc.).

Unfortunately, a lot of our clients who have been injured from the negligence of a defendant do not have health insurance. When this is the case, they treat their injuries on a lien basis. But what if your client's injuries require extensive medical attention and the negligent defendant that caused the injuries had little to no insurance coverage? You could not advise your client to sign a lien agreement because there would be no money to pay the bills off at the conclusion of the case and the physicians would have significant contract reimbursement rights against your client.

Is your client out of luck? Not yet. Don't give up.

Ask the insurance adjuster for a limited, prelitigation deposition targeted toward finding additional avenues of recovery. Tell the adjuster that if they do not agree, you will immediately file the lawsuit and get the deposition anyway. On the other hand, this limited, prelitigation deposition will streamline the process and can lead to a quick resolution. Spoiler: They always agree to the deposition.

Below is the law that you need to be familiar with so that you can tailor your prelitigation deposition questions to find an additional insured and more coverage for your client.

The going and coming rule

An employee going to and from work, or to meals, is ordinarily considered outside the scope of employment during the period. (See *Carnes v. Pacific Gas & Elec. Co*. (1937) 21 C.A.2d 568, 571.) Their employer is therefore not liable for their conduct when it falls within this rule.

Vehicle-use exception to going and coming rule

Broadly, the rule is that if an employee is *required to use their vehicle for work purposes*, their commute to and from work falls *within* the course of employment. (*Moradi v. Marsh USA, Inc*. (2013) 219

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Cal.App.4th 886, 907-908; *Pierson v. Helmerich & Payne International Drilling Co*. (2016) 4 Cal.App.5th 608, 624-630.)

Given this very important exception established by the *Moradi* case, my law firm calls these prelitigation depositions, "*Moradi*" depositions.

The cases invoking the required-vehicle exception all involve employees whose jobs entail the regular use of a vehicle to accomplish the job, as opposed to employees who use a vehicle to commute to a definite place of business. (*Tryer v. Ojai Valley School Dist*. (1992) 9 Cal.App.4th 1476, 1481.)

Commute time is within the scope of employment if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has reasonably come to rely on its use and to expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment. (*Lobo v. Tamco* (2010) 182 Cal.App.4th 297.)

The drive to and from work may also be within the scope of employment if the use of the employee's vehicle provides some direct or incidental benefit to the employer. There may be a benefit to the employer if (1) the employee has agreed to make the vehicle available as an accommodation to the employer, and (2) the employer has reasonably come to rely on the vehicle's use and expects the employee to make it available regularly. The employee's agreement may be either express or implied. (*Pierson*, 4 Cal.App.5th at pp. 624-630; *Smith v. Workers' Comp. Appeals Bd*. (1968) 69 Cal.2d 814, 815.)

Social or recreational activities

"[W]here social or recreational pursuits on the employer's premises after hours are endorsed by the express or implied permission of the employer and are 'conceivably' of some benefit to the employer or, even in the absence of proof of benefit, if such activities have become 'a customary incident of the employment relationship,' an employee engaged in such pursuits after hours is still acting within the scope of his employment." (*Rodgers v. Kemper Construction Co*. (1975) 50 Cal.App.3d 608, 620; see also *Childers v. Shasta Livestock Auction Yard, Inc*. (1987) 190 Cal.App.3d 792, 804.)

Business-errand exception

If the employee, while commuting, is on an errand for the employer, then the employee's conduct is within the scope of his or her employment from the time the employee starts on the errand until he or she returns from the errand or until he or she completely abandons the errand for personal reasons. (*Jeewarat v. Warner Brothers Entertainment, Inc*. (2009) 177 Cal.App.4th 427, 435-436.)

Compensated travel time

If an employer has agreed to compensate an employee for his or her commuting time, then the employee's conduct is within the scope of his or her employment as long as the employee is going to the workplace or returning home. (*Lynn v. Tatitlek Support Services, Inc*. (2017) 8 Cal.App.5th 1096, 1111.)

"[T]he employer may agree, either expressly or impliedly, that the relationship shall continue during the period of 'going and coming,' in which case the employee is entitled to the protection of the act during that period. Such an agreement may be inferred from the fact that the employer furnishes transportation to and from work as an incident of the employment. It seems equally clear that such an agreement may also be inferred from the fact that the employer compensates the employee for the time consumed in traveling to and from work." (*Kobe v. Industrial Acci. Com*. (1950) 35 Cal.2d 33, 35.)

Taking the "*Moradi*" deposition

Now you have the law in order to bring in the defendant's employer with the insurance coverage they need to get the medical care they require. Here is what a *Moradi* deposition might look like. Please note these are just jump-off topics for questions and you should always follow up!

- **Introduction, rules, documents**
- **Background information**: Renters or homeowners' insurance; other vehicles; all insurance policies.
- **Work experience**: Current employment/at time of incident; ownership interest; title/duties; work vehicle(s); car allowance; work pay for cell phone or insurance; known insurance with the business.
- **Vehicle information**: Type; own/lease/rent; title; primary drivers and permissive drivers; registered to a business; insured under a business; policy limits; excess/umbrella coverage; personal or work vehicle.

Moradi questions

Is one of your work responsibilities developing new business? Do you use your personal vehicle to engage in sales or client development? If you use your personal vehicle to engage in sales or client development, at which type of

Last September I had the honor of speaking at CAALA's Las Vegas Convention for the first time in my career. The topic was Medicine for Lawyers and I decided to speak about two issues that I don't hear discussed very often: (1) an effective way to find additional insurance coverage so your client can get the medical care he or she needs; and (2) noticing and deposing the treating doctor(s) via video recording.

After my discussion, I was pleasantly surprised by the positive feedback and follow-up questions I received from CAALA members. I was, and still am, delighted to send all materials I have to help each of you. I am only here today because my CAALA mentors did the same for me.

Fast forward to January of this year and CAALA once again reaches out to me to discuss the same topic! This time, in a written format. Given the overwhelming response I received from my Vegas discussion, and at the risk of sounding repetitive or lazy, with this article I take a deeper dive into the same topics because they have helped my practice and clients so much.

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places? Would you regularly conduct such sales and client development activities?

Are you required to use your personal vehicle for business travel? Does your employer reimburse you for mileage? Do you drive to work in your personal vehicle? Do you drive home from work in your personal vehicle? Does your employer require you to drive to and from your office in your personal vehicle? Does your employer expect you to be able to use your personal vehicle for work-related activities on a regular basis?

Do you use your vehicle to visit prospective clients? Do you use your vehicle to meet with prospective clients before regular work hours? Do you use your vehicle to meet with prospective clients during regular work hours? Do you use your vehicle to meet with prospective clients after regular work hours? Do you use your vehicle to develop new business before regular work hours? Do you use your vehicle to develop new business during regular work hours? Do you use your vehicle to develop new business after regular work hours?

Do you use your vehicle to transport company materials to work-related destinations? Do you use your vehicle to transport co-employees to work-related destinations? Does your employer permit you to stop and see perspective clients on the way home from work?

Since starting employment, did you regularly carpool to work in another person's vehicle? Since starting employment, did you regularly walk to work? Since starting employment, did you regularly use public transportation to get to work? Since starting employment, did you regularly get dropped off at work by someone else? Since starting employment, did you ever travel from your home directly to a work-related activity outside of your office? Since starting employment, did you ever use your personal vehicle to attend off-site appointments and meetings?

Day of incident

On [date of loss], did you use your personal vehicle to drive to work? On [date of loss], did you use your personal vehicle to drive home from work? On [date of loss], did you use your personal vehicle for work-related activities? Before you got to your office on [date of loss], did you go anywhere in your personal vehicle before getting to the office? If you went somewhere before getting to the office in your personal vehicle on [date of loss], where did you go? If you went somewhere before getting to the office in your personal vehicle on [date of loss], who, if anyone, were you with when you stopped at the location(s)?

After you left your office on [date of loss], did you go anywhere in your personal vehicle before going home? If you went somewhere before going home in your personal vehicle after you left your office on [date of loss], where did you go? If you went somewhere before going home in your personal vehicle after you left your office on [date of loss], who, if anyone, were you with when you stopped at the location(s)?

Did you have any plans to use your personal vehicle for business travel on the day after the subject incident? Did you have any work-related materials inside of your personal vehicle at the time of the subject incident? If you had any work-related materials inside of your personal vehicle at the time of the subject incident, please identify those materials. At the time of the subject incident, were you driving away from a location where you were engaged in work activity?

Assets

All bank account details; 401k; stocks/bonds and accountant information.

You are looking for a benefit to the employer from having the defendant employee's car available to the business. Hopefully, you get favorable testimony such that your client can move forward with a lawsuit against a collectable defendant and get the medical care they desperately need.

Why video-record your client's treating doctor's deposition

Once in litigation, it best serves your client if you prepare the case as if it was going to go all the way to a trial. One critical step in that preparation is deposing your client's main treating physician(s).

Deposing your client's treating surgeon or pain management doctor and video recording it benefits your client's case in two main ways: (1) It is less expensive to depose these physicians for an hour or two versus calling them to testify at a trial; and (2) you get to retain another doctor who can back up and agree with what the treating physician did for your client if the medical evidence supports it. So, at trial you get to (a) designate and play your treating physician conclusions (not opinions!) about your client's injuries and treatment and then (b) call your retained doctor to the stand to discuss it (along with other matters).

Video-recording the deposition and using it in trial

Code of Civil Procedure section 2025.330, subdivision (c) states in part: The party noticing the deposition may also record the testimony by audio or video technology if the notice of deposition stated an intention also to record the testimony by either of those methods, or if all the parties agree that the testimony may also be recorded by either of those methods.

Code of Civil Procedure section 2025.620, subdivision (d) states: Any party may use a video recording of the deposition testimony of a treating or consulting physician or of any expert witness even though the deponent is available to testify if the deposition notice under section 2025.220 reserved the right to use the deposition at trial, and if that party has complied with subdivision (m) of section 2025.340.

Code of Civil Procedure section 2025.340, subdivision (m) states in part: A party intending to offer an audio or video recording of a deposition in evidence under section 2025.620 shall notify the court and all parties in writing of that intent and of the parts of the deposition to be offered.

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So, in your deposition notice, state: Please take notice that the deposing party intends to cause the proceedings to be recorded stenographically, through the instant visual display of testimony and by videotape. Please take further notice that under Code of Civil Procedure sections 2025.340(m) and 2025.620(d), Plaintiff reserves the right to use at trial (during opening, direct, cross examination, closing, rebuttal or any other time) the video recording of the deposition.

Before the final status conference or before trial documents are due, be sure to serve the defense with your video-deposition page line designations so they have an opportunity to object and counter-designate clips to play. Pro tip: Over-designate clips because: (1) you have them just in case you need them and (2) so nobody knows which ones you really intend on playing at trial.

What to ask in the treating doctor's deposition

Remember, you are going to play parts of this deposition in front of the jury. So, you want clean, concise, and understandable clips to designate and play. Below is a general outline that I use. Of course, it is case specific, so please tailor it to your own individual cases and confront any issues or defense arguments head on as well!

- Good afternoon, Dr. Doe. What is your occupation?
- What kind of doctor are you?
- Can you tell the jury about your educational background?
- Are you board certified?
- What does board certified mean?
- What are you board certified in?
- What does your practice of (orthopedics) involve?
- When you became a doctor, did you take an oath?
- To do no undue harm to your patients and help them the best you can?
- Is [plaintiff's name] your patient?
- [Plaintiff's name] became your patient when he came to see you on [enter first date of treatment]?
- And you saw [plaintiff's name] X times?
- So, that oath you took when you became a doctor, to help your patients as best you can, applies to [plaintiff's name]?
- What was the primary purpose of [plaintiff's name] seeing you?
- [Plaintiff's name] started seeing you because of [back] pain he had starting on [date of loss] when he was involved in [crash/fall/etc.]?
- And despite trying to get rid of it through other means, nothing was really helping, so he came to you for help?
- Your job as his doctor, was to try and make him feel better?
- Ultimately, you recommended that [plaintiff's name] undergo a [procedure] on [date]?
- Why?
- Now, is [procedure] something that patients get right away or is it a last resort when someone is in pain?
- Are there risks involved with [procedure]?
- Did you disclose those to [plaintiff's name]?
- Despite these known and disclosed risks, [plaintiff's name] ultimately went forward with the [procedure] with you because he was in so much pain in his [body part]?
- I will mark as Exhibit 1 a copy of your operative report for [patient's name].
- This is the operation report you drafted and generated soon after the procedure you did?
- And you created these in the ordinary course and scope of your business?
- And the contents in this report are truthful, accurate, and reliable?
- I'd like to stipulate to the admission of the surgical report for all purposes including trial. (If the operative report is good for you, why not admit into evidence!)
- You performed a [L4-5 discectomy and decompression] procedure for [plaintiff's name] after more conservative care failed to help his [back] pain?
- And how many of these procedures have you done in your career to help your patients?
- Can you walk us through the procedure you did to help [plaintiff's name], please?
- Doctor, do you believe your care for [plaintiff's name] and the procedure you performed for him was medically reasonable and necessary to a reasonable degree of medical probability?
- And do you believe [plaintiff's name]'s injury that you treated with [procedure] was a result of the subject incident that occurred on [date of loss] to a reasonable degree of medical probability?
- Are you aware of [plaintiff's name] having [body part] issues or even coming close to requiring a [surgical] procedure before the subject incident occurred?
- When one undergoes a procedure like the one [plaintiff's name] underwent, does that mean they are going to be in the clear without the need for future medical care moving forward?
- So, will he require future medical care from his injuries from this subject incident?
- What will he need?
- These future recommendations are reasonably certain to occur to a reasonable degree of medical certainty?
- And all caused from the subject incident from [date of loss]?
- Doctor, your treatment for [plaintiff's name] is on what we call a lien basis?
- Is that an agreement you entered into with your patient to help him by stalling out collection of the bills until his case is over?
- However, regardless of the outcome of the case, [plaintiff's name] is still responsible to pay your bills in full?
- You have testified in the past as an expert on other cases on reasonable cost of medical treatment?
- You have seen and reviewed many medical bills in your field of medicine for treating patients and conducting [subject procedure]?
- Where do the bills stand right now for everything for [plaintiff's name] – your care, the [procedure], the surgery center?
- Is that a reasonable cost based on your training and experience to a reasonable degree of medical probability?

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- And that number does not include the surgery center cost?
- And why is that separate?
- I want to ask you about some defense opinions in this case, OK?
- Is degeneration the normal aging process in the spine that we all go through?
- So, as we get older, we all have degeneration in the spine, which includes the back and neck?
- And we can live our lives and see these degenerative changes on MRI and never have pain?
- But if someone that has non-symptomatic degeneration in their back or neck, is involved in a traumatic incident, that can light up the degeneration and make it painful?
- And in that situation, the pain generator is the incident and not the degeneration?
- A defense-hired doctor might say that [plaintiff's name] did not require the [procedure] based on their interpretation of the MRI films only – do you determine whether a patient requires a [procedure] just by reviewing MRI films?
- You also need a history from the patient?
- And you also need to examine the patient to determine what continues to hurt them?
- And then on top of those two things, that is when you look at an MRI to correlate all the findings together?
- And you did all three of those things for [patient's name]?

I have two cases right now in my personal portfolio (way more firmwide) where I took the *Moradi* depositions prelitigation and filed suit against a newly discovered employer. On both of those cases, I have already deposed and videorecorded the treating surgeons. Now you know why.

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