

# DEPOSITIONS

J. Alexander Tanford, 2001

## I. PRELIMINARY MATTERS

### A. WHOM DO YOU DEPOSE?

- The adverse party
- The important adverse witnesses if you have time and money to do so
- Your own witnesses only if you know they will be unavailable at trial

### B. WHAT TO DO BEFORE YOU EVEN THINK ABOUT DEPOSITIONS

- Interview your client
- Review relevant documents from your client
- Review all pleadings
- Visit the physical location of known events (e.g., client's home, school that child vandalized)
- Conduct preliminary legal research. You don't know what to ask until you know what the law is.
- Consult with experts if a question of medicine, mental condition, or other area of expertise is involved.
- Obtain public records and reports connected to the case (e.g., police report of domestic violence).
- Make sure your opponent has complied with Rule 26 mandatory disclosure

## II. TAKING A DEPOSITION

### A. PRE-DEPOSITION PLANNING

- ***Re-read Trial Rules 26, 28, 29, 30, and 37, and any applicable Local Rule.***
- Estimate how long you think deposition will take -- then double it
- Draft a Notice of Deposition (and subpoena if a non-party -- Rule 45). If you want the deponent to bring any documents, you will need to prepare a subpoena duces tecum or Rule 34 notice. Do not actually send this notice yet.
- If deponent has an attorney, call attorney to arrange mutually agreeable time and place for deposition. Seek stipulation to use videotape deposition.
- Contact notary public and official who will conduct the deposition (may be the same person). Confirm time, place, and procedure. If videotape will be used, make arrangements with video technician. NOW send the notice.
- Prepare detailed outline based on sample outline in subsection D, below..

### B. SCOPE OF WHAT YOU CAN ASK ABOUT IN A DEPOSITION

#### 1. *What Are the Legal Boundaries on What You Can Ask?* During a deposition, you may ask about:

- Just about anything
- Any non-privileged stuff that is relevant (even remotely) to the subject matter of any claim or defense involved in the pending action.
- Potential witnesses -- the existence, identity, names, addresses and other information about potential witnesses.
- Documents and exhibits -- the existence, description, nature, custody, condition and location of documents

and tangible items that are potential exhibits. You can show exhibits to the deponent and get them authenticated.

- Seemingly irrelevant information reasonably likely to lead to the discovery of admissible evidence.
- Potential impeachment evidence, including criminal record, prior statements, biases and prejudices, and information like social security numbers and prior addresses that might lead to impeachment evidence.
- Insurance information -- they have to tell you policy limits
- Potential expert witnesses -- the identity of expert witnesses who may be called at trial, their opinions, and the reasons for those opinions.

You may **NOT** ask about:

- Privileged communications made to an attorney, doctor, therapist, etc.
- The deponent's trial preparation material (sometimes called work-product, sometimes privileged), consisting of documents, reports, or other writings prepared by the deponent specifically for this case in anticipation of litigation, regardless of whom they were prepared for.
- Nontestifying experts -- the names, addresses, and opinions of expert consultants who will *not* be called at trial.
- Anything covered by a Rule 26 Protective Order

#### C. SHOULD YOUR CLIENT ATTEND?

No.

#### D. SHOULD YOU WAIVE THINGS AND STIPULATE TO STUFF AT THE BEGINNING OF A DEPOSITION?

No. Stipulations are rare, and should be worked out in writing well in advance of the deposition.

#### E. A TYPICAL DEPOSITION OUTLINE

- **Formalities at beginning of deposition**

1. Ask the court reporter if s/he is ready.
2. State in a loud, clear voice that the deposition is beginning.
3. Identify by name and connection to the case, *everyone* who is in the room. If a mouse runs by, get his name and put it on the record.
4. Ask the notary public to swear in the deponent.
5. Ask the deponent to state his or her name and spell it.
6. Explain to the deponent the procedures for conducting the deposition, e.g.:

*Mr. Deponent, I am Alexander Tanford, an attorney with the Community Legal Clinic. I represent Ms. Plaintiff. This is a deposition, in which I will ask you questions and you must answer them truthfully unless your attorney tells you clearly and directly not to answer. Although no judge is present, this is a formal legal proceeding just like testifying in court, and you are under the same legal obligation to tell the truth, the whole truth, and nothing but the truth. If you do not understand any of my questions, feel free to say so, and I will rephrase it. Before the deposition can be used in court, you will have the opportunity to read over it and correct any mistakes. Do you understand this?*

7. If the deponent was supposed to bring documents, ask for them to be produced. Give them to the court reporter and ask him/her to mark them as exhibit one, two, three, etc. Describe them verbally as you do, e.g.

*Reporter, please mark this copy of John Doe's 1995 federal tax return as exhibit one.*

After they have been marked, ask the opposing attorney if s/he would like to see them, and put it on the record, e.g.:

*Mr. Cochrane, would you like to see exhibit one?*

● **Outline of topics to cover in deposition**

1. Deponent's background
  - Name, address, age, date and place of birth, all places lived, social security number
  - State of deponent's health, including drug/alcohol use, disabilities, eyesight and hearing, mental illnesses, and whether deponent has ever been under the care of a doctor or therapist
  - Criminal record
  - Names, ages & other information about spouses, children, parents
  - Previous marriages or children, including grounds for divorce and custody arrangements
  - Current job, including hours, salary, benefits
  - Job history, including reasons for leaving prior jobs
  - Educational background, including suspensions and expulsions
  - Financial information, assets, bank accounts, investments, real property owned
  - Ownership of cars, boats, RVs and other major assets
  - If deponent represents a corporation, ask about its structure, official name, licenses, and names of important corporate officials.
2. Deponent's overview of events in narrative form, without interrupting to ask for details.
3. Factual chronology of events
  - Try to find earliest relevant point in time, then move chronologically
  - Ask about sources of information
    - Did you see it personally?*
    - Who told you about it?*
    - Where did you read about it?*
  - Ask deponent to describe and draw diagrams of important locations
  - Ask for names and addresses of every person mentioned during the chronology
  - Ask for specific details of any statements about anxiety, depression or other mental condition
4. Other similar conditions and events
  - For each important event deponent discusses, find out whether deponent has been involved in any similar events before or after.
5. Documents
  - Authenticate existing documents [hand to deponent and ask him/her to identify]
  - Get explanations of any codes or abbreviations on records
  - Ask if there are any related documents
  - Ask for explanation of deponent's record-keeping practices
  - Ask if the deponent knows of any documents in the possession of others
  - Ask if the deponent has a personal diary, journal or calendar covering the relevant times
6. Go over allegations in pleadings
  - Plaintiff should ask defendant to explain reasons for each denial in the answer.
  - Defendant should ask plaintiff to explain reasons for and give the details of the basis for each allegation
  - If defendant counterclaimed, plaintiff should ask for an explanation and the factual basis for each allegation in the counter-claim.
7. Go over factual assertions in third-person reports
  - Ask for admission, denial, explanation and details of any incidents mentioned in reports by police, welfare workers, school officials, etc.
8. Make a list of all allegations about the deponent's conduct made by your client and deponents; arrange them in order, and ask deponent for admission, denial, explanation and details, but do not say who told you.
  - Good: *On March 21 at her mother's trailer, did you hit Sally with a baseball bat? Did you hit her at all? What do you say happened at that encounter?*
  - Bad: *Sally and her mother both say you hit Sally with a baseball bat on March 21. Is this true?*

9. If any damages are claimed, go over basis for them
  - How were dollar figures calculated?
  - Are there bills or other written documents to support claim?

- **End of deposition formalities**

1. Explain that any exhibit will remain in the custody of the court reporter, annexed to the deposition itself. If the deponent needs the original for some legitimate reason, a copy may be substituted. Do it *now*. State that there will be a 5-minute adjournment while a copy is made. Make the copy. Reconvene the deposition and have the copy marked and obtain agreement that it is true and accurate. E.g.

*We are back. Let us resume the recorded deposition. Reporter, please mark this photocopy of deponent's appointment calendar as exhibit nine. I have examined it and am satisfied it is a true and accurate copy of the original. Mr. Cochrane, I am handing it to you, and would ask that you examine it and state any objections to its accuracy for the record. Hearing no objection, let us continue.*

2. State that you have no more questions.
3. The opposing attorney has the right to ask a few questions for clarification or rehabilitation, but does not have the right to conduct a lengthy interrogation.
4. After the opponent has asked his or her questions, state that the deposition is ended.
5. If the other attorney asks if you will stipulate to a waiver of the reading, signing etc., you should politely decline, because you don't know what s/he's talking about..

#### F. HOW TO ASK GOOD DEPOSITION QUESTIONS

- Ask simple, direct, one-topic questions.
- Explain what you want -- phrase your broad questions as clear instructions, e.g.,
  - Tell me everything you remember about that conversation.*
  - Please tell me exactly what steps you took.*
- Think in paragraphs -- identify a topic, ask a general question, then ask who, what, where, when, why and how, then use a closing question -- "Anything else you can think of?"
- In general, follow "funnel" sequence suggested in interviewing: Broad questions first, followed by directed questions, followed by narrow questions to nail down specific facts.
- Don't try to slant questions toward your side or persuade witness she is wrong -- remember that the whole purpose is to discover what the witness will say at trial.
- Be curious -- probe, ask why, ask witness what s/he was thinking
- Follow up generalizations and opinions with requests for details
- Pay close attention to the response
- Insist on responsive answers; if witness doesn't answer, repeat the question.
- If the witness is unsure, ask for an estimate or opinion; ask if there are any records of the fact forgotten
- Watch the deponent, not your notes
- Take notes only to remind yourself to ask a question not in your outline.
- Remain professional -- don't react visibly to unexpected events.
- Don't impeach or get hostile toward witness who is hammering you

#### G. HANDLING OBJECTIONS BY OPPONENT

- Your opponent has the right to make evidentiary objections during the deposition. S/he may only state the bare legal basis. These objections are merely for the record, and DO NOT affect the deposition itself. The witness must answer your questions without interference (see Rule 30(c)-(d)), unless the matter is privileged.
- Your opponent also has the right to make "discovery" objections
  1. Work product
  2. That you are misusing discovery for the purpose of harassment
- Your opponent MAY NOT confer with the deponent, suggest an answer to the deponent, or instruct the deponent not to answer one of your questions.

#### H. PROPER RESPONSE TO OBJECTIONS DURING DEPOSITIONS

- Ignore them.
- Instruct the witness to answer your question.
- Do not respond to or argue with the attorney.

#### I. YOUR RESPONSE IF THE OPPOSING ATTORNEY INSTRUCTS THE WITNESS NOT TO ANSWER.

- If the deponent is the attorney's client, there's nothing you can do. Ask the court reporter to "certify" the question (prepare a portion of the transcript containing the question and instruction and the reporter's certification that the transcript is accurate). If the attorney did not state grounds, ask that they be stated on the record. Tell the court reporter you would like to order a copy of the record covering this page and the five previous pages, and ask the reporter to get that to you as soon as possible. Then continue the deposition. You can decide later whether to file a Rule 37 motion to compel an answer.
- If the deponent is *not* the attorney's client, inform the deponent that the attorney does not have the legal authority to instruct anyone other than his or her clients not to answer. Tell the deponent to answer the question. If the deponent refuses, ask the Reporter to certify the question as above.

#### J. YOUR RESPONSE TO IMPROPER OBJECTIONS, OBSTRUCTION AND OTHER INTERFERENCE WITH YOUR ABILITY TO CONDUCT THE DEPOSITION

- Don't argue with the other attorney.
- Remind the other attorney that all objections other than privilege are automatically preserved and need not be made during the deposition, and that Rule 30 prohibits argumentative objections and interference with your questioning.
- State for the record that you believe the attorney is unduly interfering with the deposition, which is improper, and request that the attorney stop.
- Tell the court reporter to go off the record, then talk to other attorney to see if you can resolve the problem.
- Adjourn the deposition, go to the courthouse, and seek a Rule 37 order against obstruction by the attorney.
  1. File motion with presiding judge or in county where deposition is taking place.
  2. Attach necessary documentation (usually an extract from the deposition)
  3. Include a statement detailing your efforts to resolve things informally-- see Rule 26(F).  
You might also try just calling the judge's chambers and seeking a ruling over the phone.
- Whoever loses the motion has to pay costs and attorney fees, so be sure you are right
- If party *still* refuses to comply after being ordered to do so, you may file a motion that s/he be held in contempt and asking for other sanctions, including:
  1. That the opponent pay your costs in independently proving the matter
  2. That the information sought be presumed true
  3. That the opponent may not offer any counter-evidence on the issue
  4. That the relevant portion of the opponent's pleading be struck
  5. Dismissal of the action

#### K. POST-DEPOSITION PLANNING

- Will you need to use the deposition at trial or a hearing? If so, request a copy from the reporter and file it with the court. Note that local rules may restrict you to filing the relevant portions only.

### III. DEFENDING A DEPOSITION

#### A. MAKE SURE YOUR CLIENT SHOWS UP

- Send written notice to client giving time and place of deposition and any documents the deponent must bring.
- Tell client to meet you at your office before deposition, or arrange to pick him or her up.
- Call a few days before the deposition and remind your client.
- Call the night before the deposition and remind again

B. GIVE YOUR CLIENT THE FOLLOWING GENERAL INFORMATION:

- You will be sworn to tell the truth
- The other lawyer will ask a lot of questions; you must answer them just like in court
- They can ask anything they want, including lots of embarrassing and personal stuff.
- Everything is recorded or videotaped
- At trial, they can point out differences between what you said at the deposition and what you say at trial, so don't say anything unless you are sure about it.
- Depositions can last two hours or more.
- You can ask for a break any time you want one.
- Dress comfortably -- you don't have to put on a fancy suit.
- No smoking
- Bring your own soft drink or water
- Explain who will be there -- reporter, lawyers, etc.
- No cheering section, unless deponent is a child who wants a parent present.
- Stay calm and don't argue with the attorney

C. EXPLAIN TO YOUR CLIENT THE SEQUENCE OF EVENTS

- You will be sworn
- You will be asked a lot of background questions including who your 3rd grade teacher was
- The attorney will go over and over the same ground pointlessly
- The attorney will try to make you mad
- If I object, ignore me. It's just for the record.
- I cannot coach you during the deposition, but I can answer specific questions. If you have a question, state that you want a recess. If I think we need to talk, I will ask for a recess.
- If I instruct you not to answer a question, don't answer it no matter what the other lawyer says.
- If you do not understand a question, say so
- If you do not know the answer, say so
- Don't guess unless the lawyer asks you specifically for an opinion.
- If the lawyer asks you whether something is "possible," answer that anything's possible.
- Don't worry about trick questions -- I will object and point out the trick.
- If the attorney summarizes lots of facts and asks you to agree, ask him/her to repeat the question one fact at a time.
- Don't volunteer; don't ramble; just answer the questions.
- Don't agree to provide documents without consulting me.

D. PREPARE YOURSELF

- Re-read Trial Rule 26(B) on the legitimate scope of discovery
- Re-read Trial Rule 28 on the person before whom the deposition may take place
- Re-read Trial Rule 30, especially subsection (C) on objections.
- Review the case file

E. DECIDE IF YOU WILL ASK ANY QUESTIONS

You have the right to ask a few questions at the end of the deposition to clarify matters or rehabilitate your witness.

- Don't. You can correct it later.

F. OTHER USEFUL PREPARATION STUFF

- Take the deponent to the room where the deposition will be held and show him/her where s/he will sit.
- Take the deponent to re-visit any places likely to come up during the deposition.
- Consider a Rule 26(C) protective order to limit scope of deposition

G. AT BEGINNING OF DEPOSITION WHEN OTHER ATTORNEY ASKS CASUALLY IF YOU WILL ENTER INTO THE "USUAL" STIPULATIONS AND WAIVERS, WHAT SHOULD YOU DO?

- Just say "No."

H. WHAT TO DO DURING DEPOSITION

- Pay attention
- Keep quiet
- Make notes if client inadvertently says anything incorrect

I. SHOULD YOU MAKE ANY OBJECTIONS?

- **NO!** The Rules of Evidence do not apply. They can ask about insurance. They can ask about hearsay. They can ask for opinions. They can ask your client if he's a peeping Tom or cheated on a 10th grade math test. Besides, an objection accomplishes nothing, because the witness has to answer the question anyway.

J. NO, REALLY, WHEN SHOULD YOU OBJECT?

Well, okay, you may have to object once in awhile. Here are the legitimate grounds for objection:

- **Privilege.** Object to a request for information protected by the attorney-client or other privilege. Usually, you can object only to a question that asks the client *what s/he told* you, a doctor, a therapist, a minister, etc.
- **Attorney work-product.** Object to any request that the client reveal the advice you have given him/her.
- **Client's work product.** Object to requests that the client supply documents, reports, or other writings prepared by the client specifically for this case in anticipation of litigation, regardless of whom they were prepared for.
- **Misquoting witness.** Object if the attorney incorrectly summarizes deposition testimony.
- **Trick questions.** Object to trick questions that assume facts not in evidence, contain false implications, and half-truths, or are putting words in the witness's mouth that you know are not true.
- **Harassing the deponent.** You may object if the other attorney is conducting the deposition in bad faith or is unreasonably harassing, annoying, or embarrassing your client.

K. WHEN SHOULD YOU INSTRUCT YOUR WITNESS NOT TO ANSWER?

In rare situations, you should instruct your witness not to answer:

- If the matter is privileged.
- If the matter is covered by the work-product doctrine
- If you have previously obtained a protective order prohibiting questions on this subject.

L. WHEN SHOULD YOU TERMINATE THE DEPOSITION?

In one situation, you should instruct the witness not to continue the deposition until after you have had time to file a motion to terminate it; you should order a complete copy of the deposition so far; and then you and your client should walk out.

- If the other attorney is conducting the deposition in bad faith or is unreasonably harassing, annoying, or embarrassing your client, and you have made several objections but the harassment has not stopped.

M. AFTERWARD: REVIEW DEPOSITION AND MAKE CORRECTIONS

- Get a copy of the deposition, read over it, have your client read it, and then make any necessary changes. See Rule 30(E).