CHAPTER 1

The Role and Importance of Depositions

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"Raise your right hand."

To most people, these words conjure up an image of an anxious witness, hand on a Bible, preparing to testify at a trial. Yet to most litigators the words conjure up something quite different: the start of a deposition.

Since 1938, when the Federal Rules of Civil Procedure were adopted to eliminate "trial by ambush,"[1] discovery—particularly depositions—has been at the heart of dispute resolution. In fact, over 98 percent of all civil cases now resolve without being tried.[2] When a litigator questions a witness today, it is far more likely to be in a law office at a deposition than in a courtroom at trial.

The Essentials: Preparation and an Understanding of the Deposition Process

Much has been written about the rigors and sophistication of trial practice. But examining and defending witnesses at depositions can be just as complex and challenging as trying a case—and arguably more important to its resolution.

Experienced lawyers never try a case without doing a tremendous amount of preparation. You should adopt the same attitude for depositions. Furthermore, you should take every deposition seriously; even those that look simple and straightforward can turn into minefields when you are unprepared.

The time to start preparing for a deposition is long before a witness is asked to "raise your right hand." And to prepare properly, you need a thorough understanding of the deposition process. Without it, you can neither adequately take a deposition nor adequately prepare or defend a witness.

For proof of all this, consider the following exchange at a hypothetical deposition. The deponent is Terry Blake, a computer salesperson for Defendant Business-Aide, Inc. Blake allegedly misrepresented the suitability of computer software he sold to plaintiff Leslie Roberts, the owner of Scoops Ice Cream.

Taker (Plaintiff Roberts's lawyer): Q. Let's turn now to your conversation with Ms. Roberts. Shortly after you met Ms. Roberts, you told her that you love Scoops ice cream, is that correct?

A. Well, I don't remember using those exact words.

Q. Did you say something to that effect, sir?

A. I probably did.

Q. Had you ever eaten Scoops ice cream before meeting Ms. Roberts?

A. Probably not.

Q. That was just a selling technique of yours?

Defender (Defendant's lawyer): Objection. That question is argumentative.

Taker: Q. Please answer my question, sir.

Witness: Do I have to answer?

Defender: Go ahead and answer it.

Witness: A. I just wanted to make her feel comfortable.

Taker: Q. When you first met Ms. Roberts, you told her that your boss, Maxine Waller, had told you all about Ms. Roberts's needs, is that correct?

A. You know, I don't remember that precisely.

Defender: He's not asking you to guess. Just give him your best recollection. If you don't remember, say "no."

Taker: Q. You had not spoken with Maxine Waller before meeting with Ms. Roberts, is that correct?

A. Well, I got her memorandum.

Taker: Q. Let me repeat my question. You had not spoken with Maxine Waller before your meeting with Ms. Roberts, is that correct?
Witness: A. Just a minute.
Taker: I'd like the court reporter to note for the record that the witness is conferring with his counsel. I object to the practice of conferring in the midst of a question.
Witness: A. Probably.
Taker: Q. Is that what your counsel just told you to say?
Defender: I'm going to instruct the witness not to answer that question. The question obviously invades the attorney-client privilege.
Taker: Q. Are you going to follow the instruction given by your counsel?
Witness: A. Yes.

Even a short, apparently simple exchange like this one raises several key questions:

1. Why did the taker want to impeach the witness about whether the witness said he loved Scoops ice cream? Should the taker have saved the question for trial?
2. Did the defender successfully deflect that question by objecting to it as argumentative? Could the defender have done more? Should the defender have done more? What?
3. Did the taker respond appropriately to the objection?
4. Why did the taker ask whether Maxine Waller "told" the witness all about Ms. Roberts's needs? Was the witness's answer helpful? To whom?
5. What should the taker have done when the witness said, "I don't remember that precisely"?
6. May a witness confer with his defender while a question is pending? Was the taker's response appropriate? Should the taker have done more?
7. Was it proper for the defender to instruct the witness not to answer the question, "Is that what your counsel just told you to say"?
8. What should the taker have done in response to the instruction not to answer?

This book answers all these questions. It also raises and answers many other questions about depositions.

How the Book Approaches Depositions

As most lawyers realize, there is more to the deposition process than just the deposition. This book separates the deposition process into three distinct stages: (1) before the deposition, (2) during the deposition, and (3) after the deposition.

Every deposition is an interactive event with multiple players: the examiner, the witness, the defender, the court reporter, and possibly a videographer. Many of the chapters focus on one of the players at a time—first through the eyes of the examiner, and then through the eyes of the defender. At times, this approach can seem artificial. But it offers an enormous benefit: close scrutiny of each side's strategy. Whenever possible, the text merges the two perspectives and discusses them together.

Among the issues covered by the book are the following.

Stage One: **Before the Deposition**

The focus of this portion of the book discusses what the lawyers on each side must do to prepare.

- What are the examiner's purposes in taking a deposition? What other discovery methods should be used? In what order?
- How can a witness be compelled to attend the deposition? Where can a deposition be held? How many times can a witness be deposed? For how long?
- How does the examiner prepare to take a deposition? How does the examiner decide what topics to cover, what questions to ask, and in what order?
- How does a defender prepare herself and the witness? What should the defender say to a witness about a deposition and about how to answer questions? Are the guidelines for a deposition witness different from those for a trial witness?

Stage Two: **The Deposition**

The focus of this section is on questioning and defending techniques.

- When should the taker ask open-ended questions? What about narrow questions? What about leading questions? When should a combination be used?

- When should the taker use documents in questioning the witness? What is the most effective way to use documents at a deposition?
- How can the examiner exhaust the recollection of a witness? Where does the examiner draw the line before asking the ill-advised "one too many" question?
- How does the examiner handle an evasive witness? What can be done about an evasive witness after the deposition?
- How does an examiner or a defender deal with a witness who lied in the past or intends to lie at the deposition? What guidelines do the rules of professional conduct provide?
- What objections are available to the defending lawyer at the deposition? When should they be made? How should they be stated?
- When may the defender instruct the witness not to answer? How should the instruction be stated?
- What should the taker do in response to a defender's tactics?
- How should the examiner deal with an obstreperous defender during the deposition? After the deposition?
- When should a defender advise her witness to take the Fifth? What should the taker do in response?
- How does an examiner question an expert? What role does the defender play?
- When should a deposition be video recorded? Does video recording change the role of the examiner, defender, or witness?
- How can realtime transcription be used effectively? By the taker? By the defender?

Stage Three: **After the Deposition**

This section covers everything from getting a deposition transcript reviewed, corrected, and signed to using it at trial.

- What should the examiner, defender, witness, and court reporter do after the deposition?
- Is it useful to have the deposition summarized? By whom? In what format?
- What use can be made of deposition testimony? By whom?

- How can the testimony be used in motion practice?
- How can it be used at trial?

In addition to the foregoing list, the book covers a number of other problems that can surface in depositions.

The Use of the *Scoops* Case

From time to time, the book uses a hypothetical case: *Scoops v. Business-Aide, Inc.*[3] (The deposition exchange a few pages earlier is from this hypothetical case.) Here are the facts of the *Scoops* case you need to know.

Leslie Roberts owns Scoops, the "best little-known" ice cream shop in Cambridge, Massachusetts. Roberts has sued Business-Aide, Inc., a Boston retailer selling computer hardware and software, in connection with Scoops's purchase of accounting software from Business-Aide. The suit alleges intentional and negligent misrepresentation, breach of express warranty, and breach of the implied warranty of fitness for a particular purpose.

Roberts operates Scoops out of her own checking account. Because of Scoops's growth, she has had increasing difficulty tracking inventory and maintaining an accurate financial picture of the business.

Harold Jamison, Inc., is a New England chain of family restaurants and ice cream parlors. Two years ago, in October, Jamison offered to market Scoops's ice cream on a regional basis. However, the offer, which could prove lucrative to Scoops, was conditioned on Scoops' obtaining a line of credit sufficient to significantly increase its production capabilities. Jamison agreed to keep the offer open until January 15, one year ago.

Roberts then contacted Northeast National Bank about a line of credit. A loan officer told her to submit a loan application, including a financial statement. Aware that her business needed more financial sophistication, Roberts—a latecomer to technology—decided to buy a computer and accounting software. She reasoned that doing so would enable her to produce an accurate financial statement and monitor Scoops's inventory and cash flow.

Roberts asked one of her employees, Frank Fuller, to help Scoops find the right hardware and software. After talking with Maxine Waller, the owner of Business-Aide, Frank decided that Business-Aide could meet Scoops's needs. On November 12, Roberts met one of Business-Aide's salespersons, Terry Blake, at the store. After the meeting, Roberts purchased hardware and software from

Business-Aide. The purchase included an accounting program called "The Bottom Line." She used the program to prepare the financial statement required by Northeast National Bank for the line of credit.

At the time of her purchase, Roberts was unaware that The Bottom Line was designed only for cash-basis businesses. The software did not account for sales on credit (accounts receivable), purchases on credit (accounts payable), or prepaid expenses that benefit a business over time. Therefore, The Bottom Line was not appropriate for Scoops, an accrual-basis business with cash and credit sales as well as cash and credit purchases. As a result, the financial statement Roberts prepared using The Bottom Line substantially overstated Scoops's expenses and substantially understated its net income and assets. In other words, it made Scoops look less profitable (and less creditworthy) than it was.

Roberts submitted the misleading financial statement as part of her application for a line of credit. After reviewing it, the bank denied the application. By that time, it was too late for Roberts to reapply before the January 15 deadline. Consequently Scoops lost its potentially lucrative contract with Jamison. This lawsuit followed.

Roberts seeks damages of $250,000 for lost profits and $750,000 in punitive damages. Business-Aide denies liability.

Notes

1. Milton Pollack, *Discovery—Its Abuses and Correction*, 80 F.R.D. 219, 220 (1978) ("trial by ambush and secrecy were considered normal in courts of law" before adoption of Federal Rules of Civil Procedure).

2. *See* Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts*: *2006*, Table C-4A (only 1.3 percent of all civil cases in U.S. district courts reached trial in 2006), http://www.uscourts.gov/judbus2006/appendices/c4a.pdf. *See also* Marc Galanter, *The Vanishing Trial*: *An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459 (2004). The American Bar Association sponsored "The Vanishing Trials Project," which culminated in the ABA Litigation Section's Symposium on the Vanishing Trial in 2003. Marc Galanter's paper on the vanishing trial was presented at this symposium and later published in the *Journal of Empirical Legal Studies*.

3. Henry L. Hecht, *Scoops v. Business Aide, Inc.*: A Liability and Damages Case File (5th ed. 2009).