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TAKING A DEPOSITION UNDER NORTH CAROLINA LAW

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The primary purpose of pretrial discovery is to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[1] The deposition is the most important of all pretrial discovery devices. It provides the

1. United States v. Proctor & Gamble Co., 356 U.S. 677, 683 (1958); *see also* Willoughby v. Wilkins, 65 N.C. App. 626, 310 S.E.2d 90 (1983).

most comprehensive and effective method for identifying the facts and issues in a case. Effective deposition taking is indispensable for trial, settlement, or alternative dispute resolution.

This article covers the process and the most commonly used techniques for taking a deposition under North Carolina law,[2] with a particular emphasis on practical practice. Discussed are (I) the preliminary mechanics for taking a deposition; (II) how to take an oral deposition in terms of its purposes, questioning techniques, using documents and other exhibits, examining experts, making and meeting objections, and defending the deposition; (III) considerations involved in taking depositions by other methods such as by videotape, telephone, or on written questions; and, (IV) procedural matters after the deposition has been concluded. All references to rules are to the *North Carolina Rules of Civil Procedure*[3] unless otherwise noted.

I. PRELIMINARY MECHANICS

A. *Noticing The Deposition*

An oral deposition may be taken "of any person, including a party" upon written notice pursuant to Rule 30(a).[4] The notice must be served on all parties at least ten days prior to taking the deposition if all parties are residents of the state, or at least 15 days prior to taking the deposition if any party is a nonresident.[5] When the party is the deponent, notice upon him or his attorney compels attendance.[6] For any nonparty deponent, however, attendance may be compelled through a subpoena under Rule 45.[7]

Under Rule 30(b)(1), the notice must include a specific statement about the time and place for taking the deposition, and the names and addresses of each person to be deposed. If the deponent's name is not known, the notice must contain a general description sufficient to identify the person to be deposed.[8] A resident of North Carolina may be deposed only in the county of his residence, or in the county in

2. Federal practice in North Carolina is not discussed. Effective December 1, 1993, a number of significant changes were made to the Federal Rules of Civil Procedure, including Fed. R. Civ. P. 30 relating to depositions. These changes have not been adopted in North Carolina state practice. For an introductory discussion of the 1993 amendments to the Federal Rules of Civil Procedure, *see* G. Nicholas Herman & Frances P. Solari, *The New Amendments to the Federal Rules of Civil Procedure*, THE N.C. ST. BAR Q., Spring 1994, at 26.

3. The North Carolina Rules of Civil Procedure are codified in N.C. GEN. STAT. § 1A-1 (1990). Those most pertinent to deposition practice are Rules 26 through 32.

4. N.C. R. CIV. P. 30(a).

5. N.C. R. CIV. P. 30(b)(1).

6. N.C. R. CIV. P. 30(a).

7. *Id.*

8. N.C. R. CIV. P. 30(b)(1).

which he is employed or transacts business in person.[9] Generally, a nonresident may only be deposed in the county in which he resides or within 50 miles of the place of service.[10]

After the commencement of the action, no leave of court is required to take a deposition unless the plaintiff seeks to do so before the expiration of the 30-day period following service of the summons and complaint.[11] However, this 30-day restriction does not apply if the defendant serves a notice to take a deposition within the 30-day period, or if the deponent is about to leave the county where the action is pending and is more than 100 miles from the place of trial, or otherwise is about to leave the United States or is bound on a voyage at sea.[12]

As a matter of practice, many lawyers find it advantageous to cooperate with one another in the scheduling of depositions, even to the extent of sometimes dispensing with formal requirements of notice. This practical approach obviates unnecessary expense and time in obtaining protective orders under Rule 26(c) when depositions are unilaterally noticed for times and places that are inconvenient or impracticable for a party. Moreover, entering into cooperative arrangements for a deposition is simply a realistic concession to each party's ultimate entitlement to discovery.

B. *Persons Who May Be Present At A Deposition*

There is no North Carolina rule that specifically addresses who may be present at a deposition. As a matter of practice, it is commonly accepted that parties to the litigation are entitled to be present. If the party is a corporation, an officer or other individual who is a member of the corporate control group may attend.[13] Similarly, in cases where the deponent is a minor, it is frequently accepted that he may be accompanied by a parent or guardian.

A party may not generally be excluded from attending a deposition in his case. However, the right to attend the deposition is subject to the overall supervisory power of the court.[14] Thus, upon motion of a party or the person from whom discovery is sought, the court is empowered to designate who may attend a deposition.[15] The motion

9. *Id.*
10. *Id.*
11. N.C. R. Civ. P. 30(a).
12. N.C. R. Civ. P. 30(b)(2).
13. *See* Queen City Brewing Co. v. Duncan, 42 F.R.D. 32 (D.C. MD. 1966) (allowing bonafide officers of the corporation to attend the deposition).
14. *See* Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973) (excluding plaintiff).
15. N.C. R. Civ. P. 26(c)(v).

must establish good cause to protect the party or deponent from unreasonable annoyance, embarrassment, or oppression.[16]

C. *Persons Before Whom Depositions May Be Taken*

Under Rule 28(a), a deposition may only be taken before a person authorized to administer oaths by the laws of North Carolina or the United States, or before any person appointed by the court in which the action is pending. Unless the parties otherwise agree, a deposition cannot be taken before a person who is a relative, employee, attorney, or counsel of any of the parties, or who is a relative or employee of such attorney or counsel, or who is financially interested in the action.[17]

Persons authorized to administer oaths under North Carolina law include notaries public, registers of deeds, mayors and clerks of any municipality or incorporated village, the Secretary of State, justices, judges, magistrates, clerks, assistant clerks, or deputy clerks of the General Court of Justice, or any member of the federal judiciary.[18] Under federal law, persons authorized to administer oaths include notaries public, clerks of courts of record and magistrates authorized to administer oaths who are appointed or elected by any state, district or territory of the United States, or judges and justices of the United States.[19]

D. *Stipulations And Statements For The Record*

1. Standard Stipulations

Before the deponent is placed under oath, it is essential that counsel reach an agreement as to the manner in which the deposition will be conducted. Theoretically, the deposition may take any form agreed upon between the parties, notwithstanding other procedures prescribed by the rules.[20] However, regardless of the manner chosen, Rule 32(d)(3) provides that during the taking of a deposition:

> (a) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.
> (b) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or an-

16. N.C. R. Civ. P. 26(c).
17. N.C. R. Civ. P. 28(c).
18. N.C. Gen. Stat. § 11-7.1(a) (1993).
19. 28 U.S.C. §§ 459, 636, 953 (1988).
20. N.C. R. Civ. P. 29.

> swers, in the oath or affirmation, or in the conduct of the parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.
> (c) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within five days after service of the last questions authorized.[21]

In practice, these provisions have been interpreted to mean that, except as to the "form" of a question, essentially all evidentiary objections are preserved for later objection at trial. An example of a question that is objectionable as to form would be: "Doctor, do you have an opinion as to whether the accident resulted in permanent injury to John?" Because an expert's medical opinion about the cause of an injury must be made to a "reasonable degree of medical certainty" as against a mere possibility,[22] the proper form of the question should be: "Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether the accident could have caused permanent injury to John?"[23]

The preservation of all evidentiary objections except as to the form of a question is typically embodied in so-called "standard stipulations" recited in the deposition transcript. An example of this type of boilerplate stipulation reads:

> It is stipulated between counsel for the Plaintiff and counsel for the Defendant that each question in this deposition is deemed to be followed by an objection. The requirement for providing at this time a specific reason for the objection is waived, same to be made at the time of trial. An objection as to form, and each answer or portion thereof is deemed to be followed by a motion to strike. The objections and motions to strike may be ruled upon by the presiding Judge at any hearing or trial of this cause with the same force and effect as if made and ruled upon by the proper person at the proper time.

If counsel for both parties choose to adopt "standard stipulations" for the conduct of the deposition, it is imperative that counsel review the precise wording of the stipulations that the court reporter will include in the transcript. An inadvertent misunderstanding of those stipulations may cause a waiver of certain objections at trial. Of course, should counsel agree to modify or expand upon the standard stipulations,[24] these modifications should be clearly stated on the record.

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21. N.C. R. Civ. P. 32(d)(3); *See also infra* section III.C.
22. Lockwood v. McCaskill, 262 N.C. 663, 138 S.E.2d 541 (1964).
23. *See also infra* section II.F.1.
24. *See* N.C. R. Civ. P. 29.

2. Statements For The Record

At the outset of the deposition, it is typical for counsel (or the court reporter) to make an initial statement on the record like the following:

> Pursuant to Rules 26 and 30 of the *North Carolina Rules of Civil Procedure*, this deposition, in *John Smith v. Wayne Jones*, 95 CVS 342, is being taken before Mary L. Smith, a Notary Public, upon oral examination of the witness, Don Doe, at the law offices of Malcolm Snider, 229 Main Street, Raleigh, North Carolina, in Wake County, on February 15, 1995, commencing at 9:00 o'clock a.m. The deposition is being taken by Malcolm Snider, attorney for Plaintiff. Also present at the deposition is George Long, attorney for Defendant.

Any other preliminary matters necessary to identify the context in which the deposition is being conducted should also be stated on the record. For example, it should be noted whether the deposition is a discovery deposition or an evidence deposition to be introduced at trial. Similarly, if opposing counsel has agreed not to attend the deposition, that fact should be stated on the record.[25]

E. *Procedural Objections For The Record*

1. In General

Rule 30(c) provides, in pertinent part:

> All objections made at the time of the examination to the qualifications of the person before whom the deposition is taken, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the deposition by the person before whom the deposition is taken . . . .

This provision does not specify the types of objections that must be made at a deposition; it merely prescribes that whenever an objection is made, the court reporter must note the objection on the record.

When making an objection, counsel should be succinct and specifically state his grounds. Lengthy or argumentative objections should be avoided. A deposition is not the time or place for counsel to make a speech. Indeed, the dignity with which counsel approaches objections may have an important effect upon the judge's rulings on those objections at trial.

25. During a deposition, counsel will sometimes reach an agreement regarding other discovery in the case such as providing supplemental responses to interrogatories or exchanging certain documents. When this occurs, be sure that all details of the agreement are memorialized by a succinct statement on the deposition record.

2. Objections To Improper Notice

Rule 32(d)(1) provides that "[a]ll errors and irregularities in the notice for taking a deposition [whether oral or upon written questions] are waived unless written objection is promptly served upon the party giving the notice." Usually, any defect in the notice for a deposition will be apparent on the face of the notice. Thus, ordinarily, a prompt written objection must be served on opposing counsel before the deposition begins. Moreover, it seems plain that serving a written objection after the deposition has been concluded would not satisfy the promptness requirement because this would defeat the entire purpose of the rule.

3. Objections To The Deposition Reporter

Rule 32(d)(2) provides that "[o]bjection to taking a deposition because of the disqualification of the person before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence." Unlike objections to the notice for taking a deposition, objections to the qualifications of the deposition reporter need not be in writing, and the grounds for objection may not become apparent until the deposition commences or until after it is completed. Apart from an objection that the deposition reporter was not "authorized" under Rule 28(a),[26] another ground for objection may exist if it turns out that the reporter was incompetent in recording or transcribing the deposition.

4. Objections To Completion And Return Of The Deposition[27]

Rule 32(d)(4) provides:

> Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the person taking the deposition under Rules 30 and 31[28] are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

Although this Rule is essentially self explanatory, it is silent as to whether the motion to suppress may be oral or must be in writing. The safest practice is to file a written motion. The requirement of making the motion with "reasonable promptness" will, of course, depend upon the particular circumstances of the case.

26. *See supra* section I.C.
27. *See also infra* sections IV.B.-C.
28. *See infra* sections IV.A.-C.

II. TAKING AN ORAL DEPOSITION

A. *Purposes of Depositions*

1. Discovering Information

The most common purpose of taking a deposition is to obtain information. This means obtaining information about the facts of the case and the strengths and weaknesses of your case and those of the other party. You want to know who, what, when, where, why, and how. Fact gathering is also essential for testing legal theories—the viability of your causes of action and any defenses raised by your opponent.

Apart from obtaining rote information, the deposition is an opportunity to confirm information you already know, to obtain admissions, to obtain impeachment material, and to discover additional sources of information. In addition, the deposition provides an opportunity to evaluate the demeanor and credibility of the deponent which will be instructive in determining how to approach the deponent's examination at trial.

2. Preserving Testimony For Trial

As distinguished from discovering information, another common purpose for taking a deposition is to preserve the testimony of the witness for trial when he is "unavailable" or is otherwise not required by law to testify at trial.[29] North Carolina General Statute Section 8-83 provides:

> Every deposition taken and returned in the manner provided by law may be read on the trial of the action or proceeding, or before any referee, in the following cases, and not otherwise:
> (1) If the witness is dead, or has become insane since the deposition was taken.
> (2) If the witness is a resident of a foreign country, or of another state, and is not present at the trial.
> (3) If the witness is confined in a prison outside the county in which the trial takes place.
> (4) If the witness is so old, sick or infirm as to be unable to attend court.
> (5) If the witness is the President of the United States, or the head of any department of the federal government, or a judge, district attorney, or clerk of any court of the United States, and the trial shall take place during the term of such court.

29. In addition, Rule 27(a) provides a procedure by which, before an action is filed, a prospective party may depose any person to perpetuate his testimony for the trial of an anticipated action. Similarly, Rule 27(b) provides a procedure for perpetuating testimony pending the outcome of an appeal.

(6) If the witness is the Governor of the State, or the head of any department of the State government, or the president of the University, or the head of any other incorporated college in the State, or the superintendent or any physician in the employ of any of the hospitals for the insane for the State.
(7) If the witness is a justice of the Supreme Court, judge of the Court of Appeals, or a judge, presiding officer, clerk or district attorney of any court of record, and the trial shall take place during the term of such court.
(8) If the witness is a member of the Congress of the United States, or a member of the General Assembly, and the trial shall take place during a time that such member is in the service of that body.
(9) Except in actions or proceedings governed by the Rules of Civil Procedure, if the witness has been duly summoned, and at the time of trial is out of state, or is more than seventy-five miles by the usual public mode of travel from the place where the court is sitting, without the procurement or consent of the party offering his deposition.
(10) If the action is pending in a magistrate's court the deposition may be read on the trial of the action, provided the witness is more than 75 miles by the usual public mode of travel from the place where the court is sitting.
(11) Except in actions or proceedings governed by the Rules of Civil Procedure, if the witness is a physician duly licensed to practice medicine in the State of North Carolina, and resides or maintains his office outside the county in which the action is pending.
If any provision of this section conflicts with the Rules of Civil Procedure, then those Rules shall control in actions or proceedings governed by them.

Other situations in which a deposition may be introduced at trial in lieu of the live testimony of the deponent are found in Rule 32(a) which provides, in pertinent part:

(3) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose, whether or not the deponent testifies at the trial or hearing.
(4) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: that the witness is dead; or that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or upon application and notice, that such exceptional circumstances exist as to make it desirable, in the

interest of justice and with due regard to the importance of presenting testimony of witnesses orally in open court, to allow the deposition to be used; or the witness is an expert witness whose testimony has been procured by videotape as provided for under Rule 30(b)(4).[30]

3. Encouraging Settlement

Depositions may be instrumental in facilitating settlement of the case by exposing the opposing party's weaknesses or by giving the opposing party a taste of what cross-examination will be like at trial. Similarly, settlement may be facilitated by deposition testimony that sets up a potentially successful motion for summary judgment. To a somewhat lesser extent, counsel's proficient performance in a deposition may affect opposing counsel's confidence in trying the case and thereby foster a more willing disposition towards settlement.

B. *Conducting The Deposition*

1. Preparing An Outline Or Checklist

In light of the particular purposes discussed above,[31] it is useful to prepare an outline or checklist of the topics you intend to cover with the deponent. This checklist will ensure the thoroughness of your examination. The checklist should be prepared based upon consultation with your client, a review of the pleadings, a review of all existing discovery, and a complete understanding of the elements of your causes of action and any defenses raised by the opposing party.

The following is an example of a checklist for deposing a defendant in an automobile accident case when the defendant denies negligence and counterclaims that the plaintiff (your client) was negligent and injured the defendant:

DEFENDANT'S BACKGROUND

-Name; any prior names
-Social Security and driver's license number
-Home address and telephone number; previous addresses
-Family: marital status, spouse, previous marriages, children, parents, siblings
-Occupations of family members
-Education
-Military service
-Employment history

30. N.C. R. Civ. P. 32(a)(3)(4). Part or all of a deposition may also be used to contradict or impeach the deponent, or to expose inconsistencies in his testimony. N.C. R. Civ. P. 32(a)(1)(2).

31. *See supra* sections II.A.1.-3.

-Arrests and convictions
-Previous automobile accidents
-Prior medical history
-Involvement in prior lawsuits
-Membership in clubs or organizations
-Sports, hobbies, and avocational interests

DETAILS PRIOR TO ACCIDENT

-Defendant's activities in the 24 hours preceding accident
-Condition of car
-Seat belt
-Familiarity with scene of accident

DETAILS OF THE ACCIDENT

-When it occurred
-Where it occurred: configuration of road, lanes, traffic signals, other cars, etc.
-How and why it occurred
-What happened before, during, and after impact
-Who was involved
-Weather conditions and road conditions
-Speed limits and speed of the vehicles involved in the accident
-Obstructions to vision
-Sounds heard
-Radio on; smoking; eating; window open/closed; talking to passenger(s)
-Passenger(s) in vehicle
-Position of cars before, at, and after impact
-Skid marks; debris
-Have defendant diagram accident
-Go over accident report
-Damage to each car; other personal property damage
-Sleep; medications; drugs; alcohol
-Injuries upon impact

DETAILS AFTER ACCIDENT

-Conversations with police, plaintiff, witnesses, passengers, and anyone else
-Citations issued; court appearances and disposition
-Statements, reports or interviews by/of police, defendant, plaintiff, witnesses, passengers, and anyone else

-Subsequent investigation of accident
-Defendant's condition from time of impact until first medical treatment

MEDICAL DETAILS

-Pain and suffering from the time of accident to date
-Course of treatment at hospitals and by physicians and other health-care providers
-Diagnoses and prognoses; disability ratings
-Conversations with medical personnel about the accident and injuries
-Medications
-Future medical treatment
-Restrictions in physical/mental activities
-Prior and subsequent injuries, accidents, and sickness
-Health-care expenses and out-of-pocket expenses

LOST WAGES

-Dates off from work
-Rate of pay
-Restrictions on performing job
-Documentation of lost wages/profits
-Efforts to secure employment if unemployed

TRIAL CONTENTIONS AND EVIDENCE[32]

-Basis for each allegation denied in the answer to the complaint
-Basis for each allegation in counterclaim
-Clarification of responses to interrogatories and requests for admissions
-Identification and basis for all special and general damages claimed
-Have the defendant authenticate any necessary documents

2. Using The Outline Or Checklist

An outline or checklist is not intended to serve as a script. It is merely a reminder of topics to cover with the deponent. Thus, in a particular deposition, you might begin your line of questioning on a topic listed in the middle of the checklist rather than on the topic

32. A party is not entitled to discover a listing of witnesses, or documents or exhibits that the party opponent intends to use at trial. King v. Koucouliotes, 108 N.C. App. 751, 425 S.E.2d 462 (1993). These matters are only discoverable through pretrial conference procedure. *See* N.C. R. CIV. P. 16; N.C. GEN. PRAC. R. 7.

listed at the beginning. Similarly, depending upon the flow of the answers to your questions, you might switch from one topic to another or jot down on the checklist other subtopics to pursue. However, consistent with the goal of thoroughness, you should review your checklist before concluding the deposition to make sure that all pertinent areas of inquiry have been covered.

3. Preliminary Statement To The Deponent

After the deponent has been sworn and any stipulations and statements for the record have been made,[33] counsel should make an introductory statement to the deponent like the following:

> My name is John Jones and I represent the Plaintiff in this case. This deposition is an opportunity for me to ask you certain questions, and it is not my intent to trick you in any way. If you do not understand a question I ask, please let me know and I will try to rephrase it. Otherwise, I will assume that you have understood my question. If you realize that an earlier answer you gave was inaccurate or incomplete, please let me know and I will let you correct or complete your answer. If you need to look at a document to answer a question, please feel free to do so. Also, if there is any reason you cannot fully and fairly answer my questions today, or if you need a break, please let me know that too. Are these instructions okay with you?

The foregoing is designed to establish your credibility and sense of fairness with the jury in the event the deposition is introduced at trial. Moreover, it is designed to "set up" the deponent for effective impeachment if he tries to use some aspect of the deposition process as an excuse for testifying differently at trial.

For example, if on direct examination at trial the witness explains that his current testimony is different from his previous testimony because he was made to be confused, misled, or uncomfortable at the deposition, you might cross-examine him as follows:

Q: Mr. Smith, do you remember when I took your deposition in this case?

A: Yes.

Q: Let me show you page four of your deposition. Do you have that in front of you?

A: Yes; I do.

Q: Before we began the deposition, I told you that I didn't intend to trick you in any way, didn't I?

A: Yes.

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33. *See supra* sections I.D.1.-2.

Q: I told you that if you didn't understand a question you should let me know, didn't I?

A: Yes.

Q: I told you that if you needed to complete or correct any answer to a question, you were free to do so, didn't I?

A: Yes.

Q: I even told you that you were free to look at any document to answer any question. Remember that?

A: Yes.

Q: And I told you to let us know if there was any reason at all why you could not fully and fairly answer my questions, didn't I?

A: Yes.

Q: But now you say that you were confused, misled, and made uncomfortable at the deposition?

A: Yes; I was.

Q: You never once told us that at the deposition did you?

A: No; not at that time.

Q: Not until now. Isn't that correct, sir?

A: Yes.

4. Style of Questioning

When taking a deposition, an attorney might variously be aggressive, mild mannered, controlling, cooperative, loud, soft-spoken, deferential, matter-of-fact, or any combination of these. The particular style you adopt will, of course, depend upon your own personality and that of the deponent and opposing counsel.

In addition, your style should be adapted to the particular purpose or goal of the deposition.[34] For example, if your primary purpose is to facilitate settlement, adopting a hard-hitting, cross-examination style towards the party-deponent may be appropriate. Conversely, if the primary goal is to discover information, a mild, conversational approach would be more appropriate. Indeed, in the latter situation, you would not want to give the deponent a rehearsal of cross-examination.

There is never a good reason to be obnoxious. Bullying the deponent or opposing counsel is altogether counterproductive and will inevitably backfire before the jury and trial judge. Never say or do anything at a deposition that you would not say or do in open court.[35]

34. *See supra* sections II.A.1.-3.

35. *See* Detective Comics, Inc. v. Fawcett Publications, Inc., 4 F.R.D. 237, 239 (S.D. N.Y. 1944) ("There seems to be no reason why. . .counsel should conduct themselves upon an examination before trial any differently than in the trial of the case.").

It is also imperative that throughout the deposition you "visualize" the transcript. Use simple words and questions. Use "car" versus "vehicle;" "before" versus "prior to," etc. Make sure that your questions and the deponent's answers are audible. Similarly, elicit from the deponent a "yes" or a "no" rather than a nod or shake of the head. If the witness gestures in response to a question, clarify the meaning of the gesture on the record.

5. Sequence Of Questioning

Most attorneys organize their line of questioning by topic[36] or by chronological event. These approaches tend to relax the deponent because he can usually anticipate the course of the questioning, and they have the concomitant benefit of aiding the attorney in his quest for obtaining maximum information.

However, the principal disadvantage of these routine approaches is that they permit the deponent to remain "on guard" for handling difficult or uncomfortable questions. Alternatively, shifting questions from one topic to another or asking them out of chronological order may catch the deponent "off guard" and elicit more damaging responses than would otherwise be obtained from a more logical questioning approach. On the other hand, a shifting-back-and-forth approach is likely to end up as confusing for the examiner as for the deponent and will make it difficult for counsel to ensure that the deponent's knowledge has been exhausted on a particular matter.

Accordingly, adopting a logical questioning approach is most often preferable. Even if you manage to catch the deponent momentarily "off guard" through a back-and-forth technique, your accomplishment is apt to be fleeting after opposing counsel has his opportunity to examine the deponent and has the damaging answer clarified.[37] In the end, attempts at trickery have many more disadvantages than benefits.

6. Relevancy And Its Limitations

Rule 26(b)(1) provides, in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not a ground for objection that the information sought will be inadmissi-

36. *See, e.g., supra* section II.B.1.
37. *See infra* section II.G.3.

> ble at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence nor is it ground for objection that the examining party has knowledge of the information as to which discovery is sought.

Under this rule, relevancy is given a liberal interpretation. It is only necessary that "the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[38] However, this does not mean that a "party should be allowed to roam at will in the closets of the other," and thus the scope of the examination may be limited by a protective order under Rule 26(c).[39]

If the liberal test for relevancy is satisfied, it generally does not matter that the testimony sought would otherwise be inadmissible at trial. However, Rule 26(b)(1) prohibits discovery of "privileged" matters, and Rule 26(b)(3) restricts discovery of materials "prepared in anticipation of litigation or for trial."

Privileged matters include confidential communications between attorney and client,[40] husband and wife,[41] physician and patient,[42] clergyman and communicant,[43] and psychologist and patient.[44] Other privileges are accorded to family therapists,[45] counselors,[46] and social workers.[47] In addition, a deponent may invoke the privilege against self-incrimination on matters which might subject him to criminal punishment or when questions are posed that would tend to subject him to punitive damages.[48]

Materials prepared in anticipation of litigation or for trial are not discoverable absent "a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[49] Attorney "work product", on the other hand, is never discoverable.[50]

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38. N.C. R. Civ. P. 26(b)(1).
39. Willis v. Duke Power Co., 291 N.C. 19, 33, 229 S.E.2d 191, 200 (1976).
40. *Id.*
41. N.C. Gen. Stat. §§ 8-56, 8-57 (1994).
42. N.C. Gen. Stat. § 8-53 (1994).
43. N.C. Gen. Stat. § 8-53.2 (1994).
44. N.C. Gen. Stat. § 8-53.3 (1994).
45. N.C. Gen. Stat. § 8-53.5-6 (1994).
46. N.C. Gen. Stat. § 8-53.4-8 (1994).
47. N.C. Gen. Stat. § 8-53.7 (1994).
48. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).
49. N.C. R. Civ. P. 26(b)(3).
50. *Id.*

C. *Questioning Techniques*

1. The "Funnel" Approach

The so-called "funnel" approach is typically used to maximize and exhaust information gathering from the deponent. Under this approach, the examiner begins by posing a series of open-ended questions on a particular topic to generate a comprehensive list of what was seen, heard, felt or done. Then the examiner poses a series of questions that narrows and clarifies each aspect of the list, followed by one or more questions that pins down each aspect of the list. Metaphorically, the open-ended questions elicit a plethora of information at the wide mouth of the funnel, which is then narrowed down to the most important details at the tip of the funnel.[51]

For example, suppose you are taking the deposition of an emergency medical technician who was called to the scene of an automobile accident. The open-ended phase of questioning might be as follows:

Q: Who did you see at the accident scene?

A: There was myself; my partner, Molly Brown; Mr. Jones; and Mr. Smith.

Q: Was anyone else there?

A: No; not when I arrived.

Q: Well, other than Ms. Brown, Mr. Jones, and Mr. Smith, did anyone else come to the scene after you arrived?

A: A few minutes after I got there, I also saw a man come out of a house from across the street. He introduced himself as "Wayne".

Q: Did anyone from the police department arrive?

A: Yes; Officer Mack Gordon got there about ten minutes after we did.

Q: Did any other medical personnel go to the scene?

A: No; it was just me and Molly.

Q: Can you think of anything that might help you remember if anyone else was at the scene?

A: No; those are all the people I saw.

The narrowing and clarification phase of questioning might be as follows:

Q: Let's now begin with Mr. Jones. Do you remember his full name?

A: It's John R. Jones.

Q: How do you know that?

51. *See* DAVID M. MALONE & PETER T. HOFFMAN, THE EFFECTIVE DEPOSITION, 70-78 (1993).

A: As soon as I stepped out of the ambulance, he came up to me, told me his name, and said: "Thank God you've arrived."

Q: Did he say anything else?

A: No; that was all he said, and I didn't see him again after that.

Q: Did you ever hear from him again?

A: No, I never saw or heard from him again.

Q: Do you know where he went?

A: No, I don't know that either.

At this point, the examiner would continue similar questioning, separately about each of the other persons who the medical technician saw at the scene. Finally, to pin down the topic, the examiner might ask:

Q: So, as I understand your testimony, the only persons you saw at the scene were Ms. Brown, Mr. Jones, Mr. Smith, a man named "Wayne", and Officer Gordon — is that all?

A: Yes, that's all.

Q: And, of those persons, the only ones who said anything to you or with whom you had a conversation were Mr. Jones, the man who introduced himself as "Wayne", and Ms. Brown?

A: That's right.

2. Clarifying The Deponent's Answers

Part of the art of questioning is the art of listening. If counsel is distracted by focusing too heavily on what question he will ask next or by taking excessive notes on what the deponent says, he is unlikely to be attentive to the nuances of the deponent's answers. These nuances may become a trap for the unwary: what might appear to be an admission may only be a statement of opinion, or what might appear to be a statement of fact may only be a guess or a confused answer. Thus, the examiner must be carefully attuned to the particular word choice, inflection, and body language used by the deponent in his answers, and follow them up with appropriate questions that clarify the answers. For example:

Q: How far was your car behind Mr. Smith's when you first saw his brake lights turn on?

A: Uh, I was 'bout fifty feet from him when I hit him; like from 'bout here to there [pointing].

Q: Before your car rear-ended Mr. Smith's, how far was your car from his when you first saw his brake lights turn on?

A: Like from here to there [pointing again].

Q: You are pointing from your chair to the wall on the near side of this room. How far is that?

A: Thirty feet.

Q: So, is it fair to say that your car was thirty feet behind Mr. Smith's when you first saw his brake lights come on?

A: No; I never saw his brake lights coming on.

Q: What do you mean?

A: I only saw his brake lights after they had already turned on, bright red like.

Q: Was that the first time you noticed his car at all?

A: Yeah.

Q: Did you just say "yes"?

A: Yes.

Q: So, how far was you car behind Mr. Smith's when you first noticed his car at all?

A: Thirty feet.

Q: And what is the very next thing you remember?

A: My car hit his car; nothing else.

Q: Nothing else?

A. Nothing else.

3. Reconstructing Conversations

As pointed out previously,[52] it is generally not a ground for objection that the information sought through discovery will be inadmissible at trial.[53] However, if deposition testimony is introduced at trial, the rules of evidence will apply. Thus, if you intend to introduce at trial a deponent's testimony as to statements made by an out of court declarant who is a nonparty, you should elicit the substance and context of that conversation as precisely as possible so that the trial judge can determine whether what was said qualifies as an exception to the hearsay rule. For example:

Q: Did you see the accident happen?

A: No, I didn't actually see it; but I was there standing on the sidewalk when it happened with my back to the road.

Q: Was anyone with you?

A: Yes, my friend, George Smith.

Q: Where was he standing?

A: He was standing in front of me, facing the road, chatting away.

Q: Then what happened?

A: He suddenly indicated that the red car swerved into the blue car.

Q: What do you mean he "suddenly indicated"?

52. *See supra* section II.B.6.

53. N.C. R. Civ. P. 26(b)(1).

A: All of a sudden he just said that the red car turned into the blue car.

Q: Do you remember his exact words?

A: I remember him saying, "My gosh! That red car just hit that blue car!"

Q: Did he use the word "hit"?

A: No, actually he used "swerved, swerved." He said, "My gosh! That red car just swerved into that blue car!"

Q: Those were his words as best you remember?

A: Yes.

Q: What was George's demeanor when he said that?

A: He was really shocked-like. I saw him bring up his hand to cover his mouth when he said it, and his eyes were opened real wide.

Q: Anything else?

A: No, he just looked and sounded real shocked-like when he said it.

In the foregoing example, if the deponent is "unavailable" to testify at trial,[54] the deposition testimony could be introduced at trial and George's statement to the deponent would be admissible as an excited utterance.[55]

4. Handling "I Don't Know" Or "I Don't Recall."

Sometimes the examiner will be frustrated by a deponent who continually insists that he doesn't know or cannot recall. When faced with the "I-don't-know" deponent, the examiner should specifically pin down those areas in which the deponent has no knowledge, and then ask the deponent if he knows anyone who might have knowledge about those matters. For example:

Q: So, to summarize, is it fair to say that you have absolutely no knowledge about the terms of the contract, who said what to whom about those terms, or what any of the parties did about the contract?

A: That's right.

Q: You have absolutely no knowledge at all about any of these three matters?

A: No.

Q: You only know what happened after this lawsuit was filed?

A: That's correct.

54. *See supra* section II.A.2.

55. *See* N.C. R. EVID. 803(2); State v. Smith, 315 N.C. 76, 337 S.E.2d 883 (1985).

Q: Well, do you know of anyone who does know about the terms of the contract, who said what to whom about those terms, or what any of the parties did about the contract?

A: I think Ralph Coleman would know.

Q: Anyone else?

A: No, only Ralph Coleman. He might know.

Similarly, when the deponent persists that he cannot recall, press his professed lack of memory with specific questions, and try to exhaust all means for refreshing his recollection. For example:

Q: Do you have any memory at all about the terms of the contract?

Q: Do you remember anything about the purchase price?

Q: Do you deny that the price was to be $75,000?

Q: Do you deny that delivery of the goods was to be made no later than April 20th, or do you just not recall?

Q: If I told you that Mr. Maxwell testified that payment was to be due thirty days after delivery, does that help you remember?

Q: Would any of these documents help you to remember?

5. Handling The Unresponsive or Argumentative Deponent

If the deponent is unresponsive to your questions or is excessively argumentative, consider (1) making a motion to strike, (2) phrasing short, straightforward, yes-or-no questions, (3) asking the witness to specifically answer your questions, or (4) if all else fails, warning opposing counsel that you may have to apply for a motion to compel. For example:

Q: When did you first discuss with Mr. Moore the contract price for the house?

A: I can't believe that I even met with that man, the liar and cheat that he is. He fooled me with all his lies and deception. And, it has cost me thousands of dollars too.

Q: I move to strike that answer as being unresponsive to the question. Ms. Jones, I am only asking when you first discussed the price of the house with Mr. Moore?

A: It doesn't matter now what the price was. It shouldn't matter now after he changed it, after he changed what we had agreed to. How would you like it if . . .

Q: Did you first discuss the price with him on November 10?

A: What difference does that now make? As I was saying, how would you . . .

Q: Ms. Jones, I know that you are upset about this. I am just trying to find out what happened. I am trying to ask you simple questions. Please listen to them and try to answer what I have asked. Now, was

it November 10 when you first discussed the price of the house with Mr. Moore?

A: I don't care about your questions. All I know is that he tried to cheat me and . . .

Q: [To opposing counsel]: Mr. Halpern, I must say for the record that if your client continues to be unresponsive and argumentative to my questions, I will have no choice but to apply to the court for a motion to compel. Let's go off the record for a moment.

6. Impeachment Questions

Except when counsel is taking an evidence deposition to be read to the jury at trial, there is no reason to impeach the witness at a discovery deposition. This does not mean that you should not elicit potential impeachment information at the deposition, but only that you should reserve the execution of impeachment for trial.

On the other hand, if the primary purpose of your deposition is to facilitate settlement or if the deposition will be introduced at trial,[56] certainly the witness should be impeached at the deposition based upon prior inconsistent statements, inability to perceive, narrate or remember, or by exposing bias, interest, or motive.[57]

7. Testing Factual Or Legal Theories

After the examiner has exhausted the deponent's memory about facts relating to a particular topic, the examiner may wish to explore specific facts that are particularly essential to the opposing party's causes of action or defenses. This process is sometimes called "theory testing."[58]

For example, suppose that the plaintiff brings an action for negligent infliction of emotional distress against the defendant who negligently caused an automobile accident resulting in the death of the plaintiff's son. You know that to establish this cause of action, the plaintiff must show that she suffered "severe emotional distress," which the case law has defined as, "for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so."[59] You also know that the emotional distress must have been a foreseeable result of the defendant's negligence, and that the question of foreseeability depends

56. *See supra* sections II.A.2.-3.

57. *See* N.C. R. EVID. 607-609, 611(b).

58. *See* MALONE & HOFFMAN, *supra* note 51, at 79-80.

59. Johnson v. Ruark Obstetrics & Gynecology Assoc., 327 N.C. 283, 295, 395 S.E.2d 85, 97 (1990).

upon such factors as whether the plaintiff personally observed the negligent act and whether the defendant had any actual knowledge that the plaintiff existed.[60] Thus, for the defense, your "theory testing" phase of the examination might include the following questions of the plaintiff:

Q: After the accident, were you treated by a psychiatrist or any other mental-health professional?

Q: Did any of them ever diagnose you with neurosis, psychosis, chronic depression, or phobia of any kind?

Q: After the accident, have you been hampered in any way in your day-to-day activities?

Q: You never saw the accident, did you?

Q: You have never met the defendant, have you?

Q: It's true, isn't it, that the defendant never knew you before this accident?

D. *Using Documents And Other Exhibits*

1. Obtaining Documents And Other Exhibits In Advance

Before taking any depositions in a case, it is desirable for counsel to first make a comprehensive request for production of documents from the opposing party pursuant to Rule 34(a). A review of these documents and other materials obtained is integral to preparing for a deposition. If the deponent is a nonparty, consider compelling from him documents and other materials by service of a subpoena duces tecum. However, a subpoena duces tecum may not be served upon a party deponent or deponents who are officers, directors, or managing agents of parties, or upon persons designated to testify on behalf of a public or private corporation, partnership, association, or governmental agency under Rule 30(b)(6).[61] From those deponents, the production of documents and other materials may only be compelled through a request for production of documents under Rule 34(a).[62]

If you request documents or other materials from a nonparty deponent through a subpoena duces tecum, you may wish to request their production at the outset of the deposition. If necessary, question the deponent about his compliance with the subpoena, or otherwise make an appropriate statement on the record if the documents produced do not fully comply with the subpoena. Then, you might take a brief recess to review the documents that have been produced so that you will

60. Andersen v. Baccus, 335 N.C. 526, 531, 439 S.E.2d 136, 139 (1994).
61. N.C. R. Crv. P. 30(b)(5).
62. *Id.*

have some understanding about their contents before you begin your questioning.

2. Refreshing Recollection

A common use of documents at a deposition is to refresh the recollection of the deponent. To use a document for this purpose, it must be established that the deponent cannot remember a particular fact and that the document will jog his memory of that fact. Then, after looking at the document, the deponent testifies whether his memory has been refreshed. If it is, he testifies to what he now remembers without the aid of the document.[63] For example:

Q: Do you remember the exact purchase price?

A: No.

Q: Would anything help you to remember?

A: Yes; I could tell you if I saw the contract.

Q: Let me show you what has been pre-marked Plaintiff's Exhibit 12.[64] What is that?

A: That's the contract.

Q: Please take a look at it. [Counsel takes back the document after the deponent reviews it].

Q: Do you now remember the exact price?

A: Yes; it was $35,764.

When using a document to refresh recollection, bear in mind that opposing counsel is permitted to see it and may introduce it into evidence on cross-examination if it is relevant.[65]

If the document does not refresh the deponent's recollection, under North Carolina Rule of Evidence 803(5) it may be read into evidence as past recollection recorded, or admitted as an exhibit if introduced by opposing counsel. To use the document as past recollection recorded, it must be established that (1) the document is relevant; (2) the deponent does not now recollect the facts, (3) the deponent had knowledge of the facts when they occurred; (4) a record of the facts was made or adopted by the deponent when they were fresh in his memory; and, (5) the record was accurate when made, and is now in the same condition as when made.[66]

63. *See* State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977); N.C. R. EVID. 612.

64. As illustrated here, pre-mark all exhibits you intend to use at the deposition; and, when you use an exhibit with the deponent, refer to the exhibit by its specific number.

65. N.C. R. EVID. 612.

66. N.C. R. EVID. 803(5). *See* State v. Nickerson, 320 N.C. 603, 607, 359 S.E.2d 760, 762 (1987).

3. Authentication And Other Foundation Requirements

For a document to be admissible into evidence, it must be established that the document (1) is relevant;[67] (2) authentic;[68] (3) not barred by the hearsay rules;[69] (4) not privileged;[70] and, (5) satisfies the "best evidence rule" when applicable.[71]

If the document or other exhibit is not self-authenticating under North Carolina Rule of Evidence 902, authentication is usually established by merely showing that the document is what it purports to be and has not undergone any material change.[72] For business records, however, counsel must be sure to establish that the record (1) was made at or about the time of the event to which it refers; (2) was prepared by a person with knowledge (or from information received from such a person); (3) was kept in the regular course of business activity; and, (4) was made as part of the regular practice of the business activity.[73]

If the exhibit is a diagram, model, map, photograph, videotape, or motion picture used solely for illustrative purposes, the authentication and foundation requirements are also straightforward. It must be shown that (1) the exhibit is relevant; (2) the deponent is familiar with the matter depicted by the exhibit; (3) the exhibit "fairly and accurately" shows the matter; and, (4) the exhibit will be helpful to the deponent in explaining his testimony.[74]

4. Using Documents And Drawings to Discover Information

Of course, the contents of documents and the circumstances surrounding their preparation are fertile sources of information. For example, the examiner might want to know:

-Who prepared or participated in the preparation of the document
-When it was prepared
-Where it was prepared
-Whether previous drafts were prepared
-How it was prepared
-Why it was prepared
-What it means
-What was done with it

67. *See* N.C. R. EVID. 401-403.
68. *See* N.C. R. EVID. 901-903.
69. *See* N.C. R. EVID. 801-805.
70. *See supra* section II.B.6.
71. *See* N.C. R. EVID. 1001-1008.
72. *See* N.C. R. EVID. 901(b).
73. *See* N.C. R. EVID. 803(6).
74. *See* Campbell v. Pitt County Memorial Hosp., 84 N.C. App. 314, 352 S.E.2d 902 (1987).

-To whom it was sent
-Who was consulted about it
-What response was received
-What subsequent action was taken about it

Another source for discovering information is to have the deponent make a drawing or diagram in connection with his testimony. When using this technique, counsel must be particularly careful that the transcript accurately reflects what the deponent is doing when he makes the drawing or diagram. For example, counsel should have the deponent label the relevant portions of the diagram; and, if the deponent designates a particular matter on the diagram with an "X", counsel should follow-up with a question or statement for the record which makes it clear who or what is designated by the "X".

E. *Examining Experts*

1. Scope of Discovery

Under Rule 26(b)(4), discovery from experts is limited as follows: (1) the facts must be known and acquired in anticipation of the litigation or for the trial; (2) the opinions must be held or developed in anticipation of the litigation or for trial; (3) the facts or opinions must be otherwise discoverable under Rule 26(b)(1);[75] and, (4) the opposing party must expect to call the expert as a witness at trial.[76] Thus, not all potential experts can be deposed. Once the opposing party has identified experts he intends to call at trial (e.g., in an interrogatory response), absent agreement, counsel may compel a deposition of those experts through a court order under Rule 26(b)(4)(A)(ii), subject to any condition imposed by the court upon the taking party respecting expert-witness fees.[77]

2. Preparing For The Expert's Deposition

Before taking the deposition of an expert, counsel should obtain as much formal and informal discovery as possible about the expert's background and anticipated testimony. Thus, through interrogatories, counsel should inquire into "the subject matter on which the expert is expected to testify, . . .the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion."[78] If the expert is expected to give an opinion about the plaintiff's medical condition, you should review beforehand the plain-

75. *See supra* section II.B.6.
76. W. BRIAN HOWELL, SHUFORD NORTH CAROLINA CIVIL PRACTICE AND PROCEDURE, §§ 26-9, at 293 (4th ed. 1992).
77. N.C. R. CIV. P. 26(b)(4)(A)(ii), (B).
78. N.C. R. CIV. P. 26(b)(4)(A)(i).

tiff's medical records obtained through a request for production of documents.

Obtaining discovery informally may also be advantageous. For example, you might conduct research on the expert's background, qualifications, publications, etc. Try to obtain learned treatises to educate yourself about the subject matter on which the expert is expected to testify. Share the "paper" discovery you have obtained with your own expert or consultant and have him assist you in preparing for the deposition. In addition, you may decide to bring your own expert or a consultant to the deposition subject to Rule 26(c)(5).[79]

Finally, consider issuing a subpoena duces tecum for the expert's entire file. The only risk here is that the subpoena might cause a dishonest expert to conveniently lose or purge his file when he might otherwise unwarily bring his complete file to the deposition in the absence of a subpoena. Whether you issue a subpoena or not, always ask the expert at the deposition what documents he has brought with him. These documents may contain unique information for impeachment (e.g., correspondence from opposing counsel, the expert's notes, materials relied upon by the expert in forming his opinion, etc.).

3. Topics To Cover

As with lay deponents,[80] counsel should prepare an outline-checklist of topics to cover with the expert. A general example of such a checklist is as follows:

EXPERT'S QUALIFICATIONS

-Education and degrees
-Licenses; certifications
-Employment history
-Practice and specialties
-Staff or faculty membership at institutions or universities
-Professional societies and participation in them
-Publications
-Participation or attendance at seminars
-Prior testimony in litigation
-Areas in which deponent claims no expertise

INITIAL INVESTIGATION OF THE MATTER

-Instructions or requests made by counsel

79. *See supra* section I.B.
80. *See supra* sections II.B.1.-2.

-All information, oral or written, given to expert
-Expert's conversations or contact with the party
-Requests made by expert for further information
-Research conducted from literature or otherwise
-Tests, examinations, inspections, or studies conducted
-Compensation for serving as expert

OPINIONS

-Matters about which expert has an opinion
-What the expert's opinions are
-Matters about which expert has no opinion
-Whether opinions are to a reasonable degree of professional certainty

BASES FOR OPINIONS

-Reasons for each opinion
-Factors considered; factors not considered
-All information relied upon
-Results of tests, examinations, studies, or inspections
-Significance of tests, examinations, studies, etc.
-General acceptance of tests, etc. by other professionals
-Assumptions underlying opinions
-Consideration of alternative assumptions
-Reliance upon or consideration of other expert opinions
-Publications supporting opinions
-Other possible explanations or opinions considered
-Clarification of professional jargon
-Clarification of responses to interrogatories
-For Medical:
  -Patient's complaints and prior history
  -Physical examinations and results
  -Diagnoses
  -All treatment
  -Prognoses

NEED FOR FURTHER INVESTIGATION

-Is investigation complete
-What further investigation needs to be done
-What investigation the expert didn't do

TRIAL MATTERS

-Authentication of documents

4. Questioning Techniques

Most of the questioning techniques discussed previously[81] are applicable to questioning experts. In particular, using the "funnel" approach[82] will ensure an exhaustive examination of the expert on each topic.

Many lawyers routinely begin the deposition of an expert with an examination of his qualifications. This is usually a comfortable topic for the expert. Thus, alternatively, you might consider beginning your questioning on the expert's "initial investigation of the matter" or on his "opinions."[83] Launching first into these topics may be more unnerving to the expert and (possibly) produce more tentative or equivocal answers on critical matters. If you adopt this approach, reserve your questions about the expert's qualifications for the end of the deposition.

F. *Making And Meeting Objections*

1. Objecting To Improper Questions

As mentioned previously,[84] essentially all evidentiary objections are preserved for later objection at trial except objections to the "form" of a question. Also, as discussed above,[85] it is not a ground for objection that the information sought during a deposition will be inadmissible at trial so long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence and does not involve a matter that is privileged or prepared in anticipation of litigation or for trial. Notwithstanding the broad scope of questions that may be asked at a deposition, it nevertheless remains counsel's duty to object in those limited circumstances when improper questions are posed. The following are the most common types of questions that are objectionable as to form:

(1) Questions that lead the deponent on direct, except on preliminary matters or when he is an adverse party or a witness identified with the adverse party.

(2) Questions that are repetitive, having already been asked and answered.

81. *See supra* sections II.C.1.-7.
82. *See supra* section II.C.1.
83. *See supra* section II.E.3.
84. *See supra* section I.D.1.
85. *See supra* section II.B.6.

(3) Compound questions (e.g., "With whom, when, why, and how did you conduct your investigation?").

(4) Argumentative questions (e.g., "After your blatant, unilateral and anticipatory repudiation of the contract . . .?").

(5) Questions that contain an improper characterization (e.g., "After the accident you drove off like a bat out of hell, didn't you"?).

(6) Questions that misquote the deponent's testimony.

(7) Questions that are confusing, vague, ambiguous, misleading, or unintelligible (e.g., "Following your meeting with Mr. Doe and Mr. Jones, when did he or any of them recall that meeting?").

Objections that are otherwise preserved for trial and therefore need not (and generally should not) be made at a deposition include: objections to relevancy, materiality, competency, hearsay, opinion testimony, or speculation; and questions that violate the best evidence rule, call for a conclusion, are beyond the scope of direct or cross, assume facts not in evidence, violate the parol evidence rule, constitute improper impeachment, or are unduly prejudicial.

While counsel should make objections when appropriate, they should not be belabored. Simply state the objection and add a short phrase to indicate your grounds (e.g., "Objection to the form; argumentative and compound."). If an answer is objectionable, object and move to strike. Excessive objections disrupt the concentration of the deponent and often lead to pointless bickering between counsel. If counsel persists in making senseless or unnecessary objections at the deposition, he runs the risk of losing credibility with the judge at trial.

When an objection is made, the interrogator must choose whether to ignore it or to rephrase the question. If the objection is clearly well-taken, there should be no reason not to rephrase the question. If you are uncertain about the basis for the objection, ask opposing counsel to state his grounds. If the objection is inappropriate or picayune, simply ignore it and ask the deponent to proceed with his answer.

2. Instructing the Deponent Not To Answer

Rule 30(c) provides that "evidence objected to shall be taken subject to the objections." In practice, however, attorneys will sometimes instruct a deponent not to answer a particular question or respond to a particular line of questioning. This is entirely appropriate when the deponent is asked about a matter that is privileged,[86] constitutes attor-

86. *See, e.g.*, Int'l. Union of Elec. Radio & Mach. Workers v. Westinghouse Elec. Corp., 91 F.R.D. 277 (D.D.C. 1981); Harrington Mfg. Co., v. Powell Mfg. Co., 26 N.C. App 414, 216 S.E. 2d 379 (1975) (trade secrets generally considered privileged, but mere "confidential commercial information" is not except perhaps when the action is between competitors).

ney work product, or involves the discovery of documents or tangible things prepared in anticipation of litigation or for trial.[87]

In addition, there are three other more subjective situations when counsel may feel compelled to instruct the deponent not to answer. The first of these is when deposing counsel seeks to unduly annoy, embarrass, or harass the deponent.[88] Second, an instruction not to answer might be interposed if the examiner probes into areas beyond the permissible scope of discovery (e.g., beyond the scope permitted of experts under Rule 26(b)(4);[89] or beyond the scope of the matters identified in the notice for deposing a corporation, partnership, association, or governmental agency under Rule 30(b)(6)). Third, counsel might instruct a deponent not to answer when the questioning unreasonably oversteps the bounds of seeking information that "appears reasonably calculated to lead to the discovery of admissible evidence" under Rule 26(b)(1).

Before instructing the deponent not to answer, counsel should object and specifically state his grounds for the record. For example:

> I object. The question calls for information protected by the attorney-client privilege. If the question is not withdrawn or rephrased, I will be forced to instruct my client not to answer.

This approach will usually cause the examiner to rephrase the question (e.g., "Without telling me what your lawyer said to you in private, tell me what your lawyer said to Mr. Williams when the three of you met.").

If deposing counsel persists in asking questions that compel you to instruct the witness not to answer, you may find it necessary to recess the deposition and apply to the court for a protective order under Rule 26(c). Similarly, if you are deposing the witness and defending counsel persists in frivolously instructing the deponent not to answer, you may have to apply to the court to compel answers to your questions. In either case, use a motion for relief under Rule 26(c) as a last resort, and only after making a good faith effort to complete as much of the deposition as reasonably possible.

3. Conferences Between Counsel And The Deponent

There is no North Carolina rule that prohibits counsel who is defending the deposition from engaging in off-the-record conferences with the deponent during the deposition. If the deponent is a party,

87. *See supra* section II.B.6.

88. *See* Rule 26(c) (authorizing the court "to protect a party or person from unreasonable annoyance, embarrassment, [or] oppression."); *In re* Folding Carton Antitrust Litig., 83 F.R.D. 132 (N.D. Ill. 1979) (instruction not to answer appropriate when argumentative questions become tantamount to harrassment).

89. *See supra* section II.E.1; N.C. R. Civ. P. 26(b)(4).

what is said off the record would, of course, be protected by the attorney-client privilege. On the other hand, no such privilege exists if the deponent is not a party, and what is said off-the-record would be discoverable.

During a deposition, counsel should confer privately with his client only when absolutely necessary (e.g., to caution against revealing a privileged matter) or when requested by his client. Repeated conferences will have the undesirable effect of littering the record with statements by deposing counsel such as, "Once again, let the record reflect that counsel has conferred privately with the witness."

4. Handling The Obnoxious Lawyer

Some lawyers approach a deposition by being obstructionist. This is a grave mistake and is a harbinger for incurring the wrath of the trial judge.[90] The key to handling an obnoxious lawyer is, most often, to just ignore him and continue to question the deponent (e.g., "Did you understand my question?"; "Can you answer the question, please?"; "Please go ahead and answer the question, if you would."). If you simply persist in asking straightforward and unobjectionable questions, opposing counsel's ranting will create a self-fulfilling record for an eventual protective order under Rule 26(c) or sanctions under Rule 37.

Ignoring the obnoxious lawyer (if it fails to subdue him) may cause him to be even more hostile. Here again, do not be baited into an argument. If necessary, calmly state for the record something like:

> [To opposing counsel]: Mr. Holden, I do not intend to argue with you at this deposition. If necessary, your objections can be heard at a later time. I am simply trying to ask questions of this witness, and that is all I intend to do.

G. *Defending The Deposition*

1. In General

Various aspects of deposition practice pertinent to defending counsel have been discussed above: entering into stipulations about the conduct of the deposition;[91] preserving procedural objections;[92] making evidentiary objections;[93] instructing the deponent not to answer;[94]

90. *See* Unique Concepts Inc. v. Brown, 115 F.R.D. 292 (S.D. N.Y. 1987) (imposing fine on attorney for "contentious, abusive, obstructive, scurrilous, and insulting conduct" at deposition.).
91. *See supra* section I.D.1.
92. *See supra* sections I.E.1.-4.
93. *See supra* section II.F.1.
94. *See supra* section II.F.2.

conferring with the deponent;[95] and handling the obnoxious lawyer.[96] In addition, counsel defending a deposition must distinguish between representing his client and a nonparty deponent, know how to prepare a deponent for the deposition, and understand the limited role of examining the deponent.

2. Representing The Client vs. The Nonparty Deponent

If the deponent is defending counsel's client, all of the benefits of the attorney-client privilege apply, and defending counsel can more effectively and expansively "protect" the deponent. This is, of course, not true when the deponent is a nonparty. In the latter situation, counsel has no "right" to assert a privilege on behalf of the deponent (although an objection might be made, for example, for a privilege like the spousal privilege). In addition, conferences with the nonparty deponent are more likely to be interpreted as "coaching".

Whether counsel has an attorney-client relationship with the deponent should be made clear at the outset of the deposition. While this matter is not ordinarily problematic, the issue may arise when the deponent is closely identified with a party (e.g., an employee of a corporate party). Thus, even non-management employees of a corporate party may be protected by the attorney-client privilege if their communications were made within the scope of their employment. However, these communications must pertain to matters relevant to the attorney's advice to the corporation and the employees must be aware of the legal context of their communications.[97]

Even if the deponent is not your client, as defending counsel, you should never attend the deposition as if you were mute. Be attentive to the entire process of the deposition; preserve the accuracy of the record; make all necessary objections; attend to the comfort of the witness when appropriate (e.g, starting times, ending times, and breaks); don't permit deposing counsel to confuse, mislead, or misrepresent the witness' testimony; and don't leave a nonparty deponent alone with deposing counsel.

3. Preparing The Deponent

An attorney-client relationship with the deponent will affect the extent to which you can prepare the deponent for the deposition. If the deponent is your client, deposing counsel will not be able to inquire into what happened at the preparation session. On the other hand, if the attorney-client privilege does not apply, the deponent can be com-

95. *See supra* section II.F.3.
96. *See supra* section II.F.4.
97. *See* Upjohn Co. v. United States, 449 U.S. 383 (1981).

pelled to answer questions about any contact or conversation he had with you.

If the deponent is a witness whom you will call at trial on your client's behalf, it is altogether proper to explain to the witness the process of a deposition. Explain that he will be placed under oath; that each side will have an opportunity to question him; that the deposition will be transcribed; that he will have the opportunity to review the transcript and make any necessary corrections or changes;[98] that the attorneys might make objections from time to time; and that he should feel free to tell the lawyers if he needs a break, etc. Sometimes, you might discuss with the witness particular areas of his testimony such as the topics that he may be questioned about, or what he intends to say in response to certain questions. In this regard, however, never say anything to the witness that you would not want repeated in open court. Finally, make it a point to tell the witness that you expect nothing less and nothing more of him than to tell the truth.[99]

When the deponent is your client, you can and should prepare him thoroughly for the deposition. As appropriate, advise him of the following:

(1) The entire process of the deposition.
(2) The principal causes of action, defenses, and disputed facts in the case.
(3) The most critical facts that must be established.
(4) The most important documents or other exhibits in the case.
(5) Impeachment matters.
(6) The right to take a recess and confer with counsel in private.
(7) The importance of not revealing privileged matters.
(8) What to do when counsel objects.
(9) Counsel's role in preventing unfair questions or tactics by the deposing attorney.
(10) Listening carefully to the question, and answering only the question asked without volunteering additional information that is unnecessary or unresponsive to the specific question.
(11) Answering questions "yes" or "no", but having the right to explain one's answer if necessary.

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98. *See infra* section IV.B.

99. This point, routinely made by experienced counsel, perhaps explains why deposing attorneys are sometimes reluctant to inquire about a nonparty deponent's contact or discussions with opposing counsel. Once you have emphasized to the witness to tell the truth, when deposing counsel asks the deponent about any conversation he had with you, a rather typical response is: "He [counsel] told me over and over again just to tell the truth, and that is what I am doing."

(12) Not being afraid to answer: "I don't understand the question"; "I don't know"; "I don't remember".
(13) Telling the truth.
(14) The importance of sticking to a truthful answer when asked essentially the same question multiple times.

In covering the foregoing with the client, counsel should not be glib. For example, merely providing the client with a boilerplate list of "do's and don't's" for a deposition is inadequate. You must take sufficient time to completely explain and illustrate the foregoing matters. Being deposed is invariably a stressful and anxious experience for most clients.

4. Cross-examining The Deponent

You have the right to cross-examine the deponent after deposing counsel is finished with his questioning.[100] If the deponent is your client or one of your own witnesses, there is often little reason to conduct an examination. Further questioning only furnishes your adversary with additional information or may prompt him to pursue new lines of inquiry on re-direct.

On the other hand, conducting an examination may be desirable or unavoidable. This will depend upon whether the deponent will be available to testify at trial; whether the deponent's testimony has been harmful, incomplete or confusing; and whether there is a reasonable likelihood that your questioning will rehabilitate the deponent. If the deponent is your client, never examine him until you have taken a recess, conferred with him about the questions you intend to ask and have an understanding of what his answers will be. If the deponent is a nonparty, your decision to examine him will invariably have to be based on your best judgment at the time. Finally, if you choose to conduct an examination, remember that it may be more effective to ask non-leading questions of the deponent even though you have the technical right to lead on cross-examination.

III. Other Types of Depositions

A. *Videotape Depositions*

Rule 30(b)(4) expressly authorizes the taking of a deposition by videotape without a court order. A stenographic transcript must still be made of the deposition.[101] Videotape depositions are typically taken of important witnesses, such as experts, to preserve their testi-

100. N.C. R. Civ. P. 30(c).
101. N.C. R. Civ. P. 30(b)(4).

mony for trial.[102] Under Rule 32(a)(4), "[t]he deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . .the witness is an expert witness whose testimony has been procured by videotape as provided for under Rule 30(b)(4)." Thus, videotape depositions of experts are routinely admitted at trial in lieu of live testimony.[103]

The visual aspect of a videotape deposition poses special considerations for counsel. First, counsel must adequately prepare both the deponent and the videotape operator on how to "perform" at the deposition (e.g., the deponent's demeanor and body language, and the videotape operator's use of the camera). Second, opposing counsel should be alert to object to any unnatural or inappropriate visual enhancements or staging, and otherwise enter into clear stipulations about the conduct of the deposition and use of the video camera. Third, examining counsel should make a particular effort to get to the critical points of the testimony as quickly as possible to maintain the jury's attention. Fourth, counsel should at all times act as if the judge and the jury were present at the deposition. And fifth, opposing counsel should not attempt to cross-examine a deponent on videotape without having first taken a comprehensive discovery deposition of the witness.

B. *Telephone Depositions*

Rule 30(b)(7) provides that "[t]he parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone." Telephone depositions have the advantages of being convenient and inexpensive. On the other hand, not having the deponent physically present in the same room makes it impossible for deposing counsel to evaluate the demeanor and other body language of the witness, or to preserve the record with respect to matters that otherwise can be seen when the deponent is present. Accordingly, the relative advantages and disadvantages of using this method must be weighed on a case-by-case basis. Generally, if convenience and expense are not central considerations, it is preferable for counsel to take the deposition in person.

C. *Depositions On Written Questions*

Rule 31 provides:

102. Other witnesses who counsel might wish to depose by videotape include old or infirm persons who may not be available for trial. In addition, a videtape deposition might be taken "on location" to show, for example, how an event occurred. *See generally* Roberts v. Homelite, 109 F.R.D. 664 (N.D. Ind. 1986).

103. *See also supra* section II.A.2.

(a) After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of a subpoena as provided in Rule 45 provided that no subpoena need be served on a deponent who is a party or an officer, director or managing agent of a party, provided the party has been served with notice pursuant to this rule. Such a deposition shall be taken in the county where the witness resides or is employed or transacts his business in person unless the witness agrees that it may be taken elsewhere. The deposition of a person confined in prison or of a patient receiving inpatient care in or confined to an institution or hospital for the mentally ill or mentally handicapped may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the person designated in the notice to take the deposition, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the deponent in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(c) When the deposition is filed the clerk shall promptly give notice thereof to all parties.

The scope of examination for a deposition on written questions is the same as that provided in Rule 26(b).[104] Objections to the form of the written questions must be made in accordance with Rule 32(d)(3)(C) or are waived.[105] When objections are made, the questions are nevertheless answered subject to a later ruling by the trial

104. *See supra* section II.B.6.
105. *See supra* section I.D.1.

court. Depositions on written questions may be used at trial under those circumstances prescribed in Rule 32.[106]

As a practical matter, depositions on written questions are rarely used as a discovery device. However, they have the advantages of being simple, speedy, and inexpensive. They are best suited for discovering information from nonhostile, less important witnesses who are located some distance away. In addition, the device can be used for nonparties, and can be addressed to a particular individual in a corporation or governmental agency at the selection of the examining party, instead of a representative chosen by opposing counsel as would be the case for answering interrogatories under Rule 33(a).[107]

IV. Post-Deposition Matters

A. *Transcription And Fees*

The testimony taken at a deposition will be transcribed if requested by one of the parties.[108] Ordinarily, this request will be made by the party taking the deposition who will then also be responsible for the cost of the transcription. If the other party also wants a copy of the transcript, Rule 30(f)(2) requires him to pay a reasonable charge. The party who prevails in the litigation may be awarded the expense of the transcript as part of the costs of the action taxed in the discretion of the court.[109]

B. *Correcting The Transcript*

Rule 30(e) provides:

> When the testimony is fully transcribed the deposition shall be submitted to the deponent for examination and shall be read to or by him, unless such examination and reading are waived by the deponent and by the parties. Any changes in form or substance which the deponent desires to make shall be entered upon the deposition by the person before whom the deposition was taken with a statement of the reasons given by the deponent for making them. The deposition shall then be signed by the deponent, unless the parties by stipulation waive the signing or the deponent is ill or cannot be found or refuses to sign. If the deposition is not signed by the deponent within 30 days of its submission to him, the person before whom the deposition was taken shall sign the original thereof or, if the deponent refuses to return the original, a copy thereof and state on the record the fact of the waiver of the illness or absence of the deponent or the fact of the refusal or

106. *See supra* section II.A.2.

107. *See* Holland v. Minneapolis-Honeywell Regulator Co., 28 F.R.D. 595 (D.D.C. 1961).

108. N.C. R. Civ. P. 30(c).

109. N.C. Gen. Stat. Sec. 6-20 (1986); Dixon, Odum & Co. v. Sledge, 59 N.C. App. 280, 296 S.E.2d 512 (1982).

> failure to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

There is no reason for a deponent to ever waive the reading and signing of a deposition because, if, within 30 days after receipt, he has not signed the deposition, it will be treated as though it had been signed. Thus, counsel defending the deposition should never stipulate to waiving reading or signature.

While Rule 30(e) states that the deponent's changes "shall be entered upon the deposition by the person before whom the deposition was taken," in practice, attorneys uniformly prepare a correction sheet to append to the transcript. Counsel for the deponent should confer with him about all corrections which, apart from those respecting the deponent's testimony, should include inaccurate transcriptions in any question asked or objection made. Corrections or changes may be made to "substance"[110] as well as to "form," and should be accompanied with a brief reason for making the change. If the deponent makes substantial changes in his testimony, he may then be re-examined about those matters by deposing counsel as a continuation of the original deposition.[111]

Finally, counsel should bear in mind that a deponent is, under certain circumstances, required to supplement his deposition testimony. Rule 26(e) provides that a party who has responded to a request for discovery with an answer that was complete when made is under a duty to supplement his response with after-acquired information as follows:

> (1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (i) the identity and location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.
>
> (2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (i) he knows that the response was incorrect when made, or (ii) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

110. *See* Lutgig v. Thomas, 89 F.R.D. 639 (N.D. Ill. 1981).

111. *See* Willco Kuwait (Trading) S.A.K. v. DeSavery, 638 F. Supp. 846, 853 (D.R.I. 1986).

C. *Certification And Filing*

Rule 30(f)(1) requires that the court reporter add to the deposition his certificate that the deponent was duly sworn and that the deposition is a true record of the deponent's testimony. Documents used or produced for inspection at the deposition must, upon the request of a party, be appended to the deposition transcript.[112] The deposition is held by the attorney for the taking party who is responsible for delivering it to the court for filing when ordered to do so under Rule 5(d). Absent such an order, the deposition is not to be filed with the court.[113]

V. CONCLUSION

As a practical skill, taking a proficient deposition takes practice. It also requires a proper perspective: a deposition is primarily a method of discovery, not advocacy. It is designed to prepare yourself for trial, not the deponent or your adversary. Properly used, it is not an inquisition to be won or lost but a thorough inquiry into the merits and demerits of the case. Keeping in mind these fundamental distinctions is the *sine qua non* of effective deposition practice.

112. N.C. R. Civ. P. 30(f)(1).
113. *Id.*