

THE AMERICAN COLLEGE OF TRIAL LAWYERS
Taking and Defending Depositions
Presented by the Teaching Trial and
Appellate Advocacy Committee

VIDEO VIGNETTES

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PRELIMINARY NOTE

Because these scripts were prepared before the vignettes were recorded, there are minor variations between script and the vignette throughout.

ACTL Committee on Teaching of Trial & Appellate Advocacy

DEPOSITION TRAINING PROJECT

Vignette #1

**Contacting an unrepresented witness to arrange deposition
and dealing with the witness's request for compensation**

Participants: Mary Lee Ratzel

Deponent: Sarah Montoya

Video discussion of issues:

Participants: Mary Lee Ratzel, John Aisenbrey

Issues: Explaining purpose of deposition, responding to witness's request for payment, ethics of payment.

SCRIPT

Mary Lee Ratzel (on telephone):

Ms. Jones, my name is Mary Lee Ratzel. I represent Tommy Tenant in a lawsuit against the ABC Apartment Company. I understand that you are also a tenant in the building and have seen the conditions there. For that reason, I would like to arrange to take your deposition sometime in the next few weeks.

Jones:

Well, I don't know... I'm not sure what I can add. What's a deposition, anyway?

Ratzel:

A deposition is a method of taking sworn testimony of a witness. It will help us prepare for trial.

Jones:

Trial? Testimony? That sounds pretty serious and like I said, I don't know that I know anything that Tommy Tenant doesn't know too. Do I need a lawyer?

Ratzel:

Of course, we hope that we can resolve the matter before a trial, but if we cannot, Mr. Tenant will have to establish the condition of the building and the apartment and your testimony as another tenant in the building would be very helpful to the court.

As to whether you need a lawyer, I cannot advise you on that. I represent Mr. Tenant. What I want to do is ask a few questions about your observations of the building, trash accumulation, the condition of the elevators, whether you have observed any rats or cockroaches or the like in the building.

Jones:

Well, I could probably do that, how much time will it take? Who's going to pay me for my time? If I have to miss work, I don't get paid.

Ratzel:

It will probably take a couple of hours. We will reimburse you for your expenses such as parking and you will receive a witness fee.

Jones:

How much is the witness fee?

Ratzel:

\$40.

Jones:

\$40! I'm going to lose more than \$200 if I just miss a single morning of work. You're going to have to do better than that or I'm not showing up.

Ratzel:

Let me explain . . .

Jones:

By the way, my assistant tells me that the lawyer for ABC is on my other line. Should I talk to him?

POINTS FOR DISCUSSION

1. See p. 2 of the Written Materials re interviewing an adverse party's current or former employees.
2. See p. 9 of the Written Materials re compensating a fact witness.
3. Explaining the case, purpose of the deposition (or interview).

4. Issues beyond the script -- whether to subpoena the unwilling witness, or seek one who is more cooperative, if available.
5. Responding to witness's questions - whether she needs a lawyer, whether she should talk speak with the lawyer for the opposing party.
 - Discussion of requirements of Model Rule 4.3 – Dealing with an Unrepresented Person.
6. Ethical rules governing payments to witnesses
 - Is it permissible to compensate the witness?
 - The pros and cons of doing so.
 - If you are permitted to compensate the witness and decide to do so, how is the amount of compensation determined?

Vignette #2

Beginning a Deposition, "Usual" Stipulations

Participants: Mary Lee Ratzel & Paul Redfearn

Deponent: Sarah Montoya

Video discussion of issues:

Participants: Mary Lee Ratzel, Paul Redfearn, Dennis Suplee

Issues: Who sits where, sequestration colloquy, whether interrogator should give civil *Miranda* warnings and advantage of obtaining answer to each one separately, whether to start with background of witness or get into key questions right away.

SCRIPT

[Witness and lawyers discuss seating arrangements.]

Court Reporter:

Please raise your right hand. Do you swear to tell the whole truth and nothing but the truth, so help you God?

Witness:

I'm sorry – but I will not swear.

Court Reporter:

Will you affirm that you will tell the whole truth and nothing but the truth?

Witness:

Yes.

Interrogator:

Shall we follow the usual stipulations?

Deponent's lawyer:

That may be fine, but I would like to know the stipulations that you have in mind. I think we can dispense with presentment, but I will want Mr. Witness to have the opportunity to read and sign the deposition transcript.

And I suggest that we agree that all objections are reserved except those to the form of the question.

Interrogator:

I too prefer that the witness read and sign.

And to be more specific about stipulations, can we agree that any objection to a question that could be cured by re-framing the question is waived if not made. Is that agreeable?

Deponent's lawyer:

Yes.

Interrogator:

I see that you also have Mr. Wilson here today. His deposition is not scheduled until tomorrow. Please ask him to leave and come back tomorrow.

Deponent's lawyer:

There's no reason why he cannot be here. I want him here. Proceed with your questioning.

Interrogator:

[addressing Mr. Wilson] Mr. Wilson, please leave this conference room and come back tomorrow at 10 am.

Deponent's lawyer:

[addressing Mr. Wilson] Stay right there, Mr. Wilson. Counsel, don't try to give instructions to my client's employees. Mr. Wilson is staying.

Interrogator:

I'm going to call the Judge for a ruling.

[Fade To Black]

Interrogator:

Q. Please state your name and address.

A. [make something up]

Q. I am going to ask you some questions today to find out what you know about conditions at the ABC Apartments on 63d Street in December, 2012. Do you understand that?

A. Yes.

Q. If you do not hear or understand a question, please let me know and I will repeat it or rephrase it. Do you understand that?

A. Yes.

Q. If you answer a question, we will assume that you understood it and have given your best answer. Do you understand that?

A. Yes.

Deponent's lawyer:

Wait, wait. I don't think that is fair to the witness. He may believe he understands your question, but that doesn't mean you both have the same understanding, especially with technical terms.

Interrogator:

Well, we will both do our best to be clear, but if you have any concern about a question please let me know. Is that agreeable?

A. Yes.

Q. We will take a break about once an hour, but any time you want to take a break, just say so and we will break. However, I ask is that you not take a break while a question is pending.

Is that agreeable to you?

A. Yes.

Q. When the deposition is completed, the court reporter will provide you with a transcript of the deposition and you will have the opportunity to read it and make corrections to your testimony. Do you understand that?

A. Yes.

Q. Let me start by asking about your educational background.

A. I graduated from high school in 2005. I graduated from college in 2009.

[cut]

Q. Now that we have discussed your educational background, tell me about your employment history.

A. During college I worked at.....

[cut]

Q. Let's start at the beginning. When did you first move into the ABC Apartments on 63d Street?

A. I moved in right after college in 2009.....

POINTS FOR DISCUSSION

1. Who sits where – what considerations.
 - Are the considerations different for a video deposition?
2. What to do if the witness does not take an oath.
3. Discuss the sequestration colloquy.
4. Should the interrogator give these civil *Miranda* warnings?
 - The advantage of seeking a separate answer to each one.
5. The objection to the instruction as to whether the witness understands a question.
6. Discuss the pros and cons of this common approach (education, employment, and chronological development of the facts) versus getting to the key questions right away.

Vignette #3

Making a clear record

Participants: George Robinson, John Aisenbrey

Deponent: Hughston Walkinson

Video discussion of issues:

Participants: George Robinson, John Aisenbrey

Issue: Importance of marking exhibits clearly.

SCRIPT

Poor Record

- Q. Good Morning, Mr. Broussard. My name is George Robinson, and I represent ABC Oil & Gas, Inc. in the lawsuit you and your other siblings have brought alleging environmental damage to certain property located in the Atchafalaya Basin in St. Mary Parish, Louisiana. Can you please state your full name and address for the record.
- A. John M. Broussard, 0000 Nicholson Drive, Baton Rouge, Louisiana.
- Q. We are dealing with some 8,000 acres in this case according to your Complaint. Is that correct?
- A. Yes.
- Q. I am going to show you a document which I will mark as Exhibit 1 for identification and attachment to your deposition, which appears to be a Judgment of Possession rendered by the 16th Judicial District Court in and for St. Mary Parish, Louisiana, in favor of you and your other siblings who are Plaintiffs in the lawsuit. Do you recognize the document?
- A. Yes, that is the Judgment of Possession, under which my siblings and I inherited the property in the litigation from our parents.
- Q. When was that?
- A. That was in 1985.
- Q. I now want to show you what I have marked as Exhibit 2 for identification and attachment to your deposition, which appears to be a February 21, 1998, aerial photograph of the Charenton Oil and Gas Field, and it's oriented towards the North (North being the direction at the top of the page). Do you recognize this document?

- A. Yes.
- Q. What does it show?
- A. This shows what our attorneys refer to in the lawsuit as the North Area, as contrasted with the Southern and Central Areas of the property involved in the litigation.
- Q. Is this one of the areas that you contend ABC Oil and Gas Company or its predecessors contaminated through their oil and gas exploration and production operation?
- A. Yes, sir.
- Q. Sir, can you identify the Atchafalaya Basin levee?
- A. Yes, I can.
- Q. You are pointing to the Basin levee on Exhibit 2.
- A. Yes, sir, that is correct.
- Q. I show you what has been marked as Exhibit 3 for identification and attachment to your deposition, the Complaint that was filed in the United States District Court by you and your siblings. Do you recognize it?
- A. Yes, sir.
- Q. You have alleged in Article II of the Petition that there were large salt water or produced water disposal pits located on the property which have caused the property to become contaminated with chlorides or salt water. Is that correct?
- A. Yes, sir.
- Q. Can you tell me where that large pit is located?
- A. Yes, sir. The large pit right here where I am pointing on Exhibit "2" on the left side of the photograph which is on the west side of the basin.
- Q. I direct your attention to the east side of the Atchafalaya Basin levee to the large body of water which I pointing to on Exhibit 2. Do you see that?
- A. Yes, sir. I do not know for certain what that feature is, but we think it is another pit.
- Q. Do you know that for a fact?
- A. No, sir.

- Q. Can you identify the areas where you contend the additional pit operations were?
- A. Yes, sir. Right here on Exhibit 2 where I am pointing.
- Q. Is this feature on Exhibit 2 an emergency pit?
- A. Yes, it was.
- Q. What do you contend that is?
- A. We believe that was a pit where salt water was stored by the oil companies.
- Q. Is that part of the property that you contend was contaminated by the actions of my client or its predecessors?
- A. Yes.
- Q. Do you know where the actual oil wells were on Exhibit 2.
- A. Yes, sir, I think I do.
- Q. Can you identify them?
- A. Yes, sir. The wells are in the two places I am pointing to on Exhibit 2.
- Q. Are there other wells in the area?
- A. Yes, sir, there were two (2) more wells located in that area.
- Q. Will you identify those, please?
- A. Yes, sir, the two (2) other well sites were right here on Exhibit 2.
- Q. Do you know where the production equipment was located?
- A. Yes, I do.
- Q. Would you identify the production equipment?
- A. Yes, sir. It is right here.
- Q. Can you tell us precisely where the production equipment is to the best of your knowledge?
- A. Yes, it is here on Exhibit 2.
- Q. Mr. Broussard, are there any other significant areas where you contend contamination occurred?

A. No.

Q. Are there any other areas that contain pits in which are not marked to your knowledge?

A. No.

Q. Are there any other wells to your knowledge which are not marked?

A. No.

Q. Are there any other areas that you and your siblings contend were damaged by my client's activities?

A. No.

Q. I understand that you are essentially testifying on behalf of your siblings, because you are the only plaintiff with factual knowledge of where the alleged damage occurred. Is that correct?

A. Yes it is.

Q. Mr. Broussard, thank you for your patience. I have no further questions.

[Fade To Black]

Good Record with Premarked Exhibits

- Q. Good Morning, Mr. Broussard. My name is George Robinson, and I represent ABC Oil & Gas, Inc. in the lawsuit you and your other siblings have brought alleging environmental damage to certain property located in the Atchafalaya Basin in St. Mary Parish, Louisiana. Can you please state your full name and address for the record.
- A. John M. Broussard, 0000 Nicholson Drive, Baton Rouge, Louisiana
- Q. We are dealing with some 8,000 acres in this case according to your Complaint. Is that correct?
- A. Yes.
- Q. I am going to show you a document which I will mark as Exhibit 1 for identification and attachment to your deposition, which appears to be a Judgment of Possession rendered by the 16th Judicial District Court in and for St. Mary Parish, Louisiana, in favor of you and your other siblings who are Plaintiffs in the lawsuit. Do you recognize the document?
- A. Yes, that is the Judgment of Possession, under which my siblings and I inherited the property in the litigation from our parents.
- Q. When was that?
- A. That was in 1985.
- Q. I now want to show you what I have marked as Exhibit 2 for identification and attachment to your deposition, which appears to be a February 21, 1998, aerial photograph of the Charenton Oil and Gas Field, and it's oriented towards the North (North being the direction at the top of the page). Do you recognize this document?
- A. Yes.
- Q. What does it show?
- A. This shows what our attorneys refer to in the lawsuit as the North Area, as contrasted with the Southern and Central Areas of the property involved in the litigation.
- Q. Is this one of the areas that you contend ABC Oil and Gas Company or its predecessors contaminated through their oil and gas exploration and production operation?
- A. Yes, sir.

- Q. Sir, can you identify the Atchafalaya Basin levee?
- A. Yes, I can.
- Q. You are pointing to the large red line that starts on the East side of the photograph, Exhibit 2. Is that correct?
- A. Yes, sir, that is correct.
- Q. Is the levee marked at its western, approximately central, and eastern ends by the number "1" in red?
- A. Yes, it is.
- Q. Is it true that the levee runs where we marked it as "1" on the left side - "1" in the approximate middle and "1" on the right side – the east side?
- A. Yes, sir.
- Q. I show you what has been marked as Exhibit 3 for identification and attachment to your deposition, the Complaint that was filed in the United States District Court by you and your siblings. Do you recognize it?
- A. Yes, sir.
- Q. You have alleged in Article II of the Petition that there were large salt water or produced water disposal pits located on the property which have caused the property to become contaminated with chlorides or salt water. Is that correct?
- A. Yes, sir.
- Q. Can you tell me where that large pit is located?
- A. Yes, sir. The large pit is marked as "2" on the left side of the photograph which is on the west side of the basin.
- Q. I direct your attention to the east side of the Atchafalaya Basin levee to the large body of water which I have marked as "3" on Exhibit 2. Do you see that?
- A. Yes, sir. I do not know for certain what number "3" is, but we think it is another pit.
- Q. Do you know that for a fact?
- A. No, sir.
- Q. Can you identify the areas where you contend the additional pit operations were?
- A. Yes, sir. That pit is marked as "4" with a red arrow into the pit area.

- Q. You have marked one area as "4" on Exhibit 2. Do you know whether that was an emergency pit?
- A. Yes, it was.
- Q. I direct your attention to "5" on Exhibit 2. What do you contend that is?
- A. We believe that was a pit where salt water was stored by the oil companies.
- Q. Is that part of the property that you contend was contaminated by the actions of my client or its predecessors?
- A. Yes.
- Q. Do you know where the actual oil wells were on Exhibit 2.
- A. Yes, sir, I think I do.
- Q. Can you identify them by the numbers on Exhibit 2?
- A. Yes, sir. The wells are identified by "6" and "7."
- Q. You have drawn two arrows on "7," what does that identify?
- A. Yes, sir, there were two (2) more wells located in that area.
- Q. We will identify those with the number "7."
- A. Yes, sir, I drew a red arrow from "7" to each of the two (2) well sites.
- Q. Do you know where the production equipment was located?
- A. Yes, I do.
- Q. Would you identify the production equipment?
- A. Yes, sir. The production equipment is marked with a number "8" and a red letter "P" immediately to the west of the "8."
- Q. You have placed the "8" into what appears to be a middle of a road area. Can you tell us precisely where the production equipment is to the best of your knowledge?
- A. The production equipment is to the north and west of the number 8 on Exhibit 2.
- Q. To be absolutely certain of the location when we review the transcript of your deposition, does the letter "P" in red represent the production equipment location.
- A. Yes it does.

- Q. Mr. Broussard, are there any other significant areas where you contend contamination occurred?
- A. No.
- Q. Are there any other areas that contain pits in which are not marked to your knowledge?
- A. No.
- Q. Are there any other wells to your knowledge which are not marked?
- A. No.
- Q. Are there any other areas that you and your siblings contend were damaged by my client's activities?
- A. No.
- Q. I understand that you are essentially testifying on behalf of your siblings, because you are the only plaintiff with factual knowledge of where the alleged damage occurred. Is that correct?
- A. Yes it is.
- Q. Mr. Broussard, thank you for your patience. I have no further questions.

POINTS FOR DISCUSSION

1. What makes the second vignette so much clearer and easy to understand?

Vignette #4

Exhausting the Witness's Knowledge

Participants: Lonnie Williams, John Aisenbrey

Deponent: Sarah Montoya

Video discussion of issues:

Participants: Lonnie Williams, Dennis Suplee

Issues: Failure to elicit basic information (how long meeting lasted, whether documents were used and follow-up as appropriate, whether anyone took notes and follow-up as appropriate); failure to follow-up to get all information (identity of all who attended until witness says that's all, probe everything said until get answer that's all).

SCRIPT

- Q. On how many occasions in 2012 did you meet with representatives of the XYZ Company to negotiate the contract that is at issue in this case?
- A. At least three.
- Q. When was the first meeting?
- A. Sometime in mid-February?
- Q. Who attended on behalf of your company, ABC?
- A. I was there. And Paul Daley was there.
- Q. Who was there for XYZ?
- A. Mr. Silver was there. So was Mr. Kessler.
- Q. What was the conversation?
- A. I remember Mr. Silver saying that his company was very anxious to become our supplier for electronic chips. He said that his company prided itself on turning out a first-rate product every time. Of course, that turned out to be wrong. That's why we're here.
- Q. What you did say in response?
- A. I told him that top quality was very important to us.

Q. And then there was a meeting in March with representatives of XYZ?

A. Sometime in mid-March.

Q. Who attended?

A. Same people.

Q. What was the conversation at that meeting?

A. Just general discussion, about the same as the first meeting.

POINTS FOR DISCUSSION

1. Failure to elicit basic information, such as:
 - How long the meeting lasted
 - Whether there were any documents in the room [with follow-up as appropriate]
 - Whether anyone took notes [with follow-up as appropriate]
 - How things were left at the end of the meeting.
2. Failure to ask follow-up questions to be sure the witness has provided all relevant information, such as:
 - Did anyone else attend the meeting for ABC – until the answer is No.
 - Did anyone else attend the meeting for XYZ – until the answer is No.
 - Was anything further said at that meeting – until the answer is No.
 - Instead of identifying the meetings, get the witness to do so. Press for list of all meetings the witness recalls. When were they? Press on list of meetings until the answer is that is all there were.
3. Use a checklist
 - Journalism's 5 "W's" – who, what, where, when, why.
 - Helps avoid getting distracted and failing to come back to exhaust on a point.

Vignette #5

Dealing with the Talkative and unresponsive witness

Participants: George Robinson, Paul Redfearn

Deponent: Todd LaSala

Video discussion of issues:

Participants: George Robinson, Paul Redfearn

Issues: What, if anything, should interrogator do to discipline the witness to answer the question; what can counsel for the deponent do?

SCRIPT

[Assume this Q&A comes early in the deposition.]

Q. What was the purpose of your visit to Smithville in October 2012?

A. Well the reason I went there was....you see, I spent ten years working for the Columbia Mine Subsidence Insurance Fund. This was a, a private fund put together by the State and it was done because in the state of Columbia, we have over a million acres undermined and, unfortunately, for us 73 percent of the state is underlaid by coal and we've got new coal mines moving in all the time.

And we're a state that has always had a lot of subsidence. It started in 1840, and like here, no idea where it was, we run into something that when a hole opens up in Belleville, which is one of the older towns there. And so it's, it's a -- it's a state that's -- it has had an awful lot of subsidence in the past.

In the past the ma and pa type of operations, very close to what probably happened here, we have an idea of where, where the mine was, but it's, you know, everything's gone. And they were small and they probably went in horizontally rather than vertically because it was easier to do. They go down in a creek valley and find some coal and start digging like a mole. That went on for quite a long period of time.

And then Columbia became a center for -- basically, for coal to, to burn. It's not a coking coal that comes out of Appalachia. It is what we call a heating coal is what it is. Most of the coal has been used for home heating and for the manufacture and use of, of steam.

Q. Okay. But when you went to Smithville in October, 2012, what was the purpose for your visit there?

- A. Like I said, we have this subsidence problem in Columbia and we have a lot of coal mines...

POINTS FOR DISCUSSION:

1. What, if anything, can or should the interrogator do to discipline the witness to answer the question?
 - Off-the-record discussion with deponent's counsel, who may be as frustrated as you?
 - Call the court?
2. What are the pluses and minuses of letting a witness ramble on?

Vignette #6

Dealing with abusive lawyer

Participants: Lynn Johnson & off-camera abusive lawyer

Video discussion of issues:

Participants: Lynn Johnson, David Markowitz

Issues: How to handle obstructive tactics; whether to call the court, what relief to seek [special master?]

SCRIPT

Q. From what high school did you graduate and in what year?

Witness

Counsel: For goodness sakes, Mr. Smith is a 45-year-old man who works as security guard in a downtown building who happened to see and witness an accident at 16th and Market Streets. Of what possible relevance is where he went to high school?

Q. Please answer the question.

A. From Central High in 1985.

Q. Did you attend college?

Witness

Counsel: You're kidding me. That's even less relevant. Ask another question.

Q. Mr. Smith, please answer the question.

A. I went to Community College for 18 months.

Q. Did you leave voluntarily?

Witness

Counsel: Who cares? I don't care. The Judge won't care. The jury won't care. In fact, if you try to ask that kind of question at trial, the Judge will shut you down – real fast.

Q. Mr. Smith, please answer the question.

A. I just decided it wasn't for me, so I dropped out and went to work.

Q. What was your first job after Community College?

Witness

Counsel: You want to know what he did 20 years ago to make a buck? Really? This is beyond the pale. When this deposition is over, I'm going to show the transcript to the partner to whom you report. He and I go back a long time. I guarantee he's going to be embarrassed when he reads it. And I guarantee you're going to be embarrassed when he calls you into his office to discuss things.

Examining

Counsel: The questions I'm asking are perfectly appropriate. I have a right to learn something about the witness's background. I can move through these preliminary questions a lot quicker if we can eliminate the interruptions.

Witness

Counsel: Are you lecturing me about depositions? How long have you been practicing? Do you know how long I've been trying cases in this City? Big cases, by the way. Get to the point or we're leaving. I have to leave soon anyway for a lunch date with Judge Roberts. Figure you've got 20 minutes to complete your questioning.

Q. Would the court reporter please read back the question. And I ask you, Mr. Smith, to answer it.

[Fade to black]

Q. Mr. Smith, can you confirm that as of January 15, 2012 Mr. Jones was a partner of ABC Tech while he was still employed by Universal Tech and teaching at Universal Tech?

Witness

Counsel: Objection. No foundation, assumes facts not in evidence. It's argumentative, invades the attorney-client privilege and the work product doctrine. Instruct the witness not to answer.

Q. Mr. Smith, are you going to follow your counsel's instruction not to answer?

Witness

Counsel: What kind of question is that, of course he will follow my advice. And you're invading the attorney-client privilege and the work product doctrine. Instruct the witness not to answer.

Q. Mr. Smith, while you were working at ABC Tech did you copy your ABC Tech course materials to use when you started working at Universal Tech?

Witness

Counsel: Objection. Still no foundation, assumes facts not in evidence. Instruct the witness not to answer.

Q. Did Mr. Jones help Universal Tech in any way to develop course material while he was still working with you ABC Tech?

Witness

Counsel: Same objection – no foundation, assumes he knows what Jones did. Instruct the witness not to answer.

Q. Did you ever speak with Mr. Jones about preparing course materials?

Witness

Counsel: If you recall.

A. I don't recall.

Q. Has Mr. Jones ever told you anything about the course materials?

Witness

Counsel: That's a stupid question. He told you he doesn't recall if he ever spoke to Jones about the materials. It is absolutely speculative, no foundation or anything else. If you are going to ask unfair questions, I am going to correct them.

Examining

Counsel: Counsel, under our rules counsel may not make speaking objections – you may only state that you have an objection. Would you please confine yourself to stating that you have an objection.

Witness

Counsel: Don't...don't...ever presume to tell me what to do. I am being straight with the guy and you're being not straight with the guy. You are trying to get him to say things that are untrue. It's an old trick.

Examining

Counsel: I think you're trying to coach the witness.

Witness

Counsel: I'm telling him what the question is so he can answer it.

Examining

Counsel: No, you are making speaking objections which are improper.

Witness

Counsel: Don't lecture me, idiot. I have been doing this when you were chasing cheerleaders, puppy.

Examining

Counsel: [to court reporter] Ms. Albert, please mark where you are in the transcript. We may be calling the court in awhile and I will want you to be able to locate and read the past few minutes to the judge. Thank you.

[Fade to black]

Q. Have you had any conversations with Mr. Jones about working for Universal Tech?

A. Yes.

Q. Did he tell you anything about course materials Universal Tech needed?

Witness

Counsel: If you recall.

A. I don't recall.

Q. This is Exhibit A – I believe it is a copy of the ABC Tech course material. Can you tell me when you first worked with this material?

Witness

Counsel: If you recall.

A. I don't recall.

Q. Do you recognize Exhibit A as course material at ABC Tech?

Witness

Counsel: If you know.

Examining

Counsel: Counsel, I ask you to refrain from making comments like that.

Witness

Counsel: I'll make whatever comments I chose to make. Just ask your questions.

Q. Do you recognize Exhibit A as course material at ABC Tech?

A. It looks familiar, but I am not sure whether it was used at ABC Tech.

Q. Well, can you tell me when you first saw it?

Witness

Counsel: If you recall.

Examining

Counsel: Mr. Smith, I am sure that you are the person here who best knows what you know and what you do not know. I only want you to tell me what you know. You don't need to be reminded repeatedly of that, do you?

A. No, I don't.

[Fade to black]

Q. Mr. Smith, I asked you what Mr. Jones told you about course materials and we're going to stay here until you do, if it takes all day.

A. I really don't recall anything we talked about. We certainly did not talk about course materials.

POINTS FOR DISCUSSION

1. How well did deposing counsel handle the obstructive tactics of opposing counsel?
2. What more – or less – might he have done?
3. When can the defending attorney not only object, but instruct the witness not to answer?
4. Should he have called the Judge?
 - If he had called the Judge, what relief might he have sought?
 - Sanctions? Special master?

Vignette #7

Dealing with an evasive witness and private conversations between the deponent and his counsel during the deposition

Participants: Lonnie Williams, Lynn Johnson

Deponent: Hughston Walkinson

Video discussion of issues:

Participants: Lonnie Williams, David Markowitz'

Issues: Other ways to deal with tight-lipped deponent, ways to get deponent to be more forthcoming.

SCRIPT

[construction manager on building]

- Q. Who built the Grace Arms Apartments?
- A. I'm not sure who got the bills or who made the contracts with the subcontractors.
- Q. I'm not asking who was on the contracts now, I'm asking who built the buildings?
- A. Well, we had subcontractors.
- Q. Who was the general contractor on that job?
- A. I'm not sure how you are using that term.
- Q. I'm using that term as it is generally used in the construction industry. You've heard that term before, haven't you?
- A. Yes.
- Q. Many times?
- A. Yes.
- Q. And you've used that term yourself, haven't you?
- A. Yes.
- Q. Many times?
- A. Yes.
- Q. What does that term "general contractor" mean to you?

[Witness turns to his counsel privately so that the Interrogator cannot hear their conversation.]

Interrogator: Just a minute. You can't confer with the witness while the deposition is going on.

Deponent's

Lawyer: Sure I can. The witness's right to counsel necessarily includes the right to confer with counsel.

Interrogator: You can confer before the deposition begins, but not after. Besides, there's a question pending. You certainly can't confer while there's a question pending.

Deponent's

Lawyer: He can if he wants to inquire whether the question calls for privileged information.

[Fade To Black]

Q. What does that term "general contractor" mean to you?

A. It means the contractor who has signed a contract with the owner to take overall responsibility for completion of the project.

Q. And does the general contractor have authority to hire subcontractors as necessary?

A. Yes.

Q. Who was the general contractor on this job?

A. I'm not sure.

Q. Did Acme Construction Company serve as the general contractor?

A. It might have. I guess it did.

Q. Did Acme Construction Company people work on the Grace Arms Apartment job?

A. There was a superintendent.

Q. What's his name?

A. We had five of them.

Q. Okay. What are their names?

- A. Dale, Richard.
- Q. Do you know last names?
- A. No. Matt and Robert.
- Q. If you wanted to find out what their names are, how would you go about doing it?
- A. I would look in my log book for that job.
- Q. What's Exhibit 19?
- A. It's a log book.
- Q. On what job?
- A. It's my log book on the Grace Arms apartment job.
- Q. Would you take a minute and go through it and point out to me the names of any Acme Construction superintendents?
- A. [Witness complies.]
- Q. You have pointed to Dale Smith – was he a superintendent for Acme on this job?
- A. Yes.
- Q. Richard Jones – was he also a superintendent for Acme?
- A. Yes.
- Q. And you have also pointed out Matt Walker and Robert Martin, were they also superintendents for Acme on the Grace Arms Apartment job?
- A. Yes.
- Q. Initially you said you had 5 superintendents from Acme. We have found 4 names. Do you think there was a fifth as well?
- A. No, I was estimating. I only have 4 recorded in the log book.
- Q. So, have we exhausted your memory on who the superintendents were that worked on the Grace Arms Apartment?
- A. I cannot think of any others right now.
- Q. As we go along today, if you think of another please speak up and tell me, is that agreeable?

A. Sure, if I think of anyone else.

POINTS FOR DISCUSSION

1. See p. 11 of Written Materials re private conferences between counsel and the deponent during the deposition.
2. Were there other ways for the interrogator to deal with this tight-lipped deponent?
 - What were they?
3. How might the interrogator get the deponent to be more forthcoming in answering simple questions?
 - Threaten to call the Judge?
 - Raise the prospect that the deponent may be required for a second day of testimony?
 - Anything else?
4. Is it permissible for the witness to confer with his lawyer during the course of a deposition?
 - While a question is pending?
 - After he has answered a question and before the next one is asked?
 - During one of the periodic breaks during the deposition?
 - During an overnight break?
 - Jurisdictions vary – need to check local rules and practices.

Vignette #8

Preparing the deponent to testify

Participants: John Aisenbrey

Deponent: Robert Moore

Video discussion: Dennis Suplee, John Aisenbrey

PRELIMINARY NOTE: The fact situation underlying this vignette is described on the video entitled Introductory Commentary on Preparing the Deponent to Testify; it is also set forth below.

* * *

UNDERLYING FACTS

The following witness-preparation vignette takes place in a case involving a suit on a fire insurance policy. Plaintiff bought a building that was going to be rehabbed for young professionals seeking upscale condos. On Day 1, Williams, the principal of plaintiff, called Segal, a representative of the fire insurance company. At the end of the conversation, Segal agreed that the company would issue a \$10 million fire insurance policy on the building. Segal prepared a binder evidencing such coverage and mailed it to Williams that same day.

The very next day, a fire occurred that destroyed the building.

Some weeks later, the insurance company denied coverage for the loss on the ground that Williams had told Segal that there was a sprinkler system in the building and that it was in good working order, whereas in fact the sprinkler system was not operating.

Segal's deposition was taken last week and he testified confidently that he had asked Williams whether there was a sprinkler system in the building and, if so, whether it was in good working order; that Williams had answered yes to both questions; and that he (Segal) and the insurance company had issued the insurance policy in reliance upon Williams' answer that the sprinkler system was in good working order – which, in fact, it was not.

The following vignette shows Williams meeting with his lawyer to prepare for his own deposition. Williams is a truthful fellow but, because a lot was going on at that time, he does not have a very good recollection of his conversation with Segal. Williams recalls that he was asked about sprinklers but has little recall as to the specifics.

SCRIPT

- Q. On October 13 you're in your office and you call Segal. You tell him you want fire insurance on this building you've just purchased, right?
- A. Yes.
- Q. Did he ask any questions about the building?
- A. He asked how old the building was. It was because it was such an old building that I wanted fire insurance. He asked how the building was being currently used. I told him that it had been an office building but was now vacant. And I told him we were going to make it a trendy upscale place for these kids in their 20s and 30s who go for that kind of rehab. And, of course, we had some conversation about sprinklers but I don't remember it very well.
- Q. Did he say that if you did not answer his questions truthfully, you would have no insurance in the event of a fire?
- A. He didn't say that but I knew that. You can't lie to the insurance company and then collect on the policy.
- Q. So you knew it was important to tell Segal the truth.
- A. Sure.
- Q. What did you know about sprinklers in the building at the time of that Day 1 conversation?
- A. Not much. From walking through the building, I could see sprinklers throughout.
- Q. Did you know whether the sprinklers were working?
- A. No, that wasn't important to me when I was going through the building before I purchased it. We were going to tear them all out before we even started the rehab work.
- Q. During your conversation on Day 1, did Segal ask you whether the sprinklers were working?
- A. I've told you. I don't remember that conversation very well.
- Q. Suppose Segal had asked you that question. What would you have said?
- A. I would have said that I didn't know.
- Q. Why would you have said that?

- A. Because I didn't know. And, as I said, you can't lie to the insurance company and then collect money on the policy.
- Q. Did Segal say the insurance company won't give you coverage if the sprinklers are not working?
- A. I know that at his deposition he said he did. I just don't recall much about the details of our telephone conversation.
- Q. Again, suppose Segal had said that, what would you have said or done?
- A. I would have told him that I would have to send somebody over to the building to check.
- Q. Why would you have said that?
- A. Because I didn't know whether the sprinklers were working.
- Q. Any chance you would have told Segal that they were working even though you didn't know?
- A. No chance.
- Q. Why not?
- A. Because I would have been worried that if the sprinklers were not working, I would have no insurance.
- Q. Let's talk about what happened after the fire. How did you find out about the fire?
- A. I was on my way to the airport and got a call from my general manager telling me that the building was burning down.
- Q. What was your reaction?
- A. I was upset. I was hoping no one had been injured. Fortunately nobody was hurt. And I was sorry to see our plan for this place literally go up in smoke.
- Q. Did you think about your conversation the day before with Mr. Segal?
- A. No, it did not even occur to me.
- Q. Did you think about the insurance policy?
- A. The thought that went through my mind was, "Thank God we have insurance."
- Q. Did you think to yourself, "I hope those sprinklers were working or I have no insurance"?

- A. Never crossed my mind.
- Q. You've told me that you would have told Segal the truth in answering any questions about the building, including sprinklers. And you've told me that when you first heard of the fire, you had no worries about whether you had insurance coverage. Right?
- A. Yes.
- Q. Then think back: is this guy right when he says you told him that there were working sprinklers in the building?
- A. When you put it that way, I don't think he's right.
- Q. I know you can't recall the details of your conversation with Segal. But, can you say that, based on the facts we've gone over, you are confident that you did not tell Segal that the sprinklers were in good working order or anything like that?
- A. I think I can say that I would not have said that to Segal.
- Q. Good. Now, it's important in your testimony to make clear that you do not recall the conversation in detail. But you can explain how you have come to the conclusion about what you would, or would not, have said. So, let's practice how you would answer questions on that subject.

POINTS FOR DISCUSSION

1. See p. 21 of the Written Materials re preparing the deponent to testify.
2. Has Advocate gone over the line?
 - If you say yes, explain where he went too far.
 - If you say no, how do you defend Advocate's leading the deponent to testify about the conversation in a way that goes far beyond what the deponent was prepared to say at the beginning of his meeting with Advocate?