

# **HOW TO BEHAVE IN A DEPOSITION... EVEN IF YOU DON'T WANT TO!**

**American Inns of Court  
Earl E. O'Connor Chapter  
April 10, 2012**

## CAST OF CHARACTERS

Anthony L'Dept  
Played by **Tim McCarthy**

Experienced litigator—counsel to Defendant CBC

Nia Fite  
Played by **Lindsay Perkins**

3rd year associate—counsel to Defendant Brown

Rita Lee Rambo  
Played by **Christina Dunn**

Very aggressive fly-by-night litigator—Plaintiff's counsel

Mardell "Duke" Niebuhr  
Played by **Zach Chaffee-McClure**

Television evangelist and faith healer—Plaintiff

Marilyn Brown  
Played by **Angela Gupta**

CBC New Reporter—Individual Defendant

Tina Newton  
Played by **Linda McFee**

CBC Vice President—Defendant's Corporate Representative

Arnold A. Nabolic  
Played by **Brad Bradley**

Duke's Bodyguard

Prayer Counsel  
Played by **Jennifer Vath**

Duke's Prayer Counsel

Court Reporter  
Played by **Neely Fedde**

Court Reporter

# CAST OF PRESENTERS

1. Introduction (**Judge Standridge**)
2. Starting the Deposition: The Late Deponent (**Jennifer Vath**)
  - a. What do you do when the deponent is late?
  - b. What can you do when the deponent spends a long time talking to his lawyer at the beginning of the deposition?
  - c. Are discussions with a lawyer discoverable?
3. Stipulations (**Lindsay Perkins**)
  - a. What stipulations are appropriate?
  - b. What is the best practice?
  - c. What does “usual stipulations” mean?
4. Who Can Attend a Deposition? (**Lindsey Perkins**)
  - a. Does the rule of sequestration apply?
  - b. Who can be present at a deposition?
  - c. If this were on video, would L’Dept want Nabolic in or out?
5. Objections (**Angela Gupta**)
  - a. Is it appropriate for the examining lawyer to discuss ground rules?
  - b. What ground rules are appropriate?
  - c. What are “objections” to the form of the question?
  - d. How do they work?
  - e. Should you state the ground/basis for an objection?
  - f. What tactical mistake was made?
6. The Unresponsive Deponent (**Neely Fedde**)
  - a. What is a “motion to strike”?
  - b. What does certifying the question do?
  - c. Who can make a motion to strike?
  - d. When is a motion to strike appropriate?
  - e. How often should you object?
  - f. How much lawyer colloquy is appropriate?
  - g. What about civility? Can you call the witness an SOB?

7. Coaching the Witness (**Brad Bradley**)
  - a. What is “coaching the witness”?
  - b. Is “coaching” permissible?
  - c. What is an argumentative question?
  
8. Calling the Judge (**Brad Bradley**)
  - a. When do you call the court?
  - b. What court do you call?
  - c. What is the procedure for calling the court?
  - d. What will the court do?
  
9. Fighting on the Record and Videotaping Depositions (**Brad Bradley**)
  - a. Can the rest of the deposition be videotaped?
  - b. What are the rules for videotaping?
  - c. What are the practical effects of Rambo’s conduct if the deposition is videotaped?
  
10. Terminating a Deposition (**Linda McFee**)
  - a. Emergencies
    - i. What do you do when an emergency that requires you to leave the deposition?
    - ii. What are your options?
    - iii. Should you ever turn a deposition over to junior, less experienced counsel?
    - iv. When is a lawyer “ready” to take a deposition on his or her own?
  
  - b. Bad Faith Discovery Practices
    - i. When is it appropriate to terminate a deposition?
    - ii. How do you terminate a deposition?
    - iii. Is leave of court required if the deposition was by agreement rather than notice?
  
  - c. Secret Communications
    - i. Is it appropriate for a defending lawyer to have a secret code with the deponent (e.g., “code blue”)
    - ii. Is it appropriate to fake a heart attack in order to terminate a deposition?

## KANSAS FEDERAL & STATE RULES GOVERNING DEPOSITIONS

|  | FEDERAL RULES  | KANSAS RULES   |
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| <p><b>Scope of Deposition</b></p>          | <p>Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any 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. FRCP 26(b)(1).</p> <p>For good cause shown, the court may order discovery of any matter relevant to the subject matter involved in the action. FRCP 26(b)(1).</p> <p>Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. FRCP 26(b)(1).</p> | <p>Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to the subject matter involved in the action, whether it relates to any party's claim or defense, including the existence, description, nature, custody, condition and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. K.S.A. 2011 Supp. 60-226(b)(1).</p>  |
| <p><b>When Deposition is Permitted</b></p> | <p>After the scheduling conference is held pursuant to 26(f) unless agreed by parties or court order. FRCP 26(d).</p> <p>District Court may allow deposition of witness to perpetuate their testimony for use in event of further proceedings in the District Court. FRCP 27(b).</p>   | <p>(1) <i>Without leave.</i> A party may, by oral questions, depose any person including a party, without leave of court except as provided in subsection (a)(2). The deponent's attendance may be compelled by subpoena under K.S.A. 60-245, and amendments thereto.</p> <p>(2) <i>With leave.</i> A party must obtain leave of court, and the court must grant leave to the extent consistent with K.S.A. 60-226 (b)(2) of, and amendments thereto:</p> <p>(A) If the parties have not stipulated to the deposition and:</p> <p>(i) the deponent has already been deposed in the case; or</p> <p>(ii) the party seeks to take the deposition of a nonparty before the time specified in subsection (b) of K.S.A. 60-216, and amendments thereto, unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave Kansas and be unavailable for examination in Kansas after that time; or</p> <p>(B) the deponent is confined in prison. K.S.A. 2011 Supp. 60-230(a).</p> |

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| <p><b>Length of Deposition</b></p>          | <p>Unless otherwise authorized by the Court or agreed to by the parties, a deposition is limited to one day of seven hours. FRCP 30(d).</p> <p>Court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of deponent or if deponent or another person or circumstance delays the deposition. FRCP 30(d)(2).</p> | <p>No concrete time limit, but: At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses or oppresses the deponent or party. The motion may be filed in the court where the action is pending or where the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order. K.S.A. 2011 Supp. 60-230(d)(1).</p>   |
| <p><b>Leave of Court</b></p>                | <p>Needed if:</p> <ol style="list-style-type: none"> <li>1. Deponent is in prison;</li> <li>2. Proposed deposition would result in more than 10 depositions taken by a party.</li> <li>3. The deponent has already been deposed in the case</li> <li>4. Party seeks to take deposition before time specified in Rule 26(d). FRCP 30(a).</li> </ol>    | <p>A party must obtain leave of court, and the court must grant leave to the extent consistent with subsection (b)(2) of K.S.A. 60-226, and amendments thereto:</p> <p>(A) If the parties have not stipulated to the deposition and:</p> <p>(i) The deponent has already been deposed in the case; or</p> <p>(ii) the party seeks to take the deposition of a nonparty before the time specified in subsection (b) of K.S.A. 60-216, and amendments thereto, unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave Kansas and be unavailable for examination in Kansas after that time; or</p> <p>(B) if the deponent is confined in prison. K.S.A. 2011 Supp. 60-230(a).</p> |
| <p><b>Where Deposition May be Taken</b></p> | <p>May file Motion to Quash or Modify if non-party is ordered to travel more than 100 miles from home, work or where s/he conducts business in person. FRCP 45(c)(3)(A)(ii).</p>  | <p>On timely motion, the issuing court must quash or modify a subpoena that:</p> <p>requires a resident of this state who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed or regularly transacts business in person or requires a nonresident who is neither a party nor a party's officer to travel more than 100 miles from where the nonresident was served with the subpoena, is employed or regularly transacts business in person. K.S.A. 2011 Supp. 60-245(c)(3)(A)(ii).</p>  |

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| <p><b>Notice</b></p>   | <p>"Reasonable" notice in writing to every party. FRCP 30(b)(1).<br/>         Notice shall include:<br/>         1. Time and place of deposition;<br/>         2. Name and address of each deponent. FRCP 30(b)(1).</p>   | <p>A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. K.S.A. 2011 Supp. 60-230(b)(1).</p>   |
| <p><b>Subpoena</b></p> | <p>Shall include:<br/>         1. Name of court;<br/>         2. Title of action;<br/>         3. Command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified;<br/>         and<br/>         4. Set forth the text of subdivisions (c) (Protection of Persons Subject to Subpoenas) and (d) (Duties in Responding to Subpoena) of this rule. FRCP 45(a).</p> | <p>Every subpoena must:<br/>         (i) State the court from which it is issued;<br/>         (ii) state the title of the action, the court in which it is pending and the file number of the action;<br/>         (iii) command each person to whom it is directed to do the following at a specified time and place: Attend and testify; produce designated documents, electronically stored information or tangible things in that person's possession, custody or control; or permit the inspection of premises; and<br/>         (iv) set out the text of subsections (c) (Protecting a person subject to a subpoena) and (d) (Duties in responding to a subpoena). K.S.A. 2011 Supp. 60-245(a).</p> |
| <p><b>Service</b></p>  | <p>Subpoena may be served at:<br/>         1. any place within the district of the court by which it is issued or at:<br/>         2. any place outside of the district within 100 miles of deposition. FRCP 45(b).</p> <p>Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the:<br/>         1. Date;<br/>         2. Manner of service; and<br/>         3. Names of persons served certified by the person who made the service. FRCP 45(a)(3).</p>  | <p>Service of a subpoena may be made anywhere within this state, must be made in accordance with K.S.A. 60-303, and amendments thereto, and must, if the subpoena requires a person's attendance, be accompanied by the fees for one day's attendance and the mileage allowed by law. If, independently of a deposition, the subpoena commands the production of documents, electronically stored information or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party in accordance with subsection (b) of K.S.A. 60-205, and amendments thereto. K.S.A. 2011 Supp. 60-245(b).</p>  |

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| <p><b>Persons before whom Depositions may be Taken</b></p> | <p>Before an officer authorized to administer oaths by the laws of the United States or of the place where the deposition is held, or before a person appointed by court in which action is pending. FRCP 28 and 30(b)(4)</p> | <p><i>Within the United States.</i><br/> <i>Inside this state.</i> Depositions in this state must be taken before an officer or person authorized to administer oaths by the laws of this state.<br/> <i>Outside this state.</i> Outside this state, but within the United States, a deposition must be taken before:<br/> (A) An officer authorized to administer oaths by the law in the place of examination; or<br/> (B) a person appointed by the court where the action is pending to administer oaths and take testimony.<br/> <i>Granting of commission.</i> A court of this state in which an action is pending may grant a commission to one or more persons to take depositions inside or outside this state. The clerk may issue the commission under the seal of the court.<br/> <i>In a foreign country. In general.</i> A deposition may be taken in a foreign country:<br/> (A) Under an applicable treaty or convention;<br/> (B) under a letter of request, whether or not captioned a "letter rogatory";<br/> (C) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or<br/> (D) before a person commissioned by the court to administer any necessary oath and take testimony. K.S.A. 2011 Supp. 60-228(a) and (b).</p> |
| <p><b>Non-Person Deponent</b></p>                          | <p>Can name a public or private corporation or partnership, association or government agency as a deponent.</p> <p>Organization shall designate one or more officers or persons to testify. FRCP 30(b)(6)</p>                 | <p>A party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which the person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This subsection does not preclude a deposition by any other procedure allowed by the rules of civil procedure. K.S.A. 2011 Supp. 60-230(b)(6)</p>  |



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| <b>Witness Expenses</b> | If the witness' attendance is commanded, they shall be given a fee for one day's attendance and the mileage allowed by law. FRCP 45(b)(1).   | If the witness' attendance is commanded, they shall be given a fee for one day's attendance and the mileage allowed by law. K.S.A. 2011 Supp. 60-245(b).  |
| <b>Examination</b>      | May proceed as permitted at trial under the provisions of the Federal Rules of Evidence except Rules 103 (Rulings on Evidence) and Rule 615 (Exclusion of Witnesses). FRCP 30(c).  | The examination and cross-examination of a deponent proceed as they would at trial under the provisions of K.S.A. 60-243, and amendments thereto. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under subsection (b)(3)(A) (Method stated in a stipulation or order). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer. If requested by one of the parties, the testimony must be transcribed. The court may order the cost of transcription paid by one or some of, or apportioned among, the parties. K.S.A. 2011 Supp. 60-230(c)(1). |
| <b>Making a Record</b>  | <p>(A) Method Stated in the Notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.</p> <p>(B) Additional Method. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise. FRCP 30(b)(3).</p> | <p><i>Method of recording.</i></p> <p>(A) <i>Method stated in a stipulation or order.</i> The parties may stipulate or the court may order that the testimony at a deposition be recorded by other than stenographic means. A party may arrange to have a stenographic record made at the party's own expense.</p> <p>(B) <i>Additional method.</i> With prior notice to the deponent and other parties, any party may record on videotape, or a comparable medium, any deposition that is to be recorded stenographically. That party bears the expense of the additional record or transcript unless the court orders otherwise. K.S.A. 60-230(b)(3).</p>   |
| <b>Oath</b>             | Officer before whom the deposition is taken shall put witness under oath or affirmation and shall record the testimony. FRCP 30(b)(5).   | Officer before whom the deposition is taken shall put witness under oath or affirmation and shall record the testimony. K.S.A. 60-230(b)(5)   |

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| <b>Objection: Procedure</b> | <p>Shall be noted by the officer on the record and examination shall proceed with testimony taken subject to the objections. FRCP 30(c)</p> <p>The objection must be stated concisely and in a non-argumentative and non-suggestive manner. FRCP 30(d)(1).</p> <p>A deponent may be instructed not to answer only when necessary to:</p> <ol style="list-style-type: none"> <li>1. preserve a privilege;</li> <li>2. enforce a limitation directed by the court; or</li> <li>3. present a motion under Rule 30(d)(4). FRCP 30(d)(1).</li> </ol>   | <p>An objection at the time of the examination, whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition or to any other aspect of the deposition, must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court or to present a motion under subsection (d)(3) (Award of expenses). K.S.A. 60-230(c)(2).</p> |
| <b>Objection: Substance</b> | <p>Objection may be made at trial if admission would require the exclusion of the evidence if the witness were present and testifying. FRCP 32(b).</p>  | <p>Subject to subsection (b) of K.S.A. 60-228, and amendments thereto, and subsection (d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying. K.S.A. 2011 Supp. 60-232(b).</p>  |
| <b>Termination</b>          | <p>At any time during the deposition, any party or deponent can petition the court to stop the deposition upon a showing that the deposition is being conducted:</p> <ol style="list-style-type: none"> <li>1. in bad faith; or</li> <li>2. to unreasonably, annoy, embarrass or oppress deponent or party. FRCP 30(d)(4).</li> </ol>   | <p>At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses or oppresses the deponent or party. K.S.A. 2011 Supp. 60-230(d)(1).</p>   |
| <b>Stipulations</b>         | <p>Unless the court orders otherwise, the parties may by written stipulation:</p> <ol style="list-style-type: none"> <li>1. Provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions; and</li> <li>2. Modify other procedures governing or limitations placed upon discovery—however stipulations extending the time provided in Rules 33 (interrogatories), 34 (request for production of documents), and 36 (request for admissions) may only be made with court order upon a showing that without such modification the procedures or limitations would interfere with any time set for completion of discovery, for hearing of a motion or trial. FRCP 29.</li> </ol> | <p>Unless the court orders otherwise, the parties may stipulate that:</p> <ol style="list-style-type: none"> <li>(a) A deposition may be taken before any person, at any time or place, on any notice, and in the manner specified, in which event it may be used in the same way as any other deposition; and</li> <li>(b) other procedures governing or limiting discovery be modified, but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion or for trial. K.S.A. 2011 Supp. 60-229.</li> </ol>                                |

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| <p><b>Use of Deposition</b></p>  | <p>The deposition of a witness may be used by any party for any purpose if the court finds:</p> <ol style="list-style-type: none"> <li>1. That the witness is dead;</li> <li>2. That the witness is more than 100 miles from the place of the trial or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition;</li> <li>3. That the witness is unable to attend or testify because of age, illness, infirmity or imprisonment;</li> <li>4. That the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or</li> <li>5. 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 the testimony of witnesses orally in open court, to allow the deposition to be used. FRCP 32(a)(3).</li> </ol> | <p>A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:</p> <ol style="list-style-type: none"> <li>(A) That the witness is dead;</li> <li>(B) that the witness is more than 100 miles from the place of hearing or trial, or is outside this state, unless it appears that the witness' absence was procured by the party offering the deposition;</li> <li>(C) that the witness cannot attend or testify because of age, illness, infirmity or imprisonment;</li> <li>(D) that the party offering the deposition could not procure the witness' attendance by subpoena; or</li> <li>(E) on motion and notice, that exceptional circumstances make it desirable, in the interest of justice and with due regard to the importance of live testimony in open court, to permit the deposition to be used. K.S.A. 2011 Supp. 60-232(a)(4).</li> </ol> |
| <p>Problems with:<br/><b>Notice</b></p>  | <p>Waived unless a written objection is promptly served upon the party giving notice. FRCP 32(d)(1).</p>   | <p>An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice. K.S.A. 2011 Supp. 60-232(d)(1).</p>   |
| <p>Problems with:<br/><b>Officer's Qualifications</b></p>                        | <p>Waived unless made before the deposition begins or as soon as the disqualification becomes known or could be discovered with reasonable diligence. FRCP 32(d)(2).</p>   | <p>An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:</p> <ol style="list-style-type: none"> <li>(A) Before the deposition begins; or</li> <li>(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known. K.S.A. 2011 Supp. 60-232(d)(2).</li> </ol>  |
| <p>Problems with:<br/><b>Competency of Witness or Relevancy of Testimony</b></p> | <p>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 the time. FRCP 32(3)(A).</p>  | <p>An objection to a deponent's competence, or to the competence, relevance or materiality of testimony, is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time. K.S.A. 2011 Supp. 60-232(d)(3)(A).</p>   |
| <p>Problems with:<br/><b>Manner of taking deposition</b></p>                     | <p>Waived unless "reasonable" objection is made at the taking of the deposition. FRCP 32(d)(3)(B).</p>   | <p>An objection to an error or irregularity at an oral examination is waived if:</p> <ol style="list-style-type: none"> <li>(i) It relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct or other matters that might have been corrected at that time; and</li> <li>(ii) it is not timely made during the deposition. K.S.A. 2011 Supp. 60-232(d)(3)(B).</li> </ol>   |

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| <p>Problem with:<br/><b>Completion and return of deposition</b></p> | <p>Waived unless a Motion to Suppress is made with "reasonable promptness" after such defect is or with due diligence might have been ascertained. FRCP 32(d)(4).</p>  | <p>An objection to how the officer transcribed the testimony, or prepared, signed, certified, sealed, endorsed, sent or otherwise dealt with the deposition, is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known. K.S.A. 2011 Supp. 60-232(d)(4).</p>   |
| <p><b>Protective Order</b></p>                                      | <p>Court may make any order which just requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, include one or more of the following—that:</p> <ol style="list-style-type: none"> <li>1. Disclosure or discovery not be had;</li> <li>2. Disclosure or discovery may be had only on specified terms and conditions, including a designation of time or place;</li> <li>3. Discovery may be had only by a method of discovery other than that selected by the party seeking discovery;</li> <li>4. Certain matters not be inquired into, or that the scope of disclosure/discovery be limited to certain matters;</li> <li>5. Discovery be conducted with no one present except persons designated by the court;</li> <li>6. A deposition after being sealed, be opened only by court order;</li> <li>7. A trade secret or other confidential research, development or commercial information not be revealed or be revealed only in designated way; and</li> <li>8. The parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. FRCP 26(c).</li> </ol> | <p>A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending, as an alternative on matters relating to a deposition, in the district court where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action and must describe the steps taken by all attorneys or unrepresented parties to resolve the issues in dispute. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following:</p> <ol style="list-style-type: none"> <li>(A) Forbidding the disclosure or discovery;</li> <li>(B) specifying terms, including time and place, for the disclosure or discovery;</li> <li>(C) prescribing a discovery method other than the one selected by the party seeking discovery;</li> <li>(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;</li> <li>(E) designating the persons who may be present while the discovery is conducted;</li> <li>(F) requiring that a deposition be sealed and opened only on court order;</li> <li>(G) requiring that a trade secret or other confidential research, development or commercial information not be revealed or be revealed only in a specified way; and</li> <li>(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court orders. K.S.A. 2011 Supp. 60-226(c)(1).</li> </ol> |

# **D.KAN. DEPOSITION GUIDELINES**

**As of 04/04/2012**

## **1. Cooperation.**

Counsel are expected to cooperate with, and be courteous to, each other and deponents.

## **2. Stipulations.**

Unless contrary to or inconsistent with the Federal Rules of Civil Procedure, Rules of Practice for the District of Kansas Rules or an order of the Court, the parties (and, when appropriate, a non-party witness) may stipulate in writing to alter, amend, or modify any practice relating to the noticing or taking of a deposition. Any stipulation extending the discovery deadline shall not operate to delay trial or any hearing or pretrial conference.

## **3. Scheduling.**

Absent extraordinary circumstances, counsel shall consult in advance with opposing counsel and proposed deponents in an effort to schedule depositions at mutually convenient times and places. That counsel for a party may be unavailable shall not, however, be grounds for postponing a deposition if another attorney of record for that party is able to attend. Unless leave of court or agreement of counsel is first obtained, at least **five (5)** calendar days' notice of any deposition shall be given.

## **4. Attendance.**

Unless otherwise ordered under Fed. R. Civ. P. 26(c), depositions may be attended by counsel of record, members and employees of their firms, attorneys specially engaged by a party for purpose of the deposition, the parties or the representative of a party, and counsel for the deponent. While a deponent is being examined about any document designated as confidential pursuant to a protective or confidentiality agreement or order, any persons to whom disclosure is not authorized under the order or agreement shall be excluded from the deposition.

## 5. Conduct.

- (a) Objections.** Objections shall be concise and shall not suggest answers to or otherwise coach the deponent. Argumentative interruptions will not be permitted. The only objections that should be asserted are those involving privilege or work product protection or some matter that maybe remedied if presented at the time, such as an objection to the form of the question or the responsiveness of the answer. Other objections shall be avoided unless the deposition is being taken for the express purpose of preserving testimony.
- (b) Directions not to answer.** Counsel shall not direct or request that a deponent not answer a question, unless (1) counsel has objected to the question on the ground that the answer is protected by privilege, work product immunity, or a limitation on evidence directed by the Court; or (2) the direction not to answer is necessary to allow a party or deponent to present a Fed. R. Civ. P. 30(d) motion to the Court. When privilege or work product immunity is asserted, the witness is nevertheless required to answer questions relevant to the existence, extent, or waiver of the privilege/immunity, such as the date of a communication, who made it, to whom it has been disclosed, and its general subject matter.
- (c) Private consultation.** Private conferences between deponents and their attorneys during the actual taking of the deposition are improper except for the purpose of determining whether a privilege or work product immunity should be asserted. Unless prohibited by the Court for good cause shown, such conferences may be held during normal recesses and adjournments. Any private conference between a deponent and his/her attorney in violation of this guideline maybe a proper subject for inquiry by deposing counsel to determine whether there has been any witness-coaching and, if so, what was discussed between the deponent and counsel. In such inquiry, the Court may determine whether, under applicable law, the parties to such a conferences have waived any attorney-client privilege.

## 6. Documents.

- (a) Production of documents.** Party deponents shall have at least **thirty (30)** days before the scheduled deposition to produce any requested documents. Non-party witnesses subpoenaed to produce numerous documents shall be served at least **twenty (20)** calendar days before the deposition. Depending upon the quantity of documents to be produced, some time may be needed for inspection of the documents before the questioning begins.
- (b) Protective or confidentiality order.** A copy of any protective or confidentiality order or agreement shall be provided to the deponent before the deposition begins if the deponent is to produce, or will be asked about, any documents that are subject to the order or agreement.
- (c) Review of documents.** If the witness is going to be asked to review numerous or lengthy documents, copies of the documents should be sent to the witness sufficiently in advance of the deposition to enable the witness to read them prior to the deposition. If the documents are not provided in advance or if the witness does read them thus prolonging the deposition the court can consider that a reason for extending the time limit on the deposition.

## 7. Depositions of Witnesses Who Have No Knowledge of the Facts.

An officer, director, or managing agent of a corporation or a governmental official served with a notice of a deposition or subpoena regarding a matter about which such person has no knowledge may submit to the noticing party five (5) days before the deposition an affidavit so stating and identifying a person within the corporation or governmental entity believed to have such knowledge. Notwithstanding such an affidavit, the noticing party may proceed with the deposition, subject to the right of the witness to seek a protective order.

## 8. Videotaped depositions.

By indicating in its notice of a deposition that it will record the deposition by videotape a party shall be entitled to videotape the deposition, unless a motion for protective order is filed within the time limits provided by D.Kan. Rule 26.2. Videotape depositions shall be subject to the following terms and conditions:

- (a) Stenographic recording.** The videotaped deposition shall be simultaneously recorded stenographically by a qualified court reporter. The court reporter shall administer the oath or affirmation to the deponents on camera. The written transcript by the court reporter shall constitute the official record of the deposition for purposes of Fed. R. Civ. P. 30(e) (submission to witness) and 30(f) (filing, exhibits).
- (b) Cost.** The noticing party shall bear the expense of both the videotaping and the stenographic recording. Any party may at its own expense obtain a copy of the videotape, in addition to the stenographic transcript. Requests for taxation of these costs may be made at the conclusion of the litigation in accordance with applicable law.
- (c) Video Operator.** The operator of the videotape recording equipment shall be subject to the provisions of Fed. R. Civ. P. 28(c). At the beginning of the deposition the operator shall swear or affirm to record the proceedings fairly and accurately.
- (d) Attendance.** Each witness, attorney, and other person attending the deposition shall be identified on camera at the beginning of the deposition. Thereafter, only the deponent (and any demonstrative materials used during the deposition) shall be videotaped.
- (e) Standards.** The deposition shall be conducted in a manner to replicate, to the extent feasible, the presentation of evidence at a trial. Unless physical restrictions dictate otherwise, the deponent shall be seated at a table or in a witness box except when reviewing or presenting demonstrative materials for which a change in position is needed. To the extent practicable, the deposition shall be conducted in a neutral setting, against a solid background, with only such lighting as is required for accurate video recording. Lighting, camera angle, lens setting, and field of view shall be changed only as necessary to accurately record the natural body movements of the deponent or to portray exhibits and materials used during the deposition. Sound levels shall be altered only as necessary to satisfactorily record the voices of counsel and the deponent.
- (f) Interruptions.** The videotape shall run continuously throughout the active conduct of the deposition. Videotape recording shall be suspended during all "off the record" discussions.
- (g) Re-reading.** The re-reading of questions or answers, when needed, shall be done on camera by the stenographic court reporter.



- (h) Index.** The videotape operator shall use a counter on the recording equipment. After completion of the deposition, the operator shall prepare a log, cross-referenced to counter numbers, which identifies the positions on the tape where examination by different counsel begins and ends, where objections are made and examination resumes, where exhibits are identified, and where any interruption of continuous tape-recording occurs, whether for recesses, "off the record" discussions, mechanical failure or otherwise.
- (i) Preservation.** The party initiating the videotape procedure shall preserve custody of the original videotape in its original condition together with the operator's log index and a certificate of the operator attesting to the accuracy of the tape until further order of the Court.
- (j) Objections.** Requests for pretrial rulings on the admissibility of evidence obtained during a videotaped deposition shall be accompanied by appropriate pages of the written transcript. If the objection involves matters peculiar to the videotaping, a copy of the videotape shall also be provided to the Court.
- (k) Use at trial; editing of tapes.** A party desiring to offer a videotape deposition at trial shall be responsible for having available at trial the appropriate playback equipment and a trained operator. After the parties have designated the portions of a videotape to be used at trial, an edited copy of the tape that has been purged of any unnecessary portions and any portions to which objections have been sustained, shall be prepared by the offering party to facilitate continuous playback. A copy of the edited tape shall be made available to other parties at least **ten(10)** days before it is used. The unedited original of the tape shall also be available at the trial.

#### **9. Immediate presentation for ruling on dispute.**

Disputes that arise during the deposition which cannot be resolved by agreement and which, if not immediately resolved, will significantly disrupt the discovery schedule or require a rescheduling of the deposition may be addressed by oral motion in a telephone conference with the Court, subject to the Court's availability. The court reporter recording the deposition shall record as part of the deposition the presentation of the issue to the Court and the Court's ruling.