

UNIVERSITY OF ARIZONA
James E. Rogers College of Law

TAKING AND DEFENDING
DEPOSITIONS

April 12, 2019 – April 14, 2019

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April 19, 2019 - April 21, 2019

PROGRAM SCHEDULE

The State Bar of Arizona does not approve or accredit CLE activities for the Mandatory Continuing Legal Education requirement. This course may qualify for up to 31 hours toward your annual CLE requirement for the State Bar of Arizona, including 4.5 hours of professional responsibility.

OVERVIEW¹

In this class you will learn how to:

1. Effectively prepare your witnesses for their depositions;
2. Defend the deposition;
3. Deal with obstreperous counsel;
4. Get the answers within time constraints;
5. Optimize information from expert witnesses;
6. Test theories; and
7. Close off avenues of escape.

For the law students, this class will be graded pass/fail.

I. METHOD OF INSTRUCTION

The method of instruction for this Deposition Program will follow the basic learning/teaching model developed by the National Institute for Trial Advocacy (NITA). The emphasis will be on "*learning by doing*" in a simulated deposition setting with constructive faculty critique. In addition, the program will contain some lectures and demonstrations concerning deposition skills and the issues of Professional Responsibility and Professionalism attendant to the taking and defending of depositions.

For the purposes of this program, you will be designated as either an "A" or "B". The "A's" will represent I.M. Tokkin and "B's" will represent Luz Correa and Fast Trax, Inc.. The assignments for taking or defending the depositions in the case of *I.M. Tokkin v. Luz Correa and Fast Trax, Inc.* will be made according to the "A"/"B" designation.

Before the program begins, it is absolutely essential that the participants become thoroughly familiar with the *I.M. Tokkin v. Luz Correa and Fast Trax, Inc.* materials. That case file will be posted on D2L for the law students and distributed to the attorneys taking the program by email. All of the problems for the program are based on these materials. Preparation in advance of the program is necessary because preparation time during the program is limited.

¹ Information contained in this course syllabus may be subject to change at the discretion of the instructor with proper notice to students.

II. MATERIALS

S.S. Scholl, Developing Deposition Skills, *I.M. Tokkin v. Luz Correa and Fast Trax, Inc.*, case file. Participants will receive either the Materials for the Plaintiff's Law Firm or the Materials for the Defendants' Law Firm. Faculty members will receive the Materials for the Faculty. Witnesses will receive Witness Only materials.

Plaintiffs and Defendants will each receive the Complaint; Answer; Plaintiff's Responses to Discovery; Defendants' Responses to Discovery; and, their respective expert witness' information. Plaintiff's discovery responses include a copy of the accident report; photographs and damages evidence. The expert witness materials provided *are not* part of the discovery responses and your opposing counsel have not seen your expert's information or supporting documentation. Also, each side has information labeled as "Work Product" and that information is not available to the other side in advance of the depositions.

III. PROGRAM SCHEDULE OF TOPICS AND ASSIGNMENTS

Friday, April 12, 2019

- 11:30 – 1:00 **Faculty Training** (See Room Assignment Schedule)
- 12:00 – 1:00 **Program Registration of Enrolled Attorneys** (Lunch on your own before arrival)
- 1:00 – 2:30 **Introduction to the Program/Demonstration on Beginning the Deposition**
(See Room Assignment Schedule)
- 2:30 – 2:40 **Break**

Workshops #1 and #2 Beginning the Deposition

Workshops #1 and #2 introduce participants to (1) starting the deposition (2) dealing with preliminary matters and (3) questioning regarding the witness' relevant background through the use of (a) organizational techniques, (b) the "getting the list first" technique, and (c) the funnel technique. In gathering

information, examiners should attempt to practice the “open phase” of the deposition before going on to the “clarification phase”. Get the info . . . you can sculpt the raw clay later.

In addition to obtaining commitments and relevant information, the inquiry of a witness regarding preliminary matters has another, equally important purpose. The beginning of the deposition should be used to put the witness at ease and set a friendly tone so that the witness is encouraged to be expansive in the answering of questions.

2:40 – 3:40

**Workshop #1 – Introduction to Deposition Skills -
Deposition of I.M. Tokkin**

(Meet in Break-up Groups - See Room Assignment Schedule)

B’s, on behalf of Luz Correa and Fast Trax, Inc., take the deposition of I.M. Tokkin from the moment you are ready to start the deposition through your coverage of:

- (1) Preliminary matters concerning stipulations and commitments by the witness; and
- (2) Tokkin’s personal, education or business/employment background.

A’s on behalf of Tokkin, defend your client’s interests during the deposition.

3:40 – 3:50

Break

3:50 – 4:50

**Workshop # 2 Introduction to Deposition Skills –
Deposition of Luz Correa**

(Meet in Break-up Groups - See Room Assignment Schedule)

A’s, on behalf of Tokkin, take the deposition of Luz Correa from the moment you are ready to start the deposition through your coverage of:

- (1) Preliminary matters concerning stipulations and commitments by the witness; and

- (2) Correa’s personal, educational or business/employment background.

B’s, on behalf of the Luz Correa and Fast Trax, Inc., defend your clients’ interests during the deposition.

4:50 – 6:00

Discovery Planning Session & Planning for the Deposition
(Participants should read Effective Depo, Chapters 4-5)

All A’s and all B’s meet separately – See Room Assignment Schedule

Saturday, April 13, 2019

8:30 – 9:00

Faculty Meeting

9:00 – 10:00

Lecture/Demonstration: Defending the Deposition

Workshops #3 and #4
Information Gathering Using The Funnel Technique

Today’s workshops concentrate on information gathering skills with an emphasis on (1) developing and executing the Funnel Technique in order to obtain complete information; (2) the use of simple language; (3) taking care to create a clear record of the deposition; (4) listening carefully to answers; (5) making and dealing with objections; and (6) using exhibits during the deposition. The Funnel Technique ensures a comprehensive exploration of a witness’s knowledge of a particular subject matter by beginning each topic with broad, open-ended questions and progressively narrowing the focus of the questions until at the end of the “funnel” they are very specific and leading in form. In Workshops #3 and #4, participants should try to have the witness identify all general information relevant to a topic before attempting to elicit details. This is “getting the list first” technique.

*For the purpose of these workshops, deposing attorneys in each group should attempt to divide the topics of deposition inquiry. This division is designed to allow participants to fully prepare for a portion of the workshop. Your preparation should anticipate the use of relevant exhibits. Overlap among the listed inquiry is permissible.

10:00 – 11:00

Workshop #3 – Information Gathering Using the “Funnel Technique” – Deposition of I.M. Tokkin

(Meet in Break-up Groups – See Room Assignment Schedule)

B’s on behalf of Defendant, continue the deposition of Tokkin concerning one of the following topics:

- (1) Tokkin’s version of the facts of the crash;
- (2) Tokkin’s realization he/she was injured;
- (3) Tokkin’s experience with the law;
- (4) Tokkin’s activities the day of, but before the crash;
- (5) Property damage issues and Personal injury damages;
- (6) Any topic not fully covered in the morning session.

A’s on behalf of Defendants, defend your clients interests during Tokkin’s deposition.

11:00 – 11:15

Break

11:15 – 12:15

Workshop #4 – Information Gathering Using the “Funnel Technique” – Deposition of Luz Correa

(Meet in Break-up Groups – See Room Assignment Schedule)

A’s on behalf of Tokkin, continue the deposition of Luz Correa concerning one of the following topics ¹:

- (1) Fast Trax’s business and Correa’s job duties;
- (2) Correa’s activities the morning before the crash;
- (3) Correa’s observations of Tokkin after the crash;
- (4) Correa’s reporting of the crash to Fast Trax.

B’s on behalf of Defendant, defend your client’s interests.

12:15 – 1:15

Lunch

Workshops #5 and #6 Working Down the Funnel

1:15 – 1:55 **Lecture/Demonstration: Use of Documents & Foundations in the Deposition**

*For the purpose of these workshops, deposing attorneys in each group should attempt to divide the topics of deposition inquiry. This division is designed to allow participants to fully prepare for a portion of the workshop. Your preparation should anticipate the use of relevant exhibits. Overlap among the listed topics of inquiry is permissible.

2:00 – 3:00 **Workshop #5 – Information Gathering: “Working Down the Funnel” – Deposition of I.M. Tokkin**
(Meet in Break-up Groups – See Room Assignments Schedule)

B’s, on behalf of Defendant, continue the deposition of Tokkin concerning one of the following topics using exhibits where you can:

- (1) Issues raised by the police report;
- (2) Tokkin’s physical injuries;
- (3) Tokkin’s property damage claim;
- (4) Tokkin’s lost income claim; or
- (5) Tokkin’s medical treatments.

A’s, on behalf of Tokkin, defend you client’s interests during the deposition.

3:00 – 3:15 **Break**

3:15 – 4:15 **Workshop #6 – Information Gathering: “Working Down the Funnel” – Deposition of Luz Correa**
(Meet in Break-up Groups – See Room Assignments Schedule)

A’s, on behalf of Tokkin, continue the deposition of Correa concerning one of the following topics using exhibits where you can:

- (1) Correa’s version of what happened with the crash;

- (2) Luz Correa and Fast Trax, Inc.'s communications about the crash;
- (3) Issues raised by the police report;
- (5) Correa's driving history;
- (6) Fast Trax corporate personality; or,
- (7) Any topic not fully covered during the morning session.

B's, on behalf of Defendant, defend your client's interests during the deposition.

4:20 – 5:45 **Lecture/Demonstration: Ethics and Professionalism in Witness Preparation**

Sunday, April 14, 2019

8:00 – 8:30 **Faculty Meeting**

8:30 – 9:10 **Theory Testing: Using Leading Questions and “Questments” to Harvest Admission and Test Theories**

9:15 – 9:45 **Brainstorming Session: The Witness as Punctuation Mark**
(All “A’s” and “B’s” meet together as directed in smaller groups)

9:45 – 10:00 **Break**

Workshop #7
Ethical Witness Preparation

For the purposes of Workshops #7, assume that Tokkin and Correa are meeting with their counsel the day before their respective depositions. In this Workshop, participants will attempt the tactically and ethically complex task of preparing Tokkin and Correa for their deposition, and in particular, for opposing counsel's attempts to test theories of his or her case to obtain critical admissions. Participants must prepare their client to testify in a poised and persuasive matter with all the facts in mind. One participant can do the “ecology check”, another participant can explain the rules of the road, a third participant can act as the opposing counsel in subjecting the witness to the toughest questions, and the fourth participant will act as the facilitator.

10:00 – 12:00

Workshop #7 – Preparation of Tokkin and Correa for their Deposition

(All Participants Meet Their Client in Witness Preparation Groups – See Room Assignment Schedule)

A's, on behalf of Plaintiff, prepare Tokkin for deposition.

B's, on behalf of Defendants, prepare Correa for deposition. Defense counsel have been hired by Fast Trax's insurer which is defending the case on a General Liability Commercial Policy which provides coverage for the company and its employees who are acting within the course and scope of their employment.

This workshop will stimulate certain initial housekeeping tasks, such as representation issues, new client information for counsel, client concerns about the upcoming deposition, witness familiarization with the format of a deposition and the "rules" of testifying, an explanation of the theory of the case and key issues. Counsel may apportion each job, but there should be one lead lawyer who explains all this to the client, who may be somewhat fragile and suspicious. Meet the client at the door and escort in.

Second, participants will conduct a mock examination of the client rehearsing and "shaping" the client's answers to the "hardest questions" the witness could be asked. It is suggested that each participant recruit another member of their group to cross-examine the client. This relieves counsel of having to be both the "bad guy" and the "good guy" at the same time

12:00 – 1:00

Lunch

Workshops #8 and #9
Fact Gathering Using the Funnel Technique

Workshops #8 and #9 provide a further opportunity for participants to work on the skills of gathering information using the “Get the List” and Funnel Techniques. After choosing a topic, (1) Headline &/or ask a directive question; (2) Ask wide-open questions to get the witness talking; (3) Ask open-ended questions to get information; (4) Exhaust each point with “what else?” (5) Mini-recap with “anything else?” (6) Probe and test with leading questions; and (7) Ask recapitulating/summary questions to lock-in the answer for the record.

1:00 – 2:15

Workshop #8 – Gathering Information Using the Funnel Technique – Deposition of Luz Correa

(Meet in Break-up Groups – See Room Assignment Schedule)

A’s, on behalf of Plaintiff, pick up the deposition of Correa on some salacious topics you are interested in and which advance your case theory.

B’s, on behalf of Defendants, defend your client’s interests during Correa’s deposition

2:15 – 3:30

Workshop #9 – Gathering Information Using the Funnel Technique – Deposition of I.M. Tokkin

(Meet in Break-up Groups – See Room Assignment Schedule)

B’s, on behalf of Defendant, pick up the deposition of Tokkin and get the good stuff

A’s, on behalf of Plaintiff, defend your client’s interests during Tokkin’s deposition

Week Two
Friday, April 19, 2019

11:30 – 11:55 **Faculty Meeting (See Room Assignment Schedule -- Lunch provided)**

*Lunch on your own for participants before session begins.

12:00 – 1:30 **Lecture/Demonstration: Dealing with the Obstreperous Lawyer/Objections and the Ethical and Professionalism Issues Involved (30 minutes devoted to ethics/professionalism by examining rules and standards of conduct between lawyers in the adversarial circumstances of deposition)**

Workshops #10 and #11
Obtaining Admission sand Theory Testing

Workshops #10 and #11 provide an opportunity for participants to work on the skills of testing potential legal, factual, or persuasive theories of the case they have formulated, as well as work on obtaining admission that inform those theories and contribute to winning or defeating Summary Judgment on a particular issue. We define *legal theory* as describing why the law will support a finding for your client, *factual theory* as an explanation of what actually happened in the case, and *persuasive theory* as describing a way of presenting the case that will make the fact finder want to find in favor of your client. Theory testing a deposition uses cross-examination style questioning techniques. Leading questions, witness control, securing clear admissions and denials are used to test what legal and factual theories will work at trial and what will not.

1:30 – 1:45 **Break**

1:45 – 2:45 **Workshop #10 – Theory Testing and Obtaining Admission – Deposition of Correa**
(Meet in Break-up Groups – See Room Assignment Schedule)

A's, on behalf of Plaintiff, continue the deposition of Correa by eliciting admissions that support or test one of your factual or

legal theories using cross-examination techniques. Write 1-3 sentence statement of the theory you want to test and give it to the instructor before you begin to perform. This will assist you in planning the theory testing and aid the instructor in evaluating your performance. Use theories developed during your brain storming session or as you have heard the evidence unfold.

B's, on behalf of Defendants, defend your client's interests during Luz Correa's deposition.

2:45 – 3:45

Workshop #11 – Theory Testing and Obtaining Admission – Deposition of Tokkin

(Meet in Break-up Groups – See Room Assignment Schedule)

B's, on behalf of Defendants, continue the deposition of Tokkin by eliciting admissions that support or test one of your factual or legal theories using cross-examination techniques. Write a 1-3 sentence statement of the theory you want to test and give it to the instructor before you begin to perform. This will assist you in planning the theory testing and aid the instructor in evaluating your performance. Use theories developed during your brain storming session or as you have heard the evidence unfold.

A's, on behalf of Plaintiff, defend your client's interests during the deposition.

3:45 – 4:00

Break

4:00 – 5:00

Lecture/Demonstration: Deposing the Expert

Saturday, April 20, 2019

- 8:15 – 8:45 **Faculty Meeting**
- 8:45 – 10:00 **Lecture/Demonstration: Expert Witness Preparation**
- 10:00 – 10:15 **Break**
- 10:15 – 12:15 **Meet With Your Expert**
- 12:15 – 1:15 **Lunch**

<p><u>Workshops #12 and #13</u> <u>Getting Qualifications and the Opinion</u></p>

1:20 – 2:50 **Workshop #12 -- Getting Qualifications and the Opinion**

Deposition of the Plaintiff's Expert

B's conduct a deposition of the Plaintiff's expert witness on the following topics

- 1) The expert's assignment
- 2) The expert's qualifications; and
- 3) The expert's opinions

A's defend the deposition of the Plaintiff's expert witness.

2:50 – 3:05 **Break**

3:05 – 4:35 **Workshop #13 -- Getting Qualifications and the Opinion**

Deposition of Defendants' Expert

A's conduct a deposition of the Defendants' expert witness on the following topics:

- 1) The expert's assignment;
- 2) The expert's qualifications; and
- 3) The expert's opinions

B's defend the deposition of the Defendants' expert witness.

Sunday, April 15, 2018

- 8:30 – 9:00 **Faculty Meeting**
- 9:00 – 10:15 **Lecture/Demonstration: Ethics and Professionalism when Dealing with Experts**
- 10:15 – 10:30 **Break**

Workshops #14 and #15
Exhausting and Theory Testing

10:30 – 12:15 **Workshop #14 -- Exhausting & Theory Testing**

Deposition of Plaintiff's Expert

B's conduct a deposition of the Plaintiff's expert witness on the following topics:

- 1) The basis for the expert's opinions
- 2) How the expert arrived at the opinions being offered

A's defend the deposition of the Plaintiff's expert witness.

12:15 – 1:15 **Lunch**

1:15 – 2:45 **Workshop #15 – Exhausting & Theory Testing**

Deposition of Defendants' Expert

A's conduct a deposition of the Defendants' expert on the following topics:

- 1) The basis for the expert's opinion;
- 2) How the expert arrived at the opinions being offered.

B's defend the deposition of the Defendants' economic expert witness.

2:45 – 3:00

Break

<p style="text-align: center;"><u>Workshops #16 and #17</u> <u>More Exhausting & Theory Testing</u></p>

3:00 – 4:00

Workshop # 16 -- More Exhausting & Theory Testing
Plaintiff's Expert

Challenge the expert's opinions and bases.

4:00 – 5:00

Workshop # 17 -- More Exhausting & Theory Testing
Defendants' Expert

Challenge the expert's opinions and bases.

5:00

Conclusion and Evaluation