

How to Take and Defend Depositions Effectively and Make the Most of Deposition Transcripts

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**HOW TO TAKE AND DEFEND
DEPOSITIONS EFFECTIVELY,
AND MAKE THE MOST OF
DEPOSITION TRANSCRIPTS**

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WEBINAR PRESENTER

Stewart Edelstein taught clinical courses at Yale Law School for twenty years, during his forty-year career as a commercial trial lawyer. He is the author/presenter of more than eighty articles, podcasts, and webinars for trial lawyers, and a book, now in its second edition, *How to Succeed as a Trial Lawyer* (ABA 2017). This webinar will enhance your skills in taking and defending depositions, and using deposition transcripts effectively.

OBJECTIVES

- Advantages and disadvantages of taking depositions
- Timing and sequence of taking depositions
- How to prepare to take a deposition
- How to use the funnel method in taking depositions
- How to depose expert witnesses

OBJECTIVES

- How to prepare your client for deposition
- How to represent your client at deposition
- How to use deposition transcripts before and at trial
- How to take video depositions
- How to take remote depositions
- Deposition remedies

ADVANTAGES OF TAKING DEPOSITIONS

- Obtain unfiltered, spontaneous information, with opportunity for follow-up questions
- Obtain party admissions under oath
- Learn strengths and weaknesses of claims, counterclaims, affirmative defenses
- Test potential theories of your case

ADVANTAGES OF TAKING DEPOSITIONS

- Learn how well opposing party and witnesses will testify in court
- Obtain information from and preserve testimony of non-party witnesses
- Learn about ability of opposing counsel
- Potential advantage in negotiation, requests to admit, and summary judgment motion

DISADVANTAGES OF TAKING DEPOSITIONS

- Incurring expense: must weigh cost against benefit
- Revealing your factual and legal theories of the case
- Giving opposing counsel and party preview of your court questioning

DISADVANTAGES OF TAKING DEPOSITIONS

- Opposing counsel learns what you learn at depositions of non-parties
- Opposing counsel has the opportunity to cross-examine non-parties
- Depositions you take may cause opposing counsel to be better prepared
- Potential disadvantage in negotiation, summary judgment motion

WHEN TO TAKE A DEPOSITION

- Complete legal research as to claims, counterclaims, affirmative defenses
- Complete sufficient factual research to know whom to depose, questions to ask
- Develop working themes of your case
- Develop opposing counsel's likely themes
- Obtain answers to interrogatories

WHEN TO TAKE A DEPOSITION

- Obtain all documents you will need by formal discovery and other means
- Do an internet search of the opposing party and key witnesses
- Consider strategic sequence of depositions
- Complete Rule 26(f) conference [Rule 26(d)]
- Consider when court permission required [Rule 30(a)(2)]
- Confer with opposing counsel about date, time, and place

HOW TO NOTICE A DEPOSITION

- Reasonable written notice to all parties required [Rule 30(b)(1)]
- Contents of the notice [Rule 30(b)(2) and (3)]
- If request deponent to bring documents [Rules 30(b)(2) and 34]
- Deposition of an entity [Rule 30(b)(6)]
Caveat: rule amendment requiring meet and confer effective December 1, 2020
- Deposition of non-party witness [Rule 45(a)]

METHODS OF RECORDING DEPOSITION TESTIMONY

Unless court orders otherwise

- Stenographic
- Audio
- Audiovisual
- By telephone
- By other remote means, e.g., video conferencing

[Rule 30(b)(3) and (4) and Rule 30(b)(5)(B)]

LOCATION OF A DEPOSITION

The deposing party can unilaterally choose location, subject to protective order [Rule 26(c)], considering cost, convenience, and litigation efficiency

Ordinarily, deposition of a corporation is at its principal place of business

Factors for location of deposition of a corporation

- Location of counsel for the parties in the forum district
- Number of corporate witnesses to be deposed
- Likelihood of significant discovery disputes
- Whether corporate witnesses often engage in travel for business
- Whether defendant has filed a permissive counterclaim
- The equities

LOCATION OF A DEPOSITION

- Within 100 miles of where deponent resides, is employed, or regularly transacts business in person
- Within state where deponent resides, is employed, or regularly transacts business in person, if deponent is a party or a party's officer

[Rule 45(c)]

HOW TO PREPARE TO TAKE A DEPOSITION

- List subjects to cover
- Assess likely knowledge of deponent on those subjects
- Assemble relevant documents
 - Pleadings
 - Interrogatory responses
 - Deposition transcripts
 - Documents produced in response to requests
 - Documents from your client and your own investigation

HOW TO PREPARE TO TAKE A DEPOSITION

- Determine which documents pertain to which subjects
- Review elements for each cause of action, affirmative defense, and counterclaim
- Prepare outline of questions
- Assemble deposition kit
 - copies of proposed exhibits
 - examination outline
 - other key documents for your reference

HOW TO PREPARE YOUR CLIENT FOR DEPOSITION

- Inform your client what documents to review before you meet to prepare
- Schedule a meeting several days before the deposition
- When preparing your client for deposition
 - Explain that preparing together is ethical
 - Explain the deposition procedure and purpose
 - Explain your role at deposition
 - Deal with client anxieties about being deposed
 - Caution your client about tactics of deposing attorney
 - Explain that this is a defensive exercise
 - Explain procedure to review and correct the deposition transcript

HOW TO PREPARE YOUR CLIENT FOR DEPOSITION

Instruct your client about answering questions
(not just by listing “rules”)

- Tell the truth
- Listen to each question: understand it?
- Think before answering
- Don't volunteer
- Don't guess
- Avoid being locked in
- If unanticipated question, consider theme

HOW TO PREPARE YOUR CLIENT FOR DEPOSITION

- Conduct a mock deposition of your client
- Focus on the more sensitive areas of questioning
- If your client volunteers, take a “time out”
- Remind your client that there is no script
- If the answer does not ring true, pursue the point
- Discuss appropriate demeanor at deposition
- If a video deposition, instruct about conduct at deposition

ETHICS OF PREPARING YOUR CLIENT FOR DEPOSITION

You can

- Advise your client about applicable law
- Advise your client about the most credible way to present testimony
- Make suggestions about wording of testimony (*caveat*)
- Advise your client to avoid colloquialisms
- Reveal testimony of others and evidence in the record

ETHICS OF PREPARING YOUR CLIENT FOR DEPOSITION

You cannot

- Instruct your client to testify falsely
- Recommend modifying testimony so as to mislead
- Supply recollection of purported facts
- Instruct your client to testify without regard to the truth
- Instruct your client to feign emotion

PRE-DEPOSITION COMMUNICATIONS WITH NON-CLIENT DEPONENT

- Not privileged
- Expect opposing counsel to inquire about all such communications
- Reasons to communicate with non-client deponent before deposition
 - Subjects within non-client's knowledge
 - Logistics
 - Explanation of procedure
 - Experts

THE PROCEDURE AT DEPOSITION

- How to deal with stipulations
- Reserving the right to read and sign the transcript [Rule 30(e)]
- Keep track of deposition time [Rule 30(d)(1)]
- Stenographer administers oath [Rule 30(c)(1)]
- Deposition proceeds as at trial [Rule 30(c)(1)]

THE PROCEDURE AT DEPOSITION

- All objections must be noted on the record; if not, waived [Rule 30(c)(2)]
- Testimony is taken subject to objection
- Objection must be stated concisely, not argumentative or suggestive [Rule 30(c)(2)]
- May instruct the deponent not to answer only if necessary to
 - Preserve a privilege
 - Enforce a limitation ordered by the court
 - Present a motion under Rule 30(d)(3)

THE PROCEDURE AT DEPOSITION

- Motion to terminate or limit the deposition
[Rule 30(d)(3)]
- Grounds: bad faith; unreasonably annoys, embarrasses, or oppresses
- Suspension of deposition, if deponent or a party demands, until court order
- Court orders
 - Termination of the deposition
 - Limit scope and manner as provided in Rule 26(c) and limit frequency and extent as provided in Rule 26(b)(2)(C)
 - Award of expenses and attorney's fees as provided in Rule 37(a)(5)

HOW TO TAKE A DEPOSITION

Preliminary instructions to avoid disavowal of testimony

- If you don't understand a question, ask for clarification
- If you make a mistake and realize it during the deposition, correct it
- If any reason can't testify today, let me know now
- If you need a break, let me know

HOW TO TAKE A DEPOSITION

Preliminary questions about preparation

- What documents deponent reviewed to prepare for or in connection with deposition
- What people deponent talked with to prepare for or in connection with deposition

HOW TO TAKE A DEPOSITION

Initial substantive questioning

- Option: begin with easy questions about background, experience of deponent
- Option: begin with key questions, possibly catching deponent off guard

HOW TO TAKE A DEPOSITION

- Listen to each answer: Is it responsive? What information does it reveal? What follow-up questions should you ask?
- Be aware of deponent's body language
- Don't hesitate to ask questions eliciting information harmful to your case

Exception: deposition to preserve testimony

- Ask short, straightforward questions that are not properly objectionable
- Use words consistently for easy word search of transcript

HOW TO TAKE A DEPOSITION

- If opposing counsel objects, consider whether valid; if so, fix the question
- If you don't understand the objection, get clarification
- If opposing counsel goads you, do not engage; focus on the deponent
- Limit note-taking to what is necessary for follow-up questions

HOW TO TAKE A DEPOSITION

Dealing with “I don’t know” and “I don’t remember” non-answers

- Before the crucial question, obtain related admissions
- Be skeptical
- Use documents to challenge lack of knowledge or memory
- Use prior testimony of other witnesses
- Ask the witness if there is a document that may refresh recollection

HOW TO TAKE A DEPOSITION

Dealing with the evasive deponent

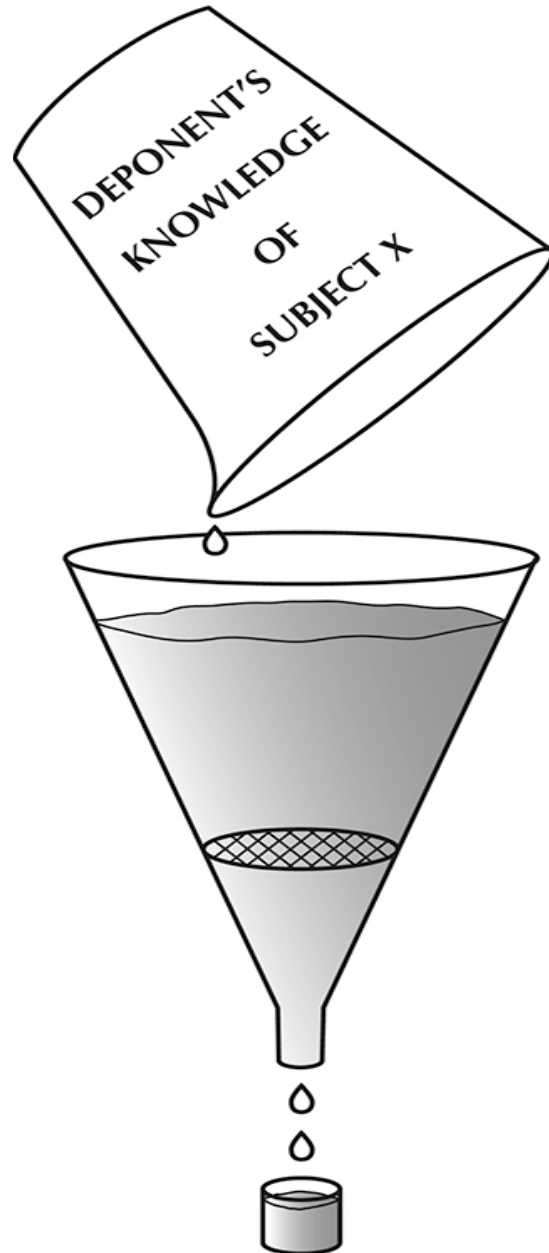
- Did the deponent answer *your* question?
- If not, was your question clear? Fix it if necessary
- If your question was clear, repeat the question verbatim, or ask the stenographer to do so
- If the deponent still does not answer, ask what is supposedly unclear
- If necessary, become confrontational

HOW TO TAKE A DEPOSITION

Dealing with deponent who may be lying

- By pointed questioning, demonstrate illogic of testimony
- Express incredulity by your words and body language
- Remind the deponent of the seriousness of the oath
- Confront the deponent with documents revealing the truth
- If the deponent has memorized a contrived story, ask questions out of order
- If another deponent has testified to the contrary, confront the deponent

FUNNEL METHOD



1. DEPONENT'S KNOWLEDGE
OF SUBJECT X

2. OPEN-ENDED QUESTIONS

3. REPORTER QUESTIONS

4. FILTER

5. ADMISSION QUESTIONS

6. ADMISSIONS

HOW TO TAKE A DEPOSITION

The funnel method – generally

- Start with general questions on a subject
- Then ask clarifying “reporter” questions
- Then obtain admissions
- Then go to the next subject, using the funnel method

HOW TO TAKE A DEPOSITION

The funnel method – top of the funnel

Ask non-leading, open-ended questions

- “Tell me about Subject X”
- “What else do you know about Subject X?”
- “Is that everything you know about Subject X?”

HOW TO TAKE A DEPOSITION

The funnel method – middle of the funnel

- Ask reporter questions: who, what, where, when, why, and how?
- Get clarification of any non-specific answers
- Exhaust the deponent's memory on each subject
- Close the door on likelihood of additional trial testimony on each subject

HOW TO TAKE A DEPOSITION

The funnel method – bottom of the funnel

- From answers at middle of funnel, determine possible admissions
- Ask only leading questions or make declaratory statements
- Obtain admissions

“You admit that”

“You don’t dispute that”

“You agree that”

HOW TO TAKE A DEPOSITION

The funnel method – variations

- While in the funnel for Subject X, explore the funnel for Subject Y
- Obtain admissions without venturing down the funnel, especially if deponent

Evasive

Terse

Adversarial

HOW TO DEFEND A DEPOSITION

Just before deposition of your client begins

- Deal with any client anxiety issues
- As necessary, review deposition preparation and procedure
- Remind your client about proper demeanor
- Explain to your client that you will likely not say much, but that your client should listen to your objections

HOW TO DEFEND A DEPOSITION

Your objections at deposition

- Object strategically, to avoid inadvertently assisting opposing counsel
- Bases to object as to form
 - Ambiguous
 - Double question
 - Question assuming facts not in evidence
 - Confusing question
 - Question already asked and answered
- Continuing objection

HOW TO DEFEND A DEPOSITION

Your objections at deposition [Rule 30(c)(2)]

All objections must be stated during the deposition to

- Evidence
- A party's conduct
- Officer's qualifications
- Manner of taking the deposition
- Any other aspect of the deposition

All objections must be stated

- Concisely
- In a nonargumentative manner
- In a nonsuggestive manner

HOW TO DEFEND A DEPOSITION

Ethical issues

- What objections are ethical
- What advice to your client during deposition is ethical
- What you can discuss with your client during deposition breaks
- Sanctions for ethical violations at deposition [Rule 30(d)(2)]

HOW TO DEFEND A DEPOSITION

When to ask questions of your client at deposition

- Usually, do not ask questions of your client at deposition
- Exceptions

Your client gave mistaken testimony

Your client will not be available at a hearing or trial

HOW TO DEPOSE AN EXPERT WITNESS

Preparation

- Review the expert's report
- Discuss the expert's report with your expert
- Work with your expert to determine what questions to ask
- Consider what questions to refrain from asking (e.g., math error)
- Refrain from noticing deposition of an expert who is required to provide a report until after receiving the report [Rule 26(a)(2)(B) and Rule 26(b)(4)(A)]

HOW TO DEPOSE AN EXPERT WITNESS

Questions you should ask each expert

- Qualifications and prior experience relevant to expert's testimony
- Prior relevant opinions the expert rendered
- All sources of information the expert considered, even if not relied upon
- Each relevant treatise the expert considers definitive
- The substance of each opinion about which the expert is expected to testify
- The basis for each opinion

HOW TO DEPOSE AN EXPERT WITNESS

Questions you should ask each expert

- All assumptions the expert made as to each opinion
- Approaches used by other experts on the same subject matter
- Anything the expert has not yet done regarding opinions
- Anything the expert has not done that could have been done regarding opinions
- The expert's evaluation of your expert's qualifications and report

HOW TO REVIEW THE TRANSCRIPT OF YOUR CLIENT'S DEPOSITION

If your client has reserved the right to review the transcript during the deposition

- Calendar 30 days from notice that the transcript is ready [Rule 30(e)(1)]
- Read the transcript, preparing an index of significant testimony and a chronology
- Provide a copy of the transcript to your client
- Remind your client that corrections in form *and substance* are permissible [Rule30(e)(1)(B)]

HOW TO REVIEW THE TRANSCRIPT OF YOUR CLIENT'S DEPOSITION

- Ask your client to inform you of all proposed changes (before inserted on errata sheet)
- Discuss your client's proposed changes
- Keep in mind that any substantive change will be the subject of cross-examination at a hearing or trial
- Substantive changes may be based on
 - Newly discovered evidence (new document or fact)
 - Review of documents after deposition not available at deposition
 - Confusion on a question
 - Lapse of memory
- Timely complete and submit the errata sheet to the stenographer and all counsel

HOW TO REVIEW THE TRANSCRIPT OF OTHER DEPOSITIONS

- Prepare an index of significant testimony and add to chronology
- Compare testimony with that of other witnesses
- Prepare examination questions for hearing or trial
- Discuss the transcript, index, and chronology with your client

HOW TO USE DEPOSITION TRANSCRIPTS BEFORE TRIAL

- Negotiation to reach a settlement
- File a request for admissions [Rule 36]
- Support and oppose motions for summary judgment [Rule 56(c)]
- Prepare for a hearing or trial

HOW TO USE DEPOSITION TRANSCRIPTS AT TRIAL

- Testimony of an unavailable witness [Rule 32(a)(4) and FRE 804(b)(1)]
- Admission of a party opponent [Rule 32(a) and FRE 801(d)(2)]
- As a basis for a proffer
- As a means to refresh recollection
- As testimony of a witness whose testimony cannot be refreshed [Rule 32(a)(2) and FRE 804(a)(3)]
- As a means of impeachment [Rule 32(a)(2)]
- Phantom impeachment

HOW TO USE DEPOSITION TRANSCRIPTS AT TRIAL

Steps of impeachment

- Commit witness to court testimony, being skeptical
- Credit the reliability of the deposition transcript
- Contrast deposition testimony with court testimony

Do not ask questions such as “Are you lying now or were you lying then?”

Caveat: Opposing counsel’s right to introduce other parts of the transcript [Rule 32(a)(6) and FRE 106]

VIDEO DEPOSITIONS

Advantages

- Trier of fact sees witness's appearance and demeanor
- More engaging than reading deposition transcripts in court
- Allows for better presentation of exhibits
- More effective for impeachment
- Highlights witness's hesitation, evasiveness, body language
- Can be edited for opening statement and closing argument
- More likely to control conduct of opposing counsel at deposition

VIDEO DEPOSITIONS

Disadvantages

- Expensive and more difficult to arrange
- More likely to encounter technical or mechanical problems
- More difficult to use for trial preparation
- Requires special equipment at deposition and trial
- More cumbersome for impeachment than transcript
- May preserve more effectively testimony harmful to your case

VIDEO DEPOSITIONS

Preparing your client

- Appropriate attire
- Appropriate demeanor
- Body language

REMOTE DEPOSITIONS

- Know the rules in the applicable jurisdiction for remote depositions. See, for example, Rule 37 of section 202.70(g) of the Uniform Rules for the Supreme and County Courts (Rules of Practice for the Commercial Division) in New York State (December 15, 2021)
- Practice in advance the technology you will use.
- Make sure all participants have the requisite technology and can use it
- Agree in advance, or obtain a court order, for deposition ground rules

REMOTE DEPOSITIONS

- Agree in advance where each participant will be located
- Agree in advance about transmitting, uploading, and marking of exhibits
- Agree in advance about post-deposition procedures, such as witness review and signature and custody of exhibits
- Draft the deposition notice so it is explicit for the remote deposition

REMOTE DEPOSITIONS

- At the beginning of the deposition, close all programs you might otherwise keep open
- At the beginning of the deposition, state the stipulations applicable to remote depositions
- At the beginning of the deposition, ask questions about possible outside influence

DEPOSITION REMEDIES

- Sanctions if impede, delay, or frustrate fair examination [Rule 30(d)(2)]
- Failure to answer deposition questions, including evasive and incomplete responses to deposition questions [Rule 37(a)(3)(B)(i) and Rule 37(a)(4)]
- Failure of an entity to designate a deponent pursuant to Rule 30(b)(6) [Rule 37(a)(3)(B)(ii)]

Options: adjourn the deposition for a court order or complete the deposition [Rule 37(a)(3)(C)]

Caveat: Rule 37 requires good faith conference before filing, certification thereof, and provides for recovery of reasonable expenses and attorney's fees [Rule 37(a)(5)]

DEPOSITION REMEDIES

***Protective orders* [Rule 26(b)(2)]**

- The court *can* limit the number and length of depositions
- The court *must* limit the frequency or extent of discovery if

Unreasonably cumulative or duplicative

Can be obtained from another more convenient, less burdensome, or less expensive source

The party seeking discovery had ample opportunity to obtain the information by discovery in the action or

The burden or expense of the proposed discovery outweighs its likely benefit

QUESTIONS