CHAPTER 1

The Big Picture

A. Begin at the End – Victory

Remember Always

- Depositions are a means to an end
- That end is to obtain facts to win your lawsuit

A deposition is not merely an item to cross off of a litigation preparation checklist. Properly used, a deposition can be a powerful and indispensable pre-

LITIGATION WORKING BLUEPRINT

A. Our Theme:	A. Their Likely Theme:
B. Our Story:	B. Their Likely Story:
C. Our Legal Elements:	C. Their Legal Elements:
D. Our Key Facts:	D. Their Key Facts:
E. Our Evidence: (Including Type and Value)	E. Their Evidence: (Including Type and Value)

B. Consider Deposition Advantages and Disadvantages

Before noticing any deposition, you should assess your reasons for and the timing of the deposition to convince yourself that the advantages of taking the

deposition outweigh the disadvantages. In those jurisdictions that limit the number of depositions allowed, it is especially important to assess in advance your overall deposition strategy together with the potential advantages and disadvantages of any given deposition you are considering in relation to other investigative and formal discovery options.

1. Advantages

Depositions offer many potential advantages. They provide an opportunity to observe and assess the deponent; they provide an opportunity to get the deponent's answers in the deponent's words, rather than the more carefully crafted and edited responses of an attorney; they provide the opportunity for immediate follow-up questions; and they provide the opportunity to preserve the testimony of witnesses who may be unavailable at the time or place of the trial. Depositions also may provide the opportunity to educate the other party about certain strengths of your case. When settlement appears to be the most advantageous avenue for resolving a dispute, a strong deposition can be an enormously persuasive means of enhancing your settlement posture.

Deposition Advantages

- Observe witness
- Get witness's words; not attorney's words
- Opportunity for follow-up
- Preserve favorable testimony
- Improve settlement posture

Deposition Disadvantages

- Costly
- Educate witness and attorney about your theories and approach
- Preserve unfavorable testimony

2. Disadvantages

Depositions are costly endeavors. Lawyer time, court reporter costs, and potential travel costs can be substantial. Even more critically, there may be important non-monetary costs. A deposition may educate both the witness and opposing counsel of theories, approaches, or evidence that may not be to your strategic advantage to reveal, at least at certain early stages of a case. Remember also that the very features of a deposition that make it potentially advantageous can also work to your disadvantage. A deposition is under oath, it is preserved word-for-word, and the words are those of the witness rather than the attorney. If the testimony elicited during a deposition is unfavorable, you have now preserved it in a readily-accessible and highly persuasive form. It is especially critical to be cautious about depositions if you plan to file a dispositive motion. Unless you are confident the deposition will provide necessary fuel for your position, it may be best to wait until your motion is filed and ruled upon, if your pretrial schedule allows for such timing.

C. Consider the Specific Witnesses in Your Case

1. Taking Their Depositions

You have control over which persons you decide to depose and the scope of the questions to ask each witness. Be guided by your working case blueprint and ask yourself the following questions:

- Does the potential witness likely have *helpful* things to say about the key facts you need (a) to prove your side of the case, and (b) to disprove the other side? If so, list those.

- Does the potential witness likely have *negative* things to say about the key facts you need (a) to prove your side of the case, and (b) to disprove the other side? If so, list those.

- For each fact listed, either good or bad, is there any for which the *only* proof is that witness's testimony – no other witness's recollection and no other type of evidence will suffice? If so, mark those.

- For each fact listed, either good or bad, is there any for which the *most persuasive* proof is that witness's testimony – no other witness's recollection and no other type of evidence will do as well? If so, mark those.

- How likely is it that the potential witness will be available to testify by affidavit (for summary judgment purposes) or live (for trial purposes) if you forego a deposition? Consider the witness's health status, travel plans, potential job relocations, retirement status, and the like.

- How likely is it that the potential witness will be more or less friendly over time? For example, a witness who is happy to testify favorably today may be distinctly unhappy to do so six months from now when your client downsizes, and fires the witness and three of her closest friends.

- Does the potential witness likely have information you do not possess but that may be important to the development or assessment of your case?

- As to any given witness, is a deposition the only lawful or ethical way to talk to that person? Recall, for example, Rule 4.2 of the Model Rules of Professional Conduct and the comments to that Rule, which state that *ex parte* contact with certain kinds of employees of an adversary organization is unethical. A deposition may be your only option.

As you work through the above questions for each potential witness, it may be helpful to record your notes on a chart similar to the one that follows:

Name of Witness

Likely helpful facts:	Only proof?	Best proof?
_____	_____	_____
_____	_____	_____
_____	_____	_____

Likely negative facts:	Only proof?	Best proof?
_____	_____	_____
_____	_____	_____
_____	_____	_____

Will the witness be available? _____
Will the witness be friendly? _____

2. Defending Their Depositions

You do not have control over the depositions the other side chooses to take (short of obtaining a protective order under appropriate, limited circumstances). But you still should be guided by your working case blueprint and the above specific deposition strategy questions in deciding your overall course of action regarding two defensive tactical issues:

First, in general, how vigorously should you seek to preclude or limit the taking of depositions by your adversary? Is there a legitimate reason for a protective order (e.g., all of the key facts known by the witness are privileged or the number of depositions sought by the adversary is burdensome and harassing)? Are the facts known by the witness generally helpful or negative? Are you going to need to rely upon the witness yourself for some facts?

Second, in general, should you plan to cross-examine the witness at the deposition? How likely is it that the witness will be available to you later? How likely is it that the witness will be friendly or unfriendly later? How vital are the

facts the witness possesses? How damaging will the current testimony likely be, and does the damage require on-the-spot rehabilitation? Will cross-examination prematurely tip your hand? Will cross-examination help position you for a quick and favorable settlement? Will cross-examination likely open the door to additional direct-examination that best is avoided?

D. Put Everything Together

Once you have completed all of the preceding steps, you are ready to think about your plan for each specific deposition in the case. The deposition is going to happen. What facts do you or the other side need to get from this witness and, of the ones you need, what facts, if any, should you get by deposition? The answers should flow from the side-by-side comparison of your overall blueprint and your charts. Only when you have finished this analysis are you ready to begin actually taking and defending the depositions. Techniques for these tasks are the subject of the rest of this handbook.