

TABLE OF CONTENTS

PREFACE.....	xvii
---------------------	-------------

CHAPTER 1

The Big Picture.....	1
A. Begin at the End – Victory.....	1
B. Consider Deposition Advantages and Disadvantages.....	4
1. Advantages.....	5
2. Disadvantages	6
C. Consider the Specific Witnesses in Your Case.....	6
1. Taking Their Depositions	6
2. Defending Their Depositions.....	8
D. Put Everything Together	9

CHAPTER 2

Taking A Deposition	11
A. Deposition Purposes and Styles	12
1. Discover Information	12
2. Pin the Deponent Down.....	15
3. Get Admissions for Dispositive Motions.....	16
4. Preserve Trial Testimony	18
5. Assess the Witness.....	18
6. Show of Strength.....	20
B. Preparation	21
1. File Review	21
2. Question Outline	21
3. Notices and Subpoenas	22
4. Miscellaneous Logistics.....	23
C. The Deposition.....	26
1. Introductory Remarks and Instructions.....	26
2. General Questioning Techniques.....	28
a. Type of Witness	28
b. What to Ask	29
i. Background	30

ii.	Inquiries about subpoenaed documents	31
iii.	Inquiries about deposition preparation.....	33
iv.	Pleadings, discovery responses, affidavits.....	36
v.	Who, what, where, when, why and how	36
vi.	The good, the bad, and sometimes even the ugly	40
vii.	Sources of proof.....	41
viii.	Sources of answers.....	41
ix.	Feelings and attitudes.....	41
x.	Hearsay, speculation and opinions.....	42
xi.	Exhaustion/closure questions.....	44
c.	Organization of Questions	45
i.	Logical/chronological	45
ii.	Unpredictable.....	46
d.	Probing for Details/Listening to the Deponent	47
e.	Pace of Questioning	48
f.	Leading Questions	50
g.	Prefatory Phrases	50
h.	Summarizing Testimony	50
i.	Reacting to the Witness	51
j.	Challenging/Impeaching the Witness	52
k.	Rephrasing Questions	53
3.	Handling Exhibits	54
4.	Demonstrations, Reenactments, and Diagrams	56
5.	Dealing with Confidential Material	59
6.	Taking Notes During the Deposition	60
7.	Concluding Procedures	61

CHAPTER 3

Preparing the Deponent	63
A. Review the Case.....	66
1. Review Applicable Claims and Defenses.....	67
2. Review Theme of Case and Role of Deponent.....	67
3. Review the Facts.....	68
4. Review Discovery Responses and Other Testimony	68
5. Review Statements, Affidavits, Photos, etc	68
B. Review Key Documents	69
C. Explain Deposition Logistics and Procedures	70
1. Definition and Uses of Depositions	70

2. Prior Depositions	71
3. Dress	71
4. Location	71
5. Persons Present	72
6. Oath.....	73
7. Deposition Record and Recording.....	73
8. Breaks	74
9. What to Bring to the Deposition	74
10. Length of the Deposition	75
11. Preliminary Instructions.....	75
12. Right to Read and Sign the Deposition.....	76
D. Tips Regarding Answering Questions	76
1. Tell the Truth	77
2. Listen to the Entire Question	78
3. Make Sure You Understand the Question and Take a Moment Before Answering.....	79
4. Do Not Volunteer Information–Keep Answers Brief.....	80
5. Do Not Speculate	81
6. Do Not Answer “Yes” or “No” If You Cannot Answer the Question that Way.....	83
7. Be Forceful on Important Points but Do Not Exaggerate.....	83
8. Be Wary of Agreeing to Counsel’s Summary of Your Testimony	84
9. Do Not Get Angry or Argue With Opposing Counsel.....	84
10. Avoid Humorous and Sarcastic Remarks	85
11. Feel Free to Tell Attorney You Have Not Completed Your Answer.....	85
12. Do Not Testify Regarding Privileged Communications.....	86
13. Feel Free to Refer to Documents; Read Documents if Necessary Before Testifying About Them	86
14. Be Prepared for Closure Questions – Employ the “At This Time” Tag-On.....	86
15. Do Not Agree to Produce Documents	87
16. Correct Mistakes at the Deposition.....	87
E. Discuss Your Role and the Limitations on What You May Do	87
1. Objections	88
2. Instructions Not To Answer.....	88
3. Conferences With You.....	89
4. Your Questions	90

5. Motion for a Protective Order.....	90
F. Discuss Opposing Counsel	91
1. Role	91
2. Style	91
G. Discuss the Witness's Fears.....	91
H. Practice.....	92
1. Do a Mock Examination	92
2. Consider Videotaping a Mock Deposition.....	93
3. Get Your Deponents To Do Their Own Preparation	93
I. Ethical Issues Regarding Preparation of Deponents.....	94
1. Can You Disclose the Law Before Deponents Give Their Narrative Account of the Facts?	94
2. Can You Challenge a Deponent's Recollection of Unfavorable Facts?	94
3. Can You Refresh a Deponent's Recollection of the Facts?	95
4. Can You Instruct a Deponent Not to Discuss Some Matter?....	96
5. Can You Suggest That a Deponent Use Different Words While Testifying?.....	96
6. Can You Signal a Witness?.....	97
7. What If You Discover Evidence of Your Client's Fraud or Illegal Conduct While Preparing a Deponent?	97

CHAPTER 4

Representing the Deponent	99
A. Preventing Depositions	99
1. Attorneys and Investigators	100
2. High Level Government/Corporate Officials	101
3. Minors and Impaired Deponents.....	103
4. Witnesses With Privileged Information.....	103
5. Experts	103
B. Protective Orders Regarding the Conduct of Depositions.....	104
C. Defending the Deposition	105
1. Protecting the Deponent and the Record Generally.....	105
2. Objections and Instructions Not to Answer	109
a. The Rules	109
b. Tactical Considerations.....	113
3. Asserting Fifth Amendment Rights	115
4. Seeking Court Intervention.....	116
a. Can You Get Help?.....	116

b. From Which Court Do You Get Help?	117
5. Questioning the Deponent.....	118

CHAPTER 5

Problem Witnesses and Problem Attorneys.....	121
A. Problem Witnesses.....	121
1. The Forgetful Witness.....	122
2. The Evasive Witness.....	126
3. The Belligerent Witness.....	128
4. The Rambling Witness.....	130
5. The Impaired or Vulnerable Witness.....	132
6. The Lying Witness.....	133
7. The Wacko Witness	134
B. Problem Attorneys	135
1. The Coach	135
2. The Testifier.....	139
3. The Objector	140
4. The Intimidator	142
5. The Professor	149
6. The Repeater (a/k/a Déjà Vu)	150
7. The Timekeeper	151
C. Judicial Intervention.....	151

CHAPTER 6

Expert Depositions	155
A. Expert Deposition Rules and Requirements	156
1. Right to Depose Experts	156
2. Expert Reports	157
3. Timing and Sequence of Expert Depositions.....	159
4. Location of Expert Depositions	159
5. Costs of Expert Depositions.....	160
6. Recording Expert Depositions	161
B. Preparing for the Expert Deposition	161
1. Create a “Book” on the Expert.....	161
a. Rule 26 Report	162
b. Expert’s Prior Testimony	162
c. Expert’s Publications	163
d. Media Articles.....	163
e. Internet Information	163

f. Licensure Boards/Professional Associations	164
g. Consultation with Other Attorneys and Associations	164
h. Check Expert's Credentials – Get Current Curriculum Vitae	164
2. Use Your Expert and Client to Help You Prepare	164
3. Get Expert's File Before the Deposition	165
a. Reports/Drafts	165
b. Raw Data and Work Papers	165
c. Communications with Counsel	166
d. Materials/Information Relied Upon	167
e. Retainer and Invoices	167
4. Prepare Outline of Questions	167
C. Taking the Deposition	167
1. Inquire About Production Requests	168
2. Do Not Try to Destroy the Expert	168
3. Consider Having Your Expert Attend the Deposition	168
4. Try Not to Educate the Expert About Your Analysis of the Case	169
5. Use Frequent Closure Questions	169
6. More Tips in Model Expert Deposition Outline	169
7. Follow-up to Expert's Deposition	170
a. Get Supplemental Reports	170
b. Take Another Deposition of the Expert	170
c. Consider Getting a Different or Additional Expert	170
d. Give Transcript to Your Expert to Evaluate	170
D. Preparing an Expert to be Deposed	171
1. Do Not Assume Expert Knows How to Testify	171
2. Review Theories of the Case	172
3. Discuss Testimony of Other Experts	172
4. Remember That Your Preparation May Be Discoverable	172
E. Model Expert Deposition Outline	172

CHAPTER 7

Uses of Depositions	185
A. Use With Motions	185
B. Use at Trial	187
1. Deposition Testimony as Substantive Evidence	187
a. Witness Unavailable	188
b. Admissions of Party Opponent	193

c. Prior Inconsistent Statement	193
2. Deposition for Impeachment.....	193
3. Deposition to Refresh Recollection and as Past Recollection Recorded	195
C. Use in Settlement Negotiations.....	196

CHAPTER 8

Miscellaneous Deposition Issues	199
A. Compensation of Fact Witnesses	199
B. Depositions on Written Questions	202
C. Telephone and Videoconference Depositions	204
D. Videotaped Depositions	206
1. Rules/Requirements	206
2. Advantages and Disadvantages.....	207
E. International Depositions.....	209
F. Internet Depositions.....	210
G. Depositions of Electronic Data Custodians	212
1. Get Help From Your Own E-Data Expert	212
2. E-Data Custodian's Background and E-Data Policies.....	213
3. Locations of E-Data	213
4. E-Data Hardware and Software, Access Types, Formats, Storage Media, and File-Naming.....	214
5. E-Data Preservation/Retention.....	215
6. Access to E-Data.....	216
7. How E-Data is Used.....	216

CHAPTER 9

Deposition Rules and Procedures	219
A. Scope of Depositions	219
B. Number of Depositions	221
C. Notice Requirement	223
D. Timing and Order of Depositions	225
1. Priority/Sequence	225
2. Multiple Tracking	226
3. Rule 27 Pre-Action Depositions	226
4. Tactical Considerations.....	227
E. Location of Depositions.....	228
1. Location of Particular Types of Depositions	229
a. Plaintiffs.....	229

b. Defendants	229
c. Corporations.....	230
d. Non-Parties	230
e. Experts	230
2. Selecting the Location.....	230
F. Deposition Subpoenas.....	232
G. Designated Deponents	234
H. Length of Depositions.....	237
I. Persons Present at Depositions	238
1. Parties.....	238
2. Witnesses	238
3. Experts	239
4. Media and/or Public.....	239
5. Tactical Considerations.....	240
J. Recording the Deposition	241
K. Hologram Depositions	243
APPENDIX A.....	245
APPENDIX B	249
APPENDIX C	321
APPENDIX D.....	389