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# Fundamentals of Taking and Defending Depositions 2017

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Deposition Practice Tips and Logistics  
(Substantive Outline) (January 2017)

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## **PLANNING THE DEPOSITION**

1. Noticing the Deposition (FRCP 30 / CPLR 3107)
  - a. Who is the deponent?
    - i. Individual
    - ii. Corporate Representative (FRCP 30(b)(6) / CPLR 3106(d) designee)
    - iii. Records Keeper
    - iv. Written Questions (CPLR 3108-09/ FRCP 31)
  - b. When will deposition take place?
    - i. CPLR 3017 – 20 days notice
    - ii. FRCP – reasonable time
    - iii. Court ordered discovery deadlines
  - c. Where will deposition take place? There are strategic and practical considerations to the location. CPLR 3110 – FRCP is silent on location)
    - i. Your office
    - ii. Adversary’s office
    - iii. Neutral location (hotel, court reporter’s office, etc.)
    - iv. Courthouse
    - v. Remote means (FRCP 30(b)(4))
    - vi. Out of state / country?
  - d. How will you record it?
    - i. Transcribed
    - ii. Videographed
2. Objections to Notice of Deposition
  - a. **Fed. R. Civ. P. 32(d)(1)**: An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.
  - b. **N.Y. CPLR 3112**: All errors and irregularities in the notice for taking a deposition are waived unless at least three days before the time for taking the deposition written objection is served upon the party giving the notice.

3. Other pre-deposition logistics
  - a. Choosing the right court reporter / videographer – subject matter of case, nature of the deposition, need for expedited transcript
  - b. LiveNote?
  - c. Exhibits – sufficient copies need to arrive on time to deposition location

## **PREPARING FOR THE DEPOSITION**

1. Develop Case Strategy
  - a. Map the Case with Themes and a Narrative
    - i. Connect each witness to your narrative
    - ii. Identify the role(s) of the deposition in the overall case strategy. For example, you may want your deposition to accomplish one or more of the following:
      - 1) To “freeze” the testimony of a witness
      - 2) To authenticate documents for trial
      - 3) To obtain background information necessary for future discovery requests or depositions
      - 4) To assess the credibility / effectiveness of an important trial witness
      - 5) To obtain party admissions as to important facts necessary for summary judgment
  - b. Prepare basic case chronology
  - c. Create a “witness file” for use in preparing your outline:
    - i. documents authored by the witness
    - ii. documents sent to (or by) the witness
    - iii. references to the witness in the testimony of other deponents
    - iv. references to the witness in pleadings, interrogatory responses, etc.
    - v. other critical documents in the case (whether authored by witness or not)
2. Prepare the Deposition Outline
  - a. Establish the goals of the deposition and create a list of things you need
  - b. Using Topic Modules
    - i. Prioritize topics
    - ii. Create a table of contents

- c. Scripted Questions
  - i. Advantages and Disadvantages
  - ii. Foundation checklists
- d. Research the witness (social media, writings, etc.)
- 3. Understand All Applicable Rules
  - a. Federal or state (or foreign laws and applicable treaties)
  - b. Local rules
  - c. Court orders (case specific, judge specific, standing orders)
  - d. Authorization to practice/conduct discovery in the jurisdiction
    - i. Out of state commissions
    - ii. Admissions pro hac vice, if necessary
    - iii. Hague Convention/foreign discovery issues
- 4. Understand Individual Case Protocols
  - a. Agreed-upon stipulations
  - b. Exhibit handling
  - c. Confidentiality issues
- 5. Exhibits
  - a. Selecting exhibits – don't attempt to mark and examine a witness regarding every document in their witness file. Be selective.
  - b. Purpose of selected exhibits
    - i. Inquiry
    - ii. Impeachment
    - iii. Admissibility / Authentication
  - c. Exhibit Checklist: prioritize exhibits as to importance to your case strategy and deposition strategy. Be certain to mark, and examine the witness about, any exhibits you deem critical to your strategy.
  - d. Sufficient number of copies – always make one more copy than you think you will need.

- e. System for ensuring that marked copies are not accidentally distributed. (At the conclusion of the deposition, make sure you check that all the marked exhibits are intact before everyone leaves the deposition room)



## **DEPOSITION PRELIMINARIES**

1. Court Reporter
  - a. Case caption
  - b. Swearing in
  - c. Identify counsel of record and other attendees on the record
2. Stipulations
  - a. The “usual stipulations” – make case-specific stipulations clear on the record
  - b. Potential Stipulations
    - i. Applicable rules governing the deposition
      - 1) “Usual Stips” – Always ask what the “usual stips” are. Before your deposition begins, you can ask your court reporter for a copy of the “usual stips,” he or she will generally have a printed page of the stips for you to review before you agree to them.
    - ii. Agreement to “waive objections”
      - 1) To “waive objections” or “reserve objections except as to form,” typically means that counsel may, and should, make any objections to the form of the question at the deposition, but any other objections should be reserved for trial and are not waived.
      - 2) *See* NY CPLR 3115 (objections to form are waived if not made; objections to competency of witness or admissibility of the evidence are not waived)
    - iii. Agreement to waive the requirement to sign the transcript
      - 1) FRCP 30(e). Under the Federal Rules, if the deponent wants an opportunity to read and correct the transcript, it must be requested. A request for review is an “absolute prerequisite” to deposition corrections. *Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc.*, 397 F.3d 1217 (9th Cir. 2005).
      - 2) CPLR 3111. Deposition must be submitted to the witness for review and signature.

- a) **Practice tip:** You should generally have the witness review and sign the transcript. Review helps assure that the testimony is accurate. In addition, the transcript will be more useful at trial (or on summary judgment) because the witness will be unable to complain that the transcript is inaccurate or incomplete.
  - iv. Objection by one is an objection by all (for multi-party cases)
3. Preliminary Questioning
- a. Extent may depend on goal or nature of deposition, sophistication of witness, time constraints, desire to build rapport, personal style, strategy
  - b. Examples
    - i. Instructions regarding deposition protocol and expectations
    - ii. Witness competency
    - iii. Deposition experience
    - iv. Preparation (especially for a 30(b)(6) designee)

### **Sample Preliminary Questions**

#### **I. INTRODUCTION**

Good morning, Ms. Smith. I am Lionel Hutz from the law firm of Rich & Famous, LLP. We represent Big Company, the defendant in this action, and I'll be asking you questions today.

First, please state your name and address for the record.

Have you ever been deposed before? How many times? What kind of cases?

Are you represented by counsel today? And is that Mr. Jones?

#### **II. GROUND RULES**

I'm sure Mr. Jones has explained the process to you, but I want to make sure you understand how we will proceed today.

- 1. I'm going to ask you a series of questions. You are to answer them as completely and accurately as you can. Do you understand?

2. Do you understand that you have just taken an oath to tell the truth?
3. Is there any reason you can't testify completely and accurately today? [Is the witness on medication? Does the witness have his glasses?]
4. If you don't hear a question, please tell me, and I'll repeat it.
5. If you don't understand a question, please tell me, and I'll try to rephrase it in a way that you do understand.
6. The court reporter is going to take down everything we say, so please answer my questions audibly. Head nods and mm-mms don't come through clearly.
7. Only one of us can speak at a time, so even if you can anticipate the rest of a question, let me finish asking it before you answer so that the transcript is clear.
8. If you need a break, just let me know, and I'll try to find a convenient stopping point – just not while a question is pending.
9. Do you understand that the testimony you provide today may be used at trial?
10. Do you understand these rules / do you have any questions about these rules?

## **MAKING AN INTELLIGIBLE AND USABLE RECORD**

1. Ask your questions slowly and clearly.
2. Do not talk over the witness. Let the witness finish her answer, and then pause for a moment before you ask your next question.
3. Clarify any ambiguous terminology, and do not use “shorthand” unless you have defined the term and the witness confirms that they understand your definition, for example:
  - Q. When I refer to “XYZ” I will mean the XYZ Manufacturing Company and not XYZ Holdings LLC, do you understand that?
4. Do not point to a document or use the articles “this” or “that” when asking a question. Instead, state the specific exhibit, page number, paragraph reference or other thing to which you are referring. Similarly, clarify the witness’ testimony if she refers to “this” or “that,” rather than a specific thing, for example:
  - Q. When you said the words “this document” in your answer a moment ago, were you referring to the document that we have marked as Plaintiff’s Exhibit 1, correct?
5. If an objection to form has been lodged prior before the witness gives an answer that you feel is important, consider whether a correction or re-phrasing of the question would eliminate the objection. Ask counsel for clarification if you do not understand the basis for the objection. Don’t risk having good testimony rendered useless at trial because you failed to address an objection at the deposition.
6. Always be sure the witness hears and understands your question. If the witness appears puzzled, ask if they understood the question.
7. Do not accept evasive answers. Rephrase/repeat your question if not sufficiently answered by the witness.

If using LiveNote, check transcript when needed
8. Beware verbal tics (ok, um, so, you know, etc.)

## **HANDLING EXHIBITS**

1. Mark the deposition notice or subpoena as an exhibit
2. Bring enough copies of exhibits for all counsel
3. Be aware of numbering protocol for your case, if already established.
  - a. Smith Exhibit 1
  - b. Plaintiffs Exhibit 12
4. Consider bringing someone to assist with voluminous exhibits/ checklist
5. Consider pre-marking exhibits at breaks or before the deposition begins, but be careful not to skip pre-marked exhibits or review out of order – it can create a lack of clarity in the transcript.
6. Consider confidentiality – may need to exclude people from the room when discussing confidential exhibits

### **Sample Exhibit Procedure**

**Hand the Court Reporter the exhibit and ask her/him to mark the Exhibit.**

**Q. Please mark this as Plaintiffs' Exhibit No. 1**

**Give a copy of the exhibit to opposing counsel.**

**Keep a copy for yourself and write the exhibit number on it.**

**Give the exhibit marked by the court reporter to the witness, and have the witness identify it for the record:**

**Q. Ms. Smith, I am showing you a document that has been marked as Plaintiffs' Exhibit 1, which is bates-numbered D004 to D005. Do you recognize this document?**

**Establish foundation for questioning on the exhibit.**

**Q. What is Exhibit 1?**

**Q. Is this a true and correct copy of \_\_\_\_?**

**Q. Please turn to the second page of the document, which is bates-numbered D005. Is that your signature at the bottom of the page?**

**If the exhibit is a business record, immediately establish the business record foundation based on the applicable rules of the jurisdiction. For example:**

- Q. Was Exhibit 1 prepared in the ordinary course of the business of your company?**
- Q. Was Exhibit 1 prepared on or about the date of the events that are reflected in Exhibit 1?**
- Q. Was it a regular part of your company's business to create and maintain records of the type reflected in Exhibit 1?**
- Q. Where are these types of documents generally stored after they are prepared?**
- Q. Where was Exhibit 1 retrieved from?**
- Q. Do you have any reason to doubt that Exhibit 1 is a true copy of a record created in the ordinary course of business of your company?**

## **MAKING AND HANDLING OBJECTIONS**

### 1. Speaking Objections

- a. Improper in most, if not all, jurisdictions.
  - i. *See Fed. R. Civ. P. 30(c)(2)* above (“An objection must be stated concisely in a nonargumentative and non-suggestive manner.”)
  - ii. Uniform Rules for N.Y.S. Trial Courts, §221.1(b)  
**Speaking objections restricted.** Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.
- b. Create a record if necessary, and suspend deposition/reserve right to move to compel further deposition if time limits become an issue.

### 2. “Form” Objections

- a. What is a proper “objection to the form?”
  - i. A form objection is one that challenges the manner in which the question is posed. The reason that the “usual stipulations” require objections to the form of the question to be made at the deposition (lest the objection be forfeited) is that it gives the questioner a chance to rephrase the question to cure the objection.
  - ii. Examples of form objections include, but are not limited to:
    - 1) Ambiguous
    - 2) Argumentative
    - 3) Asked and answered
    - 4) Assumes facts not in evidence
    - 5) Calls for speculation

- 6) Compound
  - 7) Leading
  - 8) Mischaracterizes prior testimony
  - 9) Calls for legal conclusion or lay opinion
- iii. Form objections do not include hearsay, or objections that go to the admissibility of the testimony or evidence.
- b. Form objections (as well as objections to any “error or irregularity” in the procedural aspects of the deposition) usually are waived if not made at the time of the question.

i. **Fed. R. Civ. P. 32(d)(3)**

(B) Objection to an Error or Irregularity. An objection to an error or irregularity at an oral examination is waived if:

- (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
- (ii) it is not timely made during the deposition.

ii. **N.Y. CPLR 3115**

(b) Errors which might be obviated if made known promptly.

**Errors and irregularities** occurring at the oral examination in the manner of taking the deposition, **in the form of the questions or answers**, in the oath or affirmation, or in the conduct of persons, and errors of any kind which might be obviated or removed if objection were promptly presented, **are waived unless reasonable objection thereto is made at the taking of the deposition.**

(d) Competency of witnesses or admissibility of testimony.

Objections to the competency of a witness or to the admissibility of testimony are 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 objection had been made at that time.

3. Objections ≠ Instructions Not To Answer

- a. Instructions not to answer are generally permissible only to preserve a privilege or enforce a limitation set by the court.



b. **Fed. R. Civ. P. 30(c)(2)**

*Objections.* 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 Rule 30(d)(3).**

c. **Uniform Rules for N.Y.S. Trial Courts, §221.2**

A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

4. **Conferring with the Witness**

- a. It is usually improper to confer with a witness during a question or while a question is pending.

**Uniform Rules for N.Y.S. Trial Courts § 221.3**

An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

- b. Exception: When the witness is not sure whether an answer implicates a privilege, he or she may ask to consult with the attorney on that issue alone.

## **ENDING THE DEPOSITION**

1. Final questions
  - a. Lack of recollection
    - i. Refreshed?
    - ii. Others with more knowledge?
  - b. Further intended testimony for trial
2. Take a break to make sure you have covered everything on your checklist: witness connected to narrative, goals met?
3. End versus suspend
  - a. Motion to compel
  - b. Judge's rules/practice regarding resolving disputes mid-deposition
4. Agreement re reading and signing transcript
  - a. Understand the applicable rule
5. Post-Deposition
  - a. Exhibits – who has custody of official exhibits? Generally, deposing attorney or court reporter
  - b. Submit transcript to witness for review and signature
  - c. Form of errata
    - i. Substantive changes to testimony
    - ii. Implications

## NOTES