Depositions: Disadvantages, Advantages, and Alternatives

1.01 Introduction .................................................. 3

1.02 Disadvantages of Depositions .............................. 3
   A. Expense ....................................................... 4
   B. Preserving Harmful Testimony .......................... 4
   C. Waiving Objections to Competence .................. 5
   D. Tipping Off Opponent ..................................... 6
   E. Educating Opponent ....................................... 6
   F. Dress Rehearsal ............................................. 7
   G. Identifying Witness for Opponent ....................... 7
   H. Retaliation .................................................... 7

1.03 Advantages of Depositions ................................. 7
   A. Learning Facts ............................................. 8
   B. Avoiding Surprises at Trial ............................. 8
   C. Educating Yourself ....................................... 8
D. Evaluating the Witnesses and Opposing Counsel ........................................... 9
E. Establishing Support for Summary Judgment ........................................... 9
F. Settling the Case ..................................................................................... 11

1.04 Alternatives to Depositions ............................................................. 12
A. Written Discovery ............................................................................. 12
B. Interviews ......................................................................................... 12
C. Signed Statements ............................................................................ 12
D. Depositions by Written Questions ..................................................... 13
E. Informal Discovery through Social Networking Sites ..................... 14

1.05 Recorded Conversations ................................................................. 16

1.06 Availability of Deposition Discovery .............................................. 16
1.01

Introduction

The most important preliminary question is whether to take a deposition. “Doctors order tests. Lawyers take depositions. It’s the same thing. Half the time we don’t really know exactly why we take depositions, but there seems to be some primordial need to do so. ‘Hmm,’ we say to our client, ‘this looks serious. Better take some depositions.’”¹ This chapter explores the disadvantages, advantages, and alternatives to depositions.²

1.02

Disadvantages of Depositions

Before serving a notice of deposition, consider carefully the disadvantages of depositions, such as those described in the following subsections.


²Several excellent articles discuss the risks and rewards of conducting depositions. See Steven Lubet, Showing Your Hand: A Counter-Intuitive Strategy for Deposition Defense, 29 Litigation 39 (Winter 2003); Ronald Jay Cohen, Conducting a Winning Deposition and Many, Many Thanks, 27 Litigation 1 (Spring 2001). For a helpful review of the advantages and disadvantages of taking depositions of third-party witnesses, as well as other tips, see R.X. Perry,Jr., Deposing Witnesses: A Discovery Worth Making, Trial, 64–69 (Feb. 1996). The author recommends early interviews of all nonparty witnesses—those expected to be unfriendly as well as those expected to be friendly. (See 1.04 B for a discussion of constraints on ex parte interviews.) The author also suggests, as a rule of thumb, deposing unfavorable nonparty witnesses but avoiding depositions of friendly nonparty witnesses who are within the court’s subpoena power and will thus be available for trial unless something untoward should happen; best not to commit their testimony to the record before trial. Id. See also Kenneth P. Nolan, How to Take a Deposition—Preparation, 34 Litigation 63 (Fall 2007). However, see 7.02 A of this handbook for a discussion of reasons to consider deposing a friendly witness, particularly one whose testimony is essential to the case.
A. Expense
Depositions are expensive. Consider the time spent preparing for the deposition, taking it, and reporting on it to the client, not to mention the cost of serving the subpoena, a witness fee, the reporter’s charges, and possible travel expenses. In addition, there is the cost of either summarizing the transcript or of relying on computer retrieval programs (see 14.03), not to mention the cost of a videographer if the deposition is to be video recorded.

B. Preserving Harmful Testimony
The interrogator may preserve testimony harmful to the client that otherwise would be unavailable at trial. Adverse witnesses may die. Harmful nonparty witnesses may move away or just disappear; their memories may fade or their interest wane. Although it is understandable that you want to know precisely what testimony you must prepare to meet at trial, it is not impossible to cross-examine a witness without a deposition transcript in hand (as criminal lawyers demonstrate every day). At the very least, it may be wise to consider postponing the deposition of a witness who is expected to give harmful testimony.

3 Some of these costs may be recoverable by the prevailing party. See 14.07.
4 A law firm can substantially reduce its clients’ deposition costs by establishing an approved list of court reporting agencies to be used by all its attorneys after getting competitive bids from the available agencies.
6 David Markowitz (whose helpful DVD presentation on deposition techniques is cited at length throughout this handbook) tells of representing a plaintiff in a case involving a dispute over an oral contract with a lot of money at issue. At some point early on, opposing counsel took an exquisitely detailed deposition from David’s client on video. A month later, completely unexpectedly, David’s client died. If counsel for the defendant had not taken the deposition, David would have had no case. By reason of the deposition, there was a record of everything the now-deceased plaintiff had to say in support of his claim.
C. Waiving Objections to Competence

By taking a deposition, counsel may waive an objection to the competence of a witness. For example, a party may waive a so-called dead man’s statute by deposing a witness who would otherwise be precluded by the statute from testifying. Some courts have held that the taking of the deposition alone will not waive the statutory protection, but any attempt to use the deposition or admissions obtained from it for an evidentiary purpose will.


8See L. S. Tellier, Annotation, Examination and the Like of One Witness Incompetent Under Dead Man Statute as Waiver of Incompetency, 33 A.L.R. 2d 1440 (2009); Annotation, Taking Deposition or Serving Interrogatories in Civil Case as Waiver of Incompetence of Witness, 23 A.L.R. 3d 389 (2009). See also Schroeder v. Jaquiss, 861 A.2d 885, 890 (Pa. 2004) (noting Pennsylvania common law rule that protections of Dead Man’s Act, 42 Pa. Cons. Stat. § 5930, are waived when the decedent’s representative takes depositions or requests interrogatory answers from an adverse party, whether or not he places the results into the record).

In federal court, state competency rules such as dead man’s statutes have no effect except “with respect to an element of a claim or defense as to which State law supplies the rule of decision.” Fed. R. Evid. 601. It is not settled whether state law governs waiver when a state competency rule applies in federal court. Compare 7 Alvin K. Hellerstein & Curtis C. Mechling, Moore’s Federal Practice § 32.45 (3d ed. 2010) (objections to competency are not waived by taking deposition unless the ground for it might have been corrected at that time) with 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice & Procedure § 2152 (3d ed. 2010) (the question of waiver is unsettled, but state law on competence governs as to issues governed by state law).

9Estate of Smith v. United States, 979 F. Supp. 279, 285 (D. Vt. 1997) (party used the deposition testimony of a witness who would have been incompetent under the state dead man’s statute to support the motion; court held that the moving party had thereby waived any objection to competence of that witness based on the statute); Balma v. Henry, 935 N.E.2d 1204, 1210 (Ill. App. Ct. 2010) (administrator waived the right to invoke Dead Man’s Act to exclude the decedent’s deposition when it attached the deposition transcript to its summary judgment motion); Taylor v. Taylor, 643 N.E.2d 893, 895 (Ind. 1994) (same).
D. Tipping Off Opponent

As the interrogator, you almost inevitably reveal through your questions, to some extent, what you believe to be important to your client’s claim or defense and what you plan to prove at trial. Indeed, there are times when you know that at the next break the first thing opposing counsel will ask of a colleague or perhaps the deponent will be, “Why is she asking questions about X?” Moreover, by taking a deposition, you will tip your hand not only about theory, but also about facts to which opposing counsel may not be alert.\textsuperscript{10} You know that you are tipping him off when you can see that he urgently wants to say to his witness, “You never told me about that subsequent conversation with plaintiff. What’s the story?”

For example, if defendant’s counsel presses plaintiff for an unambiguous statement that he was never previously involved in an accident causing personal injuries, plaintiff’s counsel may sense that defendant’s counsel has evidence of a prior accident. Suppose plaintiff testifies at the deposition that he has not been involved in any other accident, but later, say at a lunch break in response to his own counsel’s prodding, admits that he was in fact previously injured in an accident. Plaintiff’s counsel may then instruct the client to correct his testimony immediately following the break with whatever explanation he has for his original denial. And even if counsel does not learn of the accident until after the deposition is concluded, he may still instruct the client to correct the deposition transcript\textsuperscript{11} and thus dilute, at least to some extent, the impact at trial of the original inaccurate testimony.

E. Educating Opponent

The interrogator forces his opponent to learn the case. The opponent will assimilate a good deal just by preparing witnesses and listening to the questioning.

\textsuperscript{10}DVD: David B. Markowitz, Deposition Techniques: Strategies, Tactics, and Skills (Trial Guides LLC 2010).

\textsuperscript{11}See Fed. R. Civ. P. 30(e) and 14.04 A.
F. Dress Rehearsal

The deposition also provides the witness with a dress rehearsal. The witness will do better next time—at trial—because he knows what to expect. A witness who is rattled, evasive, and unresponsive at the deposition may perform quite well at trial. His discomfort at the deposition will rarely be evident from a mere reading of the dry transcript. The jury will see only the interrogator’s chagrin. By video recording the deposition, you will preserve the testimony and the demeanor of the witness at the dress rehearsal.

G. Identifying Witness for Opponent

The interrogator may alert the opponent to the existence and importance of a witness. For example, in an antitrust case, if counsel for the defendant decides to take the deposition of a relatively low-level employee of plaintiff on the outside chance that the employee may know something useful (or from an automatic reflex to leave no stone unturned), the interrogator may find that the witness knows much more about the nitty-gritty of competition between the parties than the interrogator wanted to hear. But for the deposition, plaintiff’s counsel might never have considered that employee as a possible trial witness.

H. Retaliation

The lawyer serving the notice must recognize that the opponent is likely to respond in kind. For example, if a notice is served for the deposition of the opposing party’s secretary, a counterpart notice is likely to be served the next day by the other side.

1.03 Advantages of Depositions

There are significant advantages to taking depositions, which are described throughout this handbook. In most cases, especially where big dollars are at stake, the advantages win out. However, before proceeding with depositions, you should think about both the
advantages and the disadvantages and make an advertent decision whether to take depositions at all; and, if depositions are to be taken, how many and how broad the scope of questioning should be.

A. Learning Facts

One of the primary purposes of depositions is to learn the facts. Depositions are far better than interrogatories for this purpose because counsel usually drafts the answers to interrogatories, so often answers to interrogatories do not yield much substantive information. Besides, at a deposition, you can rephrase questions that are not eliciting the information you seek, and ask follow-up questions on the spot.

B. Avoiding Surprises at Trial

Taking the deposition of all witnesses likely to be called by the other side to testify is a conservative way to prepare to meet the testimony that will come out at trial. If some of those witnesses change their stories at trial, you can impeach them with their deposition testimony, provided you have adequately pinned down their version of the facts during the deposition.\(^\text{12}\) However, as noted above, you can be reasonably well prepared to meet your opponent’s case at trial without having heard all of the testimony before, so it is worth considering whether at least some of the depositions in a particular case can be eliminated as unnecessary.

C. Educating Yourself

Preparing for depositions imposes the discipline many of us need to buckle down and learn the case, and eyeballing the witnesses makes the case come alive. When you come into a case after the depositions have been taken, you never have the same feel for it. So you should welcome the opportunity to schedule depositions because you know it means that you will tear into the case, organize it, develop theories, and master it. If your client attends depositions with you, the client will be reassured to see that you are on top of the case.

\(^{12}\) See 11.04.
D. Evaluating the Witnesses and Opposing Counsel

A deposition lets you see how the other side’s key witnesses will perform in the witness chair and evaluate whether they will be effective with the jury. (Of course, as discussed above, the trembling, defensive deponent might be transfigured into a confident, assertive trial witness in part because you kindly gave him a practice session.) It also lets each side take the measure of the other’s lawyers. (But, of course, lead counsel may not take or defend the deposition of a witness perceived to have a more minor role in the facts that underlie the lawsuit. Indeed, some lead trial lawyers prefer not to take any depositions so that none of the witnesses on the other side will have a feel for them before the trial starts.) Furthermore, the client might be there to observe or might receive a report about how witnesses performed, so the deposition performance of all of the witnesses has wide-ranging implications.

E. Establishing Support for Summary Judgment

Often a motion for summary judgment cannot be won purely on affidavits or documents. But depositions may provide the factual basis—that is, establish the absence of a genuine issue of material fact—necessary to prevail on summary judgment. The objectives of questioning to obtain support for a summary judgment motion may diverge from the objectives of questioning purely to develop facts. See 7.02 E.

But, as is so often the case in deposition practice, it is possible to make a good argument for the contrary proposition; that is, in a given case where one plans to move for summary judgment, it may be better to forgo taking the deposition of a seemingly obvious witness. A specific example may best make the point.

A lawyer defending an antitrust case felt reasonably optimistic about the prospects for summary judgment once discovery was over. However, in an early deposition, he learned that a former high-level employee of the defendant (his client), whose employment had ended

13 An excellent article that illustrates effective use of targeted summary judgment motions, and focused depositions in support thereof, is Joyce S. Meyers, Focusing: When Less Is More, 28 Litigation 6 (Winter 2002).
on bad terms, was cooperating with counsel for plaintiff in putting its case together. Defense counsel’s instinctive reaction was that he had to take the deposition of this disgruntled former employee who, during the course of his employment, had sat in on numerous meetings of the defendant’s top-level executives, to determine (1) whether his testimony would create a genuine issue of material fact, thereby making the contemplated motion for summary judgment a pointless exercise, and (2) what testimony defense counsel would have to be prepared to meet at trial.

But, on reflection, defense counsel decided not to take the deposition. He figured that, in light of the breadth of the former employee’s knowledge, the deposition would continue over several days; and, in light of the depth of the former employee’s ire, the deposition testimony would likely be peppered with charges of misconduct by the defendant, most likely in long vituperative narrative answers. Defense counsel reasoned that probably such testimony, even if demonstrably inaccurate in the final analysis, would be sufficient to defeat the anticipated summary judgment motion and would give his opponent plenty of testimony with which to spice his memorandum opposing the motion, perhaps giving the trial court judge a strong preliminary impression that there must be genuine issues of material fact. So defense counsel decided not to take the deposition. He anticipated that plaintiff would, as in fact it did, submit a declaration from the former employee in opposition to the motion for summary judgment, but decided that it would be far easier to handle a thirty-page declaration from the former employee (that is, to show that it did not create a genuine issue of material fact) than a 1,500-page deposition diatribe from a hostile witness, elicited by defense counsel’s own questions.

And defense counsel felt confident that if the case were to go to trial, all of the memoranda the witness had prepared or received during the course of his employment would provide plenty of grist for the cross-examination mill.

The strategy worked. Defense counsel was able to satisfy the judge that the former employee’s declaration did not create a genuine issue of material fact, so the motion for summary judgment was granted.
As this example shows, there are few absolutes in deposition practice.

**F. Settling the Case**

Depositions can expose the strengths and weaknesses of the case and position it for settlement. When deposing the principals for the other side, you have a good opportunity to lay out the weaknesses of their case and to “talk” directly to the people who will influence settlement decisions. If you are not belligerent but simply spread the evidence on the record, perhaps including some key documents whose significance opposing counsel has not previously made clear to the witnesses, you can use the deposition to your advantage to affect the settlement value of the case.\(^\text{14}\)

Again an example is instructive. A lawyer was defending a UCC check fraud suit brought against a financial institution. Plaintiff alleged that one of its employees had managed to embezzle millions of dollars because the defendant financial institution negligently opened an account in the embezzler’s name and thereafter accepted hundreds of fraudulently endorsed checks for deposit. An issue central to the determination of relative fault was whether plaintiff had adequate internal controls in place in its own operations to detect and prevent the embezzlement in the first place. Through paper discovery, defense counsel obtained documents from plaintiff that demonstrated not only that adequate internal controls were absent but also that plaintiff’s auditors had expressly commented on the risk posed by their absence at the very time the check fraud scheme was going on and had recommended that controls be put in place immediately. The audits and conclusions and the resulting recommendation were discussed at the highest echelons of plaintiff’s organization. After more than a year of litigation and extensive motion practice, an employee of plaintiff involved in the audits was deposed. Both plaintiff’s and the defendant’s in-house lawyers attended the deposition. In short order, it became clear that the deponent was a bit player who had no more than a clerical role in the audits that were to be a principal subject

\(^{14}\) See also 18.21; Lubet, *supra* note 2.
of the deposition. Nonetheless, defense counsel took the opportunity to lay out the several audits, and documentary evidence of the discussions among senior management, as well as the recommendations of the auditors, providing a copy of each deposition exhibit to plaintiff’s in-house lawyer to be sure he understood the weaknesses of plaintiff’s case. The case was resolved within weeks of the deposition.

By contrast, “Rambo” tactics by one side’s counsel in the deposition may so infuriate the other side that the cause of settlement is set back substantially.

1.04 Alternatives to Depositions

Having considered both the advantages and disadvantages, examine the following alternatives to depositions.

A. Written Discovery

Answers to interrogatories and production of documents may suffice, particularly if the amount at issue is comparatively small. For example, in a simple breach of contract suit for less than, say, $50,000, counsel may be satisfied with written discovery. If the case does not settle, the parties can tell their stories at trial and let the fact finder decide.

B. Interviews

An interview may produce remarkably good results. For further discussion of the practical and ethical implications and logistical issues, see Chapter 2.

C. Signed Statements

A signed statement from a potential witness may suffice. Under the federal rules, the signed statement is not discoverable unless
substantial need is shown. But statements may be discoverable under state rules.

D. Depositions by Written Questions

An alternative to oral depositions is the procedure under Rule 31 of the Federal Rules of Civil Procedure for taking testimony of parties and nonparties by written questions before an officer. The scope of discovery is the same as for oral depositions, and a subpoena may be used to compel attendance. A public or private corporation, a partnership, an association, or a governmental agency may be deposed by written questions in accordance with Rule 30(b)(6). Notice of taking a deposition by written questions may be given at any time after commencement of the action. As with an oral deposition, the notice must state the name and address of the deponent, if known, or a general description sufficient to identify the deponent or the class or group to which the deponent belongs, and the name or the descriptive title of the officer before whom the deposition is to be taken. Keep in mind that a Rule 31 deposition counts against your allotment of ten depositions per side under Fed. R. Civ. P. 30(a)(2)(A)(i).

The questions must be served on all parties with the notice of the deposition. Likewise, questions to the deponent from

17 For a useful article on the strategic considerations for noticing a deposition under Rule 31 and the grounds to convert a Fed. R. Civ. P. 30 deposition notice of senior management to a Rule 31 deposition, see Jerold S. Solovy & Robert L. Byman, Rule 31 Depositions, Nat’l L.J., Aug. 8, 2005, at 11.
19 Id. 31(a)(4).
20 Id. 31(a)(3).
21 Id. 30(a)(2)(A)(i).
22 Id. 31(a)(3).
other parties must be served on all parties. Cross-questions must be served within fourteen days after being served with the notice of direct questions; redirect questions must be served within seven days thereafter and recross questions must be served within seven days after that.23

The party initiating the deposition is obliged to deliver a copy of the notice and copies of all questions served to the officer designated in the notice. The officer then must promptly record the testimony of the witness in response to each question.24 After the deposition is completed, the party that initiated its taking is required to give prompt notice to all other parties.25 The deposition is completed when it is recorded and the deponent has either waived or exercised the right of review under Fed. R. Civ. P. 30(e)(1).

When compared to the cost of a live deposition, a deposition by written questions may be a sensible, economical alternative, particularly where travel costs will be incurred to take a live deposition. But depositions by written questions have their limitations. There is no opportunity for follow-up, and because the questions are disclosed in advance, any opportunity to surprise the witness is lost. Also your adversary has fourteen days to consider and formulate cross-examination to your written questions from the comfort of his office. These drawbacks need to be weighed against your alternatives, which today include videoconference depositions that permit you to take a live deposition while avoiding many of the same costs eliminated by a deposition by written questions. For more discussion of videoconference depositions, see 4.06 and 16.03 of this handbook.

E. Informal Discovery through Social Networking Sites

Recent ethics opinions have addressed the propriety of informal discovery methods that utilize social networking sites such as

23 Id. 31(a)(5).
24 Id. 31(b).
25 Id. 31(c).
Facebook, MySpace, Twitter, and LinkedIn. Networking websites may contain a vast amount of information about a party or witness that would be valuable for investigative purposes, although this information is typically inaccessible to the general public and instead can only be seen by individuals whom the social networker has “friended.” The Philadelphia Bar Association Ethics Committee has opined that a lawyer may not use a third person to “friend” a nonparty witness on a pretext in order to access a private Facebook or MySpace page to search for impeachment information. The New York City Bar Association Committee on Professional Ethics has clarified that while “deceitful friending” to access secured information is prohibited, counsel may properly search for information that is publicly available, engage in informal discovery by “truthfully friending” (where the attorney or his agent uses his real name and profile to send a “friend request”) unrepresented persons, or use formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual’s social networking page.


Of course, counsel should not socially network with represented parties, whether truthful or deceitful. If counsel wishes to obtain publicly inaccessible information from such websites, then counsel should serve discovery requests.29

1.05

RECORDED CONVERSATIONS

Wiring your client to obtain harmful admissions from the other side is not a recommended alternative to depositions. A plaintiff in a sexual harassment case secretly tape-recorded her telephone conversations with several of her coworkers about working conditions. The tapes were held to be discoverable and were ordered released to the defendant. Plaintiff’s counsel had suggested the use of surreptitious tape-recording to his client and had coached plaintiff as to the type of statement that would be helpful to her case. The court rejected the claim that the recordings were protected work product.30 Moreover, in some states, taping conversations without the consent of all violates the criminal law. And many jurors may react negatively to what they may see as a dirty trick.

1.06

AVAILABILITY OF DEPOSITION DISCOVERY

Depositions are not available in all forums. There is no due process right to pretrial discovery, including depositions, and courts have upheld the denial of discovery in administrative proceedings.31

the defendant had shown that those records were likely to contain relevant evidence regarding the nature and extent of plaintiff’s alleged injuries).


Additionally, the Federal Rules of Civil Procedure concerning depositions and other types of discovery do not apply to administrative proceedings. Finally, the Administrative Procedure Act does not provide expressly for discovery in the administrative context. Instead, the rules of each agency determine the extent of discovery to which a party is entitled. As one example, the National Labor Relations Act, like the Securities Exchange Act of 1934, does not require its implementing agency, the National Labor Relations Board (NLRB), to follow the discovery procedures set forth in the Federal Rules of Civil Procedure. The NLRB may thus properly deny a party the right to take depositions before a hearing; the opportunity to cross-examine witnesses during the hearing has been held sufficient to satisfy due process concerns.


33 5 U.S.C. § 551 et seq. See also Citizens Awareness Network, Inc. v. United States, 391 F.3d 338 (1st Cir. 2004) (“the [Administrative Procedure Act] does not explicitly require the provision of any discovery devices in formal adjudications”).


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