

WHITEMAN  
OSTERMAN  
& HANNA LLP

# A PRIMER ON DEPOSITIONS

Thursday, April 11, 2019

William S. Nolan, Esq.  
Jon E. Crain, Esq.

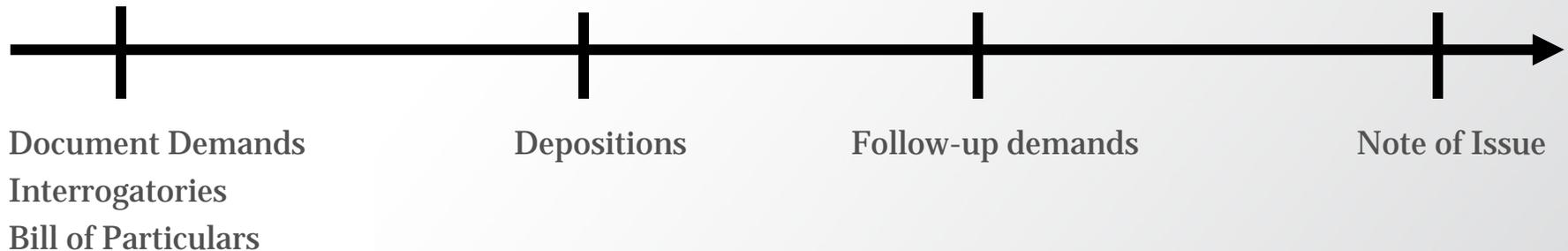
**I. TAKING DEPOSITIONS**

- a) When and how to notice depositions.
- b) Rules and usual stipulations.
- c) Preparing for your deposition.
- d) Exhibits.
- e) Avoiding and handling objections.
- f) Tactics and strategies.
- g) Procedure after deposition.

**II. DEFENDING DEPOSITIONS**

- a) Preparation.
- b) Rules of thumb for your client.
- c) Rules of thumb for counsel.

Depositions generally are conducted after the parties have completed paper discovery. This is because you want to be familiar with all of the pertinent documents before your deposition.



**Notice of Deposition**

- Served at least 20 days before deposition. CPLR 3107.
- “The notice shall be in writing, stating the time and place for taking the deposition, the name and address of each person to be examined, if known, and, if any name is not known, a general description sufficient to identify him or the particular class or group to which he belongs.” CPLR 3107.
- Can set specific date and time, or “mutually acceptable date to be determined.”
- The notice need not enumerate the matters upon which the person is to be examined.
- Addressed to opposing counsel.
- Note: the deposition of a prisoner “may be taken only by leave of the court.” CPLR 3106(c).

[CASE CAPTION]

**NOTICE OF DEPOSITION**

PLEASE TAKE NOTICE, that pursuant to Article 31 of the CPLR, Plaintiffs \_\_\_\_\_ (collectively, “Plaintiffs”), by and through their attorneys, Whiteman Osterman & Hanna LLP, will take the deposition of a representative(s) of [COMPANY NAME] before a Notary Public, or other person who is competent to administer an oath to said witness, who is not an attorney, or employee of an attorney, for any party or prospective party herein and is not a person who would be disqualified to act as a juror because of an interest in this matter or because of consanguinity or affinity to any party herein, on January 5, 2017, at 1:00 p.m. in the offices of Whiteman Osterman & Hanna, One Commerce Plaza, 19<sup>th</sup> Floor, Albany, New York 12260, with respect to evidence material and necessary to this action.

DATED: Albany, New York  
December 13, 2017

WHITEMAN OSTERMAN & HANNA LLP

By: \_\_\_\_\_  
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### **Non-Party Depositions**

“Where the person to be examined is not a party or a person who at the time of taking the deposition is an officer, director, member or employee of a party, he shall be served with a subpoena. Unless the court orders otherwise, on motion with or without notice, such subpoena shall be served at least twenty days before the examination. Where a motion for a protective order against such an examination is made, the witness shall be notified by the moving party that the examination is stayed.” CPLR 3106(b).

Promptly serve additional copies upon all counsel of record.

[CASE CAPTION]

**SUBPOENA AD TESTIFICANDUM**

TO: [Name and Address of Non-Party Witness]

WE COMMAND YOU, that all business and excuses being laid aside, pursuant to Rule 3120 of the New York Civil Practice Law and Rules, to appear for a deposition on July 7, 2017 at 10:00 A.M., at the Dutchess County Courthouse, 10 Market St, Poughkeepsie, NY 12601, or such other time and place as is mutually agreed upon by the parties. Failure to comply with this subpoena is punishable as a contempt of Court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed fifty dollars and all damages sustained by reason of your failure to comply.

Pursuant to the notice requirements of CPLR 3101(a)(4), Defendant \_\_\_\_\_ commands your testimony on the basis that, among other things, Plaintiffs \_\_\_\_\_ have identified you as having knowledge or information pertaining to the events and allegations described in Plaintiffs' Complaint, a copy of which is attached as Exhibit A.

DATED: June 14, 2017  
Albany, New York

WHITEMAN OSTERMAN & HANNA LLP

By: \_\_\_\_\_  
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*Attorneys for Defendant*

## **Location**

Party depositions can occur at any location acceptable to opposing counsel, typically one side's law offices.

CPLR 3110: A deposition within the state on notice shall be taken:

1. when the person to be examined is a party or an officer, director, member or employee of a party, within the county in which he resides or has an office for the regular transaction of business in person or where the action is pending; or
2. when any other person to be examined is a resident, within the county in which he resides, is regularly employed or has an office for the regular transaction of business in person, or if he is not a resident, within the county in which he is served, is regularly employed or has an office for the regular transaction of business in person; or
3. when the party to be examined is a public corporation or any officer, agent or employee thereof, within the county in which the action is pending; the place of such examination shall be the office of any of the attorneys for such a public corporation or any officer, agent or authorized employee thereof unless the parties stipulate otherwise. For the purpose of this rule New York city shall be considered one county.

**The “Usual Stipulations”**

**The stenographer will ask each attorney at the beginning of the deposition if the “usual stipulations” are in place. This is a formality, and the answer is yes.**

The “usual stipulations” include the following:

It is hereby stipulated and agreed by and between the attorneys for the parties hereto that the filing, sealing and certification of the within deposition are waived; that all objections, except to the form of the question, are reserved to the time of trial; that the within deposition may be signed and sworn to before any Notary Public; and that the attorney for the examining party shall furnish one copy of the within deposition to the attorney for the party examined, without charge.

**In New York, all objections are typically preserved for trial, except for objections as to the form of the question (e.g., compound questions; vague and unclear questions; questions that assume facts not in evidence or mischaracterize facts/prior testimony; argumentative questions).**

CPLR 3115

(a) Objection when deposition offered in evidence. Subject to the other provisions of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(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.

Uniform Rules for New York State Trial Courts 221.1

(a) Objections in general. No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.

**Speaking objections are prohibited. The objecting attorney should say only “Objection” or “Object to Form,” without further explanation (unless the deposing attorney inquires).**

Uniform Rules for New York State 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.

**All questions must be answered, irrespective of objections, unless the question (1) seeks privileged information, (2) violates a court order, or (3) is “plainly improper” (e.g., questions that are asked solely to harass or embarrass the witness). “Relevance” is not a ground to object, nor is it a ground to refuse to answer a question.**

Uniform Rules for New York State 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.

### Ground Rules

**It is customary practice to instruct the witness, at the beginning of the deposition, of a few “ground rules.” It is important to do this on the record so that no deponent can later claim to have been unaware of these ground rules. These rules can also be used to establish an initial rapport with the deponent.**

1. Only one person should speak at a time.
2. All answers must be verbal.
3. The deponent should ask for clarification if he or she does not understand the question.
4. The deponent can request a break at any time, except for when a question is pending.

## **Familiarize yourself with the case.**

- Review the elements of all causes of action.
- Review the pleadings.
- Review all documents exchanged in discovery.
- Review correspondence and email with opposing counsel.

## **Establish goals for the deposition.**

- Facts to establish. What would you like the witness to say? Are there certain facts you want the witness to acknowledge?
- Information to learn. What would you like to learn? What do you need clarified?
- Obtain information that can be used to impeach the witness at trial. Can you anticipate that the witness will lie about certain facts that can be proven at trial?
- Lock in the witness's story.
- Identify relevant documents not yet produced in discovery.

## **Create an outline.**

Start with a comprehensive list of the issues you want to address. Give thought to order. Do you want to proceed chronologically? Are there certain issues you want to save for last, when the witness is tired and/or a rapport has been established? Are there certain issues you want to hit immediately?

Within each issue you plan to address, your outline should move from broad points to narrow questions.

Practice writing out questions, but avoid putting more than a handful of specific questions directly into your outline (except for those which may be difficult to phrase on the spot). Each question should be based largely on the preceding answer, and the deposition should more of a conversation than a list of question and answers. That being said, your outline should remind you to ask specific questions that you want to make sure you hit.

## **Prepare to address difficult issues and bad facts.**

Identify the weaknesses in your case, and any facts that hurt your case. Will these facts come up in the deposition? You are asking the questions and controlling the deposition. Will you ask about each bad fact? If so, how will you raise the issue so as to least harm your client's case.

Identify complicated issues and fact patterns. How will you speak about these issues in a way that is clear and not confusing? How will you ensure that you comprehensively address these issues?

## Goals and Purposes of Exhibits

1. Authentication.
2. Timeline.
3. Refreshing Recollection.
4. Eliciting Details.

## Selecting and Preparing Exhibits

1. Start with your discovery file and narrow it down.
2. Don't overuse documents. Only use exhibits where necessary to introduce a topic or orient the witness, where the exhibit is a critical document in the case, where the exhibit can be used to impeach the witness or contradict misleading testimony, or where there is a document you want to authenticate.
3. Organize.
  - a. Chronologically or by topic.
  - b. Incorporate into outline.
  - c. Bring copies, and collate.
    - i. One for you, one for witness, one for counsel.

## Using Exhibits in Your Deposition

1. Have exhibits marked by the stenographer.
  - a. Consider pre-marking the exhibits.
2. Show the exhibit to the witness and opposing counsel.
3. Identify the exhibit number on the record.
  - a. “I am showing you a document marked as Exhibit 1.”
4. Allow the witness to review the document.
  - a. If it is a lengthy document, allow the witness time to review. “Please take a moment to review the document and let me know when you are ready to proceed.”

**Using Exhibits in Your Deposition, cont.**

5. Authenticate the document.
  - a. “Do you recognize the document which has been marked as Exhibit 1?”
  - b. “What do you recognize it to be?” or “What is this document?”
  - c. “How are you familiar with this document?” “Did you prepare this document?”
  - d. “Is that your signature on the document marked as Exhibit 1?” “Is that your email address?”
  - e. “Did you write this letter?” “Did you prepare this email?”
  - f. Establish the date and/or time of the document.
  - g. Establish the recipient.
  
6. Go through the substance of the document (usually).
  - a. Mark up your copy so you can find important information quickly.
  - b. Identify, in your outline, the portions you want to discuss on the record.
    - i. Page number.
    - ii. Paragraph.
    - iii. Sentence.

## Avoiding Objections

1. Build a foundation.
  - Don't assume facts in your question. First establish that the witness has knowledge or is familiar with the topic you want to ask about.
  - Don't ask why someone else did something, or if someone else did something, unless you first establish that the witness is in position to know.
  - You can always ask "Do you have an understanding?" or "do you know?" Then ask "what is your understanding?" or "how do you know?" This forces the witness to explain the source of the information they have and reveal whether they have actual personal knowledge of a fact. If they don't have personal knowledge, you can then make that clear. "You didn't see this happen, then, correct?" "You weren't there?" "You are basing this on what you were told?"
  - If your question is based on something you learned in another deposition, or in a document, but something to which the witness before you has not testified, make that clear for the record.
  - "We have heard testimony that X happened. Is that your understanding?"

## Avoiding Objections, cont.

2. Don't use legalese.
3. Don't ask for legal conclusions.
5. Keep questions simple. "Why do you say X?" is better than "What is your basis for that conclusion?"
6. Clarify testimony as you go. "When you say X, what do you mean?"

Handling Objections

- Rephrase if it was a bad question.
- If it was not a bad question, remind the witness they have to answer.
- Don't let opposing counsel coach the witness.
- “Counsel, please follow the rules and refrain from speaking objections” . . . “Please don't coach the witness” . . . “Your objection is stated, please proceed with your answer, Mr. Smith.”
- If counsel directs the witness not to answer, ask if the grounds include privilege, confidentiality, or a court order (22 NYCRR 221.2). If not, refer counsel to the rule, make a record, and expressly reserve your right to re-call the witness to answer the question.
- Only call your judge if the testimony is absolutely crucial.

## Tactics and Strategies

1. Establish a rapport with the witness (both on the record and off the record)/ get the witness into a rhythm.
2. Funnel your questions for each issue/fact. Start broad, and narrow your questions. Take notes, and don't be afraid to pause and review your notes before moving on to another topic.
3. Tell the witness what you are going to ask about.  
"There was a lot in that answer, I'm going to break it down a bit and ask you some specifics."  
"I just want to make sure I understand, is it your testimony that ..."
4. When you reach a crucial topic or event, slow the action down and create a scene, filling in as many details as possible.  
"So you are standing on the corner. What do you see first? Who is with you? What was the weather like? Was there a lot of traffic? Were you on your phone? Were you speaking with anyone?"
5. Cement good testimony (except where cementing may give the witness an opportunity to revise an answer in a harmful way).
6. Don't ask the witness to make a conclusion about the great facts you just elicited. Know when not to ask a follow up question that allows the witness to explain otherwise great facts.

**Tactics and Strategies, cont.**

5. Tackle evasive answers.

“Was it more than 10 years ago?” “Was it more than five years ago?”

“I’m just looking for a yes or no answer to this very simple question...”

“I’m going to redirect your attention to page 30 of Exhibit 6.”

“You previously testified .... -- isn’t that correct?”

“You said you didn’t know if.....you can’t rule it out then, right? It is possible X happened, then, right?”

7. Isolate testimony that is not credible.

8. Cross-examination of your client. Almost never.

## **Procedure After Deposition**

- Make sure to take and keep all marked exhibits.
- The stenographer will send you a copy of the transcript.
- Send the transcript to opposing counsel, with an errata sheet and request that the deponent review, mark any corrections, sign and return the transcript.
- The transcript can then be used at trial, as evidence and/or to impeach the deponent.

When preparing for your client's deposition, it is critical to meet with the client beforehand.

- Explain the process, rules, and purpose of the deposition. This is not their day in court.
- Discuss the case and their expected testimony, and go over important documents.
- Distinguish between fact gathering and preparation for questioning.
- Figure out what your client doesn't remember, so that they don't inadvertently attempt to reconstruct the facts during the deposition.
- It is helpful to conduct a mini-deposition of your own client on core issues so he or she knows what to expect.
- Your client should answer all questions narrowly and without elaboration. "Yes" and "no" are ideal answers. "I don't recall" is a better answer than "I don't know."
- Make them feel comfortable. "All you have to do is answer the questions honestly, and you have nothing to worry about."

- Listen extremely carefully and make sure to understand the question.
- Answer only the question asked.
- Do not volunteer information.
- The shortest possible answer is usually the safest, but don't be obnoxious about it.
- Don't force information into the record.
- Tell the truth.
- Ask for a break if you are flustered, stressed, or confused.
- Don't answer questions about documents until you are completely familiar with them.
- Take your time in answering the question.
- Don't think out loud.

- Listen very carefully to the questions in case they are misleading, assume facts not in evidence, confusing, do not seek information within the witness's personal knowledge, call for the witness to speculate, or seek a legal conclusion.
- Be strategic about when you object. If the subject matter is not harmful to your case, it's often okay to let trivial errors in form stand.
- Take notes of important testimony in case opposing counsel recharacterizes what the witness said earlier.
- Make sure your client knows you are "present."
- Know your opposing counsel.

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A PRIMER ON DEPOSITIONS  
*Conclusion*

Thank you! Please feel free to  
contact us with any questions.

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