

MARKOWITZ HERBOLD  
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**DEPOSITION TECHNIQUES & SKILLS**

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## Taking and Defending Depositions

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### Taking Depositions – Tips for Learning More

- Ask more open ended (non-leading) questions
- Ask the big questions
- Ask “why” questions
- Ignore the rules of evidence
- Maintain an inquisitive attitude

### Defending Depositions

- Primary goal – honest testimony
- Preparing your client – the most important coaching NOT to give your client
- Preparing your client for video performance
- Protecting during deposition – key rules:
  - Objections – FRCP 30(c)(2) – how to object
  - Instructions not to answer – FRCP 30(c)(2)
  - Ask questions – FRCP 30(c)(1)
  - Correcting transcript – FRCP 30(e)(1)
  - Court assistance – FRCP 30(d)(3)(A)

For Mr. Markowitz' complete DVD/CD course on Deposition Techniques: Strategies, Tactics and Skills visit [www.trialguides.com/media/deposition-techniques](http://www.trialguides.com/media/deposition-techniques).

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## **I. Deposition Goals**

A. Each deposition and each deposition question should be aimed at accomplishing a desired result.

1. Determine knowledge of relevant facts and pin down lack of knowledge of relevant facts.

FRCP 26(b)(1) – may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

2. Create admissions for use at trial.

FRCP 30(b)(6) – Notice or subpoena directed to entity to require designation of witness to testify on its behalf.

FRCP 32(a)(3) adverse party may use at trial the deposition of a party, its officer, director, managing agent, or its designee under FRCP 30(b)(6).

FRCP 32(a)(2) Impeachment of deponent as trial witness.

FRCP 32(a)(6) If part of deposition is offered, adverse party may require offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

3. Preserve testimony for trial.

FRCP 32(a)(4) unavailable witness or party:

- A. Dead;
- B. More than 100 miles from court unless absence procured;
- C. Cannot attend due to age, illness, infirmity, or imprisonment;
- D. Could not subpoena; or
- E. Exceptional circumstances.

4. Demonstrate witness dishonesty.

5. Demonstrate adverse characteristics; e.g. anger and greed.
  
6. Determine deponent's strengths and weaknesses as a witness.
  
7. Facilitate settlement.
  
8. Support motions for summary judgment.

FRCP 56(e)(1) – may be supported or opposed by deposition.

9. Develop foundation for the introduction of other evidence. For example, foundation for experiments, identification of handwriting, authentication of a document, interpretation of unclear handwriting and foreign language translations.
  
10. Determine the existence of witnesses, documents

and other evidence.

11. Develop information which will be relied upon by the experts.
  
12. Learn background information for further investigation and further discovery.

B. Many depositions/deposition questions produce undesired results which the questioner should attempt to avoid.

1. Examples of undesired results:

- a. Some questions expose the questioner's theory of the case.
- b. Some questions reveal the facts which are known to the questioner.
- c. The witness's problems as a witness are demonstrated for the witness's attorney; the witness's attorney will thereafter have an opportunity to coach the witness before trial in order to resolve demonstrated problems.
- d. Depositions are expensive. Every deposition question is an expense for the client.
- e. The deposition may preserve harmful testimony.
- f. The opportunity to take more important depositions may be lost; the opportunity to ask more important questions may be lost.

FRCP 30(a)(2)(A) – (i) leave of court required for a party to take more than 10 depositions, or (ii) if the deponent has already been deposed.

FRCP 30(d)(1) – unless stipulated or ordered by court, a deposition is limited to 1 day of 7 hours.

2. Attempt to deal with undesired deposition results as follows:
  - a. Don't take a deposition unless it is needed; don't ask any unnecessary questions.
  - b. The questioner should not emphasize theories of the case or supporting evidence; save cross-examination for trial.
  - c. Don't continue to demonstrate the witness's weaknesses as a witness after they have been discovered.



C. The questioner should never attempt to accomplish improper deposition goals. It is always improper for the questioner to:

1. Deliberately cause expense to the opposition as a tactic to punish the opposition or encourage settlement.

2. Harass, annoy or oppress, regardless of the motivation.

FRCP 30(d)(3)(A) Court may terminate or limit deposition being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party.

3. Take a deposition or ask deposition questions because of the questioner's desire to create attorney fees for the questioner's firm.

## II. How to Ask Questions

- A. Correct question structure includes each of the following considerations:
1. All parts of the question should appear on the video and in the transcript. Never ask about "this document" while showing the document to the witness.
  2. Use simple words.



7. Ask leading questions, which suggest to the witness the precise answer which is desired by the questioner.
  
  
  
  
  
  
  
  
  
  
8. Ask open questions, which encourage long, narrative answers, in order to give the witness the opportunity to tell his/her own story.

B. Procedures and techniques for taking videotape depositions.

1. Notice

FRCP 30(b)(3) – specify method of recording.

2. Set up
  
  
  
  
  
  
  
3. Question tone, style and pace
  
  
  
  
  
  
  
4. Use of exhibits

- C. Make sure that the question was fully answered on the record. Don't accept answers which are unresponsive, vague, ambiguous or incomplete. The answer needs to be on the record; nods, gestures and "uh huhs" will not adequately appear on the transcript.
- D. Dealing with evasive answers. Do not allow the witness to intentionally or unintentionally avoid the question which was asked. In order to get the question answered:
1. Repeat the question as often as necessary; be persistent.
  2. Confront the witness with his/her evasiveness, explain the problem created by the evasiveness and request an answer.
  3. The questioner should object and move to strike any non-responsive answer.

FRCP 32(d)(3)(B)(i) – objections to form of answer waived unless timely made during the deposition.

FRCP 37(a)(4) incomplete or evasive answer is treated as a failure to answer.

### **III. What to ask – important questioning techniques**

A. Ask the big questions. These questions, if answered as desired, will directly accomplish a goal or major point within a goal. Big questions are a direct attempt to try to prove or determine an issue.

1. How to ask the big questions.

2. When to ask the big questions.

B. Determine detailed information that will be used to attack the admissibility, credibility, or weight of adverse answers.

1. Source of knowledge: personal observation v. supplied information.

- Observation: proximity, attention, interference, and ability

- Supplied: by whom or what

2. Actual knowledge v. created testimony
  - assumptions, conclusions, self-serving speculation
  
3. Memory
  - quality and influences
  
4. Ability to state accurate testimony
  
  
5. Motive and bias

- C. Make the witness testify as specifically and precisely as possible. Don't accept answers which are capable of multiple interpretations. Ask follow-up questions to determine the detailed information known by the witness.
  
- D. Ask questions which the witness will perceive ask for embarrassing or damaging information.
  
- E. Ask "why" questions.
  
- F. Explore subjective thought processes. Examples include:
  - 1. The witness's reaction; e.g., surprised, upset, alarmed.
  
  - 2. What did the witness intend to do.
  
  - 3. What did the witness believe; care about; think about the situation; learn as a result of the event.







E. Jump around. Avoid asking questions in strict chronological order. Ask questions that relate to one issue, move to a different issue and return to the first issue.

F. Quicken the pace of the questioning.

G. Demonstrate to the witness an apparent desire to obtain a certain answer, when in reality you want the opposite answer.



C. If you want the witness to have recollection, the questions should be aimed at (a) increasing testimony; (b) demonstrating that the claimed absence of knowledge is false; and (c) tying down the witness' claimed absence of knowledge so that it cannot improve at trial.

1. Ask questions designed to elicit answers the intellectual force of which may cause the witness to discard his/her original inclination to claim no knowledge.
2. Demonstrate to the witness that it is illogical for the witness to not remember.
3. Confront the witness. Remind the witness that failure to disclose all knowledge is a violation of the oath and grounds for sanctions.

FRCP 37(a)(3)(B)(i) Motion for order compelling an answer if deponent fails to answer a deposition question; and

FRCP 37(a)(5) court must award reasonable expenses including attorney fees if movant made good faith effort to obtain answer without court action.

## **VI. Getting It All - Deposition Thoroughness**

- A. Emphasis. Some goals are more important than others. Some questions are more important. Most deposition time should be devoted to the most important goals and the most important questions.
  
- B. Ask summary questions. In one question, summarize the witness's prior testimony and ask the witness to agree that the list is complete.
  
- C. Ask more open ended questions.
  
- D. Ask questions which might lead to admissible evidence, even though the answer may not be admissible evidence.
  
- E. Don't be intimidated by the defending lawyer's time pressures or the witness's evasiveness.

## **VII. When To Stop Asking Questions**

- A. Ask as few questions as possible and as many questions as needed.
  
- B. Generally, the more truthful the witness, the fewer questions will be asked. Conversely, if the questioner perceives that the witness is lying, more questions will need to be asked.
  
- C. Generally, the better the answer the fewer the number of questions. If the questioner perceives the questions are hurting the questioner's case, more questions will need to be asked. The answer which does the most harm to the case will need the most follow-up questioning.
  
- D. The questioner should maintain an inquisitive attitude. Ask as many questions as it takes to really learn the whole story.





B. Pre-deposition meetings with witness

1. Review witness recollection

2. Refresh witness recollection

a. Explain what to say when asked if memory was refreshed by review of documents.

3. Structure testimony

a. Correct misstatements, misconceptions, and incorrect assumptions

b. Clarify ambiguous statements

c. Deal with surprise questions

4. Explain the deposition process

5. Instructions on how to be a great witness
  - a. Tell the truth
  - b. Don't guess
  - c. Dealing with leading questions
  - d. Answers must be responsive
  - e. Keep the correct mental attitude
  - f. Only answer questions you understand
  - g. Don't give answers that can be misconstrued

6. Train your client to understand the meaning of your properly stated Objections.
  - a. Compound
  - b. Assumes facts not in evidence
  - c. Misstates prior testimony
  - d. Incomplete hypothetical
  - e. Vague
  - f. Ambiguous
  - g. Asked and answered
  - h. Calls for speculation
  - i. Argumentative

7. Preparing your client for a videotaped deposition
  - a. what to wear
  - b. practice on video
  - c. coaching the client on video performance: act as if the jury is in the room
    - posture
    - use of hands
    - avoid excessive pauses
    - don't be arrogant or argumentative
    - avoid distracting mannerisms

C. Protecting the witness during deposition.

1. Problems with overprotection, particularly on videotape.

FRCP 30(d)(1) – additional time may be ordered.

FRCP 30(d)(2) – appropriate sanctions may be imposed on any person who impedes, delays, or frustrates the fair examination of the deponent.

2. Conferring off the record during deposition.

3. Objections

FRCP 30(c)(2) – testimony is taken subject to any objections.

a. How to state objections

FRCP 30(c)(2) – concisely in a nonargumentative and nonsuggestive manner.

- b. Objections which are waived if not made at the deposition.

FRCP 32(d) Form of question or answer, and any matters that could have been corrected.

- 4. Instructions not to answer

FRCP 30(c)(2) – only to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under FRCP 30(d)(3).

- 5. Ask questions

FRCP 30(c)(1) – examination and cross-examination proceed as they would at trial.

6. Use Real Time Reporting

7. Reading and signing

FRCP 30(e)(1) – on request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days to review the transcript or recording and make changes in form or substance, and sign a statement listing the reasons for the changes.

8. Obtaining court assistance in protecting your witness.

FRCP 30(d)(3)(A) – deposition must be suspended for time necessary to obtain an order to terminate or limit.

9. Consider motions/stipulations re time limits and deposition protocol.



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**Biography**

David Markowitz is a founding partner of the business litigation firm Markowitz, Herbold, Glade & Mehlhaf, P.C. He shepherded the firm from its beginning as an ambitious two-attorney litigation shop, to its present status as one of the premier business litigation firms in the region.

Dave has received numerous awards and recognition, not only for his outstanding trial work, but also for his efforts in mentoring and educating attorneys at all levels.

Some of his accolades include:

- Recognized by *Chambers USA* as one of the top two commercial litigators in Oregon
- Recognized in *The Best Lawyers in America* as Portland's 2010 "Bet-the-Company" Litigator of the Year
- Fellow of the American College of Trial Lawyers; former Oregon State chairperson
- Recognized as a top 10 Oregon Super Lawyer by *Super Lawyers* magazine
- Inducted into the International Academy of Trial Lawyers, an exclusive organization for elite prosecutors and defense lawyers
- Honored by the *Daily Journal of Commerce* for "Leadership in Law" 2011
- Recognized as a 2011 "Litigation Star" by *Benchmark Litigation*
- Selected as one of the Top Ten Oregon Litigators by the *National Law Journal*
- Selected as one of Lawdragon's *500 Leading Litigators in America*, and *500 Leading Plaintiffs' Lawyers in America*
- Recognized as one of Oregon's 50 Great Leaders for Oregon by *Oregon Business Magazine*
- Received *Commerce Magazine's* Rainmaker Mentor Award
- Received the Oregon State Bar President's Special Award of Appreciation for devoting significant time and energy to CLE training for Oregon attorneys
- Member of the *Litigation Journal's* editorial board since the publication's inception



Dave frequently acts as a mediator and arbitrator to resolve commercial disputes, and served as a pro-tem judge in Multnomah County for nine years. He also is an expert on attorney fees, providing courtroom testimony in legal fee award disputes.

### **Trial Guides® Issues David Markowitz' Deposition Course on DVD and CD**

Trial Guides® has released Portland, Oregon trial attorney David Markowitz' popular deposition techniques course on DVD and CD-Rom.

Markowitz, a shareholder in the Markowitz, Herbold, Glade & Mehlhaf firm, frequently lectures nationally on deposition-related topics. He has spent much of his career studying the transcripts of depositions, and through this insight, offers tangible techniques that increase the likelihood of deposition success. Whether you are new to trial practice or want to refresh your deposition skills, this presentation is an opportunity not to be missed.

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