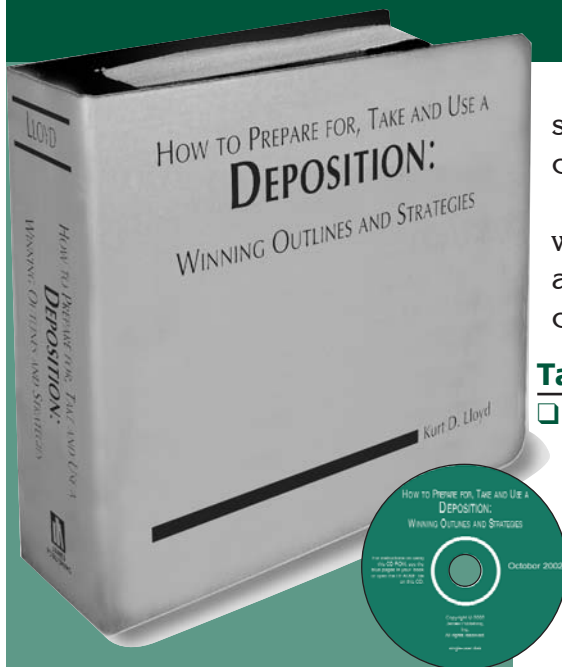


# How to Take Better Depositions

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Are your deposition strategies, techniques, and questions all they should be? Have you been frustrated by evasive or forgetful witnesses, coaching, instructions not to answer, and frequent objections?

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## Taking the deposition

- The art of pinning down a witness' testimony, including the two most useful words in an examiner's arsenal. §613
  - How to turn long narrative answers into useful testimony. §614
  - How to handle evasive and argumentative witnesses. §615.1
  - Tactics for dealing with the forgetful witness. §615.2
- Handling objections, including comments on your questions. §631
- Dealing with instructions not to answer the question. §§633, 741
- Controlling disruptive attorneys. §634
- What to do when attorney-client privilege is asserted. §§636, 761
- Dealing with coaching. §637
- Responding to claims of work product privilege. §§638, 762

## Defending

- How to block examiners who, by scheduling a deposition for less than the anticipated time, like to review the transcript and then re-examine a witness ... in essence deposing the witness twice. §421
- Considering which areas of the examination may invade privileged knowledge. §423
- Representing a client who will not follow the rules (§438) or is untrustworthy (§438.2).
- Hints for helping your witness with leading questions, summary testimony,

approximations, assumptions, speculation, and more. §440

- Dealing with examiners who badger, withhold documents, or provide inaccurate instructions. §440
- Defending the deposition of an uncooperative witness. §455
- Four techniques for closing a deposition when your adversary tries to leave it open. §554

## Deposing expert witnesses

- The 8 goals of all expert depositions. §600A
- "Many attorneys are unaware of the limited scope of privilege, if any, that applies to discussions he has with and documents he gives to his expert witness." Inquire into all documents and discussions. §622A
- "Too many attorneys waste time asking numerous questions about the expert's general background or unrelated activities and not enough questions about the expert's specific qualifications on the subject matter involved." How to do it. §631A
- "The expert's understanding of the case should be developed from his independent review of the facts, but you will often be surprised to hear that the expert is relying on what the opposing party or his attorney told him." 13 areas to explore. §633A
- The best way for plaintiff's attorneys to disarm opposing experts. §637A
- Form deposition outlines for experts. §641A

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## Case-Specific Outlines

- Auto Accident Plaintiff, Auto Accident Defendant, Auto Accident Reconstructionist, Premises Liability Plaintiff, Premises Liability Defendant Occupier or Owner, Premises Liability Defendant City's Superintendent of Streets, Premises Liability Architect
- Medical Malpractice Defendant Physician, Medical Malpractice Defense Expert, Products Liability Defendant's Design Engineer, Products Liability Expert Engineer, Injured Plaintiff on Damages, Treating Physician

## Motions and More

- Motion for Leave to Take Deposition More Than 100 Miles Away, Motion for Leave to Take Foreign Video Conference, Notice of Deposition, Motion Opposing the Date, Motion Opposing Location
- Notice of Deposition of an Officer or Director or Managing Agent, Motion Opposing Deposition of Corporate Officer, Notice of Deposition Pursuant to FRCP 30(b)(6), Motion Objecting to 30(b)(6) Deposition
- Notice of Deposition and Request for Documents, Motion for Relief with Respect to Subpoena Duces Tecum, Acceptance of Service, Opposition to Motion for Order Permitting Reporting of a Deposition on Videotape, Notice for Recording Deposition by Videotape, Stipulation for a Videotaped Deposition, Order for Recording by Videotape, Court Appointment of Interpreter for Deposition, Stipulation Pursuant to Rule 29 for Taking a Deposition
- Discovery Conference Order, Report of Parties' Planning Meeting, Motion Under Rule 26(c) to Exclude Spectators, Motion for Order Excluding Witnesses
- Correction Sheet, Motion to Redepose Witness Concerning Deposition Corrections, Deposition Summary, Issues/Subject Deposition Summary, Index to Deposition Videotape
- Motion to Compel Answers at Deposition, Motion to Compel Answers for Sanctions, Motion for Order Terminating Deposition for Bad Faith, Interrogatory to Identify Expert Witness and Opinion
- Petition to Perpetuate Testimony, Notice of Deposition to Perpetuate Testimony, Motion to Perpetuate Testimony Pending Appeal, Commission to Deposition Officer, Publishing Designated Portions of the Deposition and Ruling on Objections

7-19 MAKING AND RESPONDING TO OBJECTIONS §741

**Sample: Motion to Compel Answers at Deposition and for Sanctions**

(CASE CAPTION)

CASE NO:

NOTICE OF MOTION  
AND MOTION FOR AN  
ORDER COMPELLING  
ANSWERS AT  
DEPOSITION AND FOR

TO ALL PARTIES HERETO  
RESPECTIVE ATTORNEYS

PLEASE TAKE NOTICE THAT  
(time) or as soon thereafter  
heard before the above-entitled  
(moving party) will file  
the provisions of Fed. R. Civ. P.  
der compelling (name of  
tions at deposition which the  
answer. The motion is made  
tual basis, identifying ques-  
may's fees as authorized by  
The motion is based upon  
of points and authorities  
declaration(s) of (na-

§321 HOW TO PREPARE FOR, TAKE & USE A DEPOSITION 3-4.2  
**Sample: Motion under Rule 26(c) to Exclude Spectators from Attending a Deposition**

(CASE CAPTION)

CASE NO:

NOTICE OF MOTION  
FOR A PROTECTIVE  
ORDER EXCLUDING  
NONPARTIES FROM  
DEPOSITION

DATE: \_\_\_\_\_  
TIME: \_\_\_\_\_  
PLACE: \_\_\_\_\_

TO ALL PARTIES AND TO THEIR  
RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT ON (date) at  
heard in the above-entitled court located at (place) at  
plaintiff/defendant will move the Court for a  
protective order excluding all nonparties from attending  
the deposition of (name of deponent).

This motion is made pursuant to the provisions of  
Fed. R. Civ. P. 26(c)(5), on the grounds that (set forth  
grounds, i.e., a party intends to bring nonparties, will be  
disruptive, etc.).

The motion will be based upon this notice, the memo-  
randum of points and authorities served and filed here-  
with, the declaration(s) of (name of declarant), and  
all oral and documentary evidence that may be presented  
at the hearing.

Dated: \_\_\_\_\_

(SIGNATURE)

Attorneys for \_\_\_\_\_

6A-5 TECHNIQUES FOR DEPOSING AN EXPERT WITNESS

**Sample: Interrogatory to Identify Expert Witness and Opinions**

(CASE CAPTION)

CASE NO:

INTERROGATORIES TO

Pursuant to Fed. R. Civ. P. 33, (name of party) is  
requested to answer the following  
oath and within thirty days from

(Number). State the name and  
each person who may be called at  
trial. In addition, for each person

(a) A complete statement  
pressed, including the basis and

(b) A description of all of  
expert considered in formulating  
subparagraph (a).

(c) A complete statement  
tions;

(d) A list of all public  
within the preceding ten years

(e) The compensation  
preparation and testimony;

(f) A list of all cases  
fied as an expert at trial or  
ing ten years.

Dated: \_\_\_\_\_

§910 HOW TO PREPARE FOR, TAKE & USE A DEPOSITION 9-4  
**Sample: Form for Petition to Perpetuate Testimony**

(CASE CAPTION)

CASE NO:

PETITION TO  
PERPETUATE  
TESTIMONY OF

Petitioner (name) states:

1. Petitioner is a resident of \_\_\_\_\_ and state of \_\_\_\_\_  
which is within the jurisdiction of this court. (Name of  
responsive defendant) is a resident of the state of \_\_\_\_\_  
and is subject to the jurisdiction of this court.

2. Petitioner intends to file a complaint in this court  
against (name of prospective defendant) seeking to  
(here state the nature of the cause of action and relief  
sought, i.e., to recover damages for personal injuries  
caused by negligence of defendant and sustained by peti-  
tioner).

3. [In this paragraph you should describe the basic  
facts upon which you claim liability arises.]

4. [In this paragraph state the reason(s) why the depo-  
sition is needed immediately, i.e., witness is terminally  
ill.]

5. Petitioner desires to perpetuate the testimony of \_\_\_\_\_  
The testimony of the witness is expected to dis-  
close that [set forth substance of anticipated testimony].

WHEREFORE, Petitioner prays that the court issue an  
order authorizing (him/her) to take the deposition of  
\_\_\_\_\_ upon oral examination for the purpose of  
perpetuating (his/her) testimony pursuant to Rule 27 of  
the Federal Rules of Civil Procedure.

Dated: \_\_\_\_\_

(SIGNATURE)

Attorneys for \_\_\_\_\_

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# Abbreviated Contents

## **Who Should Be Deposed: When, Where and How**

Should You Take A Deposition?; Who Should Be Deposed?; When and Where Should Depositions Be Taken?; What Type of Deposition Should Be Taken?; Opposing the Time, Place or Taking of a Deposition

## **Procedures For Setting Up a Deposition**

Setting Up the Deposition of a Party; Setting Up the Deposition of a Nonparty; Using a Subpoena Duces Tecum to Compel Production of Evidence; Miscellaneous Deposition Situations: Audio or Videotaped Depositions, Telephone Depositions, "Foreign" Depositions; Costs of the Deposition; The Court Reporter; Stipulations; Discovery Conferences

## **Who Can and Should Attend a Deposition**

Rules Governing the Exclusion of Spectators from a Deposition: Rules 26(c), 615, 29; Excluding Parties and Other Individuals from Attending a Deposition; Procedures for Obtaining a Protective Order

## **Preparing to Take or Defend a Deposition**

Preparing to Take a Deposition; Reviewing Key Pleadings, Applicable Law, Prior Discovery and Factual Information; Preparing Your Deposition Examination; Preparing to Take the Deposition of an Expert Witness; Preparing to Defend a Deposition; Preparing Your Witness to be Deposed; Hints For Handling the Tricky Examiner and Tricky

Questions; Preparing Specific Witnesses for their Depositions: Party, Friendly Nonparty, Deponent Designated Under Rule 30(b)(6); Liability Witness Deposition Outlines; Damage Witness Deposition Outlines

## **Procedures for Taking and Defending a Deposition**

Setting the Stage for the Deposition: Objecting to Persons Present, Using Exhibits, Video and Audio Depositions; Stipulations and Orders; Introductory Examination: Identifying Documents Produced by Witness, Discovering Impediments to Answering Questions, Asking About the Witness's Preparation for Deposition; Procedures During the Deposition; Using an Interpreter; Concluding Your Examination: Cross-Examination and Redirect Examination, Post-Deposition Matters; Finalizing the Deposition: Indexing, Supplemental Answers, Index to Deposition Videotape

## **Techniques for Taking an Effective Deposition**

Techniques for Questioning the Witness: General Techniques for the Substantive Examination, Evasive or Argumentative Witness, Forgetful Witness, Language Difficulties; Techniques for Deposing an Expert Witness: Qualifications, Opinions and Foundation, Sample Examination; Dealing with the Defending Attorney: Objections, Narrow Objections, Instructions Not to Answer the Question, Coaching the Witness, Assertion of the Work Product Privilege

## **Techniques for Deposing an Expert Witness**

Written Discovery: Expert Witness Document Discovery, Expert Work Product, The Expert's Preservation of Evidence; Outline of Expert Deposition: Qualifications, Impeachment, The Expert's Understanding of Case Related Facts, Validity of Methods, Authoritative Treatises, Expert Opinions, Scope of Examination, Sample Outlines

## **Making and Responding to Objections**

Scope of Examination: Relevance to the Subject Matter; Objecting to the Deposition Procedure; Objecting to Improper Questions; Instructing a Witness Not to Answer the Question; Objecting to Questions Beyond the Scope of Discovery; Objections Based Upon Privilege; Scope of Examination of Expert Witnesses; Checklist of Objections

## **Defending the Deposition**

Preliminary Matters at the Depositions; Conduct of the Deposition: Making Objections, Demeanor, Recesses and Conferences, Duration of Depositions; Dealing with Problem Witnesses: Talkative, Argumentative or Forgetful Witness, Language Difficulties; Cross-Examining the Witness

## **Special Deposition Situations**

Depositions Before Commencement of Civil Action or Pending Appeal: Use of Rule 27 Depositions; Out-

of-District Depositions; Depositions in Foreign Countries; Appeal of Discovery Orders; Depositions in Arbitration Proceedings

## **Using the Deposition at Trial**

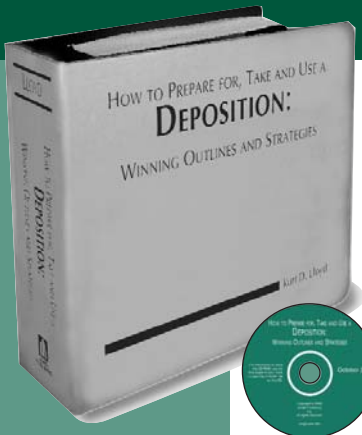
Using Depositions Taken in Other Proceedings or Involving Other Parties; Purposes for Which Depositions May be Used at Trial: Impeach or Contradict a Witness's Testimony, Deposition of an Adverse Party, Deposition of an Unavailable Witness, Catchall Provision; Introducing Deposition Testimony as Substantive Evidence; Objecting to Admissibility of Deposition Testimony; Tactics in Using Depositions at Trial

## **Using Computers in the Deposition Process**

Database Programs to Consider; Imaging Systems to Retrieve Documents; Using Full-Text Search Programs to Review Deposition Transcripts; Using Outlining Software to Prepare for a Deposition; During the Deposition: Using a Database, Using Deposition Search Programs, Real-Time Transcription; After the Deposition: Search Deposition Transcript, Annotate the Deposition Sample, Excerpt Portions of the Transcript, Summarize the Deposition; Using a Computer at Trial

## **Table of Cases & Index**

# About the Book and CD



Kurt Lloyd's *Deposition* book contains 650 5-1/2 x 8-1/2 pages in a sturdy 3-ring binder that is compact enough to travel in your briefcase.

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gestions. See, Schulman, "Coaching Witness Credibility," *The Practical Litigator*, January 1993.

### §436 Representing the Witness

During his deposition, the witness may be asked if he is represented by counsel. If the witness is your client, or an officer, director or employee of the client, the answer is usually yes and you should instruct your witness to that effect. If, however, the witness is not your client, or affiliated with your client, take the time to discuss with him whether he will appear with separate counsel, without counsel, or with you acting as counsel for the purpose of a deposition even though your client and not the witness pays your fees. The advantage of appearing as counsel are several-fold and include the fact that it may clothe your preparation session with the attorney-client privilege. It also enables you to make objections on behalf of the witness or advise the witness not to answer a question. Alternatively, it may create unrecognized conflicts down the road should that witness's interest become adverse to your client. In some cases, it is better for the witness to acknowledge that he is not represented by counsel even though you have assisted him in preparing for deposition.

### §436.1 Representing the Corporate Employee

Problems may occur when corporate counsel produces corporate employees at the deposition who were witnesses to the important acts comprising the case, particularly employees outside the "control group." See §335, *supra*. Often, representation of the employees at the deposition is based upon the assumption that no conflict exists between the employees' interests and those of the employer.

Counsel often attempt to fess the issue by stating that they represent the employee only for purposes of deposition. Does counsel producing these witnesses really "represent" them in the sense that he or she represents the principals of the corporation? If the attorney commits to full representation, then the attorney-client privilege adheres.

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### Practice Tip: Corporate Employees and Attorney-Client Privilege

When taking the deposition of a corporate employee, try to get his or her counsel's statement on the record whether the attorney is representing the employee. If counsel is unwilling to commit to this, the attorney-client privilege as to the pre-deposition meeting should not apply.

Employees will usually feel pressured to give testimony favorable to the employer at the time of the deposition. But such loyalties may fade quickly if the employee leaves the company. It is imperative that counsel use the greatest degree of circumspection when preparing such witnesses for the deposition.

### Practice Tip: Corporate Employees Who Turn Against Their Employers

If you are representing the employee, it is important to protect yourself against an employee who may change loyalties and turn against the company. Protect yourself by taking good notes at all meetings with the employee.

### §437 Timing

Where possible, consider conducting your preparation over several sessions. Trying to cram all of the preparation into a single session may be counterproductive - the witness will either stop listening or fall victim to information overload and lose much of the benefit of your counsel. Conducting the preparation over two or more sessions gives the witness time to digest the information which you have given to him.

The first session may come just after the deposition has been noticed. You might want to discuss the nature of the deposition process and the basic rules of procedure. You might also want to use that session as an opportunity to go over the facts and to make sure that all of the relevant documents have been identified. By the end of the ses-

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sion, you may have achieved two objectives: your witness may be sufficiently comfortable with the process that he does not fear it, and you will have increased your knowledge of the case.

In a follow-up session, you may want to spend more time talking about substantive issues and also focus upon techniques for answering questions. This may be the occasion to conduct a practice examination, possibly using a videotape. You should also spend time reemphasizing the most important points from the first preparation session.

Just before the deposition, consider meeting with your witness a third time. This is the time to emphasize the key points or to raise any additional thoughts you might have. If necessary, use it as an occasion to build your witness's confidence. A nervous witness will usually be less effective than one who is self-assured.

### §438 Preparing the Problem Witness

During the course of your career, you will no doubt on multiple occasions have a problem witness you must defend in a deposition—a witness that may deviate from the truth, a witness who, notwithstanding all of the preparation described in the preceding sections, persists in violating the fundamental rules of being deposed. What do you do?

Regrettably, there is no easy answer—the only answer being to keep trying every technique to get him under control.

If you anticipate that the witness will not follow the basic rules, use practice examinations, preferably video- or audiotaped. When shown his specific errors in responding to specific questions, most witnesses learn quickly. Whether or not you "harshly" emphasize the rules of deposition depends upon your feel for the response of the witness.

### §438.1 Avoiding the Dangers of Assumed Facts

It is amazing how much nonpersonal knowledge becomes admissible evidence. Witnesses, particularly when somewhat intimidated by examining counsel, too often accept the questions of the examiner as statements of fact, or accept their own logic as to what is likely or probable as being in fact what occurred. For example, how often does the witness say, "I assume...," "It probably..." "I'm sure that..."

## Helpful suggestions and cautions.

Author Kurt Lloyd's sophisticated strategies and decades of experience are evident in every section of this practical guide.

# About the Author



Kurt D. Lloyd handles major personal injury and catastrophic loss cases from Lloyd & Cavanagh in Chicago. He has obtained numerous million-dollar verdicts and settlements, including a \$9.7 million verdict against an HMO physician.

Mr. Lloyd is co-editor of the two-volume *Medical and Hospital Negligence*, and wrote the Closing Argument chapter for *Medical Negligence Trial Notebook*. He is the past co-chairman of the Illinois Trial Lawyers Association's education seminars program. He has lectured regularly to trial attorneys on discovery, trial techniques, and many negligence issues.

Mr. Lloyd is a member of the American Board of Trial Advocates. He may be reached at [kdl@lloydcavanagh.com](mailto:kdl@lloydcavanagh.com).

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### V. Post-Occurrence Repair of Subject Defect

- Was defect repaired?
  - why or why not?
  - type of repair performed
- Process for Repair
  - notice of this occurrence?
  - independent repair?
  - time necessary to repair
- If repaired earlier, then agree that occurrence, e.g. trip and fall in sidewalk hole, would not have occurred?

### §473.7 Outline For Deposing the Defendant Physician—Medical Malpractice Case

#### I. Qualifications

- Medical school attended
  - years attended
- Residencies performed in a particular specialty
  - where
  - what years
- Fellowships
  - what specialty
- Board Certifications
  - area of specialty
  - number of times took board examinations
  - if taken more than one time, why failed
- Special expertise, training, experience or interest in area of medicine at issue
  - make describe special qualifications
- Written or published any literature applicable to the medical issues involved
  - why written
  - research used
  - peer reviewed
- Given any lectures, presentations or seminars applicable to the area of medicine involved
  - state subject matter
  - research performed
  - medical literature and texts consulted or relied upon for

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- Teaching and Academic Appointments
  - taught the diagnosis, care or treatment of the medical condition involved in the present case
- Private practice
  - how long
  - define patient population, e.g. adult cardiac patients
  - number of patients treated for the same or similar condition as present case
  - any prior patients with the same outcome
- Hospital staff privileges
  - any disciplinary proceedings, suspensions or temporary revocations
- Medical publications which regularly reads or subscribes

#### II. Agency/Employment

- a. actual agency or employment**
  - name of private employer, i.e. corporation or practice group
  - name of managed care organization—staff employee or independent physician
  - number of years employed
  - full time or part time
- b. apparent agency or employment**
  - physician who works in managed care clinic or hospital setting
  - who pays salary
  - who dictates hours of practice,
  - who selects patients referred to you
  - who receives patient payment for services
  - any disclosure that actually independent contractor physician, e.g. consent forms or uniform

#### III. Medical Literature Reviewed by Defendant for the Deposition

- Identify each article, textbook or other writing reviewed
  - agree or disagree with literature reviewed
  - familiar with same literature before saw plaintiff in this case
  - actually read literature identified before care and treatment to the plaintiff
  - statements contained in literature which defendant relied upon for course of care and treatment
  - literature authoritative.

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#### IV. Medical Records Created by the Defendant

- Identify all medical records made or written by the defendant for the care and treatment at issue
  - explain abbreviations or shorthand terms
  - if physician's note illegible, make read verbatim
- Any custom or practice to not chart findings that are negative
  - which findings
  - explain when in course of visit physician made such absent findings
- Does record refresh physician's memory of any conversation with plaintiff that is not recorded as history or complaint
  - how does physician now recall
  - at time of visit was it the physician's practice to accurately record history taken and physical examination made
- Does the physician rely on the written record to conclude that the plaintiff failed to tell him a sign or symptom or accurate history

#### V. Medical Records Reviewed by the Defendant

- Identify all medical records reviewed such as nursing notes, admission histories, laboratory tests, x-ray reports, etc.
- Does the physician rely upon any of these records to support his diagnosis, care or treatment at issue
  - identify each such record
  - state the significance of the findings or history in the record
- Was the physician aware of the records at the time of his diagnosis, care or treatment, e.g. comparison of annual mammogram films
  - were they available to consult
  - why not consulted
  - does any history or findings in records change the course of his care and treatment
- Formed any opinions about the plaintiff's outcome based on records
  - state each opinion
  - specific information contained in record as the basis of the opinion

## Pattern examination checklists.

Create a clear deposition and avoid omissions with these practice-tested outlines.

# Winning Deposition Outlines and Strategies

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- Pin down evasive witnesses
- Deal with the forgetful witness
- Control disruptive attorneys
- Block coaching
- Respond to assertions of attorney-client privilege
- Prepare problem witnesses for their depositions
- Object to improper questions
- Deal with tricky examiners
- Examine experts
- Summarize and review depositions
- Use depositions at trial

Sample pages, contents,  
and table of forms inside...



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