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Deposition Procedure Best Practices

From drafting and responding to deposition notices, to prepping witnesses, giving admonitions, and defending your client.

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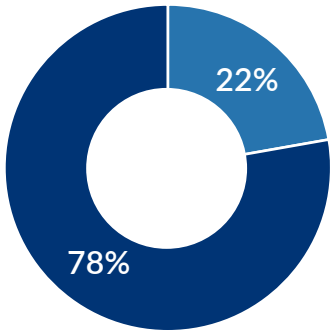
Introduction

As a litigator in California, you are responsible for lot of discovery. If you're a plaintiff's lawyer, the evidence obtained in discovery will tell you how much your case is worth. For defense counsel, discovery dictates your evaluation of an appropriate settlement value or determines whether you can dispose of the entire matter via summary judgment.

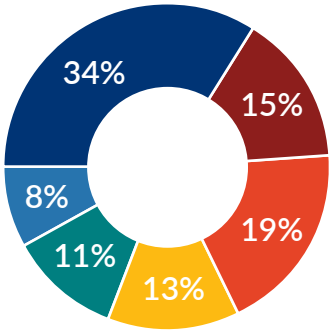
Despite the large amount of time lawyers spend propounding and responding to discovery requests, many attorneys still worry they haven't mastered the basics of discovery procedure. Nearly a quarter of the time California lawyers spend researching litigation practice and procedure is spent researching discovery procedure.[1] And, approximately 19% of discovery research centers on depositions.[2] Most of the queries about depositions center on drafting and responding to deposition notices, as well as basic deposition procedure such as proper admonitions and best practices for conducting useful direct examinations.

By mastering these rules and best practices, California attorneys can streamline the deposition process, gain confidence when examining witnesses, and spend less time researching procedure and more time creating better client outcomes.



Litigation Pageviews

- Discovery Procedure
- All other Litigation Procedure



Discovery Pageviews

- Discovery Motions & Sanctions
- Depositions
- Interrogatories
- Demands for Production
- Requests for Admissions
- All Other Discovery Topics

[1]Data taken from 18 months of page views of all CEB Litigation & Procedure content.
[2]Date taken from 18 months of page views of all CEB discovery-centric chapters & titles.

Deciding Whether to Take an Oral Deposition

So, what exactly are the advantages and disadvantages of taking an oral deposition?

Advantages

Obtain evidence from nonparties - A deposition is the only discovery method that permits you to obtain testimony, documents, electronically stored information, and other evidence from nonparties. See CCP §§2020.010-2020.510.

Lock in testimony - A deposition is usually the best way to lock in the testimony of unfriendly witnesses and opposing parties.

Make personal observations - You can personally observe the deponent in an examination setting and assess their potential effect on the trier of fact if the case goes to trial.

Obtain spontaneous responses - You can elicit more spontaneous and complete answers to your questions than with interrogatories because the witness' responses are less likely to have been rehearsed with opposing counsel. If the witness tries to evade a question or not answer it completely, you can immediately follow it with narrower, more precise questions until you are satisfied with the response.

No numerical limit to questions - Unlike interrogatories and requests for admission, there are no limits on the number of questions you may ask during a deposition.

Disadvantages

Expense - Preparing for and taking depositions may be more expensive than other forms of discovery (e.g., reporter fees, videographer fees, attorney fees for time spent reviewing the file, preparing exhibits, researching legal issues, reviewing prior transcripts, preparing questions, and traveling to and taking the deposition).

Inefficient if you are unprepared - Consider demanding documents and interrogatory responses to detailed factual questions before taking the deposition. Otherwise, you may waste time sorting through facts and documents for the first time during the deposition.

Reveals information to opponent - You lose the advantage of surprising the opposing party and opposing counsel at trial by revealing your probable areas of examination at trial and interrogation methods, and by stimulating opposing counsel to prepare for trial more carefully (e.g., your questions may reveal previously unknown facts and issues to opposing counsel).

Educates witnesses - You run the risk that witnesses who make poor showings at a deposition will learn by their mistakes and be coached to become stronger witnesses at trial. There is also the risk that the witness will disclose grounds for impeachment or weakness in testimony that the opposing party can use at trial.

5 Steps for Preparing a Deposition Notice

Pro-tip: If you're anticipating a long deposition, consider including a statement that the deposition will continue from day to day until concluded or that the deposition will be taken for two or more consecutive days. This practice may discourage the deponent's counsel from unilaterally refusing to return to the deposition after the end of the first day.

You've weighed the pros and cons and have decided to move forward with an oral deposition. Now you need to draft a written deposition notice. Here are five steps to help you get started and ensure you've included all required content:

1. Include all of the statutorily required information. California Code of Civil Procedure §2025.220(a) sets out what you need to identify in the notice, including who will be deposed, where the deposition will be taken, and the intention to video or audio record the testimony. **Carefully review this statute to be sure that you don't miss anything.**

2. If deposing an organization, be descriptive. If you're noticing the deposition of an organization, the notice must include a description of the matters on which examination is requested. CCP §2025.230. **Be specific so that the organization sends a representative to the deposition who's qualified to provide the particular information you're seeking.**

3. List everyone being served. The notice itself, or the accompanying proof of service, must list all parties or parties' attorneys on whom the notice is being served. CCP §2025.240(a).

4. Specify all documents you want at the deposition. If you want to require a party to give both oral testimony and produce documents at the deposition, you need to add the following to your deposition notice: a description of each individual item or a description with reasonable particularity of each category of items (including electronically stored information (ESI)) to be produced. CCP §2025.220(a)(4). For ESI, specify the format in which you want it produced. CCP §2025.220(a)(7).

5. If deposing a nonparty, serve a subpoena too. For party deponents, the deposition notice itself is sufficient to compel the appearance, testimony, and production of documents. CCP §2025.280(a). But if the deponent is a nonparty, you'll have to personally serve a subpoena on the deponent to compel attendance, testimony, and production of documents. CCP §2025.280(b). You must use Judicial Council Form SUBP-015 (Deposition Subpoena for Personal Appearance) or Judicial Council Form SUBP-020 (Deposition Subpoena for Personal Appearance and Production of Documents and Things). Cal Rules of Ct 1.31. Make sure to attach a copy of the subpoena to the deposition notice served on the parties who've appeared in the action. CCP §2025.240(b).

5 Steps for Responding to a Deposition Notice

Pro-Tip: Because a party represented by counsel won't get direct notice of a deposition, you'll need to inform your client immediately of the scheduled date and confirm the client's availability.

Alternately, you may have received a deposition notice. In this scenario, counsel should take a detailed look at the documents served and determine whether to comply with the notice or object to any defects. Follow these five steps to organize the process:

1. Immediately analyze the documents served to determine whether any defects exist and what you need to do to protect your client's interests. If the deposition notice or subpoena is defective, or if the conditions under which the deposition is to be conducted aren't acceptable, first try to resolve the problem by informal agreement (see Code Civ. Proc., § 2023.010(i)), and if that doesn't work, consider serving written objections, moving to quash the deposition notice or subpoena, and/or moving for a protective order.

2. Notify the party deponent. Because a party represented by counsel won't get direct notice of a deposition, you'll need to inform your client immediately of the scheduled date and confirm the client's availability. If the date won't work, seek a postponement or a protective order. Otherwise, make an appointment with your client to prepare for the deposition. When a deposition notice comes with a request to produce documents or other tangible things, give your client a copy of the request and ask them to bring all responsive documents to your predeposition meeting. (Code Civ. Proc., § 2020.510.)

3. Decide whether to contact a nonparty witness. The decision to contact a nonparty deponent whom opposing counsel has served with a deposition notice is a judgment call that depends in part on whether you expect the witness to be hostile. If the witness will agree to discuss the case, use the opportunity to preview and plan for the deposition. **But keep in mind that communications with nonclients are not protected by the attorney-client privilege and are discoverable.** (Evid. Code, § 952.)

Pro-Tip: If written objections may not be sufficient to protect your client's interests, you can seek a protective order and move to quash the notice.

4. Object to defects in the deposition notice. Defects in the deposition notice are rarely significant to the outcome of a case and are waived unless promptly challenged. If you're going to object, "promptly" serve written objections specifying each impediment. (Code Civ. Proc., § 2025.410(a).) If written objections may not be sufficient to protect your client's interests, you can seek a protective order and move to quash the notice. (Code Civ. Proc., §§ 1987.1, 2025.410(c).) However, it's better to negotiate the objection with the attorney who noticed the deposition, as the expense and time involved in such motions aren't usually justified.

5. Object to the production demand. When the deposition notice served on a party deponent is accompanied by a production demand or subpoena, you can object if the materials requested aren't reasonably specified and the deponent can't tell what should be produced, or it's otherwise objectionable (e.g., the request is unduly burdensome or seeks documents protected by the attorney-client privilege). (Code Civ. Proc., §§ 2025.410(a)–(b), 2025.440(a).) Your client may attend the deposition and refuse to comply with all or some of the document requests, placing the burden on noticing counsel to move to compel production. (Code Civ. Proc., § 2025.480(a).) Alternatively, you can move beforehand to stay the deposition and quash the notice or seek a protective order.

   If the deponent is a nonparty, the procedures to use depend on the type of documents sought and who's objecting to production. If the documents sought are certain types of personal records, a nonparty consumer, employee, or custodian (or his or her attorney) may serve written objections without filing a motion to quash. (Code Civ. Proc., §§ 1985.3(g), 1985.6(f).) When no such objection is made, any other party objecting to the production of records by a nonparty deponent must file a motion to quash the subpoena or a protective order. (Code Civ. Proc., § 1987.1.)

Who May Attend a Deposition?

Generally, the only people present at most depositions are the **examiner**, the **deponent**, **deponent's counsel**, **other parties' counsel**, the **court reporter**, a **videographer**, and an **interpreter**, if necessary.

But, if a nonparty (e.g., an expert witness or consultant) shows up at your deposition unexpectedly, and you don't want them around, can you refuse to proceed with the deposition until they leave? No, you don't have a right to refuse to proceed with a deposition when surprised by the presence of an unexpected and unwelcome person unless you have a court order. **But you can suspend the deposition to apply for a court order to exclude the person**.

Alternatively, if you're the one inviting a nonparty to the deposition, you'll want to avoid the risk that everyone will appear at the deposition only to have it suspended while opposing counsel seeks a protective order to exclude your invitee. You can save everyone the inconvenience by **notifying opposing counsel in advance** so that any motion for a protective order can be made before the deposition.

CHECKLIST

Deposition Admonitions

- ✓ Remember the oath
- ✓ Ask for clarification
- ✓ Don't guess
- ✓ Only one person can speak at a time
- ✓ Use words, not gestures
- ✓ Ask for a break
- ✓ Understand objections
- ✓ Understand the effect of changing testimony

As the examiner, be sure that the record shows the deponent's understanding of the deposition procedure. So, after the court reporter has administered the oath to the deponent and you're ready to proceed, admonish the deponent by making short statements on the record and eliciting the deponent's understanding of each admonition given.

When admonitions are part of the record before the examination begins, **the deposition testimony becomes useful as an admissible prior inconsistent statement if the deponent later contradicts statements made at the deposition.** (See Evid. Code, § 1235.)

Use these 8 standard admonishments before questioning the witness:

1. **Remember the oath**
   "Do you understand that even though this deposition is taking place in a [law office/ conference room/court reporter's office], the testimony you give today requires you to testify truthfully under penalty of perjury, as if you were testifying in a court of law?"

2. **Ask for clarification**
   "I will try to make my questions as clear as possible. But, if for any reason you do not understand a question, please ask me to repeat it or rephrase it, and I will do so. If you answer a question, everyone will assume, and the record will reflect, that you understood the question. Do you agree to ask for clarification if you need it?"

3. **Don't guess**
   "I am entitled to your best estimates, but I do not want you to guess or speculate. For example, If I were to ask you to estimate the length of this room, you could do that because you are sitting in the room and can see how big it is even if you can't measure its exact length. But if I were to ask you to estimate the length of my dining room table, your answer would be a pure guess because you have never seen my dining room table. Do you understand the difference between estimates and guesses?"

4. **Only one person can speak at a time**
   "Even if you think you know what my question will be, please allow me to finish asking it before you start to answer. The court reporter can only write down what one person is saying at a time. Do you understand?"

5. **Use words, not gestures**
   The court reporter can only record audible words, not gestures. If the answer is yes, say "yes" instead of nodding your head. Please also say "yes" or "no" instead of "uh-huh" or "uh-uh." If you point or shrug, or make a nonverbal motion, I will need to describe your actions for the record and ask you to explain them. Do you understand?"

6. **Ask for a break**
   "If, at any time during this deposition, you are unable to continue to testify accurately or need to take a break, please tell me immediately and we will take a recess. Does that sound agreeable?"

7. **Understand objections**
   "Your attorney, or one of the other attorneys in the room, may object to some of my questions. If that happens, please pause and wait for the objection before you answer. Unless your attorney instructs you not to answer a specific question, you are obligated to answer it, regardless of the objection. Do you understand?"

8. **Understand the effect of changing testimony**
   "Everything we say here today will be taken down by the court reporter. After the deposition is over, the court reporter will transcribe what we have said into a booklet. If I ask you the same questions later, at the trial, that I have asked you today, and your answers are different then than they are today, I will be able to comment on the differences and one of the reasons will be to question your truthfulness. You can expect to be asked to explain the reason for the differences in your answers. Do you understand?"

Conducting an Effective Direct Examination

After giving your admonitions, you're ready to examine the witness. Direct examination is the best way to set the foundation for your case. Here are some tips to help you conduct a direct examination that will best build that foundation.

1. Make your questions easily understood. Phrase questions so that the witness can understand them without any effort and cannot later retract their testimony by claiming they were confused by the question.

2. Speak clearly, slowly, and loudly. Be sure to enunciate each sentence the witness can hear you clearly. You should sit directly across from the deponent so they can see and hear you without straining.

3. Listen to the witness's answers to your questions. A witness may not give you exactly what you expect, and you may have to rephrase the question. **The witness may remember something new, and you must be able to formulate questions on the spot.** Also, you may have to refresh the recollection of—or impeach—a witness who deviates from former testimony.

4. Ask questions on every aspect of each important piece of evidence. Don't cover key points perfunctorily. Think about how the deposition testimony might later be used at trial. If you don't bring out information that jurors wish to know, they may speculate on why in the jury room.

5. Consider using images, charts, diagrams, or other documents. Witnesses process information in different ways, some by seeing a document or diagram, others by listening, still others by working with information in some way. **Consider using demonstrative evidence as often as possible or asking the deponent to draw a chart or diagram.** Try to tie your questions to objects or people in the room, or into the demonstrative evidence you're presenting.

6. Make your questions interesting. Think of the trial as a play or movie and try to describe the events that led up to it as compellingly as possible. Make sure the witness that you present is interesting, understandable, and has relevant testimony on the issue you're trying to establish.

7. Try to ask questions that won't be objectionable. In preparing your checklist of questions, think of any objections that may be made and be sure you provide a proper foundation to forestall that objection.

8. **Don't argue with the witness.** Your job is to persuade the judge and jury in later motions or at trial. If the jury sees video or hears a transcript of your arguing with a witness during deposition, you may appear unprofessional and lose credibility.

9. Require the witness to testify to facts, not subjective conclusions. Don't let the witness testify to opinions, assumptions, or beliefs, even when they're based on facts the witness observed, unless the testimony will enhance your case and you don't think your opponent will object.

Conclusion

Noticing, preparing for, and attending depositions – as well as researching proper deposition procedure – can be unnecessarily stressful and time-consuming. Use the best practices you've learned here to shorten the time spent researching depositions, avoid unnecessary discovery disputes, and plan ahead for dispositive motions and settlement negotiations.

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