

# **DEPOSITIONS**

**PRACTICE AND PROCEDURE IN FEDERAL  
AND NEW YORK STATE COURTS**

---

**SECOND EDITION**

**Honorable Harold Baer, Jr.  
Robert C. Meade, Jr., Esq.**

## **DEDICATION**

This book is dedicated in memory of

**HONORABLE HAROLD BAER**

and

**HONORABLE ROBERT C. MEADE,**

**JUSTICES OF THE SUPREME COURT  
OF THE STATE OF NEW YORK**

## TABLE OF CONTENTS

Preface .....	xxv
About the Authors.....	xxvii

### **PART ONE: JURISPRUDENCE**

- Chapter 1 Overview of the Discovery Process and the Deposition
- Chapter 2 Noticing and Arranging the Deposition
- Chapter 3 Documents and Depositions
- Chapter 4 Expert Witnesses
- Chapter 5 Conduct of the Deposition
- Chapter 6 Protective Orders
- Chapter 7 Motions to Compel and for Sanctions
- Chapter 8 Corrections to the Deposition
- Chapter 9 Use of the Deposition
- Chapter 10 Depositions and Motions for Summary Judgment
- Chapter 11 Deposition on Written Questions

### **PART TWO: ETHICAL OBLIGATIONS AND THE DEPOSITION**

- Chapter 1 Preparation of Witnesses
- Chapter 2 Ethics and the Deposition: The Dishonest Client and Other Issues

### **PART THREE: STRATEGIC AND PRACTICAL CONSIDERATIONS**

- Chapter 1 Before the Deposition
  - Chapter 2 At the Deposition
  - Chapter 3 Correcting the Transcript
  - Chapter 4 Use of Depositions
- Appendix: Federal and State Forms for Deposition Practice  
Table of Authorities

# **DETAILED TABLE OF CONTENTS**

Preface .....	xxv
About the Authors.....	xxvii

## **PART ONE: JURISPRUDENCE**

### **Chapter 1 Overview of the Discovery Process and the Deposition**

[1.0] I.	State Practice .....	1-1
[1.1]	A. Scope of Discovery.....	1-1
[1.2]	B. Discovery and Judicial Discretion.....	1-3
[1.3]	C. Persons from Whom Discovery May Be Obtained .....	1-3
[1.4]	1. Parties .....	1-3
[1.5]	2. Nonparties.....	1-4
[1.6]	D. Discovery Process and Supervision.....	1-4
[1.7]	1. Preliminary Conference Requirement ....	1-5
[1.8]	2. Judicial Supervision.....	1-8
[1.9]	3. Note of Issue .....	1-8
[1.10] II.	Federal Practice .....	1-9
[1.11]	A. Scope of Discovery.....	1-9
[1.12]	B. Discovery Process and Supervision.....	1-11
[1.13]	1. Scheduling Conference and Order.....	1-11
[1.14]	2. Judicial Supervision.....	1-12

### **Chapter 2 Noticing and Arranging the Deposition**

[2.0] I.	State Practice .....	2-1
[2.1]	A. Who May Be Deposed.....	2-1
[2.2]	1. Minors.....	2-1
[2.3]	2. Officers, Directors, Members and Employees of a Party .....	2-1
[2.4]	3. Physicians and Other Experts .....	2-3
[2.5]	4. Attorneys .....	2-4
[2.6]	5. Prisoners .....	2-5
[2.7]	6. Nonparty Witnesses .....	2-5
[2.8]	a. Showing of Special Circumstances...	2-5
[2.9]	b. Varying Interpretations among Appellate Departments.....	2-6
[2.10]	c. Special Circumstances Requirement Disavowed.....	2-9
[2.11]	B. Notice Requirements .....	2-11
[2.12]	1. Parties .....	2-11
[2.13]	2. Nonparties.....	2-12

[2.14]	C. Place of Deposition.....	2-12
[2.15]	1. Within New York .....	2-12
[2.16]	2. Outside of New York.....	2-13
[2.17]	D. Objecting to a Deposition Notice .....	2-16
[2.18]	E. Priority in Taking of Depositions .....	2-16
[2.19]	F. Depositions by Nonstenographic Means .....	2-18
[2.20]	1. Questions to Consider.....	2-19
[2.21]	2. Depositions by Remote Electronic Means—Court Orders.....	2-19
[2.22]	3. Videotaped Depositions.....	2-21
[2.23]	II. Federal Practice .....	2-24
[2.24]	A. Disclosure Plans and Discovery Schedules ....	2-24
[2.25]	1. Number of Depositions.....	2-25
[2.26]	2. Time Limit on Depositions.....	2-25
[2.27]	3. Depositions after Discovery Closes.....	2-26
[2.28]	4. Re-deposing a Witness .....	2-27
[2.29]	5. Depositions of Opposing Counsel .....	2-27
[2.30]	B. Deposition Notice .....	2-29
[2.31]	1. Place of Deposition.....	2-29
[2.32]	2. Depositing a Nonparty Witness .....	2-30
[2.33]	3. Depositing a Corporation or Other Entity..	2-30
[2.34]	C. Means for Taking the Deposition .....	2-31
[2.35]	D. Procedure for Depositing Corporations and Other Entities when Deponent Unknown.....	2-33
[2.36]	1. Overview of FRCP 30(b)(6) Provisions ..	2-34
[2.37]	2. Corporate Designees.....	2-35
[2.38]	3. Notice.....	2-38
[2.39]	E. Depositions Outside the District.....	2-40
[2.40]	F. Discovery Abroad in Federal Court Cases ....	2-41
[2.41]	1. Federal Rules .....	2-41
[2.42]	a. Letter of Request .....	2-42
[2.43]	b. Deposition Using Other Than Purely Stenographic Means .....	2-43
[2.44]	2. Hague Evidence Convention .....	2-43
[2.45]	a. Applicability of the Convention.....	2-43
[2.46]	b. Operation of the Convention.....	2-44
[2.47]	c. Depositions Using Other Than Purely Stenographic Means .....	2-46

## **Chapter 3 Documents and Depositions**

[3.0]	I.	State Practice .....	3-1
[3.1]	A.	Documents Obtained and Used at Depositions .....	3-1
[3.2]	1.	Demand Requirements .....	3-2
[3.3]	2.	Guidelines for Using Documents at Deposition.....	3-3
[3.4]	3.	Attorney-Client Privilege and Other Protections .....	3-5
[3.5]	B.	Documents and Other Things Obtained for Use in General .....	3-5
[3.6]	1.	Scope of Demand .....	3-6
[3.7]	2.	Inspection and Copying .....	3-8
[3.8]	3.	Objections to Document Requests and Withholding of Documents .....	3-8
[3.9]	4.	Certification of Business Records .....	3-11
[3.10]	C.	Use of Documents at or in Preparation for Depositions and Waiver of Privilege.....	3-12
[3.11]	II.	Federal Practice .....	3-13
[3.12]	A.	Obtaining Documents for Use at Deposition..	3-14
[3.13]	1.	Document Demand Procedures .....	3-14
[3.14]	2.	Objecting to the Document Demand .....	3-15
[3.15]	B.	Use of Documents to Refresh Recollection....	3-17
[3.16]	1.	Overview of Rule 612 Requirements .....	3-18
[3.17]	2.	Witness Preparation.....	3-19
[3.18]	a.	Determining Whether Documents Have Been Put to Testimonial Use ...	3-20
[3.19]	b.	Determining Whether Production Is in Interests of Justice.....	3-20
[3.20]	3.	Work-Product Protection .....	3-22
[3.21]	a.	Scope.....	3-23
[3.22]	b.	Types of Work Product .....	3-24
[3.23]	c.	Burden of Proof and Required Showings.....	3-25
[3.24]	d.	Waiver .....	3-25
[3.25]	i.	Contexts in which Possible Waiver Can Arise .....	3-25
[3.26]	ii.	Compilations of Selected Documents—Case Law .....	3-26
[3.27]	4.	Attorney-Client Privilege .....	3-28

## **Chapter 4 Expert Witnesses**

[4.0]	I.	State Practice .....	4-1
[4.1]	A.	Overview of Expert Disclosure Requirements .....	4-1
[4.2]	B.	Discovery of Party Expert's or Treating Expert's Testimony.....	4-2
[4.3]	C.	"Special Circumstances" Limitation on Depositions of Expert Witnesses.....	4-3
[4.4]	D.	Discovery of Nontestifying Experts' Testimony .....	4-5
[4.5]	1.	Reasons for Exempting Certain Experts from Disclosure Mandate .....	4-6
[4.6]	2.	When Discovery May Be Sought .....	4-7
[4.7]	E.	Exchange of Medical Reports.....	4-9
[4.8]	F.	Production of Expert Reports before Trial ....	4-10
[4.9]	G.	Perceived Limitations of State Discovery Rules .....	4-11
[4.10]	H.	Work-Product Protection.....	4-13
[4.11]	II.	Federal Practice .....	4-14
[4.12]	A.	Overview of Expert Disclosure Requirements .....	4-14
[4.13]	B.	Distinction Between Fact and Expert Witnesses .....	4-14
[4.14]	C.	Nontestifying Experts .....	4-15
[4.15]	D.	Expert Report Requirement .....	4-15
[4.16]	1.	Deadline for Production.....	4-15
[4.17]	2.	Treating Physicians.....	4-17
[4.18]	E.	Supplementation of Expert Disclosure .....	4-19
[4.19]	F.	Attorney-Client Privilege and Work-Product Protection for Materials Furnished to Experts .....	4-19

## **Chapter 5 Conduct of the Deposition**

[5.0]	I.	The Ideal Deposition .....	5-1
[5.1]	II.	State Practice .....	5-3
[5.2]	A.	Deposition Formalities: Officer, Oath and Recording.....	5-4
[5.3]	B.	Objections .....	5-5
[5.4]	1.	Minimizing Interruptions during Questioning.....	5-5
[5.5]	2.	Waivable Objections.....	5-8

[5.6]	3. Speaking Objections .....	5-10
[5.7]	4. Refusal to Answer/Directions not to Answer.....	5-11
[5.8]	a. Preservation of Privilege or Right of Confidentiality .....	5-12
[5.9]	b. Enforcement of Court-Ordered Limitations .....	5-13
[5.10]	c. Prevention of Substantial Prejudice ..	5-14
[5.11]	i. Improper Questions .....	5-14
[5.12]	ii. Irrelevant Questions .....	5-15
[5.13]	d. Protective Orders .....	5-17
[5.14]	e. Statement of Reason for Refusal to Answer .....	5-18
[5.15]	f. Continuance of Deposition after Refusal to Answer.....	5-18
[5.16]	g. Making an Adequate Record .....	5-19
[5.17]	C. Consulting with the Witness.....	5-19
[5.18]	III. Federal Practice .....	5-20
[5.19]	A. Deposition Formalities: Officer, Oath and Recording .....	5-20
[5.20]	B. Limitations on Length of Deposition .....	5-22
[5.21]	C. Objections.....	5-23
[5.22]	1. Waivable Objections .....	5-24
[5.23]	2. Direction not to Answer .....	5-25
[5.24]	a. Preservation of Privilege .....	5-25
[5.25]	b. Enforcement of Court-Ordered Limitation.....	5-27
[5.26]	c. Motion for Protective Order.....	5-27
[5.27]	d. Court Rulings.....	5-29
[5.28]	e. Objections as to Competency, Relevancy .....	5-29
[5.29]	f. Questions of Law .....	5-32
[5.30]	g. Publicly Available Information.....	5-32
[5.31]	3. Objections at the FRCP 30(b)(6) Deposition.....	5-32
[5.32]	D. Does Rule 30 Strike the Proper Balance?.....	5-33
[5.33]	E. Consulting with the Witness.....	5-34
[5.34]	1. A Restrictive Approach .....	5-34
[5.35]	2. Consultation to Determine Whether Privilege Should Be Invoked.....	5-36
[5.36]	3. Timing and Scope of Consultations .....	5-37
[5.37]	4. Constitutional Issues.....	5-40

[5.38]	5. Civil Cases .....	5-41
[5.39]	6. Conclusions of Committee on Federal Procedure .....	5-43
[5.40]	7. Correcting Errors on Cross-Examination..	5-46

## **Chapter 6 Protective Orders**

[6.0]	I. State Practice .....	6-1
[6.1]	A. Overview .....	6-1
[6.2]	1. Scope .....	6-1
[6.3]	2. Timing and Effect of Service.....	6-2
[6.4]	3. Burden of Proof .....	6-3
[6.5]	B. Rulings and Applications in Connection with Conduct at Depositions.....	6-4
[6.6]	C. Applicability of Protective Orders to Specific Disputes .....	6-6
[6.7]	1. Problems with Deposition or Discovery Schedule.....	6-6
[6.8]	2. Orders in Advance of Deposition .....	6-7
[6.9]	3. Disputes Regarding Additional Depositions .....	6-8
[6.10]	a. Multiple Nonparty Depositions.....	6-8
[6.11]	b. Additional Depositions of Corporate or Other Entity Witnesses .....	6-9
[6.12]	c. New Circumstances Warranting Further Deposition .....	6-9
[6.13]	4. Deposition of High-Level Corporate or Governmental Officials .....	6-10
[6.14]	5. Condition or Age of Potential Deponents .....	6-10
[6.15]	6. When Location Presents a Hardship.....	6-11
[6.16]	7. Document Demands .....	6-11
[6.17]	8. Payment of Expenses .....	6-13
[6.18]	9. Exclusion of Witnesses from Depositions .....	6-14
[6.19]	10. Confidentiality Stipulations .....	6-15
[6.20]	a. Scope .....	6-15
[6.21]	b. Sealing of Motion Papers— Showing Good Cause.....	6-16
[6.22]	c. Determining Whether Confidentiality Stipulations Are Governed by CPLR 3103 or Uniform Rule 216.1 .....	6-17

[6.23]	d. Discretion of Court in Ruling on Confidentiality Stipulations .....	6-18
[6.24]	II. Federal Practice .....	6-20
[6.25]	A. Overview .....	6-21
[6.26]	1. Procedure .....	6-21
[6.27]	2. Scope .....	6-21
[6.28]	3. Granting of Motion.....	6-22
[6.29]	4. Balancing of Competing Interests .....	6-24
[6.30]	5. Deadline for Motion .....	6-25
[6.31]	6. Timing and Nature of Motion Regarding a Deposition .....	6-25
[6.32]	7. Place of Motion .....	6-26
[6.33]	8. Effect of Motion on Deposition.....	6-26
[6.34]	B. Protective Orders in Advance of Depositions..	6-27
[6.35]	1. Order to Bar Deposition .....	6-27
[6.36]	a. Claimed Ignorance of Facts; Busy Schedule .....	6-28
[6.37]	b. Senior Corporate and Government Officials.....	6-28
[6.38]	c. Irrelevancy of Information Sought....	6-30
[6.39]	2. Depositions of Physically or Mentally Fragile Witnesses.....	6-31
[6.40]	3. Depositions of Counsel.....	6-32
[6.41]	a. Majority View .....	6-33
[6.42]	b. Minority View.....	6-34
[6.43]	4. Orders to Address Forum Issues.....	6-35
[6.44]	5. Order to Exclude Persons from Depositions .....	6-36
[6.45]	6. Order Changing the Time for the Deposition .....	6-37
[6.46]	7. Motions Concerning FRCP 30(b)(6) Depositions .....	6-38
[6.47]	8. Order to Protect Confidentiality of Information .....	6-39
[6.48]	a. Commercial and Other Complex Cases: Confidentiality Orders .....	6-39
[6.49]	b. Showing of Good Cause Required....	6-40
[6.50]	c. Common Forms of Order.....	6-40
[6.51]	d. Stipulated Protective Orders .....	6-41
[6.52]	e. Sealing of Depositions and Other Materials .....	6-42
[6.53]	C. FRCP 26(c) and Documents .....	6-44

[6.54]	D. Protection with Regard to Discovery by Subpoena .....	6-45
[6.55]	1. Undue Burden.....	6-45
[6.56]	2. Motion to Quash or Modify Subpoena ....	6-46
[6.57]	3. Objections .....	6-47
[6.58]	4. Relevancy .....	6-49
[6.59]	E. Protective Orders during Depositions.....	6-49

## **Chapter 7 Motions to Compel and for Sanctions**

[7.0]	I. State Practice .....	7-1
[7.1]	A. Motion to Compel.....	7-1
[7.2]	1. Good-Faith Affirmation.....	7-1
[7.3]	2. Scope of Motion .....	7-3
[7.4]	3. Timing in Connection with Motion to Compel.....	7-3
[7.5]	B. Motion for Sanctions .....	7-4
[7.6]	1. Overview .....	7-5
[7.7]	2. Motion to Compel Need not Precede Motion for Sanctions .....	7-5
[7.8]	3. Types of Sanctions.....	7-7
[7.9]	4. Striking Pleadings and Other Severe Sanctions.....	7-9
[7.10]	a. Sanctions Imposed at Court's Discretion .....	7-10
[7.11]	b. Severe Sanctions for Willful, Deliberate or Contumacious Conduct .....	7-11
[7.12]	i. Reasonable Excuse .....	7-14
[7.13]	ii. Examples of Willful, Deliberate and Contumacious or Bad-Faith Conduct.....	7-17
[7.14]	c. Effect of Conditional Order Absent Timely Compliance .....	7-18
[7.15]	d. Frivolous Conduct.....	7-19
[7.16]	e. Spoliation of Evidence .....	7-19
[7.17]	5. Lesser Sanctions for Discovery Violations.....	7-20
[7.18]	a. Conditional Order .....	7-21
[7.19]	b. Waiver of Right to Deposition .....	7-22
[7.20]	c. Monetary Sanctions.....	7-22
[7.21]	d. Effective Judicial Oversight Needed .....	7-23

[7.22]	C. Appealability of Deposition Rulings .....	7-27
[7.23]	D. Commencing a New Action after Dismissal ..	7-28
[7.24]	II. Federal Practice .....	7-31
[7.25]	A. Motions to Compel .....	7-31
[7.26]	1. Procedure .....	7-31
[7.27]	2. Grounds for a Motion to Compel .....	7-32
[7.28]	a. Failure to Respond .....	7-33
[7.29]	b. Impediments to Discovery .....	7-33
[7.30]	c. Improper Conduct of Counsel.....	7-34
[7.31]	3. Timing of Motion to Compel .....	7-36
[7.32]	4. Sanctions on a Motion to Compel .....	7-36
[7.33]	B. Motions for Sanctions.....	7-37
[7.34]	1. Grounds for Sanctions .....	7-38
[7.35]	a. Improper Conduct .....	7-38
[7.36]	b. Failure to Appear .....	7-38
[7.37]	c. Failure to Respond or Provide Documents .....	7-40
[7.38]	d. Other Bases for Sanctions .....	7-40
[7.39]	2. Types of Sanctions .....	7-41
[7.40]	3. Imposition of Sanctions.....	7-42
[7.41]	a. Discretion of Court .....	7-43
[7.42]	b. Severe Sanctions .....	7-43
[7.43]	C. Awarding Expenses .....	7-46
[7.44]	1. Substantial Justification Required .....	7-46
[7.45]	2. Grounds for Award.....	7-48
[7.46]	3. Cancellation of a Deposition .....	7-49

## **Chapter 8 Corrections to the Deposition**

[8.0]	I. State Practice .....	8-1
[8.1]	A. Timing of Witness's Review .....	8-1
[8.2]	B. Procedural Guidelines for Witness's Review and Signature.....	8-2
[8.3]	C. Extension of Deadline .....	8-3
[8.4]	D. Certification and Filing of the Transcript.....	8-4
[8.5]	E. Expenses .....	8-4
[8.6]	F. Motion to Suppress.....	8-5
[8.7]	G. Amendment or Supplementation of Deposition.....	8-6
[8.8]	II. Federal Practice .....	8-7
[8.9]	A. Procedural Guidelines for Witness's Review and Signature.....	8-7

[8.10]	B. Allowable Changes .....	8-8
[8.11]	C. Expenses .....	8-12

## **Chapter 9 Use of the Deposition**

[9.0]	I. State Practice .....	9-1
[9.1]	A. Allowable Uses .....	9-1
[9.2]	1. Impeachment .....	9-1
[9.3]	2. Use of Party Deposition by Adverse Party .....	9-2
[9.4]	3. Use of Deposition of Unavailable Witness .....	9-3
[9.5]	4. Other Uses .....	9-6
[9.6]	5. On Motions for Summary Judgment .....	9-7
[9.7]	6. Effect of Using a Deposition .....	9-7
[9.8]	B. Deposition Objections .....	9-7
[9.9]	II. Federal Practice .....	9-8
[9.10]	A. Live Testimony Preferred .....	9-8
[9.11]	B. Rules Governing Use of Depositions .....	9-9
[9.12]	1. Federal Rules of Civil Procedure.....	9-9
[9.13]	2. Federal Rules of Evidence .....	9-10
[9.14]	C. Allowable Uses .....	9-11
[9.15]	1. Impeachment .....	9-11
[9.16]	2. Use of Party Deposition by Adverse Party .....	9-12
[9.17]	3. Use of Deposition of Unavailable Witness .....	9-12
[9.18]	4. Use of Deposition in Exceptional Circumstances .....	9-14
[9.19]	5. Substitution of Parties and Prior Depositions .....	9-14
[9.20]	6. Use of Parts of Deposition .....	9-15
[9.21]	D. Deposition Need not Have Been Taken Specifically for Use at Trial .....	9-15
[9.22]	1. Second Circuit Authority .....	9-16
[9.23]	2. Discovery Deadline Context .....	9-17

## **Chapter 10 Depositions and Motions for Summary Judgment**

[10.0]	I. State Practice .....	10-1
[10.1]	A. Timing of Motion .....	10-1
[10.2]	1. Timeliness .....	10-1
[10.3]	2. Good Cause for Delays .....	10-2

[10.4]	B. Showings Required on Summary Judgment...	10-3
[10.5]	1. Motion Proponent.....	10-3
[10.6]	2. Motion Opponent.....	10-6
[10.7]	3. Court's Function .....	10-9
[10.8]	C. Potential Problems on Motion for Summary Judgment .....	10-10
[10.9]	1. Defective Errata Sheets .....	10-10
[10.10]	2. Inconsistent Affidavits.....	10-11
[10.11]	II. Federal Practice .....	10-13
[10.12]	A. Timing of the Motion .....	10-13
[10.13]	B. Showings Required on Summary Judgment...	10-14
[10.14]	1. Motion Proponent.....	10-14
[10.15]	2. Motion Opponent.....	10-15
[10.16]	3. Form of Proof Required.....	10-16
[10.17]	4. Court's Function .....	10-18
[10.18]	C. Potential Problems on Motion for Summary Judgment.....	10-19
[10.19]	1. Inconsistent Affidavits.....	10-19
[10.20]	2. Use of Errata Sheets .....	10-23

## **Chapter 11 Deposition on Written Questions**

[11.0]	I. Benefits and Drawbacks .....	11-1
[11.1]	II. State Practice .....	11-2
[11.2]	A. Procedures .....	11-2
[11.3]	B. Out-of-State Depositions .....	11-4
[11.4]	III. Federal Practice .....	11-5

## **PART TWO: ETHICAL OBLIGATIONS AND THE DEPOSITION**

### **Chapter 1 Preparation of Witnesses**

[1.0]	I. Ethical Framework in State and Federal Courts....	1-1
[1.1]	A. Admission and Regulation of Attorneys in New York State .....	1-1
[1.2]	B. Discipline of Attorneys in Federal Court .....	1-1
[1.3]	1. Local Rules—Southern and Eastern Districts .....	1-1
[1.4]	2. Local Rules—Northern and Western Districts.....	1-2
[1.5]	C. Legal Status of Rules of Professional Conduct.....	1-2

[1.6]	II.	Professional Practice and Ethical Duty in Preparing Witnesses for Deposition .....	1-3
[1.7]	III.	Civil and Criminal Limitations on Witness Preparation .....	1-5
[1.8]		A. Fundamental Civil Limitations .....	1-5
[1.9]		B. Fundamental Criminal Law Limitations.....	1-6
[1.10]	IV.	Need for and Goals of Preparing Deposition Witnesses .....	1-7
[1.11]		A. Ethical Preparation Is Proper and Necessary..	1-7
[1.12]		B. Aims of Witness Preparation.....	1-10
[1.13]	V.	Ethically Improper Preparation .....	1-12
[1.14]		A. Directly Persuading Witness to Lie .....	1-12
[1.15]		B. Indirectly Inducing Witness to Lie .....	1-14
[1.16]	VI.	Boundaries of Ethically Proper Preparation .....	1-16
[1.17]		A. Witness Preparation and Ethical Uncertainty .....	1-16
[1.18]		1. Some Shorthand Guides to Right Conduct.....	1-17
[1.19]		2. The Principal Goal: Truthful Testimony .	1-19
[1.20]		B. Key Preparation Techniques and the Rules of Ethics.....	1-19
[1.21]		1. Reviewing the Witness's Recollection and Probable Testimony .....	1-19
[1.22]		2. Reviewing the Factual Context of the Prospective Testimony .....	1-20
[1.23]		3. Suggestive or Leading Questions by Counsel .....	1-22
[1.24]		4. Discussing the Law with the Witness ....	1-23
[1.25]		5. Refreshing the Witness's Recollection....	1-26
[1.26]		6. Advising the Witness about How to Answer Questions.....	1-29
[1.27]		7. Advice Regarding the Wording of the Witness's Account.....	1-31
[1.28]		8. Rehearsing the Deposition.....	1-33
[1.29]		9. Preparation Regarding Demeanor .....	1-34
[1.30]		C. Duty to Prepare Zealously and Ethically .....	1-35
[1.31]		1. Proper Coaching .....	1-36
[1.32]		2. Preparation and the Duty to Advocate Vigorously .....	1-37
[1.33]		D. The Moussaoui Case.....	1-40
[1.34]		E. Assisting the Client during Breaks and Recesses in Depositions.....	1-42

## **Chapter 2 Ethics and the Deposition: The Dishonest Client and Other Issues**

[2.0]	I.	Planned or Actual Perjury at a Deposition by a Client .....	2-1
[2.1]		A. Declining an Improper Representation.....	2-2
[2.2]		B. Duty in Case of Planned Future Perjury .....	2-2
[2.3]		1. Application of Relevant Ethical Rules to Depositions .....	2-2
[2.4]		2. Lawyer's Knowledge of Planned Future Perjury .....	2-5
[2.5]		3. Action Required When Lawyer Knows of Plan to Commit Perjury .....	2-9
[2.6]		C. Duty in Face of Perjury Committed .....	2-11
[2.7]		1. When Duty to Act Arises .....	2-11
[2.8]		2. Specific Steps Counsel Must Take .....	2-14
[2.9]		a. Remonstrating Confidentially with Client.....	2-14
[2.10]		b. Further Remedial Action if Needed..	2-15
[2.11]		i. Withdrawal .....	2-15
[2.12]		ii. Disclosure to Court or to Other Side .....	2-17
[2.13]	II.	Planned or Actual Perjury at a Deposition by a Witness .....	2-19
[2.14]		A. Perjury of a Friendly Witness.....	2-19
[2.15]		B. Perjury by the Adverse Party or a Witness Friendly to that Party .....	2-19
[2.16]	III.	Abuse of Deposition for Improper Purposes .....	2-21
[2.17]	IV.	Communications with Unrepresented Persons .....	2-22
[2.18]	V.	Representing Party and Nonparty Witness in Same Case at Deposition .....	2-23
[2.19]		A. Relevant Rules Regarding Adverse Interests .	2-23
[2.20]		B. Case Law Regarding Concurrent Representations.....	2-26
[2.21]		1. Former Employees of a Corporation or Other Entity and Unrelated Persons as Witnesses .....	2-26
[2.22]		2. Current Employees of a Corporation or Other Entity as Nonparty Witnesses.....	2-27
[2.23]		3. Written Consent from Clients.....	2-28
[2.24]		4. Communications with Nonparty Witnesses .....	2-28

[2.25]	C. Improper Solicitation of Nonparty Witnesses .....	2-29
[2.26]	VI. Handling Abusive Personal Conduct during Depositions .....	2-30
[2.27]	A. Ethical Standards .....	2-31
[2.28]	1. Relevant Rules .....	2-31
[2.29]	2. Civility and Vigorous Representation Are Entirely Compatible.....	2-33
[2.30]	3. Relevant Case Law .....	2-35
[2.31]	a. Abusive and Discourteous Behavior by Attorney .....	2-35
[2.32]	b. Abusive and Discourteous Behavior by Witness.....	2-37
[2.33]	c. Victim's Response: Two Wrongs Don't Make a Right .....	2-39
[2.34]	B. Standards of Civility .....	2-39
[2.35]	VII. Behaving Honestly and Respecting the Court and Its Orders.....	2-43

## **PART THREE: STRATEGIC AND PRACTICAL CONSIDERATIONS**

### **Chapter 1 Before the Deposition**

[1.0]	I. Purposes of Depositions .....	1-1
[1.1]	A. Preservation of Testimony .....	1-1
[1.2]	B. Lock in Witnesses' Testimony .....	1-1
[1.3]	C. Develop Evidence to Undermine Credibility .	1-2
[1.4]	D. Fact Gathering .....	1-3
[1.5]	E. Document Authentication.....	1-3
[1.6]	F. Preview Witnesses' Ability to Testify at Trial .....	1-4
[1.7]	II. Analyzing the Case .....	1-4
[1.8]	III. Framing a Discovery Plan .....	1-5
[1.9]	A. Discovery and ADR.....	1-6
[1.10]	B. Whether to Take Depositions .....	1-6
[1.11]	C. Type and Number of Depositions to Take.....	1-8
[1.12]	1. Considerations .....	1-8
[1.13]	2. Deposition on Written Questions .....	1-9
[1.14]	3. Number of Depositions.....	1-10
[1.15]	D. Who Should Be Deposed?.....	1-11
[1.16]	E. Depositions of Corporations and Other Entities .....	1-11

[1.17]	1. State Court .....	1-11
[1.18]	2. Federal Court .....	1-12
[1.19]	a. Interrogator's Perspective .....	1-12
[1.20]	b. Defending Counsel's Perspective ....	1-14
[1.21]	F. Testifying Experts .....	1-15
[1.22]	G. Where Should Depositions Be Taken?.....	1-17
[1.23]	H. When in Relation to Other Devices Should Depositions Be Taken?.....	1-18
[1.24]	1. State Court .....	1-18
[1.25]	2. Federal Court .....	1-19
[1.26]	3. Commercial Cases .....	1-19
[1.27]	4. Document Production .....	1-19
[1.28]	5. Scheduling Order.....	1-20
[1.29]	I. In What Order Should Depositions Proceed?.	1-21
[1.30]	J. Using Technology When Taking a Deposition.....	1-22
[1.31]	1. Telephone .....	1-22
[1.32]	2. Videoconference .....	1-22
[1.33]	3. Videotape.....	1-23
[1.34]	a. Reasons for Videotaping Depositions .....	1-23
[1.35]	b. Using Videotaped Depositions as Part of Powerful Trial Presentation...	1-23
[1.36]	c. Guidelines .....	1-24
[1.37]	IV. Preparing to Take the Deposition .....	1-25
[1.38]	A. Investigatory Phase—Expert Depositions.....	1-25
[1.39]	1. Deciding which Approach to Take.....	1-25
[1.40]	2. Preparing for a Possible Expert Hearing .	1-27
[1.41]	B. Investigatory Phase—Witnesses in General...	1-29
[1.42]	C. Preparing Questions.....	1-31
[1.43]	1. Possible Approaches.....	1-31
[1.44]	a. Detailed Script .....	1-31
[1.45]	b. Outline.....	1-33
[1.46]	c. Alternative Approaches .....	1-33
[1.47]	2. Integration of Documents into Questioning.....	1-34
[1.48]	V. Preparing to Defend a Deposition .....	1-35
[1.49]	A. Facts and Documents.....	1-35
[1.50]	1. Scope of Investigation .....	1-35
[1.51]	2. Privileges and Protections .....	1-36
[1.52]	3. Witness Preparation.....	1-37
[1.53]	a. Scope.....	1-37

[1.54]	b. Meticulous Preparation Is Crucial.....	1-37
[1.55]	c. Consideration of Individual Personalities .....	1-38
[1.56]	d. Review of Deposition Procedures.....	1-39
[1.57]	e. Role Playing .....	1-39
[1.58]	B. Words of Caution and Advice .....	1-40
[1.59]	1. Tell the Truth .....	1-40
[1.60]	2. Answer the Question Asked .....	1-40
[1.61]	3. Do not Volunteer Information .....	1-42
[1.62]	4. Do not Guess .....	1-43
[1.63]	5. Avoid Arguments with Counsel .....	1-44
[1.64]	6. Do not Answer Until the Question Is Completed.....	1-44
[1.65]	7. If the Question Is Confusing, Say So .....	1-45
[1.66]	8. Ask for a Question to Be Read Back if Necessary.....	1-45
[1.67]	9. Correct Errors .....	1-45
[1.68]	10. Avoid Sweeping Answers and Be Careful When Giving Precise Ones.....	1-45
[1.69]	11. Ask for Breaks as Needed .....	1-46
[1.70]	12. Special Considerations for Videotaped Depositions .....	1-46
[1.71]	13. Understand the Place of Objections in the Deposition.....	1-46

## **Chapter 2 At the Deposition**

[2.0]	I. Agreeing upon Different or Additional Ground Rules .....	2-1
[2.1]	II. Role of Examining Attorney.....	2-1
[2.2]	A. Take Charge.....	2-2
[2.3]	1. Pursue Answers Doggedly but Professionally .....	2-2
[2.4]	2. Scope of Questioning.....	2-4
[2.5]	3. Objections .....	2-6
[2.6]	B. Listen Closely to the Testimony .....	2-8
[2.7]	C. Avoid Irrelevant Questions.....	2-8
[2.8]	D. Use of Documents .....	2-9
[2.9]	1. General Approach to Questioning .....	2-10
[2.10]	2. Discovery of Additional Documents .....	2-10
[2.11]	3. Refreshing Recollection .....	2-11
[2.12]	4. Questions Based on Documents .....	2-11

[2.13]	E. Handling Obstructive Behavior .....	2-11
[2.14]	1. Speaking Objections .....	2-11
[2.15]	2. Directions not to Answer .....	2-14
[2.16]	3. Other Forms of Obstruction.....	2-14
[2.17]	4. How to Respond to Obstructive Behavior .....	2-15
[2.18]	III. Role of Defending Attorney .....	2-16
[2.19]	A. Listen Closely to Testimony.....	2-16
[2.20]	B. Consulting with the Client.....	2-17
[2.21]	C. Protecting the Witness .....	2-20
[2.22]	D. Guidelines for Making Objections .....	2-21
[2.23]	1. Manner of Stating Objections.....	2-23
[2.24]	2. Objections as to Form.....	2-23
[2.25]	a. Speculative Questions .....	2-24
[2.26]	b. Repetitious Questions .....	2-24
[2.27]	c. Direction not to Answer.....	2-26
[2.28]	d. Relevancy of Questions .....	2-26
[2.29]	E. Walking Out of Depositions .....	2-28
[2.30]	F. Expiration of Time Limits before Questioning Completed .....	2-30
[2.31]	G. Cross-Examination .....	2-30
[2.32]	H. Requesting the Transcript.....	2-31

### **Chapter 3 Correcting the Transcript**

[3.0]	I. Reviewing the Transcript .....	3-1
[3.1]	II. How to Make Corrections .....	3-2
[3.2]	III. Minimizing the Need for Corrections.....	3-3
[3.3]	IV. Timeliness.....	3-3
[3.4]	V. Review of Corrections by Examining Counsel ....	3-4

### **Chapter 4 Use of Depositions**

[4.0]	I. Summary Judgment Motions.....	4-1
[4.1]	A. Practical Guidelines for Submitting Depositions on Summary Judgment Motions.....	4-1
[4.2]	B. Exploiting Inconsistencies and Ambiguities ..	4-2
[4.3]	C. Avoiding Problems on the Motion .....	4-3
[4.4]	1. Advice for Interrogating Counsel.....	4-3
[4.5]	2. Advice for Defense Counsel.....	4-4
[4.6]	D. Limitations on Deposition Corrections .....	4-5
[4.7]	E. Admissibility of Deposition Testimony .....	4-6

[4.8]	II.	At Trial .....	4-7
[4.9]	A.	Resolving Issues Regarding Use or Admissibility of Deposition Testimony .....	4-8
[4.10]	1.	Submitting Testimony and Objections before Trial .....	4-8
[4.11]	2.	Evidentiary Rulings on Objections Made during Deposition and Those Preserved by Rule .....	4-8
[4.12]	B.	Use of Deposition Testimony in Lieu of Witness .....	4-9
[4.13]	C.	Impeachment Based on Inconsistent Statements in Deposition Testimony .....	4-9
[4.14]	1.	Preparing to Impeach Trial Witnesses.....	4-9
[4.15]	2.	Impeachment Procedure .....	4-10
[4.16]	D.	Use of Deposition on Case in Chief .....	4-14
[4.17]	E.	Fairness Considerations .....	4-14

Appendix: Federal and State Forms for Deposition Practice  
 Table of Authorities

## **ABOUT THE AUTHORS**

### **HONORABLE HAROLD BAER, JR.**

Harold Baer, Jr. is a United States district court judge. He resigned from the New York State Supreme Court in 1992 after ten years of service. For two years before his induction as a district court judge, he was the executive judicial officer at JAMS/Endispute where he supervised and did dispute resolution work. Prior to his election to the supreme court, he was for a decade in charge of litigation in a Wall Street law firm. He was assistant U.S. attorney and headed the Organized Crime and Racketeering Unit of that office in the 1960s; he returned as first assistant U.S. attorney and chief of the Criminal Division in 1970. Judge Baer served on the Mollen Commission, a special unit of the New York State Commission of Investigation, and the State Commission on the Governmental Operations of the City of New York.

He has been active in New York State Bar Association and various city and county bar associations, chairing committees for each, and he served as a trustee of the Federal Bar Council. He is the founder of the Network of Bar Leaders and former president of the New York County Lawyers' Association. In addition to hundreds of published opinions, he has written extensively on legal topics, with some 50 books, pamphlets and articles to his credit. He graduated magna cum laude and Phi Beta Kappa from Hobart College and from Yale Law School in 1957.

### **ROBERT C. MEADE, JR., ESQ.**

Robert C. Meade, Jr., graduated from Fordham University School of Law, where he was a managing editor of the law review. He served for two years as a law clerk to Hon. William Hughes Mulligan, U.S. Court of Appeals for the Second Circuit. He was in private practice thereafter, including as an associate at a major commercial law firm. He was law secretary to Hon. Harold Baer, Jr., Supreme Court, New York County, and to Hon. Walter M. Schackman, Commercial Part 14 and Commercial Division, Supreme Court, New York County. More recently, Mr. Meade has served in various capacities at the Supreme Court, Civil Branch, New York County, including Special Counsel to the Administrative Judge, Deputy Chief Clerk and Director of the Commercial Division.

He is a member of the Advisory Committee on Civil Practice of the Chief Administrative Judge of the State of New York. He is also a member of the New York State Bar Association and the New York County Lawyers'

Association, where he was co-chair of the Committee on the Supreme Court. For more than a decade, he has served as an editor of the annual County Lawyer's publication, the *Attorneys' Guide to Civil Practice in the New York County Supreme Court*.