

What Is a Deposition?

What is a deposition? (In some jurisdictions, it is called an EBT, or examination before trial.) In its broadest terms, it is the preservation of a witness's testimony that has been taken outside of the courtroom but still under oath. The oath is usually administered by the court reporter. The form of a deposition is most often a transcript, or typed manuscript, of the questions and answers that occur. Even when you videotape a deposition, you will receive a typescript of the event.

Not all court reporters are like the ones we see on television or in the movies, typing away at a small machine with fewer keys than a typewriter. There are several different methods of preserving testimony, whether in the courtroom or in a deposition. While most jurisdictions have court reporters who use so-called steno machines upon which they type a modified version of stenography, some use "voice writing": they listen to what's happening and instead of letting their fingers do the writing, they whisper into a machine, repeating the deposition dialogue verbatim. After the session, they transcribe their whispered recordings to traditional typescript.

The first time I saw a court reporter whispering into what looked like an old-fashioned ear trumpet, I couldn't believe it. As a Philadelphia lawyer, I had seen only traditional steno reporters at depositions. The newer models of recorders for voice writing use a face mask called a "steno mask," which allows court reporters to speak into their machines without being heard by others. A court reporter using this new mask looks like an air force pilot in an oxygen mask.

Some court reporters simply audiotape the deposition and transcribe it into a typescript later.

If you want to take a videotaped deposition, you will need a trained deposition videographer to record the session, along with a traditional court reporter. In every jurisdiction, no matter the technology, court reporters must be licensed, which usually involves taking an exam of some kind.

As technology has advanced, lawyers' demands for instant satisfaction have also advanced. Don't want to wait for the testimony to be transcribed? Many court reporters now offer direct transcription to your laptop as the deposition is occurring. Even the voice writers have technology that allows the spoken word to be transformed into text. These "instant" transcripts, however, are only drafts, and a final transcript may make more sense to you.

As with so many things in lawyers' lives, depositions are defined by the rules of civil procedure in the jurisdiction

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where the case is being tried. The rules will determine who may be deposed, the method for scheduling the deposition, time limits on the deposition (if any), the number of witnesses who may be deposed, and who must administer the oath.

Although depositions are listed in most civil rules as a form of discovery—that is, fact-finding—in some instances, a lawyer can use a witness's deposition testimony as substantive evidence or as impeachment at trial. The local rules of evidence, and opinions of the local court, will determine when these situations arise. I discuss this more in the next chapter.

So use the civil rules as your bible. You will learn how and when to notify opposing counsel of your interest in taking a deposition, and how and when to notify the witness. You will learn whether or not you need a subpoena to take the witness's deposition. You will be able to determine whether or not your notice or subpoena should include a direction to produce documents (sometimes called a subpoena duces tecum).

In some cases, a deposition doesn't involve questioning a live person. It merely involves the production of documents by a witness, without an appearance.

In very rare cases, you may choose to depose a witness via written questions, submitted in advance.

Generally speaking, if a witness is a party or a managing employee of a party, a notice of deposition will suffice.