Many things go into a successful trial. A good jury and favorable facts are always important. However, credible witnesses, hard work, and good planning are also significant. Success is seldom a random event; rather, it is the earned result of preparation and good planning.

A cornerstone of any litigation plan is cost-efficient discovery, and a chief component of such discovery includes depositions. Depositions should be used to frame trial issues, develop favorable evidence, and neutralize unfavorable evidence. In many jurisdictions, depositions are used as direct evidence in a lawyer’s case-in-chief. They are also a primary tool for impeaching and managing hostile witnesses on the witness stand. Cases are frequently won or lost based upon a pre-trial deposition record.

Some lawyers underutilize depositions by using them as mere discovery devices. Although meaningful discovery is always important, depositions can and should provide much more. Skilled trial lawyers use depositions to measure and weigh the credibility, strengths, and weaknesses of all witnesses—their witnesses, opposing witnesses, and independent witnesses alike. Good trial lawyers also use depositions to extract concessions from and create foundations to challenge experts. In addition, depositions provide a stage where the performance of opposing counsel is evaluated: How does the opposing lawyer handle the evidence, the witnesses, and the issues? In sum, there are many subtle (and not-so-subtle) tell-tales that are discerned from the deposition process which go far beyond a court reporter’s transcript. Depositions are, quite simply, a proving ground for the issues, the witnesses, and the lawyers.

Every trial lawyer should have a good feel for his or her client’s case before the first deposition is taken. This means that the lawyer must have a solid footing in the relevant law and an appreciation of the important fact issues. The lawyer should also develop a trial plan for how these issues will be resolved favorably for the client, and he or she should use every deposition to build toward that resolution. A house cannot be built without a blueprint, and a lawsuit cannot be prosecuted or defended without a discovery plan.

Every case has a story, and the witnesses and events make up the story line. Although there will be pitfalls and detours, the seasoned trial lawyer knows how to influence the direction of this story line and how the story evolves from the first day of a case until the end. Depositions are used to tell your client’s side of the story and expose the weaknesses in the opposing story. Every witness—neutral, favorable, or adverse—offers something of potential value to help your case in some way. Successful trial advocates find ways to exploit this value; they use...
the deposition process to build storylines that reflect and advance their trial themes.

Depositions can have powerful, persuasive impacts on a jury. If lawyers fail to make this connection, they will be unprepared, their witnesses will be ill-prepared, and they will be following a path toward failure. Let there be no doubt that evidence lifted directly from depositions can sway a jury’s decision just as if the witnesses were testifying live. Cases can be won or lost on the deposition record.

Depositions of party opponents are typically admissible in whole or in part in most jurisdictions. In many jurisdictions, depositions are deemed to be an exception to the hearsay rule or admissions of a party opponent. In some jurisdictions, depositions are admissible without predicates and are not considered hearsay, and they are admissible as if the witness were appearing at trial. What this means is that the trial lawyer should assume that every deposition will be used at trial in some way or another. The idea of a pure “discovery” deposition is an oxymoron. No such thing really exists. Every deposition should be treated as a “trial” deposition.

Experienced advocates enter the deposition room as if the jury is present. It is this awareness that informs the lawyer’s questions, how those questions are asked, and what questions are not asked. It also drives the lawyer to prepare for every deposition with a sense of drama for jury consumption. This same awareness also drives the lawyer presenting witnesses at deposition to thoroughly prepare those witnesses, rather than feeding them to the lions. By approaching depositions with this heightened awareness, a trial lawyer increases the ability to positively impact the case, the settlement process and, if no settlement is achieved, the presentation of evidence at trial.

There are a variety of different deposition strategies for different types of witnesses. Lay witnesses are approached differently from expert witnesses. Corporate representatives are treated differently from percipient fact witnesses. A witness who resides within the subpoena power of the courthouse is treated differently from a witness who resides in another state. Different witness considerations dictate different strategies on how the deposition is approached, and different techniques as to how the deposition is conducted.

This book provides practical advice for both beginning lawyers and seasoned trial attorneys on how to take and use depositions for maximum advantage. This book also explores differing techniques for lawyers on both sides of the bar. It will specifically consider techniques that can be used when deposing hostile or adverse witnesses, expert witnesses, and lay witnesses. Lastly, this book presents best practices for preparing and presenting client representatives and testifying experts for deposition, as well as the effective use of objections during depositions.

The goal of every trial lawyer is to make every deposition come alive, making it interesting and compelling for the jury. Mastering the Art of Depositions uses
a hands-on approach with real-life examples that explain how to achieve successful results.

The Bar is blessed with talented trial lawyers on both sides, and there are many examples of how imaginative lawyers apply their craft to create powerful, persuasive evidence. They do this through controlling the deposition environment, using effective demonstratives to highlight evidence or trial themes, and utilizing powerful examination techniques to create lasting impressions. This book provides a unique approach that practitioners can use to handle depositions successfully, no matter what type of case they are involved in or whom they represent.