

## *The Executive's Guide to Depositions: A Practical Reference Explaining the Deposition Stage of Pre-Trial Discovery in Commercial Litigation*

By John Franklin Lang

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Reviewed by Vincent J. Love

At some point in their careers, CPAs and financial professionals will likely find themselves giving testimony in a deposition or an examination before trial. Forensic accounting services are a growing practice for the financial professional, and litigation to recover damages from professionals whose clients may have suffered losses or are alleged to have committed fraud increases each year. It has become commonplace for an accountant, auditor, or consultant to be faced with testifying in a dispute resolution forum as a fact or expert witness. As a fact witness, a CPA may be testifying about a transaction or issue related to a client of which he has firsthand knowledge. As an expert witness, a CPA may be applying knowledge gained through education, training, or experience to a set of circumstances of which she has only secondhand knowledge.

*The Executive's Guide to Depositions*, written by John Lang, an accomplished litigator, will be an invaluable tool to help financial professionals understand the process and the role of a testifier. (Disclosure: Lang, a partner at Loeb & Loeb LLP, is a professional acquaintance for whom this author performed forensic services and who the author has opposed in litigation.) The book offers guidance for both the novice and experienced testifier, and while primarily directed toward the fact witness, it distinguishes the different position of, and advice for, the expert witness.

The book is divided into four parts:

- A Common Sense Approach to Depositions
- An Executive Briefing on Deposition Strategy
- Introduction to Deposition Questioning
- Approaches to Answering Deposition Questions.

Each chapter begins with a mission statement and ends with definitions of the legal terms introduced, along with a summary. The book contains a glossary and synopsis, making it an easily manageable reference work. Throughout the book there are wonderfully informative graphics and lists that contain information about the process, the players, and the strategies used by the attorneys, as well as advice to the deponent.

Part One begins with a plan for a successful deposition. It includes a witness's bill of rights stating, for example, "Every witness shall be given a reasonable opportunity to answer any deposition question briefly, responsively and without interruption, and to read and review any document that the witness is shown at the deposition." A chapter devoted to the fundamentals of a deposition clarifies the differences between deposition and trial testimony and explains the rules of pretrial discovery. There is a chapter on maximizing the value of legal counsel and how to interface with counsel to ensure a successful deposition.

Toward the end of this section, the author gives a comprehensive list of things to do to feel more comfortable during the deposition, such as these three important pieces of advice:

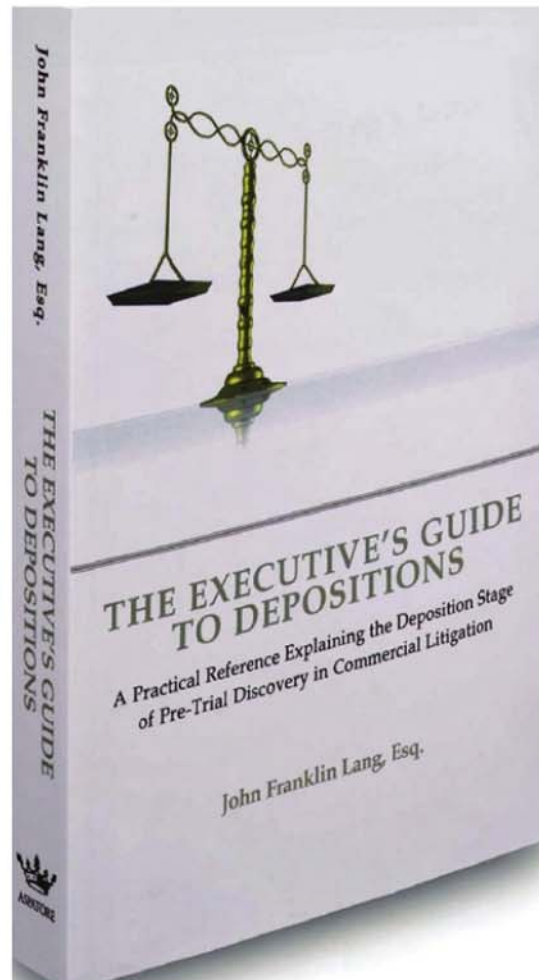
- Get a good night's sleep.
- Arrive early to acclimate yourself.
- Dress comfortably (but not casually).

The author states that Part One of the book presents a common-sense approach to depositions and how to get the most value from your attorney, and he succeeds in meeting this objective.

Part Two is a summary of the strategies used by the parties in taking a deposition. The theme of the first chapter, "Strategy of the Team Taking the Deposition," is "to be forewarned is to be forearmed." Here the author lays out the primary goals of the team taking the deposition:

- They want to find out what you know.
- They want to use it to strengthen their case.
- They want to use it to weaken your case.

In easily understandable language, the author lays out the different types of information the questioners will seek to further their positions. For example, the author discusses the information concerning documents they may already have in their possession through document discovery requests. This information will be used to allow these documents to be admitted into evidence at trial. After discussing the



types of questions that might be asked about documents, the book addresses deposition questions and answers that the opposing side may want to use at trial to support motions, freeze testimony, attack credibility, and assess one's strength as a witness.

The next chapter covers the strategy for defending a deposition. This includes advice on understanding why the deposition is occurring and how to prepare for it, including reviewing the facts in the case and learning the techniques of how to communicate. The author cautions the reader to be candid:

When you take an oath to testify truthfully as a witness, that is what you are supposed to do. It is not only the law, [it is] the only practical approach to testifying as a deposition witness. If your lips are moving at the deposition, but you have allowed yourself to become a puppet of an attorney-ventriloquist, then what you are doing is not only wrong, but also is doing your side a disservice.

The author makes a point of reminding the reader that it is deposition *preparation* and not deposition *coaching*.

In "Strategies for Special Situations," the author explains the role of the expert and the special considerations regarding expert

testimony. One aspect of expert testimony is the use of hypothetical questions. The author gives advice about when the expert should not render an opinion on the hypothetical situation, such as when the premise is impossible or irrational or the hypothetical relates to matters beyond the expert's competence (e.g., asking an accountant expert a question that deals with a legal aspect). This chapter also examines situations where there are parallel proceedings on the same issues or where the deponent will be subjected to multiparty questioning, may potentially be a party to litigation, or is a former employee.

Part Three is an introduction to the questions that will be asked, with examples of questions and answers. This section includes comprehensive lists of the questions that are common to all depositions, divided by subject matter:

- General introductory questions
- Personal background
- Professional background
- Other positions held
- Present position
- Company questions
- Deposition preparation
- General questions regarding the matter at issue

■ Conversations regarding the matter that is the focus of the litigation.

The author gives the deponent a helpful checklist of things to look for when handed a document in a deposition, subdivided into authenticity, completeness, dating, authorship and signers, recipients, and contents. This information will be invaluable to a deponent, since it is easy to be tricked when being shown a document without the chance to read it and consider it at length.

The author finishes this part of the book with a chapter on different styles of questioning. There are common styles of questioning used by a lawyer at a deposition, and it is very helpful as a witness to know the style and how to handle it when responding. The book looks at five styles: the friend, the student, the mechanic, the interrogator, and the trial lawyer.

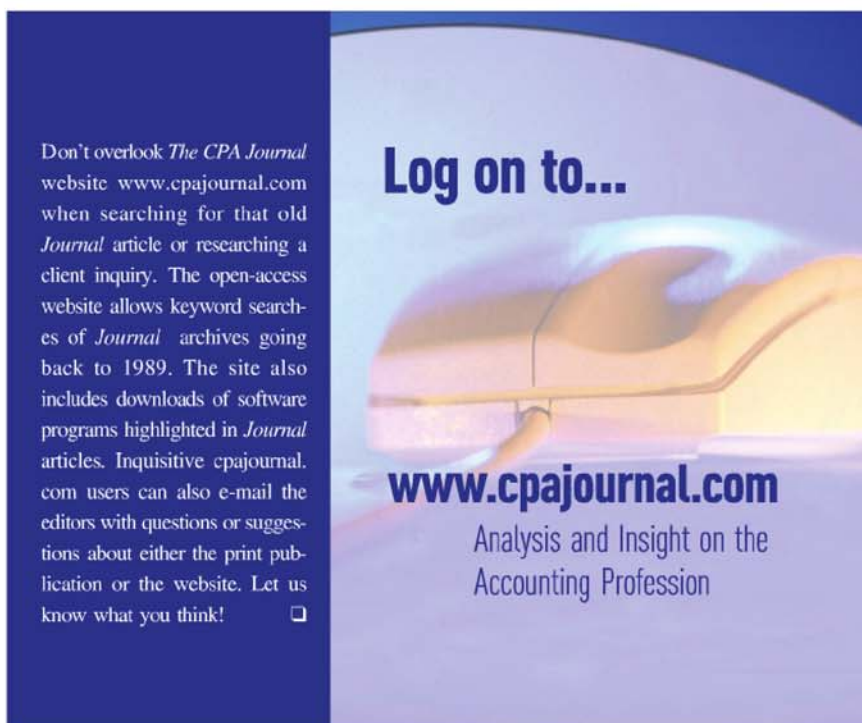
Part Four addresses how a witness can best answer questions in depositions to communicate the truth and establish a clear transcription. Included in this part of the book is a listing of what to do and not to do during the deposition, with special attention given to considerations when the deposition is being videotaped. The principles to follow when being asked and when answering a question are summarized into seven key words: when asked—listen, understand, think, and pause; answer—truthfully, responsively, and briefly.

The book describes videotaped depositions and offers advice on how to dress and on mannerisms and impressions to avoid conveying. This guidance is followed by chapters on avoiding pitfalls in a deposition, defeating loaded questions, and closing with confidence.

I would recommend this book to any business executive, especially CPAs, because in today's legal climate, practicing CPAs can expect at some point to be called as a witness for a client, for legal action against them, or as an expert witness. □

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