

Deposition Witness Preparation

Jim Murphy

Katie Hilton



Preparing the Witness





“Defending”
the
Deposition?



Kelvey v. Coughlin

**I'M NOT A POTTED PLANT. I'M HERE AS THE
LAWYER. THAT'S MY JOB.**

- BRENDAN SULLIVAN -

LIBQUOTES.COM



Failure to Prepare is Indefensible



Be Prepared... the meaning of the motto is that a scout must prepare himself by previous thinking out and practicing how to act on any accident or emergency so that he is never taken by surprise.

(Robert Baden-Powell)

izquotes.com





The Unprepared





*In Re: Shorenstein Hays –
Nederlander Theaters
Appeals*

Delaware Supreme Court

June 20, 2019





The Transcript

Q. Have you ever been deposed before?

A. *Yes.*

Q. How many times?

A. *Once.*

Q. When?

A. *I believe it was a while ago.*

Q. What was the matter about?

A. *It was a difference of opinions.*

Q. I'm sorry, go ahead. Were you done with your answer?

A. *Yes.*

Q. A difference of opinion about what?

A. *How best to proceed in one's lives.*

Q. Was it involving a lawsuit?

A. *Oh, definitely.*¹⁵⁴



The Transcript

Q. How much time did you spend with your counsel to prepare for the deposition?

A. *Sufficient.*

Q. How much is sufficient?

A. *The appropriate amount needed.*

Q. Can you give me an estimate of the amount of time?

A. *It was completely enjoyable.*

Q. How many times did you meet with your counsel to prepare for the deposition?

A. *Preparation is always a good thing.*

Q. That wasn't my question. How many times did you meet with your counsel to prepare for the deposition?

A. *I met with them – I'm not understanding the question.*

Q. You told me you met with your counsel to prepare for the deposition.

A. *Sure.*

Q. How many times?

A. *Well, see, I think of time as a continuum. So I think I met with them from the beginning to the end. And the beginning was the start, and then there was the rehearsal, and then there was the preview, and now it's what I think of as the performance. So, in my mind, I'm answering what you're asking. If you could be more specific. Do you want hours?*

Q. Yes.

A. *Oh, I don't wear a watch. So I know the sun coming up in the morning and the moon coming up at night.*

Q. Can you tell me the number of times that you met with your counsel to prepare for the deposition? I'm looking for a number.

A. *Well, I gave you that.*



The Transcript

Q. Did you go to college?

A. *Well, yes.*

Q. Where?

A. *I mean tuition was paid.*

Q. Where did you go?

A. *Oh, I had books from a lot of different places.*

Q. Did you enroll at any of those places?

A. *Oh, sure.*

Q. Where did you enroll?

A. *Many, many universities – not that many – a few.*

Q. So you enrolled in a few universities?

A. *Throughout my years, sure.*



The Transcript

Q. Since you completed your studies at NYU, have you had employment anywhere?

A. *How do you define "employment"?*

Q. You've never used the word employment in your life?

A. *I'm just wondering how you define it.*

Q. Have you used the word employment in your life, ever?

A. *I'm asking you.*

Q. You don't get to ask the questions. I get to ask the questions.

A. *Oh, sorry.*

Q. Have you ever used the word employment in your life?

A. *I've used many words.*

Q. Have you used the word employment in your life?

A. *It's a word I'm familiar with.*

Q. What is your understanding of the word employment?

A. *Well, I think it has to do with – I'm not sure.*

Q. You're not sure what the word employment means?

A. *Yeah.*

Q. Have you ever worked for any kind of company or somebody who might be referred to as an employer?

A. *Possibly.*

Q. You're not sure?

A. *I would say sure.*



This is a representative but incomplete identification **[**72]** of Hays's ridiculous and problematic responses to questions. It appears from the cover page of the deposition transcript that the only Delaware lawyer present was an attorney representing the nominal defendant, SHN. **167** Two attorneys appeared at the deposition on behalf of Hays, including Brian T. Frawley, a partner with [Sullivan & Cromwell LLP](#) ↕, and an associate from that firm. **168** They were both admitted *pro hac vice* in the Court of Chancery proceedings. Frawley took the lead in defending Hays's deposition. From our reading of the record (the transcript), it appears that Frawley made no attempt to put an end to Hays's flagrantly evasive, nonresponsive, and flippant answers. In fact, at one point, the examiner implored Frawley to control his own client but was rebuffed:

MR. DOLUISIO: I just want to know for the record, Mr. Frawley, I don't want this deposition to go multiple days. It will. I'm getting non-responsive answers and now I'm getting speeches. I'm trying not to be rude. I think you recognize what I'm going through here.

MR. FRAWLEY: I think you frankly deserve that one, but we'll go on.

[*78] MR. DOLUISIO: I asked her where she was employed.

MR. FRAWLEY: That's not really what you asked her. **[**73]** But are you done, Carole.

THE WITNESS: Uh-huh. **169**



Perhaps this episode can be used positively as a lesson to those training new lawyers on deposition skills. Lawyers have an obligation to ensure that their clients do not undermine the integrity of the deposition proceedings by engaging in bad faith litigation tactics; they cannot simply sit and passively observe as their client persists in such conduct. Given [\[**75\]](#) the restrictions on conferring with a client during deposition proceedings, these points obviously should be addressed beforehand in the deposition preparation.



What Do You Do???

What about Kelvev v. Coughlin?

Perhaps this episode can be used positively as a lesson to those training new lawyers on deposition skills. Lawyers have an obligation to ensure that their clients do not undermine the integrity of the deposition proceedings by engaging in bad faith litigation tactics; they cannot simply sit and passively observe as their client persists in such conduct. Given [\[**75\]](#) the restrictions on conferring with a client during deposition proceedings, these points obviously should be addressed beforehand in the deposition preparation.





First, Prepare Yourself





Multiple Uses of Deposition

- **Trial – Cross Examination**
- **Trial – Missing, Dead, Unavailable Witness**
- **Dispositive Motions and Other Motions**
- **Mediation**
- **Settlement Demand Packages**
- **Case/Witness Evaluation for Client**
- **Other Proceedings, including Criminal**
- **Video Depositions**
- **Media Interest/Reputational**



Types of Witnesses

- **Party Witness – Individual**
- **Party Witness – Rule 30(b)(6)**
- **Employee of Party**
- **Former or Problem Employee**
- **Expert Witness**
- **Non-Party, Non-Aligned (e.g., Percipient Witness)**

30(b)(6) Deposition

(6) Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Experts



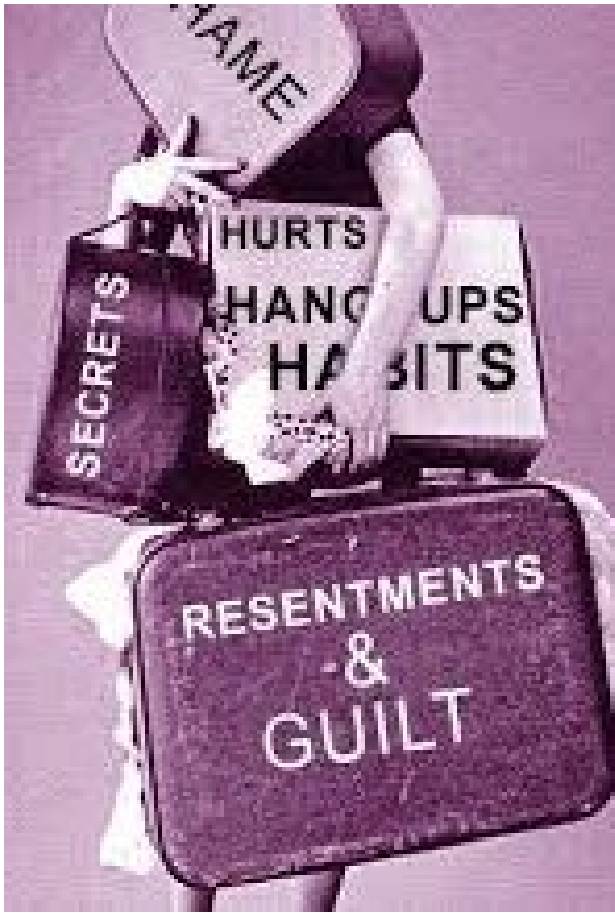


Who is Your Witness?





Witness and Their Baggage





NOW, You are
Ready to Sit
Down With
Your Witness





P.R.E.P

- Prepare
- Reassure
- Educate
- Practice



What is a Deposition?

What is going to happen?

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JANE DOE,
Plaintiff

v.

ABC CORP., XYZ CORP.,
Defendants

C.A. No. 1:23-cv-00401-MSM-PAS

NOTICE TO TAKE DEPOSITION

DEPONENT: Jane Doe

DATE: Tuesday, March 28, 2023

TIME: 10:00 AM

Please take notice that pursuant to Rules 26 and 30 of the Rhode Island Federal Court Rules of Civil Procedure, the defendants in the above-captioned matter will take the deposition of the above-named individual on oral examination, which examination will continue from day to day until completed. This deposition is to commence on the date and at the time above stated at the **DeSisto Law LLC, 60 Ship Street, Providence, RI 02903**, before a Notary Public commissioned in the State of Rhode Island.

The Room





Or Zoom Room

<p><u>394th Judicial District Court</u></p> <p>Recording of this hearing or live stream is prohibited.</p> <p>Violation may constitute contempt of court and result in a fine of up to \$500 and a jail term of up to 180 days.</p> <p>394th Judicial District Court</p>	 <p>Jerry L. Phillips</p>
 <p>H. Gibbs Bauer</p>	 <p>rod ponton</p>



Cautionary Pause

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

_____)
)
In re: JEFFREY ROSIN.)
)
_____)

Misc. Business Docket
No. 21-mc-91571-LTS

ORDER TO SHOW CAUSE

September 9, 2021

SOROKIN, J.

On August 31, 2021, pursuant to District of Massachusetts Local Rule 83.6.5(c)(2), attorney Jeffrey Rosin was referred for potential attorney discipline. See Doc. No. 1 (reflecting Judge Talwani’s finding that Rosin “exploit[ed] the remote nature of [a] deposition” by “coaching” and feeding answers to the witness “numerous times over the course of the day”).



What happened?

-
- 2) Rosin shall, within twenty-eight days after service of this Order, appear and show cause in writing why disciplinary action against him should not be taken in light of Judge Talwani's findings. In that filing, Rosin may request a hearing and address the nature of discipline to be imposed. A hearing will be held if requested; otherwise, the matter will be determined on the paper record.



What Happened?

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
ROBERT M. FARRELL, Clerk of Court,)	
)	
Movant,)	
)	
v.)	Misc. Business Docket
)	No. 21-91571-LTS
JEFFREY ROSIN,)	
)	
Respondent.)	
_____)	

ORDER

January 19, 2022

SOROKIN, J.

Pursuant to the District of Massachusetts Local Rule 83.6.5(c)(2), Attorney Jeffrey Rosin was referred to this Session of the Court for potential attorney discipline by Judge Talwani on August 31, 2021. Doc. No. 1 (finding “the allegations of attorney misconduct both ‘reasonably



What happened?

After careful consideration, the Court finds under the applicable standard that Attorney Rosin's conduct at one deposition in the case pending before Judge Talwani violated the Massachusetts Rules of Professional Conduct, applicable to lawyers practicing before this Court. L.R. 83.6.1(d). In particular, Rule 3.4(c) provides that counsel "shall not knowingly disobey" other rules of the tribunal, such as Federal Rule of Civil Procedure 30(d) which permits sanctions for conduct by a lawyer that "impedes, delays, or frustrates the fair examination of [a] deponent."

And, Rule 8.4(h) provides that "[i]t is professional misconduct for a lawyer to . . . engage in any other conduct that adversely reflects on his or her fitness to practice law." The conduct at issue here plainly ran afoul of these Rules. Attorney Rosin has never disputed nor denied the conduct giving rise to this proceeding. Thus, there is no need to delve further into the factual record on this point.



Consequences

In addition, Attorney Rosin has already suffered several consequences for his misconduct. He had to withdraw from the underlying case. He paid the fees of opposing counsel for the motion for sanctions. He and his firm forgave the fee for representing his client in the underlying case, which approximated \$65,000, and he spent additional uncompensated time getting his former client's new lawyers up to speed. Most significantly, he has been impacted professionally and personally by the public nature of the reprimand, the initiation of this public misconduct proceeding, and the media attention garnered by these events. Finally, Attorney Rosin has also accepted responsibility for his misconduct, something becoming increasingly less common.

Considering the totality of the circumstances, the Court refers Attorney Rosin to Lawyers Concerned for Lawyers for the limited purpose of receiving and completing counseling on better management of emotions and judgment in the face of adversity. The Court finds no other or



The Oath





Reporter & Transcript





Opposing Counsel?





Videotaped Deposition





The Funnel





Exhibits



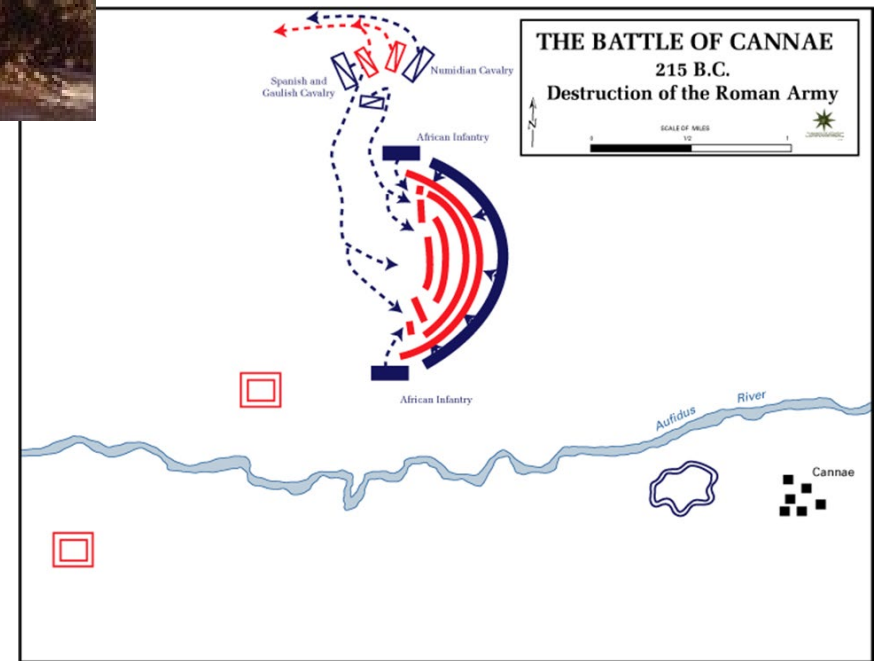


L.U.T.E.

- Listen
- Understand
- Think
- Express



Strategy





Conclusion

