

The Journal of The Section of Litigation
American Bar Association
Litigation Online
Volume 30 No. 1, Fall 2003

By Jeffrey J. Kroll

Effective Use of Depositions at Trial

People grasp ideas best when they are conveyed through images as well as words. At trial, one of the best multimedia tools for any advocate is the deposition. Run the tape, please.

Most depositions are taken for discovery purposes, because depositions are the ultimate fact-finding discovery tool. Done well, they can obtain evidence – most notably admissions – for use at trial or to defeat an opponent’s summary judgment motion. But attorneys often go into a deposition thinking it will never be used at trial. They view the deposition as a mere discovery tool, not as packaged evidence. When a deposing attorney walks into a deposition expecting it to serve as a simple exercise in fact finding, the lawyer is ignoring the potential uses of the deposition at trial. I think this is a grave mistake.

The purpose of a deposition shapes the manner in which it is taken. Thus, before taking the deposition, the examining attorney must first consider the deposition’s ultimate purpose or purposes. Even the examining attorney who expects to conduct only a discovery deposition should realize that it potentially could be useful at trial.

A deposed witness may offer an important part of the whole picture, like a piece of a puzzle. Before inquiring at a deposition, you must understand how the testimony might be used. The value of testimony can increase or decrease during the course of litigation, depending on where the case takes you. Going into a deposition with the thought that the witness may have testimony can be used at trial represents a positive thought process. It makes the questioning attorney more aggressive and forces him or her to think about the potential uses of the testimony for trial. Typically, you have but one shot at a key witness. You cannot count on being able to reopen a deposition to obtain trial testimony when you missed important information the first time. In other words, you must believe that the deposition will be used at trial.

True, most depositions are sought primarily for discovery purposes. The main object of discovery depositions is to elicit all information from the deponent concerning the facts of the case. Typically you are bringing out any information that can be damaging to the examiner’s case, as well as any helpful information. But in addition to seeking a broad range of information, a discovery deposition can have other purposes. For example, a discovery deposition can lock a deponent into his or her story of the case. This allows the attorney to prepare counter-testimony or evidence. If the deponent tells a different story or veers from the testimony offered at trial, the deposition can be used to impeach the deponent. A discovery deposition also can be used to assess a deponent’s credibility and demeanor. This may be critical when the deponent is the opposing party or a crucial witness.

Federal Rule of Civil Procedure 32 governs the use of depositions at trial in other courtroom proceedings. Rule 32 permits the use of depositions at hearings on motions. Although subsection (a)(3)(E) indicates a strong preference for live testimony in lieu of deposition testimony, depositions may be introduced as evidence in certain situations and with proper procedural safeguards in place.

In the absence of a stipulation or court order, use of deposition at trial is contingent on the witness's being "unavailable." Rule 32(a)(3). The term "unavailable" is somewhat expansive. Rule 32 allows the use of a deposition at trial for any purpose under the following circumstances:

- \$ The witness is deceased (Rule 32(a)(3)(A));
- \$ The witness is located more than 100 miles from the place of trial (Rule 32(a)(3)(B));
- \$ The age, illness, or imprisonment of the witness prohibits live testimony of that witness (Rule 32(a)(3)(C));
- \$ The party offering the deposition was unable to subpoena the witness (Rule 32(a)(3)(D));
- \$ Other exceptional circumstances exist that make unavailability desirable, in the interest of justice and with due regard to the importance of the testimony (Rule 32(a)(3)(E)).

How do you use a deposition at trial for the unavailable, nonparty witness? If a nonparty deponent is unavailable, testimony can be used for any purpose, including substantive evidence at trial, provided there are not preserved evidentiary objections. Typically, the witness will be "unavailable" when she is more than 100 miles from place of trial, outside the United States, incapacitated, or outside the reach of a subpoena. Of course, the death of an individual renders the witness unavailable for purposes of Rule 32.

An unavailable nonparty deposition at trial can be used at trial for the "available" witness, as either substantive evidence or non-substantive evidence. With respect to substantive evidence, the deposition can be used as a prior consistent statement where the statement is challenged by either the witness or opposing counsel. It can be used as an admission by a party opponent even if made by an agent or the corporation.

The deposition of a nonparty witness who is available at trial also can be used to impeach a witness. It can be used to contradict trial testimony or to refresh the recollection of a witness. And it can be used as a prior consistent statement when the testimony was not shown to that witness during the cross-examination of opposing counsel.

Can a prior deposition be used for your own party? The answer is yes. It can be used to impeach your party's own trial testimony or to contradict his or her own testimony. Unfortunately, it may be a needed tool. Also, the attorney may introduce the deposition as substantive evidence if the party is unavailable due to infirmity, distance, or death.

Some depositions are taken primarily so they may be introduced in evidence at trial. This may be the case with both friendly and opposing witnesses. For example, when a witness whose

testimony will support the case has a serious illness, it is best to depose this witness and preserve the testimony, in case the witness dies or is hospitalized and unable to testify at trial.

Can a deposition be used at trial as substantive evidence against the adverse party? Generally deposition testimony introduced substantively at trial against a party falls under the adverse or unavailable witness provisions. Of course this is subject to evidentiary objections. Most states will permit a substantive use of deposition testimony in lieu of live testimony where the adverse party is involved. Depositions also may be used for non-substantive purposes, such as to impeach the witness or to refresh the recollection of the party.

Whenever you ask yourself whether to videotape a deposition, consider several reasons for answering yes.

Our society has become very visual during the past decade. We have become visually dependent on information because of the increased use of televisions and the Internet. Many people shop via the Internet and communicate with loved ones through e-mail. For years we have been conditioned to expect and understand short bursts of information broken up by frequent intermissions, ordinary commercials, or pop-up ads. According to one study, the average person's attention span lasts no longer than a few minutes. When you consider how we have been conditioned, it makes sense. The average television news item takes roughly 90 seconds to cover a story: The first 30 seconds set the stage, the next 30 seconds provide the details, and the final 30 seconds wrap up the story.

The use of videotape in trial is almost expected these days. Society relies on visuals for gathering information, whether from television, the Internet, or even cell phones with tiny picture screens. One trial consulting firm estimated that the average graduating high school student has watched more than 15,000 hours of television. Therefore, listening to a talking head for hours at a time is boring to the average juror. The prudent lawyer must think of ways to spice up a boring topic or, worse yet, a boring witness. The logical deduction that can be reached is that videotapes offer a familiar and convenient method for a juror to receive information.

A witness schedule may conflict with an obligation to testify at a trial. In that situation, videotaped evidence deposition should be strongly considered. Typically, this is done by agreement. If not, that party should file the appropriate motion with the court.

Unavailability is not the sole reason to opt for a videotaped deposition in lieu of in-court testimony. A strategic trial attorney can introduce a videotaped evidence deposition of a witness when he or she fears a damaging cross-examination in the presence of a jury or is wary of the in-court demeanor of the witness. Not too long ago, I took a case to trial against an excellent lawyer, renowned for parading around the courtroom during cross-examination and for giving essentially closing arguments during examination. All eyes in the courtroom would be focused on the cross-examiner, as they should be – so I opted to videotape several witnesses in lieu of live testimony to minimize the grandstanding of the cross-examiner. This strategy worked.

A videotaped evidence deposition also can be effective when opposing counsel is not quite up to speed on all the issues in the case. In many cases, the associate works up the case and

the partner waits in the wings for the trial. Electing to videotape a witness may catch your opponent off guard and not yet in trial mode. In short, the videotaped evidence deposition is a tool that litigators can use for convenience and/or strategic planning.

More and more attorneys are videotaping witnesses during the discovery phase of the case, not only for trial. Today's society understands video impeachment. Many individuals can recall quite vividly when President Clinton proclaimed, "I did not have sexual relations with that woman." Of course, he was talking about Monica Lewinsky. We know how that statement came back and impacted his credibility. Similarly, a video can be used at trial to impeach a witness who is being less than candid. Once the witness veers from the discovery deposition, you have the option of impeaching the witness with the videotaped testimony. This permits the jury to view the inconsistent testimony as they hear it, thus providing a more powerful impeachment.

Another reason for videotaping a deposition for use at trial is that the witness typically is not dressed up at the deposition but at trial may wear a suit and tie and look like a true professional. For example, in a trucking accident case I had a few years ago, it was alleged that the truck was traveling too fast for conditions and violated several Federal Motor Carrier Safety Regulations. At the discovery deposition, the defendant wore a dirty flannel shirt and a baseball hat that partially hid his shoulder-length hair and was badly in need of a shave. The witness made several inconsistent statements during his discovery deposition. At trial he appeared in court wearing a sport coat and bifocals, with a haircut and no facial hair. He was impeached with the videotape at trial, and the jurors could not even recognize the deponent. During closing argument, I argued that you can "dress up a pig all you want, but the fact of the matter is... it is still a pig." The jury came back with a favorable verdict and found that the driver was the sole cause of the collision.

Many trial lawyers routinely videotape depositions of key liability and damage witnesses to guarantee that the jury will be able to observe the witness at trial if that witness is unavailable. There are additional factors that favor using videotaped evidence depositions. Unlike a transcribed record, a videotaped deposition captures the mannerisms, demeanor, and gestures of a witness – all the factors that make up the credibility of a witness. A pause that may not be included on a written page can seriously impact the credibility of a struggling witness. Many times it is not what a witness says but how he or she says it.

If a video deposition will be shown to the jury, most judges will want to rule no objections in advance, so the videotape can be edited by a video technician to delete objections or questions the court rules objectionable. Setting up the viewing of a video deposition is equally important within the courtroom. There should be at least one large monitor or two smaller monitors for the jurors, located so they can easily see the scene; the judge and attorneys should have separate monitors. The reporters hired to perform the videotaping are usually experts on the mechanics and can provide the necessary equipment at trial.

A video impeachment follows certain steps. First you must decide which deposition testimony you will designate for trial. Rely on your trial strategy in light of the nature of the case. Obviously, strategy and instinct should be your guides, but keep the following points in

mind in designating videotaped evidence deposition testimony:

1. Err on the side of designating too much rather than too little information. When in doubt, designate the testimony you may use at trial. It is that simple.
2. Of course, anything you intend to use to impeach a witness at trial must be admissible in evidence. Lay the necessary foundation to include any of this information into evidence.
3. If you are using a videotaped deposition, the designation process involved editing and counter-editing the videotape. It is going to involve large amounts of time and preparation.

The designation process should begin well in advance of trial. I also think it is important to retain the full question/answer for the video impeachment. For example, do not delete the pauses between question and answer. Often, lapses in time and demeanor of the witness are your most effective areas of cross-examination.

The designation process often involves give and take between parties. Your adversaries will designate other portions of the videotape they intend to use at trial. Of course, if you are the only one with a videotape, that may be difficult. Consider well in advance of trial whether or not the parties will cooperate or whether only the party taking the deposition will be able to sue the videotape to impeach that witness.

It is important to vary how you use deposition testimony. Use video depositions when appropriate. If you are going to read into the record the deposition testimony of a witness, you run the risk of boring the jury to death. Read a deposition only when it is absolutely necessary for the case. Depending on the jurisdiction, you may want to consider hiring an actor to reach the deposition at trial.

Rule 32(c) indicates that a party offering deposition testimony pursuant to the rule may offer it in stenographic or non-stenographic form. If the deposition testimony is offered in non-stenographic form, however, the party must provide the court with a transcript of the portion it will offer. Any party in a case tried before a jury may request that deposition testimony offered other than for impeachment purposes be presented in non-stenographic form, if available, unless the court for some good cause orders otherwise. Therefore, if the proceeding at which the deposition is presented is a jury trial, parties must present depositions used other than for impeachment purposes in a non-stenographic form, if one is available, unless the court allows otherwise. Subsection (c) supplements Rule 26(a)(3)(B), which requires a party expecting to present deposition testimony in a non-stenographic form as substantive evidence to provide the other parties with a transcript of the pertinent portions of the deposition. A note of caution: A videotaped evidence deposition must be properly noticed as such. For example, in Illinois, Supreme Court Rule 202 states that if discovery and evidence depositions are to be taken, they must be taken separately unless the parties stipulate otherwise or the court orders otherwise upon notice of motion.

The procedure for videotaping depositions varies from jurisdiction to jurisdiction.

Illinois Supreme Court Rule 206(g) sets forth the requirements for procuring a videotaped deposition. The operator will take custody of the videotape and will determine the exact length of time of the deposition. The videotape of a deposition for purposes of discovery will be returned only to the attorney for the party for whom the deposition was videotaped. The attorney is responsible for safeguarding the videotape. If it is an evidence deposition, it should be securely sealed by the operator in an envelope containing the title and number of the action, and promptly filed or sent by certified mail to the clerk of the court for filing. The videotape may be used in lieu of reading a transcribed record.

Federal Rule 30(b)(4) dictates the general requirements for noticing up depositions in a “non-traditional fashion.” The party taking the deposition has the choice of the medium for recording the testimony and must pay the cost of the recording. Generally, permission from the court or opposing parties to take depositions other than by stenographic means is not required. If a party desires to take a deposition by telephone or by other remote electronic means, Rule 30(b)(7) states that permission of court or stipulation of the opposing party is required.

If videotape or audiotape is used as the sole means of recording the deposition testimony, the party taking the deposition must arrange for a transcription of the tape. If audiotape, videotape, or another non-stenographic medium is used to record a deposition, the deposition must begin with a statement of record of the office of the court reporter’s name and business address, date, time and location of the deposition, and name of the deponent. These items must be repeated whenever a new tape or unit of recording is used. It is important to note that if a deposition is taken by videotape, the appearance or demeanor of the deponent cannot be distorted through camera or sound-recording techniques.

Choosing a qualified and capable videographer is an important decision to be made by the attorney. Do not cut corners to save costs. Ensure that both audio and video are high quality and do not detract from the presentation of evidence. Determine whether the witness will use a table or lavalier microphone. If exhibits will be used by the deponent, a lavalier microphone is preferred.

Also, look at the size of the room before you plan a videotaped deposition. If you are going to be using exhibits, you may need a larger room. Will you introduce any type of videotape through the deponent? If so, a television and VCR monitor will be required. This, too, will impact the decision on the size of the room.

Today, many depositions are taken via video teleconferencing. Teleconferencing centers now exist in most major cities throughout the country. Teleconferencing enables individuals at various locations to communicate both verbally and visually. A camera at each conference center allows the parties to observe each other while verbal communication takes place. Is it expensive? Yes. Is it effective? Absolutely. Of course, there are potential problems with video teleconferencing. Make sure each witness and each party has all pre-marked exhibits well in advance of the deposition.

Federal Rule 32(a)(4) governs using excerpts of a deposition and admitting it into evidence by a party. If a party offers into evidence only part of a deposition, subsection (a)(4)

allows an opposing party to require the party offering the deposition as evidence to introduce any *other* part of the deposition that should in fairness be considered with the part introduced. All parties have the right to introduce any other part of the deposition originally offered as well. The distinction between the first provision of Section 32 (a)(4) and the second provision is that an adverse party seeking to have portions of the deposition considered relevant to that offered by the original party does *not* have to introduce those portions itself. This actually could require the offering party to introduce portions of the deposition originally omitted.

Similarly, substitution of parties does not affect the right to use depositions previously taken. FRCP 32(a). All depositions lawfully taken and duly filed in a previous action may be used in the current action as if the deposition originally was taken in the current matter. Therefore, when an action has been brought in any court of the United States or any other state involving the same subject matter, these depositions can be used. The depositions also can be used for non-substantive purposes. The Federal Rules of Evidence (FRE) permit non-substantive use of prior depositions for refreshing recollection (Rule 612), for statements against interest (Rule 804(b)(3)), or for impeachment by prior inconsistent statements (Rule 613).

Under the evidence rules, depositions taken in other proceedings can be used as substantive evidence. Rule 804(b) provides that former testimony is not covered by the hearsay rule excluding such testimony. To use a deposition, it must be testimony: under oath, recorded, and in accordance with procedural requirements. The deposition must have been taken in the course of a proceeding. The party against whom the deposition is offered must have had an opportunity and similar motive to develop the testimony by either direct, cross, or redirect examination. If you have a deposition taken in another proceeding you need to use in your case-in-chief, and you are concerned about its admissibility, treat the deposition as a written or verbal statement and apply the FRE or the local rules of that particular state to gain admissibility.

Deposition excerpts may be read into the record or played during various portions of the trial, depending on strategy. I personally believe that an attorney is entitled to present excerpts of a videotaped deposition in closing arguments, as long as it conveys a credible and honest impression to the jury. In closing arguments, an excerpt from a videotaped deposition can be helpful as well as persuasive. Crucial deposition testimony serves a strategic purpose as a reminder to the jury of key points brought out during the trial. Because a deposition is legally equivalent to any other admitted piece of evidence, an attorney should be able to use any portions of the videotaped deposition that were properly admitted into evidence. Imagine the impact where a defendant doctor testifies in his videotaped discovery deposition that he did not perform a certain test but changes his testimony at trial. This video impeachment can be devastating. Highlighting that impeachment and showing the jury the inconsistent testimony one last time before deliberations can be a powerful way to close your case. Of course, when using depositions as substantive evidence, counsel must remember to move the transcript or videotapes into evidence. This type of reminder should be included in the trial notebook or checklist.

Not only is variety the spice of life, it is a way to keep a jury's attention. Incorporate modern technology with traditional methods of presenting demonstrative evidence and arguing damages. For example, depending on the case, a combination of photographs and videotapes

may be the best way to present the plaintiff's condition to a jury. The prudent attorney must take into account that in some situations, photographs may be the sole means of presenting the plaintiff's condition to the jury. Similarly, day-in-the-life videotapes may be the only way to convey the plaintiff's pain and suffering throughout grueling physical therapy sessions. Although there is no one correct way to demonstrate damages to the jury, certain exhibits may be better suited to depicting the plaintiff's physical, mental, and emotional condition at various stages of the recovery process.

Keep your presentation simple. For example, in a medical malpractice case, I successfully employed a colored poster board representation of the human circulatory system as a piping system. The pipes running toward the heart were labeled veins and those away from the heart were labeled arteries. The jury clearly understood the analogy, which distilled complicated human anatomy into an understandable concept that allowed jurors to comfortably return a verdict in favor the plaintiff.

It is time to embrace technology. When deciding how to present evidence, consider that the old standby exhibits like graphs, charts, and anatomical models may not be enough anymore. The prudent attorney must look at all the effective ways of getting points across. This often means a multimedia trial. From a plaintiff's attorney's perspective, the multimedia trial allows jurors to see, hear, feel, and understand the evidence. Videotaped depositions are a potent tool for driving home your point to the jury. Use them at trial, and you can empower a jury to return a favorable verdict.