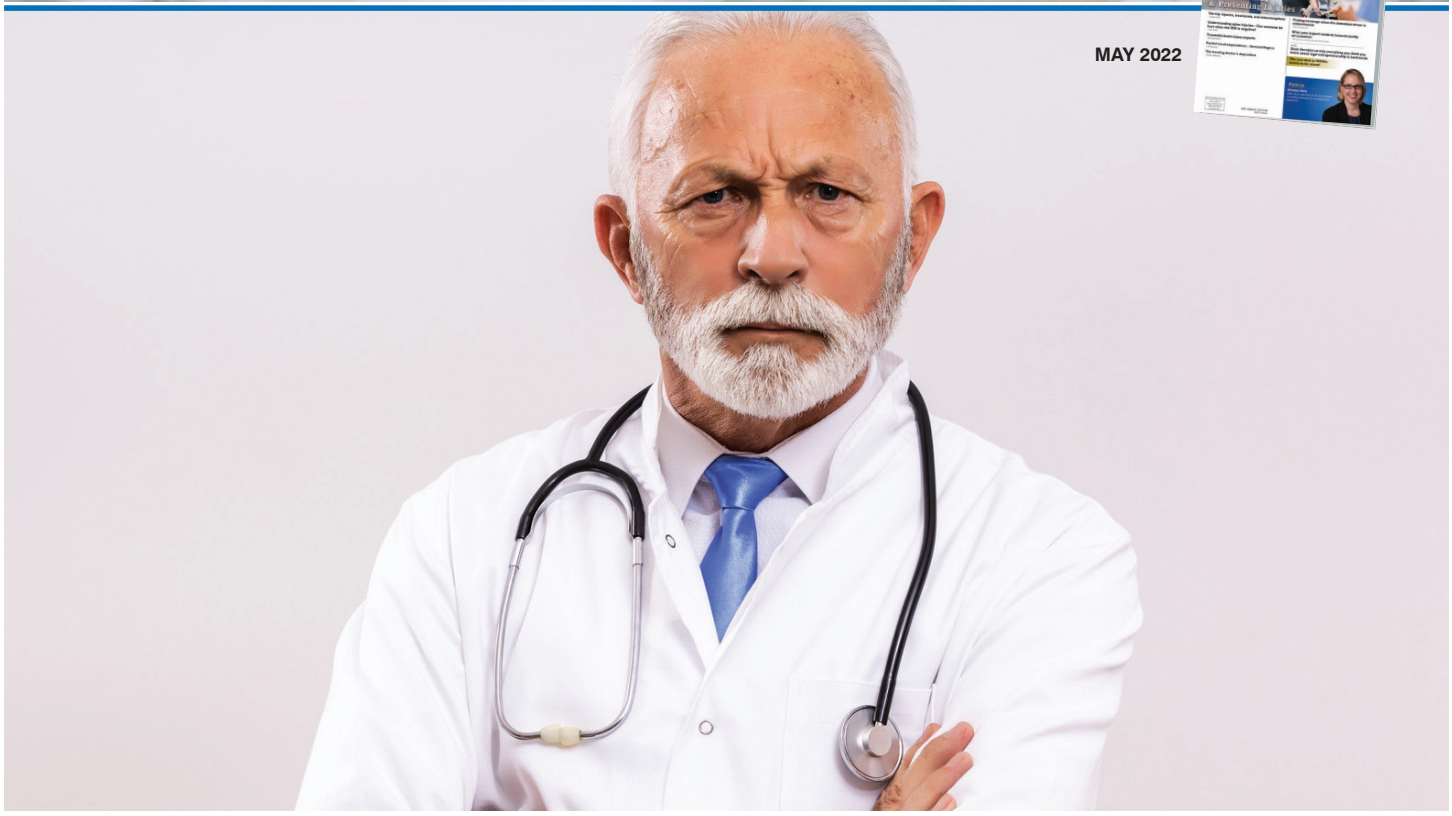


The treating doctor's deposition

Why you should video record the depo, how to get it done and get it admitted

By Daniel DeSantis

Why video-record your client's treating doctor's deposition

Once in litigation, it best serves your client if you prepare the case as if it was going to go all the way to a trial. One critical step in that preparation is deposing your client's main treating physician(s).

Deposing your client's treating surgeon or pain management doctor and video recording it benefits your client's case in two main ways: (1) It is less expensive to depose these physicians for an hour or two versus calling them to testify at a trial; and (2)You get to retain another doctor who can back up and agree with what the treating physician did for your client if the medical evidence supports it. So, at trial you get to (a) designate and play your treating physician conclusions (not opinions!) about your client's injuries and treatment and then (b) call your retained doctor to the stand to discuss it (along with other matters).

Video-recording the deposition and using it in trial

Code of Civil Procedure section 2025.330, subdivision (c) states in part: The party noticing the deposition may also record the testimony by audio or video technology if the notice of deposition stated an intention also to record the testimony by either of those methods, or if all the parties agree that the testimony may also be recorded by either of those methods.

Code of Civil Procedure section 2025.620, subdivision (d) states: Any party may use a video recording of the deposition testimony of a treating or consulting physician or of any expert witness even though the deponent is available to testify if the deposition notice under section 2025.220 reserved the right to use the deposition at trial, and if that party has complied with subdivision (m) of section 2025.340.

Code of Civil Procedure section 2025.340, subdivision (m) states in part: A party intending to offer an audio or video recording of a deposition in evidence under section 2025.620 shall notify the court and all parties in writing of that intent and of the parts of the deposition to be offered.

So, in your deposition notice, state: Please take notice that the deposing party intends to cause the proceedings to be recorded stenographically, through the instant visual display of testimony and by videotape. Please take further notice that under Code of Civil Procedure sections 2025.340(m) and 2025.620(d), Plaintiff reserves the right to use at trial (during opening, direct, cross examination,

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closing, rebuttal or any other time) the video recording of the deposition.

Before the final status conference or before trial documents are due, be sure to serve the defense with your video-deposition page line designations so they have an opportunity to object and counter-designate clips to play. Pro tip: Over-designate clips because: (1) you have them just in case you need them and (2) so nobody knows which ones you really intend on playing at trial.

What to ask in the treating doctor's deposition

Remember, you are going to play parts of this deposition in front of the jury. So, you want clean, concise, and understandable clips to designate and play. Below is a general outline that I use. Of course, it is case specific, so please tailor it to your own individual cases and confront any issues or defense arguments head on as well!

- Good afternoon, Dr. Doe. What is your occupation?
- What kind of doctor are you?
- Can you tell the jury about your educational background?
- Are you board certified?
- What does board certified mean?
- What are you board certified in?
- What does your practice of (orthopedics) involve?
- When you became a doctor, did you take an oath?
- To do no undue harm to your patients and help them the best you can?
- Is [plaintiff's name] your patient?
- [Plaintiff's name] became your patient when he came to see you on [enter first date of treatment]?
- And you saw [plaintiff's name] X times?
- So, that oath you took when you became a doctor, to help your patients as best you can, applies to [plaintiff's name]?
- What was the primary purpose of [plaintiff's name] seeing you?
- [Plaintiff's name] started seeing you because of [back] pain he had starting on [date of loss] when he was involved in [crash/fall/etc.]?
- And despite trying to get rid of it through other means, nothing was really helping, so he came to you for help?
- Your job as his doctor, was to try and make him feel better?
- Ultimately, you recommended that [plaintiff's name] undergo a [procedure] on [date]?
- Why?
- Now, is [procedure] something that patients get right away or is it a last resort when someone is in pain?
- Are there risks involved with [procedure]?
- Did you disclose those to [plaintiff's name]?
- Despite these known and disclosed risks, [plaintiff's name] ultimately went forward with the [procedure] with you because he was in so much pain in his [body part]?
- I will mark as Exhibit 1 a copy of your operative report for [patient's name].
- This is the operation report you drafted and generated soon after the procedure you did?
- And you created these in the ordinary course and scope of your business?
- And the contents in this report and truthful, accurate, and reliable?
- I'd like to stipulate to the admission of the surgical report for all purposes including trial? (If the operative report is good for you, why not admit into evidence!)
- You performed a [L4-5 discectomy and decompression] procedure for [plaintiff's name] after more conservative care failed to help his [back] pain?
- And how many of these procedures have you done in your career to help your patients?
- Can you walk us through the procedure you did to help [plaintiff's name], please?
- Doctor, do you believe your care for [plaintiff's name] and the procedure you performed for him was medically reasonable and necessary to a reasonable degree of medical probability?
- And do you believe [plaintiff's name]'s injury that you treated with [procedure] was a result of the subject incident that occurred on [date of loss] to a reasonable degree of medical probability?
- Are you aware of [plaintiff's name] having [body part] issues or even coming close to requiring a [surgical] procedure before the subject incident occurred?
- When one undergoes a procedure like the one [plaintiff's name] underwent, does that mean they are going to be in the clear without the need for future medical care moving forward?
- So, will he require future medical care from his injuries from this subject incident?
- What will he need?
- These future recommendations are reasonably certain to occur to a reasonable degree of medical certainty?
- And all caused from the subject incident from [date of loss]?
- Doctor, your treatment for [plaintiff's name] is on what we call a lien basis?
- Is that an agreement you entered into with your patient to help him by stalling out collection of the bills until his case is over?
- However, regardless of the outcome of the case, [plaintiff's name] is still responsible to pay your bills in full?
- You have testified in the past as an expert on other cases on reasonable cost of medical treatment?
- You have seen and reviewed many medical bills in your field of medicine for treating patients and conducting [subject procedure]?
- Where do the bills stand right now for everything for [plaintiff's name] – your care, the [procedure], the surgery center?
- Is that a reasonable cost based on your training and experience to a reasonable degree of medical probability?
- And that number does not include the surgery center cost?
- And why is that separate?
- I want to ask you about some defense opinions in this case, OK?
- Is degeneration the normal aging process in the spine that we all go through?
- So, as we get older, we all have degeneration in the spine, which includes the back and neck?
- And we can live our lives and see these degenerative changes on MRI and never have pain?

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• But if someone that has non-symptomatic degeneration in their back or neck, is involved in a traumatic incident, that can light up the degeneration and make it painful?
• And in that situation, the pain generator is the incident and not the degeneration?
• A defense-hired doctor might say that [plaintiff's name] did not require the [procedure] based on their interpretation of the MRI films only – do you determine whether a patient requires a [procedure] just by reviewing MRI films?
• You also need a history from the patient?
• And you also need to examine the patient to determine what continues to hurt them?
• And then on top of those two things, that is when you look at an MRI to correlate all the findings together?
• And you did all three of those things for [patient's name]?

I have two cases right now in my personal portfolio (way more firmwide) where I took the *Moradi* depositions prelitigation and filed suit against a newly discovered employer. On both of those cases, I have already deposed and videorecorded the treating surgeons. Now you know why.


DeSantis

Daniel DeSantis, is a senior trial attorney in the Wilshire Law Firm*'s personal injury department. Daniel is a graduate of CAALA's Plaintiff Trial Academy.*

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