

Using depositions at trial...

How to avoid common mistakes

By Judge Mark V. Mooney

Probably more time is spent on depositions than any other discovery activity. I think the mantra for most attorneys is: "If they walk or talk, depose them." In practically every trial over which I have presided, I have seen the attorneys coming in on the first day with boxes and boxes of deposition transcripts. Most of those transcripts never see the light of day. The transcripts stay safely tucked away in those boxes and after the trial is over those same boxes are carted away, unopened and unused.

Sometimes a party would be better off if that deposition transcript had remained unused.

What was that all about?

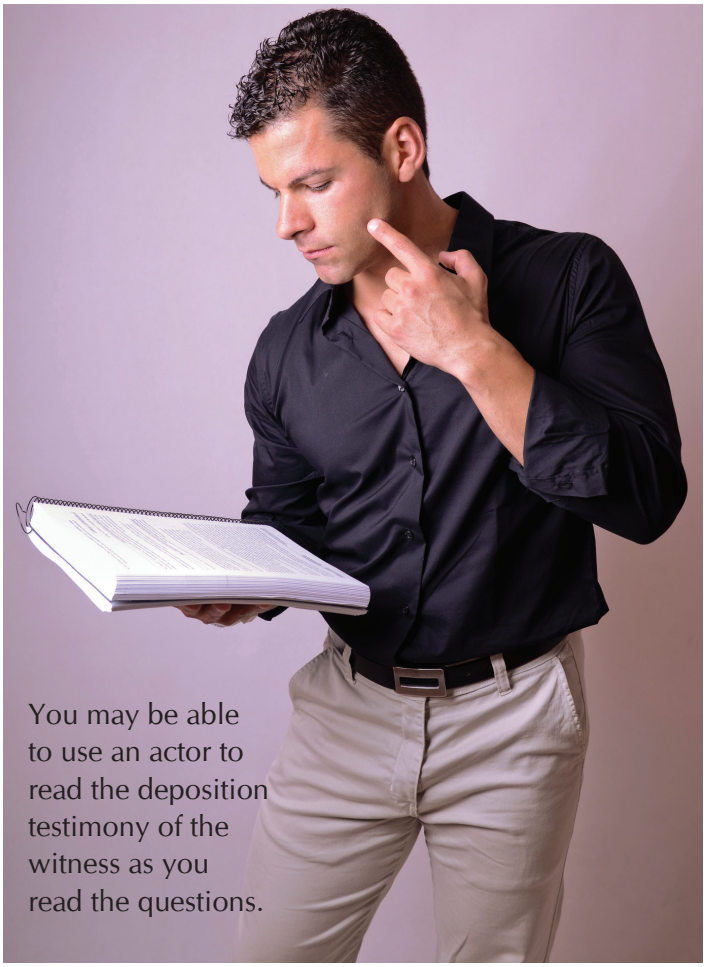
The proper use of a deposition can be devastating to your opponent's case. The right bit of impeachment or the unexpected admission can totally turn a case around. You know you have the jury's attention when you see every one of them pick up their notebooks and start jotting down notes as you read selected portions from a significant deposition. In the right hands of a skilled litigator, it can be a beautiful thing to watch. Unfortunately, it is often bungled. What should have been your Perry Mason moment just falls flat. The jurors are left scratching their heads and asking themselves: "What was all that about?"

Three ways to use a deposition at trial

Let's start with the basics. Code of Civil Procedure section 2025.260 sets off the statutory framework for the use of depositions at trial. There are essentially three ways to use a deposition at trial. The first is reading from the deposition of a witness that is unavailable. The second is reading from the deposition of an opposing party. The third is using the deposition for impeachment. It should be noted that Code of Civil Procedure section 2025.260, subdivision (c)(3) provides a "catchall" provision that permits the use of a deposition where the judge finds that "exceptional circumstances exist that make it desirable to allow the use of any deposition in the interest of justice." Quite frankly, I have never seen anyone attempt to use a deposition under the catchall provision, but it is good to know that it is there.

Handle the deposition differently depending upon its purpose

If a witness is unavailable, you have the luxury of carefully going through the transcript and selecting only those portions you need for your case. File and serve those deposition excerpts in advance and be prepared to make the requisite showing as to unavailability. The easiest type of unavailability is where the deponent lives more than 150 miles from the place of trial. When you depose a witness, make sure you ask in what city he or she resides. If it is more than 150 miles from the place of trial, then you have met your burden. Judges can take judicial notice of the distance between cities. There are other categories of unavailability that may require a greater showing (death, illness, mental infirmity, inability to compel the deponent's attendance at trial).



You may be able to use an actor to read the deposition testimony of the witness as you read the questions.

Do not wait until minutes before you are about to read the deposition testimony of an unavailable witness to provide the opposing side with your page and line designations. The opposing side is going to ask for time to review the designations, and the judge is going to give them that time. Avoid the delay and provide those designations well in advance.

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Reading it like stage dialog

If it is going to be a lengthy reading from the transcript, do not do it all yourself. Bring in someone to play the role of the deponent. It is easier for the jury to follow the questions and answers. Also, you can pick anyone you want to play the role of the deponent. Pick someone who has the characteristics that you want the jurors to imprint on that witness. Of course, the jurors will know logically that your reader is not actually the deponent. Nevertheless, if you want the jurors to think of the deponent as an attractive woman, then have an attractive woman play that role. If you want the jurors to think of the deponent as a gruff old man, then find a gruff old man to play the role (there are plenty of those around in any medium-sized law firm). When the jurors go back into the jury room, they are going to remember the testimony as it was presented to them through your reader.

Before you start reading

Code of Civil Procedure section 25.620, subdivision (b) allows a party to use the deposition of an adverse party "for any purpose." You don't have to show unavailability. You don't have to establish that it is impeaching. This does not mean, however, that you can just dive right in and start reading from the deposition. This is what you must do:

1) Request permission from the court to read from the deposition;
2) Identify the page and line you wish to read;
3) Permit opposing counsel an opportunity to object;
4) Wait for the judge to give you permission to read.

Follow those four steps before you read from any deposition, whether it is the deposition of an adverse party or for impeachment. It seems simple, but I have had many very good and very experienced attorneys skip one or two of those steps. It will usually result in an admonition from the court and the attorney must go back and do it right. You never want to be admonished in front of the jury for any reason, and it interrupts the flow of the evidence.

Whenever an attorney requests that testimony of an adverse party be read, the attorney for the adverse party will invariably make a great show of studying the transcript. He or she will study the preceding pages, following pages and generally make a display of concern. It seems as though almost every attorney goes through this act when the deposition of their client is about to be read. Do not do this!

If the opposing counsel is going to read from your client's deposition, there are very few evidentiary objections that you can make that are going to keep that testimony out. By spending time in apparent consternation over the deposition excerpt, you give the jury the impression that this must be something very important. It increases their level of attention. The jury is going to assume that this excerpt must be harmful to your case, and you are trying to figure out ways to keep it out. Since it is probably going to come in any way, you should be prepared to say "No objection" as soon as opposing counsel has finished stating the page and line to be read. In that way, you are giving the impression to the jury that there is absolutely nothing in that transcript that could possibly hurt your case.

Using the depo to impeach

When you are using a deposition to impeach a witness, the procedure is only slightly different. First, the deposition testimony needs to be impeaching, usually as a prior inconsistent statement. You should lay some basic foundation, i.e., you asked the witness, "Do you recall your deposition was taken on such date, you were sworn to tell the truth, you were given an opportunity to review and make corrections," etc. You then read the portion of the deposition containing the inconsistent statement. (See steps 1 through 4 above, before reading.)

You do not have to show the deposition transcript to the witness. You do not even need to ask the witness to explain the inconsistency. Although Evidence Code section 770, subdivision (a) requires that a witness being examined on a prior inconsistent statement have "an opportunity to explain or to deny the statement," section 770 is in the disjunctive. Subsection (b) reads *or* the "witness has not been excused from giving further testimony in the action." Go with subsection (b). Read the impeaching testimony, and then move on. If you give a witness a chance to explain an inconsistent statement, they will always come up with an explanation. Don't give them that chance.

Do not make the mistake, however, of thinking you can read the impeaching testimony after the witness has left the stand. If the witness has left the stand and been excused, then that train has left the station. You are not going to be able to read it into the record no matter how good it is.

I don't know why so many attorneys believe it is necessary to hand a witness a copy of their deposition transcript before attempting to impeach them with it. They will usually say something like, "I would like you to read page 53 to yourself to see if it refreshes your recollection." No, it doesn't work that way. You only present a document to refresh recollection after witnesses indicated he or she does not have a present recollection of the subject. You then ask if there is a writing that would help refresh a witness's recollection. If the witness says yes, then they read the document to their self and testify from their refreshed recollection. The document does not come into evidence.

But that is not what is occurring when you seek to impeach a witness with prior deposition testimony. You don't need to ask if they remember giving that testimony. Don't let the witness review anything. Don't give the witness a chance to comment about the deposition. The court is going to instruct the jury on CACI 208 and tell them that: "At a deposition the person is sworn to tell the

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truth and is questioned by the attorneys you must consider the deposition testimony that was presented to you in the same way as you consider testimony given in court." Just follow steps 1 through 4 above, and start reading.

Not all impeachment is created equal

Just because you can impeach, does not always mean you should impeach. So many times, I have seen a variation of the following scenario: The witness testifies at trial something along the lines of "I was probably 50 feet away at the time."

The cross-examining attorney pulls out his extensively tabbed copy of the witness's deposition. He then spends an excruciating amount of time laying the foundation, asking the witness all the details regarding the time and place of the deposition. The examining attorney may drag it out even further by practically reading the entire admonition that was given at the deposition. With mounting indignation, the examining attorney will add, "And you were under penalty of perjury, were you not?" Then, we finally get to the big impeachment as the attorney reads from the deposition:
Q: At the time of the accident, how far away would you say you were?
A: I was maybe 60 feet away.

Huh? That was it? That is your big impeachment? You can see the look on the jurors' faces as they have been waiting to hear what the attorney has been building up to, and it turns out to be something trivial or inconsequential. You can almost read their minds as they are thinking as a group, "Big (expletive deleted) deal." The examining attorney will often compound his folly by ratcheting up his indignation and inquiring of the witness: "Is your memory any better now than it was then?" (How many times have I heard that incredibly lame question?)

If there is deposition testimony that is legitimately impeaching on a material issue, do not hesitate to use it. In fact, be prepared to have the testimony blown up and highlighted for use in your closing argument. Please do not however, waste everybody's time reading pages of deposition testimony relevant only to a minor issue, if at all. You do not want the jurors looking at you and thinking: "Big (expletive deleted) deal."

Presentation is everything

As with a fine meal, presentation is everything. If you cannot find that section of transcript or play that piece of deposition video right away, then move on. You do not want to spend time in front of the jury fumbling around, trying to find a particular bit of deposition testimony. If it is from the deposition of an opposing party, don't sweat it. You can introduce that at any time. If it is from the deposition of a witness, keep the witness on the stand long enough so that you can find the testimony over the next break. If you can't keep the witness through the next break, ask that the witness be subject to recall before the witness is excused.

It is the short, direct response to a direct deposition question that will be the most effective. It may be useful in discovery to allow a deponent to give a long-winded response to a question. One can often pick up all kinds of valuable information if you have a witness who likes to ramble on. Let them ramble in deposition. But if you get a nugget of potentially useful testimony buried in that long response, make sure you double back so that you have a question and answer you can potentially use at trial. Confirm the response with a question that is something like, "So you told me X, is that correct?" Always be thinking of how you can use this question and answer at trial when taking a deposition.

The smooth and effective use of depositions will impress the jury with your confidence and skill. The inept and pointless use of depositions will make you look like a hack. Don't be a hack.


Mooney

Hon. Mark Mooney received his undergraduate degree from the University of Southern California in 1978. He attended law school at Southern Methodist University and received his Juris Doctor in 1981. Before being appointed to the bench he was an associate with firms of Hillsinger & Costanzo and Lafollette, Johnson, De Haas & Fesler. He also served as an Assistant United States Attorney for the Central District of California from 1991 to 1995. Judge Mooney was appointed to the Los Angeles Municipal Court by Governor Pete Wilson in 1995. In 1998, he was elevated to the Superior Court for the County of Los Angeles. He currently has an unlimited general civil assignment in the Mosk Courthouse.

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