EIGHT WAYS TO USE DEPOSITIONS AT TRIAL

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Ultimately, you may find yourself in trial, with your collection of transcripts of depositions taken months and even years earlier. What can you do with them?

Federal Rule of Civil Procedure (Rule) 32(a)(1) permits the use of "all or part of a deposition" at trial "to the extent it would be "admissible" under the Federal Rules of Evidence "if the deponent were present and testifying" under the various circumstances set out in Rule 32(a)(2)-(8). A deposition may be used "against a party" who was "present or represented at the taking of the deposition" or who had "reasonable notice" of the deposition for various purposes. These purposes include using deposition testimony at trial (1) to present admissions; (2) for impeachment; (3) as a substitute for "unavailable" witnesses; (4) to refresh recollection; (5) as a substitute for unrefreshed memory; (6) as past recollection recorded; (7) for witness control; and (8) to make offers of proof and to support or resist evidentiary motions and objections.

1. To present admissions

The deposition of a party—or a party's officer, director, managing agent or other Rule 30(b)(6) representative—may be used at trial for "any purpose." Rule 32(a)(3). So deposition testimony can be used to present party admissions—admissions by an "opposing party" that meet the standards set by Fed. R. Evid. 801(d)(2).

Opposing party admissions include the party's statements, statements adopted or endorsed by the party, statements authorized by the party, and statements by the party's agents and employees made within the scope of agency or employment during the relationship. Opposing party admissions are excluded from the definition of hearsay, and may be used as substantive evidence against the party. Fed. R. Evid. 801(d)(2).

How and when deposition admissions are presented at trial is left to the creative judgment of the presenting lawyer, subject to the judge's Fed. R. Evid. 611(a) authority over presentation of evidence and to the "rule of completeness" under Rule 32(a)(6) and Fed. R. Evid. 106.

Deposition admissions can be presented with or without a witness. If used while the admitter is on the stand (even remotely), the presenting lawyer can, but is not obligated to, show the transcript to the witness or permit the witness to explain or elaborate; party admissions are excepted from the Fed. R. Evid. 613(b) extrinsic evidence prerequisites which govern presentation of prior inconsistent statements by non-party witnesses.

> **Plaintiff's counsel:** Judge, we would now like to read an excerpt from defendant Collinson's March 31, 2019 deposition transcript as an admission under Fed. R. Evid. 801(d)(2) and Rule 32(a)(2) and (3).
>
> **The Court:** You want to read it now? Don't you have more witnesses this morning?
>
> **Plaintiff's counsel:** It will be quick, Judge. It makes sense to present it now, for continuity.
>
> **The Court:** Okay, go ahead.

Plaintiff's counsel: Thank you, Judge. [now addressing to the jury] I am reading from page 296, lines 13 through 16, of defendant Collinson's March 31, 2019 deposition testimony, transcribed by the court reporter and taken under oath.

Question to Mr. Collinson: "Did you fire Ms. Wolfe because she supported the union?"

Answer by Mr. Collinson: "No, that is not true. Her union activity had nothing to do with it. I felt I had to let her go because she was just too old to do the job."

That concludes the excerpt from Mr. Collinson's deposition testimony. Now I'd like to call Robert Fox.

Defense counsel: Uh, just a moment please, Judge. Pursuant to the "rule of completeness" under Rule 32(a)(4) and Federal Rule of Evidence 106, I would like to read to the jury the question and answer immediately following the transcript excerpt just read.

The Court: Show me.

Defense Counsel: Right here, Judge, page 296, beginning at line 17.

The Court: Go ahead and read it.

Defense counsel: [addressing the jury] I'm also reading from Mr. Collinson's deposition testimony:

Question to Mr. Collinson: "What do you mean 'too old'?"

Answer by Mr. Collinson: "Well, 'too old' were her words, not mine. She told me she was getting too old to lift those 65 pound crates off the trucks like she used to."

That's all, Judge, thank you.

The Court: Alright, counsel, call your next witness.

2. For impeachment

Deposition testimony may be used at trial "to contradict or impeach" a testifying witness. Rule 32(a)(2). Statements "inconsistent with the declarant's testimony" made under oath at a deposition are excluded from the definition of hearsay by Fed. R. Evid. 801(d)(1)(A). So, inconsistent deposition testimony can be used as substantive evidence as well as to undermine the witness's credibility.

Your clients and witnesses may be unfamiliar with the litigation term "impeachment." Depending on age and political affiliation, they might associate impeachment with Andrew Johnson, Richard Nixon, Bill Clinton, or Donald Trump. But even if they don't know the word, they understand the concept. It embodies the most common fear witnesses have about testifying: getting caught with their pants down. Impeachment is said to be *the* most memorable and influential trial evidence. It brings together drama, expose', just deserts, and schadenfreude. Ray Charles captures its essence in "I've Got News For You" [Genius + Soul = Jazz (1961)]:

> You said before we met, that your life was awful tame. / Well, I took you to a nightclub, and the whole band knew your name. / Oh, well, baby, baby, baby I've got news for you. / Oh, somehow your story don't ring true.

Using deposition transcripts and Rule 32(a)(2), you, like Ray Charles, can expose stories that "don't ring true."

The confrontation prerequisites for using inconsistent deposition testimony to impeach non-party witnesses are in Fed. R. Evid. 613. You don't have to show the impeaching testimony to the witness (although you may want to), but you have to show it to opposing counsel on request. Fed. R. Evid. 613(a). Extrinsic evidence—the deposition transcript—is admissible to prove the inconsistent statement of the non-party witness if the witness is given the opportunity to explain or deny the earlier statement. Fed. R. Evid. 613(b). The explain/deny requirement does not apply to party-opponents, whose statements

are admissions under Fed. R. Evid. 801(d)(2)(A). Fed. R. Evid. 613(b).

The judge may exclude the deposition transcript as being cumulative if the witness admits the truth, or even the accuracy, of the earlier testimony, but ought to admit the transcript if the witness denies, quibbles about, or professes not to remember the transcribed testimony.

Impeachment may be done in a confrontational were-you-lying-then-or-are-you-lying-now? style, which is sometimes appropriate. Or impeachment may be more subtle and gentle, demonstrating simultaneously your sympathetic understanding of the human condition, your relentless commitment to the precise truth, and, by showing the transcript to the witness, your fairness.

Q. You felt only *mildly* annoyed by Ms. White's remarks, isn't that true?

A. No, as I testified, I felt humiliated. I was devastated, depressed, wounded.

Q. Yes, well, your testimony today was… uh…*exaggerated,* wasn't it? Wouldn't it really be more accurate to say that you were only *mildly* annoyed?

A. No. It would not!

Q. Uh-huh, well let's see. I'm looking at your deposition transcript from last year. We've established that you testified under oath back then. You were asked back then how you felt about Ms. White's remarks. Let's see how you answered. I'm at page 173, beginning at line 20. Let me read what you said: "I felt, you know, *mildly* annoyed." Here, look. I read your testimony *exactly* right, didn't I? Your testimony was that you were *mildly* annoyed. Isn't that what you said *last year*? "*Mildly* annoyed."

You can, of course, turn the screw and suggest an improper reason for the discrepancy. For example:

Q. By the way, you met with your lawyer, Mr. Cheatham over there, to prepare your trial testimony, didn't you?

A. Of course.

Q. You did that during the past few days, didn't you?

A. Yes.

Q. And when you met with Mr. Cheatham, that's when you decided to say you were—how did you put it—"humiliated," "devastated," "depressed" and "wounded"—rather than, as you testified under oath *last year*, that you were only "*mildly* annoyed," isn't that right?

Effective impeachment proves your point and undermines your opponent at the same time.

Members of the jury, the fact is that this was a minor incident, and this is a case about day-to-day, run-of-the-mill, everybody-suffers-it mild annoyance at work.

In fact, Mr. Green was only mildly annoyed by Ms. White's remarks, just as Mr. Green testified a year ago, at his sworn deposition. There is his deposition testimony, reproduced on this four foot by six foot poster board: "I felt, you know, mildly annoyed." That's what Mr. Green testified last year.

But then, ladies and gentlemen, Mr. Green sat in that witness chair last Tuesday and changed things. Although he was again sworn to tell the whole truth, he did not. He told you, *this time*, that he was "humiliated," "devastated," "depressed" and "wounded." That's what Mr. Green said *after* he and Mr. Cheatham prepared his trial testimony.

Look again at this exhibit. It reveals two important things. First, it reveals that this was a minor incident, an everyday thing that people suffer anytime they work with other people, and certainly no violation of the law. Mr. Green said it, right here in black and white: he was only

"mildly annoyed." Second, it reveals that Mr. Green's latest testimony exaggerates and distorts. It reveals that Mr. Green *did not tell you the whole truth at this trial*.

3. As a substitute for "unavailable" witnesses

Under Rule 32(a)(4), the deposition testimony of a witness, "whether or not a party," can be used by a party for "any purpose" if the court finds that (a) the witness is dead; (b) the witness is more than 100 miles from the trial location or out of the country; (c) the witness is unable to testify because of "age, illness, infirmity, or imprisonment"; (d) the party seeking to call the witness has been unable "to procure the attendance of the witness by subpoena"; or (e) other "exceptional circumstances" warranting using the deposition transcript. Under Fed. R. Evid. 804(b)(1), deposition testimony taken under circumstances that gave the adverse party an opportunity to question the witness is not excluded as hearsay at trial when the witness is "unavailable."

How you present the deposition testimony of unavailable witnesses is a function of your preference and creativity—and the trial judge's tolerance. You can read the questions and answers aloud, have someone else do it, or "perform" the colloquy, with you reading the questions and a person of your selection on the stand reading the responses of the unavailable witness.

The "performance" approach is sometimes just that, with the witness-surrogate's dress and physical characteristics, voice inflection, attitude, and body language flavoring the testimony and enhancing the testimony's impact, within appropriate boundaries. For example, that arrogant, bejeweled, cologne-emanating doctor spending the winter in the south of France (and, therefore, "unavailable" at trial under Rule 32(a)(4)(B), (D), or (E)) may be portrayed by your kindly, rumpled, soft-spoken, humble law partner. You get the idea.

You can present as much, or as little, of the unavailable witness's deposition testimony as you need, subject to the other's side's invocation of the Rule 32(a)(6)/Fed. R. Evid. 106 "rule of completeness" and any applicable evidentiary objections. In addition, you can ask the judge for appropriate instructions to the jury communicating that the deposition testimony was taken under oath, recorded word-for-word by an official court reporter, and the transcript was certified by the reporter as "accurately" reflecting the testimony, and is to be given the same consideration at trial as if the witness had been able to testify in person.

4. To refresh recollection

Anything that helps can be used to refresh a witness's recollection, including deposition testimony. Basically, the required foundation is that the witness knows (or knew) the facts but cannot presently remember them, that the witness's deposition testimony (given closer in time to the events) may aid the witness's memory, and that having reviewed the deposition testimony, the witness's memory is refreshed.

Q. Who was present at the meeting?

A. I was. Peter Collinson was there, and… uh…there were two or three others, I…uh…I'm sorry, I just can't remember right now.

Q. Let's see if your deposition can help refresh your recollection. You gave it only a few months after the meeting. Here's the transcript. Please read page 87 beginning at line 13 to yourself, and let me know when you're done.

A. Okay, I read it.

Q. Now that you've read a portion of your deposition, did that refresh your memory of the meeting.

A. Oh, yes. I now remember who else was there. It was…

You can use the same technique using other witnesses' deposition transcripts, too.

5. As a substitute for unrefreshed memory

When a witness's memory is not refreshed by reading deposition testimony, he becomes "unavailable" within the meaning of Rule 32(a)(4)(C) or (E) and Fed. R. Evid. 804(a)(4) (even though he's sitting in the witness chair), so that his deposition testimony is not excluded as hearsay under Fed. R. Evid. 804(b)(1) and can be used as substantive evidence.

Q. Now that you've read a portion of your deposition, did that refresh your memory of the meeting?

A. No. I see what's in the transcript, but to be honest with you, I'm just not sure who was at the meeting. I just don't remember.

Q. You remember testifying at your deposition, don't you.

A. Yes.

Q. I was there asking you questions and your company's lawyer was there, too, representing both the company and you. Remember?

A. Yes.

Q. You testified under oath?

A. Yes.

Q. When you testified at the deposition, that was six months closer in time to the meeting, wasn't it?

A. Yes.

Q. Now, look at page 87, beginning at line 13, and follow along. I asked "Who as at the meeting?" And you answered "Me, Peter Collinson, Marlowe, and Archer." I read your testimony accurately, didn't I?

A. Yes.

6. As past recollection recorded

Under Fed. R. Evid. 803(5)(A)-(C), recorded recollection is a "record" of "a matter the witness once knew but now cannot recall well enough to testify fully and accurately, any record made or adopted by the witness when the matter was fresh in the witness's memory" and "accurately reflects the witness's knowledge." The deposition transcript is such a record. The deposition testimony may be read into evidence, but not received as an exhibit unless offered by the adverse party. Fed. R. Evid. 803(5). Again, you can request an instruction that this testimony is to be given the same consideration as that given by witnesses on the stand.

My friend Professor Peter T. Hoffman suggests that the "past recollection recorded" rubric is unnecessary in light of Fed. R. Evid. 804(a)(4) but concedes that it resonates with some judges of a certain age, and that sometimes it doesn't hurt to wear a belt and suspenders.

7. For witness control

You can use the deposition transcript to keep an uncooperative witness honest at trial even when the deposition testimony lacks sufficient clarity to permit effective impeachment. This works best after you've successfully used the transcript for impeachment or to "refresh" the witness's selective memory a few times.

Hold the transcript prominently, consult it with furrowed brow, look the witness dead in the eye, and ask your question in a confident tone as if: (1) you know the truth; (2) the witness told the truth at deposition; (3) you just silently read that truthful answer; (4) the witness better give you that answer again, here and now; or (5) the witness will be sorry.

Q. In fact, Mr. Smith [pause, glance at transcript], the mechanic was left-handed, wasn't he?

A. Uh, yeah, I guess he was.

If the witness persists in the "wrong" answer, and the murky transcript doesn't permit crisp impeachment, follow-through is required. Look at the transcript again and then at the witness with a mixture of disbelief and contempt, acknowledge the witness's

incredible answer, and then move on to something that actually is in the deposition transcript.

> **Q.** In fact, Mr. Smith, the mechanic was left-handed, wasn't he.
>
> **A**. No. As I testified, he was right-handed.
>
> **Q**. I see, Mr. Smith. So that's your testimony today, is it. Well, let's see what you have to say today about this: the defective brake was on the left front side, wasn't it?
>
> **A**. Yes.
>
> **Q**. Yes, it was. On the left side. [glance knowingly at the transcript] The left side.

This cross-examination technique is most effective with a "creative" witness—one willing to say whatever serves his interests but who doesn't keep good track of what he's said from time to time. This is an application of Quintilian's Law: "A liar should have a good memory."

Use this technique, of course, only in good faith and consistent with your obligation to the truth.

8. To make offers of proof and to support—or resist—evidentiary motions and objections

Deposition testimony can be used at trial to make offers of proof and to support—or resist—evidentiary motions and objections.

An offer of proof presents the substance of excluded or resisted evidence when the substance is not apparent in the context of the trial record. Fed. R. Evid. 103. The court may permit the presentation of anything that "informs the court" of the "substance" of the evidence and may direct that "an offer of proof be made in question-and-answer form" (Fed. R. Evid. 103(a)(2) and (c)), including the presentation of deposition testimony. Indeed, deposition testimony can be used in an effort to persuade the court to permit questioning the witness on the record but out of the jury's presence to make the offer under Fed. R. Evid. 103(a).

Deposition testimony also may provide support for motions and objections at trial, for example to support—or resist—efforts to exclude testimony on the basis that the witness lacks personal knowledge (Fed. R. Evid. 602), to justify leading questions based on witness hostility or identification with one side (Fed. R. Evid. 611(c)), to exclude evidence because of the danger of unfair prejudice, jury confusion, or wasting time (Fed. R. Evid. 403), or to include evidence of a witness's crimes or other acts to show motive, opportunity, absence of mistake, or other purposes listed in Fed. R. Evid. 404(b). Citations to, and quotations from, deposition testimony provide the specificity that may persuade the trial court (or the court of appeals) of the merits of your position. For example:

> Judge, I object to further inquiry into this subject matter under Rule [Fed. R. Evid.] 403. I would like to show you an excerpt from the witness's deposition that I believe demonstrates why further inquiry would be improper.

CONCLUSION

Anticipation, organization, preparation, and designation of transcript excerpts

The key to effective use of deposition testimony at trial is, of course, preparation. This includes anticipation and organization, and designation of deposition transcript excerpts in Rule 26(a)(3)(A)(ii) pretrial disclosures.

Anticipation involves identifying the transcript excerpts you will use at trial, for example to present party admissions or in place of an unavailable witness, *and* those excerpts you must be prepared to use as necessary, for impeachment, refreshing recollection, etc.

Organization involves making sure that the transcript excerpts you need are readily accessible in a form suitable for your use at trial. You do not want to be fumbling through document piles at trial, searching for the right transcript and page, making everyone watching uncomfortable and impatient, and destroying the dramatic impact of your devastating

impeachment. Nor do you want to display your copy of the transcript to opposing counsel when it is annotated with your secret handwritten margin notes.

You need a system—some system—that ensures that the important deposition testimony of the important witnesses is at your fingertips in a form you can use. Whether this involves summaries, subject-matter indexes, paper clips, post-it notes, rote memorization, an instantly searchable collection of electronically-stored deposition transcripts (and the ability to come up with the right search criteria), or a trial team of second and third chairs and paralegal hunters-and-gatherers, you have to be able to find what you need when you need it.

Some organizational discipline is provided by the rules. Rule 26(a)(3)(B) requires that the parties designate "those witnesses whose testimony the party expects to present by deposition" along with lists of witnesses expected to be called and exhibits expected to be offered. Rule 26(a)(3)(A)(i)-(iii). These pretrial disclosures must be "in writing, signed, and served." Rule 26(a)(3)(B)(4).

The pretrial disclosures are to be made at least 30 days before trial, unless the court directs otherwise. Within 14 days of the disclosures, other parties may file and serve objections "to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii)" as well as to proposed exhibits. Objections "not so made"—other than objections under Fed. R. Evid. 402 (relevance) and 403 (prejudice, confusion, undue delay, waste of time, cumulative)—are waived unless "excused by the court for good cause." Rule 26(a)(3)(B).

The pretrial disclosures need not include materials that may be presented at trial "solely for impeachment," Rule 26(a)(3)(A), and, presumably for other unanticipated (or unanticipatible) purposes, like refreshing recollection.

Practice varies as to whether the Rule 26(a)(3)(A)(ii) "designation of those witnesses whose testimony" is expected to be presented "by deposition" requires only the witnesses' names or, in addition, specifications of pages and lines expected to be used. The 1993 Advisory Committee Notes suggest that designation of "particular portions of stenographic depositions to be used at trial" is required only if mandated by court order or local rule. If the other side's designations do specify pages and lines, your objections should specify the transcript excerpts that you will want to use under the Rule 32(a)(6)/ Fed. R. Evid. 106 "rule of completeness" if the designating party's excerpts are introduced as evidence.

Some judges have additional requirements for designating, objecting to, and using transcript excerpts—including format requirements, highlighted color-coding, multiple copies, limitations on demonstrative exhibits and publication to the jury, special rules for electronic-only uses, etc.—so it pays to read the local court rules and the judge's standing and pretrial orders and ask the clerk about practices.

In sum, be prepared to use deposition transcripts at trial:

1. To present admissions;
2. For impeachment;
3. As a substitute for "unavailable" witnesses;
4. To refresh recollection;
5. As a substitute for unrefreshed memory;
6. As past recollection recorded;
7. For witness control; and
8. To make offers of proof and to support—or resist—evidentiary motions and objections.