Chapter 8

Seeing Is Believing: Using the Video Deposition of Your Opponent at Trial

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Introduction

There is something paradoxical about video depositions. On the one hand, conventional wisdom holds that you *never* present any witness whose testimony you want the jury to consider by showing their video deposition at trial. Never. It bores the jury; it bores the judge; it even bores you. No matter how persuasive or attractive the witness or how impressive his or her credentials, they are underwhelming when presented in this manner. Yet, if presenting a video deposition is anathema, why take it at all? A video deposition should be shown at trial not *despite* how poorly it presents the witness, but precisely *because* of how poorly it presents them. This points to the first rule of using a videorecording at trial—the trial lawyer should use the video deposition of an opponent to full advantage precisely because of its tendency to alienate the jury from the witness. This paradox answers the questions of whether and why to use a video deposition at trial.

There is a second paradox to the use of video depositions at trial. Namely, how can a video be so boring in an era when everyone is posting videos on the Internet? This paradox answers the question of *how* to use the video deposition at trial. The

trial lawyer uses video because modern sensibilities demand it. The good trial lawyer uses it effectively by presenting staccato sound bites that the judge and jury are primed to appreciate. Gone are (or should be) the days of presenting the hour-long video of your witness; here to stay are the days of presenting the opposing side in short, meaningful bits that maximize the message you seek to convey. This chapter offers some thoughts on when, why, and how you use the video deposition of your opponent to win your next trial.

The Rules Applicable to Using Video Depositions

Of course, like any evidence offered at trial, the use of video depositions are subject to the Rules of Evidence, the Rules of Civil Procedure, and, most importantly, the rules of your trial judge. In assessing whether, when, and how to use a video deposition at trial, you must know and understand all three. Starting with the formal rules and setting aside evidentiary concerns, Rule 32 of the Federal Rules of Civil Procedure governs the use of depositions in court proceedings. Rule 32 provides generally "at a hearing or trial, all or part of a deposition may be used against a party if the party was present and/or represented at the deposition, the subject matter of the deposition testimony is admissible under the Federal Rules of Evidence and if the use of the deposition is otherwise allowed under Rule 32(a)(2)-(8)." Rule 32(a)(3) states that "an adverse party may use for *any purpose* the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent or designee under Rule 30(b)(6) or Rule 31(a)(4)."[1] Therefore, under the Rules you can and should use the deposition of your adversary as substantive evidence at the trial of your case. Such use is permitted even though the party is available to testify at trial,[2] and even though the deponent was not a party to the matter at the time the deposition was taken.[3] And of course, the deposition is admissible as substantive proof in and of itself,[4] and may be presented even though the party has already testified on direct and cross-examination.[5] The only limitation on its use as substantive evidence is the stricture against cumulative or repetitive testimony and the limitations imposed by the Federal Rules of Evidence.[6]

Some trial lawyers believe that Rule 32 limits the form in which the deposition may be introduced as evidence, assuming it must be prepared in transcript form and

1. Fed. R. Civ. P. 32(a)(3) (emphasis added).
2. Coughlin v. Capitol Cement Co., 571 F.2d 290, 308 (5th Cir. 1978); Fey v. Walston & Co., 493 F.2d 1036, 1046 (7th Cir. 1974); Creative Consumer Concepts, Inc. v. Kreisler, 563 F.3d 1070, 1080 (10th Cir. 2009).
3. Codeiro v. Levasseau, 112 F.R.D. 209, 211 (D.R.I. 1986).
4. C. R. Bard, Inc. v. M3 Sys., Inc., 866 F. Supp. 362, 363 (N.D. Ill. 1994).
5. Cleary v. Ind. Beach, Inc., 275 F.2d 543, 551 (7th Cir. 1960).
6. *See, e.g.*, Coletti v. Cudd Pressure Control, 165 F.3d 767, 773 (10th Cir. 1999); Kolb v. Cnty. of Suffolk, 109 F.R.D 125 (E.D.N.Y. 1985); Gauthier v. Crosby Marine Serv., Inc., 752 F.2d 1085, 1089 (5th Cir. 1985).

may only be read to the jury. However, that is not so. In fact, the Rules specifically provide that unless the court orders otherwise, a party must present the deposition in nontranscript form, if available, unless the court for good cause orders otherwise.[7] In other words, if you intend to use the video deposition of your opponent at trial, the Rules not only allow you to do so, they require you to do so, unless the court orders otherwise. Though your opponent may object to displaying the video testimony of his or her client, the court should only exclude that form of presentation of the testimony for good cause. Good cause is not established by such considerations as the party was underdressed for the deposition, was not clean-shaven, or otherwise appeared in a less-than-ideal manner. This, of course, is where knowing your judge matters. Most judges will allow use of the video assuming you are able to present it efficiently, with as little disruption as possible.

Moreover, the Rules specifically contemplate playing short excerpts from the deposition.[8] Presenting an excerpt from a deposition is subject to the provisions of Rule 32(a)(6), which states that "an adverse party may require the offeror to introduce other parts [of the deposition] that in fairness should be considered with the part introduced, and any party may itself introduce any other parts."[9] But as a practical matter, most trial judges will allow the party offering the snippet of testimony to determine what portions to play and leave it to the opposing side to determine what additional portions of the deposition they wish to introduce in rebuttal. Clearly, if the snippet of deposition testimony relates to a discreet issue and other parts of the testimony do not relate to that issue, the attempt to require you to introduce other parts of the deposition will almost certainly fail.

As the Rules make clear, there is a question of who or what is a party, agent, or designee. In many cases those questions are easily resolved. For example, an individual named in a lawsuit is clearly a party and his or her deposition can be used as substantive evidence by the opposing party. If the party is a corporation, the corporation's officers, directors, and managing agents are considered parties for these purposes.[10] So too, any person who testifies as the corporate's representative under Rule 30(b)(6) is a "party" or "designee" for purposes of showing their video at trial. Therefore, when you take a Rule 30(b)(6) deposition, you can play it in whole or in part for the jury.[11] Since Rule 30(b)(6) specifically envisions use of the video by the "adverse" party, courts have also addressed the question of whether parties are

7. Fed. R. Civ. P. 32(c).
8. *See* Palmer Coal & Rock Co. v. Gulf Oil Co. U.S., 524 F.2d 884, 887 (10th Cir. 1975) (upholding admission of three questions and answers out of 654 from the deposition).
9. Fed. R. Civ. P. 32(a)(6).
10. Fed. R. Civ. P. 32(a)(3).
11. This issue of whether someone is a "managing agent" is less definitive and turns on an analysis of several factors regarding their role within and ability to bind the corporation. *See, e.g.*, Sugarhill Records, Ltd. v. Motown Record Corp., 105 F.R.D. 166, 170 (S.D.N.Y. 1985); Bianco MD v. Globus Med., Inc., 2014 U.S. Dist. LEXIS 28464 (E.D. Tex. Mar. 6, 2014). This determination is made based upon the witness's status at the time of deposition, rather than at the time of trial. Hynix Semiconductor v. Rambus, Inc., 2008 U.S. Dist. LEXIS 11767, at *17 (N.D. Cal. Feb. 2, 2008).

adverse. Courts have allowed the deposition of one co-defendant to be played by the other co-defendant even though the parties are nominally aligned.[12]

In short, the Federal Rules of Civil Procedure specifically allow you to play portions of your opponent's video deposition, not just for impeachment purposes, but for substantive evidence as well. The Rules allow it; good trial lawyers use what the Rules allow. The remainder of this chapter addresses what objectives you may accomplish and the time and manner in which you might best accomplish them by showing your opponent's deposition video.

Use the Other Side's Video Deposition for Several Objectives

Objective: To Establish Critical Evidence Helpful to Your Case-in-Chief

The objective is to admit substantive evidence particularly helpful to your case before the other side can counter it. This goal is particularly important and useful for a plaintiff. Consider this illustration. In a defamation action, plaintiff corporation has been defamed by a fictitious online review posted on the Internet. Posing as a purchaser of the plaintiff's services, the reviewer was actually the plaintiff's primary competitor. A critical issue in the case is whether the defamatory-review author told his business partner of the review and, if so, when. This fact has become critical to the plaintiff's case against the reviewer's business partner who, plaintiff alleged, adopted or ratified the defamatory statement by knowing of its existence and deliberately allowing it to remain visible on the Internet for several months. Plaintiff took the video deposition of the review's author, who testified he had told his business partner in February 2010 of the review, which remained visible to Internet users for six more months. Later during discovery, in his deposition, the business partner disclaimed any knowledge of the review or its content while it was visible online, claiming he never knew about the review until after it was removed from the Internet. Thus, the deposition testimony of the two defendants was in conflict on a critical question of timing. Plaintiff's counsel anticipates the fictitious reviewer will change his testimony at trial and assert that he did not, in fact, tell his business partner about the review until after it was taken down from the Internet. Rather than wait for the live testimony on this critical fact, plaintiff's counsel could introduce the following excerpt from the deposition of the review author. By playing the video for the jury, the plaintiff can establish the critical fact:

12. *See* Riley v. Layton, 329 F.2d 53, 58–59 (10th Cir. 1964).

Q: You flew back from Texas the next day to deal with the online review.

A: I flew back from Texas the next day, yes.

Q: What time of day did you fly back?

A: In the morning.

Q: So you had just landed in Texas the evening before?

A: Yes.

Q: And you turned around and flew back to deal with this issue.

A: I did fly back the next day, yes.

Q: And you flew back because of the subpoena you had been served with.

A: Right.

Q: And before you turned around and flew back from Texas, you told your business partner about the defamatory posting.

A: I told Mr. Smith about the Internet posting.

Q: So there is no question in your mind that Mr. Smith knew about the posting on February 29, 2010?

A: He knew about it because I told him.

Q: He didn't know about it before you told him?

A: No.

Q: But when you told him on February 29, 2010, about the posting, it was still on the Internet?

A: Yes.

Q: And from that date until August 27, 2010, almost six months later, Mr. Smith did nothing to ensure it was removed from the Internet?

A: No, he did not.

Q: Instead, it was visible to the entire online world for an additional six months?

A: Yes.

Playing this video excerpt in your case-in-chief can establish in the minds of the jury that these are the facts. Any subsequent testimony either from the fictitious reviewer or his business partner will likely be viewed by the jury as an after-the-fact attempt to avoid the truth.

In this particular case, the video excerpt could even be played during plaintiff's opening statement. The Rules allow the video of a party to be used for any purpose

during trial and, assuming it is otherwise admissible testimony, it can be played during opening, which will indelibly establish the fact in the minds of the jury before the opposing counsel has any opportunity to rebut it. Of course, in order to play a video deposition excerpt during opening statements, you must notify the opposing counsel and obtain court permission. Since the Rules do not specifically prohibit this use,[13] many judges will allow counsel to use admissible evidence in their opening statement.

In short, a primary objective to using your opponent's video deposition is to set critical facts you want to establish in the minds of the jury before the other side can explain them away. Seeing the video of someone actually testifying to the facts is so much more powerful than reading a transcript that, with today's media-driven sensibilities, juries tend to accept as true what they see on a video. When you're thinking about your next trial, if there is a critical fact or two that you wish to establish before anything else in the case, consider using the excerpt from the opposing side's video deposition. It is powerful; it is present; it is undeniable.

Objective: To Demonstrate the Opposing Party Is Untrustworthy

How many times have you taken a video deposition and been ecstatic at how untruthful the opposing party appears, only to be disappointed at trial when a different, very articulate and well-burnished party shows up to testify? Whether the witness's bait and switch was intentional or not, the Rules allow trial counsel to let the jury see the opposing party as he really is. So, a second objective of playing discreet clips from a video deposition of a party is to show the jury (and the judge) how the party appeared and behaved when he thought no one was looking. For example, consider a product liability plaintiff being questioned by defense counsel regarding his use of the product in question. During the critical part of the testimony about whether he read and understood the warnings, the plaintiff, after each question, glances sideways at his counsel in an obvious attempt to seek rescue from the tough questions. You notice it; it is readily apparent that the plaintiff is trying to evade the question and, indeed, he looks utterly untruthful in the process. In this circumstance, even the substance of what was said is far less significant than how it was said. You may wish to play this excerpt after you have cross-examined the plaintiff. The jury will see how the witness reacted to the questions the first time he was asked and will infer from the darting eyes and

13. *See, e.g.*, Sadler v. Advanced Bionics, LLC, 2013 U.S. Dist. LEXIS 46637, at *7–9 (W.D. Ky. Apr. 1, 2013); *but see In re* C.R. Bard Inc., 2013 U.S. Dist. LEXIS 90210, at *26–27 (S.D.W.V. June 27, 2013) ("the use of video clips during opening statements is precluded as to all parties, but I will not preclude the parties from summarizing or quoting deposition testimony in their opening statements"); Beem v. Providence Health & Serv., 2012 U.S. Dist. LEXIS 56077, at *7 (E.D. Wash. Apr. 19, 2012) (finding that the court's inherent authority to manage trial proceedings allowed preclusion of video deposition testimony in opening statement despite Rule 32, and finding that video deposition use in opening statement would "unduly emphasize" such testimony).

the uncomfortable body language that he is not being truthful—or at least not candid—regarding the answers. As long as the testimony is not unduly repetitive and you have an articulable basis for saying it is different from the cross, most trial judges will allow a short excerpt to be played. The subliminal message will not be lost on your jury.

Another display of bad behavior is illustrated by the following example. During the deposition of the business partner from the defamatory review case discussed above, plaintiff's counsel confronted him with e-mails written by the review author. In these e-mails, the review author is discussing the victim of his fictitious online reviews, describing him as a "douche bag" and "turd sandwich." While reading the e-mails to himself in his deposition, the business partner smiles, then laughs out loud. This is all caught on the video. The questions and answers that follow set the tone for one of the major themes of the case.

Q: Is there something funny about this e-mail, Mr. Smith?

A: Oh, ah, no, ah, some of the language is. . . .

Q: You're referring to Mr. Jones' reference to my client as a "douche bag" and "turd sandwich?"

A: Um, yes.

Q: Do you find that funny, Mr. Smith?

A: Um. . . .

Q: Is it funny to you, Mr. Smith?

A: It's just the way Mr. Jones talks.

Q: It's the way Mr. Jones talks about my client.

A: Yes.

Q: And he always has.

A: Yes.

Q: And you laughed at that.

A: Yes.

Q: And he said things like that in your presence in the past?

A: He has.

Q: And you laughed at it then, too, didn't you?

A: Um, I guess.

Q: And you wonder why your business partner thought it would be okay to post an online negative review posing as a client of the plaintiff? . . .

In this illustration, what the jury observes speaks volumes about the character of both the defaming reviewer and his business partner. Though their lawyers will have worked very hard to sandpaper them for testimony at trial, the videorecording is already in the can. Playing it for the jury is not unfairly prejudicial because it accurately captures their attitude, and judges will allow it.

Numerous other examples could be found, but the general point is you should be aware when taking the video deposition of your opponent of those moments that display his true character. Sometimes it's as simple as what the party wears to the deposition; other times it's as obvious as the snickering or the eye cutting described above. In any event, be prepared to play for the jury during your case-in-chief clips of testimony that show your opposing party's true colors, rather than the public persona they display in the courtroom.

Objective: Impeach the Party on Critical Issues in the Case

Of course, any witness can be impeached with his or her own deposition testimony. Typically, counsel are prepared to use the transcript for that purpose. However, Rule 32 allows impeachment by replay of the video. The mechanics of impeaching a witness through video deposition testimony are largely the same but require, perhaps, a bit more foresight. First, of course, you need to select a very small handful of critical questions and answers on which you will elicit testimony at trial and will impeach the witness if their answer changes. (Of course, if the witness is the party, those questions and answers can be played in your case-in-chief as substantive evidence regardless of its proper use as impeachment.) But sometimes, it is just as useful to play the video deposition and present it at the time and in the manner of impeachment to be followed by a judicial instruction that it may be considered as substantive evidence. Having identified ahead of time the questions and answers to use for this purpose, trial counsel asks the witness those same questions on cross-examination. If the witness changes the testimony in a material way, the trial lawyer employs the patter of impeachment.

Q: You remember giving a deposition in this case on January 15, 2010?

A: Yes.

Q: You were represented by your lawyer at that deposition?

A: Yes.

Q: Before the deposition you raised your right hand and swore to tell the truth, the whole truth, and nothing but the truth.

A: Yes.

Q: And you did tell the truth, the whole truth, and nothing but the truth at your deposition.

A: Yes.

Q: And you recall that your deposition was recorded on a video?

A: Yes.

Play the video of the relevant question and answer.

Q: And that was your testimony, under oath, recorded on video, on January 15, 2010.

A: Yes.

Why would we use a technical maneuver with potential technical glitches at trial? Because most jurors do not understand what impeachment is, even when presented by the most effective trial lawyers. Rather, when hearing counsel read a transcript, juries think of it as the lawyers talking rather as prior inconsistent testimony of the witness. Confronting a witness with a videorecorded statement he gave under oath drives home the point. All of a sudden the jury understands that the witness has changed his testimony on a critical issue because they have *seen* him testify in a contrary way on video. This visual imagery is highly effective and stays with the jury throughout the case.

The technical mechanics of introducing video excerpts for the purposes of impeachment are not that difficult. Working with your trial support team, you can load the video clips onto a disk and, with few clips identified, easily find and play the one clip you need at the moment you need it.

Objective: To Convey to the Jury the Misbehavior of Opposing Counsel

Shockingly, lawyers misbehave. Even more shockingly, lawyers misbehave on tape. If you have an exceptionally ill-mannered, unethical, or badly behaving counsel on the other side, the video deposition can be your best friend at trial. The lawyer who behaves badly during deposition will often behave well at trial. You want the jury and the judge to have an accurate assessment of the other lawyer. In such a circumstance, if you have an excerpt from the video in which the testimony is relevant and can be played for the jury, and during which, because of its criticality, the opposing counsel has behaved badly, he has done so at his peril. The excerpt can be played for the jury, the testimony is relevant, and the lawyer cannot escape the consequences of his own behavior. The behavior cannot be edited out of the video, and judges will often take some measure of delight seeing such improper behavior coming back to haunt the misbehaving lawyer.

When and How to Play the Excerpt

When and how to most effectively use the video deposition of the opposing party is both a matter of strategy and of knowing your judge. There are numerous

opportunities during the course of the trial for displaying a video deposition to the jury. This final section identifies and briefly discusses some of those opportunities.

During Your Opening Statement

Some judges will allow you to play short excerpts from the video deposition of the opposing party during your opening statement. Certainly there is nothing in the Rules that prohibits such use, and some federal judges have specifically allowed it. When it has been disallowed, it is typically because the evidence itself is inadmissible or due to concerns for managing the efficiency of the trial.

As previously noted, playing the video deposition of the opposing party during your opening statement can establish a fact of critical importance to your case in the minds of a jury before any of the actual testimony occurs. Having established a fact in the jury's perception at the time of the opening statement, it becomes very hard to remove that fact from the jury's consciousness. To be able to use your video excerpt during opening statement, the excerpt must be short, discreet (i.e., self-contained, not requiring a lot of explanatory or rebuttal video), admissible, and important. As in so many trials, however, the rules regarding use of a video deposition are whatever your judge says they are. If you plan to use a video excerpt during your opening statement, it is critical to obtain prior approval from your judge (inevitably over the objection of your opponent). What is fair for the goose, however, is fair for the gander. If you use a video excerpt during your opening statement, expect your opponent to do the same. Accordingly, it is wise to be certain that your excerpts of the opposing party are more devastating or more useful than what your opponent may show of your client.

During Your Case-in-Chief

As previously discussed, the primary opportunity for you to play excerpts from the video deposition of your opponent is during the presentation of your case-in-chief. Doing so, as already noted, is in fact substantive evidence (assuming it is admissible). You may achieve any number of objectives in presenting this evidence. But again, your ability to use this evidence is subject to the approval of your trial judge. Most trial judges will allow you to present such evidence during your case-in-chief, provided you do so in an efficient and fair manner. It is important to have discreet and limited presentation of this evidence, not only so as to curry favor from your judge, but also to avoid the pitfall discussed at the beginning of this chapter—boring your jury. Another opportunity for playing the video during your case-in-chief is to play it during the testimony of your expert witness. For example, in a product liability trial you might play the plaintiff's description of how he or she used the medical device at issue and ask your expert to comment on whether that is even physically/mechanically possible.

During Cross-Examination

The video deposition of your opponent or of any witness can be used during the cross-examination of that witness. In this format, the deposition excerpt is most properly understood as and used for impeachment purposes. However, it can also properly be used during the cross-examination of the opposing party's expert to show that the expert has not considered critical facts or testimony. When used in this fashion, experts can be become flustered and look incredible to the jury. A party observing this often gets equally discombobulated.

During Closing

If you have a critical excerpt you played during the course of this trial, you should replay it during your closing argument. The jury will remember. It is often good to send them to their deliberations with an image in their mind of the opposing party either saying something devastating to their own case or looking like they have been devastated.

Conclusion

The video deposition of the opposing party is one of many weapons in your trial arsenal. It is one of the very reasons you should take a video deposition of your opponent—to use it to your advantage with the jury and the judge. Like any other piece of evidence, when you gather that evidence you should be thinking of its potential use at trial. Thinking ahead will lead to better, crisper questioning during deposition; having a view toward playing the video for your jury will force you to think through how you ask the questions, how you confront the witness with damaging documents, and how you stage and produce the deposition. After all, the deposition is theater too.