DEPOSITIONS AND YOUR DISCOVERY PLAN

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I. Introduction

At trial, jurors receive information from multiple sources, including the judge, lawyers, witnesses, and demonstrative and evidentiary exhibits. Only the court can admit evidence into the judicial record, so we, the attorneys, must take care to observe the basic rules of evidence. Aside from the occasional stipulation, most evidence comes in by way of lay witness testimony or expert opinion testimony.

When a witness is unable to testify in person, a deposition is usually the only practical way to produce that evidence although under the Bearman rule, the discovery deposition of an expert can only be used to contradict or impeach the expert at trial. Regardless, the traditional method of deposing a witness by a court reporter generating a transcript from the attorneys' questions and the witness's answers has limitations.

For example, numerous studies have shown for decades that communication between people is mostly non-verbal. Jurors receive a significant amount of information on an automatic level within seconds of a perceived event. If this event is an uninspired reading of a tedious deposition, the unintended effect may be to put the jurors to sleep.

On the other hand, a properly focused video deposition can have the opposite result. Its effective use can engage jurors, communicate more information to a wider age range, allow information to be retained longer, and elicit a greater emotional response to the testimony.

This presentation will discuss why it's critical to know the procedural and evidentiary rules of interest when taking depositions, how to structure your examination to complement an overall discovery plan, why you should develop special jury instructions early in a case, and whether depositions should be conducted by video. Practical considerations on how best to conduct such depositions will be discussed. And use of video depositions for mediations, focus groups, and trial will be demonstrated.

II. Tennessee and Federal Statutes of Interest

It's critical to know and review the rules for admission of evidence at trial. In other words, learn how to lay the foundation for admissibility of trial evidence. Trial procedure is a matter of judicial discretion subject to the federal and Tennessee rules of evidence and civil procedure. Consider which evidentiary and procedural rules will be in play when you conduct discovery and take a deposition to be used at trial.

A. Evidence Rules

A discussion of evidence rules is beyond the scope of this presentation. But it's necessary for you to consider which evidence and procedural rules allow you to use a deposition at trial. What are you aiming to do with this witness' testimony? For example:

1. TRE 607 – attacking credibility with extrinsic evidence to show witness' bias, interest, corruption, or defect of capacity; prior inconsistent statements and evidence contradicting the witness' testimony.

2. TRE 613 – admissibility of extrinsic evidence of bias, interest, or corruption, prior inconsistent statements, conviction of crime, or defects of capacity after the proponent has first fairly directed the witness' attention to the matter.

3. TRE 803(1.2) – statements which are not hearsay and are offered against a party.

4. TRE 612 – writings to refresh the memory of a testifying witness while on the stand.

5. Fed. Rules of Evidence Rule 613 – admissibility of witness' prior inconsistent statement after witness is given opportunity to explain or deny the statement, and adverse party is given opportunity to examine the witness about the statement.

6. Fed. Rules of Evidence Rule 801(d)(2) – statements that are not hearsay and are those of an opposing party.

B. Procedural Rules

Of course, it's necessary to know the applicable procedural rules, too. Under the federal rules and most state analogs, deposition testimony is admissible at trial if:

- The opposing party was represented or present at the deposition's taking or otherwise had reasonable notice of it.
- It would be admissible under the federal or state rules if the deponent were present and testifying.
- The witness is unavailable.

For example:

1. TRCP 32.01 – any part or all of a deposition, so far as admissible under the Tennessee Rules of Evidence applied as though the witness were then present and testifying, may be used but only against a party who was present or represented or who had reasonable notice of the deposition sent or represented or who had reasonable notice of the deposition.

2. TRCP 32.01(1) – any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

3. TRCP 32.01(2) – an adverse party's deposition testimony may be treated as substantive proof.

4. TRCP 32.01(3) – the deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness is "unavailable" as defined by TRE 804(a).

5. See Fed. Rules of Civil Procedure Rule 32 – Using Depositions in Court Proceedings for similar treatment under the federal rules.

C. Use at Trial

Federal Rule 32(a) has been interpreted by the federal courts to permit the deposition of a party to be used by an adverse party for any legal purpose. *See* 4 Moore's Federal Practice, 2d Ed., 1190, § 26.29. The availability of the witness to testify is immaterial, and it is error to deny the admission of a deposition into evidence on this ground. However, the error is not prejudicial if the deposition contains no information that the witness' live testimony could not supply, or where the substance of the deposition testimony in question is made available to the jury during trial. Most state courts follow this procedural rule.

Frequently in the case of lay witnesses, there is no need to use or play an entire transcript or video deposition. Rather than bore the jury with Q&A's regarding the witness' life history, you should only play those portions of the testimony which (1) sufficiently introduce the witness to the jury and (2) prove an essential element of your case. For expert witnesses, make sure to qualify the specialist, provide jurors with her methodology, and explain in lay terms how the testimony applies to the facts and legal principles of the case.

Prior to trial, designate the pages and lines of transcript testimony and include the time frames if it's a video deposition. Send the page and line designations to the opposing counsel. If counsel cannot agree to edits before trial, provoke a hearing in advance of trial so the judge can rule on which portions are to be admitted.

Otherwise, the deposition's editing must take place during a break in the trial which places extra work and stress on all involved.

III. Define Goals for the Deposition

A. Have a Case Discovery Plan

Initial discovery usually includes interrogatories, requests for production, and requests for admissions. These tools, along with the initial investigation and the Petition/Complaint and Answer, provide insight into the theories of recovery and the defenses to the case. Draft a jury verdict form and basic jury instructions on the significant, special legal issues. With this information in hand, you can plan how to sequence and take depositions for the case.

There is nothing wrong with asking standard questions of a witness along the lines of who, what, when, where, and how. Often, this information is necessary to provide context. You certainly want to ask these types of questions to gather the background information for your opening statement, which should be delivered in a present tense narrative form. But this kind of checklist is not enough. To take exceptional depositions you must prove your causes of action, defeat the defendant's affirmative defenses, and expose or defeat the juror biases which exist in the case.

Do not try to analyze a deposition approach in your head. After organizing the case information referenced above and thinking through the issues, outline in writing the depositions you must take to prepare the case for motion practice and trial. What are the critical issues that must be proved or refuted for your client to be successful? And remember, it is more effective if the opposing party, or a witness who is identified with that party, admits or proves a case fact in your favor.

For example, determine which witnesses can testify about:

- Facts that will support the basis for your expert's conclusions.
- Facts that allow you to file a dispositive motion.
- Facts that allow you to defeat a dispositive motion.
- Facts that allow you to file or defeat a motion in limine or *Daubert* motion.
- Facts that show an affirmative defense is baseless.
- Facts that will support your client's harms and losses (for general and special damages).
- Facts that address, in a positive way for your client, or a negative way for the opposing party, the juror biases below.

Be proactive, not reactive, with your discovery plan. Find and develop testimony that will help you win the case on liability, causation, and damages. For

instance, in cases not involving a vehicular collision, use the Friedman/Malone Rules of the Road approach to develop the fact pattern. And even when you are defending a deposition, question the deponent about facts that will help to prove your case or help to defeat any affirmative defenses.

B. Juror Biases

For well over a decade research, for example, The Jury Bias Model, as investigated by Greg Cusimano and David Wenner, has shown jurors hold important beliefs that may affect every case. These attitudes are present in any case tried anywhere in the United States. Psychologists refer to these beliefs as biases. These beliefs/biases will, almost always, emerge in discussions about the facts of a case no matter what type of case you are trying. The biases you will see in your case are:

1. Accountability/personal responsibility
2. Anti-plaintiff
3. Suspicion
4. Victimization
5. Stuff happens

When conducting your deposition, take care to address these biases to the extent possible with any witness. Obviously, not every witness can testify about each one. But many times, you can ask questions in a deposition about one or more of these biases even when the deposition was noticed for another purpose. For example, a co-worker of the plaintiff may testify he personally observed her strong work ethic or caring nature. Or a supervisor may testify how the plaintiff always followed safety rules and had no reprimands in his file for violating the company's safety procedures.

C. Moral Foundations

Social psychologists have researched and refined a set of positive and negative moral foundations that apply across the human experience. It's helpful to point out the positive aspects of the foundations in depositions of your party and witnesses and develop the negative points in the opposing party and its witnesses.

For instance, are there positive moral foundations of your witness(es) you can emphasize in deposition testimony - even from an opposing witness? Or perhaps you can develop testimony that establishes a negative moral foundation of an opponent's witness(es).

The positive/negative moral foundations are:

1. Care/harm
2. Fairness/cheating
3. Loyalty/betrayal
4. Authority/subversion
5. Sanctity/degradation

Of interest, those who consider themselves liberal give more importance to the first two foundations in the list. Those who identify as conservative are more aligned with the last three foundations. Keep this in mind when developing your discovery plan.

D. Write It Down

To repeat, to stay on task and work efficiently, you must put your discovery plan in writing. The discovery plan doesn't need to be complicated but it must reflect your critical thinking about the case elements.

For example, identify the facts you must prove to win at trial or to defeat motion practice that will be filed against you. Think about how you can prove those facts, i.e., witnesses and documents. What will be a Defendant's likely response, and how can you counter it?

Create a single page chart for each of your important depositions that contains these important points. Don't let a witness' coached testimony lead you off track. The one pager will help you to maintain focus during the hurly burly of contested deposition testimony.

IV. Practice Tips

- When playing a video deposition at trial, it's usually better not to have the transcript testimony scrolling across the bottom of the video. Jurors' eyes will be drawn to the scrolling text, and they will miss the key benefit of the video—the deponent's body language. Of course, if the accent or pronunciation of the deponent is difficult to understand, a transcript depiction may be advisable.

- As a precaution, introduce into evidence both the video and the written transcript in case of appellate review limitation of the video.

- If you make video depositions a common element of your practice, consider investing in trial presentation software – for example, TrialPad, Sanction, TrialDirector, and ExhibitView - that allows you to easily create and arrange clips of the video deposition. This will be important if the court sustains

opposing counsel's objections to certain clips of the deposition which are different from your proposed page and line designations.

- It's unfortunate but sometimes the court must intervene when there's serious deposition misconduct, including:

  (1) Excessive use of "form" objections;
  (2) Numerous attempts to coach witnesses; and
  (3) Ubiquitous interruptions and attempts to clarify questions posed by the examiner.

  When it happens, give serious thought to filing a protective order if the opposing counsel won't stop the obstructive tactics. Regardless, it's critical for you to ask a clear question of the witness and obtain a definitive response.