Using deposition testimony at trial

Deposition testimony may be used effectively at trial if you know all the rules for getting it admitted

By Brian J. Malloy

You have some dynamite stuff on a video deposition and want to play it first thing in trial. No problem, right? Let's make sure you can do just that.

First you have to accept that historically courts have a strong preference for live testimony at trial. But what about the witness who says they simply will not be able to be at trial, or has conflicting scheduling issues? In today's world of busy people with conflicting schedules you do not want to incur steep charges while a witness waits to be called before the trial judge suddenly announces at 2:30 p.m. "Oh by the way, we have to end early today and will have no more witnesses." So to solve this potential problem, you need to make sure the deposition is ready to go, objections are resolved, and it is admissible.

Deposition testimony may be used at trial not only to impeach a witness on the stand, but also as substantive evidence to support your case. Different standards apply at trial for using deposition testimony from an adverse party as opposed to a non-party witness. This article will discuss the use of both party and non-party deposition testimony at trial under California and federal law, with a focus on common methods presented by California Code of Civil Procedure (hereafter CCP) section 2025.620 and Federal Rule of Civil Procedure (FRCP) 32.

CCP § 2025.620 states:

> At the trial or any other hearing in the action, any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition, or who had due notice of the deposition and did not serve a valid objection under Section 2025.410, so far as admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness, in accordance with" a series of provisions.

FRCP 32 similarly begins with:

> At a hearing or trial, all or part of a deposition may be used against a party on these conditions: (A) the party was present or represented at the taking of the deposition or had reasonable notice of it; (B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and (C) the use is allowed by Rule 32(a)(2) through (8).

(FRCP 32(a)(1).)

Use of an adverse party's deposition

A party's deposition may be used by an adverse party for *any purpose*. (CCP § 2025.620(b).) Any purpose.

It is not limited to impeachment, but may also be used for substantive evidence. It also does not matter whether the adverse party will be testifying at trial.

CCP, § 2025.620(b) states in full:

> An adverse party may use for any purpose, a deposition of a party to the action, or of anyone who at the time of taking the deposition was an officer, director, managing agent, employee, agent, or designee under Section 2025.230 of a party. It is not ground for objection to the use of a deposition of a party under this subdivision by an adverse party that the deponent is available to testify, has testified, or will testify at the trial or other hearing.

This provision applies to parties and "party-affiliated" witnesses. Regarding a "party-affiliated" witness, at the time of the deposition the deponent must have been an officer, director, managing agent, employee, agent or person most qualified designee of a party under CCP § 2025.230 at the time of the deposition. If the deponent later leaves employment, the video deposition testimony is still admissible.

Under FRCP 32(a)(3), 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" FRCP 30(b)(6).[1] Similar to California law, so long as the deponent was an officer, director, managing agent, or FRCP 30(b)(6) designee at the time of the deposition, the testimony will be considered that of a party-affiliated deponent even if the person later leaves employment with the entity.

Use of a non-party's deposition for impeachment

A non-party's deposition may be used to impeach the non-party who is testifying at trial. (CCP § 2025.620(a)) ("Any party may use a deposition for the purpose of contradicting or impeaching the testimony of the deponent as a witness, or for any other purpose permitted by the Evidence Code."). The same is true under the federal rules. FRCP 32(a)(2) ("Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence."). If the non-party witness has provided contradictory testimony at trial, you can simply read the impeaching deposition testimony.

Other ways to substantively use a non-party's (and party's) deposition

Whie many different ways to substantively use deposition testimony as

evidence at trial are outlined in CCP § 2025.620 and FRCP 32, below are highlights of some common methods.

Use of videotaped depositions of doctors and experts

CCP § 2025.620(d) governs the use of videotaped depositions of treating physicians and expert witnesses. This provision states in full:

> 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.

This is one of the most effective ways to make the best use of a doctor's time. Many doctors are more receptive when they know the video is all they have to do. But remember when taking the deposition, it is the direct testimony to be played to the jury and be sure to use appropriate demonstrative aids.

An issue arose in a trial Tom Brandi and I had between this subsection and CCP § 2025.620(b) governing the admissibility of party or party-affiliated deposition testimony. We wanted to play portions of a video deposition of a former employee of the defendant, who was not designated as a person most qualified under CCP § 2025.230. At the time of his deposition, he was a former employee, making the testimony not necessarily admissible under CCP § 2025.620(b). (*Haluck v. Ricoh Electronics, Inc.* (2007) 60 151 Cal.App.4th 994, 1004-1005) ("Deposition testimony from non-party former employee should not have been admitted during employment discrimination case, where employee was not employed by employer at the time her deposition was taken, and the record did not reflect any showing of employee's unavailability."). However, because the former employee was also disclosed as an expert witness, we were allowed to play his video deposition under CCP § 2025.620(d).

There are important procedural requirements, though, that must be followed in order to use a videotaped deposition of a treating physician or expert witnesses. The deposition notice must reserve the right to use the deposition at trial. (CCP, § 2025.620(d).) The deposition notice must also state that it will be videotaped. (CCP, § 2025.220.) Finally, the party must comply with CCP § 2025.340(m) governing notice, objection and rulings regarding the use of the deposition excerpts at trial.[2]

Deponent's residence from the courthouse

Under California law, a party may use for any purpose the deposition of a deponent who "resides more than 150 miles from the place of the trial or other hearing." (CCP § 2025.620(c)(1).) This can even include a deposition given by a party or party-affiliated deponent.

An issue here is how do you calculate 150 miles? Is the calculation based on a straight line "as the crow flies," or based on travel distance? Tom Brandi and I had this exact issue arise in another trial last year. Applying the straight line test, the witness, who lived in a rural part of California, was less than 150 miles from the courthouse, but applying travel distance was over 150 miles. Interestingly, there is no California authority directly on point regarding whether the 150 miles requirement is calculated using the straight line or travel method.

Federal law may provide guidance on this issue. The Federal Rules of Civil Procedure allow for the use of a deposition if the proponent shows "that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition . . . ." (FRCP 32(a)(4)(B).

Under the federal rules, the modern trend is to apply the straight line rule, and in particular under the subpoena requirements of Rule 45 of the Federal Rules of Civil Procedure. (See *Educ., LLC v. Nova Grp., Inc.*, 2013 WL 57892, at *2 (S.D.N.Y. 2013) (citing cases) ("[T]he 100 mile radius in Rule 45 is measured in a straight line, i.e., 'as the crow flies' and not by the usual driving route."); *Premier Election Solutions, Inc. v. Systest Labs Inc.*, 2009 WL 3075597 (D.Colo. 2009); *Schwartz v. Marriott Hotel Servs., Inc.* (*E.D.N.Y. 2002*) 186 F.Supp.2d 245, 251 ("The 100 mile travel rule set forth in Rule 45(b)(2) is measured from a person's residence, workplace or place in which he regularly conducts business. The method of measurement is by a straight line rather than the usual 'travel route method.'" (quoting *Hill v. Equitable Bank, Nat'l Ass'n,* 115 F.R.D. 184, 186 (D.Del.1987)); *James v. Runyon,* 1993 WL 173468, at *2 (N.D.N.Y. May 17, 1993) ("The '100 mile' provision in the Federal Rules is measured along a straight line on a map rather than along the ordinary, usual and shortest route of public travel." (citing cases)).

One major reason for this bright line test is to avoid controversies over whether the "travel miles" is or is not more than 150. As explained by the District of Idaho:

> The modern trend is to measure the distance in a straight line so that the area in which service can be made can be indicated by a circle with the place of trial as its center and the 100 miles represented as the circle's radius. Measurement in this manner has the additional advantage of eliminating controversy as to what is the ordinary means of public travel and the usual route to the place of service.

(*Weerheim v. J.R. Simplot Co.*, 2007 WL 2121925, at *1 (D.Id. 2007) (quoting 4B Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure, § 1127 at p. 260, n. 1 (2002) (commentary regarding service under Rule 4)).

In our case, the judge ultimately allowed the deposition testimony based on another ground, but this issue of distance from the courthouse should be kept in mind.

Unavailable witness

CCP § 2025.620(c)(2) lists a number of scenarios where deposition testimony may be used for any purpose if the witness is "unavailable," including that the deponent is precluded based on a privilege, disqualified, dead, has a physical or mental illness or infirmity, or is absent from the trial and the court cannot compel the deponent's attendance by its process. (CCP, § 2025.620(c)(2)(A), (B), (C) and (D).

In addition to these situations, deposition testimony may be used for any purpose where the deponent is "[a]bsent from the trial or other hearing and the proponent of the deposition has exercised reasonable diligence but has been unable to procure the deponent's attendance by the court's process." (CCP § 2025.620(c)(2)(E).)

Note that this is a different avenue for admissibility than showing a particular distance from the courthouse. If a proponent establishes that the deponent resides more than 150 miles from the court, then the deposition testimony should be admissible (subject to satisfying other admissibility standards) even if the deponent is available to testify. Under this separate section, however, a deponent may reside within 150 miles but if the proponent demonstrates "unavailability," then the testimony may still be used.

The federal rules have similar provisions for substantive use of "unavailable" deponents, including that the witness is dead or cannot testify because of age, illness, infirmity or imprisonment. (FRCP 32(a)(4)(A), (C).) In addition, similar to CCP § 2025.620(c)(2)(E), deposition testimony may be used where "the party offering the deposition could not procure the witness's attendance by subpoena . . . ." (FRCP 32(a)(4)(D).) Although this rule does not use the word "reasonable diligence," courts have required the proponent show the exercise of reasonable diligence to procure the witness. (See, e.g., *Thomas v. Cook Cnty. Sheriff's Dep't.* (7th Cir. 2010) 604 F.3d 293, 308.

Catch-all "exceptional circumstance" provision

When no other provision is available, CCP, § 2025.620(c)(3) provides a "catch all" exception for the use of a non-party's deposition for any purpose: "Exceptional circumstances exist that make it desirable to allow the use of any deposition in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court."

For example, in another case Tom Brandi and I recently tried, we had non-videoed deposition testimony from doctors who had volunteered their time at a free clinic. Because the depositions were noticed by the defendant and not videotaped, CCP § 2025.620(d) did not apply. However, the testimony was very short, the doctors were all non paid clinical volunteers and we argued it would be a substantial burden to force them to come to court to provide this relatively short testimony.

The federal rules have a similar "exceptional circumstance" provision. Under FRCP 32(a)(4)(E), following a noticed motion, the use of a deposition testimony may be permitted when "exceptional circumstances make it desirable – in the interest of justice and with due regard to the importance of live testimony in open court – to permit the deposition to be used."

For example, based on this section the Sixth Circuit allowed the plaintiff to continue to play a videotaped deposition of a witness who was unavailable but became available during the trial, because the trial testimony would be substantially the same as the deposition testimony and to require the witness to come to trial would delay proceedings. (*Bickel v. Korean Air Lines Co., Ltd.* (6th Cir. 1996) 96 F.3d 151, 154-155.)

Final considerations

• Keep in mind that it is the proponent of use of the deposition testimony who bears the burden of establishing to the court that the deposition testimony satisfies one (or more) of these methods.

• Both California and federal law follow the rule of completeness allowing any other party to introduce the transcript of a deposition introduced by another party. (CCP § 2025.620(e) ("a party may offer in evidence all or any part of a deposition, and if the party introduces only part of the deposition, any other party may introduce any other parts that are relevant to the parts introduced."); FRCP 32(a)(6) ("If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.")

• Under both California and the federal rules, a substitution of a party does not affect the use of the prior party's deposition testimony. (CCP § 2025.620(f); FRCP 32(a)(7).)

• For presentation purposes, a videotaped deposition is far superior than reading transcripts. Keep in mind if you are going to videotape the deposition, notice of intent to videotape needs to be in the deposition notice. (CCP § 2025.220(a)(5); FRCP 30(b)(3).)

• Finally, the methods discussed in this article for using deposition testimony at trial as substantive evidence are of course subject to the rules of evidence set forth in the California Evidence Code and the Federal Rules of Evidence. (CCP § 2025.620; FRCP 32(a)(1)(B).) Simply because certain testimony may come from a deponent who resides more than 150 miles from the courthouse, for example, does not make the entire transcript admissible. The rules of evidence (i.e., relevancy, hearsay, etc.) will still come into play before the trier of fact is allowed to consider the testimony as substantive evidence. Lastly, remember, a form objection is waived if not timely made at the deposition. (CCP § 2025.460(b).)

Conclusion

This article provides an overview of the common types of usage of deposition testimony in trial, both as to party and non-party witnesses. Paying careful attention to the requirements of these methods may allow you to admit – or keep out – deposition testimony at trial.


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Endnotes:

[1] FRCP 30(b)(6) provides in full: "*Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules." While FRPC 30(b)(6) does not use the phrase "person most qualified," the designee must be knowledgeable of the "matters for examination" and the testimony binds the organization.

[2] CCP § 2025.340(m) states in full: "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. That notice shall be given within sufficient time for objections to be made and ruled on by the judge to whom the case is assigned for trial or hearing, and for any editing of the recording. Objections to all or part of the deposition shall be made in writing. The court may permit further designations of testimony and objections as justice may require. With respect to those portions of an audio or video record of deposition testimony that are not designated by any party or that are ruled to be objectionable, the court may order that the party offering the recording of the deposition at the trial or hearing suppress those portions, or that an edited version of the deposition recording be prepared for use at the trial or hearing. The original audio or video record of the deposition shall be preserved unaltered. If no stenographic record of the deposition testimony has previously been made, the party offering an audio or video recording of that testimony under section 2025.620 shall accompany that offer with a stenographic transcript prepared from that recording."