



Practical Considerations for Presenting Deposition Testimony at Trial

By Roy Alan Cohen and Rahil Darbar

The French Philosopher Voltaire once said that “the secret of being boring is to say everything.” Often, lawyers spend years on discovery and trial preparation, and then must decide how best to present the evidence, make their case, and keep jurors interested and engaged. Trial lawyers who fail to heed Voltaire’s advice do so at their peril. The practical tips in this article will assist trial lawyers in making strategic decisions on how best to present deposition testimony to a jury.

Jurors' expectations of a trial are often molded by what they see in movies and on television. Many picture compelling arguments and opening statements, dramatic cross-examinations, courtroom theatrics, and impressive witness testimony. Many jurors are then surprised and disappointed when forced to sit through a cumbersome and lengthy selection process, and substantial down time that comes with either *in limine* motions, early evidence challenges, and delays associated with witness presentations.

Those who deal with trial practice know full well that much of what happens can be tedious and uninteresting. Aside from lawyer commentary in opening statements or closing arguments, the civil trial is all about the presentation of facts for the jury's consumption. Those facts are presented through live fact and expert witness testimony, recorded video testimony, reading deposition transcripts, or introducing documentary evidence. Unfortunately, anything other than live testimony lacks the magic that jurors expect from their favorite Netflix legal drama.

This dose of reality can be disconcerting and result in juror disengagement, particularly when deposition testimony is presented either by way of video record or read-in testimony. Juror disinterestedness is even more a risk during the pandemic as courts mull virtual tri-

als and remote testimony. Keeping jurors invested is an art form and the development and presentation of engaging deposition testimony will play a critical role in a trial lawyer's success. This article explores practical tips for litigators and trial lawyers.

It is essential that trial lawyers consider and follow a strategy for conducting depositions as if that testimony will be the only opportunity to obtain and present certain essential facts to prove that part of the case.

1. Strategy for Taking Depositions—Think Trial at the Outset

Most lawyers view deposition testimony as simply one small part of the search for facts in the discovery process rather than the actual testimony presented to the jury. A deposition may be the only evidence a jury will hear from a witness during trial. Testimony taken from out-of-state witnesses are essentially trial depositions because most are not within the subpoena power of New Jersey courts

and cannot be compelled to appear.¹ Under the New Jersey Court Rules, the deposition of a witness may be used by any party for any purpose if the court finds that the appearance of the witness cannot be obtained because of death or other inability to attend or testify. The inability to testify includes such factors as age, illness, infirmity, imprisonment, or if the witness is out-of-state and the party attempting to introduce the testimony cannot subpoena the individual.² Whichever way this happens, the trial lawyer must rely on deposition testimony, the authentication of documents at the deposition, and, perhaps equally important, the reliability and admissibility of those documents by the court.

It is essential that trial lawyers consider and follow a strategy for conducting depositions as if that testimony will be the only opportunity to obtain and present certain essential facts to prove that part of the case. Failing to conduct a direct or cross examination the same way one would for trial can be fatal to admissibility at the time of trial. Perhaps more important, not planning out how the substance will come across may just make the testimony so dull and uninteresting as to actually negate its value. Good trial lawyers never make this mistake.

2. Live or Video—That is the Question

Most lawyers agree that live in-person testimony is preferred over canned testimony, and the video recorded testimony is better than a paper transcript. Why? Because reading testimony is just plain dull. Any trial lawyer who has suffered through page-line designations and then had to read the testimony themselves or with a partner, and any juror who has stayed awake long enough to listen, will confirm just how deathly boring it is. Video testimony is more engaging. However, every rule has an exception, and here it depends on the witness. If the person to be deposed provides necessary testimony, but will make a poor witness, then the paper



ROY ALAN COHEN is a principal in the Litigation Group at Porzio, Bromberg & Newman, P.C. in Morristown. He is a certified civil trial attorney, Past Chair of the American Bar Association Tort Trial & Insurance Practice Section, and a frequent author and lecturer on litigation and trial practice.



RAHIL DARBAR is a counsel in the Litigation Group at Porzio, Bromberg & Newman, P.C. in Morristown. He is a member of the Justice Morris Pashman Inn of Court and Immediate Past President of the South Asian Bar Association of New Jersey. He has been recognized in *The Best Lawyers in America*, "Ones to Watch" – *Commercial Litigation 2021* and a recipient of the NJSBA's Professional Lawyer of the Year Award for 2020.

transcript may be the best way to go.

If the witness is conducive to visual presentation, then there should be no debate over the decision to preserve testimony using video record, which has become so much more popular and accepted over the last year. Lawyers can review the transcript and video and decide whether the testimony is compelling enough to present to the jury on tape or simply read into the record. Either way, whether testimony is presented live or by way of video testimony through direct or cross-examination, the same preparation is essential to success.

Even more care needs to be taken with the remote use of documents as exhibits during these depositions. The only thing less interesting than remote witness testimony is remote witness testimony about documents. Using split screen computer graphics that matches testimony to highlighted portions of a document, and pointedly examining the witness on key phrases can be extraordinarily effective. Jurors will hang on the words of witnesses who tell the story using visual confirmation of that testimony, and the planning and associated expense will pay dividends.

3. Deposition Readings—Less is More

Two rules—when reading testimony, keep it simple, and less is more. No one loves a lawyer or a client who talks too much or is repetitive. Planning witness questions and answers with the ultimate trial in mind will make transcript readings most useful to jurors. If concise questions and answers are not possible in the first round of deposition testimony, then practitioners should think about a summary set of questions at the end of the deposition during cross-examination. Much like television interviews, the objective should always be to obtain relevant soundbites that make the point in a meaningful way.

Streamlining deposition readings in this way will also make trial preparation

easier. Remember that trial counsel must confer and exchange relevant pre-trial information with adversaries seven days before trial, including a list of witnesses and the proposed deposition readings by page and line number.³ By the time that both parties have designated testi-

Knowledgeable, charismatic and engaging witnesses usually come across well in person, can command the room when speaking, and likely tip the scale, particularly where a battle of the experts makes the difference between a win and a loss.

mony, and the judge has ruled on the admissibility of that testimony, the transcript process can be cumbersome. Avoiding this long, drawn out, exhausting process for the judge and jurors by capturing the testimony in short, concise questions and answers is critical. With testimony provided in this way, trial judges will likely grant a motion to strike the longer duplicative testimony often offered by an adversary to distract from the critical evidence.

4. Presenting Experts by Video Deposition at Trial—The Good, the Bad, and the Ugly

Often, experts are essential to proving and defending many aspects of technical, scientific, or medical-related claims. The New Jersey Rules of Evidence permit a witness to testify as an expert where scientific, technical, or other specialized knowledge possessed by the expert will assist the trier of fact to understand the

evidence or to determine a fact in issue.⁴ Of course, to be admitted, the subject matter of the expert must be qualified and the expert's testimony must be outside the knowledge of the average juror and be reliable.⁵

For many years, the challenge for trial lawyers has been whether to bring experts to testify live or offer preserved testimony by way of deposition. Most times, availability, scheduling, sequencing, and expense are the determinative factors. Often, testimony must be taken out of logical sequence because of the expert's schedule, and at other times, the expert's testimony is delayed because of courtroom issues or other witnesses' schedules. Live testimony is occasionally aborted and expert depositions need to be taken at the last minute during trial and presented the following day. This adds complexity to the presentation of a case by both sides.

Having an expert witness testify at trial has definite advantages. There is no question that a live witness has a better opportunity to bond with the jury, be interactive in terms of questioning, and addressing substantive challenges as they arise. There are more effective teaching moments, and, perhaps most important, opportunities to correct course with the inevitable changes that come with the dynamics of a trial and responding to opinions expressed by other experts. Knowledgeable, charismatic and engaging witnesses usually come across well in person, can command the room when speaking, and likely tip the scale, particularly where a battle of the experts makes the difference between a win and a loss.

Those same experts can also carry the day and command the room during video depositions, but an equal if not greater amount of time must be spent in preparation, both before and at the deposition. Since the deposition will be the only testimony that the jury will hear and there is no opportunity to correct that testimony, it must anticipate all

objections and be cleanly taken to avoid any motions to strike based on qualifications and substance. First, the expert's report must be comprehensive, factually supported, and reach adequately founded conclusions to avoid any challenges. Second, the testimony must be structured to anticipate all possible permutations associated with how the expert evidence will come out from the other side. Third, demonstrative evidence must be carefully considered with objections resolved before the testimony, to avoid evidentiary objections that can either limit or gut the transcript. Fourth, developing a defined plan for testimony is essential to make sure that all points are covered, but be careful about creating an obvious script.

New Jersey Court Rules do allow parties to preserve the testimony of an expert by way of deposition, and then the use of that expert live at trial. Courts deem it unfair to preclude the preferable live testimony if the expert is available.⁶ This provides an opportunity to review and assess whether the expert's testimony would be more effective in-person or as it appears on video,

and to flush out an adversary's cross-examination and objections. Where such a deposition is taken for use in lieu of live testimony, all evidentiary objections must be made during the deposition, and the parties must move on those objections within 45 days of the deposition's completion.⁷ Likewise, the audio and video must be edited under the court's rulings. If the lawyer then has the expert testify live, direct cross-examination will need to be retooled, particularly if there are questions about keeping the expert testimony limited to the subject matter and the four corners of the expert report. This can be a very effective strategy and there is a significant expense associated with presenting the expert twice, but may be worthwhile in the right case.

5. Closing Thoughts

Most successful trial lawyers are storytellers who use witness testimony to bring jurors along for the ride. In the end, it is those witnesses who tell the story, who allow jurors to match facts with law, and who convince jurors that one side is more compelling than the

other. Those conclusions are compelled by the impact of the key fact and expert witnesses presented by each side. Whether those witnesses are presented live or by way of deposition testimony, there are certain essentials required to keep the jury engaged in the story and pave the way to a successful result. ☞

Endnotes

1. New Jersey Court Rule 4:16-1(c). This rule requires that the party against whom the deposition testimony is being used had notice of the deposition and that the absence of the witness was not procured or caused by the offering party.
2. *Id.*
3. New Jersey Court Rule 4:25-7(b).
4. New Jersey Rules of Evidence 702.
5. *Hisenaj v. Kuehner*, 194 N.J. 6, 15 (2008).
6. Pressler & Verniero, Current N.J. Court Rules, cmt. 6 on R. 4:14-9 (2021).
7. New Jersey Court Rule 4:14-9(f).