

The Ghost of Depositions Past

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Deposition testimony plays a powerful role in case resolution. Themes are developed, admissions are gathered, and claims and defenses are vetted. Depositions are also a great opportunity to size up how a witness will “play” with a fact finder later in the case. At some point in the case, decisions have to be made concerning the best way to maximize the impact of a deposition for later use. Often, this involves a decision with the client on what strategic advantages can be gained by videotaping witness testimony. Some lawyers hold the view that every deposition of every witness in the case should be videotaped. I do not hold that view. There are some circumstances in which it is better to have a cold record of the testimony instead of capturing certain aspects of the witness that a videotape would record. For example, if you are deposing a fact witness who is thought to be hostile to your client’s position, and they are not going to be within the subpoena power of the court at the time of trial, you have to consider whether you want the other side to have the benefit of video available to use at trial – assuming they do not intend to video the testimony on their own accord. Similarly, if you are deposing a witness who is expected to have emotional testimony, such as a grieving family member, it is often better to preserve the encounter through the black and white letters on a page. That said, there are times when confronting a witness with a video of their performance during a discovery deposition can create killer moments in a case. Sometimes, just the fear of that confrontation can be enough to do the trick, as I experienced in a case I tried several years ago. I don’t remember how it came to pass that I was going to take the deposition of the opposition’s sole expert in the case, but I pulled that duty. The expert was a seasoned professional who had been hired to give an opinion as to whether my client acted in a commercially reasonable manner on a central issue in the case. We elected to videotape the deposition so the encounter would be preserved for trial, which was becoming more likely as the case dragged on. The deposition started like any other, and the expert seemed comfortable with the process. She was professional and put together. Not long after, though, her utter lack of preparation for the deposition started to show. As the questions got harder, she became more uncomfortable. She was “winging it,” and it showed. All the while, the video was rolling. The deposition went a full day. By the end, the expert was mentally and physically exhausted by the experience. I left the deposition feeling good about the record and the cross exam we would have available should the case go to trial. I felt even better about things after I had the opportunity to read the transcript and sync the testimony with the video. Those who’ve done their share of depositions, particularly those that are long and involve complex

issues, know that with so much information swirling around, it is hard to fully appreciate the nuances of testimony or how a witness is performing when you are in the heat of the moment or going on hour number seven of testimony. Video, however, catches it all. As we evaluated our trial strategy, we decided that the expert would have such a terrible time on the stand we would not designate a counter expert. We would, in the words of my trial partner, go “naked” and rely solely on the deposition testimony we had to pick the expert apart at trial. I again pulled duty on examining this expert at trial. My approach, however, was rather unconventional—or so I was told after it was over. I started my cross by asking the witness if she recalled the video deposition I had taken several months prior. She did. I asked her if she remembered she had sworn to tell the truth. She did. I asked the technical assistant we had hired to put up the video screen with the expert’s video deposition on it and hit pause. He did. Next I asked the expert to confirm that if she was unsure about any of her answers to questions, we could play the video of her testifying under oath at her deposition to help her remember what she swore to at that time. She agreed. At this point, the impeachment table was set, before I asked my first substantive question. On multiple occasions during the exam, the witness would stall on key, critical issues as she tried to think of a way around the answer she knew she had to give, but did not want to give. Other times, she would try to prop up her opinions with the support she was lacking at the time of her deposition. Each time this happened, however, I would ask the expert if she wanted me to play her video deposition to help refresh her recollection of her sworn answer in the deposition. Each time, she declined the offer and instead agreed with the point established by my question. By the time the expert left the stand, she was more shaken than she had been at the conclusion of our first encounter. The only notes my trial partner took of the entire cross exam said simply “She’s gonna cry” with a time stamp of the moment when the expert nearly broke into tears. We won that case. In the judge’s written order, she found the expert was so lacking in credibility, she gave no weight to any of her trial testimony. All of this, and I never played the first second of the video deposition. The ghost of depositions past was enough to do the trick. **Republished**

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Authored By



Kevin P. McCoy

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