Presenting Depositions

By all rights it should have been fascinating. One of the nation's most respected military leaders was actually suing a major television network for defamation. A federal district court in New York was trying the war in Vietnam in *Westmoreland v. CBS*.

Judge Pierre Leval, aware that the issues were complex, had imposed thoughtful time limits on each side to keep the case from getting out of hand. And in an innovative move, he gave the lawyers the right to make periodic statements to the jury to help them keep track of the proceedings.

Yet none of it was a match for one of the most potent forces of boredom in modern civilization. Whenever the lawyers announced another deposition—whether it was written or on videotape—there would be audible groans from the jury.

The lesson of the *Westmoreland* case is simple. All other things being equal, live witnesses are more interesting than depositions. But there is another lesson that is not quite so simple. All other things are not equal.

The question is how to present depositions. The place to begin is the changing role of deposition practice in modern litigation.

Depositions started as a way to preserve the testimony of witnesses who would not be able to attend trial—because they were gravely ill, dying, or outside the subpoena power of the court. But then the dream of academics and law reformers for surprise-free trials changed the way we think about depositions. Instead of only being able to take depositions on court order for good cause, the rules were changed so that virtually any witness's deposition could

be taken as a matter of right. What began as a way of preserving testimony became a means of gathering information.

The result is that most depositions are not aimed at the courtroom, but at painstakingly gathering facts or laboriously containing a witness. We have moved so far from the original purpose of depositions that when one is actually used in court, we are likely to make a bad job of it.

Meanwhile, it has become easier to get depositions admitted in evidence. At one time a deposition was admissible as a substitute for live testimony only when the witness was actually unavailable. But the practice in most courts (whatever the words of the rule) is becoming convenience instead of necessity, especially with expert witnesses.

That means you often can choose whether to present a deposition instead of a live witness. And despite the *Westmoreland* case, there are times when a deposition is a better choice.

Unattractive Witnesses

Unfortunately, some people make a better impression on paper than they do in person. Serious problems with language, demeanor, or appearance may be reason enough to prefer a deposition over live testimony. It is what Tom Heffernan of Cleveland calls the "Ode to a Grecian Urn" theory of witness credibility: "Beauty is truth; truth, beauty."

Heffernan says that attractive, well-dressed, and groomed people are more likely to be believed than are unattractive people. Once, when Heffernan was taking the deposition of a particularly disagreeable doctor, he was struck by how much better it would be if the witness looked and acted like the court reporter, who was pleasant and attractive. That gave him an idea.

At trial he used the deposition instead of the doctor, saying, "Your Honor, at this time plaintiff would like to introduce the deposition of Dr. Marcia Williams (not her real name), and is asking the very court reporter who wrote down her words to take the witness stand and read her testimony to the jury."

Appearance is not all there is to it. Besides looking for an "affidavit" face, you should choose someone who is a good reader, says Bill Colson of Miami. And reading is an art. Sometimes, Colson warns, good speakers are not good readers. The only way to tell is to practice before trial. In fact, the ability to read aloud is so

crucial that some lawyers entrust the job only to professionals, like actors or radio and television announcers.

Virtually everyone agrees that the best way to make a deposition transcript come alive is for you to deliver the questions and let someone else answer from the witness stand. Most judges are happy to cooperate, figuring that what helps keep the jury awake ultimately aids the cause of justice. But one misguided judge in Cleveland did not agree. One of the rules for his courtroom specifically forbade using "voice inflection" in reading deposition—a rule that was literally incapable of being obeyed unless the reading was done by a computer.

Timing is another reason why you might want to use a deposition instead of a live witness. A number of good trial lawyers like to have a deposition on hold in case a star witness is late or they want to move a crucial direct examination to the next morning when the jury is fresh.

Video Depositions

What about video depositions? Ask ten lawyers who have used them, and nine will express disappointment. There are reasons for that. Tom Murray of Sandusky, Ohio, is one of the pioneers of videotaped depositions. Murray says that unless you are careful, the typical video deposition is an hour or two of a talking head on a video screen answering questions from a disembodied voice. What lawyers need to do, says Murray, is realize that video is more than just another recording device.

Once you think about it, his point is simple. We are used to taking depositions with coats off, relaxing in a conference room with a cup of coffee and some notes about the questions we are going to ask. Everything we do is shaped by our knowledge that we are not in front of the judge and jury—that the written transcript is the jury's only impression of the deposition room.

But a video deposition is different. To do it right you must think of the camera as the judge and jury. You would never dream of letting them watch only the head of a live witness while you asked questions from outside the courtroom, so why should you do it that way on video? There are some rules worth following for videotaping depositions.

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Prepare the witness

Video depositions are evidence depositions. And even though the law in most jurisdictions does not distinguish between them, evidence depositions are different from discovery depositions. The point of a discovery deposition is to probe, while the point of an evidence deposition is to present evidence to a judge and jury.

If the deposition is going to be interesting, the witness must be prepared as if for trial, because for him, the deposition *is* the trial. That means that instructions to pause and think for a few seconds before answering each question may be fine for written depositions but ruinous to a video presentation. Not surprisingly, one of the best ways to prepare the witness is in your office, with your own video camera and videocassette recorder, so both of you can see what to improve.

Act like you are at trial

This means a lot of things: keep the pace brisk. Ask short questions. Use simple words. Organize the direct examination as if you were telling a story. Be interested in what the witness says. Ask the follow-up questions you think the jury wants asked. Throughout the entire deposition your mind-set should be, "The jury is watching right now."

Use professionals

Under the rules of some states, you can videotape depositions by taking a video camera to a deposition and letting a clerk or a paralegal tape the proceedings as if they were home movies. And that is what they will look like, too. If your budget will permit it, use professionals who have good microphones, mixers to balance the volume of the different microphones, and professional quality cameras. And to get rid of the talking-head problem, use two cameras—one for the questioner and the other for the witness.

Use exhibits

One way to add interest is with demonstrative evidence. The typical way to handle exhibits is to call them deposition exhibits and have each marked for identification. Make sure you lay the proper foundation for the exhibit during the deposition or have a stipulation to its admissibility. Then, when videotaping, have the witness point to a blowup of the exhibit just as if he were in court.