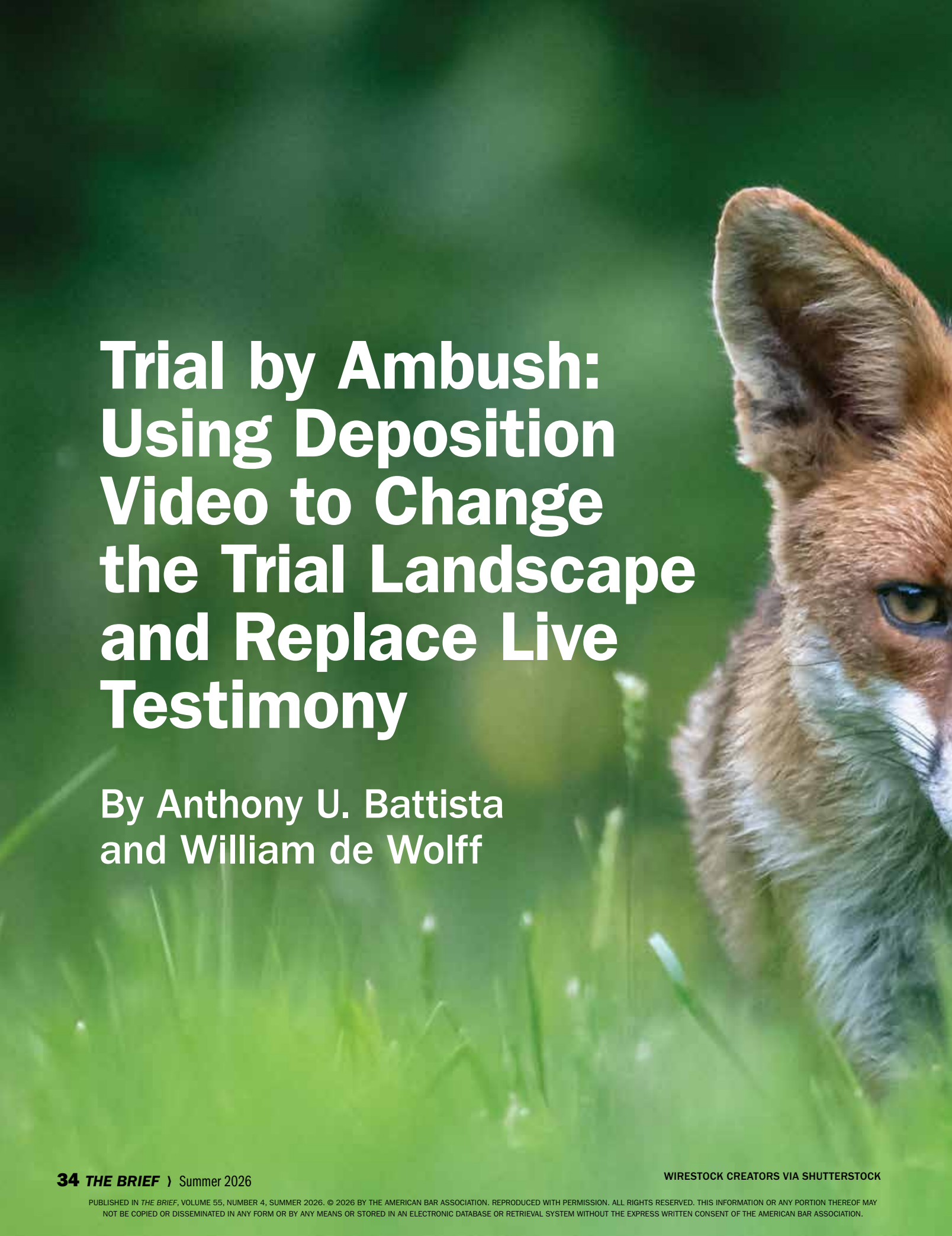


A close-up photograph of a fox's head, showing its large, pointed ears and intense yellow eyes. The fox is positioned on the right side of the frame, looking directly at the viewer. The background is a soft, out-of-focus green field of grass.

Trial by Ambush: Using Deposition Video to Change the Trial Landscape and Replace Live Testimony

By Anthony U. Battista
and William de Wolff



Imagine that you are attending a theatrical production. A playwright understands that they are telling a story. The playwright uses a narrative to advance a story, as spoken through members of the cast. This cast uses tone, facial expressions, body movement, and props to enhance the viewer's understanding of the story. All these elements together create the theatrical production, benefiting from the live production to enhance the viewer's experience compared to books, television, or movies: a story coming to life—think of *The Phantom of the Opera* or *The Color Purple*. Now, think about our trial system: a system that creates a unique opportunity to present important matters, to explain what really happened, and to allow ordinary citizens to be the decision-makers—to find the truth. In an age of sound bites and cynicism, how do you, the trial lawyer, present your case?

Trials are like two competing theatrical productions being performed simultaneously. Each trial lawyer is a primary cast member; they present with the witnesses as supporting cast members to tell their side of the story. Demonstratives function like props, seeking to enhance the trial lawyer's presentation. However, unlike traditional theater, a trial lawyer is not provided with lines; the trial lawyer must develop the story as the trial progresses. In addition, the presenting trial lawyer must contend with their adversary, who uses the rules of evidence (through trial motions and objections) to undermine the trial lawyer's presentation. At the end, the “audience” of the jury evaluates both performances and makes factual determinations based on which side “told the story” most effectively. This presentation—the “common law trial”—has been the cornerstone of U.S. litigation since the founding of this nation. Live presentation allows the jury to evaluate the credibility of the testimony and evidence to determine—using their skills as a diverse group of ordinary citizens—the truth to the best of their ability.

The jury is the fact finder during a trial. To fulfill this role, the jury must determine the weight and credibility of the evidence. Generally, the presentation of evidence is made by the direct and cross-examination of witnesses at trial, starting with the plaintiff and followed by the defendant. Direct examinations are often rehearsed and, more often than not, are a planned presentation for the jury. It is the cross-examination that usually tests the credibility of the witness and gives the jury the opportunity to weigh the evidence properly. Now, what if the ability to cross-examine a witness were taken away?

The rules of evidence in both state and federal courts¹ usually permit the reading of deposition transcripts into the record in certain circumstances (e.g., witness unavailability), but reading transcripts is a “boring” way of presenting evidence and often only serves the purpose of lulling jurors to sleep. More recently, trial lawyers have begun testing the bounds of using deposition testimony at trial in video form. As the cost of videotaping depositions has decreased and the practice has become more commonplace, trial attorneys have



TIP: When participating in videotaped depositions, know the rules, prepare the witness, schedule depositions strategically, use rapport, recognize the “trial deposition” strategy, and preserve objections.

begun to push the rules to present videotaped deposition testimony at trial to limit an adversary’s ability to cross-examine the witness (often the witness was not fully examined at the deposition).

Imagine purchasing tickets to a Broadway show, going to the theater, and finding out that you are watching a recording of the show rather than the show itself. Since the COVID-19 pandemic opened the legal profession to a new style of deposition—the low-cost remote videotaped deposition—a new style of trial presentation has emerged: the extensive use of videotaped depositions in a plaintiff’s² case in chief as a substitute for live testimony. It is becoming commonplace for trial attorneys to present one-sided videotaped depositions for multiple witnesses at trial and to only present the best live witnesses for the jury.

In such cases, plaintiffs’ lawyers use an amalgamation of deposition clips that tell the story exactly how the plaintiff wishes to tell it without having the witness appear live at trial. During the COVID-19 pandemic, remote video depositions became a routine practice to accommodate health guidelines—and videotaping such depositions became routine and cost-effective as well. As a result, plaintiffs’ attorneys began conducting depositions knowing that they were trying to elicit testimony to use at trial, and then using the rules of evidence to allow them to play select deposition clips in an order that tells the plaintiff’s story by video. These “trial depositions” focus on establishing a narrative, rather than fact-finding as in a “discovery deposition.”

Generally, the plaintiff presents their case first at trial, so the plaintiff can present all their favorite (and thus most damaging to the defendant) testimony first without any cross-examination. While civil procedure rules generally do not permit videos to be altered (such as adjusting lighting or sound), the offering party may cut and splice these videos as they wish. The defendant’s recourse is limited to evidentiary objections, presenting their own deposition clips during the

defendant’s case in chief, or calling the witnesses live later in the defendant’s case, by which time the damages may already be done. The jury is less able to evaluate a witness’s truthfulness through a curated video compared to live testimony.

It is worth noting that, historically, courts have preferred live testimony over deposition testimony even when the use of deposition video in this matter is permitted under the rules. However, because use of videotaped depositions at trial is within the court’s discretion, there are no hard-and-fast rules, and, as video becomes more commonplace, it appears its use at trial will continue to grow.

The Normal (or Discovery) Deposition

Prior to the COVID-19 pandemic, attorneys conducted depositions almost entirely in person, and videotaping the witness was reserved for specific circumstances—such as a terminally ill witness, a high-profile case, or one that involved witnesses spread around the globe. In each scenario, there was a risk that a witness would be unavailable for trial.

The procedure was familiar. An attorney knew that a single deposition was a full-day commitment (often traveling to opposing counsel’s office or a court reporting center) and broken up by infiltrating the box of pastries that started to get stale by the sixth hour of the witness’s testimony. The examining attorney would use the deposition as an opportunity to fact-find: examine the “who, what, where, when, and why” of the claim and “tie off” loose factual threads to prevent a later surprise—such as an additional witness that the deponent suddenly remembers. The court reporter would transcribe the entire deposition, producing a two-dimensional transcript with the attorney’s questions and the deponent’s responses.

When used at trial to impeach the witness, the trial attorney would read the relevant provisions of the transcript. Even if the trial attorney were a talented audiobook narrator, the impact of the witness’s prior statements was diminished through secondhand recitation. This approach lowered the stakes for attorneys during depositions, particularly defense attorneys. A bad deposition would have limited impact at trial unless opposing counsel exposed egregious inconsistencies.

Rarely, if ever, did a defending attorney question their own witness during the deposition for purposes of proffering evidence affirmatively supporting a claim or defense. It was thought to be unnecessary or too risky at that early stage of the litigation. Examining your own witness during a deposition was reserved for clarifications or mistakes made by the witness.

The Trial Deposition

In early 2020, the COVID-19 pandemic turned the world upside down. Almost all civil courts in the United States (from federal to local level) closed or substantially modified their operating procedures to limit in-person contact between lawyers, court staff, and witnesses. Social distancing, masks, and vaccine requirements heavily restricted the litigator’s

Anthony U. Battista is a partner with Condon & Forsyth LLP in New York. His practice is concentrated on high-risk matters arising in the aviation industry. He is recognized as one of the leading practitioners for the aviation bar. He may be reached at abattista@condonlaw.com. **William de Wolff** is an associate with Condon & Forsyth LLP in New York. He represents aviation and aerospace clients in civil litigation (including high-profile air crashes), advisory, and regulatory matters. He may be reached at wdewolff@condonlaw.com.

toolbox. Effective litigators benefit from in-person advocacy so they can adapt their presentation based on verbal and visual cues—facial expressions, eye movement, and subtle gestures by a witness, judge, or juror. Courts began using videoconferencing platforms—such as Zoom, Microsoft Teams, and Cisco Webex—to continue court appearances while minimizing in-person contact as much as possible. For the same reason, attorneys began using videoconferencing platforms routinely to handle various aspects of their practice. The waves of the pandemic led to years of uncertainty regarding when the world would go back to “normal.”

During this time, courts began permitting parties to conduct remote depositions using a secure videoconferencing platform. The videoconferencing companies quickly improved their platforms to meet the technical requirements for remote depositions. Although videotaping depositions was generally permissible prior to the pandemic (jurisdiction dependent), this practice expanded rapidly as the use of remote depositions expanded. Integrating a videographer into a remote deposition is technically simpler and substantially cheaper than having a videographer appear at an in-person deposition, and witnesses are less perturbed by an extra attendee to a videoconference call compared to having a video camera set up in person. A witness is often more comfortable during a deposition than in front of a jury, so a videotaped deposition can be a more natural presentation of the witness's testimony. Therefore, the practice of videotaping a deposition in addition to having a court reporter provide a stenographic transcript became cost-effective and mainstream post-2020.

With video-recorded depositions, the examining attorney may attempt to use leading questions that capture key known facts for a trial narrative. This type of deposition does not prioritize fact-finding. While an effective attorney may use part of the deposition to pose “discovery-like” questions to put the witness and opposing counsel at ease, the primary goal is to record a series of “gotcha” clips and testimony for use at trial. Such examination will present like a cross-examination at trial—because that is the function of such testimony. Common tactics used by the examining attorney during trial depositions, in addition to rounds of leading questions, are to include broad hypotheticals, few open-ended questions, and at times inflammatory premises to set up a witness to make a statement that appears damaging in isolation. Further, the examining attorney may use multiple examination styles—first attempting to build rapport and then switching to an aggressive questioning style—to undermine witness preparation.

A poorly prepared defending attorney has few options during a trial deposition as long as the examining attorney is within the bounds of professional ethics. The primary remedies are to attempt to rehabilitate the witness through the defending attorney's own questions and to mitigate the damaging testimony through evidentiary rulings later with the court. The reality is, often the defending attorney is unprepared to counter a trial deposition and neglects to

effectively question their own witness to reset the narrative for the jury. Unfortunately, if the defending attorney fails to question their own witness, then the client is left with only the plaintiff's examination at trial.

Rules Regarding the Use of Depositions at Trial

Practically every jurisdiction has its own particular requirements for when depositions can be used at trial. Comparing the federal rules and New York state rules for when depositions can be used at trial demonstrates the contrast between a comparatively restrictive approach and a more permissive approach. A practitioner should know their jurisdiction's rules for when depositions can be used at trial before starting depositions—and that will guide the appropriate strategy.

Federal rules. Rule 32 of the Federal Rules of Civil Procedure (FRCP) sets forth the circumstances when depositions can be used at trial. FRCP Rule 32(a)(2) permits depositions to be used to contradict or impeach a witness or “for any other purpose allowed by the Federal Rules of Evidence [FRE].”

FRCP Rule 32(a)(3) provides the usual method by which plaintiffs can offer such testimony in their case in chief: “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 Rule 30(b)(6) or 31(a)(4).” This category is quite broad, allowing plaintiffs in federal cases to try to extract omissions from Rule 30(b)(6) witnesses. However, courts have allowed parties to introduce employee testimony as long as it complies with FRE Rule 801.³

FRCP Rule 32(a)(4) provides the “unavailability” exceptions, such as when a witness is dead, more than 100 miles from the place of trial, or unable to testify due to age, illness, infirmity, or imprisonment; when the party offering the deposition could not procure the witness's attendance by subpoena; or by motion or notice under “exceptional circumstances.”

FRCP Rule 32(a)(6) permits adverse parties to require the offering party to introduce other parts of the deposition that “in fairness should be considered with the part introduced”—known as the “rule of completeness” under FRCP Rule 106—or may be offered by any other party as a “counter-designation.” Testimony offered pursuant to the rule of completeness will usually be presented with the affirmative designation (during the plaintiff's case in chief), whereas counter-designated testimony will be presented by the party that counter-designated it. Since a party can counter-designate testimony, judges will often view testimony offered pursuant to the rule of completeness quite narrowly—only requiring a plaintiff to include the additional testimony if the deposition clip is materially misleading without it.

New York state rules. New York's rules are more permissive. New York Civil Practice Law and Rules (CPLR) Rule 3117 provides three scenarios when a deposition may

be presented at trial. The first under CPLR 3117(a)(1) is the traditional scenario: to impeach or contradict a witness. CPLR 3117(a)(3) provides the unavailability exceptions, allowing a party to present a deposition when the witness is dead, greater than 100 miles from the courthouse (unless the witness's unavailability is caused by the party offering the deposition), or unable to testify due to age, sickness, infirmity, or imprisonment; when the offering party cannot procure the witness through reasonable efforts; or upon motion based on "exceptional circumstances." CPLR 3117(a)(2) provides the carve-out that permits plaintiffs to use adverse depositions:

Any defense attorney defending a videotaped deposition should assume that the plaintiff will attempt to use deposition testimony at trial to the maximum extent allowed under their respective jurisdiction's civil procedure rules.

[A]ny part or all of a deposition, so far as admissible under the rules of evidence, may be used in accordance with any of the following provisions: . . . (2) the deposition testimony of a party or of any person who was a party when the testimony was given or of any person who at the time the testimony was given was an officer, director, member, employee or managing or authorized agent of a party, may be used for any purpose by any party who was adversely interested when the deposition testimony was given or who is adversely interested when the deposition testimony is offered in evidence.

Compared to the FRCP, CPLR 3117(a)(2) expands the covered category to include "employee[s]" in addition to corporate representatives. The CPLR does not have a direct analogy to FRCP Rule 30(b)(6), and, traditionally, New York practitioners relied on depositions of individual witnesses rather than a "designated" corporate representative like in federal practice. Although the Uniform Rules for the Supreme Court and the County Court were amended in 2021 to

include "entity depositions" through a corporate representative,⁴ this procedure remains less common in New York state practice. Therefore, under CPLR 3117, plaintiffs do not need to find an independent basis to admit employee testimony (like FRCP Rule 801).

Like the FRCP, CPLR 3117(b) provides a tool for the opposing party: "If only part of a deposition is read at the trial by a party, any other party may read any other part of the deposition which ought in fairness to be considered in connection with the part read." Therefore, the opposing attorney can use other portions of the deposition or live testimony to counter these trial deposition videos. However, if the opposing attorney uses other portions of the deposition, the trial judge decides when these designations are presented to the jury—if they must be played with the offering party's designations under the premise of completeness or during the opposing party's case in chief under the premise of fairness.

Being the Fox or Outfoxing the Fox—Deposition Strategies

As with any emerging litigation tool, practitioners must know how to use or oppose this strategy. The "fox," or plaintiffs' attorneys looking to use this strategy, must catch the defense off guard to elicit the most damaging testimony from defense witnesses and curate a trial presentation around this testimony. Often plaintiffs will start by taking discovery depositions of peripheral witnesses and then for a key employee or corporate representative take a concise trial deposition to catch opposing counsel off guard.

"Outfoxing the fox" by the defense requires having a metaphorical fire extinguisher and evacuation plan for when the fire inevitably breaks out—effective preparation and management can drastically minimize the damage. In other words, it is imperative that trial strategy, storylines, and themes be established early in the litigation so that the trial plan can be implemented during witness deposition preparation, and if necessary, the defending attorney and a properly prepared witness can complete a counter-trial examination if the plaintiff conducts a trial deposition.

Know the rules. The first and most important rule for both sides is to know the rules in the jurisdiction; as discussed above, jurisdictions vary widely regarding the use of deposition testimony at trial. Plaintiffs will need to know which depositions can be used at trial and under what circumstances, and to tailor questioning accordingly. Defense counsel should be familiar with the rules as well to understand when plaintiffs' counsel may try to attempt to conduct a trial deposition. Both parties should be familiar with recent case law regarding the use of depositions at trial, and, if the parties know who the trial judge will be, knowing this judge's ruling tendencies is extremely beneficial.

Preparation, preparation, preparation. Conducting a trial deposition is not a simple matter, and both sides need substantial preparation. Plaintiffs are not using trial depositions for information gathering, so plaintiffs must conduct extensive discovery prior to depositions. Plaintiffs' counsel must make broad discovery requests to get sufficient information to understand the "who, what, when, where, and why" of the claims alleged. When permitted with depositions, plaintiffs' counsel needs to use interrogatories strategically to fill in information gaps as needed. Finally, plaintiffs' counsel needs to develop a plan for the deposition and consider what testimony they intend to elicit from the various witnesses.

Each attorney has a different style to prepare for a deposition, but many attorneys benefit from having prewritten, curated questions that they intend to use for their trial presentation. In many ways, the information gathering has already occurred by the time the plaintiff's attorney is conducting a trial deposition, and these depositions are the last piece of the discovery puzzle.

Any defense attorney defending a videotaped deposition should assume that the plaintiff will attempt to use deposition testimony at trial to the maximum extent allowed under their respective jurisdiction's civil procedure rules. Defense attorneys must understand the trial plan and needed trial testimony to support the defense.

Defense counsel will need to spend considerable time preparing the witness not only to answer trial questions, but also to give a direct trial examination—two very different skill sets to teach when preparing a witness. For corporate representatives, it is important for counsel to gauge a witness's ability to grasp the subject matter, manage their emotions, and then transition between different types of examinations. Counsel will need to spend time with multiple potential witnesses and determine which witness will be most effective at deposition. The defense attorney will need to understand the plaintiff's trial strategy and teach the prospective witness how to answer potentially negative questions without being defensive or emotional.

Witnesses must tell the truth and must maintain credibility. The defense attorney can help prepare a witness by coaching them on how to maintain credibility, control emotions, and maintain focus throughout an extended day of questioning. The defense attorney must ensure the witness is fully knowledgeable on the topics to be covered and understands how to respond to hypotheticals, use themes to guide responses, keep answers short, and manage stress levels during the deposition.

The second phase of the deposition preparation is preparing the witness for defense counsel's direct examination, if needed—which topics will be covered for trial, and which exhibits are key to the defense of the case. This sort of preparation cannot be done effectively right before the deposition; critical witnesses can often take several days to prepare. The preparation may need to begin weeks in advance.

Consider deposition scheduling as part of your overall strategy. Plaintiffs will want to take trial depositions at strategic points during the litigation. Often in larger cases, plaintiffs' counsel will be more unpredictable in their approach. Normally, plaintiffs will schedule the "peripheral"—or less contentious—discovery depositions early and then schedule the most important depositions back-to-back at the end of the discovery window. This gives plaintiffs as much time as possible to conduct fact-finding through the earlier depositions and prepare a plan of action for the trial depositions. Then, once plaintiffs shift strategy to trial depositions, defense counsel is off guard and has less time to prepare witnesses to counter the tactics used in those depositions if they are conducted back-to-back at the end of the discovery schedule. For these reasons, defense counsel should anticipate these tactics and use the tools available to them to space out important depositions.

Use rapport strategically. For plaintiffs, consider the witness's presentation and demeanor, and use that information to your advantage. While the jury will be able to hear an attorney's questions, the video recording presented at trial shows the witness. A sociable witness may be encouraged to make an admission, and a relaxed and talkative witness will likely come across as truthful in a deposition video. If a witness is arrogant, angry, or dismissive, a plaintiff's attorney can use various techniques to demonstrate those qualities to a jury.

Defense counsel should spend as much time as necessary building trust with the witness. Trial depositions are more challenging for the witness if the examining attorney uses a cross-examination style of questioning. Defense counsel should be deliberate about spending time during the preparation explaining every aspect of the process and reassuring the witness. In particular, defense counsel should emphasize during deposition preparation that the witness must be completely accurate (including information that may be bad for their side) and that their role during the deposition is to tell the truth—not to prevent bad information from being discovered by the other party. Counsel should spend time teaching the witness how to answer questions effectively. The witness needs to appreciate the difference between having a conversation with a colleague at the watercooler and being questioned by a very nice and friendly plaintiffs' attorney. Teaching a witness how to be precise, accurate, concise, measured, and focused takes practice and time. A deposition is a very unnatural way to communicate.

Recognize when your adversary is conducting a "trial deposition." As long as trial depositions are a viable tool, plaintiffs will continue to use them. Defense counsel should assume that any videotaped deposition could be used as a trial deposition and prepare accordingly. When defending a deposition, defense counsel should recognize when questioning is likely being used to prepare video clips for trial.

Certain types of questions can serve dual purposes, such as plaintiffs' counsel asking a witness about a company's safety

practices. Questions about safety are ripe for trial—reptilian tactics are a dead giveaway that counsel is looking for soundbites to use at trial. If your case involves regulatory violations, safety failures, or other corporate wrongdoing, defense counsel should expect to combat reptilian questioning by planning a direct examination that will allow the witness to tell the defense story that neutralizes plaintiffs’ counsel’s leading reptilian questioning.

Another ripe area for trial questions are hypotheticals and questions that call for speculation, especially when the examining attorney is asking the witness to speculate regarding ultimate issues of the case. Recognizing the shift in questioning and being prepared for such questions allows defense counsel and the witness to not be surprised and to react and modify strategy as needed.

Preserve objections as much as possible. In most jurisdictions, objections to form are waived if not raised during the deposition. Defending attorneys should be deliberate with their use of form objections but must stay within the rules, as a judge will be ruling on the admissibility of various questions and answers. Judges do not take kindly to speaking objections. This being said, defense counsel can potentially eliminate damaging testimony if plaintiffs’ counsel uses sloppy questioning. In addition, defense counsel should consider how proper and full use of objections can hinder a plaintiffs’ counsel’s stamina in questioning. When reviewing designations for trial, defense counsel should be prepared to use both trial objections and pretrial motions to attempt to eliminate damaging testimony.

Rehabilitate through effective questioning of your witness. While court rules differ regarding how a party can use its own witness’s deposition testimony, defense counsel should be prepared to question their witness as if it were at trial. Using strategic questions to clarify potentially misleading testimony or mitigate potentially damaging questioning may assist the defense. The defendant can argue that the plaintiff’s designations are incomplete and misleading, and thus that the defendant’s additional designations must be played with the plaintiff’s designations.

If the court rules permit it or if the witness is unavailable for trial, the defendant may use time during their case in chief to play “rehabilitating” testimony. As evidentiary rules for impeachment testimony are generally more permissive, rehabilitating testimony can be used for that purpose as well.

The key here is to prepare your witness so that they are comfortable with potential exhibits and topics that will likely be covered during the deposition. Another preparation technique that is often overlooked is having different attorneys focus on different types of examinations. A witness often responds differently to different attorneys. Changing attorneys for the preparation of direct and cross-examinations and exhibits is often helpful for a witness.

Be prepared for substantial time spent with the court seeking evidentiary rulings prior to trial. As

a defense attorney, all is not lost if one (or several) of your witnesses presents challenging testimony during a deposition that a plaintiff wishes to use at trial. For the same reason, a plaintiff who elicits damaging testimony from a defense witness during a trial deposition does not “automatically prevail.” Trial depositions add a substantial amount of work to all parties (including the court) during the evidentiary review process prior to trial. Plaintiffs’ counsel will need to spend time watching deposition videos to curate the story that the plaintiff intends to tell through the deposition videos. Defense counsel will also need to review the depositions to determine whether any issues came up that must be resolved by motions in limine. Both parties will need to designate testimony that they wish to present at trial, and each side will need to prepare objections to the other side’s designated testimony.

Most courts will require the parties to meet and confer before presenting their final designations to the court. When presenting designations to the court for rulings, the parties must be mindful that the presiding judge has other cases and responsibilities; best practice is to provide several weeks (if presenting hundreds of designations and objections) to several months (if presenting thousands of designations and objections) of lead time for the court to review and provide rulings. The parties must maintain effective communication with the court to avoid trial delays. Once the parties have received the court’s rulings on the designation objections, each side will need to confer with their audiovisual team to put together the deposition clips and videos prior to presentation. Neither side should underestimate how much time this entire process will take.

Should the Rules Change?

Even when a jurisdiction permits the use of depositions during a party’s case in chief, courts for the most part prefer live testimony. Even attorneys who support the use of video depositions as part of a party’s case in chief will acknowledge that jurors do not show up at trial to watch a compilation of YouTube-length clips to tell that party’s version of the facts. This form of in-the-moment examination requires greater skill by trial lawyers and provides juries with a more holistic examination of the facts in dispute compared to curated deposition videos. In most cases, the use of depositions at trial as part of a party’s case in chief benefits plaintiffs, as they present their case first and the jury gets its first exposure to the issues without cross-examination. Defense counsel will argue that this practice is fundamentally unfair—until they find themselves as plaintiffs in a case.

The primary reform for federal courts (and states that permit the use of depositions in this manner) would be to prohibit using depositions as part of a party’s case in chief when the witness is available. Such a reform would promote the spirit of courts’ preference for live testimony. The purpose of FRE Rule 801 is to be able to challenge a witness’s credibility by allowing the opposing party to introduce their own

statements. The purpose of FRE Rule 801 is not to string together a series of apparent admissions to prove a party's case solely through those admissions.

One milder civil procedure reform would be to provide greater flexibility to judges to restrict the affirmative use of trial depositions. Such a reform would rely on the judge's discretion rather than having a blanket rule that depositions cannot be used in a party's case in chief when the witness appears. FRCP Rule 611 provides the presiding judge with the flexibility to control the mode and order of witness testimony to ensure fairness to all sides; this remains a tool available to a federal trial judge to limit the use of depositions affirmatively when necessary. Juries should not be simply watching videos as a substantial portion of a trial. Experienced trial judges should be able to exercise their discretion and limit a party's ability to conduct its entire trial by deposition video. Jurisdictions that do not have an FRCP Rule 611 analogy should provide the judges with such latitude.

Another potential reform is to permit the defense to designate its own cross-examination questions to be presented during the plaintiff's case in chief. Cross-examination is the bedrock to the truth-seeking function of juries; the adversarial nature provides juries with the views of both sides. By permitting defendants to designate their own testimony to be

played during the plaintiff's case in chief if the plaintiff decides to proceed in trial by deposition, at least some aspect of the cross-examination function will be preserved.

So the next time you head to the theater, think about what the play would be like if it were a series of video clips. As a trial advocate, you have the unique opportunity to present important matters, to explain what really happened, and to allow ordinary citizens to become insiders and decision-makers. Use the opportunity to be creative, imaginative, and thoughtful, and those jurors will find the truth. ◀

Notes

1. See generally N.Y. C.P.L.R. 3117; FED. R. CIV. P. 32.

2. Throughout this article, "plaintiff" is used to describe the party using trial depositions as part of their case in chief, and "defendant" is the party opposing such use. Defendants can use depositions affirmatively as well subject to the rules, but, given the general rule that plaintiffs present their case first, the authors are using this convention for simplicity and clarity.

3. See, e.g., *Walker v. City of Buffalo*, No. 22-CV-00520-MAV, 2025 WL 828242, at *22 (W.D.N.Y. Mar. 17, 2025); *Stanphill v. Health Care Serv. Corp.*, No. CIV-06-985-BA, 2008 WL 3927468, at *3 (W.D. Okla. Aug. 20, 2008).

4. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.20-d.