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# TIP5313

## Law and the theatre: reading a deposition into evidence.

Consider the courtroom reading as theater: "activity considered in terms of its dramatic quality." This article contains twelve theatrical tips in checklist form. These are a dozen ideas to use in transforming a boring hour of someone reading into an interesting part of the trial.

Unfortunately there are times when you do not have a live witness for a critical portion of your case, and you only have a written transcript of his/her deposition. In that instance, you are left with the necessity of reading large portions of a deposition to the jury. If that happens to you, this article has the basic legal procedure you need to follow, plus the theatre to make it interesting to the jury (and judge).

### **The basic legal procedure:**

- file original deposition,
- ask the judge for permission,
- explain any failure to designate,
- read the deposition aloud into the record.

You cannot read a deposition into evidence unless a deposition original (or a copy that has been signed and certified by the court reporter) is *filed with the court before it is read into evidence*. Many jurisdictions today provide that the original deposition cannot be filed in court until it is to be used in court, so it is up to you – the attorney – to get it filed in the court file. Never forget: you can only read into evidence a deposition if it is in the court's file, not still kept in the office of the court reporter or the attorney noticing the deposition. There are instances when trial judges have refused the reading of a deposition into evidence because a certified copy was not on file with the court, so see that the original deposition, or other court reporter certified, copy is on file with the court.

The basic procedure starts by announcing to the judge that you want to read all or a portion of a deposition into evidence and securing the judge's permission to do so. Even though as a matter of right you can read into the record the deposition of the adverse party,<sup>1</sup> the trial judge controls when you can do it, because the judge controls the order of presentation of evidence. Judge's guard their prerogatives; it's wise to keep the judge happy because you understand his/her authority.

Often judges will include in a pre-trial order that you must designate the deposition and parts of them you want to read into evidence. If so, and you haven't included the designated the deposition before trial, be ready to prove to the judge — in exquisite detail — a reason why your defect should be excused. If for example, your reason is the death or disabling injury of the witness, don't depend on it that the judge will accept your word for it; be ready with a witness to say the absent witness is dead or physically unable to attend, or a certified copy of a death certificate or hospital admission. If your reason is sudden unavailability of the witness, be ready with a sheriff's return of "not found" or some other evidence; your own recitation of the witness not coming to trial after you asked for him/her to do so is not going to be sufficient.

*Fed.R.Civ.P.*, Rule 32(a)(4) and like state rules, mandate to use a deposition other than that of the adverse party as evidence at the trial, the court must "find" a specific reason to allow it. "Find" means the judge needs evidence presented to him/her.

It is not unusual for a the trial judge to ignore your own recitation of a witness not coming to trial even though they "promised" you they would. Therefore, issue a subpoena for every witness. I don't care if it is your own client's spouse, or even your brother. Even a spouse or a brother can have a traffic accident on the way to the courthouse or think it won't hurt if they stop to pick up their child after school. Always subpoena every one of your witnesses, and secure a process server's return of service

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<sup>1</sup> See, *Fed.R.Civ.P.*, Rule 32(a)(3) and like state rules.

or the witness's signed receipt/admission of service to show the trial judge if your witness does not show up at trial.

After you have received the judge's permission, at the appropriate point in time, stand up and say to the jury that you are going to read the deposition of Witness X into evidence.

### **The rule of optional completeness.**

Some lawyers will recognize the above phrase, because it is in their jurisdiction's case law or civil rule. What the phrase indicates is something applicable in all jurisdictions, to wit: if you plan on reading only part of the deposition, your adversary will have the option of reading other parts into the record. *E.g., Fed.R.Civ.P.*, Rule 30(a) reads:

“(6) Using Part of a Deposition. 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.”

Your opponents specification, your jurisdiction's civil rule, or the trial judge, will determine the timing of when what you opponent wants read into evidence from the same deposition will be read into evidence. In federal court, your opponent can choose to have you their selections to the jury as a part of your reading your selections, or instead may choose to wait until their portion of the trial to read it themselves. The judge may tell you to present everything (including the portions your adversary selects) in the order in which it was in the deposition. In summary, what you read, and what the opponent wants read, will be read when and by whom the trial judge decides.

### **How to make the reading of a deposition an interesting audio-visual experience for the jury. Twelve theatrical tips in checklist form.**

#### 1. Have someone else read the answers if the witness.

If you read all the questions and answers yourself, you will either bore the jurors or confuse them. By asking someone else to read the witnesses's answers, you make it: (1) more interesting to the jurors - and the judge, and (2) less confusing to the jurors - and the judge - as to who is “talking” in the deposition.

#### 2. Tell the judge you have a reader.

During the trial, approach the judge in chambers and tell the judge you will be reading the deposition of Witness Smith into evidence and that you have available John Jones to read the answers of Witness Smith while you read the questions, “so that it will be easier for everyone to follow which are the questions and answers and it will go faster.” I have never encountered a judge who did not breath a sigh of relief when told that the deposition answers would be read by someone other than the person reading the questions. Judges never disallow it, but judges do not like surprises during a trial. By telling the judge in advance you eliminate any surprises for the judge, and thus eliminate awkward confrontations with a startled judge when you ask another person to come forward and take the witness stand to read from the deposition.

#### 3. Get a person who will do an excellent good job of reading the answers.

In addition to a good reader with a strong clear voice, pick a reader who has is of the sex to fit the part, and who has with characteristics that help you. *E.g.*, if the deposed witness is your witness, pick a reader who will be visually appealing to the jury. And tell them what to wear that will fit the part. *E.g.*, reading the part of a business executive

calls for white shirt, tie, and jacket, but reading the part of the tow truck operator calls for sport shirt and sweater.

Preferably your reader will not be someone that is NOT identified with your law firm. The jury will take the words of the witness more easily as not being a “put up” job by you. Do not settle on using “whoever is free in the firm today.”

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**TIP.** Importantly, a drama student (or even a law student) will know how to read the answers with emphasis as you want it, e.g., you may want the critical admission by the adverse witness read slowly, loudly, and perhaps dejectedly. In all events, you want the testimony read with clarity, and read with intelligent use of phrasing.

I have always phoned the local college and asked a drama or speech teacher to help me find a student who would like to earn a few dollars reading a “part” to a jury. The response has always been positive. (If you have a law school in the area, finding a law student, through the professor of trial practice, is another good alternative.)

A side benefit of using a student is that the jury thinks you are a “nice guy” with friends at the local school.

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4. Give your reader a highlighted copy of the deposition.

Highlight all the witness's lines you want read (and only those). It's a necessary detail of preparation that ensures they won't miss any of their lines. and also helps your reader to see when the questions ends and he/she is now supposed to be speaking the answer.

5. Use a red marker to prevent reading of material.

There will probably be parts of the deposition that are not to be read. You do not want to burden the jury with listening to recitations of exchanges between counsel, or unnecessary clutter (e.g., the discovery deposition questions you needed to ask about the last ten years of employment of the witness, but which are of no relevance at the trial). You certainly cannot have read into evidence any questions and answers that the court has ruled are inadmissible at the trial. For those parts not to be read — use a red marker to line them out and draw a line across entire pages not to be read. At the start of each omission, write in red “Skip to .....” to guide the reader to which page he/she should turn to next. Readers can get caught up with reading lines all the lines on each page, and miss small "Stop" marks written in the margins. Don't risk the chance of your witness reading irrelevant or inadmissible testimony to the jury. Therefore, use big red markers to clearly and boldly mark where the reader should stop, and to where they should skip to next read answers.

6. Tab the appropriate pages to prevent what radio and television producers call “dead air.”

When your reader is trying to find what page he/she is supposed to read from next, the silence gives the jurors an opportunity to mentally wander away.

7. Tell your reader to practice reading the transcript

He should practice reading the answers several times aloud, reading them in practice as though the reader in practice were trying to communicate in a room where the furthest juror is 50 feet away,

8. Tell you reader to mark up their copy of the transcript with reading helps.

The should mark their copy themselves with their own pronunciation helps and places they want to break sentences up for readability. Drama students know how to do this. E.g., “Speak/ the speech/ I pray you.// as I pronounced it to you// trippingly on the tongue.//// And do not saw the air/ thus//. [witness gestures].” Do not mark the pronunciation or emphasis yourself, unless you want a withering cross-exam of the reader on just what he/she is reading for you.

9. Reading includes motions of the witness shown in the transcript.

If the transcript indicates any indicates actions by the deposed witness to illustrate a point (e.g., the transcripts says “witness points at foot,” tell your reader that you want him/her to use an appropriate gesture in accordance with the transcript.

If the transcript states the deposed witness pointed to an exhibit, have the exhibit available during the reading of the deposition, and coach your reader beforehand to point to the exhibit at that point in the reading.

10. Tell your reader costume, entrance, and stage position.

That is, tell your reader what to wear, when to show up in the courtroom, and where to sit until called to the witness stand, and how to move to the witness chair and how to sit there.

11. Plan on your adversary wanting to read deposition portions into evidence.

Don’t automatically invite the adverse attorney to read his/her own questions. Give it some thought whether it might be more effective to simply at the appropriate points say to the jury “This question is by Mr. Henry.”


Your adversary may ask for your reader to help. Expect that, and tell your reader it may happen, and may even require reading potions you have crossed out in red as not to read during your “direct examination reading.”

Tell the reader what do to if you object to a question or answer that the adversary wants read by your reader, that is, to wait for the judge to make a ruling.

12. At the appropriate time in the trial, rise and say:

“Judge, I would like to now read the deposition of Witness Smith into evidence. John Jones will help us by reading the answers given by Witness Smith at his deposition. Mr. Jones, will you come forward with your copy of the deposition and sit in the witness chair.”

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 **TIP.** At this point a nice touch is to turn to the court and ask the judge if he/she wants to explain the nature of a deposition to the jury. Most judges will then solemnly say a few words about how the deposition is just as important as live testimony, which gives a bit of attention-gathering to the reading of the text.

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“Ladies and Gentlemen of the jury, I am now going to read the questions that were asked Witness Smith in his sworn deposition before a court reporter. John Jones is a [e.g., college student at Mary College, or a legal assistant at my office, et cetera]. He has agreed to help us by reading aloud the sworn testimony of Witness.”

“Mr. Jones, will you now turn to page [your starting point] and read the answers Witness Smith gave to the questions.”

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