



The hidden path to bigger damages through course-and-scope

DEPOSITION TACTICS USING *MORADI* TO ESTABLISH COURSE-AND-SCOPE WHEN THE DEFENDANT IS APPARENTLY “OFF THE CLOCK”

One of my favorite Advocate articles is Andy Owen’s piece on deposition tactics to obtain a company’s incident report (Advocate, April 2018). His approach was practical, with real questions attorneys could use. I hope I can do the same for you here.

This guide focuses on deposition tactics to establish course-and-scope when a defendant is in their own personal vehicle and off the clock. Specifically, deposition tactics for both:

1. The defendant driver; and
2. The PMK from the driver’s company.

As a practical matter, if the crash occurred between 6 a.m. and 8 p.m., you have a good chance that the defendant was either commuting for work or working at the time.

The *Moradi* rule: Breaking the “going and coming” defense

The going-and-coming rule is the employer’s favorite get-out-of-jail-free card: If an employee is simply commuting, their employer generally isn’t liable. But the California Court of Appeal’s decision in *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886,895, recognized that the rule is subject to major exceptions:

- 1. Required vehicle exception:** The employee’s use of a personal vehicle is required for their job.
- 2. Incidental benefit exception:** The employer receives an incidental benefit from the employee’s use of the vehicle beyond just getting to work.
- 3. Foreseeability exception for detours or stops:** In the event the employee stops somewhere else on their way home, the employer will still be responsible if the employee’s detour or stop was reasonably foreseeable.

Key factors to look for at the outset

1. Location of the employee’s job – fixed site vs. multiple locations;
2. Employer’s requirement to carry auto insurance;
3. Employer’s reimbursement for mileage;
4. Employer’s reimbursement for gas;

5. Requirement to carry tools;
6. Need to respond to emergencies;
7. If the Defendant driver is a salesperson, maintenance worker, construction worker, supplier, or company “buyer”;
8. Job involves them needing to transport people and/or clients;
9. Traveling to the airport for work;
10. Whether the employer pays for Uber/Lyft rides

This may be counterintuitive.

But if you could establish that the employer pays for employee Uber rides to places – then you just need to find specific instances where the employee made that trip in their own car. For example, if the employer pays for the employee to get an Uber from “the office” to a client’s home, the inference exists that there must be some benefit attached to the employer, otherwise they would not pay. Once you have established that the *route* itself is of benefit, if you establish times where the employee used their own car instead (maybe an Uber was not available at the time or there was surge pricing), you can establish an incidental benefit to the employer.

11. When does the employee receive their job location assignment (night before, week before, etc.);
12. The employee manual mentions safe driving;
13. Employer requires driving tests;
14. Employee’s vehicle is inspected by employer;
15. Minimum requirements placed on employee vehicles, i.e., must have a third row seat or flatbed; and
16. Whether employee’s vehicle increases the quality of service the company provides.

Case studies: The caretaker and the maintenance worker

Throughout this guide, I will be drawing examples from two of my past cases. A summary of the facts of these cases will be helpful when reviewing the deposition questions to use below.

The caretaker case

My client, a pedestrian, was hit in a grocery store parking lot just two weeks after undergoing retina reattachment surgery. The impact caused a permanent detachment of her right retina. The defendant driver, a caretaker, carried only a 15/30 policy.

The maintenance-worker case

The defendant driver, a maintenance worker, left work and went to his parents’ home for dinner, where he got drunk (BAC twice the legal limit). Later that night, while driving home, he crashed into my clients. The collision occurred 6–7 hours after his workday ended. Defendant’s MSJ on course and scope was defeated.

Deposing the defendant driver (employee) – Flattery and getting the job done

If the employer is not in the case yet, you will have an opportunity to depose the defendant driver without any interference from the employer. This is the best-case scenario. Do not telegraph to the defense that your goal is to attach course-and-scope, and you will have a rare opportunity to get unfiltered testimony.

In other cases, you will have to deal with a scenario where the employer and employee are represented by different counsel but are working together to eliminate any arguments that course-and-scope exists.

At the deposition, don’t underestimate the ability to flatter the Defendant driver into providing more forthright responses. *Defendants – most especially those denying liability – do not like to give answers that insinuate they are lazy or irresponsible.* I like to tell the Defendant driver that they must be very hardworking and seem like the type of person ready to do anything to get their job done. This includes sitting in the car for long periods of time and/or running errands that they didn’t expect to do.

You would be surprised how often this leads to a defendant stating things

like “no matter where the job takes me – I will go.”

Asking open-ended questions and getting them to talk about their job and their responsibilities will give you insight into the instances when they use their car for work. The employer will commonly make the defense that the Defendant driver could have taken the bus, ridden a bike, or ordered an Uber instead, and there was no explicit requirement for them to have a vehicle. Use the Defendant Driver’s deposition to show how impractical this defense is. Also, the required-use or incidental-benefit exception is *implied* and does not need to be explicit.

The caretaker case

Here are some of the questions I asked in this deposition, which can be included in your outline:

“Q: You know, there’s different types of people and there are people who care about their jobs and don’t care about their jobs. I can tell that you’re someone who does care deeply about your job. Am I accurate in that assumption?”

A: Yes, I do love seniors, and I’m happy to take care of them and make sure they’re safe and happy.

Q: And so, since you care about your clients, if they ask you to take them somewhere like a doctor’s appointment, or pick them up food, would you oblige?
A: Yes.”

“Q: How often, if ever, would you take a bus to work in 2018 or 2019?
A: Never.”

“Q: Did you ever take a bicycle to work?”

A: Never.

Q: How many times did you walk to work?
A: Never.”

The maintenance-worker case

In this case, since the Defendant Driver made the decision to drink and drive, rather than leave his vehicle at his parents’ home, there was the opportunity to connect that decision to how badly he needed a car for work.

“Q: Could you have done your job the next day without the vehicle you were driving on the night of the collision?”

A: No...

Q: And it was so important for you that you had to use your vehicle the next day that, despite the fact that you were drinking and driving, you decided to drive home for that reason, correct?

A: Yes. Yes.”

“Q: Did you need your car to carry your power tools?”

A: Yes.”

“Q: Now, in that year before the incident, was there any time where during your workday you had to drive to multiple job sites?”

A: Yes.”

Deposing the PMK/company rep (employer) – Look at the big picture

Deposing the company executive is more difficult. That is because they are more prepared for this line of questioning and want to protect the company. Also, when dealing with the company rep, you must deal with the issue of foreseeability. Meaning – how foreseeable is it that their employee would be making a stop on their way home?

When deposing the company PMK, it helps to look at the big picture. *What is the company’s goal and how do they achieve it?* Their goal is to increase profits. They achieve that by providing a quality service, bringing in new clients/customers, separating themselves from their competitors, etc. Now tie in how an employee having a vehicle helps accomplish this. *Or*, how the lack of vehicles would harm this goal.

Outside of the written discovery responses from the company, you want to look at the company’s website, any advertisements they run, and even Yelp and Google reviews from their customers/clients.

When taking this birds-eye view approach, start questioning the PMK on how removing cars would harm the company and how much behind their competitors they may end up being.

The caretaker case

“Q: In the past, to your knowledge, had your company ever provided a company vehicle to any caregivers?”

A: To my knowledge, they have not.

Q: Why not?

A: Because I would have to have 150 vehicles.

Q: What’s the problem with having 150 vehicles?

A: Well, having not done it nor researched it, it seems like, financially, it would not be a feasible decision with maintenance and storage and not cost-effective from a business standpoint.

Q: And so it’s more cost-effective, from a business standpoint, to have caregivers use their own personal vehicle to get to each client’s home. Is that accurate?

A: Correct.”

“Q: If all the caregivers for your company were incapable of driving their own vehicles, how would your company go about transporting clients?”

A: Since I haven’t done the research on it, I can’t give a valid answer.

Q: Are you always trying to improve your company?

A: Yes.

Q: And so, you are researching things that you believe would improve your company?

A: Yes.

Q: But this is not something you ever researched?

A: It is not something that I have researched since taking over the company.

Q: And is that because you would agree that having all your caregivers stop using their personal vehicle is not the first thing that would come to mind in terms of improving your company?

A: There are more things that are higher in current relevance.

Q: And as you sit here today, as the person most knowledgeable for your company, if you had to choose ‘all of my caregivers drive a vehicle versus none of them drive a vehicle’ which one would be better for your company?

A: Without having reviewed the data, financial and costs and partnerships of the things that go into this speculative scenario – it would currently

make more sense to have my caregivers drive."

"Q: And so, you're trying to do things to increase the profit – profitability of your business; right?

A: Correct.

Q: Okay. And we've already talked about, you know, how the more demand you fulfill, the more potential clients you can obtain, right?

A: Correct.

Q: Okay. And so another one: Running errands and grocery shopping, for example, is that a task that you advertise to the community that you – your caregivers can provide to clients?

A: Yes

Q: And would you agree, then, that your caregivers' ability to run errands and grocery shopping – and to go grocery shopping for a client allows your company to acquire more clients?

A: Yes, I assume so.

Q: And when a caregiver runs errands or goes grocery shopping for a client, they do not use a company vehicle?

A: Correct.

Q: And that's because a company vehicle is not provided to them, correct?

A: They are – they can use their vehicle. They can also use the client's vehicle.

Q: Same with arranging transportation for events and activities: What vehicle are they expected to use there?

A: Their vehicle or the client's vehicle."

"Q: Okay. And they are still getting paid during their commute time from the client's home to the grocery store?

A: Yes."

"Q: And because of the nature of your business, having people who are able to respond to a client's home quickly, is that beneficial to the company?

A: I guess."

The maintenance-worker case

In this case the PMK was the Defendant driver's supervisor. He was the one who made the decision to allow the Defendant driver to use his vehicle for work purposes. This was considered

a privilege at this company. This allowed me to explore the theme as to whether this privilege was applied due to favoritism or something else...

"Q: Did you give him this privilege just because it was a favor, just because he asked? Or was it a business decision, meaning it's good for business? Does that make sense?

A: Yes, Sir.

Q: Which one was it?

A: Business only. No favors of any kind.

I evaluated his work ethics. He was really good at it. And he did his job duty and he did really good work. And he, in my opinion, was a good installer.

Q: Got it. How, in your mind, did giving him a take-home vehicle benefit the business?

A: 911 response from clients. We sometimes get them. And occasionally having unexpected calls from our account manager or sales that we have a job emergency, and we need guys to go immediately to the field, it helped us immediately there knowing that he – all the field techs have all their equipment and the tools to do their job and get it done in one day. And it could be anytime.

Q: So, if I'm hearing you correctly, then the only benefit to the business in giving him this privilege is if there was an emergency call from a client?

A: One of the other benefits is it helps the field tech and our clients to be there and to do the services right away. Not just last-minute calls at night, but also it helps our company and it helps our client and helps our field techs to have everything there when they do leave their home to the job site.

Q: What about carrying tools. Another benefit?

A: Yes...

Q: And so, as a manager you made the business decision that look, we've got this guy. He's doing a good job. Let's give him this privilege now. He'll be doing an even better job, which will help the company. Is that accurate?

A: Yes."

Foreseeability of detour or errand

In most cases, you'll deal with a defendant driver who has already gone

somewhere else before going home. The defense will argue that this detour eliminates any exception to the going and coming rule. The *Moradi* case stands against that. But you still need to prove it, and the PMK deposition is another avenue to do just that.

In my opinion, whenever trying to prove any legal element in a deposition, it is better to avoid using that exact word. In this case it would be avoiding using the word "foresee" or "foreseeable." These words trigger the lawyer and even the deponent who has been coached by his lawyer. Here is an option from the caregiver case:

"Q: When you learned that Ms.

[Defendant] was at a grocery store after she had left your client's home, did that surprise you in any manner?

A: No. I don't know why it would surprise me. Anybody – I'm pretty sure you stopped at the store on the way home from work.

Q: But when you learned that she was at a grocery store, that was something that you understood as normal?

A: Yep.

Q: Why?

A: Because every single one of us has stopped at a store on their way home from work to pick up dinner or whatever you do, yeah."

Using open-ended and "why" questions, make it almost impossible for the defense lawyer or defendant to undo this later either in an MSJ or at trial. It also makes it difficult for the deponent to know where you are trying to go.

Conclusion: Make these questions your own

If you copy, tweak, and apply these questions in your depositions, you can break through the going-and-coming defense. By mastering these deposition tactics, you can actualize damages, expand liability, and change the outcome for your client.

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