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More than just impeachment

EXPANDING YOUR TRIAL TOOLBOX WITH DEPOSITIONS USING C.C.P. § 2025.620

By the time cases reach trial, discovery is done (hopefully), the exhibits are prepared, and everyone is thinking about jury instructions and verdict forms. But one of the most powerful tools in your case is just sitting in a box waiting to be lodged with the court: the deposition transcripts.

We often think of depositions as a discovery device, albeit one of the most important devices available, and not as a trial device. We depose witnesses to learn what happened, what they remember, what are their opinions, and, if we're lucky, pin down some admissions that we can then use for impeachment at trial. But used correctly, depositions can be critical pieces of substantive evidence for the jury. And all that is required to turn this standard discovery into your most highly valued trial tool is a little statute called California Code of Civil Procedure ("C.C.P.") section 2025.620.

Now, is an article about C.C.P. § 2025.620 the most thrilling piece you'll read in your career? Probably not. But is it useful? Absolutely. Master some of the finer points of C.C.P. § 2025.620, and you can master the use of depositions at trial. The end result can be more thrilling for the jury than you would expect.

Using the deposition of the testifying witness

C.C.P. section 2025.620, subdivision (a) allows you to use the deposition of a witness "for the purpose of contradicting or impeaching the testimony" of the witness *and* "for any other purpose permitted by the Evidence Code." Use the testifying witness's deposition testimony for direct contradiction and impeachment under this subdivision.

To maximize the impact of the impeachment – and to all but guarantee the judge permits you to read the deposition testimony over the inevitable "Objec-

tion, not proper impeachment" response from opposing counsel – identify the deponent's best testimony and ask the identical question at trial.

But remember, impeachment is more than contradictory testimony. A witness who testifies in deposition, "I don't recall" but then forms a specific memory for trial can be just as effective impeachment as a "Yes" becoming a "No." Same for "trial amnesia," where a witness remembers a critical detail in their deposition but conveniently has no recollection in front of the jury.

And what about "for any other purpose permitted by the Evidence Code"? Prior testimony can be used for the truth of the matter as either a Prior Inconsistent Statement under Evidence Code section 1235 or a Prior Consistent Statement under Evidence Code section 1236. While both of these hearsay exceptions focus on credibility of a witness, the former being most aligned with impeachment and the latter serving to rehabilitate a witness' compromised credibility, it is important to remember that statements that get admitted are useable as substantive evidence, not just credibility.

Using the deposition of a party and persons working for a party

C.C.P. section 2025.620, subdivision (b) is one of the more misunderstood subdivisions of this section. Subdivision (b) allows you to use "*for any purpose*" the deposition of not only an opposing party, but also "anyone who at the time of taking the deposition was an officer, director, managing agent, employee, agent, or designee under Section 2025.230 of a party." (Emphasis added.)

What "for any purpose" really means

It means: (1) you do not need to show the deponent is unavailable to testify at trial, (2) you do not need to call the party or affiliated person as a witness

at trial, (3) you are not limited to impeachment, and (4) it does not matter if the deponent has testified or is going to testify later in the trial. If the deponent falls into one of the applicable categories, you can present their deposition testimony as substantive evidence.

Who does this subdivision apply to?

Opposing counsel typically argues that the statute applies to only the party themselves, someone with supervisory authority, or a Person Most Knowledgeable for the company, but the statute is clear: you can use the deposition of any party *and* an officer, director, managing agent, *employee*, agent or designee. I can't emphasize the inclusion of "employee" enough. The statute does not require that an employee be of a certain level within the company for their deposition to be used at trial. The statute does not require that the witness still be employed by the company at the time of trial. The statute only requires that the employee was employed by the company *at the time their deposition was taken.* (*Haluck v. Ricoh Elecs., Inc.* (2007) 151 Cal.App.4th 994, 1004-1005.)

Nor is there any requirement that the employee be unavailable to testify at trial. Do not allow opposing counsel to impose limitations on your ability to use an employee's deposition testimony. If the objection is made, emphasize the plain language of the statute and hold firm.

Using the deposition of an unavailable witness

The next category of witness for whom you can use deposition testimony at trial is unavailable witnesses. Code of Civil Procedure section 2025.620 subdivision (c) lists specific requirements before a witness can be declared unavailable and their deposition testimony used at trial. Asking the right questions at the depo-

More continues

sition can set you up for an easier time admitting the testimony at trial.

Unavailable due to distance

The most cut-and-dry of the “unavailable” categories is if “the deponent resides more than 150 miles from the place of the trial or other hearing.” (C.C.P. § 2025.620, subd. (c)(1).) At the deposition, ask the deponent not only about their current address, but also any plans to move between the time of their deposition and the time of trial. This black line rule can come in handy when there is an opponent-friendly witness who provided valuable testimony at their deposition, because unavailability due to distance applies regardless of whether the witness is willing to travel to testify or is capable of testifying remotely. Unavailable does not mean “unwilling.” If the witness is beyond the 150-mile radius, you are entitled to present their deposition testimony.

Within 150 miles, but otherwise unavailable

Subdivision (c)(2) lists five additional ways a deponent can be declared unavailable regardless of their proximity to the hearing. A deponent is unavailable if they have asserted a privilege to testifying regarding the matter for which their testimony is relevant (subd. (c)(2)(A)); if they are disqualified from testifying (subd. (c)(2)(B)); if the deponent has died or cannot attend the hearing or testify due to current physical or mental illness or infirmity (subd. (c)(2)(C)); if they refuse to come to court and the court is unable to compel the deponent’s attendance (subd. (c)(2)(D)); or if the deponent refuses to come to court but you, as the proponent of the deposition, have exercised reasonable diligence to procure their attendance using the court’s processes (subd. (c)(2)(E)).

While most of these are self-explanatory, the last one may require some additional pre-trial work on your end to establish reasonable diligence. Beginning at the deposition, ask questions regarding the witness’s contact information includ-

ing email, phone number, and address. You may even want to go so far as asking on the record if the witness would be willing to accept service of a trial subpoena when the time comes. Next, before the deadline to issue trial subpoenas, use that contact information to try and get an on-call agreement with the witness and informally serve a trial subpoena.

If you cannot get ahold of the witness through regular means, attempt to serve the trial subpoena through a reputable process service. To maximize your showing of diligence, it is worth attempting service more than one time, even if it is unpleasant. Also, raise the issue of this witness’s unavailability to the judge and opposing counsel as soon as possible. Different judges have different definitions of what constitutes “reasonable diligence”; you will want to learn your judge’s individual standard with sufficient time to meet their definition before you rest your case.

Exceptional circumstances

The final category of “unavailable” under C.C.P. section 2025.620, subdivision (c) is when “[e]xceptional circumstances exist that make it desirable to allow the use of any deposition in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court.” (C.C.P. § 2025.620, subd. (c)(3).) This can be a useful catch-all for some of the more unique witness situations that arise, but there is no clear definition for “exceptional circumstances” or standards for “the interests of justice.”

Be prepared to make a compelling argument about what exceptional circumstances exist and how the presentation of your case will be harmed – and therefore the interests of justice will not be served – if you are not permitted to present the deposition in lieu of live testimony.

As a quick example, in one of our employment trials, we had a critical “Me Too” witness who was diagnosed with panic disorder as a result of her own retaliation-lawsuit experience. It was so

traumatic for the witness that she had a panic attack during her deposition. The same attorney who took her deposition and caused the panic attack was defending our case, and as a result, the witness refused to testify in our trial.

To make matters worse for the witness, at the time of trial she was pregnant and was worried the stress of testifying would result in a miscarriage. In addition to arguing she was unavailable for “existing physical or mental illness or infirmity” (§ 2025.620, subd. (c)(2)(C)), we argued that a key witness’s trauma from her own participation in the legal system and her high-risk pregnancy were exceptional circumstances that warranted the use of an alternative to live testimony under subdivision (c)(3). The exceptional-circumstances rule tipped the C.C.P. section 2025.620 scale in our favor, and we were permitted to use her videotaped deposition.

Using your own expert’s deposition at trial

Another use for C.C.P. section 2025.620 is to use the videotaped deposition of your own expert at trial. Subdivision (d) specifically allows any party to “use a video deposition of a treating or consulting physician *or of any expert witness* even though the deponent is available to testify if the deposition notice under Section 2025.220 reserved the right to use the deposition at trial, and if that party has complied with subdivision (m) of Section 2025.340.”

It’s common to consider videotaping the deposition of an opposing expert, but there are some significant strategic advantages to cross-noticing and videotaping the deposition of your *own* expert for use at trial.

First, if the expert is a short, relatively uncontroversial expert such as an unopposed economist or a radiologist, it may cost less money to videotape the deposition and play the video at trial than it would to call the expert live.

Second, if there is a chance that your

expert won't be available to testify live or remotely at trial, you should take the opportunity during the initial deposition to get certain testimony you would need on direct exam rather than risk opposing counsel not agreeing to a trial preservation deposition in the future.

Third, if you have worked with a particular expert before and you know they testify better at deposition than they do at trial, preserve the best version of their testimony and use that at trial instead. This also saves costs on an unpredictable expert.

Finally, calling one of your experts by videotaped deposition may be to your benefit if the cross-examination of your expert at deposition was relatively innocuous. It may work to your advantage not to allow opposing counsel a second attempt at a damaging cross-examination in front of the jury. Although it would be within Defendant's right to call your expert as a witness in their own case-in-chief in order to do a more thorough cross-examination, odds are slim that would happen. The opposing side is now stuck with an unimpressive cross-examination. And your expert's shine remains in place.

If you think you might use your own expert's video deposition testimony in trial, make sure everything you would want to present on direct examination is contained in the deposition. If defense counsel doesn't cover a particular area, maybe they were thin on your expert's qualifications or there is a specific opinion that wasn't presented clearly, be sure you cover it at the end of the deposition. If your own examination will add significant additional time, as a professional courtesy it may be worth offering to pay the expert's hourly fee for the portion of the deposition that was done for your benefit, rather than sticking defense with the bill for your trial presentation.

To use your own expert's videotaped deposition at trial, you must comply with the other identified C.C.P. sections and ensure the deposition is in fact videotaped. It all comes down to the deposition notice. Issue your own notice of taking the expert's deposition that complies with

the requirements of C.C.P. § 2025.220, including a specific reference that you are reserving your right to use the video recorded deposition at trial under subdivision (d) of section 2025.620. You also need to comply with the designation, objection, and editing requirements in C.C.P. § 2025.340, subd. (m).

Even if the defendant's notice of deposition says the deposition will be videotaped, don't take any chances. Confirm with opposing counsel whether they have reserved a videographer and, if not, add a videographer who complies with the requirements of C.C.P. § 2025.340, subd. (c) (i.e., the videographer is a person authorized to administer an oath and is not financially interested in the action).

Using the deposition of a treating doctor

The same subdivision that allows you to use the videotaped deposition of your own experts allows you to use the deposition of any treating or consulting physician – but only if the deposition is videotaped. Treaters can be some of your best witnesses because they are generally viewed by the jury as less of a hired gun, and who better to explain what the plaintiff is going through than the person caring for them?

Treaters can be difficult to schedule at deposition, much less wrangle during the ever-changing trial schedule. Don't rely on your opponent to get this critical testimony and make it useable at trial. If there is a valuable treater, notice and take the video deposition yourself. If opposing counsel noticed the deposition, take the same steps of cross-noticing to add a videographer and specify your intent to reserve your right to use the video deposition at trial.

Setting up the use of depositions before trial

Maximizing your ability to use deposition testimony at trial requires some forethought and attention to detail, beginning with the deposition notice. Always review every deposition notice before serving to confirm that the

correct subdivision of C.C.P. § 2025.620 is identified in the notice. Across the board, include a reference to subdivision (c) regarding unavailability just in case a witness becomes unavailable in the future. For any deponent employed by the party, be sure to identify subdivision (b) in the deposition notice so there is no ambiguity at trial that the deposition was taken with ability to use at trial in mind. For treating physicians and experts, state the intention to use the videotaped deposition at trial pursuant to subdivision (d). If you do not identify the proper subdivision of section 2025.620, you may be waiving your ability to present the deposition testimony at trial.

During the deposition, ask questions that create usable evidence at trial in addition to gathering information. Ask foundational questions that could establish unavailability at trial, or establish an expert's qualifications. Get the clean question and answer; try not to relent to a difficult witness giving dodgy responses.

If mid-way through a question you realize your question contains too many words and you've lost the thread yourself, stop talking, withdraw or strike the question, take a breath, and re-ask the question in a way that will play better at trial. Plan ahead for those key trial admissions, even if it means writing an important question verbatim in your deposition outline. Keep in mind that this testimony will end up in front of the jury, and question accordingly.

As part of your trial preparation, designate the portions of the deposition you intend to use at trial and send to the opposing side for their objections and counter-designations. (C.C.P. § 2025.340, subd. (m).) Counter-designations should be limited to testimony that is relevant to the parts you designated. Subdivision (e) of C.C.P. § 2025.620 allows you to offer into evidence "all or any part of a deposition, and if the party introduces only part of the deposition, any other party may introduce any other parts *that are relevant to the parts introduced.*" (Emphasis added.)

More continues

Counter-designations are not a free-for-all opportunity for another party to designate anything else in the deposition that they want to present in their own case-in-chief. For example, if your medical expert gave multiple opinions, but you only designated for presentation their opinions regarding a foot injury, the defense cannot designate the expert's opinions regarding the plaintiff's eyes.

Counter-designations must be relevant to the original designations. This is another opportunity to deploy strategy:

If a witness gave harmful testimony in a specific area, consider not designating testimony that would make the harmful testimony relevant. It is easier to control a designation than to control a live witness.

Lastly, keep a printed copy of the entire code section in your trial notebook. It will absolutely come in handy. Trust me.

Conclusion

Thanks to C.C.P. § 2025.620, your trial preparation and presentation begins the moment you issue your first deposi-

tion notice. The Code of Civil Procedure may not seem exciting, but if you understand the nuances of this section and use some creative deployment, it may become your new favorite trial tool.



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