



PANDEMIC SUCCESS: Advanced Zoom Depositions and Mediations

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DO NOT LET NEW THIS NEW PARADIGM CONSTRAIN YOU - DOUBLE DOWN ON IT

- ▶ Waive of the Future - get used to it and use it.
- ▶ Practice a few times. Does not need to be perfect.
- ▶ Fun and different once you get used to it.
- ▶ I have done about 25 mediations and 50 depositions by zoom in the last year. My office has done a lot more.

Depositions

Zoom = better?

- ▶ Can do it from anywhere (home or hotel)
- ▶ Easy to record. Click record, record to cloud, and pin video on deponent.
- ▶ Share screen - exhibits, highlight PDFs while talking,
- ▶ show deponent docs on screen that cannot escape from - seems to work better.
- ▶ Makes me get exhibits together earlier.
- ▶ Move around from exhibit to exhibit easier.
- ▶ Never have had concern that answers being suggested to deponent.
- ▶ Clients and co counsel can easily attend.
- ▶ Not better for power point.

Basics

- ▶ Get an account
- ▶ Practice - pin video, unpin, background, share screen,
- ▶ Notice Depo by zoom. Set up zoom meeting and send your link.
- ▶ Click record and go.
- ▶ Court reporters can do the zooming for you.
- ▶ I like to do it myself. - I get the recording and its cheaper. Some reporters have charges - it depends.
- ▶ Have exhibits up and ready to open in Adobe or your preferred PDF viewer.
- ▶ Prep witnesses by zoom at least the day before.

Notice

NOTICE OF VIDEO ZOOM CONFERENCE DEPOSITION

TO: Counsel of Record

WITNESS TO BE DEPOSED: [Kathy Barton](#)

PLACE OF DEPOSITION: Remotely VIA Zoom

DATE AND TIME: 9:00 AM on September 24, 2020 and continuing until completion

COURT REPORTER: Russo Reporting

VIDEOGRAPHER: Burger Law, LLC

PLEASE TAKE NOTICE that, pursuant to rule 57.03 of the Missouri Rules of Civil Procedure, the undersigned will take the **video conference (via Zoom)** deposition of the above individual on the date and at the time indicated, before a certified Court Reporter and or some other person authorized by law to take deposition and the videographer is a member of Burger Law, LLC, 500 N. Broadway, Suite 1860, St. Louis, MO 63102, whose employer is Burger Law, LLC.

How different - Exhibits

- ▶ Share screen with exhibits. Can use and blow up language effectively.
- ▶ Have them ready to show and to go. Don't open or try to find where saved first time during depo.
- ▶ Change the file names to the exhibit numbers. Eg "1 - photo" "2-police report."
- ▶ Share google file with opponent of all the exhibits the day before. Example - Wisconsin Class action (share screen).
- ▶ Make exhibits during the depo - Wisconsin Exs. 4 and 5.
- ▶ Look for and mark new exhibits during depo of stuff you google. - Eg. Wisconsin articles.
- ▶ Can have exhibits to show doctors medical records during depo so they do not have to find theirs. Jungers.
- ▶ Be familiar with docs produced by defendant so can grab others.

- ▶ All exhibits in folder on google drive - easy to give to court reporter.
- ▶ Exhibits in shared folders makes it easy to work with remote staff and other lawyers working with you in the case.
- ▶ Highlight PDFs of documents with the stuff you want to use in the depo. Two ways (and I use both):
 - ▶ Two separate copies of exhibit - one clean and one with highlights. Advantage is do not signal the other side what your are going to use. I did this more in the beginning.
 - ▶ One copy of the exhibit pre highlighted. Easy to focus on the key stuff. I
- ▶ Pull other documents from defendant's production and show them to the witness by screen share. Remember - doesn't have to be an exhibit a first- can show photos and docs to see what witness knows and what the good documents are - then mark them.
- ▶ Mark and use designee depo notice to inquire with witness.
- ▶ Truck case where I showed nothing in 15 page employment file about termination or drug tests.

How Different - Record the depo

- ▶ I have always recorded many of my depositions. Have a Sony Handicam and still can use it.
- ▶ Zoom recording is absolutely great.
- ▶ But Zoom recording is even better - the witnesses really get that they are being recorded and they are looking at their own face on a big screen in front of them - so know exactly what's being recorded.
- ▶ I am finding that I get witnesses to give me even more.
- ▶ Admit liability in crash cases, policy violations in other cases (WI and local municipality in jail case).
- ▶ Witnesses can look really bad when lying or playing games and you see it in real time on your screen.
- ▶ Watch out for your facial expressions (I can be bad about that). May be recording you too.

How Different - Anywhere

- ▶ Columbia Mo Depo I did from New Orleans. I had better wifi than the depo location
- ▶ Some from my office where two screens helps organize.
- ▶ Depos with not a lot of documents I can often do on my laptop from home.
- ▶ Zoom presentation from Texas near thanksgiving.

How Different - Tricks

- ▶ Put depo notes in word doc in front of you on screen and minimize zoom
- ▶ Use google doc shared with co-counsel or paralegals for them to suggest questions for you.
- ▶ Put other docs in front of you and use them for language and not tell the other side or deponent what you are doing and later share or never share that document. Examples:
 - ▶ Policies and procedures - WI and corizon and municipality cases
 - ▶ Police report
 - ▶ Medical records.
- ▶ Anyone else have a trick out there they want to share.

Problems

- ▶ You're on mute.
- ▶ Bad connectivity can arise any time.
- ▶ Prep your client on zoom as a test run at least the day before. Do not have the first time they get on zoom and answer questions be at your depo.
- ▶ People can think just on Zoom and not real. Deal with that in your prep.
- ▶ Makes depo prep more important.
- ▶ Your client may not look good. Deal with that in prep - lighting, angle of camera.
- ▶ Deponent using notes? Might not know.
- ▶ Lawyer texting client in depo asking to take a break.

Depo Example - Catch deponent lying

Depo Example - Admit at fault?

Mediation

- ▶ Just as effective as in person.
- ▶ Same basics - do not have your client in the room with you unless necessary (eg - deaf)
- ▶ Prepare better and write good mediation letter. - three share with you in materials.
- ▶ We mediated a lot of these so we established a mediation preparation process that is really effective. Let's share that now.

Internal Burger Law Mediation Preparation Process

Step by step:

- ▶ Schedule Mediation- via Zoom for now or in conference rooms designated by mediator. Scheduling means you clear with client and attorney handling mediation and other side. Most mediators schedule on their websites and have available dates on there. Whether and when to mediate should be a decision by attorney and client.
- ▶ At the time of scheduling, send the below pre-mediation email and provide the client with the mediation date, as well as any other upcoming dates of importance, such as trial date, arbitration date, upcoming deposition dates, etc.
- ▶ A call with the client explaining mediation is also recommended. Discuss the mediation and what it means. Make sure we are updated with medical providers, medical treatment, wage loss info and any other stuff (like do we have all the pictures or bills from client).

- ▶ At the time of scheduling, send an email to the client and provide them with any important deposition transcripts and a copy of the demand letter if one has been sent, as well as any response received/current offer on the case.
- ▶ Within a week of scheduling the mediation, total outstanding liens and send reduction requests to all providers, and make sure lien letters are sent to all necessary parties. See lien reduction protocol. Attorney and paralegal have to plan and meet on this. Usually we ask for 50% reduction - but that may not be enough - or there may be providers we should leave alone. Also - for Medicare/Medicaid make sure conditional payment letter will be issued and get on the portal to get figures for the lien and look at the EOB.
- ▶ Within a week of scheduling the mediation, make sure any medical records or bills that need to be supplemented have been supplemented. These also need to be produced to the other side.
- ▶ Is all medical related, all liens related and have we supplemented everything to the other side, like med records, photos, wage loss, liens, and rog answers?

- ▶ Two weeks before the mediation schedule a phone call between the client and the attorney for one week to allow for preparation and to discuss any other issues with the client ahead of the mediation.
- ▶ A week to 10 days before mediation, do the mediation letter and/or presentation to the mediator with any attachments - send to mediator, client and opposing counsel.
- ▶ A week before the mediation, get Casey to get you expenses and any other financial details you need like % fee.
- ▶ A week before the mediation, send a letter or email to the client informing them of the total of the outstanding liens and any reduction acceptances that you have received.
- ▶ Day before and at mediation - last prep, update numbers and talk settlement with your client.

Three Pre- Mediation letters (Attached)

- ▶ Always send mediation letters to the other side and write them as such.
- ▶ If want to settle the case show your cards and good parts about your case - in a letter sent to other side and their adjuster - a week to 10 days before the mediation so they can get a bunch of authority.
- ▶ Feel free to kick mediator out of the room. And when they are out feel comfortable have private conversations with your client.

During mediation working notes

- ▶ Use this technique
- ▶ People are visual learners and it really helps to see on the screen what is being discussed.

Jane Doe Mediation Notes Example

Plaintiff's demand

Defendant's offer

\$200,000	\$25,000
\$180,000	\$40,000
\$165,000	\$65,000
\$145,000	\$80,000
\$130,000	\$90,000

Full release, confidentiality and responsibility for liens.

DOI 6/5/18

Damages

Medical	Billed \$44,000	Owed \$26,000
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Def - Paid is \$24,893

Wage Loss	\$32,094
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Us - \$800/week to \$500 a week reduces wage loss from \$20k to \$30k.

Special 26k + 32/20 = \$58/46k

Pain and suffering - But what about Open and obvious

Problems Jane has now

Left Big toe

Able to do most of things in life - stairs kneeling and squatting is painful.

Defendant's Doctor's Report

Ms. Doe sustained an intra-articular and minimally displaced fracture of the proximal phalanx of the left great toe as a direct result of the PVC conduit pipe landing on his great toe on 6/5/18.

The vertical nature of the falling conduit, combined with the weight and the velocity secondary to gravitational force, was certainly enough to cause the fracture.

The treatment of open reduction and internal fixation as performed by Dr. Brickhouse was also reasonable and appropriate. Ms. Doe had wound healing difficulty which was managed appropriately. The delay in bone healing was further managed appropriately with bone stimulation.

Ms. Doe does have radiographic evidence of posttraumatic arthritis of both the first metatarsal phalangeal joint and hallux interphalangeal joint. The posttraumatic arthritis is also secondary to the intra-articular nature of the comminuted fracture. Intra-articular and comminuted fractures frequently lead to arthritis of the adjacent and involved joints, as is the case with Ms. Doe.

The finding of probable impingement of the proximal screw into the first metatarsal phalangeal joint is also a contributing factor to the development of posttraumatic or postsurgical arthritis.

For that reason, it is reasonable and recommended to remove the hardware. Screw impingement into the joint can further breakdown that cartilage which remains, and therefore accelerate the progression of posttraumatic arthritis.

Overall, however, despite the intra-articular nature of the fracture and hardware impingement, the first metatarsal phalangeal joint is functioning reasonably well considering the nature of the fracture.

The **hallux interphalangeal joint is minimally functional however.**

As **previously mentioned, hardware removal is recommended. Following hardware removal, no** definitive treatment is recommended other than consideration for utilizing stiff sole shoes and orthotics.

The rate of progression of posttraumatic osteoarthritis is variable per person.

Should either of the first metatarsal phalangeal joint or hallux interphalangeal **joint develop osteoarthritis to the point where it is debilitating and prevents Ms. Doe from ambulating comfortably, surgical arthrodesis of those joints could be entertained.**

Expenses

TOTAL: 3,124.82

Filing Fee: 107.98

Service Fee: 100.00

Depo/Transcript: 1000.12

___ Depo: 800.00

Medical Records: 45.29

Mediation Deposit: 800.00

MISC: 200.00

Referring lawyer Expenses: \$171.43

Settlement at	Atty fees	Expenses	Liens	Net to Client
\$80,000	\$32,000	\$3200	26000	\$18,800/22,800
\$100,000	\$40,000	\$3200	26,000/20000	\$30,800/34,800
\$120,000	\$48,000	\$3200	26,000/20000	\$42,800/46,800

John Doe Mediation Notes Example

<u>DEMAND</u>	<u>OFFER</u>	
\$600,000	\$76,000	
550	100	
525	125	
475	140	
<u>450</u>	<u>150</u>	
350		
Settlement at	\$200,000	300,000
Fee	\$66,666	100
<u>Expenses</u>	<u>\$4,000</u>	<u>4</u>
Net	\$129,334	196k
	<u>\$23,799.04</u>	<u>+60k</u>
	\$105,534.96	83k
		113k

Medical provider liens:

Medicare	\$14,576.05
Implant company	5,890
Pain and Rehab	914
Ct	\$2,266
Med provider	<u>\$153</u>
	\$ 23,799.05
	<u>\$ 58,000</u>
	81,799.05

Defendant:
Our guy should not have turned into that lane.
John did not do anything wrong.

Notes if don't settle:
Add an image from police report or injury
Add video from the security camera from the fall

Physical Therapy	\$6,614.65	\$1,439.65	\$4,020.97	\$1,154.03
CT	\$2,266.00	\$0.00	\$0.00	\$2,266.00
Spine Surgeon	\$60,898.95	\$0.00	\$0.00	\$60,898.95
Pain Specialist	\$914.00	\$0.00	\$0.00	\$914.00
Hospital	\$75,576.65	\$9,473.99	\$66,102.66	\$0.00
implant	\$5,890.00	\$0.00	\$0.00	\$5,890.00
primary	\$153.00	\$0.00	\$0.00	\$153.00
TOTALS:	\$152,313.25	\$10,913.64	\$70,123.63	\$71,275.98
			+	

Mediation Notes - Wage and Hour case

Date wage rate begins	Hourly Wage	Additional Overtime Rate Owed	Overtime Hours Worked	Overtime Wages Owed
July 1, 2016	\$21.6125	\$10.80625	76	\$821.28
August 12, 2016	\$21.9375	\$10.96875	766.5	\$8,407.55
August 11, 2017	\$22.2625	\$11.13125	1,125.5	\$12,528.22
August 10, 2018	\$22.60	\$11.30	831	\$9,390.30
August 9, 2019	\$22.9375	\$11.46875	461	\$5,287.10
			Total Overtime Wages Owed:	\$36,434.45

The F.L.S.A. requires an award of liquidated damages totaling twice the additional wages owed. 29 U.S.C. § 216(b). Mr. Doe's wage claim under the F.L.S.A. thus totals \$72,868.90. This has been accurately calculated to the penny. Additionally, under Missouri's statute of limitations he is entitled to unpaid overtime for the prior two years, for which we do not have records. Using the above figures to calculate an average amount of overtime pay worked for these two years, the total for each year is \$12,144.82, for a total claim for the preceding two years of \$24,289.64. Adding the F.L.S.A. three-year time and the additional two years for the contract claim, Mr. Doe's total present claim is for \$97,158.54. Mr. Doe continues to work for _____ and his overtime wages will continue to accrue while the action remains pending.

Mediation Notes - Nursing Home

► _Defenses:

1. You're not the children - need not as great as niece than as child. ____ is her god daughter and very close. Treated like her child. Became care giver. Visited all the time. Saw at least weekly - big family and lots of folks visited.
 2. Conservative venue - whatever - jury would really empathize with this as they have parents in mediocre facilities.
 3. Accident and not systemic or intentional issue - Well they had significant systemic issues that ____ took note of and complained
 4. After short time resumed activities - phantom pain and controlled by medication, active till February - On pain meds and hosp records show more pain and was in more pain. Repeatedly showed phantom pain. Significant and complained about it a lot. Juxtapose records with what was happening in reality. Records are terrible - not show the truth. BS.
 5. Using scooter before and after. Not true - In wheelchair when came back and lost her independence. Very hard on her. Lost that capability. Lost her independence. Started slippery slope. Fear/terrified every time they hoiered her after. No training after
- I think these defenses are really weak - that has no kids and ____ is conservative, we didn't write down any pain she was in. No defense on liability.

Depo excerpt:

Can you reconcile the two things that you've testified to, number one -- You just said it, I don't know why I didn't see anything, I must have been looking back or looking somewhere else, and at the same time, you -- you're saying that your body was under her and you were cradling her in some way I think as she was falling. Can you reconcile those two things for me. I don't -- I -- They seem impossible to both be true to me.

A It was just the way it happened. I can't explain to you how it happened that way. I just recall acting, and I remember I was struggling like just cradling her.

Q Are you aware of any investigation or inquiry done by ____ into why or how this incident happened other than you writing up your investigation report that -- that we can't get a copy of?

A No. Not to my rec -- recollection.

Thanks for Attending and HAVE FUN WITH THIS STUFF.

Please let us know if we can support you in your litigation or co-counsel with you in your cases.