MONTHLY LUNCHTIME SEMINAR SERIES

36TH Session:

USE OF DEPOSITIONS: LAW & TECHNOLOGY

Judge Lynn M. Egan
Ms. Kathleen M. Grove

July 17, 2015

JUDGE LYNN M. EGAN

Judge Lynn M. Egan became a Cook County Circuit Court judge in 1995 and has served in the Law Division for over 18 years. She has presided over high volume motion calls, an Individual Commercial Calendar, an Individual General Calendar and bench and jury trials. She is currently the only Cook County judge assigned to a General Individual Calendar in the Law Division, which includes every type of case filed in the Division, specifically including personal injury actions such as medical & dental malpractice, product liability, infliction of emotional distress, defamation/slander, premises liability, construction & motor vehicle accidents, as well as commercial disputes such as breach of contract, fraud, conspiracy, breach of fiduciary duty, wrongful termination, employment discrimination and legal & accounting malpractice. She manages these cases from time of filing until final disposition, including all motion practice, case management, settlement conferences and trials. Additionally, Judge Egan is committed to assisting parties with the voluntary resolution of cases. As a result, hundreds of cases pending on other judges' calls in the Law & Chancery Divisions & the Municipal Districts are transferred to Judge Egan each year for settlement conferences and she has helped facilitate settlements totaling over 200 million dollars.

Judge Egan has also served as a member of several Illinois Supreme Court Committees, including the Executive Committee, Discovery Procedures Committee, Civil Justice Committee and Education Committee. She has also been a faculty member at dozens of judicial seminars throughout the state, including the annual New Judges' Seminar, regional conferences and the mandatory Education Conference. She has authored numerous articles on subjects such as discovery, requests to admit, restrictive covenants, Day-In-The-Life films, directed verdicts, jury selection & instructions, Dead Man's Act, Supreme Court Rule 213, expert witnesses, reconstruction testimony, court ordered medical exams, attorney-client/work product privileges, sanctions and damages. She also serves as a mentor for new judges and was recently appointed to the Illinois Courts Commission, a 7 member panel responsible for rendering final decisions on matters of judicial discipline.

Judge Egan has served on Bar Association committees and Boards of Directors and has been a frequent speaker at Bar Association seminars. She has taught law school classes and judged trial & appellate advocacy competitions. In 2012, she became a registered CLE provider through the Illinois MCLE Board and provides free CLE seminars for attorneys and judges every month. Since her monthly seminar series began in August 2012, Judge Egan has awarded over 6,800 hours of CLE credit to Illinois attorneys.

Prior to joining the bench, Judge Egan was an equity partner at Hinshaw & Culbertson, where she focused her practice on medical negligence cases. In addition to trial work, she argued before the Illinois Supreme Court on a matter of first impression in the country in *Cisarik v. Palos Community Hospital*. Similarly, during her earlier career in the Cook County State's Attorney's Office, she worked in the criminal and juvenile divisions and argued before the Illinois Appellate and Supreme Courts on matters of first impression in Illinois.

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SECTION A

- *"Use of Discovery Depositions,"* by Judge Lynn M. Egan, July 2015.

USE OF DISCOVERY DEPOSITIONS

by
Judge Lynn M. Egan
July 2015

I. Discovery Depositions & Supreme Court Rule 212.

The use of discovery depositions at trial is governed by Supreme Court Rule 212(a) and is strictly limited to the circumstances detailed in the rule. The limitations within the rule are the result of Illinois' unique approach to depositions. Specifically, Illinois is the only state in the country that distinguishes between discovery and evidence depositions. *Longstreet v. Cottrell, Inc., 372 Ill.App.3d 549, 555 (5th Dist., 2007). See also, Discovery, Wacky Rules, by Jerold S. Solovy & Robert L. Bynam, The National Law Journal (August 25, 2008).* This distinction dates back to at least 1955, when the Illinois Supreme Court adopted revised rules of procedure, including Rule 19-10, which specified the different uses of discovery and evidence depositions. *Longstreet, supra at 556.* Despite subsequent amendments to Supreme Court Rules and the Code of Civil Procedure, as well as significant criticism of maintaining the two types of depositions, the distinction persists. Thus, practitioners are well advised to understand the distinctions because failure to do so can negatively impact a party's ability to introduce certain evidence at trial.

A. What's the Difference? Discovery vs. Evidence.

The different treatment of discovery and evidence depositions is premised upon their different purposes. Like any other type of discovery, the purpose of a discovery deposition is to ascertain the truth by exploring the facts of the case. *In re Estate of Rennick, 181 Ill.2d 395, 401 (1998).* In contrast, evidence depositions are merely intended to preserve evidence for trial. *Berry v. American Standard, Inc., 382 Ill.App.3d 895, 899 (5th Dist., 2008).* Although both types of depositions are grounded in the concept of relevance, the scope of relevance is much broader for discovery purposes than for evidence at trial. Specifically, "relevance for discovery purposes includes not only what is admissible at trial, but also that which leads to admissible evidence." *Ramos v. Kewanee Hospital, 2013 IL App (3d) 120001, ¶ 76.* Relevance at trial, however, is limited to evidence that tends to make the existence of any consequential fact more or less probable than it would be without the evidence. *Jackson v. Reid, 402 Ill.App.3d 215, 236 (3d Dist., 2010).* Thus, the permissible scope of inquiry is much broader in a discovery deposition than in an evidence deposition.

Consequently, discovery depositions proceed much more informally and attorneys typically do not raise technical objections because Supreme Court Rule 212 strictly limits the use of discovery depositions at trial. In fact, the limitations of Rule 212 are considered a "trade-off" for the exploratory freedom permitted in a discovery deposition. *Longstreet, supra at 556-557.* Of course, such informality does not apply to evidence depositions because they are admissible "as fully as would be the testimony of the

deponent if present at trial." *In re Estate of Rennick, 181 Ill.2d 395, 403 (1998).* Therefore, questioning at an evidence deposition is governed by the rules of evidence. *Id. at 401; see also, Ill. S. Ct. Rule 202, Committee Comments.*

Because the different purposes of discovery and evidence depositions create significant differences in the type and scope of questioning, as well as their ultimate use at trial, it is essential that attorneys understand when the information in a discovery deposition may be utilized at trial.

B. Identifying the Type of Deposition – Supreme Court Rules 202 & 206.

Because the type of deposition dictates the scope of inquiry and subsequent admissibility, practitioners must first comply with the rule about identifying the type of deposition before it is taken. Supreme Court Rule 202 expressly states that, "the notice, order, or stipulation to take a deposition shall specify whether the deposition is to be a discovery deposition or an evidence deposition." *Ill. S. Ct. Rule 202 (West 2014).* Similarly, Supreme Court Rule 206(a) notes that deposition notices "shall state...whether the deposition is for purposes of discovery or for use in evidence." *Ill. S. Ct. Rule 206(a) (West 2014).* Rule 206(c) also specifies the type of examination that is permissible for each type of deposition. Specifically, it notes that a discovery deposition may include inquiry about "any matter subject to discovery under these rules," but that evidence depositions are limited "as though the deponent were testifying at the trial." *Ill. S. Ct. Rule (c)(1) & (c)(2)(West 2014).*

Failure to comply with the rules regarding identification will result in the deposition being treated as discovery only, which means a party will likely be prohibited from using it at trial. *Strope v. Chicago Transit Authority, 71 Ill.App.3d 987, 996 (1st Dist., 1979). See also, Zelinski v. Security Lumbar Company of Kankakee, 133 Ill.App.3d 927, 937 (3d Dist., 1985)("reading a discovery deposition to a jury is not permitted," even when a subpoenaed witness fails to appear.).*

II. Permissible Uses under Supreme Court Rule 212.

Due to the expansive, information-gathering purpose of discovery depositions and the liberal relevance standard applicable to them, they are generally inadmissible during trial. The only exceptions to this general rule are specified in Supreme Court Rule 212(a)(1)-(5) and include the following situations:

1) for the purpose of impeaching the testimony of the deponent as a witness in the same manner and to the same extent as any inconsistent statement made by a witness;
2) as an admission made by a party or by an officer or agent of a party in the same manner and to the same extent as any other admission made by that person;
3) if otherwise admissible as an exception to the hearsay rule;
4) for any purpose for which an affidavit may be used; or

5) upon reasonable notice to all parties, as evidence at trial or hearing against a party who appeared at the deposition or was given proper notice thereof, if the court finds that the deponent is not a controlled expert witness, the deponent's evidence deposition has not been taken, and the deponent is unable to attend or testify because of death or infirmity, and if the court, based on its sound discretion, further finds such evidence at trial or hearing will do substantial justice between or among the parties.

Ill. S. Ct. Rule 212(a)(1)-(5)(West 2014). Because the rule has been amended, most significantly in terms of subsection (a)(5), it is important to understand the applicability and import of each subsection.

A. Impeachment

The first use authorized by Supreme Court Rule 212 is impeachment and provides that a discovery deposition may be used at trial in order to impeach witnesses who were previously deposed. *Ill. S. Ct. Rule 212(a)(1)(West 2014).* Specifically, the rule notes that the impeachment may occur "in the same manner and to the same extent as any inconsistent statement made by a witness." *Id.* Thus, the credibility of a witness may be challenged by showing that he previously made a statement that is inconsistent with his trial testimony, even if the prior statement was not made under oath or in a court proceeding. *Edward Don Company v. The Industrial Commission, 344 Ill.App.3d 643, 652 (1st Dist., 2003).*

CAUTION: Not every inconsistent statement at trial triggers the right to use deposition testimony as impeachment. In fact, the practice of using discovery depositions for impeachment at trial has been described as "greatly abused." *Kelly v. Reynolds, 132 Ill.App.3d 1098, 1100 (4th Dist., 1971).* In order to qualify as proper impeachment, the statement at trial must be "materially inconsistent" with the prior deposition testimony. *Zelinski v. Security Lumber Company of Kankakee, 133 Ill.App.3d 927, 937 (3d Dist., 1985).* Moreover, the inconsistency must be "substantial and not merely trivial or collateral." *Id.* Of course, if the statement qualifies as impeachment, it is not admitted as substantive evidence and counsel should be alert for attempts to use it as such.

NOTE: Be prepared to perfect the impeachment. If the witness denies the prior statement or gives an equivocal answer, the impeachment MUST be perfected by introducing evidence of the prior statement. *Ming Auto Body v. The Industrial Commission, 387 Ill.App.3d 244, 260 (1st Dist., 2008).* Failure to do so constitutes error. *Morris v. Milby, 301 Ill.App.3d 224, 231 (4th Dist., 1998). See also, People v. Greene, 2012 IL App (1st) 100788-U, ¶ 34 ("It is reversible error to fail to offer substantive proof of the impeaching statements due to the highly prejudicial innuendo created through the incomplete impeachment.").*

B. Admissions

The second use authorized by Supreme Court Rule 212 is when the discovery deposition contains admissions. *Ill. S. Ct. Rule 212(a)(2)(West 2014).* Although the rule simply states that such testimony may be used "as an admission by a party or an agent of a party in the same manner and to the same extent as any other admission made by that person," there are several aspects to this subject that can make it challenging during trial. Because admissions are received as substantive evidence, it is important that practitioners appreciate these challenges.

i. Nature of the Statement.

For purposes of Supreme Court Rule 212(a)(2), the admission does not need to be against a party's interest or even contradict the party's trial testimony. *In re Estate of Lewis, 193 Ill.App.3d 316, 323 (4th Dist., 1990).* Instead, the admission must merely be relevant and material to an issue at trial. *Bargman v. Economics Laboratory, Inc., 181 Ill.App.3d 1023, 1029 (3d Dist., 1989).* Statements within a discovery deposition can constitute either evidentiary or judicial admissions. *Rennick, supra at 406.*

Whether a statement qualifies as a judicial admission requires "thoughtful study," which means that it must be given a meaning consistent with the context in which it was made and in relation to other evidence. *Dunning v. Dynegy Midwest Generation, Inc., 2015 IL App (5th) 140168, ¶ 50.* The rationale supporting this approach is so that "justice not be done on the strength of a chance statement made by a nervous party." *Smith v. Pavlovich, 394 Ill.App.3d 458, 468 (5th Dist., 2008).*

NOTE: The testimony of a nonparty witness cannot be considered a judicial admission. *Watrous v. Coulter, 2011 IL App (4th) 110071-U, ¶ 7.* This is true even if the witness is added as a party after making the statement. *Id. ("One cannot transform a statement made as a nonparty witness into a judicial admission by later filing a third-party action against the nonparty witness.").* However, the testimony may qualify as an evidentiary admission that is subject to contradiction or explanation. *Id. at ¶ 10-11.*

CAUTION: When attempting to introduce an admission during trial, it is essential that counsel differentiate between the different types of admissions, judicial or evidentiary (*Pryor v. American Central Transport, Inc., 260 Ill.App.3d 76, 85 (5th Dist., 1994),* because a judicial admission is binding upon the party who made it, while an evidentiary admission can be contradicted or explained. *Knauerhaze v. Nelson, 361 Ill.App.3d 538, 558 (1st Dist., 2005).*

Because judicial admissions are binding, there are stringent standards applicable to their use. For instance, they must be "deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge." *Rennick, supra at 406.* Thus, matters of opinion, estimates, appearances or uncertain summaries do not qualify. *Smith, supra.*

ii. Identity of the Deponent: Party or Agent.

Although there was previously a split of Appellate authority on the subject of whether admissions made by a party prior to death could be introduced against the party's estate, the Illinois Supreme Court resolved this issue by unequivocally declaring that "death does not erase an admission from a party's lips..." *Rennick, supra at 405.* Thus, there is currently no controversy about the trial admissibility of a deceased party's admissions from a discovery deposition.

However, Supreme Court Rule 212(a)(2) also permits trial use of admissions made by "an officer or agent of a party" during a discovery deposition. This portion of the rule requires application of agency principles in order to determine whether the deponent qualifies as an agent. As is well established, an agency relationship is defined as a "consensual, fiduciary one between two legal entities, where the principal has the right to control the conduct of the agent and the agent has the power to affect the legal relations of the principal." *Taylor v. Kohli, 162 Ill.2d 91, 95 (1994).* Several factors are relevant in determining whether an agency relationship exists, including the manner of hiring, the right to discharge, the manner and direction of the work of the parties, the right to terminate the relationship, and the type of supervision exerted over the work. *Id. at 95-96.*

NOTE: The agent's admission must concern a matter within the scope of his authority while the agency relationship exists. *Edwards v. Alton & Southern Railway Company, 275 Ill.App.3d 529, 538 (5th Dist., 1995).* Importantly, "within the scope of authority" does not require specific authority to make the statement considered an admission because agents are "seldom given specific authority to make statements that are damaging to their principal." *Id.* Instead, the modern trend in Illinois is that a statement by an agent qualifies as an admission if it is made during the employment relationship and concerns a matter within the scope of employment. *Stentz v. Rehabilitation Institute of Chicago, 2011 IL App (1st) 102675-U. See also, Calloway v. Bovis Lend Lease, Inc., 2013 IL App (1st) 112746, ¶ 88.*

iii. Availability of Deponent.

Supreme Court Rule 212(a)(2) does not require a showing that the deponent is unavailable at trial in order to use admissions from his discovery deposition. This is in contrast to subsections (a)(5) and (b), which mandate such a showing for deponents other than physicians or surgeons. *See, Ill. S. Ct. Rule 212(a)(5) & (b)(West 2014).* Importantly, the argument that the unavailability requirement of subsection (b) should be applied to subsection (a)(2) has been expressly rejected. *Behrstock v. Ace Hose & Rubber Company, 147 Ill.App.3d 76, 86 (1st Dist., 1986).*

iv. Foundation.

No foundation is necessary prior to introducing an admission of a party or its agent. In fact, there is no requirement that the deponent even be questioned about the admission

before it is introduced at trial. *Security Savings & Loan Association v. The Commissioner of Savings & Loan Association for the State of Illinois, 77 Ill.App.3d 606, 608 (3d Dist., 1979).*

C. Exceptions to Hearsay.

Supreme Court Rule 212(a)(3) allows the use of a discovery deposition "if otherwise admissible as an exception to the hearsay rule." *See, Buckley v. Cronkhite, 74 Ill.App.3d 487, 490 (2d Dist., 1979)(testimony from discovery deposition admissible under section (a)(3) because it qualified as a declaration against interest by a third party.). Accord, Calloway v. Bovis Lend Lease, Inc., 2013 IL App (1st) 112746.*

NOTE: The prior prohibition against using a deceased party's discovery deposition, even if it qualified under section (a)(3) as a hearsay exception, was lifted when subsection (a)(5) of the rule was amended in 2010. In fact, the rule was amended in response to the decision in *Berry v. American Standard, Inc., 382 Ill.App.3d 895 (5th Dist., 2008),* which held that the deceased party's discovery deposition could not be used at trial, even though the proponent argued that the statement qualified as a dying declaration. *Ill. S. Ct. Rule 212, Committee Comments (West 2014).*

D. Same Use as Affidavit.

Subsection (a)(4) allows a discovery deposition to be used "for any purpose for which an affidavit may be used." *Ill. S. Ct. Rule 212(a)(4)(West 2014). See also, Certified Mechanical Contractors, Inc. v. Wight & Co., 162 Ill.App.3d 391, 402 (1st Dist., 1987).* Thus, discovery depositions are routinely utilized in summary judgment motions in lieu of affidavits.

CAUTION: An improper deposition "cannot be transformed into an acceptable affidavit in complete disregard of the rules prescribing the form and manner in which depositions are to be obtained." *Bezin v. Ginsburg, 59 Ill.App.3d 429, 436 (1st Dist., 1978).* For instance, a deposition that was not signed by the deponent or filed with the court, contrary to Supreme Court Rule 207, could not be used in lieu of an affidavit in a summary judgment proceeding. *Id.*

NOTE: Rule 212(a)(4) does not alter the requirements of Supreme Court Rule 191(a), which governs the use of affidavits in support of summary judgment motions, section 2-619 motions to dismiss and section 2-301 motions contesting jurisdiction. All evidentiary materials used in such motions must consist of "facts admissible in evidence." *Pavlik v. Wal-Mart Stores, Inc., 323 Ill.App.3d 1060 (1st Dist., 2001).*

E. Death or Infirmity of Deponent.

Subsection (a)(5) allows the use of a discovery deposition at trial if the deponent is unable to testify due to death or infirmity. *Ill. S. Ct. Rule 212(a)(5)(West 2014).* Although the scope of this subsection is currently quite clear, it has undergone relatively recent

amendment and, arguably, generated the most significant impact on the use of discovery depositions at trial. As a result, it is essential that practitioners and judges understand the evolution of this portion of the rule.

By way of history, subsection (a)(5) was initially added to Supreme Court Rule 212 effective March 1, 2001, and provided that discovery depositions could be used at trial or during an evidentiary hearing if the court found that the deponent was neither a controlled expert witness nor a party, the deponent's evidence deposition had not been taken, the deponent was unable to testify at trial due to death or infirmity and the court found that such evidence would achieve substantial justice between the parties.

In 2008, the Fifth Appellate District decided *Berry v. American Standard, Inc., 382 Ill.App.3d 895 (5th Dist., 2008)*, which strictly interpreted subsection (a)(5). The result was considered so inequitable that it prompted the Illinois Supreme Court Rules Committee to review the rule and, ultimately, propose an amendment that allowed the use of a deceased party's discovery deposition. In so doing, the Committee suggested that "a trial court should have the discretion under subparagraph (a)(5) to permit the use of a party's discovery deposition at trial. It appears that there may be rare, but compelling, circumstances under which a party's discovery deposition should be permitted...*Berry* presents such circumstances." *See, Ill. S. Ct. Rule 212, Committee Comments.*

The Illinois Supreme Court accepted this rationale and entered an order on December 8, 2010, which became effective on January 1, 2011, amending subsection (a)(5) so as to remove the language about the deponent not being a party. As a result, the prohibition against the trial use of a deceased or infirm party's discovery deposition was removed. However, the circumstances under which subsection (a)(5) allows the use of discovery depositions is still limited and the proponent of such testimony must establish the following:

- reasonable notice of the deposition to all parties;
- the party against whom the evidence is offered appeared at the deposition or was given proper notice of it;
- the court finds that the deponent is not a controlled expert witness;
- the deponent's evidence deposition was not taken;
- the deponent is unable to testify at trial due to death or infirmity; and
- the court also finds that admitting the evidence at trial or hearing will do substantial justice between the parties.

Ill. S. Ct. Rule 212(a)(5)(West 2014).

III. Partial Use – Rule 212(c).

A frequent subject of dispute at trial is the partial use of a discovery deposition. Not surprisingly, the proponent of the testimony only wants to introduce damaging testimony, while the opposing attorney frequently argues that fairness dictates that

additional portions of the deposition be admitted. Such an argument is supported by Supreme Court Rule 212(c), which provides as follows:

> If only a part of a deposition is read or used at the trial by a party, any other party may at that time read or use or require him to read any other part of the deposition which ought in fairness to be considered in connection with the part read or used.

Ill. S. Ct. Rule 212(c)(West 2014). Because the rule cites fairness as the standard, the trial judge has substantial discretion in making this determination. However, the specific purpose of this subsection is to "prevent distortion which might occur when a party introduces isolated statements from a deposition into evidence." *Pyse v. Byrd, 115 Ill.App.3d 1003, 1008 (3d Dist., 1983).* Consequently, attorneys must possess a thorough understanding of the entire deposition in order to persuasively argue that a selected portion distorts the true meaning of the deponent's testimony. Simply arguing that the selected passage is "unfair" or "prejudicial" is unlikely to succeed.

Additionally, attorneys must be prepared to explain why the additional testimony is appropriately introduced because this subsection requires that the court conclude "the additional statements are necessary to either explain or modify statements originally introduced by the other party." *Id.* In order to do so, the court must examine each statement individually and determine whether there are other portions of the deposition which must be read "to protect against an unfair impression of the deponent's statements." *See, Morse v. Hardinger, 34 Ill.App.3d 1020 (4th Dist., 1976).* The failure to conduct such an individualized assessment is error. *Id.*

SECTION B

- *"Harnessing the Power of the Electronic Transcript & Video," by Ms. Kathleen M. Grove, July 2015.*

- *PowerPoint Presentation, by Ms. Kathleen M. Grove, July 2015.*

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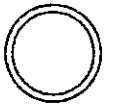

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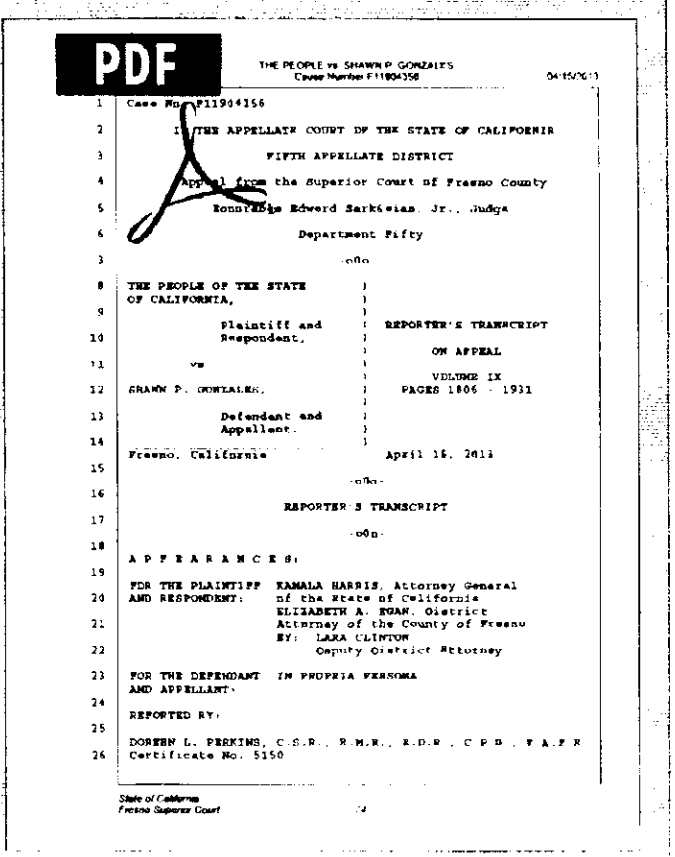

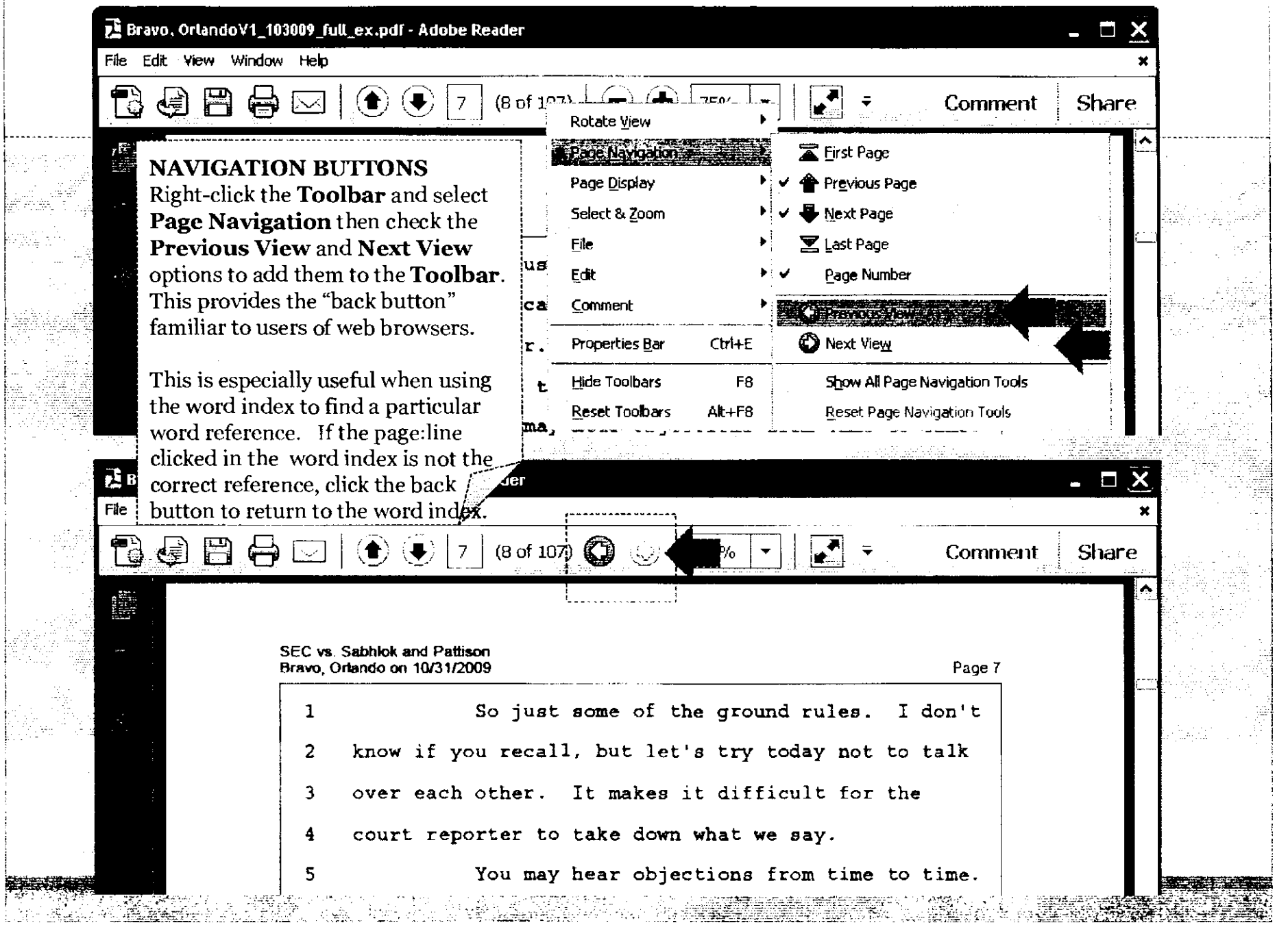
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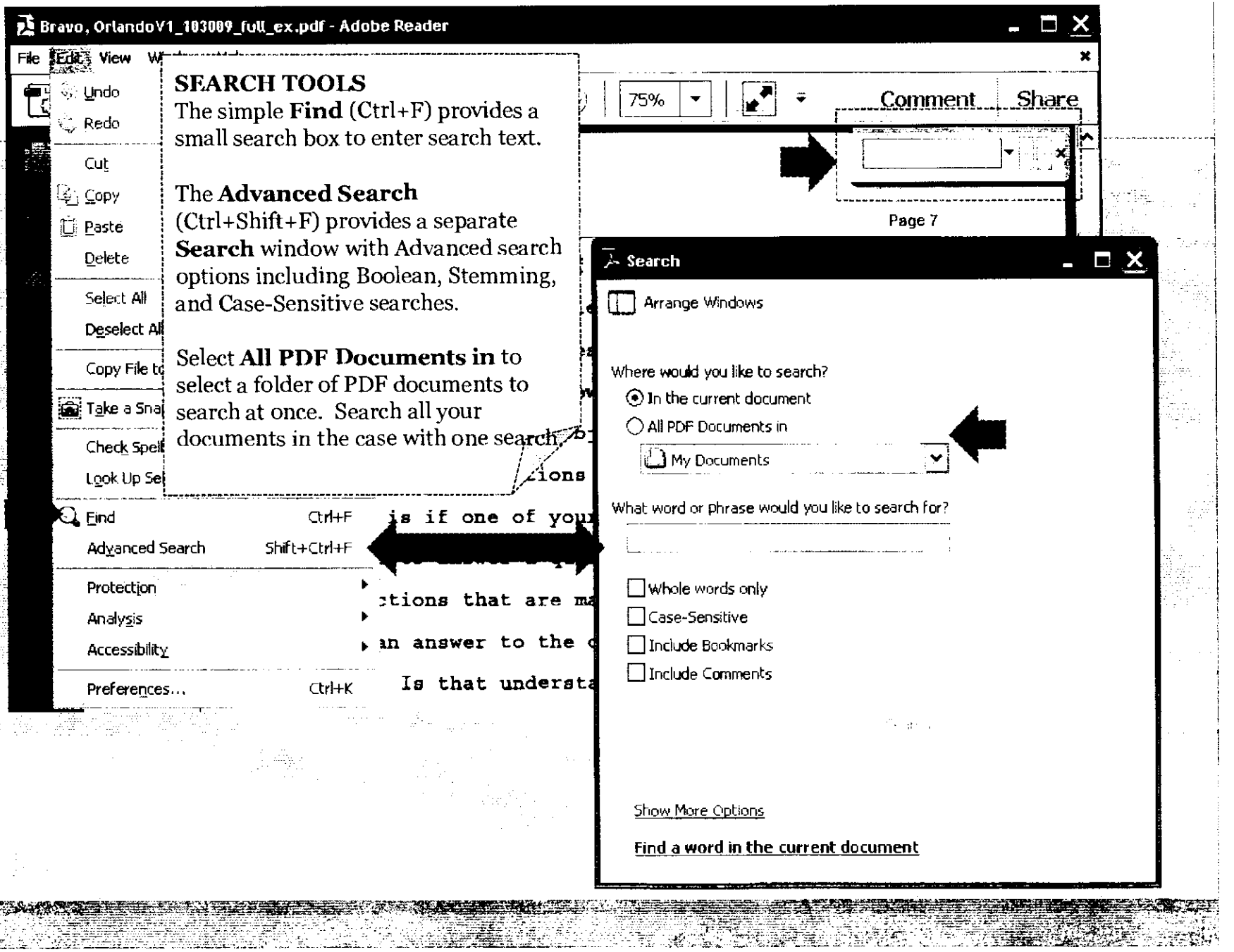
(8 of 107)
SEC vs. Sabhlok and Pattison
Bravo, Orlando on 10/31/2009
Page 7
1 So just some of the ground rules. I don't
2 know if you recall, but let's try today not to talk
3 over each other. It makes it difficult for the
4 court reporter to take down what we say.
5 You may hear objections from time to time.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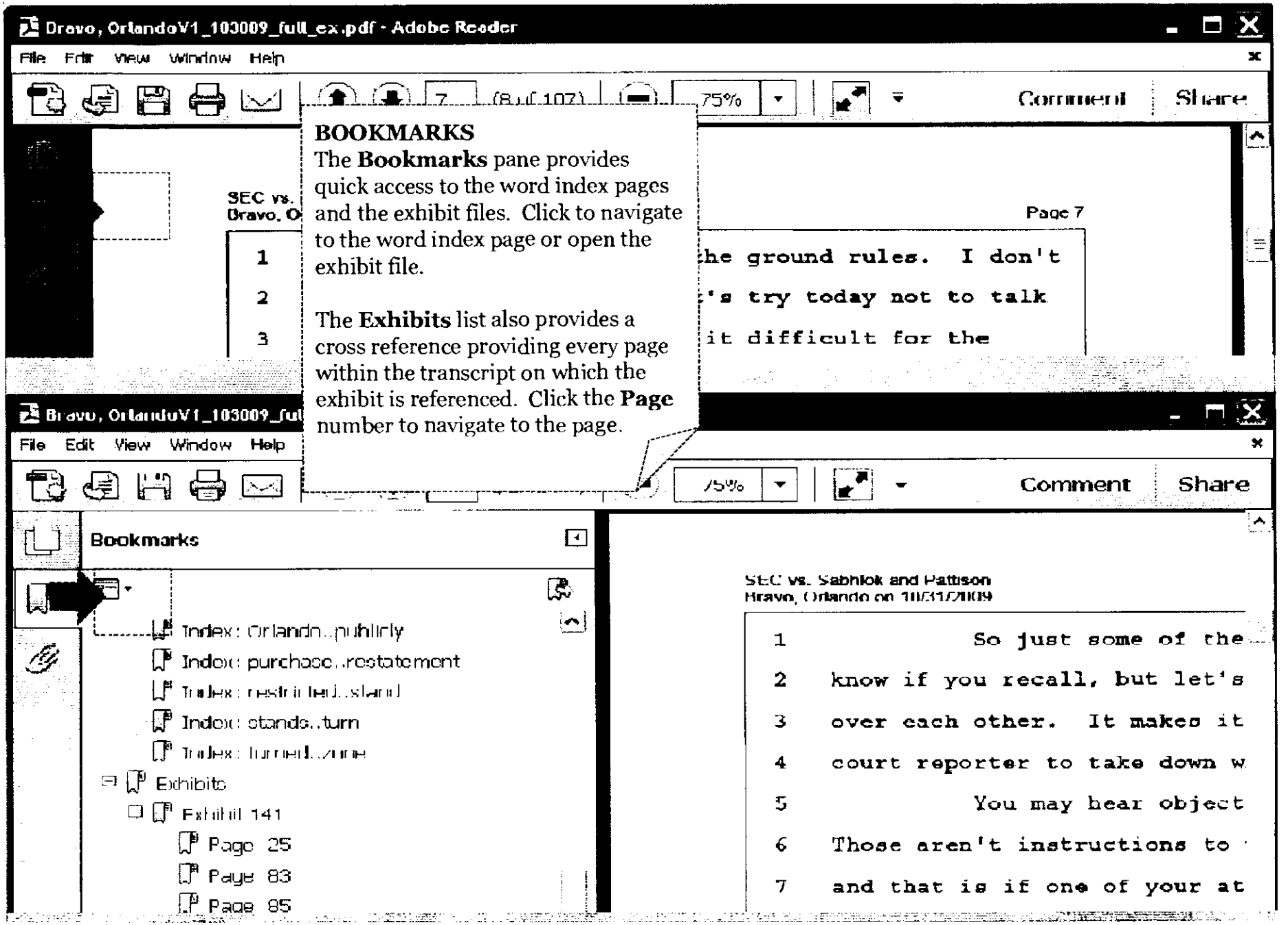
In the current document
All PDF Documents in
My Documents
What word or phrase would you like to search for?
Whole words only
Case-Sensitive
Include Bookmarks
Include Comments
Show More Options
Find a word in the current document


Bravo, OrlandoV1_103009_full_ex.pdf - Adobe Reader
File Edit View Window Help
Comment
Share
BOOKMARKS
The Bookmarks pane provides quick access to the word index pages and the exhibit files. Click to navigate to the word index page or open the exhibit file.
The Exhibits list also provides a cross reference providing every page within the transcript on which the exhibit is referenced. Click the Page number to navigate to the page.
Page 7
1
2
3
he ground rules. I don't
's try today not to talk
it difficult for the
Bookmarks
Exhibits
Exhibit 141
Page 25
Page 83
Page 85
SEC vs. Sabhlok and Pattison
Bravo, Orlando on 10/31/2009
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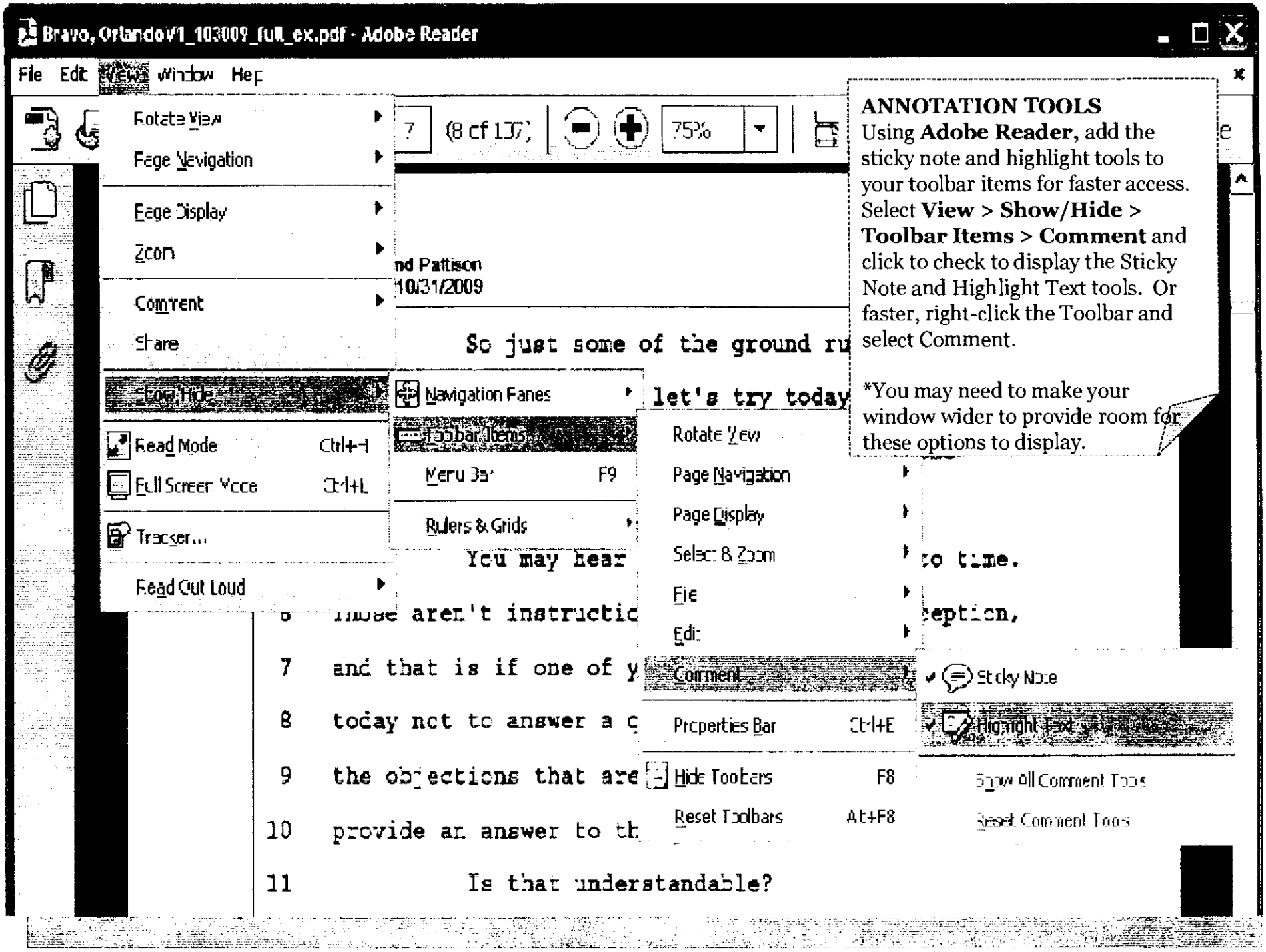
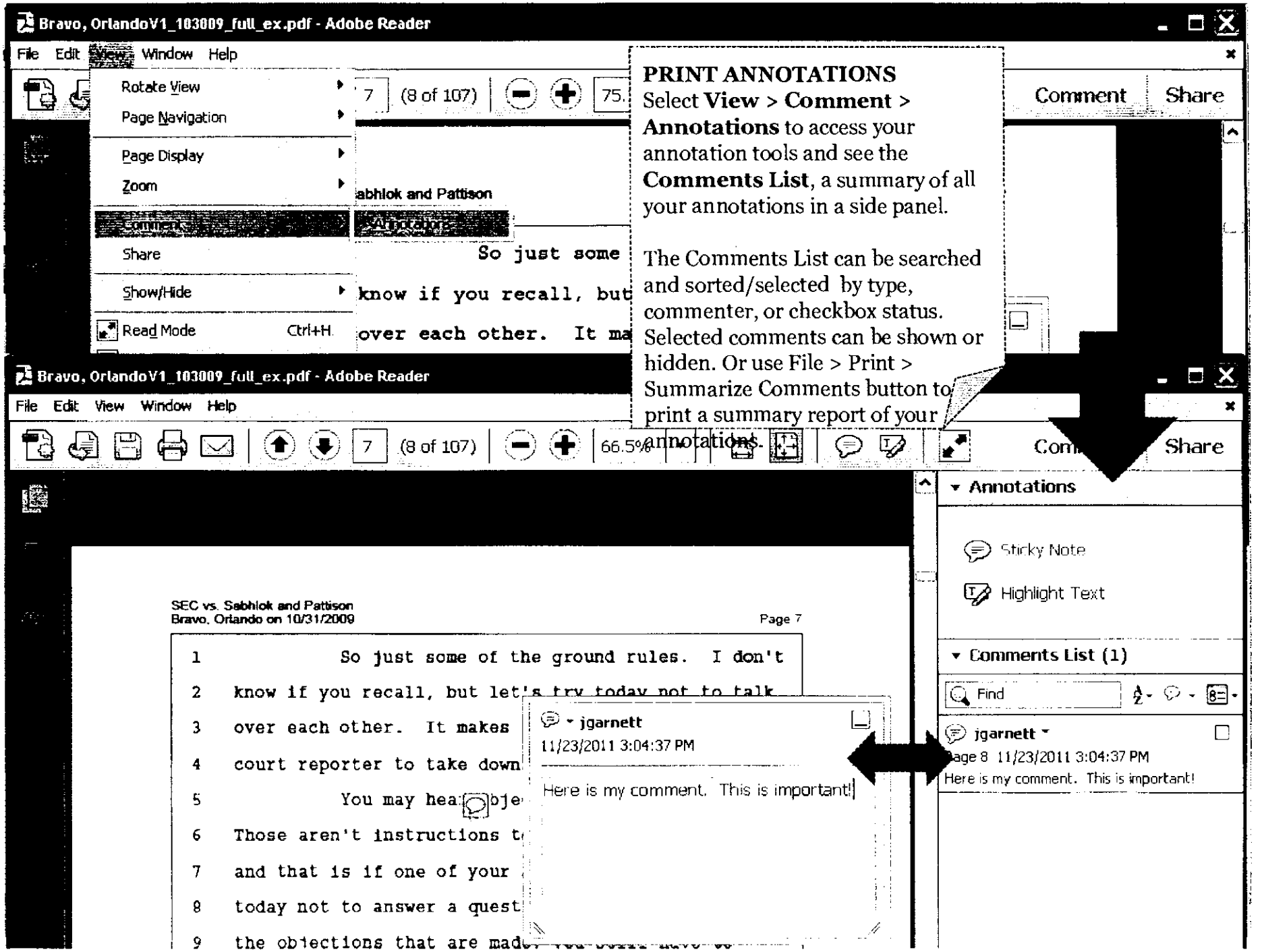


ANNOTATION TOOLS

Using **Adobe Reader,** add the sticky note and highlight tools to your toolbar items for faster access. Select **View > Show/Hide > Toolbar Items > Comment** and click to check to display the Sticky Note and Highlight Text tools. Or faster, right-click the Toolbar and select Comment.

*You may need to make your window wider to provide room for these options to display.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File Edit View Window Help
Rotate View
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Page Display
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Comment
Share
Show/Hide
Read Mode Ctrl+H
(8 of 107)
Comment
Share
So just some
know if you recall, but
over each other. It ma
PRINT ANNOTATIONS
Select View > Comment > Annotations to access your annotation tools and see the Comments List, a summary of all your annotations in a side panel.
The Comments List can be searched and sorted/selected by type, commenter, or checkbox status. Selected comments can be shown or hidden. Or use File > Print > Summarize Comments button to print a summary report of your annotations.
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11/23/2011 3:04:37 PM
Here is my comment. This is important!
SEC vs. Sabhlok and Pattison
Bravo, Orlando on 10/31/2009
Page 7
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11/23/2011 3:04:37 PM
Here is my comment. This is important!

Resources

To download the latest Adobe Acrobat Reader SW

Be sure to deselect the optional offers

https://get.adobe.com/reader/

Compare versions (Pro X – Pro XI – Pro DC)

https://acrobat.adobe.com/us/en/pricing/pricing-compare-versions.html

Compare Acrobat DC Plans (Reader - Standard - Pro)

https://acrobat.adobe.com/us/en/pricing/pricing-compare-plans.html

Rick Borstein's Acrobat for Legal Professionals Blog

Rick is a Principal Solutions Consultant for the legal professionals' community – read: legal marketing manager

http://blogs.adobe.com/acrolaw/

A Low-Cost Solution for Making Video Clips on the Fly

YesLaw On-Disc Player Editor

YESLAW.net

Player, Editor, and Video Presentation Application

YesLaw Player Editor

The YesLaw player-editor software is loaded on every YesLaw disc. There is no additional software for the attorneys to buy, download, update or install.

Flexible Viewing

YesLawDVD discs can be viewed in stand-alone DVD players as well as Windows PCs.

Instant Clip Creation

Focus on the evidence, not the technology. Create video clips by simply highlighting transcript text.

Courtroom Playback

Playback clips using the full-screen clip presentation mode. The transcript text is optionally shown below the video.

Highlights

Highlight transcript passages for further attention. Color code to identify issues, priorities, or team member assignments.

Annotations

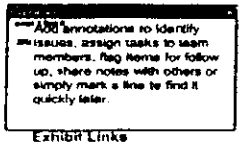
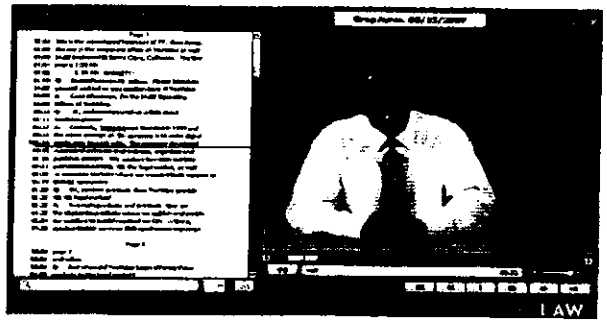


Exhibit Links

Hyperlink exhibits to transcript text to recall with a click. The exhibit files can be displayed while the video is playing.

Collaboration

Email your annotations, highlights, linked exhibits, and video clips to others.



YesLaw's On-Disc Player Editor Software

Complete Deliverable

A YesLawDVD disc is complete synchronized deposition deliverable based on YesLaw patented technology and including synchronized transcripts for all the major trial preparation and presentation software. Include hyperlinked exhibit files, video or audio media inside our YesLaw player-editor software. With higher-quality DVD-video source, the disc can be used with a DVD player or a Windows PC.

The YesLaw player-editor enables attorneys to manage their deposition content including transcript search, multi-color highlights, and intuitive sticky-note style annotations. Perform frame-accurate video clip edits and export, with full-screen clip presentation. Editing video clips is as simple as highlighting the corresponding transcript text.

No Software to Download or Manage

With the YesLaw player-editor software on the disc, there is no other software required to purchase, download, install or manage. The YesLaw software can be played directly from the disc.

Compatible with Trial Preparation and Presentation Software

When the YesLaw player-editor software first runs, it offers to import the synchronized transcript and media into the trial preparation or presentation software already loaded onto the attorney's computer. Attorneys need not remember how to properly load synchronized transcripts and media into their more complicated trial software; they can simply select the automated import check box. The disc contains synchronized transcripts and compatible media for all the major trial presentation software including:

- LiveNote (LEF transcript)
- Trial Director (CMS transcript)
- Summation (SBF transcript)
- Sanction (MDB transcript)
- Textmap (XMEF Transcript)
- Exhibit View (SMI Caption File)

YesLaw On-Disc Player Editor

YESLAW.net

Transcript Management Tools

The YesLaw software transcript management tools include multi-color highlighting to mark transcript passages for further attention or color code passages to identify issues, priorities, team-member assignments or highlighter's identity. Sticky-note style annotations identify issues, assign tasks to team members, flag items for follow up, share notes with others or simply mark a line to find it quickly later. Transcript text can be hyperlinked to exhibit documents to recall with a click. Exhibit files can be conveniently located on the disc or on a shared network resource.

Collaboration

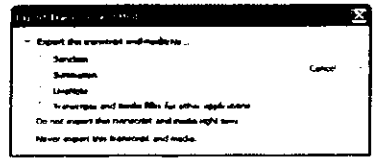
All highlights, annotations, exhibit links, and video clips can be shared amongst users with a small meta-data file. This allows a videographer or paralegal to edit video clips based on designations and email the edited clips to an attorney on the road or in trial.

Audio and Video Options

The YesLawDVD software is compatible with MPEG-1, MPEG-2 and DVD-video as well as WAV, WMA and MP3 audio files. DVD-video provides Hollywood-movie quality and the additional option of reviewing the video within a DVD player. For DVD player use, the disc is chaptered by transcript page for quickly locating video and the transcript text is optionally shown as subtitles. The DVD video can be exported as an MPEG file compatible with all the trial preparation and presentation software. And unlike the competition, the YesLawDVD software provides frame-accurate editing of MPEG-2 and DVD video.

Export to PowerPoint

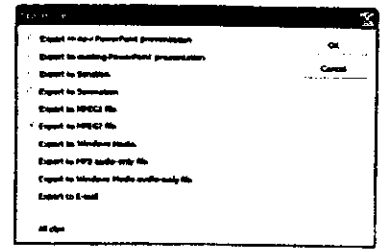
Attorneys can simply highlight the transcript text to edit video clips and export directly to PowerPoint, attorney's preferred presentation software. The transcript text is exported to the slide and 'scrolls' in time with the video.



Scripted Export in Trial Preparation Presentation Software

Export Options

In addition to PowerPoint, attorneys can export edited clips directly to their Sanction, Textmap, or Summation case data-bases; to MPEG-2, MPEG-1 or WMV video files; or to a thumbnail-sized video to include in an email.



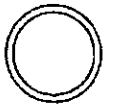
Flexible Video and Audio Clip Export Options

Presentation Mode

In the full-screen presentation mode, a pop-up menu enables single click access to all the edited video clips. During playback, the pop-up menu dissolves away to be recalled with a mouse click. The menu also provides single-click display of transcript below the video. A tap of the Enter key pauses and resumes the video, and the B-key shortcut (familiar to PowerPoint users) clears the screen to black to focus attention back to the presenter.

Full-screen Playback of Entire Video or Clip

Create Video Clips from DVD – No Software Cost!



What is needed to accomplish this?

- Video and transcript synched
- A YesLaw DVD (obtained from your trusty court reporter/videographer; not provided directly to market)

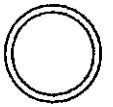
Create clips on the fly for impeachment purposes.

- Video will be keyword searchable!

Create clips from discovery depositions for a settlement video or for mediation purposes.

Create clips to be exported to Windows Media Player and more expensive litigation support software.

Some Thoughts on **Why** and **When** to Use Video for Depositions



Video is not just for evidence depositions anymore.

Juries are looking for the "dog-and-pony" show.

The impact of reading a question for impeachment purposes vs having the jury view the witness ACTUALLY saying those words is like comparing voir dire to a rambunctious cross-examination!

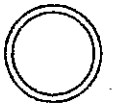
Not every case warrants the cost, but in many cases it is worth the investment to video one or two key witnesses.

AND NOW TO TAKE IT ONE STEP FURTHER!

Give some thought to taking it to the next level:

Seek out a videographer who can provide you with a DVD of not only the evidence deposition but also, through post-production, minimize the video and insert the exhibits being discussed, complete with call-outs.

TranscriptPad – Review and Annotate Transcripts



- Carry all your transcripts in one app, a full-featured and mobile transcript review tool
- Create unlimited issue codes, with color coding, in three simple taps
- Highlight or underline designations to create deposition summaries
- Flag important sections and add notes
- Export customized reports of your reviewed transcripts in PDF, TXT, or Excel formats
- Search one or all deposition transcripts in a case
- Review exhibits as you read the transcript
- Send your case, with all designations and annotations, to other TranscriptPad users
- Email designations to co-counsel, expert witnesses, or clients
- Quickly jump to any page and line of any transcript

TrialPad

A Low-Cost, Easy, and Effective Way to Organize and Present Evidence

- Full electronic presentation capability on an iPad; no companion desktop or cloud software needed
- Organize evidence into issue or witness folders
- Make multiple callouts from any document, photo, or deposition transcript
- Highlight, annotate, redact, and zoom in on evidence
- Create Key Docs with saved annotations or callouts
- Compare documents side by side
- Present wirelessly with Apple TV
- Search for a file or text within one document or a folder of documents
- Add customizable exhibit stickers with automatic incremental numbering or lettering
- Create evidence reports with exhibit numbers and admitted status
- Edit video clips or take snapshots of frames of video

DocReviewPad - Document Review Made Easy

- A full-featured and professional mobile document review tool
- Apply customized Bates numbers to hundreds of thousands of pages quickly and easily
- Rapidly review documents using intuitive swipe gestures
- Mark documents with built-in tags for "Confidential, Privileged, Relevant, or Responsive"
- Organize evidence with color-coded issue codes
- Highlight, annotate, and zoom in on documents
- Flag important documents and add notes
- Search for a Bates number, file name, or text within one document, a folder of documents, or the whole case

DocReviewPad - Document Review Made Easy (cont'd)

- All the important tools that are found in a desktop documents review program

- Export a document production set, omitting confidential and/or privileged documents

- Create reports of documents produced, including the number of pages and Bates number ranges

- Easily create separate case and witness folders

- File formats supported: Adobe Acrobat PDF, JPG, PNG, TIF, Multi-Page TIF, and TXT

- Export your documents with all issue codes organized as Key Doc folders into TrialPad

USE OF DEPOSITIONS:

LAW & TECHNOLOGY

Judge Lynn M. Egan
Ms. Kathleen M. Grove

July 17, 2015

DISCOVERY DEPOSITIONS AT TRIAL

- The use of discovery depositions at trial is very limited & is governed by Supreme Court Rule 212(a).
- The limitations are premised on the fact that Illinois distinguishes between discovery & evidence depositions.
- Illinois is currently the only state in the country that distinguishes between discovery & evidence depositions.
- The Illinois Supreme Court Civil Justice Committee is evaluating whether to maintain this distinction – so stay tuned!

BASIC DIFFERENCES:

DISCOVERY VS. EVIDENCE

- Purpose: ascertain the truth by exploring the facts.
- Relevance = not only what is admissible at trial, but that which leads to admissible evidence.
- Great "exploratory freedom."
- Proceeds informally, with few technical objections.

- Purpose: preserve evidence for trial.
- Relevance = evidence that tends to make the existence of any consequential fact more or less probable.
- Limited by rules of evidence.
- Proceeds as formally as at trial.

FIRST STEP:

PROPER IDENTIFICATION

- It is essential that you properly identify the type of deposition BEFORE taking it.
- The type of deposition dictates the proper scope of inquiry during the deposition & its utility at trial.
- Identification is required by Supreme Court Rules:

➢ Rule 202: deposition notices, orders or stipulations "shall specify whether the deposition is to be a discovery deposition or an evidence deposition."

➢ Rule 206(a): deposition notices "shall state…whether the deposition is for purposes of discovery or for use in evidence."

Failure to comply will result in deposition being treated as discovery only.

SUPREME COURT RULE 212(a):

Permissible Uses

Supreme Court Rule 212(a) authorizes the following five uses of discovery depositions at trial or hearing:

1) To impeach the trial testimony of the deponent;
2) As an admission by a party or an officer/agent of the party;
3) As an exception to the hearsay rule;
4) For any purpose for which an affidavit may be used;
5) As evidence at trial – so long as several conditions are met & trial court makes certain findings.

Ill. S. Ct. Rule 212(a)(West 2014).

SUBSECTION (a)(1):

Impeachment

This use has been characterized as "greatly abused" so it is important to understand that not every inconsistent statement at trial justifies impeachment with use of a discovery deposition. Only permissible IF:

- The trial testimony is "materially inconsistent" with the prior deposition testimony; and
- The inconsistency is substantial, rather than merely trivial or collateral.

Attorneys MUST be prepared to "prove up" the impeachment if the witness denies the prior statement or gives an equivocal answer. Considered error & potentially prejudicial not to do so.

CAUTION: Impeachment is not substantive evidence so don't allow your opponent to use it as such!

SUBSECTION (a)(2):

Admissions

- An admission from a discovery deposition is admitted as substantive evidence, which may be conclusively binding!
- It does not need to be against a party's interest or even contradict the party's trial testimony. Instead, the admission merely needs to be relevant & material to a trial issue.
- No foundation is necessary prior to introducing the admission of a party or its agent. Don't even need to question the witness about it prior to admission.
- Admissions can be either judicial or evidentiary in nature. You must understand the difference between them & their effect on the proofs at trial.

JUDICIAL ADMISSIONS

- Judicial admissions are potentially more damaging because they are binding & cannot be withdrawn, whereas evidentiary admissions can be contradicted or explained.
- Judicial admissions must be carefully examined & must constitute "deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge." *In re Estate of Rennick, 181 Ill.2d 395, 406 (1998)*
- Because judicial admissions must concern "concrete" facts, statements of opinion, estimates, appearances or uncertain summaries do not qualify. *Smith v. Pavlovich, 394 Ill.App.3d 458, 468 (5th Dist., 2008).*
- The testimony of a nonparty witness cannot constitute a judicial admission, even if the witness is later named as a party. Waltrous v. Coulter, 2011 IL App (4th) 110071-U.

ADMISSIONS

Identity of the Deponent

- Can dead men talk at trial? Yes. "Death does not erase an admission from a party's lips..." *In re Estate of Rennick, 181 Ill.2d 395, 405 (1998).*
- Status as a party's agent is governed by traditional agency principals. Relevant factors include manner of hiring, right to discharge, manner & direction of the work, right to terminate & supervision exerted over the work. *Taylor v. Kohli, 162 Ill.2d 91, 95-96 (1994).*
- The agent's admission must concern a matter within the scope of his authority while the agency relationship exists. This simply means that the admission must concern a matter within the scope of employment. *Calloway v. Bovis Lend Lease, Inc., 2013 IL App (1st) 112746.*

ADMISSIONS

Availability of Deponent

Supreme Court Rule 212(a)(2) does NOT require a showing that the deponent is unavailable at trial in order to use admissions from a discovery deposition.

NOTE: This is in contrast to subsections (a)(5) & (b), but the argument that the unavailability provisions of those subsections should be applied to admissions under subsection (a)(2) has been rejected. *Behrstock v. Ace Hose & Rubber Co., 147 Ill.App.3d 76, 86 (1st Dist., 1986).*

ADMISSIONS

When All Else Fails:

Even if it a particular statement seems like an admission, don't despair!

If you are fully conversant with the entire deposition & its relationship to the other evidence, you may still be able to argue that the statement should be excluded.

HOW?

The determination about whether a statement constitutes an admission requires that it be given a meaning consistent with the context in which it was made AND in relation to the other evidence. *Dunning v. Dynegy Midwest Generation, Inc., 2015 IL App (5th).*

WHY?

So that justice is not achieved "on the strength of a chance statement made by a nervous party." *Smith v. Pavlovich, 394 Ill.App.3d 458, 468 (5th Dist., 2008).*

SUBSECTION (a)(3)

Exceptions To Hearsay

- Supreme Court Rule 212(a)(3) expressly allows use of a discovery deposition if it is "otherwise admissible as an exception to the hearsay rule."

NOTE: The prior prohibition against using a deceased party's discovery deposition at trial, even if it qualified as a hearsay exception under subsection (a)(3), was lifted when subsection (a)(5) of the rule was amended in 2010.

SUBSECTION (a)(4)

Same Use As Affidavit

- Subsection (a)(4) allows a discovery deposition to be used "for any purpose for which an affidavit may be used."
- The most common setting is summary judgment or section 2-619 motions.
- Must still comply with the requirements of Supreme Court Rule 191(a), which mandates that all evidentiary materials used in such motions consist of "facts admissible in evidence." *Pavlik v. Wal-Mart Stores, Inc., 323 Ill.App.3d 1060 (1st Dist., 2001).*
- Must also comply with rules governing depositions, such as Supreme Court Rule 207, which requires signature/waiver by deponent & filing with the court. Failure to do so may preclude the deposition's use. *Certified Mechanical Contractors, Inc. v. Wight Co., 162 Ill.App.3d 391, 402 (1st Dist., 1987).*

SUBSECTION (a)(5)

Death or Infirmity

- Subsection (a)(5) currently allows the use of a discovery deposition at trial if the deponent (other than a retained expert) is unable to testify due to death or infirmity – assuming that certain other requirements are met.
- This was not always true so attorneys should understand the history of this subsection.

2001 – Subsection (a)(5) was first added to Rule 212. Precluded use if deponent was retained expert OR a party.

2008 – *Berry v. American Standard, Inc.* was decided; SJ granted solely because plaintiff (who had given a discovery dep) died before his evidence deposition could be taken. In response, the Illinois Supreme Court Rules Committee decided to review & revise the rule.

2011 – Amendment to (a)(5) took effect on Jan. 1st.

SUBSECTION (a)(5)

Cont'd.

Subsection (a)(5) currently allows for use of discovery depositions at trial, including those of deceased parties, under the following circumstances:

1. Reasonable notice of the deposition was given to all parties;
2. The party against whom it is offered appeared at the deposition or was given proper notice of it;
3. The court finds that the deponent is not a "controlled" expert witness;
4. The deponent's evidence deposition was not taken;
5. The deponent is unable to testify at trial due to death or infirmity;
6. The court finds that substantial justice will be achieved by admitting the evidence at trial.

RULE 212(c):

Partial Use

- Supreme Court Rule 212(c) allows a party against whom a discovery deposition is being used to read, use or require the opposing party to read "any other part of the deposition which ought in fairness to be considered in connection with the part read or used."
- The purpose is to prevent distortion or an unfair impression that may result from introducing only isolated statements from a discovery deposition.
- The trial court must conclude that the additional statements are necessary to explain or modify the statements originally introduced by the opposing party.
- This determination requires that each statement be examined individually. The failure to do so is considered error.

ELECTRONIC TRANSCRIPTS

&

VIDEO

Ms. Kathleen M. Grove

Grove & Associates Reporting & Video Services

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Wheaton, IL 60187

(630) 462-0060