

Defending Depositions in High-stakes Civil and Quasi-criminal Litigation: An Application of Therapeutic Jurisprudence

Dennis P. Stolle
Barnes & Thornburg

Mark D. Stuaan
Barnes & Thornburg

ABSTRACT

Depositions are the most common form of live testimony in litigation. Particularly in high-stakes civil and quasi-criminal litigation, however, depositions are often a source of considerable stress and anxiety for the witness. Therapeutic jurisprudence is an interdisciplinary approach to studying the law. It uses both social science and legal analysis to study the psychological and emotional effects that legal procedures have on people. The present article suggests that because depositions are often a stressful legal proceeding, they provide a rich context for the application of therapeutic jurisprudence. The authors suggest that good lawyers engage in a number of techniques during the defense of depositions that may have positive psychological effects on witnesses. Those techniques have been developed by lawyers through trial and error, but have seldom been subjected to empirical testing. The authors argue that empirical research should be conducted to identify therapeutic techniques for defending depositions.

KEYWORDS: depositions; discovery; litigation; therapeutic jurisprudence; psychology.

Depositions are the most common form of live testimony in litigation. Although most cases settle before trial, a large percentage of litigated cases do involve live testimony in the form of depositions (Willging et al. 1998). Further, for efficiency reasons, most courts increasingly push for cases to settle or be resolved through dispositive motions. In most cases, therefore, the prospect of trial testimony is remote, and deposition testimony becomes the most important testimonial evidence in the case. Accordingly, good trial lawyers are careful not to overlook the deposition of any person who may have relevant testimony.

Federal Rule of Civil Procedure 30, as well as its counterpart in most states' rules of procedure, provides that "[a]ny party may take the testimony of *any person*, including a party, by deposition upon oral examination without leave of court . . ." (emphasis added). Thus, on the face of the rule, lawyers have broad power to take the deposition of any person, even individuals who may have only limited knowledge of the facts underlying the litigation. Depositions, therefore, often reach far beyond the parties to the lawsuit and

sometimes involve people who are surprised they are being asked to testify. Empirical research on discovery practices, as well as the authors' experience, show that complex and high-stakes litigation are the cases that most often involve long lists of deponents (Willging et al. 1998). This is likely a function of the fact that high-stakes litigation warrants the expense of taking numerous depositions and also the fact that more factually complex cases usually involve a larger number of witnesses.

It is also the authors' experience that complex and high-stakes litigation, particularly quasi-criminal litigation,¹ can produce the greatest stress and anxiety for deponents. Where deponents know that millions of dollars may change hands, companies may go out of business, or people may go to jail based on the words they say in response to a lawyer's questions, the stress and pressure on the deponent can be tremendous. Further, the potentially significant impact of a deponent's words may be coupled with other personal circumstances or personality traits of the deponent that exacerbate the fear, stress, and inconvenience associated with testifying.

Consider the following hypothetical phone call from a defense lawyer to his client's in-house counsel regarding a pending civil lawsuit with allegations of fraudulent misrepresentations by the client's officers and directors.

LAWYER: *Hi, Bill. This is Jack.*

CLIENT: *So, what's the status on the fraud case today?*

LAWYER: *I just received several deposition notices. My assistant is faxing you copies. We knew notices would start coming in soon, but I'm surprised opposing counsel didn't even call to discuss scheduling.*

CLIENT: *Who do they want?*

LAWYER: *They want Jerry Smith first.*

CLIENT: *They can't start with our CEO, can they? The court will protect our CEO from deposition until it becomes clear that it is absolutely necessary, right? Otherwise, every plaintiff that ever files a lawsuit against a corporation would take the CEO's deposition. Besides, scheduling that will be a disaster. Jerry's calendar is completely full for months into the future.*

LAWYER: *Bill, in this case the Court might let them start at the top. These plaintiffs are alleging fraudulent misrepresentations at the highest levels of the company. I can file a motion for a protective order, but it may not be successful. In the current political climate and with news headlines about corporate wrongdoing coming out daily, this judge may not be too receptive to an argument to protect our CEO from deposition.*

Also, we need to think strategically about this. Jerry may end up being one of our best witnesses. It might be to our advantage to have him go first.

CLIENT: *Well, if it does go forward, I'm concerned that Jerry will lose his temper. Jerry is honest, and I'm certain he hasn't done anything wrong. But, he cares more about this company than anything in the world. With all that has been going on, Jerry is not himself. I've never seen him like he's been the last few weeks. I can't blame him, though. It's looking like everything he has built over the last twenty years might start falling apart.*

Who else do they want?

LAWYER: *Susan Johnson. Isn't she Jerry's assistant?*

CLIENT: *Yep. Jerry doesn't do anything without her knowing about it. She is smart and honest, but her deposition will be difficult. I'm sure she has never given a deposition before, and she's not going to be too happy about this. Public speaking isn't her thing. If they are taking Susan's deposition, I suppose I don't want them hearing from her without hearing from Jerry first.*

Who else?

LAWYER: *Your controller, Mike Jones.*

CLIENT: *Mike, as you know, is potentially a real problem. We are still talking about what Mike's future is going to be with this company. It's not an easy call. We are having another meeting about it tomorrow morning. Between you and me, I don't trust Mike any farther than I can throw him.*

LAWYER: *Well, just like we were saying the other day, if the facts continue to develop as they have been, Mike may need to invoke his privilege against self-incrimination and retain separate defense counsel. His interests may no longer be aligned with the company's. And with the federal government monitoring this situation, what is now just a civil fraud case may turn into a criminal investigation. I won't be surprised if we see a grand jury subpoena soon. In the worst case scenario, Mike ends up a target for prosecution.*

CLIENT: *I know. We need to get to the bottom of this fast. I'll call you right after the meeting tomorrow. Then we'll probably need to talk to Mike. I want you to be in on that conversation. It probably won't be pleasant.*

LAWYER: *Well, on the deposition notice, unless we come to a new understanding of the facts in the next couple of days, I think we are going to be in a situation where Mike needs to retain his own counsel. I will most likely not be defending his deposition.*

I also have a deposition notice for David Conner. I don't recognize his name.

CLIENT: *David is Mike's assistant. He has only been with us a couple of months. He doesn't know anything about this case. We were lucky to find David. Ever since he started, though, it's been one disaster after another. None of it is David's fault. When he finds out about this lawsuit and this deposition, it might be the last straw. I really think he might quit. We've had real problems with employee morale and retention over the last couple of months, as you can imagine. I'm sure David already understands, at some level, that his new boss may be in some very serious trouble. But David doesn't know anything about the details and he won't*

have anything relevant to say in a deposition. If you explain the situation to opposing counsel, will they back off? I don't want this guy to quit and I also don't want him going into a deposition and guessing about things he really doesn't know anything about.

LAWYER: I'll try. I suspect they pulled his name from a current organizational chart and they don't know he is new. Once they find out he has only been Mike's assistant for a couple of months, they will ask for Mike's former assistant.

CLIENT: She moved to Oregon with her family. That's why we hired David. I know from her exit interview that she hates Mike. And, to her, there is no distinction between Mike and this company. Her deposition could be a disaster.

Who else?

LAWYER: Steve Adams, your marketing director.

CLIENT: I expected that, and I have already met briefly with Adams to tell him about this lawsuit and let him know this might happen. The trouble with Adams is that he doesn't recognize the seriousness of this. He thinks the answer to all the company's problems is a more aggressive marketing program. He needs to understand that, if we don't defend this suit, there will be nothing to market. Adams doesn't like lawyers, to put it mildly. He's not too careful with his words either. I'm not worried about anything Adams did or knows, but I'm worried about opposing counsel trapping him into things he didn't intend to say. This guy is a marketing genius, but he thinks everything that comes out of the legal department is a bunch of nonsense.

LAWYER: Well, of course, I want to meet with Adams and everyone else on this list. I think you should sit in on those meetings too. We need to make sure everyone is well prepared and is going to take this very seriously. On the other hand, we need to make sure that all of them are calm and focused going into this. I know how disruptive these depositions can be on the atmosphere in the office, and we don't want any of them lying awake at night worrying about this or quitting their job over it.

The notice also lists Sandra Miller, another name I didn't recognize.

CLIENT: Sandra is Adams' assistant. She has been here for more than twenty years, and she used to work directly for our CEO. Sandra's husband has been ill for the last couple of years, and I know they are scraping by on just her salary. She is a very nice lady, and I hate for her to get put on the hot-seat, especially

right now. Jack, I dread even having to tell her about this. She just doesn't need this in her life right now.

LAWYER: Well, I don't think a motion for a protective order is going to be granted on her deposition either. If you want me to, I can tell her about the notice, or I can go with you to talk to her. But I'm not a familiar face to her. It might be better if you talk to her first. Later we can set up time for me to meet with her and start getting her prepared. We will have to think about how to do this in a way that will cause the least amount of stress on her as possible.

CLIENT: Jack, you know these depositions could kill this company if they are not handled the right way.

LAWYER: I know.

THERAPEUTIC JURISPRUDENCE

In his address to the New York Bar Association in 1921, Judge Learned Hand stated, "As a litigant I should dread a lawsuit beyond almost anything else short of sickness and death" (Hand 1921, quoted in Winick 2000). Bruce Winick has provided a detailed description of the nature of the fear and anxiety that can result from participating in the litigation process and pointed out that "the most stressful emotional aspects of a lawsuit is when the client testifies at trial or has his or her deposition taken by the adverse party" (Winick 2000: 313). Winick has approached the emotional aspects of the litigation process from the perspective of therapeutic jurisprudence and proposed that "[a] lawyer representing a person or organization in a lawsuit can significantly diffuse the stress and pain of the litigation process" (Winick 2000: 313). The present article follows Winick's approach by examining, through the lens of therapeutic jurisprudence, precisely what a lawyer representing a person or organization might be able to do to diffuse the stress and fear associated with the deposition process.

Therapeutic jurisprudence is an interdisciplinary approach to studying the law (Wexler and Winick 1996). It uses both social science and legal analysis to study the psychological and emotional effects that laws and legal procedures have on people (Wexler and Winick 1996). Therapeutic jurisprudence recognizes that the law serves many ends. Therefore, the psychological or emotional impact of the law is simply proposed by therapeutic jurisprudence as being one topic among many that is worthy of study. The goal of therapeutic jurisprudence has not been to trump constitutional rights or other legal interests with therapeutic interests. Rather, the goal has been to add balance to legal analysis by pointing out and studying

the often overlooked psychological effects of laws and legal procedures (Wexler and Winick 1996).

In its early development, therapeutic jurisprudence scholarship often focused on changes that could be made to existing laws or legal procedures to enhance their therapeutic impact (Stolle, Wexler, Winick, and Dauer 2000). More recently, a slightly different line of therapeutic jurisprudence scholarship has developed. Rather than focusing on changing the law to enhance its therapeutic impact, this line of scholarship takes the law as given and then identifies or develops methods for applying the law therapeutically (Stolle 1996; Wexler 1996; Stolle, Wexler, Winick, and Dauer 2000).

All lawyers, presumably, try to guide their clients through the legal process in a manner that is most beneficial to their clients. This involves making choices that maximize the client's legal rights. However, it also involves considering the impact that legal choices will have on non-legal interests, such as a client's financial assets. Good lawyers, therefore, apply existing law in a manner that will enhance both the client's legal and extra-legal goals, such as the client's financial goals. Just as the legal process can impact financial interests, so too can the legal process impact psychological or emotional well-being (Stolle 2000). Good lawyers know this and instinctively consider psychological or emotional concerns as one priority among many in client counseling and in zealous advocacy (Stolle 2000). In essence, good lawyers attempt, intuitively, to apply the law therapeutically. However, even the best lawyers usually lack a well-developed knowledge base from which to evaluate the psychological impact of legal choices. Law school seldom provides such training. Rather, lawyers acquire these skills through trial and error or, if they are lucky, through mentors. Even the best lawyers, therefore, are often left with little more than their personal experience and their intuition to guide their assessment of the psychological impact that certain legal strategies may have on their clients. Therapeutic jurisprudence, however, seeks to produce a more systematic and accurate knowledge base for lawyers to draw upon in evaluating the psychological impact of legal procedures.

Scholarship focused on practicing therapeutic jurisprudence uses a straightforward analytic approach. It typically involves a critical examination of the existing law, procedure, or practice of interest, considering the likely emotional or psychological impact of the procedure, based upon existing psychological research or simply upon common sense (Stolle 2001). From there, the approach typically turns to an evaluation of whether choices are available to lawyers that might enhance the therapeutic effects of the legal procedure of interest, or at least minimize the anti-therapeutic effects (Stolle 2001). This stage of the analysis often generates more questions than it resolves,

and the questions are often empirical questions that cannot be answered through legal analysis. Accordingly, the final stage of the analysis typically involves the framing of empirical questions in such a manner that they could be answered through laboratory or field research (Stolle 2001). Ideally, the analysis would then lead to scientific empirical research and the reporting of research results. However, empirical research is often the least well-developed aspect of a therapeutic jurisprudence analysis. The rigorous and time-consuming nature of empirical research necessarily results in this aspect of therapeutic jurisprudence analysis advancing more slowly than the purely analytic stages. Nonetheless, the empirical component of a therapeutic jurisprudence analysis remains one of the most important ways of developing the therapeutic jurisprudence knowledge base.

A therapeutic jurisprudence analysis is particularly appropriate in the context of defending depositions in high-stakes civil and quasi-criminal litigation (Stolle 2001). Such depositions involve lawyers interacting with clients who are likely to be under extreme psychological and emotional pressures. Further, as illustrated in the preceding hypothetical, the nature of the stress or anxiety can vary dramatically between individuals, based upon their particular circumstances, their relationships to the case, and their personalities. Although lawyers have long recognized this and have developed techniques for easing a client's fear and anxiety over giving deposition testimony, deposition practices can benefit from a careful examination of their likely psychological effects (Stolle 2001). In this article, our goal is to provide at least a preliminary discussion of the potential psychological effects of various deposition techniques and, in a general manner, to suggest experiments relating to some of the interesting empirical questions surrounding the defense of depositions. The authors are hopeful that this discussion will generate interdisciplinary interest in deposition procedures and will lead to empirical research on the topic.

DEFENDING DEPOSITIONS: A THERAPEUTIC JURISPRUDENCE ANALYSIS

Depositions are considered an informal proceeding (Gavin 1999). Under all but the most unusual circumstances, no judge is present and the proceeding occurs in a private conference room rather than in a public courtroom (Gavin 1999). The particulars of deposition procedure vary by jurisdiction (Gavin 1999). The rules of civil procedure provide only a broad framework for how depositions are to be conducted and there is considerable room for interpretation of those rules, particularly when depositions are proceeding under state, rather than federal, rules of procedure. As a result, two depositions may be conducted in the same

case, in the same jurisdiction and both technically comply with the rules even though the two depositions are conducted in dramatically different styles.

Stated in broad terms, however, the standard for attorney conduct during depositions is that a lawyer should not do anything during a deposition that he would not do in front of a judge in a courtroom. Courts often use this general standard as a fall-back position in evaluating complaints related to attorney conduct during depositions. For example, the Massachusetts Superior court stated, "A deposition is an extension of a judicial proceeding. It should be attended and conducted with the same sense of solemnity and the same rules of etiquette that would be required were the parties in the courtroom itself." (*Dominick v. Troscoso* 1996). Too often, however, attorney conduct in depositions is far from the ideal stated by the Massachusetts Superior Court. The Florida Court of Appeals has stated, "Unfortunately, there is a trend of selective adherence to the rules of civil procedure by the trial bar. We understand that conduct at depositions has diminished to the level that some lawyers now seek and obtain court permission to bring special masters to depositions to rule on disputes as they arise. . . . [T]he level of professionalism is not where it should be. Sad!" (*Smith v. Gardy* 1990).

As a result of the trend identified by the Florida Court of Appeals and many other courts, judges have shown an increasing willingness to sanction lawyers for obstructive or abusive tactics in deposition discovery (Kerper and Stuart 1997; Gavin 1999). Similarly, legislatures have increasingly sought to reduce abusive deposition tactics by enacting trial rules that limit the number of depositions that will be allowed in a single case without leave of court and rules that limit the duration of depositions. For example, Federal Rule of Civil Procedure 30 was recently amended to impose a ten-deposition limit per case and to impose a seven-hour time limit per deposition, without leave of court. Although courts and legislatures are responding to the problem of abusive deposition tactics and although such tactics fortunately are the exception rather than the norm, the reality remains that deponents sometimes may be subjected not only to the stresses inherent in providing recorded testimony under oath, but also the stresses that accompany giving that testimony in a hostile environment. Consequently, the potential for anti-therapeutic effects from the deposition process are significant (Stolle 2001). Fortunately, the potential for skillful and thoughtful lawyers to minimize the anti-therapeutic effects through their defense of deposition is also significant.

The process of defending a deposition can be broken into three primary stages: pre-deposition preparation, defense during testimony, and post-deposition debriefing (Stolle 2001). Each of these stages has the

potential for therapeutic or anti-therapeutic effects. Whether the effects are therapeutic or anti-therapeutic may depend largely upon the conduct of counsel.

Pre-Deposition Preparation

At a minimum, and therefore, probably at its worst, witness preparation involves nothing more than the lawyer telling the witness where the deposition will be held and what time to be there. And it is too common for witness preparation to amount to little more than a ten- or fifteen-minute meeting between the lawyer and deponent immediately prior to the deposition, during which the lawyer typically instructs the witness to tell the truth, to be sure to listen carefully to the questions, to answer only the question asked, not volunteer any information, and not to guess about what the questioner is "really" asking.

By contrast, good lawyers who thoughtfully prepare a witness for a deposition will typically schedule a face-to-face meeting with the witness several days prior to the deposition. If possible, the preparation meeting will occur in the same conference room in which the deposition is scheduled to occur, out of a belief that having the deposition proceed in a familiar setting will help put the witness at ease. The preparation session may last anywhere from a half hour to several hours. During the preparation session, the lawyer will provide the witness with a detailed description of what the witness should expect at the deposition, including a description of the procedures, who will be present, the role of each person who will be present, how long it is expected to last, the procedure for taking breaks, how evidentiary objections will be handled, etc. Again, it is believed that a complete description of what the witness should expect at the deposition will reduce the witness's anxiety and fear, leading to better testimony.

The preparation session will also typically involve an opportunity for the witness to express his or her concerns about the deposition. By asking open ended questions regarding what the witness is expecting or is concerned about, the lawyer can often identify "psycholegal soft spots" and prepare for handling those points during the deposition (Wexler 2000). Further, the lawyer can put the witness at ease if the witness expresses unfounded fears about the process. Finally, in some instances, the preparation session may involve mock questioning. Again, it is believed that mock questioning can put a witness at ease during the actual deposition by, in a non-adversarial setting, first exposing the witness to and familiarizing the witness with the otherwise typically unfamiliar question-and-answer format of depositions.

In our hypothetical fraud case, the defense counsel would schedule an individual face-to-face meeting with each of the potential deponents (with the possible exception of Mike, if it is determined that Mike will

need to retain separate counsel). Each meeting would be different, just as every deponent is different. In the case of the CEO, Jerry Smith, the meeting may need to be shorter than the others, as a result of Jerry's schedule. Further, it may be more likely that Jerry has given a deposition before and, consequently, less time and attention may be needed to prepare Jerry for the technical procedures or for mock questioning. Rather, the focus of the preparation session may more properly be providing Jerry with just the information he needs and doing so in an efficient fashion, while also gathering information from Jerry regarding sensitive facts or issues that may not otherwise be known to the defense counsel.

By contrast, the preparation session with Susan Johnson, the CEO's assistant who has likely never given a deposition before and dreads public speaking, may last several hours. In the case of Susan, there may be a substantial benefit to describing exactly what she should expect on the day of the deposition and engaging in mock questioning so that she becomes accustomed to the deposition format. Thus, each witness' preparation session will call for a different strategy, depending upon the witness' relationship to the case and personal circumstances. As another example, the preparation session with the marketing director, Steve Adams, may require an effort at ensuring that Steve will take the deposition seriously. By contrast, the preparation session with Sandra Miller, his assistant who is going through tough financial times as a result of her husband's illness, may require an effort at ensuring that she is not taking the deposition so seriously that it is causing undue stress or anxiety. To further complicate matters, unlike our hypothetical in which the defense counsel has the benefit of the insights of his client's in-house counsel, outside counsel defending a deposition may not know the witness' personal circumstances or even the witness' relationship to the case until the preparation session. Often, therefore, a lawyer goes into a deposition preparation session with little or no idea of what to expect in terms of the witness' personality or personal circumstances.

Witness preparation is a critical component of deposition defense. Although, as illustrated in our fraud example, the specific strategies that need to be employed during the preparation session may vary widely. There are standard techniques that are routinely employed, such as having the same lawyer who will be defending the deposition prepare the witness, holding the preparation session in the same conference room where the deposition will be held, providing a detailed explanation of the procedures and objections that the witness should expect, providing a detailed explanation of who will be present for the deposition and what their roles will be, using open-ended questions to provide the witness with an opportunity to share information about

the case or about the witness' personal circumstances that the lawyer otherwise would not know, and engaging in mock questioning. Each of these techniques is used by good lawyers, often with the justification that this type of witness preparation results in better testimony and, therefore, a stronger case. In addition to ensuring the best possible testimony, however, a thoughtful preparation effort likely has the additional therapeutic effect of minimizing the stress and fear associated with the deposition process.

Defense During Testimony

At its worst, defense of a deposition during the testimony involves a lawyer either: (1) sitting silently at a distance from the witness, such that the lawyer's presence in the room is largely forgotten, and not paying careful attention to the testimony; or (2) taunting opposing counsel by aggressively objecting to every question, with or without reasonable basis, or otherwise continuously obstructing the orderly progression of the deposition.

By contrast, good lawyers will set the tone for the deposition by meeting the witness 15 or 20 minutes before the deposition begins and using that time to make sure that the witness is comfortable and does not have any last-minute questions or concerns. The lawyer will be careful to ensure that the furniture arrangement does not minimize his or her presence, typically sitting right next to the witness and often just slightly closer than would be expected in most social situations (Malone and Hoffman 1996). The belief is that this proximity both reminds opposing counsel that the witness is not alone and provides the witness with the reassuring presence of his or her lawyer. Further, the lawyer will make efforts to be courteous to opposing counsel and maintain a professional atmosphere. The lawyer will focus intently on the testimony, objecting when legally appropriate. The lawyer will also suggest breaks when he senses that the witness is becoming tired or frustrated, or if the opposing counsel starts to become overbearing toward the witness. These techniques, and many others, are routinely applied by good lawyers and many of the techniques have been described in the more thoughtful publications on deposition practice (see e.g. Malone and Hoffman 1996).

As with witness preparation, strategies for defending the deposition during testimony may vary dramatically depending upon the particular witness involved. Looking to our hypothetical fraud case, a witness such as Steve Adams, the marketing director who is vocal about his dislike for lawyers, may get less comfort than other witnesses from defense counsel sitting right at his shoulder and may even find it annoying. As another example, Jerry Smith, the CEO who has recently had trouble controlling his temper because of the allegations being made against his company, may need more

frequent breaks than other witnesses as an opportunity to relax and collect his thoughts.

Although the details of defending a deposition will vary from witness to witness, like deposition preparation, there are a number of standard techniques at a lawyer's disposal for reducing the stress associated with the process. Those techniques are frequently employed with the justification that the techniques result in better testimony and, therefore, a stronger case. In addition to ensuring the best possible testimony, however, the thoughtful defense of a deposition during testimony likely has the additional therapeutic effect of minimizing the stress and fear associated with the deposition process.

Post-Deposition Debriefing

At its worst, post-deposition debriefing involves either: (1) essentially no discussion between the witness and counsel at all and the witness is simply sent home; or (2) counsel rehashing with the witness all the things the witness said that will damage the case.

By contrast, good lawyers will have scheduled with the witness, in advance, time immediately following the deposition to debrief. Or, where it is not possible to debrief immediately following the deposition, the lawyer will have scheduled a short meeting with the witness the following day or shortly thereafter. The debriefing session should, of course, involve a discussion of any pending procedural matters, such as errata sheets (Dickerson 1998). However, the debriefing session should also be used as an opportunity for the lawyer to follow up with the witness on any important points that opposing counsel might not have fully explored. Depending on the circumstances, it may be an excellent opportunity to provide the witness with reassurances regarding the witness' performance and to answer questions the witness may have. The belief is that this debriefing session provides an opportunity for the lawyer to further develop a positive relationship with the witness. As in the preparation session, open-ended questions can be used to elicit any lingering concerns the witness may have about the testimony the witness gave or to elicit any lingering questions the witness may have about the process. If trial testimony becomes necessary, there is good reason to believe that preparing the witness for trial will be easier if the witness' last interaction with the lawyer was a reassuring and stress-free debriefing session following the deposition.

Like the techniques associated with deposition preparation and deposition defense, there is no standardized methodology for debriefing following a deposition and the appropriate techniques may vary widely from witness to witness. However, some sort of a constructive debriefing session is frequently employed by good lawyers, and often with the justification that it

results in a better relationship with the witness, better trial testimony, and therefore, a stronger case. In addition to ensuring the best possible testimony, however, a thoughtful debriefing session likely has the additional therapeutic effect of minimizing any lingering anxiety about the process the deponent has just completed.

Developing a Research Agenda

Depositions provide a rich context for empirical research on the psychological effects of various techniques of advocacy. Although the most frequently expressed justification for many of the deposition defense techniques used by good lawyers is that the techniques result in better testimony, implicit within the justification is often the belief that the techniques have a positive psychological impact on witnesses. However, whether particular deposition defense techniques do, in fact, have positive psychological effects is largely an unresearched empirical question, and one that falls within the purview of therapeutic jurisprudence.

Many of the deposition defense techniques described above, such as sitting close to the witness during the testimony, conducting the deposition in the same room where the deposition preparation took place, engaging in mock questioning as part of the preparation process, et cetera, have been developed by lawyers over time through trial and error. The collective experience of trial lawyers is the primary body of empirical data related to the effectiveness of these techniques. However, that body of experiential data is unorganized and conveyed largely by word of mouth to new trial lawyers from their mentors or learned the hard way -- on the job and sometimes at the expense of the witness' anxiety level. This body of experiential data would benefit from being methodically and systematically organized, classified, and measured. Perhaps as a first step in a program of empirical research on the psychology of depositions, a researcher could conduct a survey of lawyers regarding the techniques they use and their perceptions of whether those techniques have positive psychological effects or whether the techniques are employed for some other reason.

A second step could be to use experimental research to test the psychological effects of the techniques identified in the survey as being in widespread use and widely believed to have positive psychological effects. A creative researcher could design experiments in a laboratory setting that randomly assign participants to various mock-deposition conditions and test differences between conditions in the participants' perceptions of and reactions to the deposition process.

As a final step, the research program could be supplemented with field research. For example, a researcher could seek permission from numerous lawyers and their clients to observe depositions. In

some instances, concerns of attorney-client privilege may prevent a researcher from sitting in on preparation sessions or other conferences, but merely the objective observation of multiple depositions could provide valuable field data to supplement experimental results.

Overall, depositions are an exciting topic for legal psychology and therapeutic jurisprudence in particular. Empirical research on deposition techniques would not only be well-received by trial lawyers attempting to improve their practices, but could provide tests of legal and psychological assumptions that would be of considerable interest to therapeutic jurisprudence scholars. In addition, such research could lead to the development of instructional materials for use in law schools, particularly in clinical courses and in courses devoted to therapeutic jurisprudence.

CONCLUSION

Depositions, particularly in high-stakes civil and quasi-criminal litigation, often are a source of considerable stress and anxiety for the witness. Lawyers often, necessarily, cast a broad net in noticing depositions in complex litigation and the precise nature of the stress or anxiety attendant to a deposition can be as widely varied as the personalities of the individuals whose depositions are sought. Accordingly, depositions provide a rich context for the application of therapeutic jurisprudence. Clearly, good lawyers have, collectively and over time, developed many techniques that may have positive psychological effects on witnesses during the defense of depositions. To further develop beneficial deposition defense practices, empirical research is needed to test the psychological assumptions underlying current practices and to identify the most therapeutic techniques for defending depositions.

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ABOUT THE AUTHORS

Dennis P. Stolle, J.D., Ph.D., is an attorney and jury consultant with the Litigation Department of the Indianapolis office of Barnes & Thornburg. He received his law degree with distinction from the University of Nebraska College of Law, where he served as Research Editor of the *Nebraska Law Review*. He received his doctorate in social psychology from the University of Nebraska and has been the recipient of a National Science Foundation research grant in law and social science. He is the author of numerous articles on various topics of legal psychology, including therapeutic jurisprudence, and is the editor, with David B. Wexler and Bruce J. Winick of *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Carolina Academic Press, 2000).

Mark D. Stuaan, J.D., is a partner in the Litigation Department of the Indianapolis office of Barnes & Thornburg. His practice is primarily in civil litigation but includes white collar criminal defense. Before joining Barnes & Thornburg, he was an assistant United States attorney for the Southern District of Indiana for more than 10 years, and, prior to joining the U.S. attorney's office in Indianapolis, he was an assistant United States attorney for the Central District of Illinois. He served as a law clerk to then Chief Judge Robert D. Morgan, United States District Court, Central District of Illinois. He received his law degree from Southern Illinois University School of Law, where he served as editor-in-chief of the *SIU Law Journal*.

Contact Information

Correspondence should be sent to *Dennis P. Stolle* at Barnes & Thornburg, 11 South Meridian Street, Indianapolis, Indiana 46204. Email: dstolle@btlaw.com

¹ We are using “quasi-criminal litigation,” for lack of a better term, to refer to civil litigation that involves intent-based allegations, such as fraud, and exists parallel to a potential separate criminal investigation and/or prosecution.