

Preventing Nuclear Settlements at Deposition: The Role of Cognitive Fatigue on Witness Performance

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NUCLEAR settlements have not received the same intense attention as nuclear verdicts in today's litigation atmosphere. This is not surprising, as it is well documented that jury damage awards are spiraling out of control in many industries, particularly the transportation, pharmaceutical, and healthcare areas. Thus, the topic of preventing nuclear verdicts is finally getting ample attention from the defense bar, as defendants and insurance companies are fearful of being the next victim. However, one could argue that the phenomenon of nuclear settlements is far more prevalent, considering the vast majority of cases never reach a courtroom. Paying nuclear settlements inevitably leads to more lawsuits against that particular client, since word spreads fast in the plaintiffs' bar about which companies are fearful of trials and would rather pay their way out of trouble.¹

Deposition performance is critical to case outcome, particularly economically. Strong, effective depositions decrease a client's financial exposure and costs, while weak, ineffective depositions result in higher payouts on claims during settlement negotiations (i.e.,

a nuclear settlement). Specifically, when witnesses drop "bombs" at deposition, those "bombs" end up costing an extraordinary amount of money. Clearly, poor deposition testimony greatly widens the gap between the real and perceived economic value of a case, putting a client in an unfavorable position when trying to settle.²

An attentive witness who can maintain maximum concentration levels during deposition is far less vulnerable to making critical testimony errors compared to an inattentive witness who struggles to concentrate. The neuroscientific literature clearly illustrates that cognitive fatigue, the failure to sustain the level of attention needed to optimize performance,³ induces significant decline in key areas of executive functioning that are essential to effective witness performance at deposition and prevention of nuclear settlements. However, no one has explored the relationship between witness cognitive fatigue and witness performance. If impaired attention and concentration due to fatigue leads to harmful testimony, then preventing witness cognitive fatigue should be a top priority for defense counsel. As a 30-year

¹ Geroge Speckart and Bill Kanasky, Jr., *The Nuclear Verdict: Old Wine, New Bottles*, FOR THE DEFENSE, 14-21 (Apr. 2020).

² Bill Kanasky, Jr., *Don't Shoot the Messenger: Exploring Ineffective Witness Testimony*, 55 IN-HOUSE DEF. Q. 20, 20-21 (2010).

³ Abhiji Chaudhuri and Peter O. Behan, *Fatigue in Neurological Disorders*, 363 LANCET 978-988 (2004).

veteran trucking attorney recently stated, “when mental fatigue sets in at deposition, bad things happen.”

To prevent fatigue-based witness errors at deposition, defense attorneys have preached for decades “*I make my witness take a break every hour during deposition.*” The key neuropsychological questions the authors of this article ask are:

- Why one hour?
- How long should the break be to sustain optimal performance?
- What should the witness do during the break to sustain optimal performance?
- If the purpose of the break is to prevent cognitive fatigue and allow the witness to

replenish their cognitive resources, shouldn’t this decision be scientifically supported?

This article illustrates that the “take a break every hour” philosophy long held by most attorneys is a gross strategic and neuropsychological mistake that leaves the witness highly vulnerable to cognitive fatigue. This fatigue can often result in poor testimony that unnecessarily harms the defense’s case, both strategically and economically.

I. The Science of Cognitive Fatigue

Cognitive fatigue causes deterioration of key executive functions such as executive attention,⁴ sustained attention,⁵

⁴ Roe Holtzer, Melissa Shuman, Jeanette R. Mahoney, Richard Lipton, and Joe Verghese, *Cognitive Fatigue Defined in the Context of Attention Networks*, 18 NEUROPSYCHOL DEV COGN B AGING NEUROPSYCHOL COG. 108–128 (2011).

⁵ Dimitri van der Linden, Michael Frese, and Theo F. Meijman, *Mental fatigue and the control of cognitive processes: effects on perseveration and planning*, 113 ACTA PSYCHOL. 45-65 (2003); Jillian Dorrian, Gregory D. Roach, Adam Fletcher, and Drew Dawson, *Simulated train driving: fatigue, self-awareness and cognitive disengagement*, 38 APPL. ERGON. 155-166 (2007); Robert Langner, Michael B. Steinborn, Anjan Chatterjee, Walter Sturm, and Klaus Willmes, *Mental fatigue and temporal*

goal-directed attention,⁶ alternating attention,⁷ and divided attention.⁸

DeLuca⁹ defines four areas of cognitive fatigue, each of which directly apply to the deposition experience:

1. Decreased performance following an extended period of time;
2. Decreased performance after a challenging mental exertion;
3. Decreased performance after a challenging physical exertion; and
4. Decreased performance during acute but sustained mental effort.

Witnesses may be exposed to all four of these circumstances during deposition. First, many depositions last over extended periods of time, ranging from several hours to multiple days. The cumulative

number of hours of deposition testimony alone represents a major mental challenge to a deponent, requiring incredible amounts of mental energy to perform optimally over time. Second, witness testimony requires high amounts of mental exertion. Many questions challenge the witness' memory of events, conduct, and decision-making, while other questions require strenuous document review and interpretation. Multiple cognitive activities can multiply the rate of cognitive fatigue. Third, deposition testimony carries with it a significant biomechanical/physical investment by the witness. Contrary to popular belief, the act of sitting upright and maintaining professional demeanor and body language for multiple hours is physically exhausting. Review of video-taped deposition testimony often illustrates that witnesses eventually resort to postures that are specifically designed to reduce the physical effort of sitting up straight, such as leaning back and/or slouching in the chair, as well as supporting their head with

preparation in simple reaction-time performance, 133 ACTA PSYCHOL. 64-72 (2010); Julian Lim, Wen-Chau Wu, Jiongjiong Wan, John A. Detre, David F. Dinges, and Hengyi Rao, *Imaging brain fatigue from sustained mental workload: an ASL perfusion study of the time-on-task effect*, 49 NEUROIMAGE 3426-3435 (2010).

⁶ Maarten A.S. Boksem, Theo F. Meijman, and Monique M. Lorist, *Effects of mental fatigue on attention: an ERP study*, 25 BRAIN RES. COGN. BRAIN RES. 107-116 (2005).

⁷ van der Linden et al, *supra* note 5, at 45-65.

⁸ Dimitri van der Linden and Paul Eling, *Mental fatigue disturbs local processing more than global processing*, 70 PSYCHOL. RES. 395-402 (2006).

⁹ John DeLuca, "Fatigue: Its Definition, its study and its future," in John DeLuca ed. *FATIGUE AS A WINDOW TO THE BRAIN*, Cambridge (MA): MIT Press (2005); 319-325.

one or both hands. Finally, witnesses must maintain sustained mental effort during deposition in the face of an acute, negative stimuli. Specifically, acute negative stimuli including the three emotional attack methods can force a witness into fight or flight response patterns: aggression, humiliation, and confusion. All three can represent direct threats to a witness, causing him or her to depart high road—logical cognition—and regress into low road—fight or flight cognition. This neurochemical process, known as “amygdala hijack,” results in exponentially higher mental energy expenditure, and in turn, in harmful deposition responses.¹⁰

Six years later, another¹¹ study suggests that cognitive fatigue should be defined as an executive failure to monitor performance over acute, but sustained, cognitive effort, which results in decline and more variable performance than the individual’s optimal ability. This study concludes that the body of research findings suggest that tasks that are mediated by the prefrontal cortex (PFC) may be more sensitive to the effect of cognitive fatigue. Put another way, tasks that require persistent prefrontal cortex activation may increase the risk of cognitive fatigue

on performance (witness testimony). Effective witnesses are specifically trained to maintain prefrontal cortex activation throughout deposition, rather than regressing into subcortical (amygdala) fight or flight information processing.¹²

Therefore, well-trained witnesses that are successfully utilizing their prefrontal cortex and providing more effective answers simultaneously become more susceptible to cognitive fatigue. In other words, effective witnesses will likely fatigue faster than ineffective witnesses due to intensive prefrontal cortex activation. Perhaps the most impressive finding of the study showed that in a relatively healthy sample of adults, only **thirty-five** minutes of testing stimuli exposure was necessary to elicit cognitive fatigue. These findings have huge implications on the philosophy of when witnesses should take breaks during deposition testimony, as they directly contradict the “I ensure my witness takes a break every hour” philosophy adopted by most attorneys.

¹⁰ Bill Kanasky, Jr., Andrew Chamberlain, J. Thaddeus Eckenrode, Jorge R. Campo, Melissa Loberg, and Alyssa Parker, *The Effective Deponent: Preventing Amygdala*

Hijack During Witness Testimony, 60 FOR THE DEFENSE, 12, 13-14 (2018).

¹¹ Holtzer et al., *supra* note 4, at 108-128.

¹² Kanasky et al., *supra* note 10, at 12-21.

Borragán et al's¹³ literature review shows that cognitive fatigue is associated with significantly impaired cognitive control, high-level information processing, and sustained attention. Additionally, they suggest that exposure to High Cognitive Load (HCL) levels, conditions where the time to process ongoing cognitive demands is restricted, also leads to increased cognitive fatigue. Many plaintiff attorneys deliberately try to restrict the amount of time a witness has to fully process a question by using the tactic of "rapid fire" questioning. This occurs when plaintiff's counsel attempts to speed up the question-answer sequence by rapidly asking the next question the moment the witness has finished their answer. Most witnesses attempt to match the questioner's speed, resulting in a high-pressure situation that can quickly fatigue a witness. This time restriction tactic deserves careful attention, as it shows that witnesses can experience cognitive fatigue not only over the course of the deposition day, but also during the actual question-answer sequence much earlier in the deposition day.

This means that cognitive decline can easily occur in "short" depositions that are scheduled for only 2-3 hours. Many defense attorneys may give the witness a

false sense of security if they inform the witness that cognitive fatigue will not play a significant role in a shorter deposition.

II. Deposition-Specific Factors That Exacerbate Cognitive Fatigue

A. Negative Reinforcement

The concept of negative reinforcement is poorly understood by attorneys and is generally defined by a response or behavior that is strengthened by stopping, removing, or avoiding a negative outcome or aversive stimulus. In a deposition setting, this occurs when a witness repeatedly provides long, wordy, often defensive explanations (response) in an effort to avoid difficult questioning by the plaintiff attorney (adverse stimulus). In other words, the plaintiff represents an adverse stimulus to the witness; thus the witness tries to remove the adverse stimulus by excessive explanation. The human brain is pre-wired to use negative reinforcement in adversarial discussions, as bilateral discussion of an issue often resolves the tension involved in such a discussion. Deponents are notorious for thinking "if I just explain myself to this reasonable

¹³ Guillermo Borragán, Hichem Slama, Arnaud Destrebecqz, and Phillipe Peigneux, *Cognitive fatigue facilitates procedural*

sequence learning, 10 FRONT. HUM. NEUROSCI. 86 (2016).

attorney, he/she will back off and the deposition will be over sooner.”

In reality, it is well known that more explanation will not only make the deposition longer but will undoubtedly leave the witness open to more intense attack. Importantly, the mental effort involved in excessive explanation during deposition is a key causative factor of witness cognitive fatigue. Witnesses that are instructed to repeatedly “pivot” away from unfavorable facts or allegations during deposition (i.e., “Yes, but....No, because...”) tend to fatigue quickly and eventually regress into fight or flight response patterns.¹⁴ While witnesses may be told by defense counsel “don’t try to win the deposition because you can’t,” the witness’ brain is pre-wired to do the opposite, thanks to negative reinforcement.

Fortunately, advanced neuro-cognitive witness training exists to rewire the witness’ brain to disable negative reinforcement circuitry.

B. Virtual Testimony

One of the authors can attest that the phenomenon known as “Zoom Fatigue” is real. Zoom fatigue refers to the (negative) impact of technology and virtual communication on the human brain. Fosslien and Duffy¹⁵ hypothesize that virtual videoconferencing requires extensive amounts of focus and attention that is simply not necessary during face-to-face communication. They believe that virtual communication requires a “constant gaze” at a computer screen, which makes people uncomfortable and tired. Sander and Bauman¹⁶ posit that “[p]eople feel like they have to make more emotional effort to appear interested, and in the absence of many non-verbal cues, the intense focus on words and sustained eye contact is exhausting.” They suggest online meetings increase cognitive load, leading to faster cognitive fatigue. Specifically, the lack of non-verbal cues, anxiety regarding the reliability of the technology, and the discomfort of constantly seeing

¹⁴ Kanasky et al., *supra* note 10, at 12-21.

¹⁵ Liz Fosslien and Mollie West Duffy, *How to Combat Zoom Fatigue*, HARVARD BUS. REV. (April 29, 2020), available at <https://hbr.org/2020/04/how-to-combat-zoom-fatigue>.

¹⁶ Libby Sander and Oliver Bauman, *Zoom fatigue is real — here’s why video calls are so draining*, ideas.ted.com (May 19, 2020), available at <https://ideas.ted.com/zoom-fatigue-is-real-heres-why-video-calls-are-so-draining/>.

one's own face during conversation are factors that lead to cognitive fatigue. While no empirical research exists to illustrate the causative factors of cognitive fatigue involved in online videoconferencing, people experience faster levels of cognitive fatigue in a virtual setting. One can conclude that witnesses participating in virtual depositions need more frequent rest breaks to prevent cognitive fatigue from impacting their performance.

C. Reptile Questions

The plaintiff reptile methodology at deposition is an intense neurocognitive manipulation attack that requires intense cognitive effort by the witness to not fall into the reptile safety and danger rule traps. Specifically, reptile attorneys use four devastating psychological weapons against defendant witnesses: confirmation bias, anchoring bias, cognitive

dissonance, and the hypocrisy paradigm. The combination of these powerful psychological tactics does not merely influence witnesses; it controls them. These psychological tactics are precisely what the reptile plaintiff attorney uses to destroy defendant witnesses at deposition.¹⁷ Thankfully, there are advanced witness training methods that, when implemented, modify witness' cognitive patterns, making them impervious to reptile attacks. Witnesses who effectively and repeatedly diffuse reptile attacks during deposition will tire at a higher rate than the untrained witness, as their cognitive effort remains at maximum capacity for the entirety of the process. Strategically determining the time intervals for breaks is crucial to witness success throughout the full deposition.

D. Litigation Stress

Interestingly, Matthews et al¹⁸ defines cognitive fatigue as the

¹⁷ Bill Kanasky, Jr., *Derailing the Reptile Safety Rule Attack: A Neurocognitive Analysis and Solution*, Courtroom Sciences Inc. (2015), available at <https://www.ncada.org/resources/CLE/A M18/Seminar%20Materials/II.%20BK%20-%20Derailing%20the%20Reptile%20Safety%20Rule%20Attack.pdf>.

¹⁸ Gerald Matthews, "Personality and individual differences in cognitive fatigue", in Phillip L. Ackerman, ed. *COGNITIVE FATIGUE: MULTIDISCIPLINARY PERSPECTIVES ON CURRENT RESEARCH AND FUTURE APPLICATIONS*, Washington, DC: APA; 209-227.

result of an *individual's evaluation of task demands* and not as high workload per se. This may play a large role in deposition performance, as so many witnesses enter the process with feelings of inadequacy and/or feeling overwhelmed with the legal process. Witnesses who enter the deposition process with high levels of fear and anxiety related to the legal process will wear down quickly during testimony. In fact, many witnesses experience intense litigation stress due to unrealistic and inaccurate assumptions about a case. For example, some witnesses feel that if they perform poorly at deposition it will result in termination of their job, loss of personal property, financial penalties, and even incarceration. These sources of stress are all unnecessary and will result in poor witness performance.

E. Litigation Guilt/Sorrow

Many fact witnesses enter a deposition with intense feelings of guilt and sorrow towards a plaintiff that was killed or suffered a catastrophic injury. An obvious example of this are nurses who are deposed in birth injury/death cases. These are inherently emotional cases that put intense psychological pressure on witnesses. Another clear example are trucking cases in which a driver, passengers, and/or pedestrians are killed or suffer

gruesome injuries. Such cases often have horrific post-accident pictures presented at deposition, and some even have dash-cam footage of the actual accident. Witnesses who are experiencing feelings of guilt and/or sorrow not only cognitively fatigue quickly at deposition but have significantly impaired attention and concentration. The "take a break every hour" philosophy will not be adequate for these emotional witnesses.

F. Corporate Representatives

Most corporate representatives are exceptional cognitive multi-taskers. They can process information at lightning speed as they listen and think simultaneously. While this skill is a perfect fit for an occupational setting, it represents an enormous vulnerability at deposition that plaintiff's counsel can quickly capitalize on. The majority of errors made by corporate representatives at deposition are inadvertent cognitive errors caused by precisely this same multi-tasking, meaning that a) the witness never heard the full question, therefore giving an erroneous answer or b) the witness misinterpreted a key word or phrase in the question, leading to an incorrect, if not harmful, answer. The fact is, the deposition of a corporate representative, or any other

witness for that matter, is inherently an unfair fight. Plaintiff's counsel has heavy weaponry: a list of pre-written questions, documents that are marked up with a highlighter and/or sticky notes, prior depositions, and maybe even a colleague to assist with those documents or additional questions. In turn, the deponent has their brain, a glass of water, and an attorney who usually can only object to "form," and cannot coach their witness. They have no pre-written answers to questions to refer to throughout the questioning, only clean documents without notes or highlights, and no one to turn to for help with an answer. The environment is one of vulnerability, not opportunity. With such an imbalance of resources, cognitive multitasking combined with a fast, efficient communication style leads to habitual errors, many of which can be harmful. This situation is ripe for witness cognitive fatigue. The human brain cannot maintain full attention and concentration for long periods of time without assistive resources, and corporate representative depositions can last for days. Maintaining full attention and concentration, without any resources (notes, phone, computer, etc.) to assist, requires an enormous amount of mental energy (far more energy than is required in an occupational setting, in which people are surrounded by multiple

informational resources that greatly limit mental energy expenditure). Therefore, it is crucial that corporate representative witnesses receive breaks frequently, as these witnesses will experience fatigue-based decreases in attention and concentration, regardless of their level of intellect or preparation.

G. Personal Issues Unrelated to Litigation

Social factors that are unrelated to the case mentally wear down witnesses at deposition. Examples include divorce, child/spouse/family illness, recent death of someone close, job loss, financial problems, other litigation, and drug/alcohol issues. Many witnesses are concurrently coping with one or more of these social issues at the time of deposition. It is the authors' experience that the COVID-19 pandemic has increased the intensity and prevalence of these social issues. The key for defense counsel is to identify the presence of these issues well before the deposition is scheduled and ensure that a qualified consultant is on board to provide special assistance to the witness. Such witnesses are highly distractible at deposition, as their focus is often elsewhere. The combination of these negative social factors with the inherent stress of the deposition leads to rapid cognitive

fatigue and responses that are harmful to the case. These witnesses don't have the cognitive or emotional resources necessary to sustain acceptable deposition performance for one hour and will require more frequent breaks.

III. Preventing Witness Cognitive Fatigue

There is no scientific literature that suggests that the "take a break every hour" philosophy is an effective tactic to protect a witness' cognitive abilities and optimize deposition performance. Rather, it is the authors' scientific and experiential opinion that for even the best-prepared, intelligent, well-intentioned witness, a break should be taken every 45 minutes. The scientific literature clearly demonstrates that cognitive fatigue significantly impairs attention and concentration and can begin as early as 35 minutes into a task requiring persistent mental effort. Providing the deponent a break every 45 minutes can not only prevent cognitive fatigue, but also doesn't appear unusual or inappropriate (vs. a break every 20-30 minutes). Forcing a break during deposition every 45 minutes (compared to every hour) gives the witness a substantial advantage throughout the process, as this break interval maximizes attention and concentration levels while simultaneously avoids cognitive

fatigue impairments. To use an auto racing analogy, the witness's "pit window" is at the 40-50 minute mark once questioning starts or restarts.

How can the breaking every 45 minutes be done practically at deposition? When the deposition begins, a routine opening will include the statement that breaks can be taken whenever the witness wants and that they just need to answer the pending question prior to the break. Therefore, during deposition preparation, it is wise to advise the client to ask for a break every 45 minutes if defense counsel hasn't already done so. Importantly, witnesses should also be instructed to ask for a break even sooner than the 45-minute mark if they feel their attention and concentration fading. If plaintiff's counsel objects, defense counsel can remind them of their earlier opening instruction regarding breaks. Technically, if the breaks are not taking away from their deposition time, plaintiff's counsel does not have grounds to object. Another way to ensure defense witnesses get more frequent breaks is to make sure that the break occurs in the next hour on the clock, rather than the same hour. For example, if questioning restarts at 2:30pm, and the next break is requested at 3:15pm, it appears more reasonable compared to questioning restarting at 3:00pm

and a break being requested at 3:45pm.

Witnesses with special physical and/or mental health circumstances require breaks even more frequently for optimal performance. While this will surely aggravate opposing counsel, it is absolutely necessary in preventing cognitive fatigue for witnesses with additional cognitive, emotional, and/or physical challenges. For example, witnesses who are experiencing chronic pain from a medical condition or injury may not be able to sit in a chair for 45 minutes without experiencing significant pain. Female witnesses who are pregnant often need to take breaks at a higher frequency. Witnesses with significant emotional problems, whether case-related or not, need breaks at a higher frequency than typical witnesses. Finally, elderly witnesses, for both mental and physical reasons, may need more frequent breaks than the average witness. Defense counsel should warn plaintiff's counsel at the start of the deposition that more frequent breaks will be necessary given these special health circumstances.

How long should the break be to fully replenish the witness' cognitive resources? The empirical research in the area is not stellar.

However, most studies report that breaks of all lengths were most beneficial for reducing fatigue and increasing vigor, and that the length of the break positively correlates with the quality of performance on subsequent tasks. In other words, a longer break tends to lead to higher performance when the task resumes. At deposition, attorneys and witnesses have schedules so breaks must be limited. However, we believe that a 10-minute break is sufficient to replenish a witness' cognitive "fuel" while a 5-minute break is insufficient time for the witness' brain to refuel.

Unfortunately, many witnesses take breaks that last 5 minutes or less purposely, to complete the deposition faster. This is a grave mistake. Insufficient breaks early in the deposition can lead to catastrophic responses in the afternoon, as the witness has depleted their cognitive resources and is unable to process and answer questions effectively.

What should the witness do during the break? Bennett, Gabriel, and Calderwood¹⁹ recently

¹⁹ Andrew A. Bennett, Allison S. Gabriel, and Charles Calderwood, *Examining the interplay of micro-break durations and activities for employee recovery: A mixed-methods investigation*, 25 J. OCCUP. HEALTH PSYCHOL. 126-142 (2019).

examined the impact that different “micro-break” durations and activities have on fatigue, vigor, and attention. They also looked at the effect of duration and break activity on “psychological detachment” from work tasks. They discovered that “detachment breaks,” those types of breaks that focused on mentally disengaging from a task, of all lengths were most beneficial for reducing fatigue and increasing vigor; they also more effectively allowed for mental disengagement from work tasks and were more relaxing and enjoyable than the other types of breaks (work-related/switching tasks and relaxation activities). These findings have huge implications on how defense counsel should handle a witness during the break, as performing more witness preparation during the breaks may very well be counterproductive.

Rather, the science suggests that defense counsel allow the witness to “detach” from the deposition for at least 10-minutes before allowing the deposition to proceed. The take home message for defense counsel on this point is that the break needs to be a true break for the witness, not a coaching session. It is the authors’ opinion that a witness must leave the deposition environment to be able to truly disengage and replenish their cognitive energy. This means not only leaving the conference room, but actually

leaving the office altogether, preferably allowing the witnesses to go outdoors (weather permitting) to walk around and get fresh air. This change of environment will maximize cognitive replenishment.

IV. Conclusion

The scientific literature shows us that the human brain is neurocognitively incapable of maintaining maximal levels of attention and concentration for 60 minutes. Therefore, the final 15 minutes of questioning exposes the witness to needless and unnecessary vulnerability. Fatigue-based errors during deposition are 100% preventable, if and only if the witness is given the opportunity to rest at the correct time intervals. A longer deposition, with appropriately spaced rest breaks, is much safer for the witness than a shorter deposition with inadequate rest breaks. Witnesses are notoriously incapable of determining when they need a break. The defending attorney needs to be in charge of asking for breaks.

The first step in preventing nuclear settlements is preventing plaintiff’s counsel from taking control of the trajectory of the case. Providing witnesses with advanced witness training that consists of cognitive, behavioral, and emotional components has proven to be highly disruptive to plaintiff

attorneys who attempt to force a nuclear settlement by torpedoing defense witnesses one by one. This is particularly true in cases in which the plaintiff employs the reptile questioning methodology. This article offers a scientifically-supported weapon for defense counsel to use to further protect their clients at deposition. Going forward, preventing witness cognitive fatigue at deposition should be a top priority for defense counsel as the economic risks are enormous.