When a Deposition Will Do

Overcoming the Hearsay Bar to Deposition Testimony

By Christopher P. Keleher

Trials often turn on witness credibility. A jury gauges credibility by observing the mannerisms, speech, and demeanor of a witness. But when testimony of an unavailable witness is presented through deposition, the jury's ability to evaluate credibility is greatly reduced. Substituting a deposition for live testimony can render a questionable witness commanding and a fragile witness strong. The inability to cross-examine before a jury also limits the right to a fair trial. For these reasons, courts are reluctant to use depositions of unavailable witnesses in lieu of live testimony. As Judge Learned Hand observed, "The deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand."[1]

These tenets aside, civil procedure and evidence rules permit deposition testimony to be admitted under limited circumstances. This article examines those federal and state provisions along with caselaw addressing deposition testimony to assist practitioners confronted with an unavailable witness.

Federal rules permitting deposition testimony

Deposition testimony is hearsay. However, Rule 32 of the Federal Rules of Civil Procedure provides an exception.[2] Rule 32 distinguishes between deposition testimony of parties and nonparties.[3] Adverse parties' depositions may be used for any purpose,

regardless of availability.[4] However, a nonparty must be unavailable for the deposition to be admitted.[5] A witness is unavailable under Rule 32 if the court finds:

(a) that the witness is dead;

(b) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(c) that the witness cannot attend because of age, illness, infirmity, or imprisonment;

(d) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(e) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used.[6]

Courts interpret Rule 32 narrowly. As one federal district court stated, "Rule 32 assumes that under normal circumstances the deposition of a witness will *not* be used at trial in lieu of that witness's live testimony."[7]

Federal Rule of Evidence 804 also creates a hearsay exception. A deposition can be admitted via Rule 804(a) if the witness is unavailable.[8] A witness is unavailable if his attendance cannot be procured "by process or other reasonable means."[9] Rule 32 and Rule 804 provide alternative grounds for admissibility.[10]

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How federal courts determine unavailability

A party seeking to admit deposition testimony must first demonstrate the witness's unavailability.[11] The unavailability requirements of Rule 32 and Rule 804 implement courts' preference for live testimony at trial, which is "axiomatic."[12] Further, the Sixth Circuit Court of Appeals has held that admitting a deposition despite an insufficient showing on unavailability is an abuse of discretion.[13]

Unavailability based on a witness's job is typically insufficient. For example, the Tenth Circuit Court of Appeals affirmed the exclusion of a doctor's deposition because his work schedule could not justify his absence.[14] Similarly, the Sixth Circuit Court of Appeals concluded that a witness is not "automatically unavailable" simply because he or she is a physician.[15] "[M]ore persuasive evidence of unavailability" is required before allowing deposition testimony.[16] In contrast, a district court found a witness was unavailable when her reserve unit was activated, necessitating her to go to another state for military training.[17]

FAST FACTS

Because the expectation is that testimony at trial must be live, a deposition in lieu of live testimony is strongly disfavored by most courts.

Proponents of deposition testimony must use reasonable diligence in procuring a witness's attendance—merely issuing a subpoena is not enough.

The inability to cross-examine before a jury is the strongest argument for litigants challenging the admission of deposition testimony.

Reasonable diligence in attempting to locate the witness

Along with unavailability, proponents of deposition testimony must also show "reasonable diligence" in attempting to locate the witness.[18] What constitutes reasonable diligence depends on the facts. But as the Fifth Circuit Court of Appeals explained, it is insufficient to offer "nothing except the plain assertion that [the witness] was unavailable."[19] Further, simply issuing a subpoena is not enough.[20]

Dueling Seventh Circuit decisions highlight the elusive nature of reasonable diligence. In *Rascon v Hardiman*,[21] the Seventh Circuit Court of Appeals affirmed the admission of a deposition based on a private investigator's efforts to locate the witness.[22] But the court reached a different conclusion in *Griman v Makousky*.[23] The unavailable witness had been released from prison and despite "strenuous efforts," the plaintiff could not locate him.[24] The district court refused to admit the witness's deposition, and the Seventh Circuit affirmed because the preference for live testimony—"especially in a case that turns on the credibility of testimony contradicted by other witnesses"—warranted the exclusion.[25]

Beyond issuing a subpoena, what is reasonable diligence? The more efforts you make, the better the chance the court will allow deposition testimony. Send reminders of the trial date to the witness via certified mail. If the witness is recalcitrant, hire a private investigator and have the investigator testify about his or her efforts. Finally, advance notice to the court minimizes surprise and enables the court to use its authority to compel attendance.

Demonstrating exceptional circumstances under Rule 32

The catchall provision of Rule 32(a)(4)(E) allows deposition testimony when "exceptional circumstances make it desirable" in the interest of justice.[26] This standard is difficult. The Tenth Circuit Court of Appeals describes exceptional circumstances as "a reason the deponent cannot appear, not merely serious prejudice that would result if the court did not admit the deposition testimony."[27] Indeed, if harm to the proponent of the testimony were the focus, the exception would swallow the rule.

The exceptional circumstances inquiry considers whether the situation is "appropriately analogous" to the unavailability of a witness because of death, illness, imprisonment, or the witness being more than 100 miles from the courthouse.[28] A district court rejected a litigant's claim of exceptional circumstances because his medical experts were specialists with busy schedules preventing their trial attendance.[29] Deeming such reasons "'exceptional circumstances' would eviscerate the presumption in our jurisprudence favoring live testimony."[30] However, exceptional circumstances existed when a witness's hotel and travel costs in attending trial would have exceeded the damages at issue.[31]

A deposition cross-examination is not a trial cross-examination

While courts typically exclude depositions, objectors to such testimony should still be cautious, especially since an adverse ruling is reviewed for abuse of discretion. In thwarting the admission of a deposition, the importance of cross-examination before a jury should be stressed. Proponents of deposition testimony often argue that opposing counsel's presence at the deposition and opportunity to cross-examine minimizes the negative effect of the inability to cross-examine at trial. But such logic justifies admitting every deposition. Moreover, the rote reading of a deposition cannot duplicate the rigor of a trial cross-examination. Live testimony and immediate cross-examination force a witness to clarify deposition ambiguities. Trial cross-examination also challenges a witness's claims in light of other trial testimony. Denying jurors the opportunity to observe and consider the factors' bearing on credibility should be done only for very substantial reasons.

Justice Thurgood Marshall observed that live cross-examination "has always been regarded as the greatest safeguard of American trial procedure."[32] The Seventh Circuit adopted this reasoning in *Griman*. The court determined that a deposition cross-examination notwithstanding, "a jury would not find it easy to determine [the witness's] credibility without hearing him testify under direct and cross-examination."[33] Further, the inability to cross-examine a critical witness in a defamation suit prompted the Fifth Circuit Court of Appeals to reverse in *Jauch v Corley*.[34] The deposition testimony was "the only probative evidence that [the defendant] knowingly made false statements," prompting the court to find the deposition too prejudicial.[35]

Michigan rules permitting deposition testimony

Similar to its federal counterpart, Michigan Rule of Evidence 804(a) allows for the admission of deposition testimony if the declarant is "unavailable."[36] Witnesses are unavailable if they cannot testify at trial "because of death or then existing physical or mental illness or infirmity."[37] Unavailability also exists when the proponent of a statement cannot procure the declarant's attendance by process or other reasonable means.[38]

Michigan caselaw addressing deposition testimony of unavailable witnesses

The burden of establishing admissibility of deposition testimony in Michigan rests with the proponent of the testimony.[39] Trial courts have latitude in admitting depositions, as such rulings are reviewed for abuse of discretion.[40] Moreover, a trial court need not threaten a witness with contempt before declaring him unavailable.[41]

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State caselaw addressing deposition testimony is minimal. One of the few instances is *Bonelli v Volkswagen*,[42] in which the trial court excluded deposition testimony because the deposition was taken before another party came into the case.[43] The Court of Appeals affirmed, holding that admitting the testimony would violate the due process requirement that a party have the opportunity to cross-examine a witness before the testimony is used against it.[44]

Deposition testimony of unavailable witnesses in criminal cases

Historically, criminal defendants were not entitled to take depositions of witnesses.[45] Most states, including Michigan, still do not permit criminal discovery depositions.[46] Furthermore, the Confrontation Clause of the U.S. Constitution requires that evidence against a criminal defendant be subjected "to rigorous testing in the context of an adversary proceeding before the trier of fact."[47] Courts interpret this to mean that defendants have the right to confront witnesses in person. Specifically, the right to confront an accuser is satisfied by (1) a face-to-face meeting at trial between the defendant and witness, (2) a witness competent to testify under oath, (3) a witness subject to cross-examination, and (4) a witness observed by the jury.[48] For these reasons, discovery depositions are rare in federal prosecutions.[49] However, a federal statute reflects the interest in protecting children from trauma by altering traditional methods of confronting witnesses in court.[50] Similarly, Michigan makes an exception for witnesses who have psychological difficulties testifying at trial. Under MCL 600.2163a(18), if the court finds a "witness is or will be psychologically or emotionally unable to testify at a court proceeding," the witness may testify through closed circuit television or other electronic means.[51] In *People v Pesquera*,[52] the defendant argued that allowing juvenile victims to testify by video violated his right to confront his accusers.[53] The Court of Appeals disagreed, citing the harm that would be inflicted on the children if they testified in court.[54]

Summary

The preference for live testimony is universal. Although videotaped depositions provide a better alternative than reading a written transcription, the preference for live testimony remains. Courts thus view the admission of deposition testimony skeptically. Movants should strive to secure the witness's attendance and document those efforts in the event the witness is unavailable. Nonmovants should emphasize the unfairness of removing the crucible of cross-examination. ■

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ENDNOTES

1. *Napier v Bossard*, 102 F2d 467, 469 (CA 2, 1939).
2. *Garcia-Martinez v City & County of Denver*, 392 F3d 1187, 1191 (CA 10, 2004).
3. Compare FR Civ P 32(a)(3) with FR Civ P 32(a)(4).
4. FR Civ P 32(a)(3).
5. FR Civ P 32(a)(4).
6. *Id.*
7. *Bobrosky v Vickers*, 170 FRD 411, 413 (WD Va, 1997).
8. FRE 804(a).
9. FRE 804(a)(5).
10. Coffee, *Admissibility of Prior-Action Depositions and Former Testimony Under Fed R Civ P 32(a)(4) and Fed R Evid 803(b)(1): Courts Differing Interpretations*, 41 Wash & Lee L R 155, 160 (1984).
11. *Garcia-Martinez*, 392 F3d at 1191.
12. *Id.*
13. *Allgeier v United States*, 909 F2d 869, 876 (CA 6, 1990).
14. *Angelo v Armstrong World Indus, Inc*, 11 F3d 957, 963 (CA 10, 1993).
15. *Allgeier*, 909 F2d at 876–877.
16. *Id.* at 876.
17. *Robinson v Food Serv of Belton, Inc*, 415 F Supp 2d 1232, 1238 (D Kan, 2005).
18. *United States v Tchibassa*, 371 US App DC 542, 549; 452 F3d 918 (2006).
19. *Moore v Mississippi Valley State Univ*, 871 F2d 545, 552 (CA 5, 1989).
20. *Thomas v Cook Co Sheriff*, 604 F3d 293, 308 (CA 7, 2010).
21. *Rascon v Hardiman*, 803 F2d 269 (CA 7, 1986).
22. *Id.* at 277.
23. *Griman v Makousky*, 76 F3d 151 (CA 7, 1996).
24. *Id.* at 153.
25. *Id.*
26. FR Civ P 32(a)(4)(E).
27. *Angelo*, 11 F3d at 963–964.
28. *Bobrosky v Vickers*, 170 FRD at 413.
29. *Id.*
30. *Flores v NJ Transit Rail Operations, Inc*, unpublished opinion of the U.S. District Court for the District of New Jersey, issued November 2, 1998 (No. CIV.A. 96-3237), p 5.
31. *Robinson*, 415 F Supp 2d at 1238.
32. *United States v Inadi*, 475 US 387, 410; 106 S Ct 1121; 89 L Ed 2d 390 (1986) (Marshall, J., dissenting), quoting *New York Life Ins Co v Taylor*, 79 US App DC 66, 74; 147 F2d 297, 305 (1945).
33. *Griman*, 76 F3d at 153.
34. *Jauch v Corley*, 830 F2d 47, 49 (CA 5, 1987).
35. *Id.* at 50.
36. MRE 804(a).
37. MRE 804(a)(4).
38. MRE 804(a)(5).
39. *Valley Nat'l Bank of Arizona v Kline*, 108 Mich App 133, 140–141; 310 NW2d 301 (1981).
40. See *id.* at 141.
41. *People v Burgess*, 96 Mich App 390, 401; 292 NW2d 209 (1980).
42. *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483; 421 NW2d 213 (1988).
43. *Id.* at 487.
44. *Id.* at 501.
45. Eclavea, Annotation, *Accused's Right to Depose Prospective Witnesses Before Trial in State Court*, 2 ALR4th 704, 711 (1980).
46. MCR 6.001(D); Kamiser, LaFave & Israel, *Modern Criminal Procedure Cases: Comments and Questions* (13th ed), p 1,235.
47. *Maryland v Craig*, 497 US 836, 845; 110 S Ct 3157; 111 L Ed 2d 666 (1990).
48. See *id.* at 845–851.
49. FR Crim P 15.
50. 18 USCA 3509(b).
51. MCL 600.2163a(18).
52. *People v Pesquera*, 244 Mich App 305; 625 NW2d 407 (2001).
53. *Id.*
54. *Id.* at 413.