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Using Witness Depositions in Lieu of Live Testimony at Trial:
For When Your Best Laid Plans Go Awry

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I. Introduction

The best laid plans of mice and men often go awry. These words by Robert Burns, despite being written in 1786, are still painfully true, especially for litigators. What happens when your witness, who has been deposed, suddenly falls ill or otherwise can no longer attend trial? Conversely, what can you do when opposing counsel's deposed witness is outside the subpoena power of the court and, instead of using this witness's deposition as provided by the West Virginia Rules of Civil Procedure, counsel moves for a continuance? These hypotheticals are just a few of the situations in which you may want to consider presenting a witness by deposition at trial in lieu of live testimony.[1]

Despite technological advances allowing a witness to testify via a recorded deposition, use of depositions at trial can still be contentious in West Virginia state courts because of a perceived distinction between an evidentiary (historically referred to as "*de bene esse*") and a discovery deposition. This distinction has been deleted from the West Virginia Rules of Civil Procedure but lives on in practice. Although a witness's sudden inability to appear at trial may present different circumstances to consider every time it arises, it is still important to understand that either an evidentiary or a discovery deposition may be used in lieu of live witness testimony at trial and to know how to maximize your time in deposition to efficiently manage your cases.

Of course, "discovery" depositions are commonly used for a number of reasons at trial, including for impeachment and refreshing a witness's recollection. This article will focus instead on the use of depositions in lieu of live testimony. Presenting witness testimony by deposition, whether video-recorded or simply transcribed, makes the trial lawyer more flexible and effective, and it enhances the efficiency of the courts. Courts should not shy away from their use to ensure justice is served. We believe the presentation of witnesses by deposition should be routinely considered as an alternative to delay and rescheduling any time a witness is unavailable.

II. The Use of Deposition Testimony at Trial in Lieu of Live Testimony.

For a deposition to be used at trial in lieu of live testimony, the witness must be "unavailable." It does not matter whether the prior deposition was considered an evidentiary or a discovery deposition as both are permissible for use at trial under the West Virginia Rules of Civil Procedure. A court may be persuaded to permit a deposition in lieu of live testimony if counsel had an opportunity to defend and respond during the deposition but chose not to. Finally, if a party moves to continue to obtain a new witness instead of using the witness's deposition, a

[1] It is presumed, for the purposes of this article, that attorneys will make efforts to confer and agree with opposing counsel about using a deposition transcript at trial in lieu of a live witness before involving the judge. *See, e.g.*, W. Va. R. Civ. P. 37(a)(2) (parties must confer in good faith before seeking the court's guidance in discovery disputes.)

court should consider whether manifest injustice would result if the continuance were not granted.

1. The "Unavailable" Witness.

The West Virginia Rules of Civil Procedure provide that:

> The deposition of an unavailable witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness is dead, out of the state, unable to attend or testify because of age, illness, infirmity, or imprisonment; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or . . . that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

W. Va. R. Civ. P. 32(a)(3).

Use of depositions in lieu of live testimony is not such a rare occurrence that it is ignored in practice. For example, West Virginia Pattern Jury Instructions for Civil Cases §1304 provides that the jury "should use the same methods in evaluating deposition testimony that you use for a witness testifying in court. You are the judges of any witness's testimony whether it was in court or in a deposition."

2. Evidentiary v. Discovery Depositions – a Distinction without a Difference Under the Rules.

If a witness has been deposed but is unavailable to testify at trial, any party may use the witness's deposition. Counsel opposing the alternative may argue that the deposition taken was "only for discovery purposes, and not as an 'evidentiary deposition'". Neither the West Virginia Rules of Civil Procedure nor the Federal Rules of Civil Procedure make a distinction between evidentiary and discovery depositions. Likewise, there is no such distinction in the West Virginia Rules of Evidence or Federal Rules of Evidence.

Historically, West Virginia had recognized a difference between discovery and evidentiary depositions. *See State ex rel. Means v. King*, 205 W. Va. 708, 520 S.E.2d 875 (1999). The cases, however, do little to draw a significant and enduring distinction between the two.

> The purpose of an evidentiary deposition, as its name implies, is very different from the purpose of a discovery deposition. An evidentiary deposition "is taken with the knowledge that it will be introduced as 'evidence' at the hearing [or a trial.]" A discovery deposition "is taken in order to 'discover' information."

State ex rel. Hoover v. Smith, 198 W. Va. 507, 513, 482 S.E.2d 124, 130 (1997).

Indeed, the primary authority for a distinction between evidentiary and discovery depositions appears in unamended sections of the West Virginia Code, enacted when the West Virginia Rules of Civil Procedure still provided for a distinction between the two. *See* W. Va. Code § 29A-5-1(c) (1964); W. Va. R. Civ. P. 26(a) (1960). *See also State ex rel. Hoover v. Smith, supra*.

Nonetheless, either an evidentiary or discovery deposition may be read or presented as evidence at trial. The Rules simply do not make a distinction that discovery depositions are considered *per se* inadmissible or otherwise deficient because their proponent's or participants' primary or intended purpose was to "discover" information. Federal courts have discussed this rule and said that "based on the lack of distinction in the Federal Rules between trial and discovery depositions, . . . there is no difference between the two," and "a sound argument can be made that if a party wishes to introduce deposition testimony at trial, that testimony should be procured during the time set by the court to conduct discovery." *Integra Lifesciences I, Ltd. v. Merck KGaA*, 190 F.R.D. 556, 559 (S.D. Cal 1999).

At the federal level, any distinction between a "discovery" deposition and an "evidentiary" deposition was deliberately eliminated from the Rules:

> Prior to the revision of the Federal Rules of Civil Procedure in 1970, Rule 26(a) provided that depositions could be taken "for the purpose of discovery or for use as evidence in the action or for both purposes." Rule 26(d), the predecessor of Rule 32(a), which governed the use of depositions at trial, did not, however, state any distinction between discovery and evidentiary depositions. Recognizing a possible ambiguity in the rule, courts nevertheless refused to recognize a distinction between "discovery" and "evidentiary" depositions with regard to admissibility at trial. When the subject matter of Rule 26(a) was transferred to Rule 30(a) in the 1970 revision of the rules, the language authorizing depositions "for the purpose of discovery or for use as evidence in the action or for both purposes" was omitted.

United States v. IBM Corp., 90 F.R.D. 377, 381 n.7 (S.D.N.Y. 1981).

The Fourth Circuit followed this logic in *Tatman v. Collins,* finding that a court may not exclude deposition testimony on the basis that the defendant intended that the deposition be taken for discovery purposes and not to be used as the witness's testimony at trial. *Tatman v. Collins*, 938 F.2d 509 (4th Cir. 1991).

Thus, because the distinction between discovery and evidentiary depositions has been stricken from the rules, a court should not be overly concerned with the purposes for which a deposition was taken, when the record of that deposition is proposed for use in lieu of live testimony at trial. Instead, the most important factor is counsel's opportunity to meaningfully participate. Conversely, deposition planning and preparation should include consideration for all the potential uses of the deposition record both by the proponent and every party's attorney.

3. Take it or Leave it: the Opportunity to Defend and Respond.

Perhaps the strongest argument for the use of a deposition at trial is that the opposing party's counsel had an opportunity to participate in the deposition and to respond to any potential issues raised during the deposition, whether or not they actually chose to do so, or were effective in doing so. *See Carper v. Kanawha Banking & Trust Co.*, 157 W. Va. 477, 519, 207 S.E.2d 897, 944 (1974). The party seeking the use of the deposition cannot be legitimately precluded from doing so because the opposing party believed it was a "discovery" deposition or because counsel decided not to address any perceived shortcomings with the witness's testimony at the time of deposition.

A trial judge may disfavor the use of a deposition at trial because "when depositions are submitted in place of live testimony, the trial judge is denied the opportunity to question the witness." Franklin D. Cleckley, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 32 (2000). That rare occasion, however, should not be an impediment, when the court can (and should) review in advance any questionable testimony to be presented by the parties, and either satisfy herself that it is not a problem or order that any problematic portion of the deposition will not be presented.[2]

Indeed, the potential for any deposition to become the actual trial testimony of the witness should be a part of every trial attorney's preparation and planning:

> It is incumbent upon the parties to thoroughly question a deponent when it is known that the deposition will be used in lieu of live testimony. Failure to do so, when not caused by an impediment by the adversary or deponent, is a tactical decision with which a party must live.

Ware v. Howell, 217 W. Va. 25, 614 S.E.2d 464 (2005).

This is also true in a case where the witness is beyond the subpoena power of the court, as this adds the risk that the witness may not appear voluntarily. *See Henkel v. XIM Products, Inc.*, 133 F.R.D. 556, 557 (D.Minn. 1991) ("A party who makes the tactical decision during a deposition to refrain from examining a witness who is beyond the subpoena power of the court, takes the risk that the testimony could be admitted at trial if the witness will not or cannot appear voluntarily."). *See also State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996) ("The rule in West Virginia is that . . . if [parties] forget their lines, they will likely be bound forever to hold their peace.").

[2] As a practical matter, it is important to make sure a deposition transcript or video to be used at trial has been edited to remove all inadmissible portions ahead of trial, so that the court need not make rulings during the presentation. Although this process can be meticulous, it is essential to trial preparation. If the testimony is important enough to present, it is important enough to prepare the record to avoid distracting the court and jury during its presentation. Of course, it falls to counsel who would use the deposition to raise it in pre-trial proceedings as soon as the circumstances arise, to confer with opposing counsel to address any and all objections either by agreement or court ruling, and to "edit" the deposition record accordingly.

When presented with an opportunity to defend and respond, especially when your witness is outside the subpoena power of the court or you have any suspicion the witness may not be available at trial for any reason, it is important to preserve as much of the witness's testimony as you may need. This involves some thoughtful and balanced consideration of just how much to develop in the deposition, but certainly it includes the routine application of basic evidentiary foundations, including qualifications and basis for any opinion testimony. Even though the circumstances justify or compel use of the deposition in lieu of live testimony, if the deposition record does not contain the foundational prerequisites for any subject or line of examination, all or part of the record may be excluded. Conversely, when you are "defending" you either need a record stipulation that any and all objections are reserved, or you will have to note an objection on every point which you may want the court to exclude from presentation.

4. The Absence of Manifest Injustice to Modify the Scheduling Order and Continue.

In many cases, the unavailability of a witness may only present after discovery is closed, the deadline is drawing near, or trial is looming. If opposing counsel moves to continue to obtain a new or "replacement" witness, they must observe a basic tenet of Rule 16 of the West Virginia Rules of Civil Procedure, that "the order following a final pretrial conference shall be modified only to prevent manifest injustice." W. Va. R. Civ. P. 16(e). While undefined by the West Virginia Rules of Civil Procedure, federal and state decisions have defined "manifest injustice" as: (1) prejudice or surprise to the party opposing trial of the issue; (2) the ability of that party to cure any prejudice; (3) disruption to the orderly and efficient trial of the case by inclusion of the new issue; and (4) bad faith by the party seeking to modify the order." *Cunningham v. LeGrand*, 2012 WL 3028015 (S.D. W. Va. July 24, 2012) (*quoting Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1222–23 (10th Cir. 2000)).

A party moving for a continuance due to the unavailability of a witness must show:

> (1) the materiality and importance of the witness to the issues to be tried; (2) due diligence in an attempt to procure the attendance of the witness; (3) that a good possibility exists that the testimony will be secured at some later date; and (4) that the postponement will not be likely to cause an unreasonable delay or disruption in the orderly process of justice.

State v. Cole, 180 W. Va. 412, 376 S.E.2d 618 (1988). A party seeking a continuance because of the absence of a witness must show that he cannot safely go to trial without such witness. *Dimmey v. Wheeling & E.G.R. Co.*, 27 W. Va. 32 (1885).

In the context of using a deposition in lieu of live testimony, it is almost axiomatic that a party who has previously deposed a witness will not have to go to trial without a witness, as their testimony has already been preserved. We argue that there is no compelling basis for a postponement or continuance because a witness is not available to testify "live", when the parties have that witness's deposition testimony to present. In effect, because a deposition may be presented when a witness is "unavailable", a witness who has been deposed is not "unavailable" for purposes of delay or rescheduling.

III. The Case Against Mandating Live Testimony for Every Witness in Every Trial.

While live testimony is preferred by West Virginia courts, it may not be feasible in every case. For instance, it may be more efficient for parties to use a videotaped deposition of an expert when the parties know in advance that the witness will be unavailable. Likewise, counsel may not want to routinely use video recording in every deposition; the practice is likely not justified by the issues and circumstances in every case for every witness. It is, however, another deposition planning consideration. If a deposition is going to be presented at trial, the video recording of the actual witness during examination should be far more effective than counsel reading their questions and a "stand in" reading the answers from a transcript. That certainly is an option, however, if the record is not on video.

Efficient and economic case management is at the heart of what trial lawyers and the courts do. Rule 1 of the West Virginia Rules of Civil Procedure states:

> These rules govern the procedure in all trial courts of record in all actions, suits, or other judicial proceedings of a civil nature . . . [t]hey shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

W. Va. R. Civ. P. 1. Also per the Rules, discovery may be limited to reflect the cost of defending or prosecuting the matter:

> The frequency or extent of the use of discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

W. Va. R. Civ. P. 26(b)(1)(C). *See e.g.*, *Whyte v. U.S. Postal Service*, 280 F.R.D. 700 (S.D. Fla. 2012) (denying plaintiff's motion to take deposition for use at trial because increased cost was not an exceptional circumstance.).

For instance, in a case with a relatively small amount in controversy, it may be more prudent to take stenographically recorded depositions instead of video recordings. With either a video or transcribed deposition record available, however, the court will be justified in refusing to postpone a trial for the asserted "unavailability" of any witness.

IV. Conclusion

When you suspect that your best laid plans for trial may not work out in the event your witness becomes unavailable, or if you just want to keep all your options open, it is important to anticipate the use of deposition testimony on your opportunity to defend and respond. There is no distinction between evidentiary and discovery depositions under the West Virginia Rules of Civil Procedure and either may be used at trial in the event your witness is unavailable. Thus, it is better to anticipate and cover all the bases with a witness during a

"discovery" deposition, than to let the opportunity pass and not have valuable or even essential testimony preserved in admissible form for possible use at trial.