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New Tips for Examining Your Own Witnesses and Using Their Depositions at Trial

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The conventional wisdom looks askance at questioning your own witnesses during their depositions, and at using those depositions at trial. Following recent amendments to the Federal Rules of Civil Procedure, it may be worth rethinking the traditional approach.

Whether by custom or misunderstanding of the rules, many lawyers defending depositions forgo the opportunity to ask their witness questions at the end of the deposition. "Traditionally, defending counsel did not ask any questions at the deposition of the party witness or a friendly witness." David M. Malone *et al*., National Institute of Trial Advocacy, *The Effective Deposition: Techniques and Strategies That Work* 245 (3d ed. 2006). Many lawyers assume that because the witness—who, for example, may be an employee of a party or a party's officer—is under his client's "control," they must produce the witness at trial and cannot, therefore, offer the witness' deposition testimony. *See* 8A Charles A. Wright *et al*., Fed. Prac. & Proc. Civ. § 2147 (3d ed. 2010) ("There has been some controversy, however, about the use by a party of his or her own deposition."). With such a view, asking questions at the end of the deposition of your own witness serves little purpose—it only gives the other side a free preview of direct examination.

But the assumption that you cannot use your own witnesses' deposition testimony is wrong. Rule 32 ("Using Depositions in Court Proceedings") has—for several decades—contemplated that a party may offer deposition testimony of its own employee, if that employee is "unavailable." Rule 32(a)(4)(D) provides that "[a] party may use for any purpose the deposition of a witness, whether or not a party, if the court finds . . . that the party offering the deposition could not procure the witness's attendance by subpoena." In other words, Rule 32 has always contemplated the possibility that a party could use its own witness's deposition testimony at trial, if that witness was beyond the court's subpoena power. *See also* 7 James Wm. Moore *et al*., Moore's Federal Practice ¶ 32.24 (3d ed. 2014) ("The Federal Rules of Civil Procedure contemplate that a party may use his or her own deposition at a trial.").

The 2013 Amendments to Rule 45 made clear what had previously been in doubt: A party's own employees, and even its officers or agents, may well be beyond the court's subpoena power. Prior to the recent amendment, Rule 45(b)(2)(B) provided that a "[s]ubject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place." Rule 45(b)(3)(A)(ii) contained a 100-mile limitation on a subpoena that expressly applied only to non-parties—it mandated that a court quash any subpoena (for trial or deposition) that required a *non-party* witness to travel more than 100 miles from the place where he or she "resides, is employed, or regularly transacts business in person." Several courts—indeed, dozens of them—read these provisions together to

find that a court could, therefore, subpoena a *party* witness to travel more than 100 miles for a trial. *See, e.g., Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas,* 262 F.R.D. 293, 302 (S.D.N.Y. 2009) ("The Court agrees with the majority position that corporate officers of a party may be subpoenaed and required to travel more than 100 miles from where they reside, are employed, or regularly transact business."); *Clark v. Wilkin,* No. 2:06 CV 693, 2008 WL 648542, at *1 (D. Utah Mar. 10, 2008) ("[T]he majority of courts . . . have found that when a subpoena is served upon a party to the suit, the 100 mile rule does not apply."). Perhaps the most well-known example of the "majority" rule was the massive multidistrict litigation concerning the drug Vioxx, where the district court sitting in Louisiana allowed plaintiffs to compel the testimony of a high-level Merck executive who was based in the Midwest and Northeast, hundreds of miles from the trial court. *See generally In re Vioxx Products Liab. Litig.*, 438 F. Supp. 2d 664 (E.D. La. 2006).

The 2013 Amendment to Rule 45 discards this "majority" view. Under the new Rule 45, a trial subpoena cannot "require a party or party officer to travel more than 100 miles unless the party or party officer resides, is employed, or regularly transacts business in person in the state."*See* 2013 Amendment to Rule 45; Rule 45(c)(1)(A). The same is true for any party employee—i.e., a party's witnesses who are not officers. *Id.* Indeed, under the new Rule, a non-officer witness may only be subpoenaed for trial if he would also "not incur substantial expense" in attending trial within the state but outside the 100-mile area. Rule 45(c)(1)(B)(ii). The bottom line, then, is that witnesses who are both outside the 100-mile area and outside the state in which trial will take place are *always* unreachable by subpoena under Rule 45.

The amendment, therefore, discards the notion that a party's own employees and officers—by virtue of being affiliated with a party—are required to testify at trial, regardless of where they or the trial are located. (Indeed, the Advisory Committee Notes to Rule 45 now also make clear that subpoena compliance "may only be commanded as [the Rule] provides").

But what does this mean for depositions? If your client, its officers, or its employees are beyond the narrowly drawn limits of amended Rule 45's subpoena power, then they are "unavailable" within the meaning of Rule 32(a)(4)(D). Accordingly, you can, in lieu of live testimony, use their depositions at trial. Being able to do so means you should rethink the conventional wisdom of not asking questions of your own witnesses at a deposition. It has always been true that a witnesses' recollection at a deposition is likely to be stronger than at a trial that takes place months or even years later. A tried and true technique is to impeach a witness's trial testimony with what he said at an earlier deposition. Relying on a deposition, and avoiding trial testimony, allows you to avoid impeachment battles springing from a witness's potentially faulty recollection. Thus, there may be real strategic benefits in new Rule 45's expansion of the universe of witnesses whose deposition testimony may be offered in lieu of live testimony.

Of course, you should be mindful of a few things. If you are contemplating using your own client's deposition testimony at trial, then deposition preparation should be that much more extensive. You will have to go over with your client, in advance, the questions you intend to ask. Those questions will have to cover some, if not all, of the questions you might ask in court,

including those about the person's background, work experience, and role in the case. You may also need to deal with problematic documents or other evidence so your witness has an opportunity to explain or downplay the significance of those items. Finally, you may need this witness to lay the foundation for trial evidence that may not be admissible through any other person; be prepared to ask the necessary questions at the deposition.

If the deposition is not videotaped, you have only a dry transcript to read to the jury. As one court explained, testimony via deposition can be a "highly unsatisfactory result," and given the "long standing preference for live testimony" it is "unusual to present . . . an important witness's testimony through lengthy deposition excerpts." *Mazloum v. Dist. of Columbia Metro. Police Dep't*, 248 F.R.D. 725, 728 (D.D.C. 2008). Even if the deposition is videotaped and could be played for the jury, it may seem odd not to have an important witness testify live. As Judge Learned Hand said, "[t]he deposition always has been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand." *Napier v. Bossard*, 102 F.2d 467, 469 (2d Cir. 1939). Indeed, the potentially soporific effects of videotaped deposition were a major motivation for the former "majority" rule that allowed party employees to be compelled to testify even from hundreds of miles and several states away. *See Vioxx*, 438 F. Supp. 2d at 668 ("[T]he deposition, whether read into the record or played by video . . . is a sedative prone to slowly erode the jury's consciousness until truth takes a back seat to apathy and boredom."). Thus, while the amended Rule 45 means that counsel should consider the value of offering deposition testimony under Rule 32—with the issue of the jury's capacity to engage with a video deposition depending, in part, on the length of the excerpts—there are strategic benefits to using a live witness in certain, if not most, cases.

One final point. Some lawyers erroneously believe that they cannot offer the deposition of their own client (or the client's employees), because their statements are hearsay. It is true that your client's statements in deposition testimony, if offered by your adversary, are non-hearsay statements, because they are admissions of a party opponent. *See* Fed. R. Evid. 801(d)(2). It is also true that the same deposition testimony, if offered by you, would usually be hearsay. But there is an important exception—if the deposition falls within Rule 32, there is no hearsay problem. That is because Rule 32 is itself an exception to the hearsay bar. *See* Fed. R. Evid. 802 & 1972 Advisory Committee Notes (noting that Fed. R. Civ. P. 32 is an exception to the hearsay rule); 30C Charles A. Wright *et al.*, Fed. Prac. & Proc. Evid. § 7073 n.2 (2014) ("Testimony in the form of a deposition is also admissible in civil matters if the requirements of Fed. R. Civ. Proc. 32(a)(3) are satisfied . . . . As provided in Rule 802, these provisions act independently of Rule 804(b)(1) to create hearsay exceptions.").

The amendments to Rule 45, in sum, require new thinking about deposition and trial strategy. Next time you are preparing to defend a deposition, determine whether the witness falls outside the newly fashioned Rule 45. If so, consider whether you want to question your witness in more depth, develop and lock in testimony for use at trial, and avoid calling the witness at trial altogether. And make sure to bring a video camera.

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