Roy's Trial Law Tip No. 96

Expert Depositions Inadmissible in Federal Trials Absent Showing of Unavailability

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Florida trial lawyers are so used to the procedure of presenting expert testimony during trial by deposition—whether reading written transcripts or by video—they may be in for a rude awakening when attempting to introduce expert deposition testimony in a federal trial. Unlike the practice in state court, the Federal Rules of Civil Procedure and Evidence do not recognize an independent exception to the usual rule requiring a showing of witness unavailability applicable to "an expert or skilled witness" recognized by Fla. R. Civ. P. 1.330(a)(3)(F).

Florida Rule 1.330(a)(3) identifies the circumstances under which a deposition of a non-party may be used "against any party who was present or represented at the taking of the deposition or who had reasonable notice of it" as follows:

> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; (B) that the witness is a greater distance than 100 miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; (E) upon application and notice that such exceptional circumstances exist as to make it desirable, in the interests 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; or (F) ***the witness is an expert or skilled witness***.

(emphasis added).

As is apparent from the text of that rule, all the situations in which a non-party witness's deposition may be used—other than the exception for "an expert or skilled witness"—require either a showing of the unavailability of the witness or "exceptional

circumstances." Florida trial lawyers never give a second thought to the question whether their experts' depositions will be admissible in a trial even without a showing of unavailability or such exceptional circumstances. Such is not the case in federal practice in Florida federal courts and nationwide.

The equivalent rule in federal court is Fed. R. Civ. P. 32(a). Subsection (4) of that rule contains five subsections of circumstances in which the deposition of an "Unavailable Witness" may be used at trial that are basically identical to those subsections (A) through (E) of the Florida rule (with the notable exception that subsection (B) under the federal rule refers to a witness being "more than 100 miles from the place of hearing or trial or is outside the United States", whereas the state rule refers to such a witness being "out of the state"). However, subsection (F) of Fla. R. Civ. P. 1.330 ("the witness is an expert or skilled witness") is conspicuously absent in Federal Rule 32.

Trial lawyers who practice primarily in state court have been caught unawares when, upon the federal judge saying, "call your next witness," they attempt to present expert deposition testimony. I was one of those poor souls who—in a maritime case tried before Judge Stanley Marcus more than twenty years ago—I announced that my "next witness" would be using my expert by way of his deposition rather than calling him live. I do not recall there being any objection made by defense counsel, but Judge Marcus immediately demanded that I demonstrate my expert's unavailability, failing which the jury would not hear the testimony.

My expert was in the middle of a transatlantic crossing, so I was eventually able to demonstrate his unavailability; although the judge asked me to produce some cruise line ticket or other tangible proof that the witness was at sea. I was able to read the deposition, so at least the reason I lost that trial (which I did) was not my unfamiliarity with the expert deposition inadmissibility rule.

Creative lawyers have attempted to use the "exceptional circumstances" exception to the normal unavailability requirement in federal court, but without success. In denying such a motion to permit use of medical experts' depositions in lieu of live trial testimony, one federal judge has held as follows:

> Plaintiff contends her experts are "extremely busy doctors," and there is "the strong possibility that they would have some type of patient care that would require them to take care of the patient as opposed to appearing for testimony."

* * *

> The "exceptional circumstances" required are those where the testimony is "impossible or highly impracticable" to obtain. *Kraese v. Jialiang Qi*, CV417-166, 2020 WL 4016250, at *3 (S.D. Ga. Jul. 16, 2020) (citation and quotations omitted). ***A physician's extremely busy schedule is an insufficient justification for finding exceptional circumstances under Rule 32***. *See Rementer v. United States*, No. 8:14-cv-642-T-17MAP, 2015 WL 12862518, at * 1 (M.D. Fla. Sept. 16, 2015) (denying motion to provide testimony of plaintiff's treating physician via video deposition rather than live testimony). Although Drs. Martinez and McClimans may be inconvenienced by appearing at trial, the same is true for most witnesses. Considering Defendant's opposition, the fact that Plaintiff filed her motion just one month prior to the start of the trial term even though the case has been pending for a year and a half, that the parties have already deposed Drs. Martinez and McClimans, and Plaintiff's failure to articulate "exceptional circumstances," Plaintiff's motion is denied.

Marshall v. Wal-Mart Stores E., LP, 2022 U.S. Dist. LEXIS 105672; 2022 WL 2111056; No. 8:20-cv-1835-CEH-SPF (M.D. Fla. Jan. 4, 2022).

Of course, many cases require expert testimony merely to survive the inevitable motion for directed verdict. A miscalculation in assuming that your expert's deposition will be admissible could cost you and your client the entire case. Be aware of this critical difference between the Florida rule and the federal rule. Although it is becoming increasingly difficult to navigate the intricacies of procedural rules in multiple jurisdictions' courts, all you can do is . . .

Keep tryin!

Roy