Using Depositions As Affirmative Proof In Federal Court: More Than The Classic Unavailable Witness

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1. Introduction

Beginning the day a new case comes through the door and continuing throughout discovery, top trial attorneys always think about how the evidence will play out before a judge or jury at trial. This should be no different with respect to deposition testimony. The most common uses of deposition testimony at trial are (a) to impeach a witness on the stand and (b) when the deponent is “unavailable” to testify, typically because he or she is located more than 100 miles from the federal courthouse, the deponent’s testimony can be used in either party’s case-in-chief. But the law on the affirmative use of depositions at trial is more nuanced.

For example, what happens if the opposing party lists a deponent on their trial witness list who lives more than 100 miles from the courthouse? Can you nevertheless use their deposition testimony in your case-in-chief, or do you have to call them adversely or cross-examine them live? Sometimes presenting the deposition itself (especially if videotaped) may be a more effective way of convincing the jury. However, courts often hold that if the opposing party brings the witness to trial, the deposition many not be used as affirmative evidence.

Similarly, many attorneys know that the deposition of an officer, director or 30(b)(6) witness may be used by an adverse party for any purpose, regardless of whether the deponent is present at trial. What is less known, however, is that the deposition of an adversary’s “managing agent” can also be used, and courts broadly construe this definition.

It is critical for counsel to inform themselves of these nuances and think through if and how a deposition may later be used at trial before taking or defending a deposition.
2. The Federal Rules of Civil Procedure

Federal Rule of Civil Procedure 32 (a)(1) provides:

At a hearing or trial, all or part of a deposition may be used against a party on these conditions:
(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;
(B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and
(C) the use is allowed by Rule 32(a)(2) through (8).

The most relevant parts of Rule 32(a) then read:

(2) Impeachment and Other Uses. Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(3) Deposition of a Party, Agent or Designee. An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party’s officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) Unavailable Witness. A party may use for any purpose the deposition of a witness, whether or not a party, 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 or testify 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.
3. Who is Unavailable – The Distant Witness

The deposition of a witness who is located more than 100 miles from the courthouse is ordinarily admissible at trial under Rule 32(a)(4)(B). If a party wants to use the deposition testimony of an unavailable witness in its case-in-chief, it can. This especially might be desirable if it is a non-friendly witness, their testimony helps establish an element of your claim or defense and they came across poorly in their deposition (particularly in the case of videotaped depositions). Perhaps opposing counsel has recognized this and offers to make the witness available to testify at trial. Can you still use the witness’s deposition testimony affirmatively?

A strict reading of the Rule arguably would not prohibit you from doing so. However, many courts hold that unavailability is determined at the time the deposition is offered – i.e. at trial – and therefore, when a witness is present at trial, live testimony must be used in lieu of deposition testimony. See Kay v. United of Omaha Life Ins. Co., 562 F. App’x 380, 383-6 (6th Cir. 2014) (the district court abused its discretion when it allowed deposition testimony to be used despite the witness being present in the court room); Hartman v. United States, 538 F.2d 1336, 1345 (8th Cir. 1976) (the 100-mile exception is determined at the time the deposition is offered); Mazloum v. D.C. Metro. Police Dep’t, 248 F.R.D. 725, 727 (D.D.C. 2008) (“Simply put, it is the fact that a witness will actually be present at the trial that renders him or her ‘available,’ and thus outside the scope of Rule 32(a)(4)(B), not the fact that the witness could be compelled to appear via subpoena…”); Estate of Thompson v. Kawasaki Heavy Indus., Ltd., 291 F.R.D. 297, 312 (N.D. Iowa 2013) (if a party guarantees an otherwise “unavailable” witness will be present at trial to testify, and the witness appears at trial when called to testify, the opposing party cannot use deposition testimony in lieu of a live examination under Rule 32(a)(4)(B); however, it would be premature to rule on the affirmative use of deposition testimony until the day of trial, because only then will the court know if the witness is present); Young & Assocs. Public Relations, L.L.C., v. Delta Air Lines, Inc., 216 F.R.D. 521, 524 (D.Utah 2003) (if certain witnesses “are made available as has been agreed for examination [at trial], the Court will not allow deposition testimony in lieu of live testimony, even though at the time of … trial the witness resides or is located at a greater distance than 100 miles.”)

4. Managing Agents of Adverse Parties

If the witness is associated with an adverse party, Rule 32(a)(3) must be consulted. It allows affirmative use of the deposition testimony of an adverse party’s officer, director or 30(b)(6) designee, regardless of whether they are available to testify live. Coughlin v. Capitol Cement Co., 571 F.2d 290, 308 (5th Cir. 1978) (“As stated, the Rule permits a party to introduce the
deposition of an adversary as part of his substantive proof regardless of the adversary’s availability to testify at trial.”); Pingatore v. Montgomery Ward & Co., 419 F.2d 1138, 1142 (6th Cir. 1969) (adverse party’s deposition may be used for any purpose “even though the party was present at the trial and testified orally”).

But the Rule also allows affirmative use of the deposition testimony of an adverse party’s “managing agent.” Although this definition is sometimes overlooked, how courts interpret the “managing agent” definition may provide a tool to affirmatively use the testimony of an adverse party’s employees.

The Federal Rules of Civil Procedure nowhere define the term “managing agent.” However, most courts have settled on a three-pronged test that considers the following central questions:

1) Did the corporation invest the person with discretion to exercise his/her judgment, as opposed to a common employee that only takes orders and has no discretion;
2) Could the employee be depended upon to carry out the employer’s directions to give testimony if the employer is in litigation; and
3) Could the person be expected to identify him/herself with the interests of the corporation rather than those of the other party?

Reed Paper Co. v. Proctor & Gamble Distrib. Co., 144 F.R.D. 2,4 (D. Me. 1992); Young & Associates Pub. Relations, L.L.C. v. Delta Air Lines, Inc., 216 F.R.D. 521, 523 (D. Utah 2003). With slight variations, courts have defined “managing agent” similarly in the context of other Federal Rules. See, e.g., Brandon v. Art Ctr. Hosp. (Osteopathic), 366 F.2d 369, 372 (6th Cir. 1966) (same test used to define managing agent); John B. v. Goetz, 879 F. Supp. 2d 787, 858 (M.D. Tenn. 2010) (discussing various uses of the term in the Rules and noting the “managing agent” test focuses on whether the person possesses autonomy and discretion and on whether his/her interests are fully aligned with those of the principal); Atmosphere Hospitality Mgmt., LLC v. Curtullo, No. 5:13-CV-05040-KES, 2015 WL 136120, at *9, 13-14 (D.S.D. Jan. 9, 2015) (analyzing whether deposition notice was sufficient and stating “[t]he question of who is a managing agent is highly fact-specific and so it is to be answered ‘pragmatically’ on an ‘ad hoc’ basis…[e]ven lower-level employees may qualify as managing agents for purposes of the rules of discovery where those employees’ ‘duties and activities are closely linked with the events giving rise to the lawsuit.’”)

On the other hand, employees with no general power to exercise judgment or discretion, and/or whose work is largely routine, are not considered “managing agents.” Colonial Capital Co. v. General Motors Corp., 29 F.R.D. 514, 515 (D. Conn. 1961) (secretaries and stenographers are not managing agents); Seaboard Coastline R. Co. v. Hughes, 521 S.W.2d 558, 562 (Tenn. 1975) (railroad conductor is not a managing agent).
Whether witnesses fall within the category of “managing agent” requires a determination of what the employee actually did, rather than what title or position he or she held.  


Relatedly, attorneys should also not forget Federal Rule of Evidence 801(d)(2)(D), which makes the statement of an agent or employee of a party opponent admissible against the party opponent if the statement was on a matter within the scope of the employment or agency relationship and made while that relationship existed.  Some courts have held that Rule 801(d)(2)(D) may provide an independent method to admit deposition testimony, even if Rule 32’s requirements are not met and the deponent testified live.  See In re Hayes Lemmerz Int'l, Inc., 340 B.R. 461, 468-69 (Bankr. D. Del. 2006) (discussing cases and holding that “Rule 32 is not the exclusive means by which depositions can be admitted and [] Rule 801(d)(2)(D) is an independent basis for admissibility. The testimony relates to areas covered by the deponents’ employment and therefore is admissible under Rule 801(d)(2)(D).”) But not all courts are in agreement.  See Kolb v. Suffolk Cnty., 109 F.R.D. 125, 126-28 (E.D.N.Y. 1985) (comparing the interplay between Rule 32 and the Rules of Evidence and holding that the conditions in Rule 32(a) must exist before deposition testimony can be used at trial and otherwise noting that even if Rule 801 provided an independent basis for admission, Rule 801 is rarely used to admit whole depositions of witnesses who could appear at trial).  Accordingly, counsel should consult the authority in their jurisdiction.

5. Use of a Party’s Own Deposition

While the Federal Rules specify that only an adverse party may use the deposition of an officer, director, 30(b)(6) designee or managing agent, the rules for an unavailable witness are not limited to use by an adversary.  As long as the offering party has not procured the witness’ absence, any party may use the witness’s deposition. Fed. R. Civ. P. 32(a)(4); see also A.H. ex rel. Hadjih v. Evenflo Co., 579 F. App'x 649, 656 (10th Cir. 2014) (affirming decision to allow corporate defendant to introduce deposition testimony of its former employee even though the court found the defendant could have brought the witness to trial if it wanted, and holding “there is a difference between procuring a witness’s absence and electing not to procure his attendance”); Carey v. Bahama Cruise Lines, 864 F.2d 201, 204 (1st Cir.1988) (“Under the case law interpreting Rule 32, the mere fact that the deponents are employed by the defendant and that there is an identity of interest between the deponents and their employer is not enough to trigger exclusion because
‘procuring absence and doing nothing to facilitate presence are quite different things.’); Ginther v. Sea Support Servs. L.L.C., No. CIV.A. 00-2928, 2002 WL 1213601, at *2 (E.D. La. June 4, 2002) (“The weight of the cases ... tends to allow the introduction deposition testimony in lieu of a live appearance, when the witness is over 100 miles from the courthouse, so long as the absence of the witness was not procured by the party offering the deposition.”); Houser v. Snap–On Tools, Co., 202 F. Supp. 181 (D. Md. 1962) (corporate party can introduce depositions of its officers when they were more than 100 miles away from the courthouse, so long as it took no active steps to keep the deponents from the courtroom).

Some lawyers erroneously believe they cannot offer the deposition of their own client (or the client’s employees) because their statements are hearsay. Although it is true your client’s statements offered by your adversary are non-hearsay party opponent admissions (Fed. R. Evid. 801(d)(2)), the same deposition testimony if offered by you also is not hearsay if the deposition falls within Rule 32. This is because Rule 32 is itself an exception to the hearsay rules. See Fed. R. Evid. 802 and 1972 Advisory Committee Notes (noting that Fed. R. Civ. P. 32 is an exception to the hearsay rule); see also Ueland v. United States, 291 F.3d 993, 996 (7th Cir. 2002) (“Rule 32(a), as a freestanding exception to the hearsay rule, is one of the ‘other rules’ to which Fed.R.Evid. 802 refers. Evidence authorized by Rule 32(a) cannot be excluded as hearsay, unless it would be inadmissible even if delivered in court.”)

6. Preservation of Objections

Rule 32 also governs the preservation of objections to deposition questions and witnesses. Objections are not waived to a deponent’s competence, or to the competence, relevance, or materiality of testimony by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time. Fed. R. Civ. P. 32(d)(3)(A).

Objections are waived as to an error or irregularity at a deposition if it:

- Relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party’s conduct, or other matters that might have been corrected at that time, and
- Is not timely made during the deposition.


Thus, even for an unavailable witness whose deposition is used at trial, objections that do not pertain to the form of the question, the oath, or another matter can still be made to the trial judge. Typically, objections are made once the parties have designated the portions of the deposition they intended
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to be use at trial. Rulings may not be forthcoming, however, until the time of the pre-trial conference (which may be just a few days prior to trial, depending upon the judge).

7. Concluding Practice Pointers

Although courts have a preference for live testimony, there are a variety of ways attorneys may affirmatively use deposition testimony. Counsel must consider the various ways deposition testimony may later be used at trial when preparing to take or defend a deposition. In preparing for the deposition, consult Rule 32 and the relevant caselaw and answer these initial questions:

- Is the deponent more than 100 miles from the courthouse, or otherwise “unavailable”? If so, his/her deposition potentially may be used by either party as affirmative proof at trial.

- Is the deponent, even though not an officer, director or Rule 30(b)(6) designee, nevertheless a managing agent of a party? If so, that deposition may be able to be used for affirmative proof by adverse counsel.

- If the deponent is your client, did the deponent come across poorly in the deposition? If the deponent is not a managing agent, officer, director or 30(b)(6) witness, consider bringing him/her to trial to testify live to decrease the likelihood that your opponent may affirmatively use their deposition testimony.

- Videotape deposition testimony if possible; later, if you want (and can) use the testimony at trial, it will be more effective and engaging than reading a cold transcript.

- If you have employees (or former employees) who are not officers, directors, corporate designees or managing agents, and who reside far from the courthouse, consider deposing them if you later think you might want their testimony but do not want to or cannot bring them to trial.