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A Primer on Using Third-Party Depositions To Prove Your Case at Trial

By Scott M. Himes
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Trial preparation in civil litigation invariably involves the parties deposing one another. But also evidence from a third party—some non-litigant who knows facts pertinent to the case—is important. The rules for deposing a third party, and how testimony from that party may be used at trial, differ significantly from a party's deposition testimony. Often, however, lawyers do not pay adequate attention to those rules. The consequences can be that valuable third-party deposition testimony will not be admitted at trial, or that harmful testimony may be available to your trial adversary.

Deposing a third party—typically a "percipient witness" who testifies based on what she personally observed, heard, experienced, or participated in—is governed by both rules of civil procedure and rules of evidence.

To have trial ammunition, or to avoid "incoming" from the other side, the lawyer dealing with pretrial testimony of a third party must know these rules and must plan strategically based on them. Whether to depose a third party, how otherwise to preserve a third party's knowledge, and how to question a third party at a deposition are decisions that should be driven by trial

considerations. When confronting a third-party deposition, your mantra should be—*"think trial."*

Core Principles

The basic, time-tested rules are instructive. A *party's* statements, whether given at deposition or otherwise simply made out of court, are admissions, generally received in evidence per se. As the New York Court of Appeals said long ago: "In a civil action the admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever, or to whomsoever made." *Reed v. McCord*, 160 N.Y. 330, 341 (1899). That is because "it is highly improbable that a party will admit or state anything against himself or against his own interest unless it is true." *Id*.

Moreover, the adversarial process of litigation makes a litigant's statements fair game. Their evidentiary significance "derive[s] vestigially from an older, rough and ready view of the adversary process which leaves each party to bear the consequences of its own acts, no matter how unreliable these acts may be as proof." *United States v. McKeon*, 738 F.2d 26, 32 (2d Cir. 1984).

Another rationale for admissibility of a party's statement is that an out-of-court statement may be excluded as hearsay because the declarant is unavailable for cross examination. However, a party-declarant can take the stand, and will thereby be subject to cross examination about his out-of-court statement. Thus, no lack-of-cross examination concern exists.

Relatedly, when a party takes the stand, the adversary can cross-examine with leading questions. "*Isn't it fact, ma'am*,...." is the norm for cross examination. Suggestive questions can be posed to an adversary because she is assumed to be hostile and likely to resist the suggestions of a cross-examiner.

Conversely, a witness who is not a party is generally deemed not hostile toward the party who called her; therefore, suggestive questions—ones that might obscure what the witness actually knows or observed—are prohibited on direct examination.

These evidentiary principles pertaining to a party's evidence contrast with the situation of a non-party's knowledge and testimony. Hence, different rules apply for admitting into evidence a non-party's deposition testimony.

Availability for Trial?

A threshold question for deposing a non-party is whether the witness will be "available" to testify at the trial. That question will govern whether pretrial deposition will be admissible at trial.

When it comes to the deposition testimony of an adversary party, both the Federal Rules of Civil Procedure and New York's CPLR generally permit one party to offer in evidence at trial the opposing party's deposition testimony (or that of its agents) "for any purpose." Fed. R. Civ. Pro. 32(a)(3); CPLR 3117(a)(2).

For example, subject to other evidentiary rules, a tenant suing her landlord for injuries suffered when scaffolding around the landlord's building came loose and fell on her can offer any testimony the landlord gave at deposition to prove her case. If the landlord testified that *"yep, I noticed that the scaffolding around my building was falling down but I didn't get around to fixing it,"* the plaintiff-tenant can offer that testimony at trial as (a powerful) admission of liability.

But a bystander's observation of scaffolding falling from the building—*"I walked by the day the tenant says she was injured and saw scaffolding falling from the building"*—is different. The bystander's testimony carries less evidentiary significance than a party's testimony. As a person who happens to possess relevant knowledge but has no "skin in the game," the bystander's testimony does not qualify as an "admission." Instead, whether it can be received into evidence at trial is governed by other principles designed to assure reliability, test credibility, and elicit the true facts at trial.

A third-party's deposition testimony is an out-of-court statement when proffered at trial, and so the threshold question for admissibility is whether the witness is unavailable to testify "live" at trial. Rule 32 of the Federal Rules of Civil Procedure provides that a witness is "unavailable" if, most commonly, the witness (i) is situated more than 100 miles from the courthouse; or (ii) is outside the U.S.; or (iii) is not subject to Rule 45 subpoena power (which in turn is territorially limited

to a 100-mile radius or generally the state where the witness "resides, is employed, or regularly transacts business in person"). A witness is also deemed unavailable if unable to testify "because of age, illness, infirmity, or imprisonment" or, of course, if deceased. *Id*., Rules 32(a)(4) and 45(c)(1). Rule 3117 of the CPLR, governing "Use of depositions," is similar.

So, unless the third-party witness you depose is or becomes unavailable due to these (or possibly other) reasons, the witness's deposition testimony will not be admissible to prove your case. Imagine, for example, that the bystander who observed the falling scaffolding lived in the plaintiff's building, had a long-time job with a New York company, was in her early-30's and in good health. That person is likely to be around at the time of trial. You can subpoena her to testify, live, at the trial (or she might appear voluntarily without a subpoena).

If you had deposed her, her knowledge and testimony will be "locked down" in advance. You will know what her trial testimony should be. While her deposition testimony cannot be proffered as affirmative evidence (and you expect to have her testify in-person anyway), still the defendant-landlord might be able to use her deposition on cross examination to impeach or contradict her trial testimony (as could the plaintiff if the witness deviates from her deposition testimony). *See* Fed. R. Civ. Pro. Rule 32(a)(2); CPLR 3117(a)(1).

The situation differs if the witness is unavailable for trial. Say the bystander was a student from Italy, studying in the U.S. for a semester abroad that will end soon, and so will return home long before the case will come up for trial. In all likelihood, she will not be "available" for trial, being beyond federal or state court subpoena power (and unlikely to return voluntarily for the trial). In that circumstance, her testimony given at deposition may be proffered as trial evidence. Thus, the third-party's availability or unavailability is a key issue for deciding whether to depose that witness.

The Need To Preserve Testimony for Trial... Or Not?

Because admissibility may turn on trial availability, the strategic question exists whether you *should* depose a third-party witness. By subpoenaing the third party for a deposition, the other side will be able to learn the witness's knowledge and can also question the witness to challenge her testimony. Remember, no rule says a litigant *must depose* a knowledgeable third-party witness. Your objectives are how best to assure that you can present the favorable witness's testimony *at trial*, while not unnecessarily or prematurely memorializing detrimental testimony that could come back to hurt your client.

When you believe that a third party might have relevant knowledge (whether good or bad for your client's case), the first question should be whether to interview the person. Find out—informally—what the witness knows, or doesn't know. That question informs whether the witness might be sympathetic, hostile, or neutral to your client's claim. Returning to our scaffold-injury case—if the witness is another tenant in the building, or a bystander waiting at a nearby bus stop, you might deduce the witness's attitude will be favorable or at least neutral.

It often is best practices to contact the witness by telephone to get a preliminary feel, then follow up with an in-person interview to gather the facts from the witness's perspective. (Of course, if you know that the witness is represented by a lawyer, or the hypothetical building-manager witness is an employee or legal agent of the defendant-landlord, you must contact the lawyer, not the witness directly.) But the most prudent first step in non-party fact gathering is simply to find out what a

percipient witness knows, observed, participated in, and the like as relevant to your client's case.

Once you interview the witness, what's next? Do you plan to depose her? Maybe...or maybe not. Suppose our notional third party who observed the defendant's scaffolding land on your client's head presents well, is a diehard New Yorker who you're sure isn't moving to Florida any time soon, and—expressing hostility to the property owner who didn't keep his property safe—says she'll "be there" for your client at trial. You might well decide not to give your adversary a shot at challenging her testimony in a deposition.

You also might decide, equally soundly, that you want your adversary to learn the witness's evidence sooner rather than later, hoping that doing so might lead to an early and favorable settlement (and believing that your opponent will not be able to shake off the impact of her testimony). You can also ask the witness in the interview about documents that are important to your case. (Maybe the witness took a photo of the scaffolding on her phone when she saw the heavy board land on your client...a great piece of evidence.) Have the witness authenticate the document—"*I took that picture on my phone right when the piece fell down*"—and get her to explain what happened using the document, as if she were on the stand at trial.

Often a sound next step is preserve the witness's recollection and understandings in an affidavit. After interviewing the witness, prepare a draft affidavit, adhering very carefully to the witness's interview statements. Send it to the witness to review. Not *"here's what you told me, now sign and swear to it."* Rather, *"here's an affidavit I wrote up from the interview. Please review it carefully, make sure its 100% correct, or otherwise let me know how it should be corrected. Of course, I'll correct it. Once you're satisfied the affidavit is 100% correct, please sign it before a notary, which will mean you're swearing under oath to the accuracy as your statements."* Or words to that effect, evidencing that you only want the witness's fully truthful testimony, as if she were on the stand at trial. Where the affidavit talks about documents you showed the witness, you should attach them to the affidavit to amplify the affidavit statements.

Remember, the affidavit, any drafts, and your communications with the witness about it, will generally be discoverable as a "witness statement."

Further, your notes of the interview might also be discoverable. Experienced lawyers often take no notes memorializing the witness's statements during the interview, make only cursory notations, use key words as memory joggers for what was said, or include work-product-like analysis as an integral part of the notes. These are appropriate techniques for limiting discoverable information developed from a witness interview.

Why go to the trouble of an affidavit, which typically will involve back-and-forth with the witness and, thus, your time and more cost to your client (as well as possibly creating discover fodder)? The main reason is to lock down testimony.

The affidavit, being hearsay elicited without your adversary's involvement, will not be admissible at trial. But witnesses generally adhere to their prior stated recollections, particularly those under oath. And, akin to use of a deposition, should your witness (unfortunately) change her story at trial, and suddenly not support your case, you can impeach her with her own prior contradictory affidavit statements to try to mitigate the harm.

Of course, no witness must voluntarily meet with you, or give you any information. If a witness won't meet, another strategic decision exists. Should you subpoena the person for a deposition "sight unseen," that is, without knowing what the testimony will be? Again, this becomes a multi-factor, nuanced decision.

What strategic purpose is advanced by deposing the witness? That question involves numerous, and often opposing, considerations. Do you simply need to learn facts unknown to your client, the impact of the testimony be damned? Do you need to preserve the witness's evidence, a question that implicates whether the witness can be called at trial, and whether you (or your opponent) will want to call the witness?

In turn, pretrial preservation of testimony implicates whether the testimony will be "pro or con" for your case, which also involves your best prognostication of the witness's attitude. Will the other side look to get the witness's testimony, either by a deposition or eventually at trial? Is it important to get ammunition to impeach the witness at trial because you anticipate her testimony will be harmful? Or, on the flip side, would you prefer that your adversary not learn what the witness will say?

The decision for deposing a nonparty presents a Rubik's cube of factors that need to be considered holistically to best prepare for trial.

Question at the Deposition for Admissibility at Trial

One common mistake in examining a third-party witness at deposition is asking objectionable questions, thereby eliciting testimony that will be inadmissible at trial. That is, often the examining lawyer questions as if the witness is an adversary party. Doing so can mean that the testimony be useless at trial.

You need to question the third-party deponent as you were eliciting testimony *at trial*. Adhere to the evidentiary principle: you cannot cross examine a non-hostile third-party witness, and must ask non-leading questions in the deposition. So, asking the bystander at a deposition in our scaffolding-injury case *"isn't it a fact that you saw the scaffolding fall and land on my client?"* is problematic. Here is where the often heard "objection to the form of the question" has real teeth. A leading question posed at the deposition, if not corrected then-and-there based on the objection, may be held inadmissible when you offer the deposition Q & A at trial. The question should be "*what did you see*," or "*what happened*," to avoid improperly suggesting answers as if on cross. If the witness is, or turns, hostile, you can then cross examine. But if the third party is a neutral, testimony resulting from leading questions will be ruled inadmissible when the witness is unavailable for trial and you need to proffer the deposition transcript excerpts.

In short, when you plan for deposing a third-party witness, think about the rules of evidence... and think of the deposition *as trial testimony*.

Conclusion

Deposing a nonparty, or not, is one of the most important decisions you make for trying your client's case. Make an informed, strategic decision based on the various, and often clashing concerns. But doing so *before trial* is the stuff of prevailing *at trial*.

Scott M. Himes *is a partner with Kishner Miller Himes P.C. He focuses his practice on complex commercial litigation.*

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