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CIVIL PROCEDURE

Expert Witness Availability: Stop Second Bites at the Apple

By Eric S. Poe

In the real world there are few opportunities to truly redo something. In baseball, batters can't get a fourth strike just because they missed the last pitch and struck out. So why in New Jersey civil courtrooms, when stakes are so high, should attorneys who have declared their expert witnesses "unavailable" to testify live at trial, with no affidavit explaining why they cannot appear required, be allowed to suddenly change their mind and produce the expert witness in the courtroom, with no questions asked? Not only does this practice allow for gamesmanship, the issue becomes of even greater concern when, without anyone asking questions, the witness is suddenly capable of testifying "live" in front of the jury. This is especially true in the area of medical malpractice. So, if no one else raises the question, let me. It seems the answer is simple: A change in the rules for video de bene esse testimony and it's needed today more than ever before.

Before delving into the legalese of this fancy Latin term, let's walk through how this rule may play out in the real world. After a lawsuit is filed, preparations are underway for trial. Most importantly a phase of discovery is shared and depositions are taken. Legal theories and strategy are planned by attorneys for both parties. For example, at some point in a medical malpractice case, an attorney will produce an expert witness who opines under oath as to the medical errors in the case. During this sworn deposition, questions may be asked about the expert's written opinion and basis of the conclusion rendered. There are times when an attorney will simply state an expert is "unavailable" to testify "live" at trial, without any explanation. That's

Eric S. Poe, Esq., CPA

when the court allows this expert witness to provide a de bene esse deposition on video for both their direct and cross examination testimony. This procedure is governed by Rules 4:14-9(e) and 4:16-1(c), and this sworn evidence is taken outside of the courtroom and done before the trial even starts.

Like in the courtroom, during the de bene esse deposition the attorney questions their own witness while opposing counsel can (and should) object during the testimony, otherwise the objections are waived. Then it's time for cross-examination when the other attorney will unveil his or her strategy by "poking holes" in the direct questioning with the intention to discredit the witness

Eric S. Poe, attorney and CPA, is principal and serves as chief operating officer and complex claims litigation officer for Citizens United Reciprocal Exchange (CURE) auto insurance and New Jersey Physicians United Reciprocal Exchange (NJ PURE), a leading medical malpractice insurance carrier in New Jersey.

by showing a jury unreliable facts used to support the expert opinion. But the answers and revelations are only part of the story. What is also caught on this video is the irreplaceable first reaction when an attorney is successful in catching the witness in a falsehood, exaggeration, or omission of one or more key facts. With this "gotcha" moment caught on tape, what is the calling attorney to do? Sadly under the loopholes in the rules, the attorney simply advises the court—yes, after the video has been completed—that this expert witness is now suddenly able to appear in court for "live" testimony. As result of this simple declaration, the video, including the irreplicable bombshell moment, will never see the light of day. The only time this recording is played for the jury would be if there is a contradictory statement during the witness' new "live" testimony.

This time, before the live jury, all of the "gotcha" moments will be mitigated. The calling attorney can better prepare the reactions of the now-calm expert witness by coaching the witness ahead of time, using the previously unveiled legal theories. Ultimately this gives the unavailable-turned-available expert witness a do-over. The witness can appear and testify live at trial, after already fielding the tough questions and surprises in the out-of-court, pre-trial video de bene esse deposition. This is great for the calling attorney but undoubtedly puts opposing counsel at a clear disadvantage. Such a practice calls into question the integrity of the jury's verdict.

Where We Came From to Today

Now for a refresher. The use of video depositions is not new in New Jersey and dates back 40 years when the Supreme Court, in 1980, codified by rule the guidelines and usage of such procedures. Rule 4:14-9(e) was the result of that codification, and in conjunction with Rule 4:16-1(c) provides the structure and basis for the use of de bene esse depositions. Pressler & Verniero, N.J. Court Rules Annotated, History & Analysis of Rule Amendments to R. 4:14-9 (2021).

In the decade following the enactment of Rule 4:19-9(e), questions arose as to whether an expert witness could provide live testimony after the taking of a de bene esse deposition. The Supreme Court recognized the need to address the situation and amended the rule to state: "The taking of an audiovisually recorded deposition of a treating physician or expert witness shall not preclude the party taking the deposition from producing the witness at trial." While this amendment reflects the preference for live testimony over low-quality videotaped de bene esse deposition

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If a witness is unavailable, and a de bene esse deposition is completed, that witness should not be permitted to testify live at trial if they become 're-available.'

testimony that would be played for a jury, such as they were in 1990, this shift did not provide guidance on the question raised here.

The result is what remains in the New Jersey Rules of Court today. Expert witnesses who are declared to be unavailable at the time of trial can provide trial testimony through a de bene esse deposition, taken pursuant to Rule 4:16-1(c).

Where We Go From Here

Don't get me wrong—the premise and intended use of de bene esse depositions make it a useful tool. I appreciate the opinion of legal scholars who have recognized that, at the time the rule was drafted and enacted, the cost of having experts testify,

combined with a reluctance of witnesses to appear to testify in court, even after opining on the case, were real and valid concerns. Combine those issues with the quality (or lack thereof) of video recordings at the time the rule was enacted and amended, it is clear why the Supreme Court preferred live testimony. Not to mention the incessant delays that arise when those who are willing to appear at trial are truly unavailable when trial dates are rescheduled over and over again. Based on all of this, the intent of the rule is valid. However, fast-forward 40 years, and its application today has shifted to one of gamesmanship and abuse for strategic purposes.

Think back to the 1980s and 1990s—a time before smartphones, a time when virtual video meetings were not even the figment of one's imagination, and when the A/V technology was nothing like what we have today. It was a time of VHS tapes, bad audio, shaky camera work and small screens. These antiquated tools have been replaced by a digital era where most people have the ability to easily record and play video in high-definition on screens of unlimited proportions.

As is often the case, laws and rules do not catch up with the real world as quickly as they should. Our modern-day technology and digital era require an updated analysis. Otherwise, the equitable balance between the preference for live testimony and issues that occur when a witness' video de bene esse deposition is taken ahead of trial will continue. Now add in the COVID-19 pandemic and a "year like no other," when we were forced to use such technology for any and all instances, I might even say such a review is not simply due but "overdue" at this point.

A Simple Fix

Taking into account all of the issues with the current rule weighed against the now-antiquated preference for live testimony, leaves little to no choice but to amend the rule to preclude such a "redo." Simply stated: If a witness is unavailable, and a de bene esse deposition is completed, that witness cannot become "re-available" to testify live at trial.

Over the years, I'm often heard responding to statements like, "Well, the current law is …" with "Well, I guess we need to find a way to change the law." This is one of those instances—where a seemingly good set of rules may have run its course—when the original intent is being challenged because it has become abused to the benefit of one side. Such prejudicial imbalance is simply unjust, and amending the rules is needed to properly "rebalance" the intent with the practical impact of a witness who is truly unavailable to testify at trial.

While rule changes are often arduous and may take years in the making, in my eyes, this one is rather straightforward and why I have respectfully proposed the following be added to Rule 4:16-1(c): "No witness who has been deemed unavailable for the purpose of this Rule may subsequently testify in person in the same proceeding, unless such witness is called for the purposes of rebuttal."

The addition of this one sentence combined with a few basic word shifts in Rule 4:14-9(e) would level the playing field for all witnesses and parties, thus returning the use of this rule to the original intent.

Live testimony will never go away, nor should it—but it should be "real time" with all first reactions and "gotcha" moments, and not a manufactured second bite of the apple for the trier of fact, which diminishes the integrity of the entire proceeding. ■