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Using Prior Expert Testimony Requires Extra Effort

BY DANIEL BROWN
AND LEO CASERIA

IT IS NOT UNCOMMON for a litigant to rely on the testimony of an expert hired by another litigant in the same or different proceeding. For example, one or more defendants in an antitrust conspiracy case might forego hiring their own expert(s) and instead rely upon a larger defendant who agreed to foot the bill for a high-priced expert to prepare a report.

Even absent such an agreement, a defendant with fewer resources might decide to piggyback off of a codefendant's efforts and resources. Codefendant's counsel will then take the lead on working with the experts on their reports and defending them during the depositions, wherein the experts might give some helpful testimony for the defense. If that codefendant settles with plaintiff before trial, and the expert is beyond the court's subpoena power, will a court permit another party to use that expert's deposition testimony at trial in lieu of live testimony?

Similarly, consider the situation of a plaintiff in a product liability case where numerous cases have been filed against the same defendant by different plaintiffs, all alleging a similar injury caused by the same alleged product defect. Experts have already provided testimony regarding the alleged defect and/or causation in some of those other cases. If one of those experts is beyond the court's subpoena power, will a court permit use of that expert's deposition testimony at trial in lieu of live testimony?

Finally, a case brought under federal law in federal court often leads to a similar case brought in state court pursuant to state law. To what extent can the parties in the state court proceedings rely on expert testimony presented in the federal court proceedings, and vice versa?

Most litigators are familiar with Federal Rule of Evidence (FRE) 804(b)(1), which sets forth the requirements that must be met before prior testimony may be used at trial in place of live testimony. Similarly, Federal Rule of Civil Procedure (FRCP) 32 sets forth an alternative avenue for the admissibility of deposition testimony at trial. This article will discuss the additional requirements that some federal courts impose when determining whether to admit prior expert testimony at trial when that expert does not appear at trial.

DANIEL BROWN *is a partner in the New York office of Sheppard Mullin Richter & Hampton, and* LEO CASERIA *is an associate in the firm's Los Angeles office.*

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The Ground Rules

As a general matter, prior testimony, deposition or otherwise, is hearsay and, thus, is only admissible if the requirements of FRE 804(b)(1) have been met. FRE 804(b)(1) provides that prior testimony, including testimony of an "unavailable" declarant, is admissible at trial if the party against whom the testimony is offered "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." FRE 804(a) defines "unavailability." A witness who resides beyond the court's subpoena power is unavailable pursuant to FRE 804(a)(5).

Alternatively, prior deposition testimony is also admissible under FRCP 32(a)(4)(B). See *Ueland v. United States*, 291 F.3d 993, 996 (7th Cir. 2002) (Easterbrook, J.) ("Rule 32(a) [is] a free-standing exception to the hearsay rule… Evidence authorized by Rule 32(a) cannot be excluded as hearsay, unless it would be inadmissible even if delivered in court"). FRCP 32 allows parties to use prior deposition testimony at trial as long as the witness is "unavailable."

A witness is "unavailable" pursuant to FRCP 32(a)(4)(B) if "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' absence was procured by the party offering the deposition." The witness is also unavailable under FRCP 32(a)(4)(D) if "the party offering the deposition could not procure the witness' attendance by subpoena."

Consequently, it would appear that a party seeking to admit prior expert testimony in place of live testimony under FRE 804 must show that the expert is beyond the court's subpoena power and that the party against whom the testimony is offered had the opportunity and a similar motive to cross examine the expert at his or her deposition. Under the plain language of FRCP 32, prior expert deposition testimony appears to be admissible in place of live testimony upon a showing that the witness is more than 100 miles from the courthouse.

However, in 1972 the Second Circuit decided *Carter-Wallace Inc. v. Otte*, 474 F.2d 529 (2d Cir. 1972) (*Carter-Wallace*) and held that the use of prior expert testimony at trial in place of live testimony is subject to different requirements than the use of prior testimony by a fact witness. As a result, regardless of whether the parties invoke FRE 804 or FRCP 32, some federal courts also require the proponent of prior expert testimony to make reasonably diligent efforts to procure the expert, or a similar one, for attendance at trial before admitting expert deposition testimony in place of live testimony.

Go the Extra Mile

In *Carter-Wallace*, plaintiff argued that the district court unfairly allowed defendant to present evidence and trial testimony regarding the same patent issues from a prior patent infringement proceeding. Id. at 534-35. Defendant argued that the prior evidence and testimony was admissible because (1) the prior proceeding "involved substantially the same issue," (2) the plaintiff had a "fair opportunity and adequate motive" to cross-examine witnesses, and (3) the witnesses were unavailable because they resided beyond the reach of the court's subpoena power. Id. at 535.[1]

The Second Circuit observed that "there is something unusual about the use of the prior testimony of an expert witness that calls for further scrutiny of his unavailability." 474 F.2d at 536 (citations omitted). As a result, the Circuit imposed two additional requirements on

parties seeking to offer prior expert testimony at trial.

First, the proponent of the prior expert testimony must "attempt to secure the voluntary [trial] attendance of a witness who lives beyond the subpoena power of the court." Id. at 536. The reason for this additional requirement is that "unlike the typical witness whose involvement with the case may depend on the fortuity of his observing a particular event and whose presence at trial is often involuntary, a party ordinarily has the opportunity to choose the expert witness whose testimony he desires and invariably arranges for his presence privately, by mutual agreement, and for a fee." Id.

Second, "before former testimony of an expert witness can be used, there should be some showing, not only that the witness is unavailable, but that no other expert of similar qualifications is available or that the unavailable expert has unique testimony to contribute." Id. at 536-37. The reason for this additional requirement is that, unlike an ordinary fact witness, "the expert witness generally has no knowledge of the facts of the case… Thus, even if one particular expert is unavailable…there will usually be other experts available to give similar testimony orally." Id. at 536.

In sum, under *Carter-Wallace*, prior expert testimony is only admissible in the place of live expert testimony if the proponent of the testimony tries to secure the expert's voluntary attendance and demonstrates that no similar expert is available. These judicially-created requirements have been applied in addition to the requirements of FRE 804(b)(1) or FRCP 32.

A Federal Struggle

In the nearly 40 years since the *Carter-Wallace* decision, federal courts have struggled with the additional requirements the Second Circuit imposed on a party seeking to admit prior expert testimony in place of live testimony at trial. The federal courts are split on this issue. See *Aubrey Rogers Agency Inc. v. AIG Life Ins. Co.*, 2000 U.S. Dist. LEXIS 997, *15 (D. Del. 2000) (discussing split and collecting cases on both sides of the split).

The Second, Third and Sixth circuits impose extra requirements before prior expert testimony may be admitted. See *Carter-Wallace*, 474 F.2d at 536-37; *Kirk v. Raymark Industries Inc.*, 61 F. 3d 147, 165 (3d Cir. 1995); *Hanson v. Parkside Surgery Ctr.,* 872 F.2d 745, 750 (6th Cir. 1989).

The Fifth and Eleventh circuits do not apply additional requirements, instead relying solely on the plain language of FRCP 32. *Savoie v. LaFourche Boat Rentals Inc.*, 627 F. 2d 722, 724 (5th Cir. 1980); *Gill v. Westinghouse Elec. Corp.*, 714 F. 2d 1105, 1107 (11th Cir. 1983).

Finally, decisions in the Tenth Circuit reveal an intracircuit split. Compare *Angelo v. Armstrong World Indus. Inc.*, 11 F.3d 957, 962-64 (10th Cir. 1993) (applying additional requirements) and *Polys v. Trans-Colorado Airlines*, 941 F .2d 1404, 1410 (10th Cir. 1991) (applying additional requirements) with *Alfonso v. Lund*, 783 F.2d 958, 961 (10th Cir. 1986) (treating fact witnesses and expert witnesses alike under FRCP 32(a)).

Required Effort Remains Unclear

When a court applies the additional requirements of *Carter-Wallace*, the question arises as to how much of an effort a party should make to secure the attendance of the expert, or a similar one, at trial. *Carter-Wallace* is silent on this point, and only a handful of subsequent cases have discussed the specific efforts that the proponent of prior expert testimony should use to secure an expert witness' attendance at trial.

For instance, in *Kirk v. Raymark Indus.*, supra, the Third Circuit held that it was error for the district court to admit prior expert deposition testimony because a plaintiff failed to use "reasonable means" to secure the expert's attendance at trial:

> Kirk claims that Dr. Burgher, who is a resident of Nebraska, was beyond her ability to subpoena and was thus unavailable. See Fed.R.Civ.P. 45(c)(3)(A)(ii). However, Kirk made no independent attempt to contact Dr. Burgher, offer him his usual expert witness fee, and request his attendance at trial. Because Dr. Burgher was never even as much as contacted, Kirk has failed to prove that she used "reasonable means" to enlist his services.

61 F.3d at 165.

In *Thompson v. Merrell Dow Pharm.*, 229 N.J. Super. 230 (1988), the court relied on the rationale of *Carter-Wallace* and held that expert deposition transcripts were inadmissible because plaintiffs had not made diligent efforts to secure their experts' attendance at trial, and stated that "due diligence must be used to secure the attendance of the witness at trial." Id. at 252-53.

However, because the litigants in these cases failed to make any effort at all to arrange for live expert testimony at trial, the courts had no occasion to discuss whether any particular efforts were sufficient or not. It thus remains unclear, for example, how hard a party must try to obtain a different expert to offer a similar opinion before prior expert testimony is admissible. Can a party simply call a handful of experts and ask if they are willing to offer similar testimony, and admit prior expert testimony if they all say "no"? This would likely set the bar too low, as most experts are unlikely to agree to adopt another expert's opinions after only a short phone call.

On the other hand, does a party have to actually hire multiple experts to pore over the facts and data in the case, develop complicated models and formulas, and then see whether any of them come to a conclusion similar to a prior expert's testimony? This would seem to set the bar too high.

Applicability in New York State Courts

In footnote 8 of *Carter-Wallace*, the Second Circuit discussed several New York state court opinions, finding at least one that indicated "that before the prior testimony of an unavailable witness can be used there must be some showing of efforts to secure his voluntary attendance." 474 F.2d at 537 n.8 (discussing *Longacre v. Yonkers R.R.*, 191 App. Div. 770, 182 N.Y.S. 373 (2d Dept. 1920)). No reported New York state court case since *Carter-Wallace* has elaborated further or expressly adopted *Carter-Wallace*.

One reason why New York state courts may not have had much occasion to rule on the issue is because the procedural rules applicable in New York state court generally prohibit depositions of experts. See CPLR 3101(d)(1)(iii) ("Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate").

CPLR §4517 governs the admissibility of prior trial testimony, and CPLR §3117 governs the admissibility of prior deposition testimony; both are similarly worded. Notably, CPLR §3117(a)(3)(iv) explicitly provides that one circumstance when prior deposition testimony is admissible is when the proponent "has been unable to procure the attendance of the witness by diligent efforts."

It is ultimately not clear whether New York state courts would follow or reject *Carter-Wallace*. A plain reading of CPLR §3117(a)(3) seems to give the proponent of prior testimony the choice of not making diligent efforts, and instead arguing that a witness is beyond the court's subpoena power, regardless of whether that witness is a fact or an expert witness.

However, one could also argue that the *Carter-Wallace* requirements would apply in New York state courts to experts other than medical doctors, because only where the expert is a medical doctor does CPLR §3117(a)(4) excuse the proponent of prior expert testimony from making any showing other than that the party against whom the evidence is offered had the opportunity to attend the deposition. CPLR §4517(a)(3) contains a similar exception.

Conclusion

Whether a party will be able to submit prior testimony of an expert witness without fulfilling the additional requirements imposed by *Carter-Wallace* will in large part depend on the particular federal court in which the dispute arises. Case law indicates that, at the very least, the proponent of prior expert testimony should make an attempt to contact the expert, offer the expert his or her usual fee, request the expert's attendance at trial, and work around the expert's schedule and needs before trying to admit his or her prior testimony.

1. Although the court never expressly referred to FRE 804 in its opinion, these requirements match the required showing under that rule.

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