Where is My Witness? Out of State? Use of *De Bene Esse* Depositions in Family Law Matters

by Rita M. Aquilio

During a hearing or trial, it may become necessary for a family law practitioner to utilize the deposition testimony of a witness who is unavailable to appear at the proceeding occurring in a New Jersey courtroom. Simply put, the testimony of a lay witness or expert who is located outside of the state of New Jersey may be offered via the process known as *de bene esse*. While this scenario may create a challenge or add complexity to a matter, guidance into the process can be found in the New Jersey Court Rules.

De Bene Esse Depositions

Testimony *de bene esse* is defined by *Black's Law Dictionary* as "a deposition taken from a witness who will likely be unable to attend a scheduled trial or hearing." Further, *Black's* notes that "if the witness is not available to attend trial, the testimony is read at trial as if the witness were present in Court."[1]

New Jersey Court Rules outline the use of depositions and how a party may use the testimony of a witness who is unavailable to appear at the trial or hearing.

The Court Rule

Rule 4:16-1 addresses the use of depositions in a proceeding. It states:

> At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used in accordance with any of the following provisions:
>
> (a) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Rules of Evidence.
>
> (b) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing or authorized agent, or a person designated under R. 4:14-2(c) or R. 4:15-1 to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party, may be used by an adverse party for any purpose against the deponent or the corporation, partnership, association or agency.
>
> (c) Except as otherwise provided by R. 4:14-9(e), the deposition of a witness, whether or not a party, may be used by any party for any purpose, against other party who was present or represented at the taking of the deposition or who had reasonable notice thereof if the court finds that the appearance of the witness cannot be obtained because of death or other inability to attend or testify, such as age, illness, infirmity or imprisonment, or is out of state or because the party offering the deposition has been unable in the exercise of reasonable diligence to procure the witness's attendance by subpoena, provided, however, that the absence of the witness was not procured or caused by the offering party. The deposition of an absent but not unavailable witness may also be so used if, upon application and notice, the court finds that such exceptional circumstances exist as to make such use desirable in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court.
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> (d) If only part of a deposition is offered in evidence by a party, an adverse party may require the offering party to introduce any other part which ought in fairness be considered with the part introduced, and any party may offer any other parts.[2]

The Rules of Evidence

N.J.R.E. 804(a)(4) defines an unavailable witness as "one who is absent from the hearing…and the proponent of the statement is unable by process…to procure the declarant's attendance." As the comment outlines, this rule essentially follows the provisions of the Federal Rules of Evidence and, additionally incorporates some of the provisions of the former evidence rule, N.J. Evid. R.62(6), which set forth a definition of the term "unavailable as a witness" for the purpose of certain hearsay exceptions. Specifically, the rule defines a declarant unavailable as a witness if the declarant:

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the statement; or
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> (2) persists in refusing to testify concerning the subject matter of the statement despite an order of the court to do so; or
>
> (3) testifies to a lack of memory of the subject matter of the statement; or
>
> (4) is absent from the hearing because of death, physical or mental illness or infirmity, or other cause, and the proponent of the statement is unable by process or other reasonable means to procure the declarant's attendance at trial, and, with respect to statements proffered under Rules 804(b)(4) and (7), the proponent is unable, without undue hardship or expense, to obtain declarant's deposition for use in lieu of testimony at trial.[3]

The Practical Application of the Rules and Relevant Case Law

A *de bene esse* deposition is vital if a witness is out of state, or for some legitimate reason (such as health or age) is unable to appear at the trial or hearing. The key to admissibility of the testimony is the unavailability of the witness. The use of the sworn testimony from a deponent who is "absent but not unavailable" under subsection (c) of Rule 4:16-1 may be used "upon application and notice." The standard the court applies upon such an application is whether exceptional circumstances exist, such that the deposition testimony is permitted "in the interest of justice." When the proffering party reads the testimony orally "in open court," and only part of the testimony is read, then the adverse party has the ability to require the offering party to introduce any other part, under subsection (d) of Rule 4:16-1, which ought to be considered. This allows the full picture and scope of the testimony to be considered by the court, rather than the narrow focus of only one party for its sole purpose and intent. Rule 4:16-1 "represents the 'modern and more liberal counterpart of the former practice of testimony *de bene esse*....'"[4]

Case law addresses the use of *de bene esse* depositions at trial. While this type of deposition is taken for potential use at trial, "it is not part of the trial itself, until so used."[5]

When objections to *de bene esse* testimony are made, the courts have held that a motion must be made for a ruling.[6] The objection does not then remain pending and "[c]ounsel should not expect a discovery objection…to remain viable at trial if there was a fair opportunity in the intervening time to move for a ruling on the objection, pursuant to R. 4:14-9(f)."[7] Following the filing of a motion for a ruling, the "judge considering such a motion is not limited to granting or denying the objection made at the deposition, but may fashion a fair remedy suggested by all of the circumstances…"[8]

In sum, the use of a *de bene esse* deposition pursuant to the Court Rules, may be a more cost-effective alternative for litigants, more convenient for a witness or expert and more efficient for the court in conducting a hearing or trial.

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Endnotes

1. *Black's Law Dictionary*, 412 (8th ed. 2004).
2. R. 4:16-1.
3. N.J.R.E. 804(a)(4).
4. *Avis Rent-a-Car, Inc. v. Cooper*, 273 N.J. Super. 198, 202 (App. Div. 1994) (*quoting Ross v. Lewin*, 83 N.J. Super. 420, 423-24 (App. Div. 1964)).
5. *See Genovese v. New Jersey Transit Rail Operations*, 234 N.J. Super. 375, 382 (App. Div.), *cert. denied*, 118 N.J. 195 (1989).
6. *Mellwig v. Kebalo*, 264 N.J. Super. 168, 171 (App. Div. 1993).
7. *Id.* at 172.
8. *Id.*