Use of deposition testimony at trial

Depositions are primarily a discovery tool. When it comes to trial, live witness testimony is "more desirable," *Investors Title Ins. Co. v. Herzig*, 330 N.C. 681, 690 (1992), and Rule of Civil Procedure 43 states that, "[i]n all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules." In "sharply limited" circumstances, however, deposition testimony may be used at trial, *Warren v. City of Asheville*, 74 N.C. App. 402, 408 (1985), and Rule 32 of the North Carolina Rules of Civil Procedure sets out (most of) those circumstances.

Under Rule 32, deposition testimony may be used at trial if it meets three criteria:

- It is being used against a party who was present or represented at or had reasonable notice of the deposition;
- It falls within one of the categories in Rule 32(a)(1) through (a)(4); and
- It is admissible under the Rules of Evidence (applied as though the witness were present and testifying).

First requirement: The first requirement is that the testimony is being "used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof." Rule 32(a). The point is that the parties are entitled to have had an opportunity to cross-examine the deponent. *See Investors Title*, 330 N.C. at 692 (deposition from related foreclosure admissible because defendant participated).

Apparent exception for impeachment. As discussed in the next section, Rule 32 provides that "[a]ny deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness." The Court of Appeals has held that a deposition of that witness filed with the clerk of court in *another case* could be used for impeachment if it otherwise complied with the relevant Rules of Evidence. *Gillespie v. Draughn*, 54 N.C. App. 413, 415–16 (1981).

Later-added parties. Does inclusion of additional defendants after a deposition is taken preclude the use of the deposition at trial? Not necessarily. In *Craig v. Kessing*, 36 N.C. App. 389 (1978), the court allowed the use of a deposition taken before another defendant became a party, but noted that it would *only be admissible against the earlier defendant*, and that in such a circumstance, "limiting instructions would be necessary" to properly inform the jury. *Id.* at 400, *aff'd,* 297 N.C. 32 (1979). The Supreme Court recently cited *Kessing* and reiterated this "limiting instruction" procedure. *See Green v. Freeman*, 233 N.C. App. 109, 116 (2014).

Substitution of parties. When a party is substituted pursuant to Rule 25, the substitution does not prevent prior depositions from being used against the substitute at the trial. Rule 32(a).

Dismissed and refiled actions. When a case brought in state or federal court has been dismissed, and then another case is filed "involving the same subject matter…between the same parties…", the depositions from the prior action "may be used in the latter as if originally taken therefor." Rule 32(a).

Exception for summary judgment proceedings. Rule 32 applies "at the trial or upon the hearing of a motion or an interlocutory proceeding…." Rule 32(a). But the Court of Appeals has held that in summary judgment proceedings, competent and admissible deposition testimony used pursuant to Rule 56(e) may be used as evidence "even if the party against whom the deposition is used was not present or represented at the taking of the deposition." The adverse party may not have had an opportunity to cross-examine the deponent, but that party may still file opposing affidavits under Rule 56(e) or take additional depositions (see Rule 56(f)). *First Gaston Bank of N. Carolina v. City of Hickory*, 203 N.C. App. 195, 198–200 (2010).

Second requirement: Before a deposition may be admitted at trial, it must fall within one of the uses in Rule 32(a). There are four categories: (1) depositions of witnesses for impeachment; (2) depositions of witnesses as substantive evidence, (3) depositions of parties for any purpose; and (3) depositions of unavailable witnesses for any purpose.

Deposition of any witness for impeachment. **Rule 32(a)(1).** Probably the most common use of depositions at trial is to impeach witnesses on the stand with their own prior testimony. Rule 32 authorizes this by stating: "Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness." Typically the deposition will have been taken in the underlying litigation. Our Court of Appeals has held, however, that a deposition filed with the clerk of court in another case could be used for impeachment if it complied with relevant Rules of Evidence. *Gillespie*, 54 N.C. App. 413, 415–16 (1981). (Note that the credibility of a witness may be attacked by any party, including the one who called the witness. *See* N.C. Rule of Evid. 607.)

Deposition of a witness as substantive evidence. **Rule 32(a)(2).** Depositions of witnesses (non-party) called to testify at trial may be used as *substantive* evidence in two circumstances:

By adverse party. The deposition of a witness who is called to testify at trial may be used as substantive evidence by a party adverse to the party who called the witness; and

By party who called witness. If a witness testifies on the stand in a way that is inconsistent with his or her deposition testimony, the party who called the witness to the stand may use that witness's deposition as substantive evidence of those facts.

*Deposition of a **party** "for any purpose".* **Rule 32(a)(3).** Rule 32 allows liberal use of depositions of parties *by their opponents* by stating that "[t]he deposition of a party…may be used by an adverse party for any purpose, whether or not the deponent testifies at the trial or hearing." Rule 32(a)(3).

It is clear that "any part of a party's deposition or all of a party's deposition" may be used against the party without the same limitations applicable to depositions of non-parties. *Floyd v. McGill*, 156 N.C. App. 29, 39–40 (2003). The use of a party's deposition in no way depends on that party's unavailability to give live testimony. *Green*, 233 N.C. App. at 115–18; *Stilwell v. Walden*, 70 N.C. App. 543, 547–48 (1984). It is also important to note that use of a "party" deposition includes use of the deposition of "[a]ny one who at the time of taking the deposition" was a party's officer, director, or managing agent; or was the party's designee under Rule 30(b)(6) or 31(a) (to testify on behalf of a party who is public or private corporation, partnership or association or governmental agency). *See, e.g.*, *Elliott v. Food Lion, L.L.C.*, 167 N.C. App. 653 (2004) (unpublished) (quoting *In re Honda Am. Motor Co., Inc. Dealership Relations Litig.,* 168 F.R.D. 535, 540-41 (D.Md. 1996) (citations omitted) (analyzing whether a customer service manager was a "managing agent"). The witness must have fallen into one of the enumerated categories "at the time of taking the deposition." The Court of Appeals found error in the admission of deposition as substantive evidence where the witness was only an officer sometime before (and then again sometime after) his deposition. *Fortune v. First Union Nat. Bank*, 87 N.C. App. 1, 10–11 (1987), *rev'd on other grounds*, 323 N.C. 146 (1988).

Deposition of an unavailable witness used "for any purpose". **Rule 32(a)(4)**. A deposition of a witness may be used "by any party for any purpose" if the witness is unavailable pursuant to *any one* of the six categories below. Before admitting testimony pursuant to one of these bases, the trial court should make relevant findings on the record. *See Suarez v. Wotring*, 155 N.C. App. 20, 29–30 (2002). In addition to fitting into one of the categories, the deposition testimony must also comply with Rule of Evidence 804(b)(1), which states that the party against whom it is used "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 659 (1995); *see also Investors Title*, 330 N.C. at 692 (1992) (opposing party had been given requisite opportunity). The six categories of unavailability in Rule 32(a)(4) are:

1. *The witness is dead*;
2. *The witness is 100+ miles away from place of trial or out of U.S.;*
3. *The witness is unable to testify due to age, illness, infirmity, or imprisonment.* A doctor's note or report is likely to support a trial court's finding that a witness was ill; but counsel's oral statement that the witness's wife had called to report the witness ill was not sufficient proof, and the trial court properly excluded the deposition. *Vandervoort v. McKenzie*, 117 N.C. App. 152, 163–64 (1994).
4. *The offering party has been unable to procure attendance of witness by subpoena.* *See Wright v. American Gen. Life Ins. Co.*, 59 N.C. App. 591, 594 (1982) (party need not first subpoena a witness out of reach of court's subpoena power); *Econo-Travel Motor Hotel Corp. v. Foreman's, Inc.*, 44 N.C. App. 126, 131–32, (1979) (no "continuous search" required). Note that G.S. 8-83 remains in effect to the extent it does not conflict with Rule 32, and it provides that a deposition may be read at trial "if the witness is a resident

of…another state, and is not present at the trial." G.S. 8-83(2).

5. *Exceptional circumstances.* Where a witness deposition does not fit into one of the other categories, the court may still allow it upon application and notice if "such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting testimony of witnesses orally in open court, to allow the deposition to be used." *See, e.g.*, *Manning v. Anagnost*, 225 N.C. App. 576, 579 (2013) (allowing use of deposition when trial was unexpectedly accelerated).
6. *The witness is an expert whose video deposition was taken pursuant to Rule 30(b)(4).* This category makes a concession for the busy schedules (and expensive testimony) of certain types of experts, particularly physicians.

Third requirement: Deposition testimony that meets the other requirements of the rule is allowed "so far as admissible under the rules of evidence." Rule 32(a); *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 659 (1995). The rules of evidence are to be "applied as though the witness were then present and testifying;" thus the court need not entertain hearsay arguments based on absence of deponent from court. *See* Rule 32, Comment. Objections to evidentiary admissibility of deposition testimony are preserved for trial. Rule 32(b); (d)(3)a.; *see, e.g.*, *Estate of Redden ex rel. Morley v. Redden*, 179 N.C. App. 113, 118–19, (2006) (testimony properly excluded under Dead Man's Rule).

The Completeness Rule: Other Relevant Portions. **Rule 32(a)(5).** When a party offers only a portion of a deposition, the adverse party may require that party to "introduce any other part which is relevant to the part introduced." Rule 32(a)(5); s*ee Lenins v. K-Mart Corp.*, 98 N.C. App. 590, 598 (1990); *Property Shop, Inc. v. Mountain City Inv. Co.*, 56 N.C. App. 644, 647–48 (1982); *Holbrooks v. Duke Univ., Inc.*, 63 N.C. App. 504, 506 (1983). This rule is a matter of basic fairness, and it ensures that the jury hears the evidence in its broader context. The intent of the rule is that the testimony offered and the additional relevant testimony will be introduced together—and in logical order—by the offering party. But in one case the court found no basis for relief where the judge had instead required the objecting party to introduce the rest of the statement on redirect. Because the party was able to examine the witness as to the complete statement, there was no prejudice. *Gray v. Allen*, 197 N.C. App. 349, 357–58 (2009).

A party aggrieved by a trial judge's erroneous admission or exclusion of deposition testimony is entitled to relief if that party also shows material prejudice or denial of a substantial right. *See, e.g.*, *Green*, 233 N.C. App. at 118 (no new trial where excluded testimony would have no material impact); *Suarez*, 155 N.C. App. at 29–30 (excluded testimony merely corroborative of other testimony); *Robertson*, 116 N.C. App. at 328 (exclusion prejudiced plaintiff because it materially differed from deponent's other testimony); *Warren*, 74 N.C. App. at 408–10 (exclusion not prejudicial where same evidence elicited from other witnesses).