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IN PRACTICE

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Stop the Games: Using Deposition Testimony for an Out-of-State Witness

The case for clarifying N.J. Rule 4:16-1(c)

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Early in discovery, you recognize that an out-of-state nonparty witness has information you need for trial, including testimony that supports your case and/or provides a basis for admitting a crucial document into evidence. You smartly obtain a commission (or, if the witness is in New York, serve a subpoena as permitted by CPLR 3119), properly notice a videographer under R. 4:14-9, and take your deposition. At the deposition, the witness clearly states that he/she is not a New Jersey resident. At trial, you should be able to show key portions of the deposition, correct? Not so fast. Some adversaries will try to exploit the unclear language of R. 4:16-1(c) to claim that you have failed to show that the witness is "unavailable," either because you have not begged the nonparty to appear at trial, or because your adversary makes a vague statement that he can convince the nonparty to "voluntarily" appear at trial, although not necessarily on the day you want to have that testimony put before the judge or jury.

Such gamesmanship should be rejected. Rule 4:16-1(c) "generally follows Fed. R. Civ. P. 32." Pressler & Verniero, *Current N.J. Court Rules*, Comment R. 4:16-1 (GANN). Rule 32(a)(4)(D) clearly provides that the "party may use for any purpose the deposition of a witness, whether or not a party, if the Court finds that the party offering the deposition could not procure the witness's attendance by subpoena."

The problem, however, is that New Jersey does not follow the language of the federal rule. Rather, New Jersey engages in linguistic somersaults that, while sounding like the federal rule, create ambiguity and confusion:

> [T]he deposition of a witness, whether or not a party, may be used by any party for purpose … if the court finds that the appearance of the witness cannot be obtained because [he] … *is out of this 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."

R. 4:16-1(c) (emphasis added).

This convoluted language leads to a problem in deciding when a witness is "out of this state" (i.e., even if the witness testified at his deposition that he resides elsewhere, will he voluntarily come into New Jersey at some point during the trial), or what "exercise of reasonable diligence" must be shown in trying to procure the witness's attendance by subpoena (i.e., must you call and beg the nonparty to accept service of subpoena beyond New Jersey's jurisdiction). Read properly, the issue should be whether the party offering the deposition testimony "controls" the witness; if there is no control, the mere fact that the witness is outside of New Jersey should permit the use of the deposition testimony without any further showing of "unavailability."

For example, in *Witter by Witter v. Leo*, 269 N.J. Super. 380 (App. Div.), certif. den., 135 N.J. 469 (1994), the court rejected the use of a Connecticut witness' deposition at trial because the witness was controlled by the defendant and could have been made to appear at trial (indeed, defense counsel admitted that he elected for strategic reasons not to cause the witness to appear at trial). The court properly rejected the defen-

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dant's contention that because she did not "procure or cause" the witness' absence from New Jersey—since he resided in Connecticut—R. 4:16-1(c) allowed for the "read in" of the deposition testimony, because in that case the defendant controlled this particular witness. The Appellate Division declared:

> Mindful of the Rule's clear preference for live testimony at trial, we see no difference between deliberately suppressing a declarant's testimony by asking the declarant to leave this state or by declining to ask the declarant to come into this state. If a party controls whether the declarant will be in this state to testify and elects not to call him as a witness, that party has at least "caused" if not "procured" the declarant's absence under the Rule.

The Appellate Division concluded that the result is the same under N.J.R.E. 804(a)(4), which defines a witness as "unavailable" if a party "is unable by process or other reasonable means to procure the declarant's attendance at trial."

Witter by Witter v. Leo is a case that should be limited to its facts: the party offering the deposition testimony controlled whether the nonparty witness could appear in New Jersey for trial. Unfortunately, counsel have tried to extend this approach to where the nonparty is *not* controlled by the party offering his deposition testimony, either by seeking to require that party to "prove" that the nonparty will not voluntarily accept a trial subpoena, and/or by "offering" to make the nonparty witness available at an inconvenient time or with other limitations.

The better approach is that set forth in *Avis Rent-A-Car v. Cooper*, 273 N.J. Super. 198 (App. Div. 1994). There, the Appellate Division found that R. 4:16-1(c) "required" the admission of an out-of-state witness' deposition testimony not controlled by plaintiff, holding, "He was a lay witness who was outside of New Jersey, and his absence was not procured or caused by Avis." The court did not require any showing by the plaintiff that he begged the nonparty witness to come to trial; rather, the simple fact that the nonparty witness was outside of New Jersey was sufficient. The court also correctly rejected the use of deposition testimony from a witness who has served as the plaintiff's corporate representative and was within the control of the plaintiff.

These cases should provide a clear distinction. Where a party offering deposition testimony does not control the witness, all the party must show is that the witness resides outside of New Jersey. However, where the party "controls" the witness, use of deposition testimony at trial is improper unless it is shown that the witness is actually unavailable (e.g., witness refuses to show up at trial, has taken ill, etc.).

Despite this clear distinction, counsel continue to try to impose unnecessary requirements that encourage gamesmanship. For example, in *Mandal v. Port Authority of New York and New Jersey*, 2013 N.J. Super. Unpub. LEXIS 759 (App. Div. 2013), a defendant objected to the use of deposition testimony of a Texas resident because "plaintiff did nothing to determine whether [the nonparty witness] would or could return to New Jersey." The Appellate Division correctly rejected this argument, holding that the witness's "location outside of New Jersey was sufficient to trigger plaintiff's right to use his deposition so long as plaintiff had not procured his absence" and that the plaintiff "was not required to show that [the nonparty witness] was unable or unwilling to return to New Jersey to testify at trial." (Note that the published version of this decision was limited to certain issues and did not include the section on admissibility of deposition testimony at trial. *See* 430 N.J. Super. 287 (App. Div. 2013).)

Our courts have occasionally failed to recognize this distinction. In *Reliastar Life Ins. Co. v. Smith*, 2011 N.J. Super. Unpub. LEXIS 470 (App. Div. 2011), the Appellate Division refused to overturn a trial court's failure to admit deposition testimony of a witness who was in France at the time of trial. The Appellate Division, while finding that witness "was not in Reliastar's control," mistakenly required Reliastar to show that it "took the appropriate steps to facilitate his coming back to New Jersey from France."

In sum, too much time and effort is spent on whether deposition testimony of an out-of-state nonparty witness is admissible. The goal here is the "search for truth," and barring such testimony both hurts that search and undermines the ability of a party to present its case in an appropriate manner.

Let me suggest a simplification of R. 4:16 as it applies to this situation: Properly noticed deposition testimony of a witness residing beyond the subpoena power of the trial court is admissible at trial if the party offering such testimony does not "control" the witness and/or has not procured or caused the absence of the witness from New Jersey. However, where the party offering such deposition testimony at trial "controls" the witness, that witness must testify live unless the party proves that the witness cannot come to New Jersey (for example, due to illness or death). This simplification will reduce unnecessary motion practice and avoid the harm to a party that, justifiably, takes an out-of-state deposition on the belief that testimony from that deposition will be admissible at trial. ■