

NORTH CAROLINA LAWYERS WEEKLY

CELEBRATING 25 YEARS OF LEGAL JOURNALISM

Attorneys say use of videotaped testimony on rise, raising issues

■ BY BILL CRESENZO
bcresenzo@nclawyersweekly.com

Rule 32 of North Carolina's Rules of Civil Procedure dictates when and how witnesses' testimony can be offered at trial by using recordings of depositions rather than having the witness appear in court in person, and as technology advances and video testimony becomes more common, knowing how to effectively handle such testimony is becoming an increasingly important part of trial advocacy.

"More and more defense attorneys are hiring doctors over the border in North Carolina," said attorney Mark Bringardner of the Joye Law Firm in Charleston, South Carolina, who recently made the four-hour trip to Wilmington for a deposition. "They are planning for it in advance, which is an interesting approach. It is putting a lot of strain on plaintiffs' lawyers, who have to travel to Charlotte or Wilmington for a defense expert witness deposition when there are hundreds, if not thousands of orthopedic surgeons who can do the same work in South Carolina and appear live."

And there's the rub, because under the rules in both North and South Carolina, "unavailable" can mean that a witness is more than 100 miles away or lives outside of the state. Lawyers may have little control over where key eyewitnesses in a case make their home, but Bringardner said that some attorneys are taking advantage of the law to circumvent live testimony for their chosen expert witnesses.

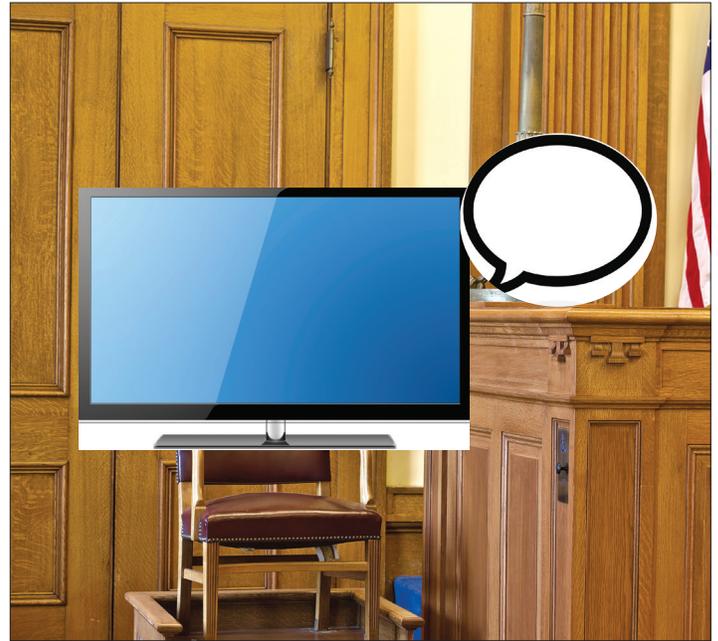
"He [the witness] is sitting in the comfort of his own office. He is not in the courtroom, and he doesn't have the judge and jury staring at him," Bringardner said, saying that it was important for juries to be able to observe a witness's demeanor and cadence and the way he or she deals with a question, rather than have to view testimony through the filter of a video that might have been taped months before hand.

Wade Byrd, an attorney in Fayetteville, said in his experience with expert video testimony, he couldn't think of an instance in which he thought it had created a problem, but posits that the "tight" insurance companies might want to save money by providing video testimony.

One advantage of videotaped testimony is that it gives attorneys concrete knowledge of what the jurors will hear, and it gives attorneys an opportunity to strategize and decide whether they want to put the cross-examination into evidence. Still, Byrd said that he would always want a live expert witness, whether he was working as a plaintiff's or defense attorney, because jurors are more attentive during live testimony, whereas video testimony tends to distract a jury.

"I've seen jurors use that time as nap time, especially in a case where multiple experts are testifying for both sides," he said. "Every case has its own dynamics that you can't always prepare for. There's almost always the hassle of editing out the objections and answers. I'm really impatient during trial, and I truly hate this aspect of pre-trial depositions. The court will have to take time out of the presence of the jury to rule on the objections. Also, the editing shows up in how the testimony flows, with hitches and burps and gaps when the jury sees it. In a bench trial, I wouldn't care, but juries are not judges."

Dan Hansen, an attorney with Shumaker, Loop & Kendrick in Charlotte, said that if deposition testimony is being taken for use at trial, attorneys need to be mindful about what sorts of objections will be preserved for trial if they're not raised during the deposition. Attorneys will often agree that any objections about the form of the question must be raised during deposition, but any other objection, such as whether a question or answer is relevant, can be lodged for the first time during trial.



If attorneys don't want these "usual" stipulations to apply, Hansen said, they need to address how objections will be handled before the deposition starts, because otherwise the court reporter will often assume that the usual stipulations are in place, and they become controlling for the deposition. If neither the attorneys nor the court reporter address objections at all, then Rule 32 controls.

The difference can matter a lot, for instance, if a plaintiff's lawyer is deposing an eyewitness to a crucial event and the lawyer fails to lay a proper foundation establishing how the witness was in a position to observe the event in question.

"If all objections are preserved except those that concern the form of the question, the question-asking lawyer needs to be extra careful during the deposition to lay all proper foundations and proceed as if the witness were in court testifying," Hansen said. "But if Rule 32 controls preservation of objections, the defending or non-question-asking lawyer needs to make more objections during the deposition to ensure that he or she has not failed to raise an objection concerning a competency, relevancy, or

materiality matter that could have been addressed during the deposition."

Bringardner is now litigating a motor vehicle personal injury case in South Carolina in which opposing counsel hired a Wilmington, North Carolina medical expert. Bringardner filed a motion for protective relief, saying that defense counsel did not give proper notice and if the expert does testify, he should testify in person so that plaintiff's counsel, the jury, and the court can fully evaluate his testimony and credibility based on his live appearance at trial.

"There is no affidavit from [the doctor] and no other competent evidence to show why he cannot appear live at trial," the motion says. "He knew of the venue and scheduling order when he agreed to be retained and the defense knew the same when they chose him. There is no apparent reason to suggest defendants would be unable to have [the doctor] attend the trial of this matter in person and testify live."

The judge denied the motion and left it up to the trial court judge whether to allow the testimony in the trial.

Follow Bill Cresenzo on Twitter
[@bcresenzonclw](https://twitter.com/bcresenzonclw)