UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ANTHONY J. SCIRICA
CIRCUIT JUDGE

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July 17, 2002

Honorable David F. Levi
United States Courthouse
501 I Street, 14th Floor
Sacramento, California 95814

Dear David:

I enclose a thoughtful memorandum prepared by Judge Joseph E. Irenas suggesting that the Federal Rules of Civil Procedure be amended to provide specifically for *de bene esse* depositions. I also enclose a law clerk memorandum that prompted Judge Irenas to begin thinking about this issue.

Judge Irenas is one of the "stars" in our circuit. It bears noting also that he came to the bench after a distinguished career as an active trial lawyer.

I would be grateful if your Committee would be kind enough to take this matter under consideration. Many thanks.

Sincerely,

Tony

Anthony J. Scirica

AJS:sss

Enclosures

cc: Professor Edward H. Cooper
John K. Rabiej

MEMORANDUM

TO: Hon. Anthony J. Scirica
United States Court of Appeals

FROM: Hon. Joseph E. Irenas
United States District Court

DATE: June 7, 2002

RE: *De Bene Esse* Depositions

I would like to suggest to the Committee which governs the Federal Rules of Civil Procedure that amendments should be made to recognize that *de bene esse* depositions taken for the express purpose of being introduced at trial in lieu of live testimony are different from discovery depositions and should be governed at least in part by separate rules.

Discovery depositions are generally taken early in the case. They are taken by the lawyer who is adverse to the party who is likely to offer the witness. As a practical matter, there is little or no examination of the witness by the party who intends to offer his or her testimony. Also, the questioning by the adverse party is designed not only to elicit information, but to develop testimony which will harm the party for whom the witness will be testifying.

De bene esse depositions, which occur frequently in my court, generally take place just a few days or a few weeks before

trial. They are invariably videotaped. In my experience in ten years on the bench, I do not recall a single discovery deposition which was videotaped. Moreover, the party who does the questioning in a *de bene esse* deposition, and in fact arranges for the deposition, is a party who intends to call the witness. Unlike a discovery deposition, there is full cross-examination by the adverse party, since the very reason for the deposition is to use it as a substitute for the live witness.

There are yet other differences. A party seeking to use a deposition as direct evidence to the extent permitted by Fed.R.Civ.P. 32(a) is only required to offer such parts of the deposition as he or she chooses, subject to the fairness rule in Fed.R.Civ.P. 32(a)(4). On the other hand, if a party is taking a *de bene esse* deposition for the express purpose of offering it in lieu of the witness, the party cannot pick and chose which parts he is going to offer. Once he does his direct and the adverse party cross-examines, both parties are stuck with the result just as they would be if the witness was offered live.

During a discovery deposition, parties are encouraged not to make objections to the witness' testimony, and objections as to "competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, . . ." Fed.R.Civ.P. 32(d)(3)(A). This rule would not apply in a *de bene esse* deposition where both sides are required to

object to the same extent as in a trial, since this witness is being offered as a trial witness. Before playing the videotape of a *de bene esse* witness, the court is required to rule on objections made during the course of the deposition just as the judge would rule at trial. The videographer edits the tape based on the judge's rulings before it is played to the jury. On appeal, the failure to object at a *de bene esse* deposition should be treated as a waiver subject to the plain error rule. By contrast, in determining the admissibility of a discovery deposition being offered under Fed.R.Civ.P. 32(a), the court could and should consider objections not raised when the deposition was taken. See Fed.R.Civ.P. 32(d)(3)(A).

An earlier version of the rule did distinguish between discovery depositions and *de bene esse* depositions, but that distinction was eliminated apparently on the theory that the current rules are adequate to cover both. I respectfully suggest that an analysis of the rules shows that they really apply only to discovery depositions. Fed.R.Civ.P. 43(a) provides that the testimony of witnesses shall be taken in open court unless an existing federal rule or statute provides otherwise. There is also provision in the rule for testimony from remote locations, but no provision for *de bene esse* depositions in lieu of testimony. Fed.R.Civ.P. 32(a) does allow use of discovery depositions in a variety of situations which generally reflect standard exceptions

to the hearsay rule found in the Federal Rules of Evidence. Deposition testimony can be used to impeach a witness, can be used as direct evidence by an adverse party, and can be used in the event of certain types of witness unavailability. Compare Fed.R.Civ.P. 32(a)(3) with Fed.R.Evid. 804(a); Fed.R.Civ.P. 32(a)(2) with Fed.R.Evid. 801(d)(2).

The basic principle here is that the federal deposition rules have their roots in the use of discovery depositions. The typical *de bene esse* witness is not a party, the deposition is not being used to impeach, and he or she is not unavailable as defined in Fed.R.Civ.P. 32(a)(3). In the usual case, the most that can be said is that it is inconvenient for the witness to be present.

The disclosure requirements of Fed.R.Civ.P. 26(a)(3)(B) are also geared to discovery depositions. First, the portions of the deposition used must be identified at least thirty (30) days before trial. Generally, *de bene esse* depositions are taken much closer to trial. This rule also anticipates that only parts of the deposition are going to be used, which is fine for discovery depositions, but not the operative rule for *de bene esse* depositions which must be offered in their entirety.

The failure to distinguish between *de bene esse* depositions and discovery depositions also can be confounding on the issue of costs to the prevailing party. These costs provided by Fed.R.Civ.P. 54(d)(1) are governed by 28 U.S.C. § 1920(2) which

provides that the Clerk may tax as costs "fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; . . ." This very general designation is generally thought to apply to discovery depositions, not to transcripts of the trial itself. New Jersey's Local Rule 54.1 generally provides that discovery depositions can be taxed if the transcripts are "used at trial," a somewhat ambiguous term. Local Rule 54.1(g)(7). Trial transcripts are generally taxable only if transcribed at the request of the judge or as needed on appeal. Local Rule 54.1(g)(6). *De bene esse* depositions to some extent should really be treated as trial transcripts rather than discovery materials used at trial in accordance with Fed.R.Civ.P. 32(a).

It should be noted here that *de bene esse* depositions specifically prepared to be used at trial in lieu of live testimony are more expensive than discovery depositions. One must have a videographer as well as a court reporter who must prepare a written transcript, if for no other reason than allowing the court to rule on objections made when the deposition is being taken. If the court orders certain testimony excised, the videographer can use the references in the written transcript to adjust the tape machine accordingly. Thus, we have a videographer and his equipment which must be used twice, once at the taking of the deposition and again at the playback. We still have a court reporter who often has to

prepare the transcript on a rush basis, thus increasing the cost, because these depositions are often taken only a few days before trial.

I suggest at the least there ought to be rule modifications specifically recognizing the difference between discovery depositions and *de bene esse* depositions. The use of *de bene esse* depositions should be freed from the constraints of Fed.R.Civ.P. 32(a), but subject to the specific condition that if offered it must be used in its entirety. I also believe that either Rule 54 or the statute, 28 U.S.C. § 1920, should be amended to elaborate on the same subject. The use of *de bene esse* depositions is a useful tool for moving along a trial calendar, since trying to accommodate a court's trial schedule to witnesses' availability often results in substantial delays, sometimes after a jury is already picked. My trial instructions encourage the use of *de bene esse* depositions and further indicate that the court will be uninclined to grant adjournments or trial delays based on a witness' alleged schedule unavailability.

Enclosed for your review is a brief memo from my law clerk discussing some of the cases involving *de bene esse* depositions. This memo was originally prepared in connection with a dispute over the taxation of costs. It was that dispute which led to my reconsidering the whole place of *de bene esse* depositions in the Rules of Civil Procedure. I appreciate your time and the

time of your Committee in considering this matter. If there is anything further I can do, please let me know.

Thanks for taking the time to hear me out.

JEI

:lok
Enclosure

MEMORANDUM

TO: Judge Irenas

FROM Ian

RE: *De Bene Esse* Depositions and Taxation of Costs Associated with Videotaped Depositions

DATE: June 6, 2002

I. *De Bene Esse Depositions Generally*

The *de bene esse* deposition appears to have its origins in admiralty law. *See* Charles Alan Wright, et al., *Fed. Prac. & Proc.: Civil 2d,* § 2105 ("It was a common practice in maritime litigation to take depositions immediately upon the filing the complaint to avoid the possibility of witnesses sailing away while plaintiff was obtaining leave of court."). Based on this tradition, prior to the unification of civil and admiralty procedure in 1966, Congress made explicit provision for the taking of *de bene esse* depositions in all civil cases "when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea." *See* note preceding 28 U.S.C. § 1781 (*quoting* Revised Stat. §§ 863-65); *see also, Dowling v. Isthmian S.S. Corp.*, 184 F.2d 758, 770 (3d Cir. 1950) ("Congress extended the ancient practice of depositions de bene esse under the familiar conditions to all courts of the United States."). For a while after the unification of the rules of admiralty and civil jurisdiction, Rule 26(a) of the Federal Rules of Civil Procedure provided that depositions could be taken

"for the purpose of discovery or for use as evidence in the action or for both purposes." *See United States v. IBM Corp.*, 90 F.R.D. 377, 381 n. 7 (S.D.N.Y. 1981). However, in 1970, Rule 26(a) was transferred to the current Rule 30(a) and reference to the distinction between discovery and trial (*de bene esse*) depositions was eliminated, *see id.* As a result, courts appear generally to ignore any distinctions between discovery and *de bene esse* deposition, relying instead on Rule 30(a)(1), which provides broad authority for taking "the testimony of any person, including a party, without leave of court." *See Tatman v. Collins*, 938 F.2d 509, 511 (4th Cir. 1991); *In re Tutu Wells Contaminations CERCLA Litig.*, 189 F.R.D. 153, 157 (D. Virgin Islands 1999) (finding no authority for distinguishing between *de bene esse* and discovery depositions).

Generally, the purpose of a *de bene esse* deposition is for admission at trial as the direct examination testimony of the witness. The Federal Rules of Civil Procedure and the Federal Rules of Evidence, however, do not explicitly provide for the admissibility of such depositions. However, it appears that a number of courts have countenanced the use of *de bene esse* depositions at trial under the "exceptional circumstances" provision of Fed. R. Civ. P. 32(a)(3)(E), which provides that:

> the deposition of a witness, whether of not a party, may be used by any party for any purposes if the court finds: (E) upon application and notice, that such exceptional circumstances exists as to make it

> desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witness orally in open court, to allow the deposition to be used.

For instance, in *Reber v. General Motors Corp.*, 669 F.Supp. 717 (E.D.Pa. 1987), the district court found that the heavy surgical schedule of a physician constituted exceptional circumstances that warranted the admission of his deposition at trial, despite that he was not technically "unavailable" within the meaning of the Federal Rules. *Id.* at 720. Central to the court's decision in that case, it appears, was that the deposition was *de bene esse*: "while the rule regulating the use of depositions at trial makes no such distinction, we are convinced that videotaped testimony prepared specifically for use at trial [the deposition at issue was taken "just prior to the trial date"] mitigates the concerns militating against the use of depositions in lieu of live testimony." *Id.; see also, Melore v. Great Lakes Dredge and Dry Dock Co.*, 1996 WL 548142, at * 4 (E.D.Pa. Sept. 20, 1996) ("The court may, in the exercise of its discretion, find that a physician or other witness with an unpredictable schedule is unavailable to testify at trial and this allow his or her deposition testimony to be read." Deposition at issue was a discovery deposition, although court explicitly rejected any distinction between discovery and trial depositions.); *Hague v. Celebrity Cruises*, 2001 WL 546519, at * 2 (S.D.N.Y. May 23, 2001) (*quoting Reber*) (deposition was *de bene*

esse); *but see Angelo v. Armstrong World Industries, Inc.*, 11 F.3d 957, 963 (10th Cir. 1993 (discovery deposition of "extremely busy" doctor excluded); *Flores v. New Jersey Transit Rail Operations Inc.*, 1998 WL 110781, at * 205 (D.N.J. Nov. 2, 1998) (permission to take *de bene esse* depositions denied because exceptional circumstances not shown); *Rubel v. Eli Lilly and Co.*, 160 F.R.D. 28 (S.D.N.Y. 1995) (excluding discovery deposition because, although circumstances were exceptional, "litigants who conduct discovery, as opposed to trial, depositions, typically do not attempt to undermine the testimony of the witness").

II. *Taxation of Costs of Videotaped Depositions*

Courts treating the question of the taxability, pursuant 28 U.S.C. § 1920(2), of the cost of videotaped depositions and the transcription of such depositions have reached differing results. However, in *Garonzik v. Whitman Diner*, 910 F.Supp. 167 (D.N.J. 1995),the most comprehensive treatment of the issue in this district, Judge Kugler concluded that, given the authorization of recording of deposition testimony by other than stenographic means, *see* Fed. R. Civ. P. 30(b)(2) (a deposition may be recorded by "sound, sound-and-visual or stenographic means"), and the requirement that a transcript of such testimony be made, *see* Fed. R. Civ. P. 26(a)(3)(B), 32(c), both the costs of transcription, and the cost of preparation and playback, were taxable under § 1920. *See also, Roberts v. Owens-Corning Fiberglass Corp.*, 101

F.Supp.2d 1076 (S.D. Ind. 1999); *Meredith v. Schreiner Transport*, 814 F.Supp. 1004, 1006 (D. Kans. 1993). However, a number of courts have concluded that it would be improper to tax the costs of both the transcription and videotaping of a deposition, instead permitting taxation only of one recording or the other. *See Migis v. Pearle Vision*, 135 F.3d 1041, 1049 (5th Cir. 1998) (taxing cost of transcription only because "there is no provision [in § 1920(2) for videotapes of depositions" and because plaintiff had not shown that videotape was necessary); *Barber v. Ruth*, 7 F.3d 636, 645 (7th Cir. 1993) (taxing costs of videotaping only); *Griffith v. Mt. Carmel Medical Center*, 157 F.R.D. 499, 503 (D. Kans. 1994) (taxing costs of transcription only). It should be noted, however, that, as Judge Kugler pointed out, a number of the cases so holding were decided under a former version of Rule 30 which provided that "a party may arrange to have a stenographic transcription made *at the party's own expense.*" *Garonzik*, at 171.