Civil Procedure
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Supplementary Materials

Jonathan R. Siegel
GW Law School
A Rule 32 Problem

Rule 32(a)(1)(B) provides that a deposition may be used “to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying.” This slightly tricky rule is important because of the hearsay rule. Hearsay evidence is evidence of an out-of-court statement introduced to prove the truth of the matter asserted in the statement. The rule against hearsay normally prohibits the use of hearsay evidence (although the rule is subject to numerous exceptions).

Thus, for example, suppose Amy and Bill get into a car accident. Gary, who witnessed the accident, could testify in court that Bill ran a red light just before the collision. But suppose Gary is unavailable for trial. Amy tries to introduce the testimony of Wendy, who didn’t witness the accident, but who proposes to say, on the witness stand, “Gary told me that he saw Bill run a red light just before the collision.” This testimony would be barred by the hearsay rule. Wendy would be reporting an out-of-court statement by Gary, and the statement would be introduced in an effort to prove what the statement asserts, i.e., that Bill ran a red light.

The reason for the hearsay rule is that introduction of such evidence would be unfair to the party who cannot cross-examine the person who made the out-of-court statement. In the above example, Bill would like to be able to cross-examine Gary, to find out such details as where Gary was standing, how well Gary could see the events, whether Gary has any motive to lie, etc. But Bill cannot cross-examine Gary if Gary is not present in court and Gary’s statement is reported only by Wendy, who didn’t even witness the accident.

Now re-read Rule 32(a)(1)(B) and consider how it interacts with the hearsay rule.

(a) On the above facts, suppose Bill’s counsel deposes Gary, who states during the deposition that he saw Bill run a red light just before the collision. At the time of trial, Gary is unavailable for one of the reasons stated in Rule 32(a)(4). Can Amy introduce Gary’s deposition at the trial?

(b) On the above facts, suppose Bill’s counsel deposes Wendy, who states during the deposition that she did not witness the accident, but that Gary told her that he saw Bill run a red light just before the collision. At the time of the trial, Wendy is unavailable for one of the reasons stated in Rule 32(a)(4). Can Amy introduce Wendy’s deposition at the trial?
N. Y. Civ. Prac. Law Ann. § 901
(to be read in connection with the Shady Grove case)

(a) One or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
4. the representative parties will fairly and adequately protect the interests of the class; and
5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(b) Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.