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Alabama

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Videotaped depositions of experts may be used at trial, and is especially common for the depositions of medical experts, as physicians may not be subpoenaed or otherwise compelled to testify at trial. Depositions of any witness—including the depositions of a party-witness—may be used by a party for “any purpose” if the witness is (1) dead; (2) “at a greater distance than one hundred (100) miles from the place of trial or hearing, or is out of the state”; (3) “is unable to attend or testify because of age, illness, infirmity, or imprisonment”; or (4) “that the witness is a licensed physician or dentist”; or (5) “that the party offering the deposition has been unable to procure the attendance of the witness by subpoena.” Ala. R. Civ. P. 32(a)(3).

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Arkansas

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Rule 32 of the Arkansas Rules of Civil Procedure allow deposition testimony to be used against any party “who was present or represented at the taking of the deposition or who had reasonable notice thereof,” so long as certain conditions are met: (1) it is used to contradict or impeach testimony of deponent as a witness or otherwise permitted under the Arkansas Rules of Evidence; (2) the person being deposed was the officer, director, managing agent, or 30(b)(6) or 31(a) designee of a party; or (3) if the witness is unavailable as defined under Rule 32(a)(3).

If deposition testimony is being offered in video form, the party presenting that testimony must present the court with a transcript of the offered portions prepared by a certified court reporter. Additionally, “on request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in non-stenographic form, if available, unless the court for good cause orders otherwise.” Ark. R. Civ. P. 32(c). Each court room is different and may have variable technology capabilities that each party should consider before attempting to use videotaped deposition testimony at trial.

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California

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Yes, as long as the deposition is properly noticed. California Code of Civil Procedure §2025.620(d) provides “Any party may use a video recording of the deposition testimony of a treating or consulting physician or of any expert witness even though the deponent is available to testify if the deposition notice under Section 2025.220 reserved the right to use the deposition at trial, and if that party has complied with subdivision (m) of Section 2025.340.”

Subdivision (m) of California Code of Civil Procedure §2025.340 provides:

“A party intending to offer an audio or video recording of a deposition in evidence under Section 2025.620 shall notify the court and all parties in writing of that intent and of the parts of the deposition to be offered. That notice shall be given within sufficient time for objections to be made and ruled on by the judge to whom the case is assigned for trial or hearing, and for any editing of the recording. Objections to all or part of the deposition shall be made in writing. The court may permit further designations of testimony and objections as justice may require. With respect to those portions of an audio or video record of deposition testimony that are not designated by any party or that are ruled to be objectionable, the court may order that the party offering the recording of the deposition at the trial or hearing suppress those portions, or that an edited version of the deposition recording be prepared for use at the trial or hearing. The original audio or video record of the deposition shall be preserved unaltered. If no stenographic record of the deposition testimony has previously been made, the party offering an audio or video recording of that testimony under Section 2025.620 shall accompany that offer with a stenographic transcript prepared from that recording.”

Section 2025.340 provides further procedural requirements for video depositions in general. For example, the section requires that the area used for recording the testimony should be suitably large, lighted and reasonably quiet. The section further requires that if the video is to be used at trial, the operator of the recording equipment shall be a person who is authorized to administer an oath and shall not be financially interested in the action or be a relative or employee of any attorney of the parties unless the parties agree on the record to waive the requirements. Please refer to Section 2025.340 for a complete list of procedural requirements, as not all are discussed here.

Colorado

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

The use of deposition testimony, including videotaped deposition testimony, in court proceedings is governed by Colorado Rule of Civil Procedure 32. First, under Rule 32, the deposition testimony sought to be used must be admissible under the Colorado Rules of Evidence.^{vi} Second, such testimony can only be used against a party who was present or represented at the taking of the deposition or who had reasonable notice of such deposition.^{vii} If these two conditions are met, deposition testimony may be used in court proceedings under the following circumstances:

1. Any deposition may be used by any party to contradict or impeach the testimony of deponent as a witness;
2. An adverse party may use the deposition of a party or representative of a party for any purpose.
3. The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that:
 - a. The witness is dead; or
 - b. that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or
 - c. that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or
 - d. that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or
 - e. upon application and notice, that such exceptional circumstances exist, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.
4. If a party only offers part of a deposition into evidence, an adverse party may require the offering party to introduce any other part which ought in fairness to be considered with the part introduced and any party may introduce any other parts.^{viii}

Additionally, a party may still object at trial or hearing to the admission of any deposition testimony or part thereof which would require the exclusion of the evidence if the witness were then present and testifying.^{ix}

Connecticut

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Connecticut courts widely permit video recorded testimony, including for impeachment.

Delaware

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Use of videotaped deposition testimony is permitted in Delaware, but a transcript must be provided to the court if deposition testimony is offered in nonstenographic form. Super. Ct. Civ. R. 32(e) (“Except as otherwise directed by the Court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the Court with a transcript of the portions so offered”). Generally, this is done by providing transcript designations of the portion of video testimony offered. The use of these depositions must follow Delaware’s rules of evidence and other rules concerning the use of depositions at trial. Super. Ct. Civ. R. 32(a).

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Florida

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Yes. Depositions may be "audiovisually" recorded without leave of court or stipulation of the parties. See Fla. R. Civ. P. 1.310(b)(4). Florida Rule of Civil Procedure 1.330 provides that a party may use against any other party "any part or all of a deposition" if the party against whom the deposition is used was "present or represented at the taking of the deposition or who had reasonable notice of it" for any of the following reasons: (1) any deposition may be used for contradicting or impeaching the testimony of the deponent as a witness or for any purpose permitted by the Florida Evidence Code; (2) a party's deposition may be used for any purpose against an adverse "officer, director, or managing agent," or a corporate representative of a business or government agency.

Additionally, a witness' deposition may be used by any party for any purpose if the court finds: (A) that the witness is dead; (B) located more than 100 miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; (E) that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; or (F) the witness is an expert or skilled witness.

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Georgia

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

In Georgia, “[u]nless the court orders otherwise, the testimony at a deposition must be recorded by stenographic means, and may also be recorded by sound or sound and visual means in addition to stenographic means, and the party taking the deposition shall bear the costs of the recording.” O.C.G.A. § 9-11-30(b)(4). However, prior to the July 1, 1996 amendment to O.C.G.A. § 9-11-30, a court order was required to video tape a deposition. C. Frederick Overy by, Jason Crawford, & Teresa T. Abell, *Trial Practice and Procedure*, 48 MERCER L. REV. 517, 588 (Fall 1996). The July 1, 1996 amendment permits a deposition to be videotaped at the option of either party, unless the court orders otherwise. *Id.*

Georgia does not have any rules or regulations specific to the use of videotaped deposition of an expert or party witness at trial. Georgia state courts have explained that medical experts may “give an evidentiary deposition that is transcribed or videotaped (or both) in lieu of live trial testimony.” *Neill v. Addington Enters.*, 2013 Ga. State LEXIS 1419, *3, State Court of Fulton County, Georgia, Civil Action No. 13EV016913E (October 7, 2013); *see also Savannah v. Palmerio*, 135 Ga. App. 147, 150 (1975) (“[i]t is well to remember that the taking of a deposition of the testimony of a witness to be used at the trial of the cause is a substitute, at best, for the actual live testimony of the witness. It is our opinion that the testimony of the witness by videotaping is a better substitute than the reading of a stenographic transcript provided by a court reporter.”). However, federal court have found that “[g]enerally, a videotaped deposition may not be tendered to the jury in lieu of live testimony unless the witness's presence is excused.” Ronald L. Carlson, *Distorting Due Process For Noble Purposes: The Emasculation Of America’s Material Witness Laws*, 42 GA. L. REV. 941, 956 (Summer 2008).

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Indiana

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

The Indiana Trial Rules similarly follow the Federal Rules of Evidence on this issue. Indiana Trial Rule 32(A)(3), states that the deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

1. that the witness is dead; or
2. that the witness is outside the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or
3. that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or
4. that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or
5. upon application and notice, that such exceptional circumstances exist to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; or
6. upon agreement of the parties.

Furthermore, Indiana Rule of Evidence 804(b)(1) allows the admission of deposition testimony if the declarant is unavailable, and the opposing party had the opportunity to depose the declarant. In *Burns v. State*, the court admitted the videotaped deposition of a witness who was unavailable to travel to trial due to a brain tumor. 91 N.E.3d 635.

Illinois

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Rule 206(e) permits the taking and use of depositions by the usual court reporting methods (in written or audio form) but requires the agreement of the parties or "order of the court for good cause shown" for the use of a videotape recording device. *People v. Zehr*, 103 Ill. 2d 472, 480 (1984). Whether to permit the use of a videotaped deposition is within the discretion of the court. *Id.*

A trial court may assess costs of videotaping, editing, and transcribing a videotaped evidence deposition if the deposition is "necessarily used at trial." *Perkins v. Harris*, 308 Ill. App. 3d 1076, 1080 (1999). Necessity requires a determination that the deposition must be used, such as if the witness has died or disappeared. *Wiegman v. Hitch-Inn Post*, 308 Ill. App. 3d 789, 804 (1999).

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Iowa

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

In addition to standard Iowa Rules of Evidence, there are rules and regulations in Iowa governing the use of videotaped deposition testimony of a witness at trial. In civil trials, “[a]ny part of a deposition . . . may be used upon the trial . . . in the same action against any party who appeared when it was taken, or stipulated therefor, or had due notice thereof, to do any of the following”:

- (1) to impeach or contradict the deponent;
- (2) for any purpose if the deponent was a party adverse to the offeror when the deposition was taken;
- (3) for any purpose if the deponent is unavailable for a variety of reasons listed in the Iowa Rules of Civil Procedure § 1.704(3);
- (4) “[f]or any purpose, if it was taken of an expert witness specially retained for litigation; or the deponent was a health care practitioner offering opinions or facts concerning a party's physical or mental condition;” and
- (5) “[o]n application and notice, the court may also permit a deposition to be used for any purpose, under exceptional circumstances making it desirable in the interests of justice.”

Iowa R. Civ. P. 1.704 (2024).

However, before the videotaped deposition can even be taken, the party requesting the videotaping may need the court’s permission to do so. In Iowa, a motion for leave of court is not required in order to videotape a deposition if the deposition is to be recorded stenographically as well. Iowa R. Civ. P. 1.701(4) (2024). If the deposition is not going to be recorded stenographically, a motion for leave of court is required. *Id*; Iowa R. Civ. P. 1.708(1)(a) (2024). The court *may* order the videotaping upon motion, and if they do “the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to ensure that the recorded testimony will be accurate and trustworthy.” Iowa R. Civ. P. 1.701(4) (2024).

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Kansas

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Videotaped deposition testimony is generally allowed, and there is no distinction in Kansas between a discovery deposition and a trial deposition.

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Kentucky

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Yes. Generally, any part or all of a properly noticed deposition, so far as admissible under the rules of evidence, may be used at trial against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof in accordance with the provisions of CR 32.01.

Videotaped depositions of party witnesses and experts may be used by any party for the purpose of contradicting or impeaching the testimony or the deponent as a witness as trial. CR 32.01(a). Additionally, the videotaped deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds the witness: (i) is at a greater distance than 100 miles from the place where the court sits in which the action is pending or out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition; or (ii) is the Governor, Secretary, Auditor or Treasurer of the State; or (iii) is a judge or clerk of a court; or (iv) is a postmaster; or (v) is a president, cashier, teller or clerk of a bank; or (vi) is a practicing physician, dentist, chiropractor, osteopath, podiatrist or lawyer; or (vii) is a keeper, officer or guard of a penitentiary; or (viii) is dead; or (ix) is in the military service of the United States of this State; or (xii) if the court finds that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. CR 32.01(c).

If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts. CR 30.01(d).

CR 30.02(4)(e) requires all deposition video footage to be edited prior to trial in order to remove all objections and colloquies.

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Louisiana

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Yes. Under La. C.C.P. 1450, all depositions, videotaped or otherwise, can be used at trial as if the witness was present and testifying, as long as the testimony given is admissible under the Louisiana Code of Evidence. The requirements to be admissible under the Louisiana Code of Evidence include: (1) the deposition be properly noticed to all parties in a lawsuit; and (2) all parties had an opportunity to question that witness during the deposition.

Typically, in Louisiana, we see depositions being used as evidence at trial, in lieu of live testimony, when a witness is “unavailable” or lives more than one hundred miles from the courthouse. Under Louisiana Code of Evidence article 804, a witness will be found as “unavailable” if:

- Exempted from testifying due to privileged testimony;
- Persists in refusing to testify concerning the subject matter of his statement, despite an order from the court to do so;
- Lack of memory of the subject matter;
- Death, physical illness, mental illness, infirmity, or other sufficient cause; or,
- Absent from the hearing and unable to be located by process or other reasonable means.

Further, in Louisiana, parties often use trial perpetuation depositions to minimize the costs of having to subpoena witnesses to trial, and to make a trial more efficient. More often than not, those trial perpetuation depositions are videotaped, and the videotape of that deposition is played before the judge or jury. Trial perpetuation depositions are governed by LA C.C.P. arts. 1429-1431.

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Maryland

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

A broad allowance is made in Maryland for videotaped depositions, and the recording of experts, party members, and party witnesses can be used at trial, as guided by Maryland Rules 2-416 and 2-419. There are certain procedures that must be followed for a proper videotaped deposition, including in the operation of the camera and sound recording, the procedure in beginning the deposition, and how objections are noted.^{xix}

A videotaped deposition of an expert witness may be used at trial, even if the witness is available for it.^{xx} However, the deposition of a witness, regardless of party status, may only be used a trial if the witness is not available or there are other exceptional circumstances, including if the witness is out of state, unable to attend because of “age, mental incapacity, sickness, infirmity, or imprisonment”, or in the interests of justice the videotaped deposition is considered to be necessary.^{xxi}

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Massachusetts

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

If a factual witness is “unavailable” for trial deposition testimony, audio video deposition testimony may be used at trial. Generally, audio visual expert testimony is allowed regardless of the expert’s availability to testify at trial.

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Michigan

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Yes. MCR 2.308 and MCR 2.315

- **MCR 2.308:** Depositions or parts thereof shall be admissible at trial or on the hearing of a motion or in an interlocutory proceeding only as provided in the Michigan Rules of Evidence.
- **MCR 2.315:** Depositions authorized under 2.303 and 2.306 may be taken by means of simultaneous audio and visual electronic recording without leave of the court or stipulation of the parties, provided the deposition is taken in accordance with this rule.
- **2.315(F) Use as Evidence:**
 - **(1)** A video deposition may not be used in a court proceeding unless it has been filed with the court.
 - **(2)** Except as modified by this rule, the use of video depositions in court proceedings is governed by MCR 2.308.
 - **(3)** A party who seeks to use a video deposition at trial must provide the court with either
 - **(a)** a transcript of the deposition, which shall be used for ruling on any objections, or
 - **(b)** a stipulation by all parties that there are no objections to the deposition and that the recording (or an agreed portion of it) may be played
 - **(4)** When a video deposition is used in a court proceeding, the court must indicate on the record what portions of the recording have been played. The court reporter or recorder need not make a record of the statements in the recording.

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Minnesota

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Yes, Minn. R. Civ. P. 32.01 governs the use of deposition at trial. Any videotaped deposition can only be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, and is only admissible under the Minnesota Rules of Evidence applied as though the witness were then present and testifying. The videotaped deposition of a party can be used by an adverse party. The videotaped deposition of an expert witness can be used in circumstances where the witness is unavailable or other exceptional circumstances exist. See Minn. R. Civ. P. 32.01(c).

Mississippi

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Absent an agreement by counsel for use of a videotaped deposition, MRCP 32 governs the use of depositions at trial, including expert and party witnesses. The videotaped deposition of a party or a corporate 30(b)(6) witness may be used an adverse party for any purpose. MRCP 32(a)(2). The deposition of any witness may be used by any party for any purpose if the witness is dead, or at a greater distance than 100 miles from the place of trial, or is out of the state, or if the witness is unable to attend or testify because of age, illness, infirmity or imprisonment. MRCP 32(a)(3).

Missouri

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

At trial, depositions may be used for any purpose, and a showing of witness unavailability is unnecessary. Mo.R.Civ.P. 57.07(a). This rule applies to the deposition of experts. Treating doctors invariably appear at trial by videotaped depositions. Retained experts may also appear by videotaped deposition.

Montana

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Under Montana law depositions may be used “for any purpose.” Mont. R.C.P. 32.

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Nebraska

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Testimony may be recorded by audio, audiovisual (videotape), or stenographic means, or any combination of those means. NEB. CT. R. DISC. § 6-330(4)(A). The United States District Court for the District of Nebraska Civil Rules further provide that the deposition notice must state that the deposition will be recorded by video, the camera operator must be identified, the witness must be sworn on camera, and the camera must be directed at the witness at all times. NECivR. § 30.1.

Additionally, a party seeking to use the deposition at trial must submit any unresolved objections to the court in limine after the deposition, but no later than 7 days before trial or, alternatively, the date set by the pretrial order. *Id.* Importantly, a transcript of the video must accompany the motion. *Id.*

New Hampshire

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

The admissibility of video testimony at trial is governed by the New Hampshire Rules of Evidence. Generally, hearsay (i.e., out-of-court statements used to prove the truth of the matter asserted in such statements) is inadmissible unless an exception applies. *See* N.H. R. Evid. 801(c), 802. If a witness is unavailable, then their former videotaped testimony may be offered against a party (or, in a civil case, their predecessor in interest) who had an opportunity to develop such testimony via direct, cross, or redirect examination. *Id.* 804(b)(1). A witness is “unavailable” if they: 1) are exempted from testifying on the subject matter by court ruling; 2) refuse to testify despite a court order to do so; 3) testify to a lack of memory on the subject matter; 4) are unable to be present or testify due to death or a then-existing physical or mental condition; or 5) are otherwise absent and the proponent of the videotaped testimony could not procure the witness’s attendance. *See id.* 804(a).

In criminal cases, prosecutors may move to take videotape trial testimony of any witness who was sixteen years-old or younger at the time of the offense. RSA 517:13-a, I. Witnesses or victims who were sixteen years-old or younger at the time of the offense may also move to take videotape trial testimony. *Id.* A court will grant such motions if it finds by a preponderance of the evidence that: 1) the minor would suffer emotional or mental strain if required to testify in open court; or 2) further delay would impair the minor’s recollection of the facts. *See id.* “Such testimony shall be admissible into evidence at trial in lieu of any other testimony by the child.” *Id.*

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New Jersey

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Pursuant to NJ Rule 4:14-9(e), audio visually-recorded depositions may be used at trial in accordance with Rule 4:16-1. In addition, an audio visually-recorded deposition of a treating physician or expert witness, which has been taken in accordance with these rules, may be used at trial in lieu of testimony whether or not such witness is available to testify and provided further that the party who has taken the deposition has produced the witness for further audio visually-recorded deposition necessitated by discovery completed following the original deposition or for other good cause. Disputes among parties regarding the recalling a treating physician or expert witness shall be resolved by motion, which shall be made as early as practicable before trial. The taking of an audio visually-recorded deposition of a treating physician or expert witness shall not preclude the party taking the deposition from producing the witness at trial.

Rule 4:16-1 states that at the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying.

New Mexico

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

The use of videotaped deposition testimony of an expert or party witness at trial is permitted. Litigants must file designations prior to trial to permit the opposing parties the opportunity to object to the designations, and/or subpoena the witness to appear in person.

North Carolina

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Under Rule 32 of the North Carolina Rules of Civil Procedure, videotaped deposition testimony is permissible in the following circumstances:

- (1) For the purpose of contradicting or impeaching the testimony of a witness.
- (2) The deposition of a person called as a witness may also be used as substantive evidence by any party adverse to the party who called the deponent as a witness and it may be used by the party calling deponent as a witness as substantive evidence of such facts stated in the deposition as are in conflict with or inconsistent with the testimony of deponent as a witness.
- (3) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose, whether or not the deponent testifies at the trial or hearing.
- (4) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: that the witness is dead; or that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or upon application and notice, that 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.
- (5) An expert witness whose testimony has been procured by videotape.

A party may object to all or portions of the deposition testimony for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

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North Dakota

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Yes, N.D. R. Civ. P. 32(a)(1) outlines when a party is permitted to use deposition testimony. When a party uses deposition testimony, unless the court orders otherwise, they are to provide the testimony in transcript form. *See* N.D. R. Civ. P. 32(c). However, a party offering deposition testimony may also provide the court with the testimony in non-transcript form. *Id.* Upon the request of any party, “deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in non-transcript form, if available, unless the court for good cause orders otherwise.” *Id.*

N.D. R. Civ. P. 30(b) also outlines the permissible methods of recording a deposition. Unless the Court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording cost. Any party may arrange to transcribe a deposition. *See* N.D. R. Civ. P. 30(b)(3).

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Ohio

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Rule 40 of the Ohio Rules of Civil Procedure permits the use of pre-recorded testimony at trial and references the Rules of Superintendence, which provide the procedural mechanism by which a party can use prerecorded testimony. Specifically, Rule 13(B) of the Rules of Superintendence identifies the time by which a party must provide the court with a copy of the video recording and when and how the parties must object to the presentation of the all or part of the videotaped testimony.

Oklahoma

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

In general, the use of videotaped deposition testimony at trial is governed by the same rules as live testimony, including 12 O.S. § 3232.

The transcript of the videotaped deposition must be made a part of the record in the trial court and on appeal in order for allegations of error regarding the videotaped deposition, the witness's testimony, or the exhibits admitted through the videotaped deposition to be preserved. *See B-Star, Inc. v. Polyone Corp.*, 2005 OK 8, ¶ 17. Objections raised during the deposition or reserved for presentation to the trial court must be made prior to the videotaped deposition being played for the jury. *Id.* Any objection not raised or argued until after the jury is shown the videotaped deposition is waived as untimely. *Id.*

Additionally, the local rules for each district court in Oklahoma often contain additional rules regarding the use of videotaped deposition testimony at trial.

Oregon

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

After commencement of an action, any party wishing to perpetuate the testimony of a witness for the purpose of trial or hearing may do so by serving a complying deposition perpetuation notice. Or. R. Civ. P. 39 I. Before the time set for the deposition, any other party may object to protect the party or person from annoyance, embarrassment, oppression, or undue burden or expense. *Id.*; Or. R. Civ. P. 36 C. As any hearing on such objection, the burden shall be on the party seeking the perpetuation to show that: (a) the witness may be “unavailable,” as defined by statute, (b) it would be an undue hardship on the witness to appear at the trial or hearing, or (c) other good cause exists for allowing the perpetuation. Or. R. Civ. P. 39 I(3). If no objection is filed, or if perpetuation is allowed, the testimony taken shall be admissible at any subsequent trial or hearing in the action, subject to the Oregon Evidence Code. *Id.* Any perpetuation deposition shall be taken not less than seven days before the trial or hearing on not less than 14 days’ notice. Or. R. Civ. P. 39 I(4). However, the court in which the action is pending may allow a shorter period for a perpetuation deposition before or during trial upon a showing of good cause. *Id.* If a discovery deposition is allowed by law, any party may conduct a discovery deposition of the witness prior to the perpetuation deposition. Or. R. Civ. P. 39 I(5).

Additionally, use of discovery depositions, so far as admissible under the rules of evidence, are permitted at trial under certain circumstances. *See* Or. Rev. Stat. 45.250. For example, the deposition of a party, or of anyone who at the time of taking the deposition was an officer, director or managing agent of a public or private corporation, partnership or association that is a party, may be used by an adverse party for any purpose. Or. Rev. Stat. 45.250(1)(b). Also, a discovery deposition may be used against any party for any purpose, if the party was present or represented at the taking of the deposition or had due notice thereof, and the court finds that the witness is dead, unable to testify because of age, sickness, infirmity or imprisonment, or the witness is beyond subpoena power, or exceptional circumstances exist. Or. Rev. Stat. 45.250(2). Use of a discovery deposition at trial is also authorized by the rules of evidence. *See* Or. R. Evid. 804(3)(a) (where declarant is unavailable as a witness, the witness’s out-of-court statements made in a deposition in the same proceeding are ordinarily admissible evidence under an exception to the hearsay rule); Or. R. Evid. 804(1)(e) (defining “unavailability as a witness” to include situations in which the proponent of the declarant’s statement “has been unable to procure the declarant’s attendance . . . by process or other reasonable means”); *State v. Iseli*,

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366 Or. 151, 164, 458 P.3d 653 (2020) (inability to procure attendance “by process” includes the scenario “in which the declarant is outside the reach of the court’s subpoena power”).

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Pennsylvania

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Yes. The rules for use of depositions at trial generally have been used by Pennsylvania courts to determine the permissibility of using videotaped depositions at trial. *See Quinby v. Burmeister*, 850 A.2d 667, 670 (Pa. Super. 2004), *affirmed in relevant part and reversed in part by Quinby v. Plumsteadville Family Practice, Inc.*, 907 A.2d 1061, 1078–79 (Pa. 2006). If the party witness was deposed by way of designation under Pennsylvania Rules of Civil Procedure 4004(a)(2) or 4007.1(e), then the deposition may be used by an adverse party for any purpose. Pa.R.Civ.P. 4020(a)(2). Any deposition may be used for the purpose of contradiction or impeachment of a deponent as a witness, or as permitted by the Pennsylvania Rules of Evidence. Pa.R.Civ.P. 4020(a)(1). Furthermore, deposition of any witness may be used by any party for any purpose under the following circumstances: (a) the witness is dead; (b) the witness is at a greater distance than one hundred miles from the place of trial or is outside the Commonwealth, unless it appears that the absence of the witness was procured by the party offering the deposition; (c) the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment; (d) the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (e) upon application and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used. Pa.R.Civ.P. 4020(a)(3). Absent one of the five circumstances discussed above, the use of a pretrial expert video deposition would not be permitted. *See* Pa.R.Civ.P. 4003.5, Explanatory Comment (“[I]n the absence of cause shown, the Pennsylvania rules of civil procedure do not permit an expert to be deposed.”)

Rhode Island

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Generally, a videotaped deposition may be used for the same purposes, and to the same extent as a stenographic deposition, except as otherwise directed by the court. See Super. R. Civ. P. 32(d). A party seeking to introduce a videotaped deposition must also provide a transcript of the deposition testimony to be offered to the court and to all parties in advance of trial.

As it specifically pertains to expert witnesses, Rule 32(a)(3)(E) of the Rhode Island Superior Court Rules of Civil Procedure provides that

[a] deposition of a medical witness or any witness called as an expert, other than a party, which has been recorded by videotape by written stipulation of the parties or pursuant to an order of court may be used at trial for any purpose whether or not the witness is available to testify.

Super. R. Civ. P. 32(a)(3)(E).

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Tennessee

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Generally, medical providers are immune from in-person trial subpoenas and their depositions “for proof” are taken by videotape or other means prior to trial. Tennessee allows any deposition to be videotaped, and Tenn. R. Civ. P. 32 provides that “any part or all of a deposition, so far as admissible under the Tennessee Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof in accordance with any of the following provisions:

- (1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.
- (2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30.02 (6) or 31.01 to testify on behalf of a public or private corporation, partnership or association, governmental agency or individual proprietorship which is a party may be used by an adverse party for any purpose.
- (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness is “unavailable” as defined by Tennessee Rule of Evidence 804(a). But depositions of experts taken pursuant to the provisions of Rule 26.02 (4) may not be used at trial except to impeach in accordance with the provisions of Rule 32.01 (1).
- (4) If only part of a deposition is offered in evidence by a party, an adverse party may require the introduction at that time of any other part which ought in fairness to be considered contemporaneously with it.

Tenn. R. Civ. P. 32.01.

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Vermont

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Vermont Rule of Civil Procedure 43 provides that “[i]n all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules, the Vermont Rules of Evidence, or other rules adopted by the Supreme Court.” Vt. R. Civ. P. 43(a). A witness’s deposition, including that of a treating physician, may not be used at trial unless an exception applies. See *Nichols v. Brattleboro Retreat*, 970 A.2d 1249, 1251, 2009 VT 4 (2009); *Boehm v. Willis*, 180 Vt. 615, 910 A.2d 908 (2006); see also *Simpson v. Rood*, 175 Vt. 546, 548, 830 A.2d 4, 7 (2003) (“In terms of the presentation of oral testimony in civil cases, Rule 43(a) leaves nothing to the court’s discretion in the absence of agreement by the parties to allow testimony in a different form.”).

The applicable exemptions are outlined in Vermont Rule of Civil Procedure 32(a)(3) provides for the use of a deposition in “exceptional circumstances” and include privilege grounds, the witness’s persistent refusal to testify despite a court order, unavailability due to death, illness or infirmity, or the witness’s absence from the jurisdiction, when the proponent has been unable to procure the witness’s presence by reasonable means. Vt. R. Civ. P. 32(a)(3); see also *Int’l Collection Serv., Inc. v. Gibbs*, 147 Vt. 105, 107, 510 A.2d 1325, 1327 (1986) (“[D]eposition testimony can be taken and used at trial if the witnesses are unavailable.”).

Vermont Rule of Procedure 32 was adapted to match the language of Vermont Rule of Evidence 804(a), which specifies grounds of unavailability. These rules allow for unavailability on the ground of absence is intended to require the proponent to seek the witness’s deposition before less reliable forms of hearsay may be used. See House Judiciary Committee Report, H.R.Rep. No. 650, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad.News 7075, 7088. Therefore, remote testimony or a deposition to perpetuate evidence will be preferable to a simple discovery deposition, and the court must determine whether “exceptional circumstances” exist in the use of the deposition, balancing “the interest of justice” and the desirability of oral testimony. V.R.C.P. 32(a)(3)(E).

Parties may also stipulate to the use of a treating physician’s deposition at trial. See *Simpson*, 175 Vt. 546 at 548, 830 A.2d 4 at 7. In the absence of such a stipulation, however, plaintiff has no obligation to raise an objection at the time of a deposition to the use of such testimony at trial; it is defendant’s burden to demonstrate that the witness is unavailable at the time of trial and thus that an exemption to the well-established requirement for live oral testimony applies. See *Nichols*, 970 A.2d at 1251.

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Washington

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

It is common for videotaped depositions to be used at trial, particularly of expert witnesses, but also of lay witnesses. The state supreme court in Washington recently entered an order that pretrial depositions should presumptively be via Zoom unless the parties agree for in person depositions or by court order.

West Virginia

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Rule 32 of the West Virginia Rules of Civil Procedure allows the use of depositions at a hearing or trial under certain conditions, such as the party being present or having reasonable notice of the deposition, and the deposition being admissible under the West Virginia Rules of Evidence. It also specifies that depositions can be used for impeachment, contradicting testimony, or if the witness is unavailable due to reasons like death, illness, or absence from the state. W. Va. R. Civ. P. 32.

Rule 30 of the West Virginia Rules of Civil Procedure details the procedures for taking depositions, including the use of remote means like videoconference, and the duties of the officer conducting the deposition. It also covers the examination and cross-examination of witnesses, ensuring the process aligns with trial procedures under the West Virginia Rules of Evidence. W. Va. R. Civ. P. 30.

Rule 15 of the West Virginia Rules of Criminal Procedure permits the use of depositions in criminal cases when exceptional circumstances make it necessary to preserve testimony for trial. It allows depositions to be used as substantive evidence if the witness is unavailable or provides inconsistent testimony at trial. W. Va. R. Crim. P. 15.

Section 15-1E-49 of the West Virginia Code applicable to military courts, allows the use of authenticated depositions, including videotaped ones, if the witness is beyond the state, unable to appear due to various reasons, or if the witness's whereabouts are unknown. W. Va. Code § 15-1E-49.

Section 77-8-10 of the West Virginia Code of State Rules, governing administrative hearings, permits the use of depositions, including those of expert witnesses, unless deemed unfair or a violation of due process by the administrative law judge. It outlines conditions under which depositions can be used, such as the witness being dead, out of state, or unable to attend due to illness or imprisonment. W. Va. Code § 77-8-10.

Sections 102-1-13 and 93-1-13 of the West Virginia Code of State Rules encourages the use of depositions, especially for cross-examining expert witnesses, without prior consent of the Workers' Compensation Board of Review. It specifies the procedures for taking depositions and handling objections. W. Va. Code §§ 102-1-13, 93-1-13.

Wyoming

Are there any rules and regulations in your state governing the use of videotaped deposition testimony of an expert or party witness at trial?

Under Amended Rule 30.1 of the Wyoming Rules of Civil Procedure, a remote deposition holds the same effect as a video deposition that was recorded in person at the same physical location as the deponent and may be admissible at trial subject to the requirements of Wyo. R. Civ. P. 30. There are no any rules or regulations unique to experts and parties.