8.36 Prior Testimony in a Civil Proceeding

Part I: CPLR 4517

(a) In a civil action, at the trial or upon the hearing of a motion or an interlocutory proceeding, all or any part of the testimony of a witness that was taken at a prior trial in the same action or at a prior trial involving the same parties or their representatives and arising from the same subject matter, so far as admissible under the rules of evidence, may be used in accordance with any of the following provisions:

1. any such testimony may be used by any party for the purpose of contradicting or impeaching the testimony of the same witness;

2. the prior trial testimony of a party or of any person who was a party when the testimony was given or of any person who at the time the testimony was given was an officer, director, member, employee, or managing or authorized agent of a party, may be used for any purpose by any party who is adversely interested when the prior testimony is offered in evidence;

3. the prior trial testimony of any person may be used by any party for any purpose against any other party, provided the court finds:

(i) that the witness is dead; or

(ii) that the witness is at a greater distance than one hundred miles from the place of trial or is out of the state, unless it appears that the absence of the witness was procured by the party offering the testimony; or

(iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or

(iv) that the party offering the testimony has been unable to procure the attendance of the witness by diligent efforts; or

(v) upon motion on notice, that such exceptional circumstances exist as to make its use desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court;

4. the prior trial testimony of a person authorized to practice medicine may be used by any party without the necessity of showing unavailability or special circumstances subject to the right of any party to move for preclusion upon the ground that admission of the prior testimony would be prejudicial under the circumstances.

(b) Use of part of the prior trial testimony of a witness. If only part of the prior trial testimony of a witness is read at the trial by a party, any other party may read any other part of the prior testimony of that witness that ought in fairness to be considered in connection with the part read.

(c) Substitution of parties; prior actions. Substitution of parties does not affect the right to use testimony previously taken at trial.

Part II: Common Law

At a hearing or trial in a civil proceeding, the testimony of a witness that was taken at a prior hearing or trial or other legal proceeding before a tribunal may be admitted,

provided the witness is unavailable due to death or otherwise as a court may determine; the testimony referred to the same subject matter and was given under oath against the party contesting its admission; and the contesting party had the opportunity to be represented by counsel and cross-examine the witness.

Note

Introduction

The rule sets forth a hearsay exception governing the admissibility of former testimony in civil actions. It encompasses both the statutory former testimony exception for civil actions provided by CPLR 4517 and the former testimony exception recognized in civil actions under the common law.

Part I reproduces CPLR 4517 verbatim, including that statute's numbering system, except for the heading of the statute (Impeachment of witnesses; parties; unavailable witness) which is less informative, if not misleading, given that the statute and its embodiment in this rule simply set forth the requirements for the admissibility of former testimony.

Part II is derived from *Fleury v Edwards* (14 NY2d 334 [1964]) and sets forth the common-law rule on the admission of former testimony that continues to coexist with the statute in a civil case. There is no common-law former testimony exception applicable in criminal proceedings (*People v Harding*, 37 NY2d 130, 133-134 [1975]; *see* Guide to NY Evid rule 8.36.1).

Part I

Subdivision (a) requires that the former testimony must have been "taken at a prior trial in the same action or at a prior trial involving the same parties or their representatives and arising from the same subject matter." Cf. Part II: the common-law rule does not require that the former testimony be "taken at a prior trial" (*Siegel v Waldbaum*, 59 AD2d 555, 555 [2d Dept 1977]).

Subdivision (a) proceeds to define the authorized uses of the former testimony in its following paragraphs.

Subdivision (a) (1) provides for the use of the former testimony for impeachment of witnesses.

Subdivision (a) (2) governs the use of former testimony of an adverse party and the *adverse* party's employees.

Subdivision (a) (3) provides for the admissibility of the former trial testimony of a witness who is now deemed to be unavailable (by reason of one of the five categories of unavailability set forth in the rule) to testify against a party who, at the former trial, had an opportunity to cross-examine the party.

Subdivision (a) (4) permits the use of the former testimony of a physician by any party for any purpose without the need to show unavailability or special circumstances, subject to the court's discretion.

For an analysis of those paragraphs, see Vincent C. Alexander, Practice Commentaries (McKinney's Cons Laws of NY, Book 7B, CPLR 4517).

Subdivision (b) sets forth the common-law rule of completeness as applied to former testimony, which is also set forth in Guide to NY Evidence rule 4.03.

Subdivision (c), which provides that the "[s]ubstitution of parties does not affect the right to use testimony previously taken at trial," applies equally to the common-law rule set forth in Part II of this rule.

Part II

Part II sets forth the common-law rule and is derived as noted from *Fleury v Edwards* (14 NY2d 334 [1964]).

In *Fleury*, the Court of Appeals held that the common-law exception was conterminous with CPLR 4517's statutory predecessor. Thus, the common-law rule may provide a basis for the admission of former testimony where the statute does not (*Shaw v New York El. R.R. Co.*, 187 NY 186, 194 [1907] ["evidence was competent under the common law, even if not so under the statute"]).

In *Fleury*, the former testimony was taken not at a prior trial, but at a hearing held by the State Motor Vehicle Bureau. The Court held that the former testimony could be introduced in evidence by the deceased's administratrix at the trial of a personal injury suit against the party the deceased had testified against who had been present at the hearing with counsel and had cross-examined the deceased.

Thus, the first requirement of the common-law rule for the admission of former testimony is that the witness be unavailable. In *Fleury*, the unavailability of the witness was due to the witness's death. Whether the common-law rule extends to other forms of unavailability (e.g., incompetency, beyond the jurisdiction, illness) is an open question.

With respect to the remaining requirements of the common-law rule, the *Fleury* Court stated:

> "the prime and essential requirement for [the former testimony's] use is that it related to the same subject matter as given under oath and against the same party now contesting it with the right in the latter to have counsel present and to cross-examine." (*Id*. at 339.)

Of note, this common-law rule is not restricted to former testimony at a trial, as required by CPLR 4517 (a) and set forth in Part I, subdivision (a) of this rule, but extends to former testimony "given in any legal proceeding and before any tribunal employing cross-examination as part of its procedure," which includes administrative hearings (*id*. at 338 [driver's license revocation hearing]). (*See Siegel*, 59 AD2d at 555 [allowing testimony of a deceased given in an examination before trial]; *but see* CPLR 3117 [Use of depositions].)