

Rules of Civil Procedure Corner

Rule 1.330(a): Use of Depositions

By Matt Triggs and Jonathan Galler

The rules of civil procedure are essentially a collection of vehicles made readily available to litigators for the purpose of getting them safely to their legal destinations. Some rules, like those governing motions for dismissal and summary judgment, are vehicles with obvious popularity and muscle. Others, like Rule 1.330(a), are a bit less flashy but can be surprisingly powerful in their own right.

Rule 1.330(a) governs the conditions under which a deposition may be used at a hearing or trial against a party who was present or represented at the deposition or had reasonable notice of the deposition. The rule addresses three broad categories: the use of a deposition to impeach a witness who has appeared and testified; the use of the deposition of a party; and the use of the deposition of a party or non-party who is unavailable to attend the trial or hearing.

At issue in the recent case of *Bank of Montreal v. Estate of Antoine* was the use of the deposition of a witness who was dead and, thus, unavailable for attendance at trial. 2012 WL 1605248 (Fla. 4th DCA May 9, 2012). The trial court did not permit the use of the deposition at trial because the witness died before the completion of his deposition and before he was even cross-examined by the party against whom the deposition was to be used at trial.

But the Fourth District reversed the trial court's decision and, in so doing, illustrated the horsepower, so to speak, of Rule 1.330(a). In particular, Rule 1.330(a)(3)(A) provides that "[t]he 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." The Fourth District concluded that the litigants should have been permitted to use that rule to drive right over two otherwise significant hurdles to the admissibility of the deposition.

The Hearsay Hurdle

By its own terms, Rule 1.330 allows the use of a deposition only if the testimony contained therein is otherwise admissible under the rules of evidence. And, as the Fourth District acknowledged, the deposition testimony at issue qualified as hearsay. Moreover, the "Former Testimony" exception to the hearsay rule, codified at section 90.804(2)(a), Florida Statutes, was inapplicable because it requires that the declarant be unavailable and that "the party against whom the testimony is now offered... had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

Citing, however, to *Dinter v. Brewer*, 420 So. 2d 932, 934 (Fla. 3d DCA 1982), the Fourth District wrote: "Hearsay which is inadmissible because it does not satisfy the provisions of the former testimony rule will still be admissible if it satisfies the provisions of Rule 1.330." In other words, it turns out that Rule 1.330 a rule of civil procedure is itself an exception to the hearsay rule. As the *Dinter* court put it, Rule 1.330 "eliminates the threshold hearsay objection based on the deponent's absence from the court and is, in this respect, a rule of evidence."

Dinter, 420 So. 2d at 934 n.1. See also Charles W. Ehrhardt, *Florida Evidence* § 802.1 (2012 ed.) (stating that the Florida Supreme Court has provided in some instances, such as Rule 1.330, for the admission of hearsay testimony).

The Florida Supreme Court has even described the Rules of Civil Procedure as the first place to look for the exception to the rule excluding depositions as hearsay. "It is generally accepted that when an exception to the rule excluding depositions as

hearsay is not found in the Rules of Civil Procedure, the evidence code may provide such an exception in a civil proceeding." *Rodriguez v. State*, 609 So. 2d 493, 498 (Fla. 1992) (distinguishing the use of depositions in civil and criminal proceedings).¹

Rule 1.330, therefore, provides a hearsay exception for the admissibility of depositions, and the provisions of the evidence code "expand the admissibility of depositions... but do not limit admissibility as provided for in the rule of civil procedure." *Dinter*, 420 So. 2d at 934 (internal brackets omitted).

The Due Process Hurdle

The Fourth District in *Bank of Montreal* also held that Rule 1.330 is a powerful enough vehicle to overcome even the due process concerns associated with allowing a deposition to be used against a party who never had an opportunity to cross-examine the witness. [W]e find it desirable to adhere to the Florida Rules of Civil Procedure, in this case rule 1.330. *Bank of Montreal*, 2012 WL 1605248, at *2. Specifically, the court found that the rule and its federal counterpart, Rule 26(d)(3), both serve the same objective: "the admission of the deposition of a witness who is now dead, even before completion of cross-examination." *Id.*

Citing a variety of legal commentators, as well as cases from several jurisdictions, including New York and Massachusetts cases dating back to the 19th century, the Fourth District emphasized its reluctance to allow direct testimony to go to waste. "No matter how valuable cross-examination may be, common sense tells us that the half-loaf of direct testimony is better than no bread at all." *Id.* at *3 (citing 1 McCormick, *Evidence* § 19 (6th ed. 2006)).

The Fourth District concluded that the trial court should decline to follow Rule 1.330 only where the party moving to exclude the deposition demonstrates that the loss of his or her opportunity to cross-examine the witness was a "material loss" or was caused by the witness through postponement or other deliberate interruption. In the case at issue, the court found that the benefit that supposedly would have been gained from cross-examining the witness was speculative and unlikely to have elicited anything of importance a conclusion which, thankfully for the lawyer involved, appears to have been a commentary on the facts of the case, rather than the lawyer's anticipated cross-examination skills! The court reversed the trial court's refusal to allow the use of the deposition at trial.

Although the specific fact pattern in *Bank of Montreal* is unusual, the holding of the case reveals that Rule 1.330 is a particularly effective vehicle for presenting depositions at trial in the face of what might otherwise seem like substantial evidentiary and procedural hurdles.

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¹ The power of Rule 1.330 to overcome hurdles like hearsay may be limited, however, to trials or hearings in the same judicial proceeding in which the deposition at issue was taken. See *Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 259 (Fla. 1st DCA 1984).