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FDCC QUARTERLY VOLUME 62 INDEX

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CONTENTS

SPEAKING FROM THE GRAVE: THE ADMISSIBILITY OF A DECEDENT'S TESTIMONY
David M. Governo and Corey M. Dennis 288

THE CAUSAL CONNECTION REQUIREMENT IN LIFE AND DISABILITY POLICIES:
A REWARD FOR BAD BEHAVIOR?
C. Edgar Sentell, Robert B. House and Christopher R. Shaw 306

BORDERS AND FENCES: WHO GETS TO BE AN AMERICAN?
Robert Christie, Mercedes Colwin, Joshua S. Hurwit
and Elizabeth F. Lorell 337

FDCC QUARTERLY VOLUME 62 INDEX 355

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Speaking from the Grave: The Admissibility of a Decedent's Testimony†

David M. Governo
Corey M. Dennis

I. Introduction

The decedent's testimony in wrongful death cases, as well as other cases, is often the most critical evidence presented, as it generally relates to both liability and damages.[1] Moreover, given the fact of his or her death between the time of the testimony and the trial, along with the associated emotionally charged issues, the question of the admissibility of this testimony may well be the key factor in the success or failure of the case. Whether a deceased person's testimony is admissible often presents a complex question. Despite the importance of the testimony to communicate the deceased's story to the jury, unless the opposing party has had a real opportunity for cross-examination, the testimony may not be factually accurate or reliable. Courts rule on the admissibility of this testimony inconsistently, further complicating the law in this area.

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[1] Such testimony has been allowed under the Massachusetts's Dead Man's Statute in a variety of cases, as this exception to the hearsay rule "is applicable in all civil cases." Harrison v. Loyal Protective Life Ins. Co., 396 N.E.2d 987, 991 (Mass. 1979) (applying statute in intentional infliction of emotional distress action); Swartz v. Schering-Plough Corp., 53 F. Supp. 2d 95, 103 (D. Mass. 1999) (applying statute in case with various claims against pharmaceutical company, including misappropriation of trade secrets, breach of contract, and RICO); Kelley v. Jordan Marsh Co., 179 N.E. 299, 301 (Mass. 1932) (applying statute in negligence case); *see also* Tarquinio v. Diglio, 394 A.2d 198, 200 (Conn. 1978) (applying Connecticut Dead Man's Statute in motor vehicle case).

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This admissibility issue typically arises when the plaintiff attempts to introduce such testimony against a defendant through the use of a deposition recorded on video. The court's ruling is often most crucial in wrongful death cases—including toxic tort, product liability, and medical malpractice actions—where the deposition testimony implicates the defendant or describes the decedent's medical condition before his death, creating both liability for the defendant and sympathy for the plaintiff.[2] When the defendant does not have the opportunity for cross-examination, such testimony is particularly vulnerable to attack because the right

[2] *See* Donovan v. Sears Roebuck & Co., 849 F. Supp. 86, 87-88 (D. Mass. 1994) (excluding testimony of plaintiff's witnesses regarding their conversations with the decedent about his accident and injury in product liability action); Anselmo v. Reback, 513 N.E.2d 1270, 1272 (Mass. 1987) (holding pre-suit videotaped statement of decedent inadmissible hearsay in wrongful death medical malpractice action); Brandt v. A.W. Chesterton Co., No. PC 07-4811, 2011 WL 1827790 (R.I. Super. Ct. May 9, 2011) (admitting testimony of decedent implicating defendant in mesothelioma asbestos action).

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of cross-examination has long been recognized in both civil and criminal cases as critical for "separating hearsay from knowledge, error from truth, opinion from fact, and inference from recollection."[3]

But even if cross-examination is available, it may not be meaningful. Trial depositions are often noticed at the early stages of a case, before any significant discovery can be completed. How much discovery is enough? Perhaps because of the emotionally charged nature of the testimony and the importance it holds for the success of the trial, complex rules and convoluted precedent impact the crucial question of admissibility. In order to effectively challenge such testimony, counsel must understand the applicable rules of procedure and evidence, as well as the case law interpreting them.

This article provides an overview of the approaches courts have taken in grappling with this issue. Since statutes and case law from Massachusetts, Rhode Island, and Connecticut are particularly instructive, the laws of these states are highlighted in this article.

II.
Rules of Civil Procedure Governing Admissibility of Decedent's Testimony

Depending upon the circumstances in which the decedent's testimony is offered, counsel may have potential challenges to its admissibility under both state and federal rules of procedure. The rules of procedure in Massachusetts, Connecticut, and Rhode Island allow

[3] Roche v. Mass. Bay Transp. Auth., 508 N.E.2d 614, 616 (Mass. 1987) (internal citation and quotation omitted); C.O. v. M.M., 815 N.E.2d 582, 590 (Mass. 2004); *see also* Goldberg v. Kelly, 397 U.S. 254, 269 (1970) ("due process requires an opportunity to confront and cross-examine adverse witnesses."); Alford v. United States, 282 U.S. 687, 691 (1931) ("[c]ross-examination of a witness is a matter of right."); Trascher v. Territo, 89 So. 3d 357, 362 (La. 2012) (explaining "the importance of cross-examination cannot be minimized in civil cases" and holding decedent's testimony inadmissible in asbestos action where he died before being cross-examined).

the deposition of a deceased witness to be "used by any party for any purpose" at a trial or hearing "so far as admissible under the rules of evidence," against "*any party who was present or represented at the taking of the deposition or who had due notice thereof*."[4] Similarly, the Federal Rules of Civil Procedure include a general rule on the use of depositions, which provides that a deposition may be used against a party if the party was "present or represented at the taking of the deposition or had reasonable notice of it."[5] Thus, both state and federal rules of procedure require at least the opportunity for the cross-examination of the deponent as a prerequisite to the admissibility of a deposition against a party.[6]

Under state and federal rules of procedure, a party seeking to perpetuate his testimony before an action is filed must file a petition in court requesting that the deposition take place and provide notice to all adverse parties.[7] Courts allow such petitions "only in special circumstances where it is necessary to preserve testimony and require the moving party to show why the evidence is likely to be lost."[8]

The Federal Rules of Civil Procedure also have specific provisions allowing the use of depositions of an unavailable witness, including a deceased witness, "for any purpose."[9] However, the Federal Rules explicitly impose additional limitations on the use of such depositions. For example, depositions taken "on short notice" cannot be "used against a party" when: (1) that party received less than fourteen days' notice of the deposition; (2) the party "promptly" moved for a protective order requesting "that it not be taken or be taken at a different time or place"; and (3) the motion was pending when the deposition was taken.[10] In addition, a party must obtain leave of court to take a deposition under the Federal Rules if the parties have not stipulated to the deposition and (1) the witness has already been deposed in the case (i.e., the "one deposition rule"); or (2) the party seeks to take the

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[4] Mass. R. Civ. P. 32(a)(3) (emphasis added); *see also* R.I. Super. R. Civ. P. 32(a)(3); Conn. Practice Book § 13-31(a)(4). The Connecticut rule requires "reasonable notice thereof." Conn. Practice Book § 13-31(a)(4).

[5] Fed. R. Civ. P. 32(a)(1). This rule does not distinguish between discovery depositions and trial depositions, and, thus, either may be used at trial. *See* Manley v. AmBase Corp., 337 F.3d 237, 247 (2d Cir. 2003); Battle *ex rel.* Battle v. Mem'l Hosp. at Gulfport, 228 F.3d 544, 551 (5th Cir. 2000).

[6] *See* GAVCO, Inc. v. Chem-Trend Inc., 81 F. Supp. 2d 633, 638 (W.D.N.C. 1999) (holding deposition testimony inadmissible against party under Fed. R. Civ. P. 32(a)); Kirby v. Morales, 741 N.E.2d 855, 859 (Mass. App. Ct. 2001) (holding deposition could not be used against party that had no notice of deposition); Frizzell v. Wes Pine Millwork, Inc., 358 N.E.2d 447, 449-50 (Mass. App. Ct. 1976) (holding out-of-state deposition inadmissible against one who was not a party "who had due notice" of the deposition under Mass. R. Civ. P. 32(a)).

[7] *See* Fed. R. Civ. P. 27(a); Conn. Gen. Stat. Ann. § 52-156a (West 2005); R.I. Gen. Laws § 9-18-15 (1997); Mass. R. Civ. P. 27(a); *see also* Mass. Gen. Laws Ann. ch. 233, §§ 46 & 47 (West 2009).

[8] Malinou v. Seattle Sav. Bank, 970 A.2d 6, 12 (R.I. 2009); *see also* Ash v. Cort, 512 F.2d 909, 912 (3d Cir. 1975); *In re* Yamaha Motor Corp., U.S.A., 251 F.R.D. 97, 99 (N.D.N.Y. 2008).

[9] Fed. R. Civ. P. 32(a)(4).

[10] Fed. R. Civ. P. 32(a)(5).

deposition before the parties' Rule 26(f) scheduling conference.[11] However, federal courts may allow expedited discovery or depositions to preserve testimony for trial ("de bene esse" depositions) where good cause is shown.[12]

Accordingly, state and federal rules of civil procedure impose a number of limitations upon the use of depositions that may bar the admission of a decedent's deposition testimony. Nevertheless, even if the applicable rules of civil procedure allow for the use of the deposition of the deceased witness, the admissibility of the testimony must also be analyzed under—and may be excluded by—the applicable rules of evidence with respect to hearsay.[13]

III.
Hearsay Exceptions Admitting Decedent's Testimony

The testimony of a decedent, as an out-of-court statement, generally constitutes inadmissible hearsay where it is offered to prove the truth of the matter asserted.[14] Where there was no opportunity to cross-examine the decedent, counsel should be prepared to file motions

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[11] *See* Fed. R. Civ. P. 30(a)(2); *see also* Fed. R. Civ. P. 26(d) (providing parties may not seek discovery before Rule 26(f) conference). Rule 26(d) imposes a moratorium on discovery prior to the parties' Rule 26(f) conference. *See* Alston v. Parker, 363 F.3d 229, 236 n.11 (3d Cir. 2004); St. Louis Group, Inc. v. Metals & Additives Corp., Inc., No. L–11–22, 2011 WL 1833460, at *5 (S.D. Tex. Apr. 26, 2011).

[12] *See* E.E.O.C. v. Beauty Enterprises, Inc., No. 3:01CV378(AHN), 2008 WL 3892203, at *1 n.1 (D. Conn. July 9, 2008) (noting courts have "stated that de bene esse depositions are not bound by the scheduling order"); Ayyash v. Bank Al-Madina, 233 F.R.D. 325, 327 (S.D.N.Y. 2005) (granting plaintiff's motion to conduct expedited discovery prior to Rule 26(f) conference where plaintiff demonstrated good cause and reasonableness). A party may notice a deposition as an audio-visual deposition as a matter of course under the Federal Rules of Civil Procedure and the rules of many states. *See* Fed. R. Civ. P. 30(b)(3)(A); R.I. Super. R. Civ. P. 30(b)(2); Conn. Practice Book § 13-27(f)(2). However, the rules of some states, including Massachusetts, require parties to obtain leave of court or a stipulation from all parties before doing so. *See* Mass. R. Civ. P. 30A(a).

[13] *See* Kolb v. Suffolk County, 109 F.R.D. 125, 127 (E.D.N.Y. 1985); 8A Charles Alan Wright et al., Federal Practice and Procedure § 2142 (3d ed. 2010). However, Fed. R. Civ. P. 32(a)(4)(B)—which allows the deposition of a witness who is more than 100 miles from the place of the hearing/trial or outside the U.S. to be used for any purpose—constitutes an independent exception to the hearsay rule, and, thus, generally renders that witness's testimony admissible regardless of the hearsay rules. *See* Nationwide Life Ins. Co. v. Richards, 541 F.3d 903, 915 (9th Cir. 2008); United States v. Vespe, 868 F.2d 1328, 1339 (3d Cir. 1989).

[14] *See* Fed. R. Evid. 801 & 802; Conn. Code Evid. §§ 8-1 & 8-2; Mass. G. Evid. §§ 801-802; R.I. R. Evid. 801 & 802; Commonwealth v. Purdy, 945 N.E.2d 372, 382 (Mass. 2011). Hearsay evidence cannot be considered on a motion for summary judgment under the Federal Rules of Civil Procedure and the procedural rules of most states. *See* Davila v. Corporacion De Puerto Rico Para La Difusion Publica, 498 F.3d 9, 17 (1st Cir. 2007); 2830 Whitney Ave. Corp. v. Heritage Canal Dev. Assocs., Inc., 636 A.2d 1377, 1380 (Conn. Ct. App. 1994); Locator Services Group, Ltd. v. Treasurer & Receiver Gen., 825 N.E.2d 78, 100 (Mass. 2005); Nichola v. Fiat Motor Co., Inc., 463 A.2d 511, 513-14 (R.I. 1983). However, some decisions from other states, such as New York, have held that hearsay evidence may be considered and used to defeat a motion for summary judgment. *See* Phillips v. Joseph Kantor & Co., 297 N.E.2d 129, 131 (N.Y. 1972); Ratut v. Singh, 718 N.Y.S.2d 135, 137 (N.Y. Civ. Ct. 2000).

in limine and object at trial to the admission of such evidence. In response, plaintiffs may invoke several hearsay exceptions that apply where the declarant is unavailable, including the "former testimony" hearsay exception and the "dying declarations" hearsay exception.[15]

A. *Former Testimony Hearsay Exception*

The "Former Testimony" or "Prior Recorded Testimony" exception to the hearsay rule makes an unavailable witness's prior testimony in the same or different proceeding admissible against a party or its predecessor in interest who had an opportunity and similar motive to develop the testimony at the former hearing.[16] For example, in *In re Johns-Manville/ Asbestosis Cases*,[17] the United States District Court for the Northern District of Illinois held that the former testimony of Johns-Manville's medical director was admissible against all Johns-Manville entities under this exception where Johns-Manville's attorneys cross-examined him on behalf of a Johns-Manville subsidiary at the prior deposition.[18] In order to establish this exception, the party or its predecessor need not have actually cross-examined the witness at the former proceeding, but must have had an "adequate opportunity" to do so.[19]

To meet the "similar motive" requirement, the issues in the former proceeding must have been the same or substantially similar.[20] For instance, in *Lohrmann v. Pittsburgh Corning*

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[15] *See* Fed. R. Civ. P. 804; Conn. Code Evid. § 8-6; Mass. G. Evid. § 804; R.I. R. Evid. 804. The definition of unavailability varies by jurisdiction, but it typically includes circumstances where the declarant is deceased, exempt from testifying due to a privilege, or absent from a hearing where the party offering the testimony is unavailable to procedure his attendance by process or other reasonable means. *See* Fed. R. Evid. 804(a); Conn. Code Evid. § 8-6; Mass. G. Evid. § 804(a); R.I. R. Evid. 804(a); State v. Frye, 438 A.2d 735, 738 (Conn. 1980).

[16] *See* Fed. R. Civ. P. 804(b)(1); Conn. Code Evid. § 8-6(1); Mass. G. Evid. § 804(b)(1); R.I. R. Evid. 804(b)(1).

[17] 93 F.R.D. 853 (N.D. Ill. 1982).

[18] *Id.* at 856. The court explained that the "predecessor in interest" language in the rule has been "given an expansive reading" and requires only that the "parties to the earlier and later actions have a 'sufficient community of interest' or a 'like motive.'" *Id.* (quoting Lloyd v. American Export Lines, Inc., 580 F.2d 1179, 1185-87 (3d Cir. 1978)).

[19] *See* Commonwealth v. Canon, 368 N.E.2d 1181, 1185 (Mass. 1977); Notes to Mass. G. Evid. § 804; DeLuryea v. Winthrop Laboratories, 697 F.2d 222, 227 (8th Cir. 1983); State v. Crump, 683 A.2d 402, 409 (Conn. 1996); *see also* Commonwealth v. Sena, 809 N.E.2d 505, 515 (Mass. 2004) (holding judge properly admitted testimony even though "cross-examination did not cover every detail and every possible avenue of impeachment that counsel would now like to pursue").

[20] *See* United States v. Lombard, 72 F.3d 170, 188 (1st Cir. 1995) (explaining motive must have been similar, though "not necessarily identical"); State v. Parker, 289 A.2d 894, 895 (Conn. 1971) (same); Perez v. D & L Tractor Trailer Sch., 981 A.2d 497, 506-07 (Conn. 2009) (holding testimony inadmissible where former testimony was offered at administrative unemployment hearing, which involved different issues than employment discrimination action).

Corp.,[21] the United States Court of Appeals for the Fourth Circuit held that the similar motive requirement was not met in an asbestos action brought by a shipyard pipefitter where the prior action differed in that it involved a manufacturing plant worker with exposure to raw asbestos.[22] Similarity of issues is required "primarily as a means of ensuring that the party against whom the former testimony is offered had a motive and interest to adequately examine the witness in the former proceeding."[23] Courts have held that the mere "naked opportunity" to cross-examine is "not enough" and that, in addition, there must have been a "real need or incentive to thoroughly cross-examine" at the time of the deposition or hearing.[24]

B. *Dying Declaration Hearsay Exception*

Under the "Dying Declaration" exception (also known as the "Statement Under the Belief of Imminent Death" or "Statement Made Under Belief of Impending Death" exception), an unavailable witness's testimony is admissible where it (1) was made under the belief of "imminent" or "impending" death; and (2) concerned the cause or circumstances surrounding the death.[25] The common law required that the statement be "that of the victim, offered in a prosecution for criminal homicide."[26] Some states—including Massachusetts and Connecticut—still impose this limitation, and thus, the dying declarations exception is unavailable in civil cases in these states.[27] However, the Federal Rules of Evidence and the rules of other states, including Rhode Island, have expanded the applicability of the dying declarations exception to civil cases.[28]

The dying declarations hearsay exception has been applied in wrongful death asbestos actions in Rhode Island based on the reasoning that the plaintiffs were suffering from "end-

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[21] 782 F.2d 1156 (4th Cir. 1986).

[22] *Id.* at 1161.

[23] Conn. Code Evid. § 8-6 cmt. n.1 (citing Atwood v. Atwood, 86 A. 29, 31 (Conn. 1913)).

[24] United States v. Feldman, 761 F.2d 380, 385 (7th Cir. 1985); Schimpf v. Gerald, Inc., 52 F. Supp. 2d 976, 983 (E.D. Wis. 1999).

[25] *See* Fed. R. Evid. 804(b)(2); Conn. Code Evid. § 8-6(2); Mass. G. Evid. § 804(2); R.I. R. Evid. 804(b)(2). The original justification for the dying declaration exception was religious conviction. *See* Fed. R. Civ. P. 804(b)(2) Advisory Committee's Note; *see also* Rick A. Howard, *Hearsay Exceptions—the Dying Declaration: Return to Its Original Application*, 19 Am. J. Trial Advoc. 481, 482-83 (1995) (noting older common law rule required evidence that witness believe in a supreme being). However, this justification has significantly less force today.

[26] *See* Fed. R. Evid. 804(b)(2) Advisory Committee's Note.

[27] *See* Conn. Code Evid. § 8-6(2); Mass. G. Evid. § 804(2); *see also* State v. Mills, 837 A.2d 808, 810 (Conn. App. Ct. 2003), *cert. denied*, 847 A.2d 311, 311 (Conn. 2004); Commonwealth v. Nesbitt, 892 N.E.2d 299, 312 (Mass. 2008).

[28] *See* Fed. R. Evid. 804(b)(2); R.I. R. Evid. 804(b)(2).

stage mesothelioma" and were "facing imminent death" when they made the statements.[29] This reasoning is at odds with other decisions, which have required closer temporal proximity, supporting the argument that the mere fact that the plaintiff was diagnosed with a life-threatening disease is insufficient to establish that his death was "imminent" or "impending."[30] Thus, attempts to invoke the dying declaration hearsay exception in circumstances where the death was not imminent should be challenged.

IV.
Admissibility of Decedent's Testimony Under Dead Man's Statutes

Common law recognized a number of grounds by which a witness was incompetent to testify, including connection with the litigation as a party or interested person, or spouse of a party or interested person.[31] Traditional Dead Man's Statutes preserved "surviving traces" of these common law disqualifications where communications with a deceased person were at issue due to concerns that "such situations are especially ripe for perjurious testimony."[32] These rules have largely been abolished, and under modern law, every person is generally competent to be a witness, except as otherwise provided by statute.[33]

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[29] *See* Brandt v. A.W. Chesterton Co., No. PC 07-4811, 2011 WL 1827790 (R.I. Super. Ct. May 9, 2011) (holding plaintiff's product exposure chart admissible where he swore to its accuracy at his deposition six days before his death); Quackenbos v. Am. Optical Corp., No. PC 04-6504, 2008 WL 914390 (R.I. Super. Ct. Jan. 17, 2008) (holding plaintiff's videotaped deposition from out-of-state action admissible against defendant who was not a party to that action where plaintiff died three months later).

[30] *See* Shepard v. United States, 290 U.S. 96, 100 (1933) (holding "[f]ear or even belief that illness will end in death" is insufficient and that the declarant "must have spoken with the consciousness of a swift and certain doom."); Garza v. Delta Tau Delta Fraternity Nat'l, 948 So. 2d 84, 95 (La. 2006) (same); *see also* Trascher v. Territo, 89 So. 3d 357, 368 (La. 2012) (holding exception not met where decedent's doctor attested that he had less than six months to live due to asbestosis); *cf.* State v. Pailin, 576 A.2d 1384, 1386-87 (R.I. 1990) (holding victim's statements that he was "dying," that defendant "stabbed" him and that his "guts were hanging out" made while he was being transported to nearby hospital were admissible where defendant stabbed victim and victim died two weeks later).

[31] *See* Fed. R. Civ. P. 601 Advisory Committee's Note; Litif v. United States, 682 F. Supp. 2d 60, 65 (D. Mass. 2010), *aff'd*, 670 F.3d 39 (1st Cir. 2012).

[32] *Litif*, 682 F. Supp. 2d at 66; Fed. R. Evid. 601 Advisory Committee's Note. Traditional Dead Man's statutes are still effective in a minority of states. *See* Ariz. Rev. Stat. § 12-2251 (2010); Md. Code Ann. § 9-116 (LexisNexis 2006); Ten. Code. Ann. § 24-1-203 (1997).

[33] *See* Fed. R. Evid. 601; Mass. Gen. Laws Ann. ch. 233, § 20; Mass. G. Evid. § 601.

While the Dead Man's statutes effective today vary significantly by jurisdiction, some of them—including those in Massachusetts, Connecticut, and Rhode Island—provide a hearsay exception allowing for the admissibility of a decedent's statements.[34] The Dead Man's Statutes are "confusing to lawyers, judges, [and] scholars . . . as '[t]he mere mention of the [Dead Man's] statute is enough to make most practitioners shudder.'"[35] A discussion of these statutes is below.

A. *The Massachusetts Dead Man's Statute*

Massachusetts General Laws chapter 233, section 65—the Massachusetts Dead Man's Statute—provides that "a declaration of a deceased person shall not be inadmissible in evidence as hearsay . . . if the court finds that it was made in good faith and upon the personal knowledge of the declarant."[36] The statute is not available to a party "attempting to perpetuate testimony of a person who is expected to die shortly."[37] Further, the proponent of the evidence has the burden of establishing the foundational requirements of good faith and personal knowledge.[38]

In *Barbosa v. Hopper Feeds, Inc.*,[39] the Massachusetts Supreme Judicial Court held that a statement of the plaintiff's co-worker in a product liability action concerning a warning he gave to the plaintiff was not made in good faith, and was thus inadmissible, where it was made after the plaintiff was injured at a time when the co-worker had "an incentive to avoid blame for the accident."[40] A defendant may rely on this decision to support the argument that

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[34] Although these statutes do not take the form of a traditional Dead Man's Statute, they are often referred to as "Dead Man's Statutes." Roy v. Star Chopper Co., Inc., 584 F.2d 1124, 1134 (1st Cir. 1978) ; Swartz v. Schering-Plough Corp., 53 F. Supp. 2d 95, 103 (D. Mass. 1999); Rosales v. Lupien, 717 A.2d 821, 823 (Conn. App. Ct. 1998). California and New Hampshire have similar statutes. *See* Cal. Evid. Code § 1227 (providing hearsay exception for statement of deceased in wrongful death action); Cal. Evid. Code § 1261 (providing hearsay exception for statement of deceased in action against his estate); N.H. R. Evid. 804(b)(5) (providing hearsay exception for statement of deceased).

[35] Ed Wallis, *An Outdated Form of Evidentiary Law: A Survey of Dead Man's Statutes and A Proposal for Change*, 53 Clev. St. L. Rev. 75, 76 (2005) (quoting Michael D. Simon & William T. Hennessey, *Estates, Trusts, and Guardianships: 1998 Survey of Florida Law*, 23 Nova. L. Rev. 119, 145 (1998)).

[36] Mass. Gen. Laws Ann. ch. 233, § 65; *see also* Mass. G. Evid. § 804(b)(5)(A). A separate Massachusetts statute provides for the admissibility of a deceased party's answers to interrogatories in actions by a representative of the deceased party where those answers were made upon personal knowledge. *See* Mass. Gen. Laws Ann. ch. 233, § 65A; Mass. G. Evid. § 804(b)(5)(B).

[37] Notes to Mass. G. Evid. § 804(b)(5)(A) (citing Anselmo v. Reback, 513 N.E.2d 1270, 1272 (Mass. 1987)).

[38] *See* Notes to Mass. G. Evid. § 804(b)(5)(A) (citing Kelley v. Jordan Marsh Co., 179 N.E. 299, 302 (Mass. 1932)).

[39] 537 N.E.2d 99 (Mass. 1989).

[40] *Id.* at 105.

a decedent's testimony in a wrongful death case implicating that defendant was not made in good faith because the decedent had an incentive to fabricate such testimony. However, the court has also held that a statement made in anticipation of litigation does not "inherently" fail to meet the requirement of good faith under the statute.[41]

In *Anselmo v. Reback,*[42] the Massachusetts Supreme Judicial Court concluded that a videotaped statement of the decedent, which was made without notice to known potential defendants and before suit was filed, was inadmissible because the defendants had no opportunity to cross-examine the decedent before her death.[43] The plaintiffs in *Anselmo* had filed a pre-trial motion for preliminary findings that the decedent's statement, which described her medical and personal history, her treatment, and the impact of her medical condition (stomach cancer), was admissible under Massachusetts General Laws chapter 233, section 65, in a medical malpractice case for wrongful death. The superior court judge denied the motion, reasoning that the defendants had no opportunity for cross-examination and that admitting the statement into evidence would be unfairly prejudicial.[44]

The Supreme Judicial Court affirmed, holding that Massachusetts General Laws chapter 233, section 65 does not admit the testimony of a decedent where the "affected parties were unfairly denied an opportunity to cross-examine," given that the statute "only removes the hearsay rule as an obstacle to the admissibility of the declaration of a deceased person" and "does not purport to remove other obstacles grounded in fairness."[45] Thus, *Anselmo* requires the opportunity for cross-examination as a prerequisite to the admissibility of a decedent's testimony under Massachusetts General Laws chapter 233, section 65.

However, in *Rogers v. ACandS, Inc.*,[46] a Massachusetts Superior Court judge concluded that because *Anselmo* involved a pre-suit statement intended to perpetuate testimony, it was inapplicable where the defendants noticed the decedent's discovery deposition in a wrongful death asbestos case and lead defense counsel (but not counsel for every defendant) had the opportunity to examine him.[47] Several defendants had moved for summary judgment, arguing that the decedent's testimony was inadmissible because they did not have the opportunity to cross-examine the decedent before his death, but the court denied the motions,

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[41] Shine v. Vega, 709 N.E.2d 58, 65-66 (Mass. 1999) (concluding trial judge improperly excluded plaintiff's undated notes concerning her treatment at the defendant hospital, which were created in preparation for a meeting with her attorney, in wrongful death/medical malpractice action).

[42] 513 N.E.2d 1270 (Mass. 1987).

[43] *See id.* at 1270-71.

[44] *Id.* at 1270.

[45] *Id.* at 1272; *see also* Fahey v. R.J. Reynolds Tobacco Co., 3 Mass. L. Rptr. 27, 1995 WL 809581, at *3, *6 (Mass. Supp. June 12, 1995) (striking videotaped statement of plaintiff made shortly before his death without notice to the defendants). In *Anselmo*, the SJC also emphasized that the plaintiff failed to follow the proper procedure for perpetuating a party's testimony before suit is filed under Mass. R. Civ. P. 27(a) as well as Mass. Gen. Laws ch. 233, §§ 46 and 47. *See Anselmo*, 513 N.E.2d at 1271-72.

[46] No. 00-4477 (Mass. Super. Ct. Sept. 27, 2002).

[47] *See id.* at 3-4.

holding that the testimony was admissible under Massachusetts General Laws chapter 233, section 65, as it was made in good faith and based on personal knowledge.[48]

The *Rogers* decision overlooked the importance that cross-examination has held in the law for centuries. The right of cross-examination is one of the primary purposes underlying the hearsay rule today and a "vital feature" of our civil justice system.[49] "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[50] Where the "opportunity for cross-examination is absent, the testimony must be excluded as inadmissible hearsay."[51]

B. *The Connecticut Dead Man's Statute*

The Connecticut Dead Man's Statute provides that declarations and memoranda of deceased persons are admissible in actions by or against representatives of the deceased person if "relevant to the matter in issue."[52] There are two prerequisites for the statute to apply: (1) the statements must be "relevant to the matter in issue"; and (2) the action must be brought "by or against the representatives of the deceased persons."[53] However, Connecticut General Statutes section 52-172 "is not a carte blanche for the admission of statements by a decedent in an action brought by or against a representative of the decedent."[54] This is "particularly true where its admission would violate another well-established rule of evidence."[55] The trial court has broad discretion in ruling on the admissibility of the evidence, and such a ruling will be overturned only for a clear abuse of discretion.[56]

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[48] *See id.* at 4-5.

[49] *See* Fed. R. Evid. Intro. Advisory Notes to Art. VIII; *see also* Trascher v. Territo, 89 So. 3d 357, 362 (La. 2012) ("[O]ne of the basic reasons for excluding hearsay testimony, is that "there is no opportunity for cross-examination.") (internal citation and quotation omitted).

[50] Daubert v. Merrell Dow Pharm, Inc., 509 U.S. 579, 596 (1993). Prohibiting a party's right to cross-examine witnesses "can violate that individual's constitutional rights." Schwab v. Boston Mun. Court, No. 06–0964, 2007 WL 2204838, at *3 (Mass. Super. Ct. Apr. 26, 2007).

[51] Young v. U.S. Postal Serv., No. 86 CIV. 9492 (RLC), 1988 WL 126906, at *3 (S.D.N.Y. Nov. 23, 1988); *see also* Cury v. Philip Morris USA, No. 93 Civ. 2395 (CSH), 1995 WL 594856, at *7 (S.D.N.Y. Oct. 6, 1995) (excluding witness's deposition testimony where party did not have "meaningful opportunity to cross-examine him on certain crucial aspects of this case"); Duca v. Raymark Indus., Civ. A. No. 84-0587, 1986 WL 10539, at *3 (E.D. Pa. Sept. 22, 1986) (holding deposition testimony from prior suit inadmissible in asbestos case where defendant had no opportunity to cross-examine witness).

[52] Conn. Gen. Stat. Ann. § 52-172.

[53] Dinan v. Marchand, 903 A.2d 201, 213 (Conn. 2006).

[54] Kalas v. Cook, 800 A.2d 553, 560 (Conn. App. Ct. 2002).

[55] Rosales v. Lupien, 717 A.2d 821, 822 (Conn. App. Ct. 1998); *see also* Cormier v. 3M Corp., No. CV-04-0409253, 2005 WL 407641, at *2 (Conn. Super. Ct. Jan. 12, 2005) (excluding decedent's hearsay statements for lack of personal knowledge in asbestos case and granting defendant's motion for summary judgment).

[56] *See Dinan*, 903 A.2d at 208.

Plaintiffs in wrongful death or negligence cases may rely on Connecticut General Statutes section 52-172 in an attempt to introduce testimony from the decedent.[57] Although there is little case law on the issue, defendants should object where they have not had the opportunity to cross-examine the decedent regarding this testimony.

C. *The Rhode Island Dead Man's Statute (Rhode Island Rules of Evidence Rule 804(c))*

The Rhode Island Dead Man's Statute, Rule 804(c) of the Rhode Island Rules of Evidence, provides that a declaration of a deceased person is admissible non-hearsay if the court finds that it was "made in good faith before the commencement of the action and upon the personal knowledge of the declarant."[58] This statute differs from the Massachusetts and Connecticut Dead Man's Statutes in that it expressly provides that it applies where the declaration was made before commencement of the action; thus, cross-examination is not a prerequisite to the admissibility of such statements under this statute. In fact, the testimony of a decedent in a wrongful death asbestos case has been deemed admissible under Rule 804(c), even though the defendants did not have the opportunity for cross-examination, where the decedent was found to have testified in good faith and on personal knowledge before the commencement of the action (in a predecessor action).[59]

V.
The Applicability of Dead Man's Statutes in Federal Court

The issue of whether a state's Dead Man's Statute applies in federal court is unresolved and may have significant strategic implications for defendants in wrongful death or other civil matters where the case is removable to federal court. Although the forum state's law will govern issues of substantive law in federal court, the Federal Rules of Civil Procedure and Federal Rules of Evidence generally apply in all cases in federal court.[60] There are limited

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[57] *See* Saldibar v. A.O. Smith Corp., CV-09-5024498-S, 2011 WL 5084317, at *2-3 (Conn. Super. Ct. Oct. 13, 2011).

[58] R.I. R. Evid. 804(c); *see also* State v. Ramirez, 936 A.2d 1254, 1266 (R.I. 2007). This statute was formerly found at Rhode Island General Laws § 9-19-11, which has since been repealed. The Rhode Island Supreme Court has explained that, unlike the dying declaration hearsay exception, Rule 804(c) "applies in all criminal and civil cases, and is not limited to the cause or circumstances of the declarant's impending death." State v. Feliciano, 901 A.2d 631, 639 n.7 (R.I. 2006) (internal citation and quotations omitted).

[59] *See* Quackenbos v. Am. Optical Corp., No. PC 04-6504, 2008 WL 914390 (R.I. Super. Ct. Jan. 17, 2008).

[60] *See* King v. E.I. DuPont De Nemours & Co., 741 F. Supp. 2d 699, 701 (E.D. Pa. 2010); *see also* Downey v. Bob's Disc. Furniture Holdings, Inc., 633 F.3d 1, 8 (1st Cir. 2011). Although it is often stated that the federal rules of procedure and evidence only apply in federal diversity cases, these rules generally apply in all federal cases. *See* Ricciardi v. Children's Hosp. Med. Ctr., 811 F.2d 18, 21 (1st Cir. 1987) (explaining Federal Rules of Evidence "apply to all cases in the district courts").

circumstances where state evidentiary law applies in federal court; namely, Federal Rule of Evidence 601 provides for the general application of state law regarding competency of witnesses,[61] while Rule 501 generally applies state privilege law.[62]

There is no federal Dead Man's Statute, and the courts are split as to whether state Dead Man's Statutes apply in federal court. Courts and legal scholars have noted that the question of the applicability of a state Dead Man's Statute in federal court is a complicated one for which there is no easy answer: "Some scholars have said that dead man's statutes are substance, others have said that they are procedure, while still others have put them in the 'twilight zone.'"[63]

Many courts have held that Dead Man's Statutes governing witness competency, which typically bar the testimony of decedents in certain circumstances, apply in federal court pursuant to Federal Rule of Civil Procedure 601.[64] However, whether Dead Man's statutes creating hearsay exceptions and allowing the admission of a decedent's testimony apply in federal court is less clear. Some decisions have concluded that the Massachusetts and Connecticut Dead Man's Statutes apply—and thus, admit a decedent's testimony—in federal court based on the reasoning that they relate to witness competency. For example, in *Larsen v. Sunrise Senior Living Management, Inc.*,[65] the United States District Court for the District of Connecticut held that a decedent's statements were admissible against the defendant assisted living facility under the Connecticut Dead Man's Statute in a negligence action in federal court.[66] The defendant moved in limine to preclude the plaintiff from testifying as to statements that the decedent, her mother, had allegedly made to her regarding the facility's excessive delay in responding to a fall the decedent had at the facility. The facility argued that these statements were hearsay under the Federal Rules of Evidence.[67]

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[61] *See* Fed. R. Evid. 601 (providing "state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision" in civil cases). Federal competency law governs only where the applicable substantive law is derived from a federal statute, such as in suits brought under the Internal Revenue Code or federal laws concerning antitrust, securities regulation, labor relations, and civil rights. *See* 27 Charles Alan Wright et al., Federal Practice and Procedure § 6007 (2d ed. 2007).

[62] *See* Fed. R. Evid. 501 (providing "state law governs privilege regarding a claim or defense for which state law supplies the rule of decision" in civil cases).

[63] Maltas v. Maltas, 197 F. Supp. 2d 409, 424 (D. Md. 2002) (quoting Robert G. Lawson, *Modifying the Kentucky Rules of Evidence–A Separation of Powers Issue*, 88 Ky. L.J. 525, 574 (2000)), *rev'd on other grounds*, 65 F. Appx. 917 (4th Cir. 2003). Although prominent commentators have contended that state Dead Man's Statutes providing hearsay exceptions to state hearsay rules apply in federal court because they are state reforms intended to protect decedent's estates, others have noted that this argument "extends both the language and policy of Rule 601 beyond reasonable limits." Wright, *supra* note 63, § 6006.

[64] *See* Rosenfeld v. Basquiat, 78 F.3d 84, 89-90 (2d Cir. 1996); Estate of Genecin *ex rel*. Genecin v. Genecin, 363 F. Supp. 2d 306, 313-14 (D. Conn. 2005); Clark v. Meyer, 188 F. Supp. 2d 416, 421-22 (S.D.N.Y. 2002); Foucher v. First Vt. Bank & Trust Co., 821 F. Supp. 916, 927-28 (D. Vt. 1993).

[65] 7:08-CV-455 (WWE), 2010 WL 4340468 (D. Conn. Oct. 20, 2010).

[66] *See id.* at *1.

[67] *See Larsen*, 2010 WL 4340468, at *1.

The *Larsen* court held that the statements were admissible, reasoning that "[t]he Dead Man's Statute is a rule of substantive law and not purely an evidentiary rule," and citing two decisions involving Dead Man's Statutes of other states, New York and Maryland.[68] However, the court disregarded the fact that both statutes relate to witness competency and bar witness testimony in certain circumstances;[69] in contrast, "the Connecticut Dead Man's Statute does not bar testimony but rather is an exception to state hearsay rules that provides for the admission of statements of deceased persons under certain circumstances."[70]

Similarly, in *Litif v. United States*,[71] the United States District Court for the District of Massachusetts admitted the statements of two decedents under the Massachusetts Dead Man's statute, concluding that although the statute "is couched in terms of admissibility and hearsay, its requirements for personal knowledge and good faith ought be read as addressing competency," an issue of state substantive law.[72] In *Litif*, the plaintiffs brought claims under the Federal Tort Claims Act against the United States stemming from the murders of several individuals due to the FBI's protection of a group of murderers in order to use them as informants in a criminal investigation of the Mafia.[73] The court noted that statements of an informant who had been murdered and a deceased federal prosecutor, which were offered by the plaintiffs, presented "a thorny problem involving both federalism and evidence law."[74] After holding that the statements were admissible, the court ultimately found the United States liable for $2.7 million in damages based on the FBI's breach of its duty of care to the victims.[75]

The *Litif* court reasoned that while the Massachusetts Dead Man's statute has been "classified and referred to" as a hearsay exception in the Massachusetts Guide to Evidence and other sources, "[n]one of these sources have the force of law or the authority of the decisions of the Massachusetts Supreme Judicial Court."[76] However, the Supreme Judicial Court has, in fact, ruled that the Massachusetts Dead Man's Statute creates an "exception

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[68] *See id.* (citing *Rosenfeld*, 78, F.3d at 88; Estate of Genecin, 363 F.Supp.2d at 313).

[69] *See* N.Y. C.P.L.R. 4519 (Consol. 1999); Md. Code Ann. § 9-116.

[70] McMunn v. Pirelli Tire, LLC., 161 F. Supp. 2d 97, 127 n.153 (D. Conn. 2001); *see also* Rosales v. Lupien, 717 A.2d 821, 822 (Conn. App. Ct. 1998) (explaining Connecticut Dead Man's Statute "creates an exception to the hearsay rule").

[71] 682 F. Supp. 2d 60 (D. Mass. 2010), *aff'd*, 670 F.3d 39 (1st Cir. 2012).

[72] *Id.* at 66.

[73] *See Litif*, 682 F. Supp. 2d at 63-64.

[74] *Id.* at 65.

[75] *Id.* at 86.

[76] *Id.* at 66 n.5.

to the hearsay rule."[77] Recognizing this problem, the First Circuit affirmed the *Litif* decision on appeal, but it noted that the statements were inadmissible hearsay, relying on other evidence to support the affirmance.[78] The First Circuit explained that "application of Rule 601—the only invoked basis for importing state competency law—cannot be read to trump federal hearsay rules in a federal proceeding, whether the substantive claim rests on federal or state law."[79]

Other courts have concluded that Dead Man's Statutes creating hearsay exceptions to state hearsay rules, including those of Massachusetts and Connecticut, are inapplicable in federal court.[80] For instance, in *Donovan v. Sears Roebuck & Co.,*[81] a product liability action, the United States District Court for the District of Massachusetts, in a well-reasoned decision, rejected the plaintiff's argument that the Massachusetts Dead Man's Statute applied in federal court, holding that the statute "is not a rule of substantive policy, but a rule of admissibility."[82]

The plaintiff in *Donovan*, the administrator of the decedent's estate, claimed that the decedent was injured when the defective "scissor" footrest mechanism in a reclining chair locked on the decedent's leg. The only evidence supporting the plaintiff's claim was the

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[77] Harrison v. Loyal Protective Life Ins. Co., 396 N.E.2d 987, 991 (Mass. 1979); *see also* Mass. Gen. Laws Ann. ch. 233, § 65 (providing deceased's declarations "shall not be inadmissible in evidence as hearsay" when requirements of statute met); Mass. G. Evid. § 804 & Notes; Anselmo v. Reback, 513 N.E.2d 1270, 1272 (Mass. 1987) (noting statute "only removes the hearsay rule as an obstacle to the admissibility of the declaration of a deceased person"). Moreover, the Massachusetts Guide to Evidence, first published in 2009, has been endorsed, recommended, and cited by the SJC with approval. *See* Mass. G. Evid., Statement from the Supreme Judicial Court and Introduction (noting SJC recommends and encourages use of Guide); Commonwealth v. Patton, 934 N.E.2d 236, 251 n.13 (Mass. 2010); Commonwealth v. Arana, 901 N.E.2d 99, 104 n.11 (Mass. 2009).

[78] *See* Litif v. United States, 670 F.3d 39, 46-47 (1st Cir. 2012) (explaining district judge was "[l]ikely aware" of doubts regarding applicability of the statute and "did not significantly rely" on the decedent's testimony in his bench trial findings, which were "amply supported by other evidence").

[79] *Id.* at 46-47. "'If a Federal Rule of Evidence covers a disputed point of evidence, the Rule is to be followed, even in diversity cases, and state law is pertinent only if and to the extent the applicable Evidence Rule makes it so.'" Fitzgerald v. Expressway Sewerage Const., Inc., 177 F.3d 71, 74 (1st Cir. 1999) (quoting 27 Charles Alan Wright et al., Federal Practice and Procedure § 4512 (2d ed. 2007)).

[80] *See* Maltas v. Maltas, 197 F. Supp. 2d 409, 425 (D. Md. 2002) (explaining Connecticut Dead Man's Statute inapplicable in federal court because it "creates an exception to the state hearsay rule" and "is not a rule of witness competency at all"), *rev'd on other grounds*, 65 F. Appx. 917 (4th Cir. 2003); Donovan v. Sears Roebuck & Co., 849 F. Supp. 86, 87-88 (D. Mass. 1994) (reaching same conclusion with respect to Massachusetts Dead Man's Statute); Delta Educ., Inc. v. Langlois, 719 F. Supp. 42, 46 (D.N.H. 1989) (holding New Hampshire Dead Man's Statute inapplicable in federal court).

[81] 849 F. Supp. 86 (D. Mass. 1994).

[82] *Id.* at 87. The court distinguished Dead Man's Statutes that operate to exclude certain statements of deceased persons, which relate to competency. *Id.* at 88.

testimony of the plaintiff and another witness, both of whom planned to testify regarding the decedent's account of how the accident occurred. The defendants moved in limine to exclude this testimony on the ground that it was inadmissible hearsay under the Federal Rules of Evidence.[83]

Although the plaintiff argued that the testimony was admissible under the Massachusetts Dead Man's Statute, the court disagreed. The court explained that the Massachusetts Dead Man's Statute "does not relate to competency"; and if this hearsay exception were deemed "substantive," then all state hearsay exceptions would apply in federal court, which would be contrary to Congress's intent.[84] Accordingly, where parties invoke Dead Man's Statutes creating hearsay exceptions in federal court, such attempts should be met with resistance.

VI.
Minimizing the Impact of the Decedent's Testimony on the Jury

The introduction of a decedent's testimony in a wrongful death case, particularly videotaped deposition testimony directly implicating the defendant or portraying the decedent shortly before his death, can have an undeniably powerful and potentially devastating impact on the defendant. As such, where defendants are unable to preclude such testimony, they must be prepared to minimize its effect on the jury.

Defense counsel's preparation for videotaped trial preservation depositions is critical. The plaintiff's discovery responses, including answers to interrogatories and responses to requests for production, along with accompanying documents, must be closely reviewed well in advance of such depositions. Medical records must also be analyzed and fact investigation regarding the witness's background conducted, with an eye towards impeaching the witness's testimony.

When armed with only the medical records or other information the plaintiff chose to disclose, it is difficult to prepare an effective cross-examination. Where the plaintiff has failed to fully comply with discovery obligations, a discovery conference should be held and a motion to compel served promptly. If plaintiff's counsel insists on proceeding with a videotaped trial preservation deposition despite discovery non-compliance, defense counsel should seek a protective order preventing the deposition from going forward without adequate investigation and preparation. The use of exhibits should be carefully planned before the deposition. Because the videotaped deposition will be presented before the jury at trial, defense counsel should take extra care to act civilly and professionally, presenting themselves in the best possible light.

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[83] *Id.* at 86-87.

[84] *Id.* at 87-88. The validity of the Federal Rules of Evidence, which were written and enacted directly by Congress, in relation to state law and the Erie doctrine "stands on even firmer ground than that of the Rules of Civil Procedure," which were merely approved by Congress. Rioux v. Daniel Int'l Corp., 582 F. Supp. 620, 624-25 (D. Me. 1984); *see also* McInnis v. A.M.F., Inc., 765 F.2d 240, 245 n.5 (1st Cir. 1985).

To develop an effective trial strategy, defense counsel must also consider the jurors' perceptions of the decedent and his family. Jurors filter evidence through their own life experiences, basic attitudes toward the world and corporations, beliefs about personal responsibility, and their general personality makeup. Fundamental attitudes, firmly entrenched beliefs, customs, and social norms relating to death and dying undoubtedly influence juror decision-making in wrongful death cases. Jurors are often guided more by these factors, rather than by a careful understanding or application of relevant law.

The death of loved ones is very uncomfortable for most. Perhaps as a coping mechanism in response to our uneasiness about the perceived injustice and arbitrariness of death, we tend to instill a sense of meaning in the lives of others who have died around us. This tendency results in the glorification of the deceased; hence, the aphorism that emerged as early as 600 B.C. that has carried into our social norms today: "de mortuis nil nisi bonum" or "don't badmouth a dead man." The tendency to give the deceased the benefit of the doubt may lead jurors in wrongful death cases to be less skeptical of a decedent's testimony and ignore indications of undesirable motives, viewing the testimony as more credible than they otherwise would.

Plaintiffs' attorneys seek to take advantage of these driving forces by showing the decedent on video and by displaying photographs. Regardless of the source, emphasizing observations, interactions, and documentation proximal to the decedent's death serve to humanize him and to connect his emotionally-charged "last moments" to the situation and events in dispute. Defendants should expect the decedent's own testimony on video to be the most potent.

It is wise to develop a strategic approach to reduce the impact of the decedent's testimony. Body language, proximity to the witness, and voice (including pitch, rate, volume, and tone of speech) used when arguing and examining witnesses (especially the deposition of the decedent plaintiff) should convey respect, sincerity, and authenticity in the eyes of the jury. Defense counsel should be sure to communicate compassion for the decedent and his family. Highlighting what the jury perceives to be minor inconsistencies in testimony may be interpreted as bullying the witness. Negative information regarding the decedent, such as his smoking history, alcohol use, or other lifestyle choices, should be elicited in a matter-of-fact and non-threatening manner. Further, jurors may be critical of arguments and cross-examination that seem designed only to support the defendant's agenda, particularly where they are not supported by the evidence.

VII.
Conclusion

The question of whether a decedent's testimony is admissible in wrongful death and other tort cases, particularly where the opposing party had no meaningful opportunity for cross-examination, is a complex one that requires an examination of a variety of rules of evidence and procedure as well as relevant case law. The outcome of the analysis varies depending on the jurisdiction, the judge, and the facts of the case, but the admissibility of the

testimony undoubtedly has a significant impact on the case, especially when the testimony implicates the defendant or creates sympathy for the plaintiff.

In the event that the testimony is deemed admissible, counsel must carefully develop a deposition and trial strategy, with due consideration to the jurors' perceptions of the decedent and his family. Planning, preparation, and the exercise of judgment are crucial in effectively minimizing the emotional impact of the decedent's testimony on the jury.

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