ILLINOIS STATE BAR ASSOCIATION

BENCH & BAR The newsletter of the ISBA's Bench & Bar Section Council

May 2012, vol. 42, no. 5

Deposition advocacy: A step too far?

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What is a lawyer to do when a witness initially responds to a question in a manner which has serious consequences not only in the pending civil case, but potentially could identify criminal conduct? What are the limits of an attorney's attempts to stifle such a witness' testimony and coach her how to respond to a pending question? And what sanctions should be assessed against both the attorney and witness if they cross the line from advocacy to a violation of the court rules?

U.S. Magistrate Judge Jeffrey N. Cole was faced with this troubling scenario as reported in the recent federal decision of *LM Ins. Co. v. ACEO, Inc.*, 275 F.R.D. 490 (N.D. Ill, July 21, 2011). Natalie Finke, an employee of a corporate defendant was represented at her deposition by the company's attorney. The witness testified during her deposition that "she thought that 'an individual broker' received 'return' (i.e., kickback) to which he was not entitled, and she 'definitely' thought that there may have been 'improprieties to not disclose.'" Ms. Finke testified that the kickback would have come from "one … individual broker" that Mr. Taylor -- the apparent recipient of the kickback -- was assigned to. When asked to name the person to whom she had referred, she said "I don't want to use the name. I can't do that." At that point, defendants' counsel objected that the question called for speculation "unless she has, you know, clear information on this." When the witness was again asked, counsel halted the deposition and took his witness out of the room for approximately one-half hour. Upon returning, the witness was again asked the question and counsel asked the examiner to "suspend this line of questioning regarding this issue until later in the deposition … so that I can speak to my client and his personal counsel regarding testimony thus far!" Counsel for the plaintiff said that he intended on asking the question again.

Before he could even do so, the witness chimed in, "I feel I was speculating, I don't feel I was -- I don't feel what I said was correct." She then volunteered, "I was speculating"... "I mean, I don't have any hard evidence." She then repeated that same line. When asked again for the name of the person to whom she had referred in her earlier answers, she said "I don't have any hard evidence, and I misspoke." She conceded that she had "a few brokers in mind," but she had "speculated. I saw no hard evidence of anything." Ms. Finke then refused to answer.

Id. at 491. [Citations omitted]

In his decision, Magistrate Cole was censorious of what he perceived to be violations of the Federal Rules limiting an attorney from coaching a witness. He ordered the aborted deposition to resume in his courtroom, and ordered the witness to also appear for an *in camera* interview with the Court. Magistrate Cole also ruled that there was no attorney-client privilege to protect the conversations about why she changed her testimony during the deposition, as the crime-fraud exception applied. Finally, the Court noted that the attorney and firm who represented the witness's employer, and who was tendering the witness, may be conflicted out from representing her at that interview. Magistrate Cole felt that counsel had violated the Federal Rules by each of his actions: the improper coaching objection, the one-half hour break while a question was pending without invoking any of the allowed reasons to halt a deposition, the instruction not to answer without asserting a privilege, and the instructions which the witness was given by counsel outside the deposition. *Id* at 491-92.

Would such conduct violate Illinois Rules? If so, what is a judge to do? Should the distinction between discovery and evidence depositions matter relative to assessing improper conduct? If a judge is presented with a request for the

admission of a discovery deposition in which conduct occurred which would be prohibited at trial, such as taking a break while a question was pending, or lengthy breaks with counsel followed by variances in testimony, what is the judge to do?

The Federal Rules of Civil Procedure contain some significant differences from the Illinois Supreme Court Rules relative to depositions. In particular, F.R.Civ.P. 30(c)(1) provides that: " the examination and cross-examination of a deponent proceed as they would at trial...", whereas such a provision is missing from the Illinois Rules as to discovery depositions (Sup. Ct. R. 206(c)(1)). The Illinois Supreme Court Rule pertinent to evidence depositions provides that "in an evidence deposition the examination and cross-examination shall be the same as though the deponent were testifying at the trial." Sup. Ct. R. 206 (c)(2).

The Federal Rules of Civil Procedure also contain restrictions on objections: "An objection must be stated concisely in a nonargumentative and nonsuggestive manner..." (F. R. Civ. P. 30(c)(2). The Illinois Rules provide: "Objections at depositions shall be concise, stating the exact legal nature of the objection." (Sup. Ct. R. 206(c)(3)). The comments to the Illinois Rules specifically state that subparagraph 3 was added "to eliminate speaking objections." *Comment paragraph (c).*

It stands to reason then, that the coaching during a pending question and the attorney's comments outside the deposition which cause a witness to change testimony, are also improper in an Illinois state court case, regardless of whether it arises in an evidence or discovery deposition. Interestingly, although the long attorney-witness conference might raise eyebrows, the rules do not specifically prohibit this conduct in a discovery deposition. In fact, one pretrial practice treatise, suggests that counsel, in preparing the witness for a deposition, advise the deponent "that he or she may consult privately with you during breaks or recesses, but discourage private conferences during the questioning itself. If the examiner feels that you are telling the witness what to say, he or she may terminate the deposition and seek sanctions....Stress, however, that it is better to seek a private conference while the clock is running than to give testimony that is untruthful, inaccurate, verbose, or excessive. Thus, tell your witness that he or she may consult with you while a question is pending, but doing so will allow the questioning attorney to comment about the need to consult with counsel to determine what to say. In addition, make sure the witness understands that the court may allow evidence or statements, discussion, objections or other occurrences that reflect upon the credibility of the witness to be introduced at trial." Judge Jennifer Duncan-Brice, Timothy W. Kelly & Kevin G. Owens, *Illinois Pretrial Practice, vol. 2, chapter 23 (Rev. 7, James Publishing 11/10)* at Sec. 23:355.

Nevertheless, in a case remotely related to this issue, the 2nd District found a trial court order prohibiting a party/witness from consulting with counsel during a weekend break in trial testimony did not require reversal. *Hill v. Ben Franklin Savings & Loan Ass'n.*, 177 Ill.App.3d 51 (2nd Dist. 1988). Unlike criminal defendants, civil litigants do not have an automatic right to counsel and hence limiting their right to speak with counsel is not inherently reversible error nor violative of the 6th Amendment right to counsel provisions. *See*, *Stocker Hinge Manufacturing Co. v. Damel Industries, Inc.*, 61 Ill.App.3d 636 (1st Dist., 1978).

The only two cases interpreting the distinction between evidence and discovery depositions contained in Illinois Supreme Court Rule 206(c)(2) have both focused on the issue of whether the cross-examination exceeded the scope of the direct examination. The earlier case relied on the Rules to hold that the portions of the cross-examination in an evidence deposition which went beyond the scope of the direct were not admissible and stated "in an evidence deposition the examination and cross-examination shall be the same as though the deponent were testifying at trial. (103 Ill.2d R. 206(c)(2).) Cross-examination is limited to subjects covered in direct examination, because other subjects would not be relevant." *Gust K. Newberg, Inc. v. Illinois State Toll Highway Authority*, 153 Ill.App.3d 918 (2nd Dist. 1987). More recently, the 4th District reiterated the fact that evidence depositions are to be conducted as if the witness is on the stand at a trial, and again limited the admissibility of cross examination to the scope of direct examination. *Adams v. Sarah Bush Lincoln Health Center*, 369 Ill.App.3d 988 (4th Dist. 2007). There was no discussion by the court in either case about whether its ruling would have differed if the deposition was a discovery deposition being used rather than an evidence deposition. There appears to be no Illinois cases on the issue of whether other conduct which would be impermissible in an evidence deposition would be permissible in a discovery deposition.

In no event, whether at trial or during either a discovery or evidence deposition, may an attorney "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent," including suborning perjury by allowing a client to testify falsely. *Illinois Rules of Professional Conduct of 2010, Rule 1.2(d).* Such conduct by an attorney is clearly a step too far. ■

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