EMPLOYMENT LAW REPORT

Effectively Handling Improper Deposition Tactics In Employment and Civil Rights Cases

By Justin D. Cummins

INTRODUCTION

Given the frequency with which federal and state courts grant dispositive motions filed by employers and other civil rights defendants, much of the action in such cases occurs during depositions and related pre-trial procedures. Perhaps not surprisingly, then, some defense counsel pursue overly aggressive tactics in depositions.

Plaintiff counsel should be prepared to handle overreaching and even abusive conduct as efficiently as possible to avoid costly side shows that divert attention and resources from the merits of cases. This article outlines three ways that defense counsel may attempt to misuse the deposition process and how plaintiff counsel can best respond to stay on track in prosecuting the case at hand.

I. PRECLUDING DISCOVERY INTO THE CONTENT OF DISCUSSIONS BETWEEN A PLAINTIFF AND PLAINTIFF COUNSEL DURING DEPOSITION BREAKS

Some depositions become contentious because, among other reasons, defense counsel believe a deponent can be pushed into giving testimony that is harmful to a plaintiff's case. Under such circumstances, some defense counsel may ask the witness under oath for the substance of the conversations with plaintiff counsel during a given recess in the deposition.

In this context, a quick review of the nature and scope of the attorney-client privilege is important. The United States Supreme Court summed up the purpose of the privilege as follows:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. * * * [and it promotes] broader public interests in the observance of law and administration of justice.[1]

In short, the attorney-client privilege applies under both federal and state law when a person talks with an attorney confidentially to seek legal advice.[2]

Pursuant to federal and state precedent, the attorney-client privilege attaches to communications with a lawyer even when the person seeking legal advice does not pay or formally retain that attorney.[3] Notably, the courts have also long construed "confidential communication" broadly for purposes of determining whether the attorney-client privilege applies.[4]

Consequently, communications between a witness and his or her lawyer during deposition recesses should be covered by the attorney-client privilege. Although no published decisions in the Eighth Circuit have reached the issue, rulings by courts in other jurisdictions have. The overwhelming consensus holds that the attorney-client privilege covers deposition recesses. Published decisions in that regard include the following: *Henry v. Champlain Enters., Inc.*, 212 F.R.D. 73, 92 (N.D.N.Y. 2003); *McKinley Infuser, Inc. v. Zdeb*, 200 F.R.D. 648, 650 (D.Colo. 2001); *In re Stratosphere Corp. Securities Litigation*, 182 F.R.D. 614, 621 (D.Nev. 1998); *Odone v. Croda Int'l PLC*, 170 F.R.D. 66, 69 (D.D.C. 1997).

Significantly, the more recent precedent on the discoverability of communications during breaks has roundly rejected the opinion, *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D.Pa. 1993), on which defense counsel typically rely. *Stratosphere* cogently articulated the rationale in that regard:

> [A]ttorneys and clients regularly confer during trial and even during the client's testimony, while the court is in recess, be it mid morning or mid afternoon, the lunch recess, or the evening recess. The right to prepare a witness is not different before the questions begin than it is during (or after, since a witness may be recalled for rebuttal, etc., during trial). * * * This Court will not preclude an attorney, during a recess that he or she did not request, from making sure that his client did not misunderstand or misinterpret questions or documents, or attempt to help rehabilitate the client by ***fulfilling an attorney's ethical duty to prepare a witness.***[5]

In more recently reaffirming that recess communications should not be discoverable, *McKinley*, underscored the central importance of an attorney's ability to prepare and provide counsel to his or her clients during legal proceedings:

> ***[T]he truth finding function is adequately protected if deponents are prohibited from conferring with their counsel while a question is pending***; other consultations, during periodic deposition breaks, luncheon and overnight recesses, and more prolonged recesses ordinarily are appropriate.[6]

The propriety of protecting communications between a deponent and his or her attorney during a deposition is especially obvious when the witness does not have mastery of the English language.[7]

In sum, defense counsel should not succeed in discovering the content of communications between plaintiff counsel and his or her client during a deposition, especially if defense counsel called for the break at issue. That said, a prudent plaintiff attorney will keep substantive discussions to a minimum during deposition breaks and, instead, focus on ensuring that the witness understands the process and continues to tell the whole truth and nothing but the truth.

II. OVERCOMING IMPROPER INSTRUCTIONS NOT TO ANSWER AND REPETITIOUS SPEAKING OBJECTIONS

Moving from overreaching to obstructionism, some defense counsel may instruct a defendant's representative not to answer routine and even necessary deposition questions. In conjunction with, or apart from, this disruptive tactic, defense counsel may also make numerous narrative objections that materially interfere with the deposition procedure.

Importantly, the Federal Rules of Civil Procedure and the Minnesota analog both define the scope of discovery in the most expansive terms possible:

> Parties may obtain discovery regarding ***any matter***, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.[8]

Moreover, the applicable Rule bars that "[t]he information sought ***need not be admissible*** at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[9]

Accordingly, instructions not to answer a deposition question based on a non-privilege-related objection (such as "seeks a legal conclusion") is improper. The governing federal and state Rule mandate, in pertinent part, as follows:

> A person may instruct a deponent not to answer ***only*** when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion [for sanctions].[10]

The governing Rule also explicitly prohibits speaking objections: "[a]ny objection to evidence during a deposition ***shall*** be stated concisely and in a non-argumentative and non-suggestive manner."[11]

To illustrate the type of conduct prohibited by counsel defending a deposition, the Advisory Committee Notes to the relevant Minnesota Rule cited a case wherein the deponent's lawyer made speaking objections and gave instructions not to answer for reasons other than to protect a privilege.[12] In sanctioning the deposed party, the court ruled that "***ordering that the deposition be retaken was the minimum sanction*** the trial justice could have ordered."[13] Similarly, the federal District Court of Minnesota recently reaffirmed that instructions not to answer are improper unless given to preserve a privilege, uphold an existing protective order, or to pursue a motion for sanctions.[14]

In the event that defense counsel attempts to disrupt the deposition procedure through improper instructions not to answer and lengthy speaking objections, plaintiff counsel would be wise to act calmly, swiftly, and decisively. For example, plaintiff counsel should immediately request the basis for the instruction not to answer. If the basis for the instruction is improper, plaintiff counsel should direct the court reporter to certify the question (for a subsequent motion to compel or motion in limine) and promptly move to the next line of

continued on page 50

JUSTIN CUMMINS, *of Miller-O'Brien-Cummins, is Chair of the MSBA's Labor & Employment Section and an Officer of the National Employment Lawyers Association's Eighth Circuit Board. Justin teaches courses on civil rights and employment law at the University of Minnesota Law School and William Mitchell College of Law, and he spearheaded the development of the Workers' Rights Clinic at the University of Minnesota Law School.*

questioning to minimize further delay. If defense counsel resists articulating the basis for the instruction not to answer, plaintiff counsel should make a record of that refusal while offering to rephrase the question if defense counsel will explain the basis for his or her instruction.

As to speaking objections in general, plaintiff counsel should politely and concisely remind defense counsel that such objections are improper and will require the deposition to go beyond the seven hour limit if they continue. Neither the deponent nor his or her attorney will want that, and defense counsel will likely curtail the speaking objections for the remainder of the deposition. Plaintiff counsel could also state on the record that he or she will agree defense counsel has a standing objection to the form of each question asked during the deposition. If defense counsel nonetheless continues with disruptive speaking objections, then plaintiff counsel will be well positioned to obtain a Court order to exceed the seven-hour limit and the imposition of other sanctions.

Preemptively, plaintiff counsel may consider videotaping the depositions when defense counsel known for obstructionist tactics will be representing the deponent; having video and audio recordings of lawyer behavior during depositions may discourage or even eliminate the misconduct. Plaintiff counsel may also want to call the Judge's clerk before a deposition about the Judge's availability for making rulings on disputes if they come up during that deposition. Such an approach not only could expedite resolution of conflicts in depositions, it also would put the Court on notice about the nature of the problem in the case.

III. ADDRESSING CORRECTIONS TO DEPOSITION TRANSCRIPTS THAT SUBSTANTIVELY AND INEXPLICABLY ALTER A DEPONENT'S TESTIMONY

Another tactic that interferes with the deposition procedure actually occurs after the deposition has been taken. In particular, defense counsel "corrects" the transcript of the deposition by substantively altering the testimony of the witness. This action is especially problematic when defense counsel changes an answer from, in sum or substance, "no" to "yes." Such a gratuitous rewriting of history prevents plaintiff counsel from doing the necessary follow up questions that would have been triggered by an original "yes" answer.

The governing law requires that deponents state the reasons for making changes to deposition testimony after the deposition has concluded: "the deponent ***shall*** . . . sign a statement reciting such changes and the reasons given by the deponent for making them."[15] If the deposition correction sheet does not give the reason for the material changes to testimony, plaintiff counsel should – at a minimum – be able to reopen the deposition to discover the reason(s) for the reversal of testimony.[16]

Even if the deponent or his or her counsel has offered a reason for the substantive changes in testimony, plaintiff counsel may still be able to reopen the deposition – particularly if the changes are numerous and go to core issues in the case. In this way, the deposition "corrections" would amount to ex post facto witness coaching that the Rules do not allow.[17] In sanctioning the culpable party, one court put it well:

> The Rule cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful

continued on next page

responses. Depositions differ from interrogatories in that regard. ***A deposition is not a take home examination.***[18]

CONCLUSION

Cases often rise and fall on the testimony of key witnesses in employment and civil rights cases. With so much at stake during depositions, some defense counsel engage in improper tactics, including demanding to know the content of recess communications between a plaintiff and his or her counsel, instructing a defendant's representative not to answer highly probative questions, and submitting "corrections" to depositions transcripts that repeatedly and inexplicably reverse substantive testimony.

Plaintiff counsel can minimize the adverse impact of such deposition misconduct by having a clear understanding of the governing Rules and related precedent as well as by pursuing both preemptive and contemporaneous strategies that keep the litigation focused on the substance of the case at hand.

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[1] *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981).

[2] *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977); *Triple Five of Minnesota, Inc. v. Simon*, 212 F.R.D. 523, 527 (D.Minn. 2002); *Kobluk v. Univ. of Minn.*, 574 N.W.2d 436, 440 (Minn. 1998); Minn.Stat. § 595.02(b).

[3] *Macawber Engineering, Inc. v. Robson & Miller*, 47 F.3d 253, 256 (8th Cir. 1995) (citing *TJD Dissolution Corp. v. Savoie Supply Co.*, 460 N.W.2d 59, 62 (Minn.App.1990)) (emphasis added) ("Under Minnesota law, an attorney-client relationship is established when the parties enter an ***express or implied contract of representation or*** when an individual seeks and receives legal advice ***under circumstances which would lead a reasonable person to rely on the advice.***"); see also *Martin Marietta Materials, Inc. v. Bedford Reinforced Plastics*, 227 F.R.D. 382, 392 (W.D.Pa. 2005) (citing *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978), cert. denied 439 U.S. 955 (1978)) ("[T]he existence of an attorney-client relationship does not necessarily depend upon the payment of fees or upon the execution of a formal contract."); *Southern Union Co. v. Southwest Gas Corp.*, 205 F.R.D. 542, 546 (D.Ariz. 2002) ("Because the application of the privilege

continued on next page

does not require formal representation by the attorney, neither the absence of a formal contract of employment nor the payment of fees preclude the attachment of the privilege.").

[4] See, e.g., *Brown v. St. Paul City Ry. Co.*, 62 N.W.2d 688, 700 (Minn. 1954) (citation omitted) (emphasis added) ("'[C]onfidential communication between client and lawyer' means information transmitted by a voluntary act of disclosure between a client and his lawyer in confidence and by a means which, so far as the client is aware, discloses the information to no third persons other than ***those reasonably necessary for*** the transmission of the information or ***the accomplishment of the purpose for which it was transmitted.***"); see also *Katz v. AT&T Corp.*, 191 F.R.D. 433, 437 (E.D.Pa. 2000) (citation omitted) (emphasis added) ("Pursuant to the common interest doctrine (or community of interest doctrine), '***parties with shared interest in actual or potential litigation*** against a common adversary ***may share privileged information*** without waiving their right to assert the privilege.'").

[5] 182 F.R.D. at 621 (citation omitted) (emphasis added); see also *Odone*, 170 F.R.D. at 69 ("The Court, however, cannot penalize an attorney for utilizing a five-minute recess that he did not request to learn whether his client misunderstood or misinterpreted the questions and then for attempting to rehabilitate his client on the record.").

[6] 200 F.R.D. at 650 (emphasis added).

[7] *Odone*, 170 F.R.D. at 69, n. 6 (reasoning that the plaintiff was an immigrant and "appears not to have a complete mastery of the English language. . . .").

[8] See Minn.R.Civ.P. 26.02(a) (emphasis added); see also Fed.R.Civ.P. 26(b)(1).

[9] *Id.* (emphasis added); see also *Wards Cove Packing, Inc. v. Antonio*, 490 U.S. 642, 657 (1989) ("[L]iberal civil discovery rules give plaintiffs broad access to employers' records to document their claims."); *M. Kramer v. Boeing Co.*, 126 F.R.D. 690, 692 (D.Minn. 1989) ("[D]iscovery [is to] be self-effectuating, without need to resort to the court, and [] its scope [is to] be liberal, extending to all matters reasonably calculated to lead to admissible evidence."); *In re GlaxoSmithKline plc*, 732 N.W.2d 257, 272 (Minn. 2007) (reaffirming the broad scope of discovery); *Gale v. County of Hennepin*, 609 N.W.2d 887, 891 (Minn. 2000) (holding the discovery rules' purpose includes encouraging the exchange of relevant information prior to trial and discouraging unjust surprise and prejudice); *Larson v. Indep. Sch. Dist. No. 314*, 233 N.W.2d 744, 747 (Minn. 1975) (holding "we have consistently construed the discovery rules in favor of broad discovery.").

[10] See Minn.R.Civ.P. 30.04(a) (emphasis added); see also Fed.R.Civ.P. 30(c)(2) (same).

[11] *Id.* (emphasis added).

[12] See Minn.R.Civ.P. 30.04, Advisory Committee Comments to the 1996 Amendments (citing *Kelvey v. Coughlin*, 625 A.2d 775 (R.I. 1993)).

[13] *Id.* at 777 (emphasis added).

[14] *UltiMed, Inc. v. Becton, Dickinson & Co.*, 2008 WL 4849034, *3-4 (D.Minn. 2008) (DSD/JJG).

[15] See Minn.R.Civ.P. 30.05 (emphasis added).

[16] *Id.*

[17] See, e.g., Fed.R.Civ.P. 30(c)(2); Minn.R.Civ.P. 30.04(a).

[18] *Greenway v. Int'l Paper Co.*, 144 F.R.D. 322, 325 (W.D.La. 1992) (emphasis added).

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