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Weighing Unilateral Termination Of A Deposition

Law360, New York (October 21, 2010) -- Hardly any pretrial proceeding lends itself to the potential for incivility more than a deposition.

First, a deposition occurs beyond the watchful eye and moderating authority of a judge, so the attorneys and witnesses present are less likely to exercise self-control to filter out unacceptable or impulsive conduct.

Second, because the lawyers set the agenda and the pace of a deposition, any differences in the relative skill of, or levels of experience between, counsel for the different parties are likely to be more pronounced; if the more experienced lawyer senses weakness in his opponent, that lawyer may be tempted to cross the fine line between zealous representation and unprofessional or abusive interaction.

Finally, depending on the case, the deposition itself can create an incentive for lawyers to act unprofessionally. With sufficient pressure to obtain critical evidence or elicit determinative testimony, a less than scrupulous lawyer might attempt to intimidate a witness through an unjustified show of hostility.

Despite the judiciary's general prohibitions against conduct meant to harass, annoy or intimidate, too many lawyers exemplify the so-called "Rambo litigator," resorting to unduly hostile or offensive litigation tactics under the guise of zealous representation. To this type of lawyer, effective advocacy unfortunately means being the loudest and the most aggressive person in the room.

Putting aside the question of why an attorney acts unprofessionally at a deposition, there is a much more practical consideration we may face as advocates in this type of situation: When is enough enough, such that opposing counsel's

attempts to interfere with your client's testimony by being improperly aggressive and obstreperous justifies your terminating the deposition?

To be sure, no litigant is required to suffer undue hostilities during a deposition. Absent extreme circumstances, however, the chances that a judge will find a party to have been justified in terminating a deposition unilaterally are rare and, in any event, entirely subjective.

Thus, one must weigh the risk of protecting your client (and the case) from deposition testimony that is elicited in a less than professional atmosphere versus subjecting yourself and your client to sanctions for impeding the discovery process.

Imagine you are defending the deposition of your client's Rule 30(b)(6) (of the Federal Rules of Civil Procedure (FRCP)) witness and opposing counsel's overly aggressive, argumentative and confrontational conduct is causing your witness to answer questions incorrectly, with the consequence that an unfavorable record is created, or that counsel's behavior has created such a hostile environment that your client wishes to end the deposition prematurely. How you handle this situation procedurally will determine whether it is you, rather than your counterpart, that draws the court's ire.

Assuming your requests to opposing counsel to handle themselves with appropriate decorum and required professionalism are ignored and that the situation cannot simply be resolved by contacting a judge to resolve the issue during the deposition, your only option may be to suspend the deposition and rescue your client (and your case) from the situation. Generally speaking, however, courts disfavor unilaterally terminating a deposition before its natural conclusion.

Nevertheless, various bodies of law do empower litigants with options to maintain the integrity of a civil proceeding.

For instance, Rule 30(d)(3) of the FRCP allows a litigant to suspend a deposition at any point for the purpose of filing a motion to terminate or limit the deposition on the grounds that it is being conducted in a manner that unreasonably annoys, embarrasses or oppresses the deponent or the litigant. If such a suspension is sought, the deposition remains postponed until such time as the court issues an order.

Because judges weigh motions to terminate a deposition against the court's interest in liberal discovery, however, one would be well-advised to tread carefully when going down this path.

Indeed, motions filed pursuant to Rule 30(d)(3) of the FRCP are also governed by Rule 37(a)(5) of the FRCP, which permits the court to award sanctions against the movant if the motion is denied. Accordingly, like motions filed under Rule 11, motions filed pursuant to Rule 30(d)(3) of the FRCP should be filed only in the most extreme circumstances.

If, however, as in the example set forth above, you determine that it is in your client's best interests to suspend the deposition as a result of the conduct of opposing counsel, ensuring that the record clearly demonstrates that the deposition is being taken solely for an improper purpose is paramount.

Indeed, federal courts have held consistently that obscenity or insults, persistent questioning that embarrasses a witness or concerns privileged matter, or instructions that a witness not answer a question (other than for protecting a privilege) are sufficient grounds for suspending or terminating a deposition. See Redwood v. Dobson, 476 F.3d 462 (7th Cir. 2007); Lewis v. United Air Lines Transp. Corp., 32 F. Supp. 21 (W.D. Pa. 1940); Broadbent v. Moore-McCormack Lines, 5 F.R.D. 220 (E.D. Pa. 1946); Shapiro v. Freeman, 38 F.R.D. 308 (S.D.N.Y. 1965).

Furthermore, although simply walking out of a deposition is rarely advisable, in one extreme case a court refused to hold a deponent in contempt when he stormed out of the deposition shortly after it began, because the adverse party's counsel persisted in asking questions regarding the deponent's qualifications for a job for which the deponent was interviewing. Bythewood v. Unisource Worldwide Inc., 413 F.Supp.2d 1367 (N.D. Ga. 2006).

Similarly, federal courts have found that because an attorney's repeated questions about the personal lives of individuals other than the deponent, as well as about deponent's mental health and sexual orientation, had no bearing on the case other than to harass the witness, suspension of the deposition was appropriate. See Redwood, supra.

Conversely, federal courts have found it improper to suspend or terminate a deposition merely because an attorney's questions are repetitive, inartfully posed or confusing. Oleson v. Kmart Corp., 175 F.R.D. 568 (D. Kan. 1997). Indeed, even

when attorneys ask irrelevant questions, as long as there is no evidence of an improper motive (i.e., to harass, annoy or embarrass), courts generally allow depositions to proceed. Id.

The same principle applies to the length of the proceeding, such that a federal court held that a deposition could continue even after it had lasted four days, because the court found that the questions appeared relevant and there was no evidence suggesting bad faith on the questioning attorney's part. Caplan v. Fellheimer Eichen Braverman & Kaskey, 161 F.R.D. 29 (E.D. Pa. 1995).

Ultimately, the common thread woven into the relevant law is the subjective intent of the party accused of objectionable behavior. This thread weighs both for and against motions to terminate a deposition, and courts appear inclined to be as lenient as possible absent evidence that the deponent is being subjected to unjustifiable abuse.

Accordingly, when faced with inappropriate behavior by an opponent in a deposition, you should first seek to resolve the dispute by conferring with opposing counsel. Only after a determination that engaging the opposing party in good faith will be to no avail should a lawyer move to limit or terminate the deposition.

Given the inherent risk of a Rule 30(d)(3) under the FRCP motion and the subjective nature of the court decisions interpreting those motions, however, one must be certain that the opposing party's conduct rises to a level sufficient to justify suspension of a deposition or else they risk not only losing their motion, but may also ultimately be the party that is sanctioned.

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