DISCOVERY AND RAMBO LITIGATION IN INADEQUATE SECURITY CASES

Association of Trial Lawyers of America
1998 Annual Convention
Washington, D.C.
July 1998

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The acrimony in discovery during the pendency of inadequate security cases has increased with each passing year. The frequency of these cases, combined with frenetic defense counsel and new billing pressures by insurance carriers makes this an area ripe for discovery abuse.

The most prevalent abuses come in defendants failing to provide written discovery and in obstructed depositions. This presentation will attempt to address these two main features of "Rambo Litigation".

DEPOSITION ABUSE

Conferences among the witness and his attorney are prohibited once the deposition has begun except to determine whether a privilege should be asserted. This rule, of course, is virtually ignored in most cases, either

directly or circuitously. Many defense counsel think nothing of taking their clients aside and discussing the deposition during the proceeding or taking them out during a break. Others are more surreptitious – and confer during lunch or bathroom breaks. Still others write notes to their clients.

Under prevailing case law (what little there is), opposing counsel can inquire about any witness coaching that might have taken place during any conferences with attorney or on a break. Private discussions with attorney are prohibited about documents shown to the witness and documents need not be shown to attorney before deposition. *Arthur J. Hall v. Clifton Precision,* 150 F.R.D. 525 (ED Pa. July 29, 1993).

Still other clever members of the bar interpose "objections" and other instructions during depositions that serve only to coach witnesses and alter testimony. Again, objections that suggest an answer to the witness are prohibited. *Arthur J. Hall v. Clifton Precision,* 150 F.R.D. 525 (ED Pa. July 29, 1993).

See, e.g., Dondi Properties Corp. v. Commercial Savings & Loan Ass'n, 121 F.R.D. 284 (N.D. Tex. 1988) for an example of local court rules of decorum for Dallas County. *Id.* At 287-88 and Appendix.

In *Dondi*, *supra*, the local federal court adopted many of the provisions

of the Dallas Court's rules of decorum. These include:

1. A duty to opposing counsel of courtesy and cooperation;
2. A duty of personal dignity of professional integrity;
3. Treat opposing counsel and the court with courtesy and civility and conduct oneself in a professional manner at all times;
4. A client has no right to demand their attorney abuse an opposing party or engage in abusive conduct.
5. Treat adverse witnesses and suitors with fairness and due consideration;
6. A duty not to use discovery or the scheduling of discovery as a means of harassing opposing parties or their counsel;
7. "Effective advocacy does not require antagonistic or obnoxious behavior and members of the Bar will adhere to the higher standard of conduct which judges, lawyers, clients, and the public may rightfully expect."

●**<u>Instructions not to answer</u> questions are absolutely prohibited unless a specific privilege is asserted.**

There are limited but clear cases on this type of deposition abuse. One of the most recent and pointed cases is *Arthur J. Hall v. Clifton Precision,* 150 F.R.D. 525 (ED Pa. July 29, 1993). A case cited around the country, the court addressed the issue of how much an attorney can control his client, and the deposition generally, when it is his witness/client being deposed. The court first noted that a deposition is for the purpose of finding out what the deponent saw, heard, did or thinks. To that end, there is no need for an attorney to act as an intermediary, interpreting each question and deciding which questions the witness should answer. *Id.* at 528 *See also*, *Resolution Trust Corp. v. Dabney*, 73 F.3d. 262, 266 (10th Cir. 1995)

(Attorney cannot tell witness to wait after each answer until attorney says to answer). The *Hall* court continued, stating that a witness comes to the deposition to testify, not to have his lawyer coaching or bending his words. The lawyer, rather, must accept the facts as they develop. *Hall*, 150 F.R.D. at 528. The court also held that objections should be concise, non-argumentative and non-suggestive. *Id.* at 529; *see also*, *Armstrong v. Hussmann Corp.,* 163 F.R.D. 299, 303 (E.D. Mo. 1995) (Attorney should not act as an intermediary for understanding questions and should not make speaking objections); *Damaj v. Farmers Ins. Co., 164 F.R.D., 559, 561* (N.D. Okla. 1995) (No speaking objections).

The Hall court specifically addressed when it is and is not permissible for a witness to confer with his counsel. The court first noted that there is not an absolute right to confer with counsel; whether such a stoppage is requested by counsel or the deponent is irrelevant. *Hall*, 150 F.R.D. at 529. The court went on to find that there is likewise not right to confer for the purpose of discussing documents which are handed to the deponent during the deposition. The court did, however, note that it is proper for the attorney taking the deposition to provide a copy of all documents to be proffered prior to the deposition. Id. If fact, the court

found that the only private conference to be carried on between an attorney and deponent from the time the deposition starts until it ends (including during recesses and lunch breaks) is for the purpose of determining whether a valid privilege exists. Furthermore, after such a conference, the attorney should place on the record that a conference took place, the subject matter of the conference, and the decision reached. *Id.*

The federal courts have a sanction rule at their disposal which specifically addresses what should occur if an attorney improperly extends a deposition 28 U.S.C. § 1927 provides:

> An attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorney's fees reasonably incurred because of such conduct.

ETHICAL CONSIDERATIONS GOVERNING IMPROPER ADVICE TO DEPONENT DURING A DEPOSITION (BLURTING OUR ANSWER)

I. **Ethical Rules.**

A. Model Rule 1.1 states:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation

B. There is no specific rule regarding a lawyer's conduct at a

deposition. However, Federal Rule of Civil Procedure 30 (c) provides that "examination and cross-examination of witnesses may proceed as permitted at trial."

C. Under Federal Rule of Civil Procedure (32 (d) (3) (A), objections to competency, relevancy or materiality of deposition testimony are preserved for trial. Although if the question relates to matters protected by a privilege, an objection must be made or it is waived. Federal Rule of Civil Procedure 32 (d) (3) (B).

"Counsel for party had no right to impose silence or instruct witnesses not to answer, and if he believed questions to be without scope of orders, he should have done nothing more than state his objections." *Ralston Purina Company v. McFarland* 550 F.2d 967, 973 (4th Cir. 1977) (citing *Shapiro v. Freeman,* 38 F.R.D. 308).

Courts throughout the country have made clear the procedure for taking depositions: "At the taking of a deposition, the witness will be examined and cross-examined by counsel for the parties in the same fashion as at trial, with one important exception. If there is objection to a question, the reporter will simply note the objection in the transcript and **the witness will answer the question** despite the objection." *Lloyd v. Cessna Aircraft*

Co., 74 F.R.D. 518 (E.D. Tenn. 1977) (emphasis supplied).

It is well established law that it is never proper to instruct a witness not to answer a question unless it calls for a privileged answer. See *United States v. International Business Machines Corp.,* 79 F.R.D. 378, 381 (S.D.N.Y. 1978) (rule prohibiting attorneys from instructing witnesses not to answer questions is well established). See also *First Tennessee Bank v. Federal Deposit Insurance Corp.,* 108 F.R.D. 640 (E.D. Tenn. 1985) ("It is well-settled that counsel should never instruct a witness not to answer a question during a deposition unless the question seeks privileged information..."). Accord *American Hangar, Inc., v. Basic Line Inc.,* 105 F.R.D. 173 (D. Mass. 1985); *Alexander v. Cannon Mills Co.,* 112 F.R.D. 404 (M.D.N.C. 1986); *Perrignon v. Bergen Brunswig Corp.,* 77 F.R.D. 455 (N.D. Cal. 1978); *Preyer v. United States Lines Inc.,* 64 F.R.D. 430 (E.D. Pa. 1973); *Lloyd v. Cessna Aircraft Co.,* 74 F.R.D. 518 (E.D. Tenn. 1977); *Paparelli v. Prudential Insurance Co.,* 103 F.R.D. 727 (D. Mass. 1985); *Lowe's of Roanoke, Inc. v. Jefferson Standard Life Insurance Co.,* 219 F. Supp. 181 (S.D.N.Y. 1963).

Even where questions are asked in an "incriminatory context," a witness must answer. *Preyer v. United States Lines,* 64 F.R.D. 430 (E.D. Penn. 1973) (where no real claim of privilege the rule should be strictly applied). *See* also *Lowe's of Roanoke v. Jefferson Standard Life Ins. Co.,* 219 F.Supp.

181 (S.D.N.Y. 1963) (refusal to answer question inappropriate on ground that it might not be admissible at trial).

TRIAL vs. DEPOSITION

Several courts have held specifically that a deposition conducted under the Federal Rules of Civil Procedure should follow the same testimonial rules as at trial. *See, e.g. Hall*, 150 F.R.D. at 528. In *Hall*, the court used the example of coaching of a witness. The court noted that at trial, preparation ends when testimony begins. *Id.*; *see also*, *Damai,* 164. F.R.D. at 560 (Court stressed that a deposition should proceed as is permitted at trial); *Armstrong*, 163 F.R.D. at 303 (Counsel should not engage in conduct during a deposition that would not be allowed in the presence of a judicial officer).

WRITTEN DISCOVERY

Counsel needs to take an aggressive approach to written discovery. You can almost always expect that documents will be withheld and hidden, especially if they are harmful to the defendant. There will be inevitable objections to the scope of the discovery requests regardless of how carefully you craft your requests. Therefore do not be overly conservative in limiting the scope of your requests. Most jurisdictions permit relatively liberal discovery as to when it comes to prior criminal

acts in terms of time and location.

You would be well advised to see discovery from third parties wherever possible, since you will likely be at the mercy of the defendant's interpretation of what is relevant, discoverable or in existence. Many defendants in security cases deliberately create "document retention policies" that are nothing more that thinly veiled attempts to destroy incriminating documents.

Today's inadequate security case requires an aggressive litigation posture. With the questionable discovery tactics routinely employed by defendants, you will need to enlist the assistance of the Court early.