Florida Bar Journal
June, 2001

Column

Criminal Law

*77 DEPOSITON POTPOURRI OR HELPFUL HINTS TO AVOID DEPOSITION FATIGUE

Steven G. Mason [FNa1], William J. Sheaffer [FNa2]

Our experience has been that depositions can be an incredibly helpful tool in either prosecuting a civil lawsuit or defending against charges levied by the state. On the other hand, experience has likewise taught us that depositions can be one of the most befuddling and stressful aspects of a lawyer's trial practice. The latter probably results from lawyers who are unfamiliar with the rules or who go astray when outside the watchful eye of a judge. This article will help some of you with the day-to-day issues that arise during depositions.

Sworn Statements Absent Compulsion

A deposition is nothing more than a sworn statement made under compulsion (*e.g.*, a subpoena or court order) taken for the purpose of discovery. *Black's Law Dictionary*, 5th Edition, p. 396 (1979). However, absent compulsion, an attorney is free to interview intended witnesses without the presence or input of opposing counsel. This long-standing legal principle was recognized by the court in *Devlin v. Rossman*, 205 So. 2d 346 (Fla. 3d DCA 1967):

> It is the general rule that attorneys for one party in a pending cause are free to interview the other party's intended witnesses without the consent or presence of opposing counsel. 35 Fla. Jur. Witnesses §5. This presupposes that the person thus sought to be interviewed is willing to submit thereto. If he is not, he may insist that his views or testimony be given only upon deposition or at a trial or other court proceeding in the cause, after having been subpoenaed. *Id.* at 347.

See also *U.S. v. Saa*, 859 F.2d 1067, 1074-1075 (2d Cir. 1988) (defense counsel entitled to ask informant directly whether he will submit to interview); *Gilbert v. State*, 547 So. 2d 246, 249 (Fla. 4th DCA 1989) (improper to interfere with right to informally interview witnesses).

Therefore, contrary statements notwithstanding, it is not improper to take a sworn (voluntary) statement from an unrepresented witness. It is, in fact, sage trial strategy. For cases discussing contacting former employees of an adverse party, see *H.B.A. Management, Inc. v. Estate of Schwartz*, 693 So. 2d 541 (Fla. 1997); *Reynoso v. Greynolds Park Manor, Inc.*, 659 So. 2d 1156, 1158 n.2 (Fla. 3d DCA 1995) (citation to cases reaching a contrary conclusion); *Browning v. AT & T Paradyne*, 838 F. Supp. 1564, 1567 (M.D. Fla. 1993); Rule 4-4.3, Rules Regulating The Florida Bar (contact with unrepresented persons).

Distinction Between Criminal and Civil Cases

The general rules that govern discovery depositions can be found at Fla. R.

Civ. P. 1.290 through 1.330, Fla. R. Crim. P. 3.220(h), and Fed. R. Civ. P. 27-32. The major distinction between the Florida civil and criminal rules is that there is no automatic right to take depositions in misdemeanor cases, whereas such a right exists in felony cases. See Fla. R. Crim. P. 3.220(h)(1)(D). In misdemeanor cases the accused must file a motion with the court demonstrating good cause to take a deposition. There are few reported cases addressing exactly what is " good cause." However, two helpful cases are *State v. Sheffer*, 6 Fla. L. Weekly Supp. 512 (Fla. Orange Cty. Ct. 1999) (where arrest report lacked specificity, depositions warranted); and *State v. Greene*, 6 Fla. L. Weekly Supp. 561 (Fla. Duval Cty. Ct. 1999) (complexity of issues constitutes good cause). Further, in criminal cases the accused does not have an absolute right to attend depositions, but rather must obtain leave of the court. See *State v. Ceccarelli*, 7 Fla. L. Weekly Supp. 683 (Fla. Orange Cty. Ct. 2000) (where police waited several weeks after alleged incidents to make arrests, prejudice established, and attendance at deposition appropriate).***78** There is no express provision for depositions in federal criminal cases; however, under certain circumstances the court has discretion to allow same. See Fed. R. Crim. P. 15; *United States v. Wilson*, 601 F.2d 95, 97-98 (3d Cir. 1979).

One point that criminal law practitioners may overlook is that the Florida Rules of Civil Procedure overlap and are controlling on many issues not addressed in the criminal rules.

Except as provided herein, the procedure for taking the deposition, including the scope of the examination, and the issuance of a subpoena (except a subpoena duces tecum) for deposition by an attorney of record in the action, shall be the same as that provided in the Florida Rules of Civil Procedure.

Fla. R. Crim. P. 3.220(h)(1).

Speaking Objections and Preservation

Attorneys like to object; too often, perhaps. Improper " speaking objections" are routinely made. Practitioners know from experience that speaking objections are nothing more than an attempt to improperly influence a witness not to answer a question. For example, consider the following " objections" which occurred during one of the author's recent depositions.

I'm going to object to that. That's not what anybody said. He's testified that the code gives the tax collector the authority to issue and that the county attorney's office advises ....

* * *

No. I don't like you putting facts in the questions that aren't true.

At one time the Florida rules did not specifically prohibit speaking objections. See former Fla. R. Civ. P. 1.310(c), which stated in part that depositions " [m]ay proceed as permitted at the trial." However, all that ended in 1996 when the Florida Supreme Court amended the rules. *In re: Amendments to Florida Rules of Civil Procedure*, 682 So. 2d 105, 117 (Fla. 1996). The rule now states, " Any objection during a deposition should be stated concisely and in a nonargumentative and nonsuggestive manner." Rule 1.310(d) permits a litigant to terminate an examination when a lawyer improperly uses speaking objections to

prevent meaningful discovery. See also *Quinones v. State*, 766 So. 2d 1165, 1168 (Fla. 3d DCA 2000) (speaking trial objections containing improper editorials); *Owens-Corning Fiberglass Corp. v. Crane*, 683 So. 2d 552, 554 (Fla. 3d DCA 1996) (examples of speaking objections); *Heller v. Wofsey*, 1989 U.S. Dist. Lexis 7765 (S.D.N.Y. 1989).

There are several other sources that reinforce this point. For instance, the circuit judges in the Ninth Judicial Circuit have implemented guidelines which state in part: " Speaking objections and other tactics and recesses for coaching a deponent during a deposition are improper and may also be cause for sanctions." Uniform Administrative Policies & Procedures, Section XIV, Deposition Guidelines, 3 Fla. L. Weekly Supp. 164 (Fla. 9th Jud. Cir. 1995).

The Trial Lawyers Section of The Florida Bar also promulgated a manual styled " Guidelines for Professional Conduct" which provides:

Counsel defending a deposition should limit objections to those that are well-founded and permitted by the rules of civil procedure or applicable case law. *Counsel should bear in mind that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought. When objecting to the form of a question, counsel should simply state: " I object to the form of the question."* The grounds should not be stated unless asked for by the examining attorney. When the grounds are then stated they should be stated succinctly and only what is necessary to state the grounds should be stated.

While a question is pending, counsel should not, through objections or otherwise, coach the deponent or suggest answers. Should any lawyer do so, the courts are urged to take stern action to put a stop to such practices and to serve as a deterrent to others.

Counsel for all parties should refrain from self-serving speeches during depositions.

The Florida Bar Trial Lawyers Section, " Guidelines for Professional Conduct," §E, ¶¶8, 9, and 11 (emphasis added).

However, the fact that speaking objections are prohibited does not mitigate an attorney's obligation to preserve some substantive (as well as form) objections for trial. For cases that discuss this obligation see *Clairson International v. Rose*, 718 So. 2d 210, 214-15 (Fla. 1st DCA 1998) (if objection to competency had been made, error may have been remedied at time of deposition, waiver); *David v. City of Jacksonville*, 534 So. 2d 784, 786 (Fla. 1st DCA 1988) (no waiver for failing to object to questions addressing witness's arrest and conviction record-automatically preserved); *Weyant v. Rawlings*, 389 So. 2d 710 (Fla. 2d DCA 1980); *Evans v. Perry*, 161 So. 2d 27, 29-30 (Fla. 2d DCA 1964); Fla. R. Civ. P. 1.330(b)(3).

Fed. R. Civ. P. 30(d) likewise prohibits such blatant interruptions. Fed. R. Civ. P. 32(d)(3)(B) expressly states that objections to the form of a question are waived unless raised during deposition. This obligation can be easily satisfied by stating you object to the form or by stating, " Objection, form." If there is a question regarding the basis for the objection, opposing counsel may ask for specifics to ensure that the witness understands the question and to remediate any

flaw. In an effort to assist lawyers, the judges in the Middle District of Florida produced a manual styled " Discovery Practice in the United States District Court, Middle District of Florida." [FN1] This manual instructively states:

Federal rule of civil procedure 32(d)(3)(B) provides that an objection to the form of the question is waived unless***79** made during the deposition. Many lawyers make such objections simply by stating " I object to the form of the question." This normally suffices because it is usually apparent that the objection is directed to " leading" or to an insufficient or inaccurate foundation.

Discovery Practice Manual at IIB, p. 11.

Therefore, as a " general" rule, most objections are preserved other than objections to the form of the question, *e.g.*, leading, compound, etc. See *Associated Bus. Tele. Sys. Corp. v. Greater Capital Corp.*, 729 F. Supp. 1488, 1500 (D.N.J. 1990) (leading questions must be objected to to be preserved for trial); *Cronkrite v. Fahrbach*, 853 F. Supp. 257, 259-60 (W.D. Mich. 1994) (questions as to competency which could not be changed during deposition not waived). There are scores of cases where the federal court has chastised attorneys for improper conduct during depositions. *Hall v. Clifton Precision*, 150 F.R.D. 525, 528-31 (E.D. Pa. 1993) (lawyers are prohibited from making comments on or off the record which may limit a witness's ability to answer an appropriate question); *Castillo v. St. Paul Fire & Marine Ins. Co.*, 938 F.2d 776 (7th Cir. 1991) (obstructive tactics during a deposition warrant sanctions); *Stengel v. Kawasaki Heavy Industries, Ltd.*, 116 F.R.D. 263 (N.D. Tex. 1987) (constant interruptions where attorney made comments such as " big deal," " waste of time," etc., were nothing more than blatant attempts to frustrate the litigant's attempt to take the deposition); *Kelly v. GAF Corporation*, 115 F.R.D. 257 (E.D. Pa. 1987) (frivolous objections destroyed the purpose of the deposition]; *Unique Concepts, Inc. v. Brown*, 115 F.R.D. 292, 292-93 (S.D.N.Y. 1987) (again, constant interruptions resulted in sanctions); *Langston v. Standard Register Company*, 95 F.R.D. 386 (N.D. Ga. 1982) (meaningful depositions are destroyed when repetitive objections are made).

Think Before Instructing Witness Not to Answer

• *The Question of Privilege*

Another recurring theme arises when an attorney instructs witnesses not to answer questions. When the Florida Supreme Court amended the civil rules in 1996, it did so with the intent that the refusal to answer questions should generally only be invoked when the answers are " privileged." See *In Re: Amendments to Florida Rules of Civil Procedure*, 682 So. 2d 105, 106 (Fla. 1996). Lawyers tend to forget that the purpose of a deposition is not to determine whether evidence is admissible at trial but rather whether the questions are reasonably calculated to lead to the discovery of admissible evidence. In this regard, a must-read is *Smith v. Gardy*, 569 So. 2d 504, 507 (Fla. 4th DCA 1990), where the court stated:

Dr. Freeman indeed should have answered, and the arrogance of the defense attorney in instructing the witness not to answer is without legal justification. Nowhere in the Florida Rules of Civil Procedure is there a provision that states that an attorney may instruct a witness not to answer a question.

See *Jones v. Seaboard Coastline Railroad Co.*, 297 So. 2d 861 (Fla. 2d DCA 1974).

There is a plethora of federal cases which also reinforce this provision. See *Nutmeg Insurance Company v. Atwell, Vogel & Sterling*, 120 F.R.D. 504 (W.D. La. 1988); *American Hangar, Inc. v. Basic Line, Inc.*, 105 F.R.D. 173, 175 (D. Mass. 1985); *Paparelli v. Prudential Insurance Co. of Am.*, 108 F.R.D. 727 (E.D. Pa. 1985); *Ralston Purina Co. v. McFarland*, 550 F.2d 967, 973 (4th Cir. 1977). For an additional discussion of the invocation of privilege during deposition, see " Discovery Practice in the United States District Court, Middle District of Florida, at V, Privilege, pp. 29-30 (1992).

Like all general rules there appears to be at least some exceptions to the " rule." For instance, in *Calderbank v. Cazares*, 435 So. 2d 377 (Fla. 5th DCA 1983), Calderbank was ordered by the trial court to answer questions posed by the Church of Scientology and its attorney. Mr. Calderbank refused to answer certain question at his deposition, stating that they were not relevant to the matter at hand. Subsequent to the trial court ordering him to answer the questions, Calderbank appealed to the district court for relief. In an opinion authored by Judge Cowart, the court held that a party cannot question a witness unless the questioning is relevant to the proceeding at hand and will reasonably lead to the development of admissible evidence. Judge Cowart stated: " [A] reasonably ' calculated' causal connection between the information sought and the possible evidence relevant to the issues in the pending action must ' appear' from the nature of both or it must be demonstrated by a person seeking the discovery." *Calderbank*, 435 So. 2d at 379; *Smith v. Gardy*, 569 So. 2d 504 (rules permit suspension of deposition if objecting party has basis for concluding answer is clearly objectionable and irreparable).

Disclosure and Filing of Depositions

Generally, only a party to a lawsuit has a right to attend a deposition or to obtain a transcript of a deposition. See *Palm Beach Newspapers, Inc. v. Burke*, 504 So. 2d 378 (Fla. 1987) (the media does not have a right under the public records law or the First Amendment to obtain copies of unfiled depositions or to attend such proceedings); *Smith v. Southern Baptist Hospital of Florida*, 564 So. 2d 1115 (Fla. 1st DCA 1990) (petitioner did not satisfy burden to exclude potential witness***80** /doctor from attending deposition); Fla. R. Civ. P. 1.280(c)(5), (6) (procedure addressing sealing deposition and excluding witnesses). Further, depositions can only be filed for a specific purpose. Fla. R. Civ. P. 1.310(f)(3)(A).

The authors have experienced two recurring problems involving the filing and copying of depositions. First, attorneys will file depositions with the court without providing a copy to opposing counsel. The theory is that opposing counsel has the financial obligation to purchase the deposition from the court reporter or from the filing attorney. However, the rules are clear, any document filed with the court must also be provided to the other side.

In the instant case, it is undisputed that appellee's trial attorney failed to give appellant notice of either the taking of the deposition or the filing thereof, and that he likewise failed to provide appellant with a copy. Consequently, it is clear that appellee violated the above procedural rule, and the trial court abused its discretion by denying appellants' motions to strike and for rehearing.

Thomas v. Thomas, 589 So. 2d 944, 947 (Fla. 1st DCA 1991); Fla. R. Civ. P. 1.080(a), 1.310(f)(3); Rule 4-3.4, Rules Reg. The Florida Bar; and Canon 3(B)(2), Code of Judicial Conduct (prohibition against ex parte communications).

Additionally, the Florida Rules of Professional Responsibility reinforce counsel's obligation to furnish his opponent with any documents provided to the court in contemporaneous fashion. In other words, the rule prohibits stonewalling. Rule 4-3.5(b)(2), Rules Reg. The Florida Bar.

Second, some lawyers and court reporters have suggested that Fla. R. Civ. P. 1.310(g), and the commentary to same, prohibits an attorney from photocopying a deposition and disseminating it at will. Under this interpretation, an attorney would not have an obligation to furnish opposing counsel with a transcript filed with the court. This is a distortion of the rules. This provision merely provides that a court reporter cannot be *required* to provide a deposition to counsel without cost. However, that is a far cry from an attorney who, *after* purchasing the deposition, unilaterally photocopies and disseminates it. This is the same as an agreement to share depositions to reduce the costs of litigation. Court reporters frown upon the practice but there is nothing in the rules which holds to the contrary. In other words, once a deposition is purchased, an attorney is free to disseminate it at will. Unlike a case involving copyrighted materials, no one would ever suggest that a witness's statement can be " patented."

Changes in Deposition Testimony

Federal Rule 30(e) requires that a witness review the transcript of his deposition within 30 days, whereas the Florida Rule, Rule 1.310(e), merely states that it should be completed within a reasonable time. Subsection " e" also requires that a witness read (or have the transcript read to him) and sign the transcript. We all know from practice that witnesses often will waive reading and signing the transcript. However, Rule 1.310(e) requires that the witness *and* the parties agree to such waiver. In those situations where the deponent does not read, sign, or waive reading, the transcript can be filed (for a specific purpose) subject to the court reporter indicating why the transcript was not signed. Ultimately, the court has the power to refuse to accept the transcript in those situations where the refusal to review was inappropriate.

A situation that arises at the end of the deposition is the explanation regarding reading the transcript. Often witnesses are instructed that the only purpose behind reading the transcript is to ensure that the proceedings were accurately transcribed. However, that is not what Rule 1.310(e) states. It expressly states that the deponent may make changes in substance. Both the federal and state courts recognize this procedure. *Feltner v. Internationale Nederlanden Bank*, 622 So. 2d 123, 124 (Fla. 4th DCA 1993); *Motel 6, Inc. v. Dowling*, 595 So. 2d 260, 261 (Fla. 1st DCA 1992); *Lugtig v. Thomas*, 89 F.R.D. 639, 641 (N.D. Ill.1981); Fed. R. Civ. P. 30(e).

When changes are made, reasons must be listed on the errata sheet explaining why the witness made the changes. The substantive changes are listed on the errata sheet but the original transcript remains the same so that it is clear exactly what was in fact changed. *Lugtig*, 89 F.R.D. at 641-42. Additionally, if a witness does make substantive changes, a party may request that the deposition be reopened so that an inquiry can be made into the basis for the change. *Feltner*, 622 So. 2d at 124-25; *Sanford v. C.B.S., Inc.*, 594 F. Supp. 713, 715 (N.D. Ill. 1984). As stated earlier, a transcript can be rejected by the court if it remains unsigned. The burden, however, rests with the objecting party moving to strike the deposition. Objections can be waived absent objection. Fla. R. Civ. P. 1.330(b)(4); *Rothschild v. De Gaspari*, 287 So. 2d 341, 343 (Fla. 3d DCA 1973).

Conclusion

Obviously, depositions are more complicated than many attorneys may acknowledge. Perhaps with a little more attention to detail, the deposition-discovery process can become less agonizing and more helpful-as originally contemplated under the procedural rules.

[FNa1]. ***Steven G. Mason*** *is a sole practitioner who is board certified by The Florida Bar in criminal trial and criminal appellate law. He limits his practice to First Amendment, criminal, and civil rights litigation*.

[FNa2]. ***William J. Sheaffer*** *is a sole practitioner who is board certified by The Florida Bar in criminal trial law. He limits his practice to criminal defense and the representation of individuals before state boards and agencies in defense of professional licensure matters*.

This column is submitted on behalf of the Criminal Law Section, Harvey J. Sepler, chair, and Randy E. Merrill, editor.

[FN1]. Unfortunately, this manual is no longer in print; however, anyone wishing to copy the manual may contact Steve Mason at 407/895-6767 or sgmason @bellsouth.net.

75-JUN FLBJ 77

75-JUN Fla. B.J. 77

END OF DOCUMENT