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Column

Young Lawyers' Report

***111** SIMPLE ANSWERS TO COMMON PROBLEMS DURING DEPOSITIONS

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Many difficult circumstances can arise during a deposition. A successful handling of these circumstances depends upon your knowledge of the Florida Rules of Civil Procedure, predeposition preparation, and an awareness of possible ramifications from your actions. Your knowledge and preparation will give you confidence in your decisions and a justification for your actions.

Instructing a Deponent Not to Answer

An attorney may not instruct a witness not to answer a question during a deposition. The Florida Rules of Civil Procedure provide no basis for an attorney to instruct a witness not to answer a question during a deposition. Comparatively, an attorney has the right to instruct a client not to answer questions which, if answered, would violate some type of privilege. The following caselaw deals strictly with unprotected witnesses.

In **Jones v. Seaboard Coast Line Railroad Company, 297 So. 2d 861 (Fla. 2d DCA 1974)**, and Smith v. Gardy, 569 So. 2d 504 (Fla. 4th DCA 1990), the courts held that it was improper for an attorney to instruct a witness not to answer questions asked during a deposition. In **Jones**, objections were raised during the deposition as to the specific form of questions being asked of the witness. The questions were leading and therefore improper. Opposing counsel instructed the witness not to answer the leading questions, and the questioning attorney terminated the deposition and moved for a court order requiring answers to his questions. The trial court denied the motion to compel and agreed that the deponent should not be required to answer improper leading questions asked during a deposition.

The appellate court overruled the trial court and held that it was improper for the attorney to instruct the witness not to answer the leading questions. The court stated that correct procedure was for the objecting attorney to make the proper objection on the record and request a ruling from the court concerning the admissibility of the objectionable question at a later date.

Smith also held that an attorney may not instruct a witness not to answer questions at a deposition. The court concluded that an attorney instructing a witness not to answer questions during a deposition will find no legal support in the Florida Rules of Civil Procedure.

In Smith, the defense counsel instructed the deponent doctor not to answer questions that pertained to standards of care because they were outside the scope of expert interrogatories previously propounded to the doctor. The court of appeal stated that the doctor should have answered the questions posed during the deposition stating, "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 any provision that states that an attorney may instruct a witness not to answer a question." Smith, 569 So. 2d at 507.

There are certain circumstances when an attorney may terminate a deposition. Florida Rule of Civil Procedure 1.310(d) states: "At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the deponent or party . . . the court may limit the scope and manner of the deposition under Rule 1.280(c)."

Florida Rule of Civil Procedure 1.280(c) allows for the suspension of the deposition and the filing of a motion for protective order if an attorney believes that the information sought from the witness would be irreparable if revealed by the witness. Although the attorney may not instruct a witness not to answer a question, the attorney may suspend the deposition and have the court determine if the witness should be required to answer the question. Rule 1.280(c) states in relevant part that, "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, ***112** embarrassment, oppression, or undue burden or expense that justice requires."

If you anticipate a question or line of questioning that would cause you to terminate the deposition, speak to opposing counsel about these questions. If the attorney refuses to refrain from asking these questions, the attorneys may agree to ask the questions at the end of the deposition thus allowing for the completion of the deposition and effectuating a more complete and efficient fact investigation.

Who May Attend a Deposition?

You have set the deposition of the plaintiff. She arrives with her live-in boyfriend, who is a party to the action. He wants to sit in on the deposition. You do not want him present because you intend to depose him at a later date to verify the plaintiff's story and you feel that his testimony may be tainted if he is allowed to be present.

Florida Rule of Civil Procedure 1.310(a) states: "After the commencement of an action, any party may take the testimony of any person, including a party by deposition upon oral examination." Florida Rule of Civil Procedure 1.310(b)(1) adds that a party wanting to take the deposition of any person shall give reasonable notice in writing to every other party in the action.

Lingelbach's Bavarian Restaurants, Inc. v. Del Bello, 467 So. 2d 476 (Fla. 2d DCA 1985), stated

the purpose of the notice rule is to inform all parties to the action of the pending deposition so they may attend and cross-examine all witnesses being deposed. The Florida Rules of Civil Procedure and Florida caselaw make it clear that a party to an action may attend any deposition relevant to the lawsuit in which they are a party.

If the plaintiff's-live in boyfriend is not a party to the action, the results may be different.

Historically, Florida Rule of Civil Procedure 1.310(b) gave the courts the power to order "that the examination be held with no one present except the parties to the action and their officers or counsel." In 1972, the Rules of Civil Procedure were amended.

Today, Florida Rule of Civil Procedure 1.280(c) provides that a judge may, upon a showing of good cause, "make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one or more of the following: . . . (5) that discovery be conducted with no one present except persons designated by the court." To exclude a nonparty from a deposition, there must be a showing of compelling evidence of annoyance, embarrassment, oppression, or undue expense to the deponent or the nonparty will be allowed to attend the deposition.

Smith v. Southern Baptist Hospital of Florida, Inc., 564 So. 2d 1115 (Fla. 1st DCA 1990), held that there is no unwritten rule of sequestration that would prohibit prospective witnesses from attending depositions. In Smith, a nonparty treating doctor attended his supervising doctor's deposition. Plaintiff's counsel invoked the rule of sequestration of witnesses that is generally applicable at trial. Defense counsel objected. The plaintiff's attorney moved for a protective order to exclude the doctor from the deposition. This order was denied by the trial court.

In Smith, the plaintiff relied upon Dardashti v. Singer, 407 So. 2d 1098 (Fla. 4th DCA 1982), to support his argument for invoking the sequestration rule at the deposition. In Dardashti, the defendant attempted to exclude the plaintiff's wife from the deposition by invoking the rule of sequestration. The court relied upon Spencer v. State, 133 So. 2d 729 (Fla. 1961), which held that a trial judge may invoke the rule of sequestration at trial by excluding all prospective witnesses from the courtroom in an effort to avoid the coloring of witness testimony. The court stated: "[A]lthough Spencer's particular facts involved exclusions at criminal trial, there is no reason why its strictures should not pertain equally to pretrial depositions in a civil matter and we so apply them." The appellate court stated that the sequestration rule invoked in Dardashti has been invoked by caselaw but is not recognized by the Florida Supreme Court as a written rule. The court added that this rule is applicable at trial but not at deposition. "The presence of witnesses at a deposition is controlled by Florida Rule of Civil Procedure 1.280(c), which provides that upon a motion by a party and for good cause shown, the court in which an action is pending may enter a Protective Order designated by the court." Smith, 569 So. 2d at 1117.

The court in Smith, persuaded by a federal decision out of Alabama, stated that excluding a potential witness from a plaintiff's deposition because that witness would be exposed to that deponent's testimony and thus permitting collusion or fabrication, did not justify the granting of a

protective order. BCI Communications Sys., Inc. v. Bell Atlanticom Sys., Inc., 112 F.R.D. 154 (N.D.Ala. 1986).

Because Florida law promotes liberal pretrial discovery rules, judges will be hesitant to grant a protective order excluding a witness from a deposition. If you decide to terminate the deposition and lose your argument for a protective order, your client may be liable for costs, but only if your motion for a protective order was unreasonable.

A protective order will only be granted by the court if the moving party can show annoyance, embarrassment, oppression, or undue burden or expense to the deponent. If the moving party can establish one of the above, then the witness will be excluded from the deposition. "A party may not simply invoke the unwritten rule of sequestration which is applicable at trial." Smith, 569 So. 2d at 1118.

If you anticipate that an objectionable witness may be present at a deposition, contact opposing counsel and attempt to resolve the issue prior to the deposition. State your objection to opposing counsel. You may be able to come to an agreement without the court's intervention. If you cannot come to an agreement, move for the protective order pursuant to Florida Rule of Civil Procedure 1.280(c).

In summation, all parties have the right to be present at all depositions. Generally, all potential witnesses will be allowed to attend as well, absent a showing of annoyance, embarrassment, oppression, undue burden, or expense.

Scope of Discovery in Deposition

Florida Rule of Civil Procedure 1.280(b) states in relevant part: "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial ***113** if the information sought appears reasonably calculated to the discovery of admissible evidence."

Jones v. Seaboard Coast Line Railroad Company, 297 So. 2d 861 (Fla. 2d DCA 1974), interpreted this rule to mean that the "oral deposition of any deponent shall proceed to completion, subject to recorded objections subsequently to be resolved by the court, and all reasonably relevant questions, leading or otherwise, must be answered unless privileged, whether or not such answers themselves, or other evidence toward which they may lead, would be admissible at trial."

The court in **Jones** noted that their interpretation is subject to Rule 1.280(c), which allows for a deposition to be terminated or delayed pending a protective order.

The trial court in **Jones** ruled that the attorney's leading questions on direct examination were improper, stating that leading questions were improper at trial and thus improper at deposition. The trial court based its opinion on Florida Rule of Civil Procedure 1.310(c) which states:

"Examination and cross-examination of witnesses may proceed as permitted at trial." The trial court ruled that the discovery rules permitted at trial were also applicable to discovery depositions.

The Second District Court of Appeal disagreed with the trial court and stated, "To impose such limitations would frustrate, we think, the very purpose of the rule and at the same time be inconsistent with other portions of the rules relating to discovery which do promote their purpose." **Jones, 297 So. 2d at 864.**

The appellate court's opinion correctly argued that the drafting of the Florida Rules of Civil Procedure closely parallel the Federal Rules of Civil Procedure. Wright and Miller, Federal Practice and Procedure, Civil § 2001, vol. 8, p. 15, states: "The scope of discovery has been made very broad and restrictions imposed upon it are directed chiefly at the use of, rather than the acquisition of, the information discovered."

The rules of discovery in Florida are very broad and are to be liberally construed. The ability and availability to use this information at trial is more stringent. Discovery evidence compared to trial evidence are separate issues that must be analyzed accordingly.

Should I Object?

Florida Rule of Civil Procedure 1.330(d) states that an "[o]bjection to the competency of a witness or the competence, relevancy, or materiality of the testimony are not waived by a failure to make such objections before or during the taking of the deposition unless the ground of the objection is one that might have been obviated, removed, or presented at that time."

Errors that occur during the deposition that concern the manner of the taking of the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of the parties and errors of any kind that might be obviated, removed, or cured if promptly presented are waived, unless a timely objection to them is made at the time of the taking of the deposition. For example, compound or leading questions would be waived if not objected to during the deposition.

Weyant v. Rawlings, 389 So. 2d 710 (Fla. 2d DCA 1980), stated that a failure to object to a question because of a failure to lay a proper predicate waives the right to raise that objection later in the proceedings. In Weyant, the defense attorney instructed the deponent doctor not to answer questions, because plaintiff's counsel failed to lay a proper predicate that the doctor was qualified to answer questions pertaining to Hodgkin's disease.

To preserve your right to object to the form of a question at a later time, you must object at the time of the taking of the deposition. Florida Rule of Civil Procedure 1.330(d)(3)(B) requires the attorney to state the basis for the objection. In Weyant, the attorney failed to do so, therefore, the appellate court ruled that he waived his right to object to the form of questions later in the

proceedings. Furthermore, the attorney was in error instructing the deponent not to answer questions solely based upon the questioning attorney's failure to lay a proper predicate for certain questions.

The attorney who makes an objection as to the form of the question is essentially requesting the attorney who asked the question to clarify a specific point. The attorney receiving the objection should then inquire as to the basis of the objection so that the attorney may determine whether to rephrase the question or let it stand as currently phrased.

All objections, except as to the form of the question, are preserved until the time of trial. You should only object to questions that you believe are improper as to form (i.e., it is leading, compound, or vague). All other objections should be made via a motion in limine or at trial.

Finally, prepare your client for objections. Instruct your client prior to the deposition that you might object to questions. Your client should understand ***114** that he or she must respond to a question once you have objected unless there is an issue of privileged matters. If your client does respond to an objectionable question, you need to state your objection on the record, your reasons for failing to object in a more timely manner, and move to strike the question and the response.

Practical Tips for a Successful Deposition

These suggestions are not supported by rules of procedure or caselaw. They are based upon common sense and courtesy with the key focus on your ultimate goal, that being discovery of facts to help ascertain the parties' strengths and weaknesses in the lawsuit.

Introduce yourself on the record and briefly explain whom you represent. The deponent should be instructed to respond verbally to questions asked. Nodding, shrugging, or other bodily movements to affirm or disaffirm questions do not appear on the record. Also, instruct the deponent to wait until you have finished your question before responding. This will alleviate any confusion as to what the deponent responded to and will make the deposition transcript easier to read.

The deponent should understand that he or she must request that you rephrase a question if you ask a question the deponent does not understand. It is important to tell the deponent that if a question is answered, then it will be assumed that the question was understood.

Clarify important points for the record. For example, a treating physician testifies that the plaintiff's injuries are not causally related to the litigated accident. This point must be established in no uncertain terms. You need to ensure that the trier of fact will not misinterpret this crucial testimony. To ensure this testimony is clearly established, you need to ask, "Is it your testimony here today that there is no causal relationship between the plaintiff's injuries and the accident of January 1, 1993?" You now have the deponent's position nailed down in no uncertain terms.

Keep your questions simple. If the deponent does not understand the question, chances are the jury will not understand the question either, so rephrase the question. Avoid any side comments during the deposition. These comments take away from the important issues and may detract the reader from the more important theme or content of the deposition.

Treat the deponent with respect. Coarse and abrasive language may make the deponent less willing to provide gratuitous information. Furthermore, the jury may be offended if the deposition transcript is read. It is important that you remain in control of the witness and the deposition, but you may achieve these objectives in a polite and courteous manner.

Be prepared. Give yourself plenty of time to review the file, facts, and available discovery prior to the deposition. This is important whether you are taking the deposition or your client is being deposed. As you prepare for the deposition, make a list of questions that need to be asked. Do not hesitate to look at these questions for fear of looking inexperienced. It is better to look inexperienced and obtain your information than to look experienced and go home "empty handed."

The Rules of Civil Procedure and caselaw address a few of the problems you will deal with during your years of practice. The answers to these problems are not highly technical. Your knowledge and awareness of these discovery rules and procedure will enable you to focus more fully on the important issue at hand, information gathering.

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This column is submitted on behalf of the Young Lawyers Division, Theodore C. Eastmoore, president, and Stephen O. Decker, editor.

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