Lawyers Sanctioned for Unilaterally Terminating Deposition

Trial lawyers beware: Ongoing relevancy objections are no basis for terminating a deposition, according to one federal court. Even if the objecting lawyers believed that the questioning was intended to further discovery in an unrelated case, they risked sanctions by summarily ending the deposition. Instead, the lawyers should have expressly invoked Federal Rule 30, built a record that the questioning was in bad faith, and turned to the court for a protective order. Having failed to do that, the lawyers were liable for both costs and attorney fees incurred in subsequent motion practice.

The litigants in Black & Decker, Inc. v. Positec USA Inc. were well-known to each other, having previously tried to verdict a separate $54 million trade dress case in the U.S. District Court for the Northern District of Illinois. That earlier dispute was undergoing post-trial briefings as discovery progressed in an unrelated patent case between these same parties and before the same court. During a deposition in the patent case, the plaintiff's counsel questioned the defendant's corporate representative about the product line at issue in the trade dress case. Defense counsel objected that these questions were irrelevant to the subject at hand and ultimately instructed her client not to answer. When the questioning continued along these same lines, defense counsel suspended the deposition for a short break, and upon returning, unilaterally terminated the deposition. She moved thereafter for a protective order, arguing that the plaintiffs were "seeking evidentiary fodder for post-trial motions then pending in the trade dress case" where discovery had long closed.

The district court disagreed and granted the defendant's motion for sanctions.

The Rules Provide a Mechanism

As the court explained, under Rule 30(c)(2) of the Federal Rules of Civil Procedure, an objection "whether to evidence, to a party's conduct, to the officer's qualification, to the manner of taking the deposition, or to any other aspect of the deposition," must be noted on the record, "but the examination still proceeds." Moreover, under Rule 30(d)(2), a party may only instruct a witness not to answer "only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)." Finally, Rule 30(d)(3) provides that a party may move to terminate or limit a deposition "on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses or oppresses the deponent or party."

As the court cautioned, however, relevancy alone "is not a basis for the termination of a deposition under Rule 30(d)(3)."

Make Your Record

Yet relevance was the only basis that defense

counsel cited at the time. As the court observed, the defendants "never made mention of a Rule 30(d)(3) motion at the deposition. Nor did the defendants give any indication that the directive not to answer . . . was based on such grounds. Instead defendants instructed [the witness] not to testify solely on the ground that the questions were not relevant to this lawsuit." Because the defendants did not contemporaneously claim that they found the questioning to be abusive, or that they were contemplating a Rule 30(d)(3) motion, the court found no basis for terminating the deposition.

"The opinion is a good reminder for counsel to build a strong record using the language of Rule 30(d)(3) before unilaterally terminating a deposition," says Ethan T. Tidmore, Birmingam, AL, cochair of the Membership and Diversity Subcommittee of the ABA Section of Litigation Pretrial Practice & Discovery Committee. Because the rule identifies bad faith and oppression as grounds for limiting the deposition, counsel should invoke that language in particular where applicable, he added.

Michael P. Downey, St. Louis, MO, cochair of the Legislation & Rules Subcommittee of the Section's Ethics & Professionalism Committee agrees. "One of the big messages is that a deposition should go on—unless you can show that opposing counsel is harassing or intruding on a privilege."

Try To Work It Out

But even then, merely characterizing the objection in terms of Rule 30(d)(3) may not be enough, warns Tidmore. "It is important to repeatedly warn counsel and not pull the plug immediately." Downey agrees, noting that carefully articulated objections may have allowed counsel to work through the impasse. As Downey explains, "it's very appropriate for the lawyer to take a break and think through her objections. Since she did not do that at the time, she removed the ability for both sides to work through their issues."

Should the impasse prove intractable, Downey adds, the court is only a phone call away. "Courts often prefer that you take a break and contact them. The fact that you are going to call the court can sometimes change the questions or the objections, and tends to make everybody more reasonable." But calling the judge poses problems of its own, warns Tidmore. "The upside to contacting the court is that you often will get an immediate answer, saving time and money and avoiding the risks involved with terminating the deposition. The downside is that if the issues are complicated, a rushed and unplanned telephone call may not be the best way to frame them for the court."

In either event, Downey says, the crucial question is whether the objecting lawyer built a record invoking Rule 30(d)(3) and showing reasonable efforts to resolve the dispute before terminating the deposition. "Judges often find it frustrating when a lawyer's response is just to take their marbles and go home," adds Downey.

In conclusion, the case of Black & Decker, Inc. v. Positec USA Inc. serves as a critical lesson for trial lawyers. Terminating depositions based solely on relevancy objections is not a sound strategy, as the court emphasized that relevancy alone does not justify such actions under Rule 30(d)(3). To protect your client's interests and avoid potential sanctions, it's crucial to build a strong record by invoking Rule 30(d)(3) when necessary and working through objections with opposing counsel. Rushing to terminate a deposition should be a last resort, and judges generally prefer attorneys to take breaks and contact the court if needed. Ultimately, the key takeaway is that lawyers must demonstrate reasonable efforts to resolve disputes before resorting to abrupt terminations. Remember, leaving the deposition table prematurely can have serious consequences. Take these lessons to heart and ensure your deposition strategies are sound and in compliance with the rules. Your clients depend on it.