Litigation Journal article

Defending Depositions and Fed. R. Civ. P. 30(d)

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Effective December 1, 1993, Fed. R. Civ. P. 30 governing depositions was amended, in part to address how objections are made during depositions. This article reviews the amendments to Rule 30 governing conduct during depositions and the relatively sparse case law that has developed under the rule.

Rule 30(d)(1), which was added, directly addresses both the use of "speaking objections" and instructions to a witness not to answer a question:

> Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence, directed by the court, or to present a motion under paragraph (3) [to terminate or limit the scope and manner of the taking of the deposition].

The Advisory Committee Notes concerning Rule 30(d)(1) contain the observation that depositions "frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond."

Rule 30(d)(2) was also added. In addition to authorizing courts to limit the length of depositions, Rule 30(d)(2) authorizes courts to impose sanctions for conduct that prolongs or obstructs a deposition. If the court finds that "the deponent or another party impedes or delays the examination" or finds "other conduct that has frustrated the fair examination of the

deponent," then it may impose "an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof." The Advisory Committee Notes also indicate that improper objections, giving improper instructions not to answer, and possibly an excessive number of unnecessary objections all could constitute sanctionable obstructive conduct during a deposition under Rule 30(d).

We found about 35 cases touching upon Rule 30(d) since the effective date of the 1993 amendments. Only a handful discuss the application of Rule 30(d) sanctions. Monetary sanctions imposed under Rule 30(d) have included the cost of the motion and, on the high end, the entire cost of resuming a deposition, including travel, court reporting, and attorney fees. Sanctions under the rule will likely be assessed against the offending attorney personally. The other consequences of violating Rule 30(d) may include the opportunity of the opponent to re-depose witnesses and imposition of stringent limitations on the defending attorney's role during subsequent depositions.

The Eastern District of Pennsylvania has imposed the most stringent controls on attorneys defending depositions, beginning with cases that were not directly decided pursuant to Rule 30(d). In Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993), a case involving an aborted deposition, the defending lawyer took the position that the witness could confer with him at any time, the witness stopped to confer with his attorney regarding the meaning of "document" and then asked the deposing attorney its meaning, and the defending lawyer attempted to review a document

with the witness prior to any questioning regarding the document. Id. at 526. The court in Hall limited the defending attorney's role, most significantly by barring discussion of testimony with the witness once the deposition was commenced, even during recesses, except to confer regarding the possible assertion of a privilege. Id. at 529. The court went even further in ordering that the fact and the subject matter of any conferences must be disclosed on the record, and attorney-client communications during the conferences were discoverable to the extent of determining what, if any, witness-coaching occurred. Id. at 532.

In Applied Telematics, Inc. v. Sprint Corp., Civ. A. No. 94-CV-4603, 1995 WL 79237 (E.D. Pa. Feb. 22, 1995), the district court strictly followed Hall in granting a motion to preclude the deponent's counsel from obstructing discovery. The magistrate judge imposed guidelines requiring the witness to ask the deposing attorney for clarification, limited objections only to those that would be waived under Fed. R. Civ. P. 32(d)(3)(B) (relating to form) or those necessary to preserve a privilege or to enforce a limitation on evidence, limited directions not to answer to those based on privilege or a court-ordered limitation on evidence, prohibited speaking objections, and prohibited conferences between the witness and counsel except for those related to assertion of a privilege. Id. at *4.

Rule 30(d) was applied in Frazier v. Southeastern Pennsylvania Transportation Authority, 161 F.R.D. 309, 314-17 (E.D. Pa. 1995), where the court granted a motion for monetary sanctions and the re-deposition of the plaintiff after

plaintiff's counsel interrupted the deposition repeatedly by suggesting answers, cutting short his client's responses, and instructing her without a proper basis not to answer questions. The court noted that Rule 30(d) served to "animate" the rules it followed as stated in Hall. Plaintiff's counsel was ordered to pay the costs and fees associated with the defendant's motion. 161 F.R.D. at 317.

Other district courts have imposed sanctions using Rule 30(d) as well. In Armstrong v. Hussman Corp., 163 F.R.D. 299 (E.D. Mo. 1995), for example, the plaintiff's two attorneys made objections that suggested answers to their client, instructed him not to answer questions without basis, reformulated questions, conferred with the witness when documents were presented to him, and had private conferences with the witness during the deposition. Id. at 301-303. The court held that the attorneys violated Rule 30(d)(1) and engaged in bad faith conduct and thus ordered them to pay for the defendant's attorney fees for the deposition under 28 U.S.C. § 1927. Id. at 303. The court also ordered that defendant could re-depose the plaintiff and numerous witnesses and imposed guidelines for the depositions almost identical to those in the Applied Telematics case. Id. at 304.

In Dravo Corp. v. Liberty Mutual Ins. Co., 164 F.R.D. 70 (D. Neb. 1995), the defending attorney instructed a non-party corporation's designated witness not to answer questions because they were purportedly repetitive or outside the scope of the subpoena. The court noted that the instructions were "highly improper" absent a claim of privilege or the attorney's motion

pursuant to Rule 30(d)(3) that the deposition was being conducted in bad faith or in a manner as to unreasonably annoy, embarrass, or oppress the witness. 164 F.R.D. at 74. The non-party corporation was required to pay for costs (including travel expenses and court reporting) and attorney fees for the time consumed in resumption of the deposition. Id. at 75.

The amendments to Rule 30(d) make the imposition of sanctions much easier, as the analysis in Phillips v. Manufacturers Hanover Trust Co., No. 92 CIV. 8527 (KTD), 1994 WL 116078 (S.D.N.Y. March 29, 1994), demonstrates. The court noted that 60% of the pages of the transcript contained objections by counsel, including many speaking objections, and that the witness began to ask for clarification of apparently unambiguous questions in response to objections. Id. at *3. Although noting sanctions could not be awarded under the standards of Fed. R. Civ. P. 37, of 28 U.S.C. § 1927, or for the court's exercise of its inherent power, whether to grant sanctions under Rule 30(d) was a close call. The court warned that it was not the defending attorney's role to interrupt a question that is perceived to be potentially unclear to the witness, that the attorney's conduct was inappropriate, and that a repeat performance would result in sanctions. Id. at *4. See also Langer v. Presbyterian Medical Center of Philadelphia, Civ. A. Nos. 87-4000, 91-1814, and 88-1064, 1995 WL 79520 at *15 (E.D. Pa. Feb. 17, 1995) (noting that neither Rule 37 nor Rule 26(g) could be used to sanction the defending attorney's behavior during a deposition, but awarding sanctions under § 1927 because he acted in bad faith). Thus,

regardless of an attorney's good faith or bad faith, by making speaking objections or instructing a witness not to answer questions without a proper basis, the attorney may be subject to sanctions under Rule 30(d).