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Trial Briefs

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

Absolute immunity

BY ROBERT T. PARK, CALIFF & HARPER, P.C., MOLINE

The April 14, 2016, *Chicago Daily Law Bulletin* contained an article about James G. Walker ("Walker"), a Bloomington lawyer who was suspended by the ARDC for filing statements that challenged the qualifications and integrity of three justices of the Third District of the Illinois Appellate Court.[1] Reading the article prompted research into the underlying cases.

In 2005, Walker filed a suit on behalf of a widow, Patricia Moncelle, for the wrongful death of her husband. The trial court dismissed, struck, and granted summary judgment against the plaintiff as to certain portions of her complaint. When that case came up for trial in late 2007, Walker took a voluntary non-suit.[2]

A few months later in 2008, Walker filed a new action for the same plaintiff against the same defendants. He also filed a Section 2-1401 petition to revive the 2005 action. The trial court held that *res*

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Witnesses, statements and depositions: A few new thoughts

BY PATRICK M. KINNALLY

I have been taking statements and depositions from people since 1975. First, it was in the context of working for a federal agency where sworn statements were used in enforcement proceedings before a federal administrative law judge. Many of these statements were in the Spanish language. This made me listen to what was said. Later, when I became a lawyer, statements were taken for the purpose of investigating a case and depositions were conducted formally for court proceedings. These experiences helped me decide whether or not what was said was material, accurate, and credible; or maybe should a statement be recorded at all. What is said, counts. What is unsaid may be more important.

This training taught me to consider

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judicata barred the new suit because of the dismissal of the first suit, and it denied the Section 2-1401 petition. Walker appealed that decision. In 2010, the Third District affirmed in a Rule 23 order.[3] The Illinois Supreme Court denied leave to appeal from that order.

In 2011, on behalf of the same plaintiff, Walker filed a new suit against the original wrongful death defendants, later adding counts against Appellate Justices Mary McDade, Vicki Wright and Mary O'Brien, alleging judicial misconduct including tampering with public records, corruption and intentional misrepresentation. The trial court dismissed the 2011 action, and that dismissal was affirmed on appeal in 2014, again in a Rule 23 Order.[4]

The key part of that decision is near the end, where the court discusses judicial immunity (referring to defendants McDade, Wright and O'Brien as "the Justices"):

> As an aside, we feel compelled to note that even if count III was not a nullity, it is also insufficient as a matter of law because in it Moncelle sought damages against the Justices for actions taken in their judicial capacities. It has long been held that a judge is absolutely immune from liability for acts committed while exercising the authority vested in her. *Grund v. Donegan*, 298 Ill. App. 3d 1034, 1039, 700 N.E.2d 157, 233 Ill. Dec. 56 (1998). Judges are not liable to civil actions even when such acts are alleged to have been done maliciously or corruptly. *Generes v. Foreman*, 277 Ill. App. 3d 353, 356, 660 N.E.2d 192, 214 Ill. Dec. 1 (1995). This doctrine is subject to only two exceptions: (1) actions not taken in the judge's judicial capacity; and (2) actions taken in the complete absence of all jurisdiction. *Grund*, 298 Ill. App. 3d at 1039. Neither exception applies in this case. Therefore, count III is barred on the grounds of judicial immunity.[5]

While a Rule 23 order may not be cited, the court relied on published decisions. In *Grund v. Donegan*, an attorney sued a judge for tortious interference with contract and prospective economic advantage, alleging that the defendant made every effort to hinder plaintiff's ability to represent his client in a divorce action because of the judge's extreme dislike of the attorney. The court affirmed dismissal of the action based on absolute judicial immunity.[6] Likewise, in *Generes v. Foreman,* the court relied on judicial immunity in affirming dismissal of a suit by former litigants against a judge.[7]

Public employees enjoy similar absolute immunity in connection with their public statements. In the recent case of *Novoselsky v. Brown*, an attorney sued the Cook County Circuit Clerk in federal court under 28 U.S.C. § 1983 for charges she filed against him with the ARDC, the press release she issued regarding that filing, her communications about him to the Reverend Jesse Jackson, and letters she sent to the Better Government Association, the Cook County President and Board.

Defendant Brown took an interlocutory appeal from the district court's denial of her motion for summary judgment. Reversing and holding the attorney's suit had to be dismissed, the 7th Circuit Court of Appeals stated (citations and quotes omitted):

> Illinois courts have long held that executive branch officials of state and local governments cannot be civilly liable for statements within the scope of their official duties. This immunity covers even defamatory statements. The protection cannot be overcome by demonstrating improper motivation or knowledge of the statement's falsity, including malice. This absolute immunity for such statements represents a severe restriction" for individuals seeking redress against

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defamation. The Supreme Court of Illinois has explained that this immunity is justified by the countervailing policy that officials of government should be free to exercise their duties without fear of potential civil liability.[8]

The *Novoselsky* court cited Illinois cases applying such absolute immunity to statements by executive officials, such as the governor,[9] and to mayors of Illinois municipalities, chief administrators, and officials of the executive branch of a local government.[10] The court also noted its previous prediction that Illinois courts would extend this immunity to local school board members because the privilege ensured that governmental officials could be free from unwarranted defamation suits.[11] It said the sole consideration was whether the statements were reasonably related to the official's duties or, put another way, were within the scope of their authority.[12]

Another type of absolute immunity has been applied to child representatives appointed under the Illinois Marriage and Dissolution of Marriage Act ("the Act"). Under the Act, the court can appoint (1) an attorney for a minor or dependent child, (2) a guardian ad litem, or (3) a child representative.[13] In *Vlastelica v. Brend*,[14] a mother sued a court-appointed child representative and his law firm, alleging legal malpractice, intentional breach of fiduciary duty and intentional interference with her custody rights in a divorce action. In response to a motion to dismiss, the plaintiff relied on the fact that the Act grants no immunity to child representatives.

Relying on a 7th Circuit decision, the *Vlastelica* court affirmed dismissal the action based on judicial immunity (citations and quotes omitted):

> Guardians ad litem and court-appointed experts, including psychiatrists, are absolutely immune from liability for damages when they act at the court's direction. They are arms of the court, much like special masters, and deserve protection from harassment by disappointed litigants, just as judges do. Experts asked by the court to advise on what disposition will serve the best interests of a child in a custody proceeding need absolute immunity in order to be able to fulfill their obligations without the worry of intimidation and harassment from dissatisfied parents. This principle is applicable to a child's representative, who although bound to consult the child is not bound by the child's wishes but rather by the child's best interests, and is thus a neutral, much like a court-appointed expert witness.[15]

The foregoing decisions show that absolute immunity from suit is applicable to judges, public officers making statements in their official capacity, guardians ad litem, court-appointed experts and child representatives. ■

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1. <http://www.chicagolawbulletin.com/Articles/2016/04/14/Attorneys-suspended-4-14-16.aspx> (last visited June 26, 2016), citing the ARDC decision *In re James Gordon Walker*, 2014PR132.

2. A voluntary dismissal may be taken under 735 ILCS 5/2-1009 up to the beginning of trial, as in *Kahle v. John Deere Co*., 104 Ill. 2d 302 (1984) (affirming a dismissal without prejudice taken just before jury selection after the court had ruled on pre-trial motions). But under certain circumstances, a voluntary dismissal can bar refiling, *e.g. Hudson v. City of Chicago*, 228 Ill.2d 462 (2008) (holding *res judicata* barred plaintiffs' new filing after a voluntary dismissal when part of the action had been involuntarily dismissed on defendant's motion).

3. This order is not available on the Illinois Courts web site or on LEXIS.

4. *Moncelle v. C.A.P. Air Freight, Inc.,* 2014 IL App (3d) 130121-U. Although nominally a Third District decision, the appeal was decided by justices from the Second District because some Third District justices were parties and the other Third District justices recused themselves.

5. *Id.*, ¶ 70.

6. 298 Ill. App. 3d 1034, 1039. Under the State Lawsuit Immunity Act, 745 ILCS 5/0.01 *et seq*., a judge may also be entitled to immunity from suit except in the Court of Claims for his or her actions taken as a state employee, as held in *Amu v. Snyder*, 2014 IL App (1st) 123731-U.

7. 277 Ill.App.3d 353, 356 (1st Dist. 1995).

8. *Novoselsky v. Brown*, 2016 U.S. App. LEXIS 8589 at *10-*11.

9. *Blair v. Walker*, 64 Ill.2d 1 (1976).

10. *Geick v. Kay*, 236 Ill.App.3d 868 (2nd Dist. 1992), *app.den.* 148 Ill.2d 641.

11. Citing *Klug v. Chicago School Reform Board of Trustees*, 197 F.3d 853 (7th Cir. 1999).

12. *Novoselsky v. Brown*, *supra*, at *12.

13. 750 ILCS 5/506(a).

14. 2011 IL App (1st) 102587.

15. *Vlastelica v. Brend*, *supra*, ¶ 21, quoting *Cooney v. Rossiter*, 583 F.3d 967, 970 (7th Cir. 2009). See also *Davidson v. Gurewitz*, 2015 IL App (2d) 150171, ¶¶ 11- 14, following *Vlastelica,* and *Shen v. Shen*, 2015 IL App (1st) 130733, ¶ 118, citing *Vlastelica.*

Witnesses, statements and depositions: A few new thoughts

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three things prior to taking statements or depositions. First, in order to appreciate a witness' story, you must know why you are doing it. In short, is it purposeful? Does it help you achieve the theory of your case? Next, what are you going to do with the statement or deposition? Is it evidentiary? Do you want to limit the story, learn facts, and/or make a record? Third, how are you going to take the statement or deposition? This question has two components. Initially, will you "go after" the witness or will you use a style that puts the witness at ease? Finally, will you take the statement by oral question, ask the witness to write it out longhand, take your own notes, record it for your own advantage, or use the formal discovery devices provided by our Supreme Court Rules? Hopefully, this article may provide some insights.

Deposition is a curious word. Literally, it means to take one from a position. It's one of the words, like interrogatory, that lay people do not understand. There is a little mystery to it. Your job is to remove the shroud of what a deposition may connote to your client. Strip it down. Make it the sworn statement it actually is.

Depositions are part of the discovery process of a lawsuit. They did not used to be. Historically, depositions were not routine exercises. Leave of court was required. This is still true for some medical professionals (735 ILCS 5/2-1003, S.Ct.R. 204(c)); and in ordinance and small claims cases (S.Ct.R. 287, S.Ct.R. 201(b)). In arbitration cases, depositions are basically limited to the parties and treating physicians (S.Ct.R.222). Liberal rules of discovery were promoted because judges and legislators felt that surprise by testifying witnesses was not resulting in the promotion of the truth-seeking process we aspire to as justice. Now depositions occur in almost every civil case. Lawyers make money doing them. Remember, there is no requirement that you take a deposition. Nonparty, lay witness statements can serve the same function. Also, they are less expensive and can be taken *ex parte* in certain circumstances.

The rules that pertain to depositions in the discovery process have been laid out extensively by the Illinois Supreme Court (S.Ct.R. 201). The rules provide the purpose for which depositions may be taken in a pending action (S.Ct.R. 203), how to take a deposition before a suit is filed (S.Ct.R. 217), to perpetuate testimony (735 ILCS 5/8-2301) and to compel the appearance of a deponent in this state, as well as other states (S.Ct.R. 204). The rules provide where the deposition may be taken (S.Ct.R. 203), who it may be taken in front of (S.Ct.R. 205), how it is to be conducted—orally (S.Ct.R.206) or in writing (S.Ct.R.210), what you do with the deposition once it is over (S.Ct.R. 207), and who pays for it (S.Ct.R. 208). Finally, the rules provide how you can object (S.Ct.R. 211), what you can use a deposition for (S.Ct.R. 212 and 191, 735 ILCS 2/1005), and what happens if you do not show up for a deposition (S.Ct.R. 209,219).

So, you need to know the rules. If you are in state court, these maxims are different than those in federal tribunals. Also, they may be different for arbitrations and mediations. In federal court, a deposition transcript can be used with greater ease than in an Illinois trial court (Fed Rule Civ. Proc. 32(d); S.Ct.R. 212). In other words, a party cannot wait until trial to bring up objections which could have been addressed during the deposition. Illinois Supreme Court Rules, on the other hand, list the type of objections that may be made at deposition. Full disclosure is required. Objections as to the form of the question, privilege, and that the question will not lead to the discovery of evidence admissible at trial are the only reins on this philosophy. So, you need to read the rules. As to the federal rules, obtain a copy of David Malone's *Deposition Rules*. It is a small book with a lot of good information. Also, Tom Mauet's books, *Fundamentals of Trial Techniques and Trials* and *Pretrial* have good analyses of taking witness statements and depositions[1]. And, James McElhaney's Trial Notebook (2005) is insightful about asking simple questions, among other topics.

Six questions are applicable to the taking of any statement or deposition. You learned them a long time ago. They are: what, where, why, when, who and how. That may sound simple. It is not. Those inquiries cover a lot of ground. If you keep these questions in mind throughout your examination of the witness, you will simplify things. The deposition transcript will be much more understandable.

When you talk to your client, put yourself in her position. Witnesses are anxious. They do not know what to expect. They think they have to know something because they are the focus of your interest. Witness preparation varies not only by the individual but also by the theory of recovery. A "stoic" and a "whiner" present different problems, as does the surviving spouse and a child in wrongful death litigation. Five minutes before the deposition is not enough. Make house calls. See how people experience their lives. Doctors used to do it. Why? Because people know you are interested in them when you call them at their homes. That promotes trust.

Explain to your client how the deposition proceeds in terms of examination. Tell your client what to expect in terms of your opponent's examination. Make sure your witness understands the question and that she can request clarification of any question at any time. Instill in your client a wariness of questions that start with "Don't you agree with me?," or "Isn't it true? " that such and such happened. Explain what objections are at a deposition. Tell him why you make or don't make objections and what to do when you do make an objection. Remember, you client wants to know why you are instructing her to not answer a question. Describe not only your theory or

the case, but also the burden of proof and its quantum. Discuss changing an answer, signing the deposition, and what happens to the transcript. Be sure your witness understands what use(s) can be made of his/her testimony. The importance of the impression that your client makes at the deposition cannot be overemphasized. Cast her in a favorable light. It is your job not just to turn that light bulb on, but to illuminate your client as both likable and credible.[2]

Witness statements and depositions have two purposes. First, they are used to gather information. You need information to not only assess your opponent's theories, but also because the witness probably knows more about the facts of the case than you do. In this regard, taking a witnesses deposition can provide links to other witness testimony you have not discovered which produces new proof, corroborates your client's theory, or discredits the opponent's defense. Most importantly, you need information to assess the viability of your own position.

Another purpose of the deposition is to seal the witness into a position which he cannot change materially. In short, you must make the witness "take a stand" with respect to their own testimony. Although much of a deposition contains open-ended questioning, there comes a time during the deposition that you need to push the witness into a corner from which he cannot emerge without contradiction. This is not merely an exercise in logistics. More importantly, it has do with credibility. A person can only say "I do not remember" so many times before she loses any persuasive force as to having knowledge on the topic about which she is being questioned. Similarly, if a witness takes an inconsistent or vague position on a topic of which he is supposedly knowledgeable, he is either feigning, not disclosing for a reason, or ill-informed. This happens often with opinion witnesses such as physicians or appraisers, who always want to know the other side's theory of the case before disclosing their views. Be persistent. Make them take a specific position. You are fixing one's belief in a given array of facts. You will use that at trial to possibly show mistake, inconsistency, or impeachment. You set the stage now in clear, precise utterances from the witness.

Some lawyers take depositions for long periods of time. This is understandable in some cases, but they are a singular minority. Most cases where depositions are taken are car wrecks and divorces. In Illinois, we have a rule that depositions must be completed within three hours unless you obtain permission from the court for a longer period of time. This is a good rule. Depositions should not rival root canal dentistry. Generally, you do not need three hours to understand a witness's view of what happened as he approached the open intersection and a collision occurred. Focus your inquiry.

If your opponent is using three hours to take such a deposition, be wary. Your opponent is probably beefing up his billable hours, trying to show how knowledgeable he is, or trying to tire your witness so she makes an admission she might not otherwise have made. Lawyers are great at covering ground they have plowed twice before. Do not permit this to happen. Instruct your witness about this before it happens. There is nothing wrong with your witness saying, "I already answered that." If the lawyer persists, which she can, then the witness can say she stands by her earlier answer and does not have anything to add since she thinks her original answer was accurate. This should suffice. Generally, I ask my opponent before the deposition starts how long he thinks it will take. If you do not get a straight answer, then take time with your witness before the deposition starts to alert her.

Remember, during a deposition, there is nothing wrong with taking breaks. You should encourage your witness to do that. Don't talk to the witness during the break about her testimony. I will address this later in this article. Tell the witness to go for a five-minute walk and move around. Keep a clear head. Tell him not to agonize over his testimony and, for certain, do not evaluate his testimony during the deposition. This is not a time to be handing out report cards.

The above rules apply to all witnesses, but there are special rules that apply to opinion witnesses. There are a few points you need to remember. First, with an opinion witness, you must prepare, prepare, and then prepare some more. Next, appreciate that an opinion witness may be (and probably is) smarter than you are about the topic of her opinions. This not a sign of inefficacy on your part but, more importantly, respect. This type of witness truly believes he knows all. And he or she is making money doing it. It is your job to test the witness' view. The witness' opinion is only a part of a trial's mosaic. Yet, you are the artist who places or arranges the mosaic's tiles in an understandable, simple form. There are very few opinion witnesses who have the mettle to say their opinion is the only correct one. Reasonable persons, as well as reasonable opinion witnesses, can differ as to a given set of facts, regardless of their pedigree. Remember that. Use it to your advantage.

Opinion witnesses can be condescending. This is a trait you want an opposing opinion witness to flaunt. Let her puff, strut, or manifest her importance. People, like jurors, generally do not like this. Humility is a virtue with which most people identify. It is the utmost factor in establishing witness credibility. Imbue that notion in you own opinion witnesses and your trial tapestry will be more successful.

Try to elicit some of the following information from any opinion witness:

- What significance does the witness have to the elements of proof in the case? Is her testimony relevant and material? Is it accurate not only as to philosophical integrity but as people understand it as it applies to the facts of your case?
- Read the witness' resume. Determine where his expertise rests. Obtain his written materials. Has he given any speeches? Read them.
- Obtain the witness' prior depositions, trial testimony, and any reports introduced into evidence. Opinion witnesses often waffle on giving up past testimony. Don't let them.
- Is the witness a teacher? Look at the courses he teaches. Talking with his students might be worthwhile.
- Determine what materials the opinion

witness is relying upon and get his working papers and notes. Carefully craft Rule 213 interrogatories and use subpoenas.

- Get copies of all correspondence between the opposing party and any attorney with this particular witness.
- Determine the amount of independent analyses or testing performed by the witness. Are you in a *Daubert* or *Frye* jurisdiction?[3]
- Accentuate the fact that the witness has no first hand contact with the topic or person about whom she is testifying.
- Ascertain the amount of income the witness obtains from being an opinion witness and whether he has been employed by your opponent or persons with similar interests as your opponent before.
- Limit his area of expertise. Make him concede that other knowledgeable experts in the field have different opinions and reinforce that with recognized professional literature.
- Read the transcript and determine whether or not the witness will hurt you based on his expertise, the reliability of his analysis, and his credibility.[4]

Finally, I think you will find the following 12 maxims for witness preparation useful in taking statements or depositions.

1. TELL THE TRUTH

There is no substitute for this. But remember, truth is based on knowledge, not supposition or what the witness thinks she ought to know. Also, truth is not the platitude we learned in law school or Sunday school. Truth is based on one's perception, which is as different for your witness as it is for you. Perception centers on one's ability to distinguish fact from figment. Factors such as environment, mores, and personal and physical attributes color one's perception. Perceptions have varying accuracy, but they become "truth" based on one's belief in the "truth" of what is perceived. This is reinforced by rationality. Don't assume that "It had to be that way," or "that's the only way it makes sense." What is objectively reasonable may be persuasive but is not necessarily true. DNA testing has taught us this. Truth is seldom black and white; in fact, it is usually gray. No one likes that, but you must accept it and address it with your witness.

2. DON'T BE SOMEONE ELSE

If you do otherwise, you will not be sincere; if you are not sincere, the examiner or jury will see through this. This will be held against you or your witness, or both. Speak your own language. If you try to use words that you are unfamiliar with--being someone else--you might as well be speaking Pashto. You will not create interest but thwart it because of misunderstanding. This is as true for a witness as it is for a lawyer. The witness becomes hollow and thus incredible. A witness's world view cannot be changed, but her attitude can be altered. Shaping behavior and recognizing the undesirable habits of your witness is critical. Instruct, do not preach to your witness how he can change his persona.. A witness's flaws must be addressed with candidacy, at the outset. Forgiveness is not given; it is earned. You accomplish this by displaying fault at the first opportunity.

3. DON'T BE PRESIDENTIAL

Admit what you know; do not admit what you do not know. As Americans, we think we have to know the answer; otherwise, we have failed. Others will think we are uninformed or not intelligent. Failure, instead of being an opportunity to learn, often creates rebuke or reprimand. There is a lot of guilt in American society. It promotes cover-ups. That leads to deception. We learned this from Richard Nixon and Bill Clinton. Most guilt is learned behavior. Guilt, unlike true sorrow, has no place at a deposition. Nor should you permit blame to become arrogance in your witness or you. The latter is an unappealing attribute. It promotes evasiveness. Questions that are answerable by your witness should be done directly. Don't equivocate. "Is" means "is".

4. RECOGNIZE LIMITATIONS

A witness who thinks he is more crucial or dignified with respect to an issue or person only deceives himself. Humility is a virtue, not a sign of weakness. The opposing examiner must be respected with a wary ear and eye, but this caution does not equate with incivility. This requires the ability to listen to the question asked, not only in its words, but its tone and manner. One human condition is aging. With it comes an affect on memory. Again, people's memories are shaped on not only what they want to remember or forget, but also what they think others think they should remember. The latter has no place in witness preparation. Memories fade. Using pre-marked documents and exhibits to assist your witness is the key.

5. VOLUNTEERING IS ANATHEMA

Again, as Americans, we are quintessential volunteers. It is part of our American heritage. There are "1000 points of light" in the United States. At least, we believe that. The truth of that proposition is not significant. We want to help. We need to help. If we do not, it becomes a moral failure. You must instruct your witness against this attribute when testifying. The other prong of volunteering addresses knowledge. A witness thinks he has to have an answer; otherwise he has failed. Let's face it, we think we know it all. These attitudes have no place at a deposition. Morality, other than telling the truth, has no place in witness preparation. Nor does helping or volunteering. This is the most difficult cultural trait to overcome in preparing a witness for a deposition. Witnesses do not like this. They fight it.

6. TEACH LISTENING

It is difficult for us to listen because we think we have to say something to have any impact. Also, because we think we have something to say, we are always formulating our answers while the person with whom we are conversing is talking. We used to call it "making a point." People think this is the way depositions proceed; she who can make her point, wins. This is wrong thinking. The purpose is to display facts. To make a word picture. To display a perspective. To make a favorable presentation. In other words, to expand, as well as limit, depending on whom you

represent. You can do neither unless you listen. You must also be vigilant in your view of the speaker's tone, body language, and when he does not speak. Silence can be telling. Observe it.

7. DO NOT ADVOCATE CHARITY

Once the deposition commences, the rules apply. Adhere to them to the letter. A deposition or trial is a process for reaching a decision, not an exercise. You need to have a rhythm more than a flow. Don't let your opponent talk to the witness once the deposition starts. Don't let her make long-winded, oral objections. Discovery depositions are extremely wide ranging under Illinois law. Do not let your witness speculate if a document can be used as a prompt. Make the opponent produce it. Documents should be reviewed during preparation but not necessarily given to the witness to review. Make the witness answer specific questions. Try to reinforce with the witness that guessing at questions only hurts. Do not let your witness get lazy with her answers.

8. SHIFTING GEARS

Don't be afraid to tell a witness to change his testimony if it needs to be corrected. Making a mistake is human. So is changing a wrong answer. We all did it in school and were encouraged to do so. Likewise, at a deposition, if the question is not understandable, it should be made so. During every deposition your witness can never comprehend every question. Make sure your witness requests clarification of questions. Many lawyers ask questions with words that are unintelligible and stilted. Your client must be reminded that these questions should be and will be changed at her request. Your witness needs to know that asking an examiner to re-phrase a question is a good thing. It shows intelligence, not its antonym. It shows she is listening. If your client does not do this in her deposition, you should be disappointed. Remember, your witness knows more about the event in which she is being deposed than the examiner. Otherwise, the deposition wouldn't be occurring.

9. EXPLAIN THE PLAYERS AND THEIR PURPOSE

You need to tell the witness who the judge, the court reporter, and the other lawyers are. More importantly, you need to describe what their purposes and roles are. It is not enough to say what a transcript is and how it is prepared. What happens to it once it is prepared? Is this a discovery deposition or an evidence deposition? Who reads it? Why? Is it evidence? What is an objections's effect? What does the witness do when someone objects? Explain applicable privileges like attorney-client, work product and whether medical or psychiatric records will be produced and how that happens. As to your opponent's lawyer, who does he really represent? Does he get paid by the insurance company? Why is he taking your client's deposition, and what is his purpose? Explain the dichotomy of expected styles of the "nice guy lawyer" or the "aggressive advocate". Make sure your witness understands that your opponent is not only prying but also appraising credibility. Ninety-five percent of all cases are settled. Your witness needs to know that before his deposition is taken. Spend time with your witness before the day of the deposition, not just 15 minutes beforehand. If you try the case, take your witness to the courthouse so she can understand the layout of the bench, bar, and jury box. This will help your witness talk to and make eye contact with the jury or the court instead of locking in on your opponent's examination.

10. WOODSHEDDING

When I began practicing law, the concept of witness preparation was foreign. It was not taught in law school. Suborning perjury is not on the bar exam. It should be. Many lawyers do not understand it. Woodshedding has two components: preparation of direct examination and anticipation of cross-examination. Although the latter is always highlighted the former is usually more important. This is because it is your client's story. She has to tell it, not you. If it is not understandable, the impression she makes will be unfavorable. Simplicity and credibility must be the hallmarks of what is said. Everyday words, that provide reasons to believe a proposition is more likely true than not, must be used. The most important thing about cross-examination is cross-examining your own witness before the deposition and accentuating her weak points. By doing this, you can address these low-points in direct. The witness can then get the idea. As to your own cross-examination, the point is realizing that sometimes you do not need to do it. My partner, Bill Murphy, taught me this 25 years ago. It took a while for me to understand this. Limit yourself. Learn to sit down. This requires the jury or examiner to focus not on you, but on what the witness says. Woodshedding is about providing leadership to your client without taking the lead role. The latter will only get you in trouble. You are the guide, not the witness. Don't carry the latter's baggage. Spend time with your witness not only before but after the deposition is over. Explain the theory of the case and the role of the witness in that theory. After a deposition your client will invariably ask, "How did I do?" This should be expected. Do not ignore the question. Be objective. Deal with the problems or warts in your case as well as its high points. Sugar-coating leads to unrealistic client expectations. When those are not met, you will be blamed. This only leads to trouble for you with the client. Every case has peaks and valleys. Recognize and explain that. You want to keep your case on the diagonal going up, not down; and that will not be vertical--no real case or witness ever is.

11. WITNESS LYING

Lying in the business of lawyering is common. Witnesses do this. You cannot ignore this behavior. The Rules of Professional Conduct discusses the topic. Read them. Let me provide an example. You have agreed to represent Maria. Maria has made a misrepresentation in her immigration law case where she has submitted an untrue affidavit to an immigration court. She wants you to correct this. What do you do?

Historically, an appropriate course of action was simply to withdraw from representation. This no longer is appropriate. Illinois Rule of Professional Conduct Rule 3.3 (Candor to the Tribunal) (RPC) states a lawyer shall not:

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(a) offer evidence that the lawyer knows to be false: If a lawyer, the lawyer's client, or witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceedings shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

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The Rule casts a wide net. It applies to all venues where contested decision making results. That is not just courts: but all administrative settings where fact finding and adjudication occurs. It imposes on the attorney the obligation to rectify fraud even if it occurred prior to the attorney's representation. Significantly, it does not only apply to the attorney's client, but to *persons* whom have engaged or intend to engage in fraudulent conduct related to the adjudicative proceeding.

For the attorney this has been in effect since 2010 so it is not a new rule. The point is not what we as attorney's know; it is what our clients know. So in our hypothetical Maria must understand the limitations this rule mandates. Talk to her about it. The attorney client privilege shields from the eyes or ears of others what our clients tell us in confidence. This Rule, like the crime fraud exception, is a very clear departure from the attorney client privilege. The point being, that at the outset of your representation you need to have a discussion with your client about this rule.

12. TALKING TO YOUR CLIENT DURING THE DEPOSITION

A final rule has to do with whether you can talk to your client once the deposition starts. Two views of whether you can do so are apparent. Which school of thought you adhere to is important: but what is more significant is you have to discuss it with your client. They expect it. So you need to have a consistent perspective.

Two views on whether you can talk to you client-witness during a deposition prevail. One is based on the idea the lawyer has a right to consult and advise a client of privileges available. The other is unqualified, based on the lawyer's duty to the client. A very good article exists on the topic at least in the federal context. "But , we were on a Break" Lovelette and Hallaj, ISBA *The Public Servant* (June 2014, Vol. 15 No. 4) Take a look at it. (See also, *Geders v. United States* 425 U.S. 80 (1976) and *LM Insurance Corp v. ACEO Inc.* 275 F.R.D. 490 (N.D. Ill. 2011).

It seems to me in the to me in the civil context the right to confer during a deposition is limited to inform a client of applicable privileges. Of course, this is a conversation you should have already had during witness preparation. The ultimate point is: talk to your client about discussions that might occur between the two of you during the upcoming deposition before it begins. Than a problem will not occur.

CONCLUSION

Preparing yourself and witnesses for statements and depositions requires forethought and recognition that, as Americans, we think we possess an incredible intellect, are very compassionate, and know more than most about the world and our neighbors. That is a troubling recipe. If you address its ingredients, recognizing its limitations, you will take a statement or deposition which is persuasive, believable, and purposeful. ■

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1. Malone. *Deposition Rules* (National Institute for Trial Advocacy 2001); Thomas Mauet *Pretrial* (8th Ed. 2012) *Trial Evidence* (5th Ed. 2011) *Trial Techniques and Trials* (9th Ed. 2013)
2. Hegland. *Trial and Practice Skills*. (West, 2002). pp. 80-93.
3. See *Daubert v. Merrill Dow Pharmaceuticals* (1993) 509 US 579. *Frye v. United States* (D.C. Cir. 1923) 293 F 1013. See also *Donaldson v. Central Illinois Public Service* (2002) 199 Ill.2d 63, 82).
4. See Clancy, Michael W. "A Primer on Selection and Management of an Expert Witness." *Chicago Daily Law Bulletin*. March 28, 2003. Tanford, J. Alexander. *The Trial Process: Law Tactics and Ethics* (3rd Edition 2002). pp. 338-348. Thomas Mauet *Pretrial* (8th Ed. 2012) *Trial Evidence* (5th Ed. 2011) *Trial Techniques and Trials* (9th Ed. 2013)

Comparative fault not trumped by summary judgment on liability

BY JASON G. SCHUTTE AND B. MOSES BROWN

Background

On June 24, 2008, Defendant Chiquita Smith was in an accident with Plaintiff, Miguel Klesowitch, after she ran a stop sign and drove into the intersection. Defendant admitted she never saw the stop sign, nor did she slow her vehicle before the collision. Defendant testified she was not aware of Plaintiff's car until the moment of impact.[1]

Plaintiff filed a negligence personal injury action seeking damages. Plaintiff filed a Motion for Summary Judgment on the issue of liability for causing the accident at issue. . Defendant replied that Plaintiff admitted during his deposition he was partially at fault for the collision, as he was traveling over the speed limit, did not slow as he approached the intersection, and failed to keep a lookout for other vehicles.[2]

The trial court granted Plaintiff's motion for summary judgment. The court declined to rule on issues of proximate cause and damages. Plaintiff subsequently filed a motion *in limine* to exclude any evidence concerning the avoidability of accident. Plaintiff asserted that fault had already been decided and that this evidence was irrelevant to the remaining issues in the case.[3]

The trial court denied Plaintiff's motion *in limine*, reasoning that the prior ruling of summary judgment only contemplated the matter of Defendant's negligence. In the words of the trial court, "contributory negligence [could] still be raised before the trier of fact to ascertain any percentage of fault of the plaintiff."[4]

On appeal, the First District Court affirmed the trial court's decision, finding that summary judgment on Defendant's negligence preserved questions of fault and damages for further review. The appellate court found that summary judgment on the issue of Defendant's negligence did not interfere with Defendant's ability to argue contributory negligence at trial.[5]

Analysis

Many, if not the majority, of personal injury claims arising from a motor vehicle collision involve a defendant who is 100% at fault in causing the accident at issue; however, often motor vehicle collisions and other types of personal injury claims involve questions of liability for causing the accident, including plaintiff's comparative fault.

Quite often in this industry a case will arise where a prima *fascie* case of liability can be established against the defendant. Experienced plaintiff's attorneys may utilize a summary judgment motion to establish the required elements of their cause of action and liability, which a trial court may grant. The filing and granting of such a motion is beneficial to the plaintiff because it establishes some of the necessary elements of their case prior to trial. Hence, there are less issues for the plaintiff to address at trial.

These motions often create intricate questions about whether the granting of such a motion forecloses arguments for comparative fault (plaintiff's fault). Comparative fault is a very valuable tool for many several important reasons. First, if the judge/jury finds that the plaintiff was partially at fault in causing his injuries, then his damages can be reduced in proportion to his negligence. Hence, comparative fault reduces the defendant's exposure.

Comparative fault is also a valuable tool because it creates uncertainty as to the potential verdict and how fault will be attributed. This uncertainty can create leverage if there is some credible evidence to support comparative fault against the plaintiff. This leverage may be useful in negotiating a reasonable settlement pre-trial.

The *Kelsowich* case demonstrates summary judgment on the existence of a duty and breach of duty will not a bar to claims of contributory negligence/comparative fault. Furthermore, it does not automatically prevent the defendant from presenting evidence of comparative fault against the plaintiff.

Attorneys, claims adjusters and interested parties must understand that a defense can be maintained on liability even in light of a summary judgment ruling on liability. Whether such a defense is viable will depend on the facts of the case. Understanding that such an argument is still present provides one more tool to utilize in settlement negotiation and trial tactics. ■

1. *Klesowitch v. Smith,* 2016 IL App (1st) 150414, ¶ 6.
2. Id. at ¶ 7.
3. Id. at ¶ 11.
4. Id. at ¶ 12.
5. Id. at ¶ 28.

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