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Southern District Civil Practice Roundup

BY EDWARD M. SPIRO

Attorneys Under Fire

Judges from the U.S. District Court for the Southern District of New York have recently devoted an unusual degree of attention (much of it very critical) to conduct of attorneys that often goes unexamined and that many attorneys may not recognize as potentially problematic.

Defending Depositions

• ***Improper Conduct in Defending Depositions.*** Most battles over deposition conduct occur between counsel during the deposition itself, with attorneys occasionally seeking court intervention as the deposition is proceeding. Less frequently such disputes are the subject of post-deposition formal motions, and even less commonly they become the subject of a written decision. But recently, Southern District Magistrate Judge Henry Pitman issued decisions in two cases addressing the question of speaking objections and other deposition conduct.

In the first of those cases, *Cameron Industries Inc. v. Mothers Work, Inc.*,[1] the defendant sought sanctions against plaintiff's counsel under both Rule 30(d)(3) of the Federal Rules of Civil Procedure and 28 U.S.C. §1927 for his conduct while defending depositions of two Rule 30(b)(6) witnesses. The defending attorney corrected one witness' answers, supplementing and even contradicting her testimony, and ignoring the deposing attorney's repeated requests that he desist. At one point he actually took over questioning the witness, and when the deposing attorney objected, responded that she was "not asking the questions appropriately" and was going to have "an improper deposition." The attorney also instructed a second witness in that case not to answer questions to which he objected on the grounds of relevance.

Quoting a leading treatise, Magistrate Judge Pitman noted that objections should not be made at deposition "unless the ground of the objection is one that might have been obviated or removed if made when the deposition was being taken."[2] He further cautioned that under Rule 30(d)(1) objections that are made must be "stated concisely and in a nonargumentative and nonsuggestive manner." He lamented that "[a]s any practitioner unfortunately knows, adherence to the foregoing rules rarely occurs."

Magistrate Judge Pitman went on to find that the plaintiff's attorney had:

> volunteered information to the witness, made unnecessary, unjustified and unprofessional remarks concerning defendant's counsel, made unnecessary and suggestive speaking objections, improperly posed his own questions during defendant's direct examination instead of conducting cross-examination, contradicted the witness' testimony and issued instructions to the witness not to answer questions on the grounds of irrelevance.[3]

While much of the conduct at issue was plainly improper, Magistrate Judge Pitman found objectionable some conduct for which an attorney might not necessarily expect to draw rebuke. For example, following a question asking the witness how many other times she had done business with the defendant, the attorney defending the deposition asked the attorney to define "doing business" and insisted on the need to clarify the deposing attorney's question, noting a number of different types of interaction that could constitute doing business. In another instance, the defending attorney corrected the witness' inaccurate statement about the number of litigations in which her company was involved. Magistrate Judge Pitman found that the only avenues available to clarify or correct the record are through cross-examination or an errata sheet, and that any effort to do so while the witness is under direct examination is improper.

Magistrate Judge Pitman concluded that despite conduct that was "improper and unbecoming," sanctions were not called for in this case. He reasoned that both §1927 (authorizing sanctions for conduct that essentially destroys the deposition) and Rule 30(d)(3) (authorizing sanctions where the fair examination of the deponent has been frustrated) require that there be some material impairment of a deposition before sanctions can be imposed. Because neither witness was in fact prevented from answering any relevant or material questions, he denied the defendant's motion for sanctions.

'Flaherty v. Filardi'

Magistrate Judge Pitman's second decision on deposition misconduct was issued in *Flaherty v. Filardi*.[4] As he did in *Cameron Industries*, Magistrate Judge Pitman included a number of deposition transcript excerpts in which the attorneys defending the deposition interrupted the witness' answers, and interjected "speaking" and other groundless or improper objections. He found that the defending attorneys had gratuitously provided suggestive reasons for their objections and had engaged in colloquy that was "nothing more than an attempt to kick up dust and to fluster plaintiff," who was an attorney appearing pro se. But just as in *Cameron Industries*, Magistrate Judge Pitman concluded that sanctions were inappropriate because the conduct in question, while improper, had not actually prevented the plaintiff from obtaining the answer to any relevant questions. He did voice frustration that his hands were apparently tied in these circumstances, noting in a footnote that "[i]n light of defense counsel's misconduct…, it is troubling that there is no sanction available to provide specific and general deterrence."[5]

It is worth noting that in both *Cameron Industries* and *Flaherty*, Magistrate Judge Pitman stressed that he had instructed the parties to contact chambers if they had a deposition dispute that they could not resolve on their own. While he was clearly disturbed by the conduct of the defending attorneys, he also held the deposing attorneys accountable for failing to take more immediate action that would have allowed him to provide relief in an "effective and practical manner."

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Nonparty Witness

• ***Interference With the Deposition of a Nonparty Witness.*** One of the most thorny problems litigators face is dealing with the unrepresented nonparty witness. The lawyer's obligation to zealously protect a client's interests must be balanced with other ethical restrictions against providing advice to unrepresented individuals and interfering with another party's access to information. DR 7-104(A)(2) of the New York Lawyer's Code of Professional Responsibility prohibits an attorney representing a client from giving advice to someone who is not represented "other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer's client." Rule 3.4(f) of the ABA Model Rules of Professional Conduct, which has no direct corollary under the New York Code, provides that an attorney should not "request a person other than a client to refrain from voluntarily giving relevant information to another party unless…the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information." How then, if at all, should an attorney discuss the potential role an unrepresented witness will play in a case? And how should the attorney guard against misunderstandings that are more likely to arise when dealing with an individual who does not have counsel?

The defendant's lawyers in *Kensington International Ltd. v. Republic of Congo*[6] learned just how treacherous this territory can be. When they were notified that a witness who did not speak English was planning to attend his deposition without counsel, they first sought unsuccessfully to postpone the deposition, and then contacted the witness by e-mail. The e-mail identified the firm as the law firm for the Republic of Congo, and informed the witness that depositions under U.S. law are given under oath and that it is "extremely rare" for an individual to submit to this procedure without preparation or legal assistance. The e-mail concluded with a warning that "giving a deposition without the assistance of an attorney who is familiar with the case seems to us to present very serious risks and inconveniences that I will leave to you to assess." In a subsequent telephone conversation with the Congolese witness (as to which recollections differed considerably), an attorney for the firm described the litigation as "the Congo …fighting to conserve its assets from foreign vulture creditors."

At the request of the witness, the Congo's attorneys notified plaintiff's counsel by e-mail that the witness had decided not to appear, explaining that the witness "fe[lt] uncomfortable appearing without having consulted a lawyer, which he has not apparently done." Ultimately, the witness decided to testify and the plaintiff's attorneys subsequently sought sanctions against the law firm representing the Congo.

U.S. District Judge Loretta A. Preska for the Southern District of New York found that the firm had acted "without legal justification" to "delay or obstruct the post-judgment discovery process in [that] case."[7] She pointed to a number of factors in support of her conclusion, including the decision to contact the witness rather than seeking a protective order, and the selection of a partner "known for having extensive connections with Congo's political leadership" to contact the witness. Her principal concern, however, was that in speaking with the witness, the attorney went beyond a simple admonition against testifying without counsel (advice with which Judge Preska seemed to have no quarrel) and instead appealed to the witness' patriotism in a manner calculated to discourage his appearance. Judge Preska was dismayed that the Congo's attorneys sought to advance their own client's interests in their interactions with the witness. She viewed the partner's candid testimony to this effect as an "admission" and said that a phone call to the witness "made in good faith would have had as its aim [the witness'] interest, not [the] Congo's."[8] Invoking her inherent authority, she sanctioned the firm in the amount of plaintiff's reasonable attorney's fees in bringing the motion and directed that her opinion be treated as a formal reprimand and circulated throughout the firm.

It may be that this decision can be read as limited to those circumstances where an attorney interferes with a validly issued subpoena. But Judge Preska's decision does not address the ethical obligation to advocate zealously for one's client, finding that to the extent the attorneys in this case were animated by concern for their client they had acted in bad faith. Her decision also appears to turn in large measure on the witness' recollection of his conversations with the Congo's attorney, which differed in material respects from that of the attorney. Given the risks inherent in contact with unrepresented persons, lawyers should take steps to memorialize such communications so as to avoid, or at least minimize their potential to be misunderstood, and should attempt to have a colleague present to take notes of any oral communication.

Attorney Disqualification

In *In re Ski Train Fire in Kaprun, Austria on November 11, 2000*,[9] Southern District Judge Shira A. Scheindlin considered a motion to disqualify counsel based on events occurring largely outside the litigation. Judge Scheindlin held that an attorney's petition for bankruptcy under Chapter 11 required his disqualification as counsel for some of the foreign plaintiffs. She noted that although an attorney's personal bankruptcy does not in itself constitute adequate grounds for disqualification, the facts surrounding this attorney's bankruptcy gave rise to an impermissible conflict of interest with his clients and undermined the court's confidence in his ability to provide adequate representation. She found that the attorney lacked the resources to hire staff and to pay for experts and court reporters, noting that two of his creditors were experts in the present action.

Critical to Judge Scheindlin's decision was the fact that the "linchpin" of the attorney's reorganization plan was the fees he anticipated receiving through settlement of the action before her. She held that his lack of financial resources and his dependence on the outcome of that litigation violated several disciplinary rules—saying that "[t]here can be little doubt that [the attorney's] professional judgment in these cases has been and will continue to be seriously affected by his personal interests in this litigation."[10] Judge Scheindlin also concluded that his stake in the outcome "seriously undermines this Court's confidence in his ability to devise a prudent litigation strategy for his clients, to assess whether any proposed settlement offer is fair to his clients, or to otherwise conduct himself as a fiduciary of his clients' interests."

Several other factors played a role in Judge Scheindlin's decision to disqualify this attorney. First, he had failed to file tax returns for a seven-year period, demonstrating an "extreme lack of financial responsibility and accountability [that] seriously calls into question his ability to prosecute these actions."[11] Additionally, because two of his creditors were experts retained in the litigation, and would thus be paid only if the attorney obtained a favorable settlement or verdict, Judge Scheindlin reasoned that they had an impermissible stake in the outcome of their testimony and that their retention was thus unethical under DR 7-109 of the Code of Professional Responsibility.

Finally, she noted that other New York federal judges had imposed sanctions upon this attorney in other cases, and that in this case sanctions were warranted as well. Specifically, she found that he had shown a lack of preparation and professionalism in submitting "glaringly inadequate filings," and had obtained a confidentiality order and required counsel to travel to Germany to depose two "whistle-blower" witnesses based on false representations concerning their knowledge and the need to safeguard their identities.

Conclusion

These cases reflect the increasing trend in litigation in the Southern District of New York (and elsewhere) to focus on allegations of attorney misconduct. While attorneys undoubtedly feel a strong obligation to advocate zealously their clients' causes, and clients undoubtedly add to this pressure, both attorney and client are well-advised to bear in mind the real and substantial adverse consequences for them arising from collateral litigation concerning attorney misconduct.

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1. 2007 WL 1649856 (S.D.N.Y. June 6, 2007).
2. Id. at *4 (quoting 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, FEDERAL PRACTICE AND PROCEDURE §2152, at 194-95 (2d ed. 1994)).
3. Id. at *5.
4. 2007 WL 2398762 (S.D.N.Y. Aug. 15, 2007).
5. Id. at *8 n.6.
6. 2007 WL 2456993 (S.D.N.Y. Aug. 24, 2007), Notice of Appeal filed Sept. 20, 2007.
7. Id. at *6.
8. Id. at *9.
9. 2007 WL 2398697 (S.D.N.Y. Aug. 16, 2007).
10. Id. at *3.
11. Id. at *4.

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