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DEPARTMENTS

STATE UPDATE

Deposition Practice: The New Jersey Experience

JONATHAN W. WOLFE

The purpose of this article is to assist family law practitioners in taking and defending depositions more effectively. Although I use New Jersey law and rules, because this is where I practice, the underlying issues are common to matrimonial practitioners in other jurisdictions as well.

TIMING OF DEPOSITION

In jurisdictions such as New Jersey, under limited conditions, and only when necessary to preserve evidence, a deposition may

Jonathan W. Wolfe, *partner, Skoloff & Wolfe, Livingston, New Jersey, focuses his practice on sophisticated business litigation and matrimonial disputes. A significant portion of his practice is devoted to business valuation, the treatment of trust assets in divorce, and the protection of nonmarital assets. He also assists clients with custody, parenting time, and the negotiation and preparation of prenuptial and postnuptial agreements. He has successfully represented clients at the trial and appellate levels in the state and federal courts in New York, New Jersey, and Pennsylvania and the US Supreme Court. He also frequently serves as local counsel for out-of-state law firms.*

Mr. Wolfe has been listed as one of the "Leading Lawyers In America" by Best Lawyers, *one of the nation's "500 Leading Lawyers" by* Lawdragon, *and a "Super Lawyer" by* Super Lawyers Magazine. *He has been named a "New Leader of the Bar" by the* New Jersey Law Journal *and one of the top "40 under 40" business leader by* NJ BIZ.

Mr. Wolfe has served as a member of the American Bar Association's Executive Committee, Board of Governors, and House of Delegates, and is a Fellow of the American Bar Foundation. He has held numerous leadership positions in the American Bar Association Family Law Section and General Practice and Small Firm Division, including Chair of its Family Law Committee. He has served on the Board of Trustees of the New Jersey State Bar Association and the Executive Committee of its Family Law Section, and as Chair of its Young Lawyers Division, and he received its 2008 Professional Achievement Award.

Mr. Wolfe has been featured in the national media, including New York Times, Los Angeles Times, Washington Post, New York Post, Wall Street Journal, Chicago Tribune, New York Daily News, USA Today, Dateline NBC, Fox News, NBC Today Show, Bloomberg, Reuters, *and* Business Week.

be taken *before* the commencement of an action.[1] Following the commencement of an action, depositions may be taken (absent leave of court) after 35 days from service of the summons and complaint. Leave is not required if the defendant has already sought discovery or noticed the plaintiff's deposition.

PERSONS TO BE DEPOSED

According to another rule,[2] "[A]ny party may take the testimony of any person including a party by deposition." Moreover, our courts have stated that, "New Jersey's discovery rules are to be construed liberally in favor of broad pretrial discovery;"[3] and that broad pretrial discovery is the only way to ensure "the essential purposes of a civil trial"—"the search for the truth."[4]

In a family action, the "deposition of any person"—other than family members under the age of 18—"as of course may be taken … as to all matters except those relating to the elements that constitute the grounds for divorce…".[5] In turn, another rule provides that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action…," that the information must only appear "reasonably calculated to the discovery of admissible evidence," and that a party may not object to discovery on the basis that the "examining party has knowledge of the matters as to which discovery is sought."[6]

In *Berrie v. Berrie*,[7] when a wife sought discovery from a business operated by her husband's brother, the court identified five factors to assess whether discovery sought from nonparties should be permitted in an action for divorce. In quashing the subpoena to the husband's brother, who was a direct competitor of the husband, the court set forth the following factors:

(1) interest of the proposed deponent in the outcome of the litigation,

(2) necessity or importance of the information sought in relation to the main case,

(3) ease of supplying the information requested,

(4) significance of the rights or interests that the non-party seeks to protect by limiting disclosure, and

(5) availability of less burdensome means of accomplishing the objective of discovery sought.

The court reaffirmed that "when pre-trial discovery is sought to be restricted, the principle generally applied permits the widest latitude in the use of discovery tools … where the information sought will aid in the preparation of the case or otherwise facilitate proof of progress at trial."[8] The court further noted that "carefully conducted discovery can significantly reduce or even eliminate factual disputes otherwise requiring resolution at trial."[9]

In analyzing the previously detailed factors (and reaching the conclusion to limit the discovery sought), the court stressed that the information sought related to the brother's business—not the business being valued—and was therefore "not necessarily direct indicia of value," "not direct or primary evidence," was "collateral and supportive rather than direct proof of the value of the plaintiff's business," and its "usefulness … in relation to the main case is speculative … [and] certainly not essential." On the other hand, to require the production of the requested information would require the husband's brother—his direct competitor and "rival"—to disclose "confidential information," "trade secrets," and "propriety and confidential information …" "Under these circumstances," the court concluded that the discovery would not be permitted.

Cover letters with subpoenas may not confuse a witness into premature document production.

Thus, while *Berrie* is frequently cited as a basis to limit nonparty discovery, such limitations are to be the exception, not the rule.

LOCATION FOR THE DEPOSITION

A rule[10] provides that a New Jersey resident may be subpoenaed to appear for a deposition in

(1) in the county of this State in which he or she resides, is employed or transacts business in person; *or*

(2) at a location in New Jersey within 20 miles from the witnesses' residence or place of business; *or*

(3) at such other convenient place fixed by the court.

A nonresident may only be compelled by subpoena to appear for a deposition in New Jersey if

he or she is *served* in New Jersey, in which case the deposition must be conducted within 40 miles of service or at a convenient location set by the court.

REQUIREMENTS FOR PROPER SERVICE

The subpoena power is a significant one, and the New Jersey Rules, which are strictly enforced, require simultaneous notice of service and prohibit cover letters that could confuse a witness into making a premature production of documents (*i.e.*, prior to the expiration of the notice period). The state appellate courts have considered both of these tactics, which often occur together, and found them to be improper, sanctionable, and the basis for civil and disciplinary proceedings.[11] "The authority of an attorney to issue a discovery subpoena *duces tecum,* under the seal of the Superior Court pursuant to *R.* 4:14-7(c), 'is a significant one which must be exercised in good faith and in strict adherence to the rules to eliminate potential abuses.'"[12] *R.* 4:14-7(c) is a single paragraph long and its text has been broken down by the Appellate Division into five obligations, as follows:

> [1.] A subpoena commanding a person to produce evidence for discovery purposes may be issued only to a person whose attendance at a designated time and place for the taking of *a deposition is simultaneously compelled*[;]
>
> [2.] *The subpoena shall state* that the subpoenaed evidence *shall not be produced or released* until the date specified for the taking of the deposition[;]
>
> [3.] [I]f the deponent is notified that a motion to quash the subpoena has been filed, the deponent shall not produce or release the subpoenaed evidence until ordered to do so by the court or the release is consented to by all the parties to the action[;]
>
> [4.] The subpoena shall be simultaneously served no less than 10 days prior to the date therein scheduled on the witness and *on all parties,* who shall have the right at the taking of the deposition to inspect and copy the subpoenaed evidence produced[;] and
>
> [5.] If evidence is produced by a subpoenaed witness who does not attend the taking of the deposition, the parties to whom the evidence is so furnished shall forthwith provide notice to all other parties of the receipt thereof and of its specific nature and contents, and shall make it available to all other parties for inspection and copying.[13]

The subpoena must notify the recipient that documents shall not be produced or released until the date of the deposition and that a notification of a motion to quash requires withholding the documents until further notice. A practice which obfuscates or conflicts with these requirements, confuses subpoenaed witnesses, and lulls witnesses into avoiding the inconvenience of appearing by encouraging untimely production undercuts the purpose and effectiveness of the Rule.[14]

A witness may only be instructed not to answer a question on the basis of privilege, confidentiality, or a court order.

In *Cavallaro*,[15] defendant's counsel had served a subpoena on various doctors to obtain the plaintiff's medical records. While counsel served the subpoena on his adversary, he sent an accompanying cover letter to the witness that was *not* provided to opposing counsel. The cover letter contained the required language stating that no production was to be made prior to that date of the deposition, but it also stated: "If you would like to avoid appearing in my office on March 10, 2000 and would rather forward the copies to me that would be acceptable."[16] The trial court found this conduct to be an "egregious" violation of the discovery rules and a violation of at least two disciplinary rules. It quashed the subpoenas and disqualified counsel from any further representation of defendants, and the sanction was upheld on appeal.[17] Notably, the appellate court rejected the defendants' counsel's argument of "substantial compliance" and its assertion that practical considerations required this sort of shortcut.

In *Crescenzo*,[18] the appellate court considered almost identical

conduct—a subpoena served along with a cover letter, not provided to opposing counsel, that stated: "If I do obtain a copy of the requested medical records, then there is no reason to have any individual from your office to appear in my office on said Tuesday, May 12, 1998 at 10:00 a.m."[19] The medical records were produced and the trial court found them nonprivileged and admissible. Subsequently, the owner of the records sued the lawyer who had prepared the improper subpoena and the doctor who had produced the records. The defendants (the doctor and the lawyer) argued lack of prejudice:

> Even if…the procedures were wrong, and we'll assume for the purposes of argument that they were, that the subpoena that was issued didn't carry the proper notice to the adversary, the court ends up admitting the records into evidence anyhow, and if they're admissible in evidence they have to be discoverable. There's no way around that, and…if they're discoverable, to use a basketball analogy, no harm, no foul.[20]

The trial court accepted this argument and dismissed the case against the doctor and lawyer, but the appellate court reversed. It stated that, "Both [the doctor] and [the lawyer] assert that the records were ultimately admissible and thus adopt the trial judge's view of 'no harm, no foul.' We reject that position. The determination of whether the records are ultimately admissible should not in the first instance be made by a doctor responding to a subpoena or an attorney who violates the rule and improperly subpoenas the records."[21] Given the "the utter disregard for the language, spirit and intent of the Rule" demonstrated by counsel, the appellate court found that he could properly be liable in a civil action.[22]

Finally, in *Welch v. Welch*,[23] the Family Court examined a case in which counsel for a husband seeking a custodial change had used the same improper technique described previously—a subpoena combined with an un-served cover letter calling for early production—to obtain criminal records related to his former wife. As an additional wrinkle, the court noted that a subpoena in support of such a post-judgment family action is not permitted at all absent court approval.[24] The husband again argued "no harm, no foul," noting that the records were not only admissible, but vital to his motion, and that the wife had made no motion to quash. The court rejected these arguments. Citing *Crescenzo* and *Cavallaro*, it suppressed the use of the records, dismissed the motion, and granted the wife her attorney's fees.[25]

Permissible (and Impermissible) Objections and Grounds for a Protective Order

A rule[26] defines the scope of permissible objections during the course of a deposition. Specifically, objections may *only* be made to "the form of a question or to assert a privilege, a right to confidentiality or a limitation pursuant to a previously entered court order." The rule continues that the right to object "on other grounds is preserved and may be asserted at the time the deposition testimony is proffered at trial."

Although the rule requires that an objection to form shall "include a statement…why the form is objectionable so as to allow the interrogator to amend the question" it also cautions that "no objection shall be expressed in language that *suggests an answer to the deponent*."[27] In *In re Neurontin Antitrust Litigation*,[28] the court identified examples of improper speaking objections, including a statement that counsel "does not understand the question" or objections such as "if you remember," "if you know," "don't guess," "you've answered the question," and "do you understand the question."

The federal rules explicitly prohibit discussions during breaks.

A witness may only be instructed not to answer a question on the basis of privilege, confidentiality, or a limitation pursuant to existing court order.[29] That being said, an attorney for either the *witness or* a *party* may seek to limit or terminate an examination on the basis that the questioning "is being conducted or defended in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party."[30] Such an application may be made telephonically or by formal motion, and the objecting party or deponent has the right to suspend the deposition "for the time necessary to make a motion or telephone application" for a protective order. In addition, a rule on fee-shifting provisions[31] "*shall* apply to the award of expenses incurred in making or defending against the motion or telephone application."[32]

Questions Concerning Witness Preparation and Consultation During the Deposition

In *Sporck v. Peil*,[33] the US Court of Appeals for the Third Circuit considered whether the identity of documents selected by counsel for a deponent to review in advance of a deposition was entitled to work-product protection. In answering the question in the affirmative, the court recognized that the selection and compilation of documents would "reveal defense counsel's … mental impressions" and therefore fell within "the highly-protected category of opinion work product." The court did recognize, however, that a witness could be compelled, under certain circumstances, to identify a document used to *refresh* his or her recollection in advance of the deposition.[34]

A rule states that,[35] "[o]nce the deponent has been sworn, there shall be *no communication* between the deponent and counsel during the course of the deposition *while testimony is being taken* except with regard to the assertion of a claim of privilege." (Emphasis added). Disputes have arisen concerning whether this rule, like the federal rule, extends to conversations between counsel and clients during breaks. In *Edison Corp. v. Secaucus Town*,[36] the Tax Court concluded it did not, given the limiting phrase "while testimony is being taken" as explained in Judge Pressler's commentary: "Since the Rule speaks only to 'while the deposition is being taken,' it clearly does not address consultation during overnight, lunch, and other breaks."[37]

This issue, however, is not settled particularly in the instance when a deponent *changes* his or her testimony following a break. In *PSE&G*,[38] the court recognized that it is generally impermissible to question a witness about the substance of either preparation in advance of a deposition or the substance of a discussion during a break: "Although it may be appropriate to question the witness as to whether or not he had discussion with counsel in preparation of the witness's testimony, the nature of those conversations is protected by the privilege."[39] Nevertheless, the court recognized that "*if a witness changes his deposition testimony after consultation with counsel, then a different question may be presented.*"[40]

Although the federal rules are admittedly more broad (in that they explicitly prohibit discussions during breaks), federal precedent may be helpful to practitioners confronted with a deponent that has changed his or her testimony following a break. For example, in *Ngai v. Old Navy*, the court recognized that the privilege did not apply and the "deposing attorney is [] entitled to inquire about the content of the discussions."[41] Specifically, the court ruled that the deposing attorney may "question the deponent about the contents of the discussion to determine if any witness-coaching occurred" and further noted that the crime-fraud exception could serve as an alternative basis to compel such testimony.[42]

NOTES

1. *R.* 4:11-1.
2. *R.*4:14-1.
3. Payton v. N.J. Tpk. Auth., 148 N.J. 524, 535 (1997).
4. Gonzalez v. Safe & Sound Sec. Corp., 185 N.J. 100, 117 (2005).
5. *R.* 5:5-1.
6. *Id. R.* 4:10-2(a).
7. 188 N.J. Super. 274 (Ch. Div. 1983).
8. *Id.* at 278.
9. *Id.*
10. *R.* 4:14-7(b)(1).
11. *See* Crescenzo v. Crane, 350 N.J. Super. 531, 542–43 (App. Div. 2002) (civil penalties); Cavallaro v. Jamco Prop. Mgmt., 334 N.J. Super. 557, 572 (App. Div. 2000) (sanctions and disciplinary proceedings).
12. *Crescenzo*, *supra* n.11 at 533–534 (*quoting Cavallaro*, *supra* n.11 at 569).
13. *Crescenzo*, *supra* n.11 at 538 (quoting *R.* 4:14-7(c), emphasis and brackets original).
14. *Cavallaro*, *supra* n.11 at 566–567.
15. *Id.* at 562.
16. *Id*.
17. *Id.* at 572–573.
18. *Crescenzo*, *supra* n.11 at 536.
19. *Id.*
20. *Id.* at 537.
21. *Id.* at 543.
22. *Id.*
23. 401 N.J. Super. 438, 447 (Ch. Div. 2008).
24. *Id.* at 446.
25. *Id.* at 447–448.
26. *R.* 4:14-3.
27. *Id.* (emphasis added).
28. 2011 WL 253434 (D. N. J. 2011).
29. *R.* 4:14-3 (c).
30. *R.* 4:14-4.
31. *R.* 423-1(c).
32. *Id.* (emphasis added).
33. 759 F.2d 312 (3d Cir. 1985).
34. *Id. see also* In re PSE&G Shareholder Litigation, 320 N.J. Super. 112

(Ch. Div. 1998) ("Any documents that the witness *uses to refresh the witness' recollection*, either in preparation for the deposition or during the deposition, must be produced. The fact that the document may have been turned over to plaintiffs' counsel in discovery is immaterial. The actual document that the witness used to refresh the witness's recollection is the document that counsel is entitled to.") (emphasis added).

35. *R.* 4:14-3(f).

36. 17 N.J. Tax 178 (N.J. Tax 1998).

37. *Id.* (quoting Pressler, *Current N.J. Court Rules,* comment *R.* 4:14-3(f) (1998)).

38. 320 N.J. Super. at 117–118.

39. *Id.*

40. *Id.* (emphasis added).

41. 2009 WL 23912 (D. N.J. 2009) (quoting Plaisted v. Geisinger Medical Center, 210 F.R.D. 527, 535 (M.D. Pa. 2002)).

42. *Id.*