To Represent or Not

Richard P. Green – September 11, 2017

This article can be read on the ABA website here.

One of the most important aspects of complex civil litigation is the use of discovery depositions. Every trial lawyer uses discovery as an important component of his or her case development strategy in order to be more effective during trial. For the complex civil litigator, the deposition is key. Complex civil litigation involves numerous fact witnesses, numerous expert witnesses, thousands of pages of document production, all squeezed into a very specific area of the law. The following analysis is primarily a review of the Florida Rules of Professional Conduct, which closely mirror the ABA rules.

Because discovery is so vital, attorneys have relied on the use of privilege to cloak discovery material from production. Two commonly used privileges are the attorney-client privilege and the attorney work-product doctrine. The reason is that these two privileges are often seen as the closest thing to an absolute privilege. *See State v. Rabin*, 495 So. 2d 257, 262 (Fla. 3d Dist. Ct. App. 1986). If successful, an attorney can shield potentially detrimental information from being disclosed in the litigation. Of course, the purpose of litigation is to decide cases on the merits, but litigation is a game and this is a strategy many attorneys use.

A frustrating component to complex litigation matters is the nonparty fact witness. Nonparty fact witnesses are individuals who potentially have knowledge of facts that could affect the outcome of the case but who have no stake in the claim or defense. Furthermore, they are not expert witnesses. They are necessary because attorneys can make use of their unique, specific, or general knowledge of the facts in the case to educate the jury. They are frustrating because an attorney is heavily burdened with the task of shielding his or her client from the effects of the witness's testimony. That burden is addressed by deposing the opposing party's fact witness to discover what knowledge the witness has and, when necessary, learn information that could be used to discredit the witness.

A few issues present themselves for the scenario of the nonparty fact witness being deposed. First, who represents the witness, if anyone? Second, is the witness entitled to an attorney at the deposition? The answer to this question will depend on the jurisdiction. A New York appellate court has ruled that a nonparty witness is not entitled to have his or her own attorney present. *Thompson v. Mather*, 70 A.D.3d 1436 (N.Y. App. Div. 2010). The basis for this ruling was that the rules governing the taking and use of depositions were to proceed as if it were in a trial. For

example, the non-party fact witness is being questioned on the stand at trial. Only the opposing attorney(s) may record an objection to the form/substance of the question being asked. An attorney who happens to represent the non-party fact witness cannot object. Accordingly, because the nonparty witness attorney could not object at trial, that attorney could not lodge an objection at the deposition. *Id.* Florida has no bright-line rule, but the rule governing depositions has a similar standard. Florida Rule of Civil Procedure 1.310 allows for examination and cross-examination as permitted at trial. Further, it limits only a "party" to instructing a deponent not to answer on the basis of privilege. Although no case is directly on point, it is certainly the case that there is no affirmative right of a nonparty to have an attorney present.

Third, may an attorney representing one of the interested parties also represent the nonparty fact witness? The allure of such an action should be clear to any litigator. Although the nonparty witness has no stake in the outcome of the case, the attorney can establish control over the witness and guide what information is disclosed. The attorney can also learn off the record what information the witness may speak to at deposition.

Contact with a nonparty fact witness outside a formal deposition is inevitable. There certainly is no ABA model rule that prohibits this contact, nor is there a rule in Florida. However, there are rules that govern the attorney's *conduct* in such situations. Florida Rule of Professional Conduct 4-4.3(a), which mirrors ABA Model Rule 4.3, deals specifically with attorneys who represent a party to the litigation and their contact with unrepresented persons. These unrepresented persons can be pro se litigants or nonparty persons who are not otherwise represented. The rule is as follows:

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel.

Of course, there are instances where a nonparty would likely fall within the purview of the attorney's representation of a named party. If the attorney is able to demonstrate that his or her current client and the nonparty witness had some commonality in the past, then the attorney should be able to represent the witness respective to that common interest. Such commonalities include the employer-employee relationship or marriage or the witness was prior legal counsel for the interested party. In any of these instances, it can be construed that at one time, which was the basis for the knowledge of the witness, the two parties were one and the same. If the witness does not meet any of those particular attributes, then the witness is likely an unrepresented person falling within the purview of the aforementioned rule.

An attorney in this instance, in coming into contact with this witness, should inform the witness of who the attorney is and represents in the litigation. The attorney cannot inform the witness that the attorney will represent the witness at the deposition. This is impliedly prohibited in the rule by the wording, which prohibits the attorney from giving legal advice to the witness. Furthermore, if at any point in the conversation it becomes apparent that the witness believes the attorney represents the witness, the rule mandates that the attorney correct the witness regarding the misunderstanding. If the witness seeks legal advice, the attorney may only inform the witness to seek legal counsel. This is particularly important because the threshold for creating the attorney-client relationship is a low bar, hinging on the reasonable belief of the client. *See*

Mansur v. Podhurst Orseck, P.A., 994 So. 2d. 435, 437 (Fla. 3d Dist. Ct. App. 2008). Should the attorney follow the rule when in contact with an unrepresented nonparty fact witness, it would be unreasonable for the witness to conclude that the attorney will represent the witness at the deposition.

However, even after all of these disclosures, it is conceivable that a witness with a prior relationship with the attorney's client will nonetheless seek to be represented by the attorney. This representation is likely prohibited by the Florida Rules. Florida Rule of Professional Conduct 4-1.7, which closely resembles ABA Model Rule 1.7, limits the ability of an attorney to represent parties with a conflict of interest. The attorney for the interested party has a duty of loyalty and a pecuniary interest to that party. That interest and duty can be seen as the compelling interest in wanting to represent the nonparty fact witness. The attorney will have no interest in the fact witness, but rather will only want to dictate what information the fact witness discloses. At trial, the attorney for the interested party will be unable to represent the nonparty witness. Accordingly, the interests of the fact witness and interested party cannot both be adequately preserved by the attorney for the interested party. Therefore, the attorney is under the obligation of Rule 4-1.7 to decline representation.

Attempting to cloak a nonparty fact witness in the attorney-client relationship such as this could lead to detrimental outcomes for the attorney. First, the opposing party will likely move to compel testimony from the fact witness, including all manner of discussions between the attorney and witness. In this situation, the nonparty fact witness will bear the burden to demonstrate that the attorney-client relationship exists. *S. Bell Tel., Co. v. Deason*, 632 So. 2d 1377 (Fla. 1994); *Carnival Corp. v. Romero*, 710 So. 2d 690, 694 (Fla. 5th Dist. Ct. App. 1998). Should the court evaluate the ethical rules and properly conclude that representation in this manner is prohibited, then the court will likely order the witness to answer all questions from the opposing attorney, which potentially would include attorney strategies as well as privileged information jeopardizing the interested party's case. *See Visual Scene, Inc. v. Pilkington Bros., plc*, 508 So. 2d 437 (Fla. 3d Dist. Ct. App. 1987) (holding that to the extent privileged information was disclosed to an unrepresented third party, the attorney-client privilege is waived).

This could be argued as legal malpractice. *See Lenahan v. Russell L. Forkey, P.A.*, 702 So. 2d 610, 611 (Fla. 4th Dist. Ct. App. 1997). Violating the rules, whether unintentionally or otherwise, is grounds for a legal malpractice claim. Attorneys are expected to know and abide by the ethical rules. *See* Preamble to Florida Rules of Prof'l Conduct. In complex litigation, damages in the millions are often what is at stake. The attorney could arguably be on the hook for losses to that degree. Also, violations of the ethical rules are bar violations that can result in punishment from the bar as severe as disbarment. Florida Rules of Prof'l Conduct R. 4-8.4(a).

It is not the intent of the justice system to shield facts from being used to determine a case on the merits, but it is nonetheless a component of our adversary system. Most litigators I have encountered do it, and most seek new strategies for accomplishing this goal. However, litigators must be cognizant of their responsibilities to represent the interests of their clients ethically.