ILLINOIS STATE BAR ASSOCIATION™

Illinois Bar Journal

May 2008 • Volume 96 • Number 5 • Page 230 The Magazine of Illinois Lawyers

LawPulse

Clients behaving badly

By Helen W. Gunnarsson

When a client or witness spins out of control during a hearing or deposition, is doing nothing a safe route?

What are the lawyer's options when a client or witness spins out of control during a hearing or deposition? Where it's your client, is doing nothing a safe route? And where it's a witness you're trying to depose, how much nonsense should you tolerate before asking the court for relief?

A memorandum order dated February 29, 2008, from the federal District Court for the Eastern District of Pennsylvania in *GMAC Bank v HTFC Corp*, 2008 WL 542386, addresses these questions. The court issued the order pursuant to GMAC's motion to compel and for sanctions against HTFC's owner and CEO, Aaron Wider, and its own rule to show cause against the defendant's counsel, Joseph Ziccardi, a Chicago attorney, based upon what the court termed "the spectacular failure of the deposition process" in the case.

Quoting and citing liberally to the deposition transcript and videorecording, which were filed of record, the court jointly sanctioned the deponent and his counsel to the tune of over $29,000, representing GMAC's costs and 75 percent of its attorney's fees incurred in connection with the deposition and all of GMAC's fees and expenses incurred in connection with its motion to compel. Warning of the possibility of further, more severe sanctions, the court further ordered that the deposition be reconvened before a magistrate judge.

Using the f-word

The case involves a dispute over a contract between the parties for the sale of certain residential mortgage loans. On September 26 and November 8, 2007, GMAC attempted to depose Wider. Throughout the nearly 12 hours of deposition testimony, the court said, Wider persisted in hostile, uncivil, and vulgar conduct, using the f-word and variants no fewer than 73 times. Id at *3. He failed to answer or provided intentionally evasive answers to opposing counsel's questions and, thus, willfully and in bad faith impeded, delayed, and frustrated the proceedings, the court concluded.

After imposing sanctions upon Wider, the court turned to whether Ziccardi's conduct at the deposition also warranted sanctions. "[T]hroughout the deposition," the court said, "notwithstanding the severe and repeated nature of Wider's misconduct, Ziccardi persistently failed to intercede and correct Wider's violations of the Federal Rules....Instead, Ziccardi sat idly by as a mere spectator to Wider's abusive, obstructive, and evasive behavior; and when he did speak, he either incorrectly directed the witness not to answer, dared opposing counsel to file a motion to compel, or even joined in Wider's offensive conduct." Id at *11; footnotes omitted.

As to its latter observation, the court cited a portion of the deposition in which it said "Ziccardi chuckl[ed] at Wider's abusive behavior toward counsel for GMAC." Id at *16, FN 17.

The court wrote as follows:

> The nature of Wider's misconduct was so severe and pervasive, and his violations of the Federal Rules of Civil Procedure so frequent and blatant, that any reasonable attorney representing Wider would have intervened in an effort to curb Wider's misconduct. Ziccardi's failure to address, then and there, Wider's misconduct could have no other effect but to empower Wider to persist in his behavior. Under these circumstances, the Court equates Ziccardi's silence with endorsement and ratification of Wider's misconduct.

Id at *14.

Finding ratification "the functional equivalent of 'advising [Wider's] conduct' under Rule 37(a)(5)(A)," Id, and noting that FRCP 30(d)(2) contemplates sanctions for attorney inaction as well as affirmative acts that "impede[], delay[], or frustrate[] the fair examination of the deponent," Id at *15 and FN 22, the court ordered Ziccardi to pay the sanctions it assessed to GMAC jointly and severally with Wider.

"a danger to himself and you"

The order has made the rounds of the legal press, the blogosphere, and lawyers' e-mail inboxes. Among many others taking note were ISBA President Joseph Bisceglia, whose April 2008 President's Page in the *Journal* addresses lawyer incivility, and fellow Chicago litigator Mark Stang.

Bisceglia and Stang say they've never had a client quite like Wider, but both have had clients who, during depositions or hearings, behaved in unbecoming fashions. Stang recounts a client climbing up on a chair during a videotaped deposition and announcing, standing, that he'd answer all questions from that vantage point. In another case, Stang noticed his client sticking his tongue out at a blind hearing officer. In both cases, Stang immediately called for a break and privately scolded his clients, telling the latter "The hearing officer may be blind, but the corporation counsel isn't."

Bisceglia has reacted similarly in cases in which his clients were behaving inappropriately, and comments that, while it's usually sufficient to explain to clients as forcefully as necessary that inappropriate behavior is not helping their cause, a lawyer with an exceptionally difficult client might wish to see whether opposing counsel would agree to suspend the deposition and reconvene on another day.

Admonishes Stang, "You have to control your client." Referring to the sanctions imposed against Ziccardi, he continues, "A client out of control is a danger to himself and to you."

But what of the conduct of GMAC's counsel? Was he correct to continue his questioning for 12 hours and over two days, or would the better course of action have been for him to have adjourned the deposition after the third or fourth use of the f-word and moved for a protective order at that point?

Bisceglia and Stang find no fault with that lawyer's decision. "The questioning attorney showed a lot of self-restraint," says Stang. "He may have had a plan for sanctions and giving the deponent all the rope he wanted to hang himself."

Bisceglia agrees. "In the back of every lawyer's mind is the need to make a clear and complete record before bothering the judge," he said. "Judges are busy and expect lawyers to police themselves."

Magistrate Judge Morton Denlow of Illinois's Northern District, a member of ISBA's Federal Practice Section Council, concurs with these litigators. Before moving for a protective order, Denlow says, "[t]he lawyer must convince the court that there's really a problem. It can't be a one-time slip of the tongue."

The Pennsylvania judge's order directing the deposition to be reconvened under the supervision of a magistrate judge is "very unusual," says Chief Judge James Holderman of Illinois's Northern District, also a member of ISBA's Federal Practice Section Council. In fact, Holder-man doesn't recall ever seeing a district judge in his district ordering a magistrate judge to preside over a deposition.

Denlow offers another, possibly even more effective, alternative for judges to consider when faced with such conduct: deposition babysitting by a special master instead of a magistrate judge. "The judge could order the offending party to pay the special

master's expenses of, say, $500 per hour."

For his part, Ziccardi refers questions regarding the matter to the court record, which contains his motion for reconsideration, a supporting memorandum, and three affidavits, including one from Wider in which he states that Ziccardi and cocounsel admonished him repeatedly of proper conduct, to cease his misconduct, and that his conduct was damaging his case. In his own affidavit, Ziccardi denies chuckling or making any noise or other comment to encourage Wider's behavior.

Since February 29, the court has granted Ziccardi's motion to stay enforcement of its order. The motion to reconsider as well as Ziccardi's motion to withdraw remain pending at press time.

Helen W. Gunnarsson is an attorney and writer in Highland Park.