LITIGATION NEWS

ABA Litigation Section

TOP STORY

No Stupid Deposition Questions, But Some Can Be Costly

By Bide B. Akande – June 12, 2023

It is often said that "there are no stupid questions." While that may be true, a ruling from a federal appellate court ruling demonstrates that there are certainly some expensive ones. While attorneys may investigate their client's novel legal claims, they should think twice before asking too many irrelevant deposition questions, lest they find themselves footing the bill for sanctions.

In *Vaughan v. Lewisville Independent School District*, the plaintiff, a white man, sued a school district and seven school board members under Section 2 of the Voting Rights Act, alleging that the district's at-large election system diluted the votes of nonwhite minorities. To support his claim, the plaintiff produced expert reports and planned to call five expert witnesses. The plaintiff's attorneys also took four depositions.

Emphasis on the "Necessary"

During these depositions, the plaintiff's attorneys "questioned school board members on a range of topics that b[ore] little relevance to a voting rights lawsuit, including a separate Title IX suit against the school district, claims of sexual harassment at a school, state standardized testing, mental health accommodations for students during standardized testing, and board members' individual views on policy topics such as allowing teachers to carry guns on campus." Neither the plaintiff nor his attorneys explained why these questions were relevant; however, the court recognized, and plaintiff's attorneys noted, that the defendants "did not move to quash the depositions and made only form objections."

The defendants filed a motion for summary judgment arguing that the plaintiff lacked standing because he "[wa]s not a member of any minority group he seeks to advocate for in his lawsuit (*i.e.*, Asian, Black, or Hispanic)." The district court granted summary judgment and costs taxable under 28 U.S.C. § 1920. The district court also granted the defendants' motion for sanctions against the plaintiff, his attorneys, and their law firm based on the findings that the plaintiff's

lawsuit was frivolous under 52 U.S.C. § 10310(e) and his attorneys multiplied proceedings unreasonably and vexatiously under 28 U.S.C. § 1927.

Sanctions for Deposition Misconduct

On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed, in part. The court vacated the fee award under section 10310(e), the Voting Rights Act's fee-shifting provision for parties, finding that the plaintiff's standing argument was not frivolous because it presented an issue of first impression and sought to extend the application of existing law. But the court agreed with the district court's award of fees for the plaintiff's attorneys' conduct during depositions and remanded with instructions to the district court to identify which, if any, expenses were incurred because of the attorneys' "unreasonable and vexatious multiplication of proceedings through irrelevant deposition topics." Finally, the Fifth Circuit reversed the district court's award of fees against the attorneys' law firm, holding that § 1927 does not provide grounds for a district court to award attorney fees against law firms or other entities not admitted to practice law.

ABA Litigation Section leaders agree with the court's decision to vacate the award under the Voting Rights Act's fee-shifting provision. It is important that claimants and their attorneys "can make arguments based on good-faith extensions of the law," explains Joseph V. Schaeffer, Pittsburgh, PA, cochair of the Litigation Section's Pretrial Practice & Discovery Committee. "We don't want to discourage civil rights claims," he adds. "I don't think [the U.S. Supreme Court] is ever going to take this case on appeal, but if they did, I think they would affirm the Fifth Circuit's reversal of the Voting Rights Act sanctions," he posits.

"It's a pretty reasonable outcome and reiteration of the standard of whether a claim is frivolous," concurs Ashley J. Heilprin, New Orleans, LA, cochair of the Litigation Section's Pretrial Practice & Discovery Committee. If attorneys were outright barred from pursuing novel legal theories, "would *Brown v. Board of Education* be sanctionable?" Heilprin asks. "You do not get that decision without first braving a new legal theory," she adds.

Sanctioning Lawyers and Firms

Section leaders are less enthused by the court's decision to uphold sanctions under 28 U.S.C. § 1927. "I was more puzzled by the partial sanctions for the attorney conduct," comments Schaeffer. "The whole discovery system is set up to allow attorneys to work together in good faith. This ruling seems inconsistent with that purpose," he contends. Without objections from opposing counsel during the depositions, "I don't know if I would have done anything differently," he notes.

Heilprin agrees, adding that these sanctions could have a chilling effect, especially on junior attorneys. "Younger and less experienced lawyers, it takes them a while to get into the relevant questions [during a deposition]," she offers. "There are also a number of different strategic reasons why someone would go into less relevant questions. As long as the questions were asked within the time limits of the deposition, I don't see a problem."

The court's revocation of the attorney's fees against law firms is a more open question. "A law firm has a responsibility for its attorneys," states Heilprin. "An attorney's conduct can already be imputed onto his or her law firm in a malpractice claim; why would we treat sanctions differently?" she ponders.

Avoiding Unnecessary Deposition Risks

Litigators have options to try to avoid sanctions if they find themselves in a similar situation. "Be thoughtful about how your questions fit into the bigger picture," cautions Heilprin. "Anticipate your opponent's objections and have in your notes the reasons why your question is relevant," she advises. Attorneys should also understand that their conduct could subject them to sanctions even where opposing counsel does not put them on notice. "It's the attorney's obligation to observe the rules even when no objections are made," Schaeffer concludes.

Bide B. Akande is a contributing editor for Litigation News.

Hashtags: #sanctions #rulesofprofesionalconduct #VotingRightsAct

Resources

- *Vaughan v. Lewisville Independent School District*, No. 22-40057 (5th Cir. Mar. 9, 2023).
- Grant H. Hackley, "Patent Incivility Justifies Fee Shifting," *Litigation News* (May 12, 2022).