3 Surprising Deposition Dangers Attorneys Must Heed

By **Nate Sabri** (June 21, 2024)

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In federal court, all rules and deadlines are important and should not be missed. But, as every practicing litigator knows, some mistakes are more dire than others.

A March 28 order in Larsen v. PTT LLC from U.S. District Judge Tiffany M. Cartwright in the Western District of Washington, for example, excused the filing of an oversized brief as inadvertent and in good faith.

By contrast, forgetting to exercise your right to a jury could be irreversible, as discussed ad nauseam a few months ago when many believed former President Donald Trump's attorneys had done exactly that in the New York attorney general's business fraud suit against Trump and his company.[1]

It is worth noting, though, that the judge presiding over that case rejected that rumor and is reported to have stated, "No one forgot to check a box."

One area that attorneys often do not think of as being quite so dicey is discovery. When it comes to depositions, however, there are surprisingly strict and often overlooked requirements that can lead to outsize consequences.

Here are three traps about which counsel must be vigilant — before, during and after the deposition.

1. Before: Do not forget a witness fee check.

Imagine this: You spend days preparing to take the deposition of an important third-party witness. You discuss the date and time in advance with counsel for the witness. You fly halfway across the country to take the deposition in person. You arrive at the location with documents in tow, and find only the videographer and court reporter present.

After the start time has passed, you contact the witness's counsel, and he responds that you did not serve a valid subpoena because you did not include a witness fee check.[2]

Even if it seems unnecessary in modern litigation — when many depositions may take place over videoconference — and both location and timing are often the subject of discussion and agreement, tendering a witness fee check is part of the threshold requirement for effective service of a subpoena.

Under Rule 45(b)(1) of the Federal Rules of Civil Procedure, "[s]erving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law."

Some courts have found that this invalidates the subpoena outright, even where the subpoena recipient's counsel agreed to accept service by email and made no mention of the fee.[3]

This requirement holds for videoconference depositions, too, because the rule requires both

mileage fees and "1 day's attendance."[4]

And it may not be fixable by later tendering witness fees because the conjunctive nature of the rule requires delivery of the fee "at the time of service," as articulated by the U.S. District Court for the Eastern District of California in its 2013 decision in Wallis v. Centennial Insurance Co.[5]

This is something that must be on your final checklist before a subpoena is served.

2. During: Beware mid-deposition discussions.

Now imagine you are the one defending a deposition. During lunch, your client asks you how they are doing. You discuss their answers so far, express some concern about a few responses and start a conversation about the substance of the case.

Back on the record, the deposing attorney asks your client what they discussed with you during the break. You object on privilege grounds, and the attorney responds: "The contents of those discussions are not privileged in this district, counsel."

The bright-line split here arises from a 30-year-old decision in Hall v. Clifton Precision.[6]

In that 1993 case, the U.S. District Court for the Eastern District of Pennsylvania imposed nine "guidelines for discovery depositions," and the dire consequences discussed in this article arise from Nos. 5 and 6.

The fifth guideline states, "Counsel and their witness-clients shall not engage in private, off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding whether to assert a privilege." And, under the sixth guideline, "Any conferences which occur pursuant to, or in violation of, guideline (5) are a proper subject for inquiry by deposing counsel to ascertain whether there has been any witness-coaching."[7]

Over the years, some courts have emulated this model. In 2009, a judge in the U.S. District Court for the District of New Jersey ruled in Ngai v. Old Navy that text messages exchanged between an attorney and their client during a deposition were not privileged and needed to be produced.

Then-U.S. Magistrate Judge Patty Shwartz, now a U.S. circuit judge, cited Hall and subsequent cases for the notion that an off-the-record conference during a deposition, other than to discuss asserting a privilege, "is not protected by the attorney-client privilege."[8]

Other judges, such as U.S. District Judge Edward M. Chen in the Northern District of California, have adopted language similar to that in Hall prohibiting conferences during depositions other than to determine whether to assert privilege.[9]

Of course, not every court takes this approach. In Few v. Yellowpages.com, for example, a judge in the U.S. District Court for the Southern District of New York rejected a litigant's reliance on Hall in 2014. Then-U.S. Magistrate Judge Michael H. Dolinger stated that there was no such rule in that court.[10]

But a defending attorney had better know which group the court falls in before the deposition begins.

3. After: Reserve the right to review and sign.

This final tip is even more basic, but often overlooked: The right to review and correct a transcript through an errata sheet is not automatic.

Under Rule 30(e) of the Federal Rules of Civil Procedure, it must be explicitly requested "before the deposition is completed." This means an attorney must remember to put this on the record or — correct or not — the deposition transcript may stand as is.[11]

The remaining procedural requirements, of course, must also be met: Calendar the 30-day deadline and submit the errata sheet within that time, and sign a statement listing any changes and the reasons for making them. But the threshold requirement, before the deposition is completed, can moot all the others if forgotten.

Conclusion

Major events and critical deadlines, such as filing a notice of appeal, preserving the right defenses in an answer or stating a jury demand, are generally top of mind, as they should be.

But sometimes seemingly minor rules can also be unforgiving. Keep these pitfalls in mind, and always ensure that your deposition checklist is thorough — a critical piece of evidence may depend on it.

Nate Sabri is a partner at Perkins Coie LLP.

[1] https://www.salon.com/2023/10/02/mind-blowing-legal-experts-warn-that-lawyers-incredible-screw-up-is-very-ominous-for/.

[2] A low move, but also a true horror story from a colleague years ago.

[3] See, e.g., Schwieterman v. Caterpillar Inc., Case No. 1:20-cv-2611-SCJ, 2021 U.S. Dist. LEXIS 258534 (N.D. Ga. Nov. 17, 2021); see also Benanav v. Healthy Paws Pet Ins. LLC, Case No. 2:20-cv-00421-LK, 2023 U.S. Dist. LEXIS 142774, at *13 n.5 (W.D. Wash. Aug. 15, 2023) (citing prior order denying motion to compel because "subpoena's service was invalid for failure to tender witness fees"); City of Baton Rouge v. Centroplex Ctr. Convention Hotel LLC, Case No. 22-94-SDD-SDJ, 2022 U.S. Dist. LEXIS 226393, at *6 (M.D. La. Dec. 14, 2022) (quashing subpoenas and stating recipient "is under no obligation to respond to or otherwise comply with" subpoenas, in part due to failure to tender witness fees).

[4] Ortega v. Mister Price Inc., Case No. 21-1050 (MEL), 2022 U.S. Dist. LEXIS 67002, at *5-6 (D.P.R. Apr. 11, 2022) (denying motion to hold third party in contempt for failure to attend videoconference deposition because "the subpoena was served on [the witness] without the required fees, thereby rendering service invalid").

[5] Wallis v. Centennial Ins. Co., Case No. 2:08-cv-2558 WBS AC, 2013 U.S. Dist. LEXIS 14181, at *9-10 (E.D. Cal. Jan. 31, 2013) (granting motion to quash subpoena where fee was not tendered at time of service but tendered "as soon as [Plaintiffs] became aware that this was a problem.").

[6] Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993).

[7] Hall, 150 F.R.D. at 531-32.

[8] Ngai v. Old Navy, Case No. 07-cv-5653 (KSH) (PS), 2009 U.S. Dist. LEXIS 67117, at * 13 (D.N.J. July 31, 2009).

[9] https://www.cand.uscourts.gov/wp-content/uploads/judges/chen-emc/EMC-Standing-Order-Civil-Discovery.pdf.

[10] Few v. Yellowpages.com LLC, Case No. 13-cv-4170 (RA) (MHD), 2014 U.S. Dist. LEXIS 96672, at *8 (S.D.N.Y. July 7, 2014).

[11] See, e.g., Judge v. New York City Police Dep't, Case No. 10-civ-4236 (RMB), 2012 U.S. Dist. LEXIS 4239, at *11-12 (S.D.N.Y. Jan. 12, 2012) (deponent may be precluded from making changes to transcript where not requested); see also Winston v. Marriott Int'l Inc., Case No. 03-cv-6321 (ARR) (JO), 2006 U.S. Dist. LEXIS 100989, at *14 (E.D.N.Y. May 4, 2006) ("Numerous courts have rejected changes to depositions when the procedural requirements of Rule 30(e) were not met.").