



Delaware Court of Chancery Enforces Deposition Practice Standards

This latest ethics column will provide an overview of the highlights from a recent decision by the Delaware Court of Chancery in which deposition practice standards were described and enforced. In general, reading court decisions regarding the enforcement of discovery practice standards are akin to passing a car accident on the road and thinking: “there, but for the grace of God, go I.” Nonetheless, those who toil in the vineyards of litigation practice infrequently find court decisions that clearly articulate the applicable standards and also enforce those standards with equal clarity. The reason that there are so few such decisions are manifold. One reason is that it remains expensive and time-consuming to engage in motion practice, and motion practice on discovery disputes and the result of the effort are often unsatisfying when courts take an approach of “a pox on both your houses,” and pay no heed to which party started the imbroglio.

Recently in the matter of *In re: Appraisal of Dole Food Company, Inc.*, (Del. Ch. Dec. 9, 2014), the Delaware Court of Chancery interpreted its own Rule 37 to require fee-shifting based on an improper instruction to a deponent that the deponent should refuse to answer a question during the deposition, based merely on an argument that the question was either irrelevant or not likely to lead to the introduction of admissible evidence. The Delaware Rules of Civil Procedure are based on the Federal Rules of Civil Procedure.

The law in Delaware has been clear that during a deposition it is improper for a lawyer to instruct the deponent not to answer a question. Very limited exceptions apply, such as to protect an attorney/client privilege or to allow time for the filing of a motion to seek a protective order. Neither exception applied in this case.

The larger factual issue involved an effort to obtain valuations that the plaintiff had prepared prior to the litigation, which began in the form of a request for documents. After that request was rejected, the defendant company then noticed a deposition for a Rule 30(b)(6) witness. During the deposition similar questions were asked about the prior valuations, but the deponent was instructed not to answer questions regarding prior valuations based on an objection that the questions lacked relevance.

Dole moved to compel production of the valuation-related documents and for a supplemental deposi-

tion of the Rule 30(b)(6) witness. The 35-page decision of the court provided an extensive factual background of the dispute. For purposes of widespread applicability, I will focus on aspects of the opinion useful for every lawyer who tries to maintain civility and productivity in depositions.

Permissible Discovery

The court began its analysis with a review of the broad scope of permissible discovery pursuant to Rule 26(b)(1), which essentially allows discovery regarding any matter that is not privileged. It is not grounds for objection that the information will not be admissible at trial as long as the information sought “appears reasonably calculated to lead to the discovery of admissible evidence.”

Nonetheless, objections to discovery in this case were made on the grounds of relevance, although the plaintiff abandoned that position in response to the motion to compel. The court explained that, in any event, the valuation materials prepared prior to the lawsuit may lead to admissible evidence. Prior Chancery decisions have so held.

The court explained that under Rule 26(b)(1), the burden to demonstrate that the discovery sought is reasonably calculated to lead to the introduction of admissible evidence is a slight burden, but after that minimal explanation is provided by the requesting party, it is the burden of the party opposing discovery to show that the explanation provided is erroneous and that the Rule 26(b)(1) standard has not been met. The Delaware decisions are consistent with federal decisions on this point.

The court also provided an explanation of those instances where the communication of an in-house lawyer is not an attorney/client privileged communication because that in-house attorney was providing business advice as opposed to legal advice. In those instances where it is a close call, as here, for one small portion of the discovery requested, the court conducted an in camera review. That was but a small aspect of the dispute, however, in this case.

Mandatory Fee-Shifting

The court interpreted Court of Chancery Rule 37(b)(2) to require mandatory fee-shifting when a party is “found to have failed to honor a discovery

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request unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." In this case, the court did not find the failure to be substantially justified nor did it find other circumstances that would make an award of expenses unjust. The primary reasoning of the court was that the objection to the production of documents and the instruction to a deponent not to answer a question based on relevance justified fee-shifting. That objection to potential admissibility was also contrary to prior precedent in appraisal actions. The court instructed that the proper procedure that should have been followed would have been for the attorney for the deponent to seek a motion for protective order to the extent that the petitioner believed that prior precedent should be distinguished or applied to reach a different result, in support of the non-discoverability of the inquiry.

Rule 30(c) provides that "evidence objected to [during a deposition] shall be taken subject to

the objection." The deposition rules prevent an attorney from instructing a witness not to answer deposition questions based on relevance. Rather, "instructions not to answer only would be permissible on grounds of privilege or to enforce a limitation on evidence directed by the court."

In sum, the court awarded reasonable costs, including fees, incurred in taking the aborted Rule 30(b)(6) depositions and in bringing the motion to compel. The court explained that this award was not the same as penalty for bad faith litigation conduct. Rather, it was "simply the consequence contemplated by Rule 37 as part of an incentive structure intended by the drafters of the amended rule to limit the need for judicial intervention in discovery disputes." ♦

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