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## IN PRACTICE LITIGATION

By WILLIAM S. GYVES

### The Duty To Disclose Inaccurate Deposition Testimony

#### Appellate Division ruling puts New Jersey law at odds with Federal Rules of Civil Procedure

It was the pivotal deposition in the highest profile case your firm had seen in years. In preparing your client for the ordeal, you did everything precisely by the book.

You drilled your client on the pitfalls of the deposition process and how to avoid them.

You instructed him to respond to only those questions posed, and to do so succinctly and truthfully.

You reviewed, revisited and then reviewed again the pleadings, relevant testimony of other witnesses and key documents on which he likely would be questioned.

You made it clear that under no circumstance was the client to mistake your adversary for a friend, no matter how charming she might appear to be

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*The author is a litigation partner with Entwistle & Cappucci of Princeton and New York.*

sitting across the conference table.

You aggressively challenged your client's account of the underlying facts and circumstances.

For good measure, you enlisted assistance from your firm's resident pit bull litigator, subjecting the witness to an even more intensive grilling. Your client withstood the heat and held his ground.

On the day of reckoning, your client performed brilliantly. He demonstrated that he would be a powerful witness at trial, volunteered nothing harmful and, where appropriate, advanced his position forcefully. In the wake of this sterling performance, there were kudos from around the office and a celebratory dinner at your client's favorite restaurant.

There is just one problem. One week after the deposition (before the transcript had even been delivered to your office) and just weeks prior to the scheduled trial date, your client advises that although at the time he believed his testimony to be truthful, upon further reflection he has concluded that it was perhaps less than accurate.

In fact, as you quickly determine, his testimony with respect to the core issue in the litigation was absolutely, undeniably and regrettably just plain

wrong. He now advances a position that is far more beneficial to his case.

Skeptical of this convenient 11th-hour reversal, you and your pit bull colleague subject the client to a grilling of the highest order. The inquisition settles a number of issues. You are absolutely certain that your client did not knowingly offer false testimony or attempt to intentionally mislead your adversary. You also are convinced that his current position is accurate in all respects. Further, there is no question whatsoever that the client's deposition testimony upon which your adversary has relied in preparing her case will be diametrically opposed to his trial testimony.

Indeed, at this point there is only one thing of which you are uncertain: Must you disclose this development to your adversary and, if so, when should you do so?

Until recently, the answer to that question under New Jersey law has been surprisingly unclear. No reported decision, court rule or ethical provision expressly required counsel either to disclose materially inaccurate deposition testimony or supplement that testimony prior to trial so as to cure the inaccuracy.

All that has now changed with the Appellate Division's recent decision in *McKenney v. Jersey City Medical Center*, 750 A.2d 189 (App. Div. 2000). There, the Appellate Division in no uncertain terms found it "axiomatic" that attorneys are "duty-bound" to inform their adversaries of "radical" changes to the deposition testimony of a party or key witness prior to trial.

Although perhaps a most salutary development in advancing the objectives underlying the discovery process, the obligation to disclose inaccurate deposition testimony is far less "axiomatic" than the *McKenney* court suggested.

Further, and perhaps most problematic for litigators whose practices send them shuttling between the federal and state courts of New Jersey, this "axiomatic" obligation seemingly is at odds with their responsibilities under the Federal Rules of Civil Procedure. The litigator who practices primarily in the federal courts could be caught napping on this critical issue in one of her occasional state court matters. As *McKenney* illustrates, that could prove a costly mistake, indeed.

#### Hard Case, Bad Law

The underlying facts in *McKenney* were most unfortunate. Plaintiffs brought the action on behalf of themselves and their son, alleging damages for wrongful birth, wrongful life and injuries sustained during delivery. Among other things, the parents alleged that some of the defendants were negligent in failing to detect a severe birth defect and thus deprived the mother of the opportunity to terminate the pregnancy. The child was born with severe birth defects. Years after the birth and despite nine operations, the child remained unable to sit or walk without assistance.

It is what transpired during the course of discovery that renders this medical malpractice action of utmost importance to all New Jersey litigators, regardless of the nature of their practice. One of the defendants, the chief obstetric and gynecological resident, was questioned during his deposition with respect to a sonogram administered to the mother on Aug. 13, 1990. At the time of the sonogram, the mother was in the 22nd or 23rd week of her pregnancy.

It was undisputed that the resident made certain notations to the sonogram report, expressing some concern with the pregnancy and indicating the need for a more extensive sonogram to determine conclusively the existence of a congenital malformation. The critical

issue in *McKenney* was determining when the resident made these notations. If the resident examined the report and made his notes at the time of the Aug. 13 sonogram, plaintiffs were likely to establish that he had concerns about the pregnancy at a time apparently falling just within the period when terminating the pregnancy was still feasible. However, if the notes were made even a short while after the sonogram was administered, plaintiffs' claims would be significantly undermined because by that time the mother apparently would have had little, if any, opportunity to terminate the pregnancy. The resident's deposition testimony indicated that he reviewed the report and made his notations at the time of the Aug. 13 examination.

At trial, the resident completely reversed his position on this critical issue. There, the resident testified that subsequent to his deposition but prior to trial he reviewed certain hospital records indicating that the ultrasound machine used to administer sonograms at the satellite clinic to which he was assigned in August 1990 was not functioning. As a result, the resident testified, the sonogram at issue must have been administered at the main hospital facility. The resident testified that because he was not assigned to the hospital at the time, he could not have examined the sonogram or made the critical notations on the date the sonogram was administered. Indeed, the resident testified, given his assignment to the clinic and the institutional delays in forwarding sonograms from the main hospital facility to the clinic located in a different building, he must have reviewed the report toward the end of August 1990. That was the point when plaintiffs' expert conceded that terminating the pregnancy no longer was a practical or legal option.

This dramatic shift in testimony struck to the very core of plaintiffs' case. Plaintiffs' counsel moved for a new trial based, in part, on the fact that the resident's trial testimony substantially deviated from his deposition testimony. The trial court denied the application. On appeal, plaintiffs' counsel contended that the trial court abused its discretion. Defense counsel countered that they were under no obligation to

make a pretrial disclosure that they anticipated material changes to the resident's deposition testimony.

#### Defense Counsel Get Lashing

The Appellate Division declined to reverse the trial court's denial of the motion for a new trial. It did, however, excoriate defense counsel for failing to promptly disclose the resident's change of position. The court focused on the materiality of the resident's change in position, what defense counsel knew of this reversal and when they knew about it. The court had little doubt that, prior to trial, defense counsel knew of the resident's change in position and appreciated the gravity of that development.

Indeed, the court concluded that defense counsels' opening statements confirmed that "they were aware of it and anticipated [the resident's] newly adopted position." The court concluded that the knowing failure to disclose this development prior to trial was improper.

"Where, as here, an attorney knows that his client or a material witness intends to deviate from his deposition testimony in a crucial way, we believe that the attorney has an ethical obligation to convey that fact to his adversary," the panel wrote.

"Our procedures for discovery are designed to eliminate the element of surprise at trial by requiring a litigant to disclose the facts upon which a cause of action or defense is based. ... The search for truth in furtherance of justice is paramount. ... This basic principle is designed to ensure that the outcome of litigation shall depend on the merits in the light of all of the available facts, rather than on the craftiness of the parties or the guile of their counsel. ... By contrast, [defense counsels'] position is akin to trial by ambush."

The court cautioned that this duty to disclose inaccurate deposition testimony is a relatively narrow one, applying only if the reversal involves testimony "which goes to the heart of the claim in controversy." As the court emphasized, "not every anticipated change of a person's deposition testimony will require disclosure — only a significant change pertaining to a material issue."

Although it deemed this obligation to be "axiomatic," the court acknowledged that the principle was not expressly articulated in the authorities governing discovery: "Although our rules of practice do not specifically provide that there is a continuing duty to disclose where it can reasonably be anticipated that a party or material wit-

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ness will depart significantly from his or her deposition testimony, their purpose and spirit mandate such a course. We thus take this opportunity to make explicit what is plainly implicit in our discovery practice."

In the end, the court concluded that counsel's failure to disclose the change in testimony, although improper, did not warrant the conclusion that plaintiffs had been denied a fair trial. The court found that plaintiffs had not established that they would have tried the case any differently had this disclosure been made. Instead, given the undisputed evidence that the resident had been assigned to the satellite clinic rather than the main hospital facility at the time of the sonogram, the court reasoned that the jury accepted the resident's "chronology defense." The court found that although he may have been negligent, that negligence could not have caused plaintiffs' claimed damages because an abortion apparently no longer was a viable option at the time the resident made his notes. Significantly, the court did not impose sanctions against defense counsel.

The *McKenney* court's analysis might leave our hypothetical pit bull litigator somewhat perplexed. Absent an expressly articulated obligation, he might wonder, how can counsel rightfully be taken to task for not disclosing inaccurate deposition testimony when, notwithstanding this nondisclosure, the adversary still could resort to that most potent of remedies — cross-examination?

If a party or material witness reverses his position as fundamentally and conveniently as did the resident in *McKenney*, competent trial counsel should have no problem effectively challenging that testimony (if not completely destroying the witness's credibility) at trial. Indeed, in *McKenney*, the court noted that plaintiffs' counsel's aggressive cross-examination of the resident "was highly effective."

#### Looking to Federal Rules

Searching for an analytical peg for its ruling, the Appellate Division resorted to the sort of strained reading of authorities that would trigger a well-deserved rebuke from the court if counsel engaged in such contortions. In the absence of any direct support for its holding under New Jersey law, the court relied heavily on the core discovery provision in federal practice, Rule 26 of the Federal Rules of Civil Procedure. Specifically citing Rule 26(e)(1), the court observed that the federal rules "require a party to supplement its pretrial disclosures if it 'learns that in some material respect the information disclosed is incomplete or incorrect.'"

Rule 26(e), however, provides no support for the court's conclusion that the federal rules compel the supplementation of the deposition testimony of parties or fact witnesses. Rule 26(e)'s supplementation provision cannot fairly be read to extend to such deposition testimony. Prior to 1970, there was considerable uncertainty regarding the duty to supplement discovery responses under the federal rules. That year, Rule 26 was amended to expressly introduce a duty to supplement responses to interrogatories requesting the identity and location of fact witnesses. Similarly, the 1970 amendment imposed a duty to supplement interrogatories seeking the identity of expert witnesses and

the substance of their anticipated testimony. The amendment said nothing of supplementing or correcting the deposition testimony of parties or fact witnesses. See generally 4 J. Moore, *Moore's Federal Practice*, ¶26.33 at 26-416.1 to 26-418 (2d ed. 1996).

The federal discovery rules were substantially overhauled in 1993. Among other things, Rule 26(e) was revised to expand significantly the duty to supplement prior discovery responses. The amended rule enlarges the class of discovery devices subject to supplementation. Specifically, the amended rule imposes a duty to supplement the mandatory disclosures made under Rule 26(a)(1)-(2). Those disclosures involve the identity of potential witnesses, production of or description of relevant documents, computation of damages, production of relevant insurance policies, the identity of any experts and the production of expert reports. See Fed. R. Civ. P. 26(e)(1). In addition, the revised rule imposes a duty to supplement a prior response "to an interrogatory, request for production, or request for admission." See Fed. R. Civ. P. 26(e)(2).

#### No Federal Duty To Supplement

Significantly, however, despite the specificity of these amendments and the expanded scope of the duty to supplement, Rule 26(e) still does not expressly include fact depositions as being among the disclosure devices subject to the duty to supplement when a party or its counsel learns that in some material respect the information previously disclosed is incomplete or incorrect.

As the Advisory Committee emphasized in its note to the 1993 amendments, the revision to Rule 26(e) "clarifies that the obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, *but not ordinarily the deposition testimony*. However, with respect to experts from whom a written report is required under subdivision (a)(2)(B), changes in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to a duty of supplemental disclosures under subdivision (e)(1)." Fed.

R. Civ. P. 56(e), Advisory Committee's Note (1993) [emphasis supplied].

Faced with this rather direct observation from no less a source than the Advisory Committee, the Appellate Division did what counsel could only dream of doing when faced with adverse authority: the court ignored it. The court reasoned, "Although the Advisory Committee's notes indicate that the provision establishing a continuing duty to disclose does not apply to deposition testimony, the express language of the Rule is not so limited."

In fact, the express language of Rule 26(e) does reflect such a limitation. The Rule includes a laundry list of discovery devices specifically made subject to a duty to supplement. The Rule's drafters did not include the depositions of parties or fact witnesses on this list. This was not inadvertent. As evidenced by the fact that Rule 26(e)(1) directly addresses the obligation to supplement expert depositions, the drafters clearly understood that the need to supplement deposition testimony could arise. The only reasonable reading of

Rule 26(e), given its specificity, is that the drafters did not consider it necessary to obligate counsel to supplement the deposition testimony of parties or fact witnesses.

Delving even further afield, the Appellate Division relied on the Ninth Circuit's decision in *Bunch v. United States*, 680 F.2d 1271 (9 Cir. 1982), for the proposition that Rule 26(e) "has been said to apply where a party has deliberately concealed 'new facts' inconsistent with its deposition testimony." *Bunch*, of course, preceded the "clarified" version of Rule 26(e) by more than a decade. Its relevance to the issue of supplementing the deposition testimony of parties or fact witnesses therefore is, at best, questionable.

Notwithstanding this dearth of support for its analogy to the federal rules, the *McKenney* court deemed the duty to supplement inaccurate deposition testimony it purported to find in Rule 26(e) to be the "correct" approach.

The court continued: "An attorney is under a duty seasonably to apprise his adversary where he obtains information upon the basis of which he knows that

his client's or witness's prior deposition was incorrect in a material respect when made, or he knows that the deposition, though correct when made, is no longer true in a material respect."

Notwithstanding its rather tenuous legal and analytical footing, *McKenney* makes clear that New Jersey litigators now indisputably operate under a very real obligation to move swiftly to correct materially inaccurate deposition testimony. Whether or not this duty was "axiomatic" prior to *McKenney*, it unmistakably now is part of the legal framework within which litigators must thread the needle in attempting to meet their discovery obligations without (in most instances) volunteering anything more than is absolutely required.

Although some litigators might quibble with the need for this obligation, the *McKenney* decision significantly strips the duty to disclose and to supplement inaccurate deposition testimony of any of its former uncertainty. The ruling makes plain that a transgression of that duty could result in seriously adverse consequences for counsel and client. ■