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A modest proposal for a better rule 30(b)(6) deposition

By Iain D. Johnston, U.S. Magistrate Judge, Northern District of Illinois, Western Division

I am sure that this has never happened to you, but, perhaps, maybe "a friend" has participated in the following scenario.

- "Your friend" is involved in litigation akin to the Thunderdome of the Mad Max variety.
- "Your friend" receives a notice of a deposition pursuant to Federal Rule of Civil Procedure 30(b)(6).[1]
- The notice contains a laundry list of categories spanning every conceivable aspect of all the claims and affirmative defenses at issue – and then some. For example, the notice seeks "all facts" supporting each affirmative defense and the legal bases for those defenses.
- "Your friend" begrudgingly contacts her client to explain the requirements of producing a Rule 30(b)(6) witness (or witnesses).[2] The client is unpleased, but understands.
- "Your friend" uses her best efforts to prepare the Rule 30(b)(6) witness for the deposition, including providing the witness with information the witness previously did not know so as to comply with the notice.[3]
- "Your friend" and her Rule 30(b)(6) witness appear at the designated time and location for the deposition.
- A few hours (although it seems like years) into the deposition, the opposing counsel begins to ask questions outside the scope of the Rule 30(b)(6) deposition, some of which are clearly attempts to impeach the witness by showing, among other things, bias. (The opponent's ability and desire to seek information beyond the scope of the notice may have seemed impossible based upon the broad scope of the

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Summary judgment without asking: The Power of a United States District Court Judge to enter Summary Judgment *sua sponte* under Rule 56(f)

By Tom Schanzle-Haskins, United States Magistrate Judge, Central District of Illinois, Springfield Division

In 1977, the Seventh Circuit in *Choudhry v. Jenkins*, 559 F.2d 1085 (7th Cir. 1977), gave the following stern admonition regarding the entry of summary judgment *sua sponte* by a Federal District Court Judge. In reversing the entry of summary judgment *sua sponte* by the Court, the Seventh Circuit held as follows:

> Rule 56 plainly does not authorize a court to enter an arbitrary summary judgment *sua sponte* against a party; indeed the express language of paragraphs (a) and (b) of the Rule discloses that a motion for summary judgment is to be made by a party. Professor Moore consequently has concluded that "the court should rarely consider entering summary judgment *sua sponte* where no party has moved for summary judgment or the provisions of Rule 12 are not satisfied." 6 Moore's Fed. Prac. P 56.12 (2d ed. 1976) at 338-339. We

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A modest proposal for a better rule 30(b)(6) deposition

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notice, but as we all know, litigation is full of surprises.) Moreover, the opponent begins to also ask questions that appear to seek legal conclusions.

- "Your friend" frantically tries to recall a seminar she attended years before that explained the few instances in which it is proper to instruct a witness not to answer.[4]
- "Your friend" is confident that the questions seeking legal conclusions are improper.[5]
- "Your friend" seems to recall that there *may be* a split of authority on whether she can instruct a Rule 30(b)(6) witness not to answer questions that are beyond the scope of notice or seek legal conclusions.[6] Although she certainly feels sandbagged because she prepared her witness on the topics of the notice, not on other issues, she is unsure what the proper response should be.[7]
- Frustrated by the nature of the questions, the length of the deposition and the acrimonious litigation history, "your friend" instructs the witness not to answer those types of questions. Her opponent balks and demands that the witness answer the questions.
- The deposition comes to a screeching halt, and "your friend" files a motion for a protective order. Her opponent files a motion for sanctions.
- The motions are heard before a cranky judge, who is unhappy with both attorneys and who enters a ruling that displeases both sides.

* * *

The next time "your friend" encounters this type of distasteful circumstance, think of all the opportunities that exist to avoid or prevent the downward spiral of problems.

First, try to avoid death matches.[8] Without doubt, there are lawyers who stink. (You know who you are; so knock it off). During a career that may last four decades, "your friend" is bound to litigate against a couple of them. But she should try to be the bigger person and the better attorney. A good judge and court staff will recognize that effort. And if "your friend" does not believe that, tell her to be like Earl and have faith in karma.

Second, upon receipt of a laundry list Rule 30(b)(6) notice, instead of trying to create an omniscient witness, "your friend" should try the following.[9] Initially, "your friend" should write a polite and thorough letter (not an e-mail) that contains at a minimum the following: (a) an explanation of her concerns about the notice; (b) an acknowledgment that she takes her duty of presenting a properly prepared and knowledgeably witness seriously and that the notice is preventing her from fulfilling that duty; and (c) a date and time when she will call opposing counsel to personally discuss these issues. (If opposing counsel responds with an e-mail, "your friend" should simply reply by stating she will call him to discuss the issues).

Third, "your friend" should call the opposing counsel at the identified time and have a proper Rule 37 conference, addressing the concerns.

Fourth, if "your friend" and the opposing counsel reach an agreement on limiting or at least clarifying the scope of the notice, "your friend" should follow up with a letter confirming those limits or clarifications. During the Rule 37 conference, "your friend" should let her opponent know that she will be sending a confirmatory letter and that if she has misconstrued any understanding, then he should let her know. She should honestly explain that the purpose is to allow her to present a witness that can provide the information sought. By letting opposing counsel know that this type of letter will be forthcoming, he will, hopefully, be less inclined to think that the letter is simply part of a game.

Alternatively, if "your friend" and the opposing counsel are unable to reach an agreement, "your friend" should move for a protective order from the court.[10] "Your friend" should explain in the motion that the notice does not "describe with reasonable particularity the matters for examination," that the information sought is not "known or reasonably available" to her client and that the types of "information" sought are, in fact, legal conclusions. The motion should explain all the efforts "your friend" has attempted to avoid seeking court intervention. It is apparently a little known secret that courts prefer to prevent problems rather than fix them. By seeking a protective order before the deposition,

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"your friend" is giving the court the opportunity to address the problem and fashion an appropriate remedy *before* a larger problem occurs. In the motion for a protective order, "your friend" can also argue that written discovery, in particular serving contention interrogatories, would be more appropriate than the Rule 30(b)(6) deposition.[11] If "your friend" is unfamiliar with contention interrogatories, simply refer her to an excellent article on the subject.[12]

Fifth, if the opposing counsel is more of a stinker than originally thought, and, despite the written agreement clarifying and limiting the scope of the notice, he asks questions beyond the agreement, "your friend" has only a few options. Initially, "your friend" can ask opposing counsel for a brief recess so that they can call the magistrate judge to address the issue.[13] Moreover, she can halt the deposition and seek a protective order from the court.[14] Further, "your friend" can object during the lines of questioning that exceed the agreement, noting that the witness is answering only in a personal capacity and not as a designated representative.[15] Additionally, without objecting, "your friend" can simply let the witness answer the questions. The same options exist if the opponent seeks to obtain legal conclusions or impeachment information from the witness.[16] "Your friend" *cannot* instruct the witness not to answer the questions, unless the instruction is made so that she can obtain a protective order.[17] In fact, instructing Rule 30(b)(6) witnesses not to answer questions that are beyond the scope or seek legal conclusions can result in sanctions.[18] As one court has noted, "[t]here simply is no more aggravating action than a lawyer improperly instructing a deponent not to answer a question."[19] The theory for allowing a witness to answer over the objection is that an answer to a question outside the scope of the Rule 30(b)(6) notice does not bind the party. Similarly, a questioning party that asks a question outside the scope of the notice cannot be heard to complain if the witness does not know the answer.[20] Moreover, although a Rule 30(b)(6) witness' testimony "binds" the entity in a way, the answers do not constitute judicial admissions that can never go unchallenged.[21]

* * *

A Rule 30(b)(6) deposition can be an effective discovery tool, if parties use it properly and in good faith.[22] The court in *Peshlakai v. Ruiz*, 2014 U.S. Dist. LEXIS 14278, *75-76 (D. N.M. 2014) explained the good faith required by both sides:

> A good Rule 30(b)(6) deposition – from both parties' standpoints – requires cooperation. There is little room for hiding the ball at this stage. The rules of engagement are relatively demanding. The corporation must produce fully prepared and knowledgeable witnesses on the topics designated, but the questioning party must be specific in what it wants to know – before the deposition day. If the questioning party wants a prepared witness, the questioning party must help the witness prepare. This assistance may come close to scripting out questions, there is no need or privilege that protects such work product when one is about to take a 30(b)(6) deposition. If the corporation wants more specificity, it is entitled to it. In the end, however, the questioner is entitled to answers to his or her questions. The corporation is not free to reframe or limit the scope of questioning. Accordingly, the parties must try, in good faith, to agree on what topics fit into which category. . .

At first blush, this may seem like asking a lot from the parties and their attorneys. But if the parties and their attorneys want to avoid the situation "your friend" found herself in, they should follow this sage advice. ■

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1. Fed. R. Civ. P. 30(b)(6) ("In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify on its behalf. . . The persons designated must testify about information known or reasonably available to the organization.").

2. *Peshlakai v. Ruiz*, 2014 U.S. Dist. LEXIS 14278, *66 (D. N.M. 2014) ("the corporate deponent has an affirmative duty to make available 'such number of persons as will' be able 'to give complete, knowledgeable and binding answers' on its behalf").

3. *Id.* at *68-71 (duty to prepare witness includes duty to educate the witness even if the information is voluminous and to collect information, review documents and interview employees, even former employees, with personal knowledge).

4. Fed. R. Civ. P. 30(c)(2) ("A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).").

5. *See Cat Iron, Inc. v. Bodine Environmental Services, Inc.*, 2011 U.S. Dist. LEXIS 63162, *19-27 (C.D. Ill. 2011); *First Internet Bank of Indiana v. Lawyers Title Ins. Co.*, 2009 U.S. Dist. LEXIS 59673 (S.D. Ind. 2009).

6. *See Boyer v. Reed Smith LLC*, 2013 U.S. Dist. LEXIS 151133, *8-10 (W.D. Wash. 2013); *Dagdagan v. City of Vallejo*, 263 F.R.D. 632 (E.D. Cal. 2010) (seeming to allow defending party to instruct deponent not to answer questions beyond the scope of the notice); *Paparelli v. Prudential Ins. Co.*, 108 F.R.D. 727, 730 (D. Mass. 1985) (Rule 30(b)(6) deposition limited to scope of notice).

7. *See Paparelli*, 108 F.R.D. at 730-31 (although Rule 30(b)(6) deposition limited to scope of notice, instruction not to answer questions beyond scope is improper).

8. *See generally* Standards for Professional Conduct within the Seventh Federal Judicial Circuit.

9. Fed. R. Civ. P. 26(c)(1) ("The motion [for protective order] must include a certification that the movant has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action.").

10. *See Ingersoll v. Farmland Foods, Inc.*, 2011 U.S. Dist. LEXIS 31872, *10-16 (W.D. Mo. 2011) (granting motion for protective order, in part, because scope of notice was too broad); *Murray v. Tyson Foods, Inc.*, 2010 U.S. Dist. LEXIS 16556, *63 (C.D. Ill. 2010) (granting motion for protective order limiting scope of notice).

11. *Exxon Res. & Eng'g Co. v. U.S.*, 44 Fed. Cl. 597, 601 (Fed. Cl. 1999); *U.S. v. Taylor*, 166 F.R.D. 356, 363 n. 7 (M.D.N.C. 1996).

12. *See* Johnston & Johnston, *Contention Interrogatories in Federal Court*, 148 F.R.D. 441 (1993).

13. *Peshlakai*, 2014 U.S. Dist. LEXIS 14278 at *76, *81; *American General Life Ins. Co. v. Billard*, 2010 U.S. Dist. LEXIS 114961, *25 (N.D. Iowa 2010) ("Rather than simply walking out, it would have been preferable . . . to call a magistrate judge in an attempt to resolve the issue.").

14. *Peshlakai*, 2014 U.S. Dist. LEXIS 14278 at *80-81.

15. *EEOC v. Freeman*, 288 F.R.D. 92, 99 (D. Md. 2012); *ZCT Systems Group, Inc. v. Flightsafety Int'l.*, 2010 U.S. Dist. LEXIS 29298, *6 (N.D. Okl. 2010).

16. *Freeman*, 288 F.R.D. at 99.

17. *See Duke Energy Progress, Inc. v. 3M Co.*, 2014 U.S. Dist. LEXIS 174197, *70-71 (E.D.N.C. 2014); *American General Life Ins. Co. v. Billard*, 2010 U.S. Dist. LEXIS 114961, *12, *20 (N.D. Iowa 2010).

18. *Mass Engineered Design, Inc. v. Ergotron, Inc.*, 2008 U.S. Dist. LEXIS 123347, *15-17 (E.D. Tex. 2008) (imposing sanctions of attorneys' fees for instructing Rule 30(b)(6) witness not to answer questions beyond scope of notice or seeking legal conclusions).

19. *Boyd v. University of Maryland Med. System*, 173 F.R.D. 143 (D. Md. 1997).

20. *Freeman*, 288 F.R.D. at 98-99.

21. *See Cat Iron*, 2011 U.S. Dist. LEXIS 63162 at *23-24 (citing *First Internet Bank of Indiana v. Lawyers Title Ins. Co.*, 2009 U.S. Dist. LEXIS 59673 (S.D. Ind. 2009)).

22. *Cat Iron*, 2011 U.S. Dist. LEXIS at *23.

Summary judgment without asking: The power of a United States District Court Judge to enter summary judgment *sua sponte* under Rule 56(f)

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agree. Without a party-generated Rule 56 motion or Rule 12(b) motion which may be treated under Rule 12 as a motion for summary judgment, the district court normally lacks power to enter summary judgment. See *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 935-936 (10th Cir. 1975); *Mustang Fuel Corp. v. Youngstown Sheet and Tube Co.*, 480 F.2d 607, 608 (10th Cir. 1973). Here no party-generated Rule 56 or Rule 12(b) motion was made.

Id. at 1088-1089.

Times have changed.

In its opinion in *Celotex v. Catrett*, 477 U.S. 317, 325 (1986), the United States Supreme Court noted that District Courts are widely acknowledged to possess the power to enter summary judgment *sua sponte* so long as the losing party was on notice they had to come forward with all of their evidence. *Id*. at 325.

In *Osler Institute, Inc. v. Forde*, 333 F.3d 832 (7th Cir. 2003), the Seventh Circuit analyzed whether it was "cricket" for a District Court to enter summary judgment *sua sponte* following the Supreme Court's ruling in *Celotex*. The Seventh Circuit acknowledged that the District Court's granting summary judgment *sua sponte* is permissible, but characterized the act as "a hazardous procedure which warrants special caution." The Court noted, if no issues of material fact are in dispute, a District Court may grant summary judgment on its own motion as long as the losing party is given notice and an opportunity to come forward in opposition to the motion. The Court noted that the party against whom summary judgment is entered must have notice that the Court is "considering dropping the axe . . . before it actually falls." *Id*. at 836 (quoting *Choudhry*, 559 F.2d 1089).

In 2010, Rule 56 of the Federal Rules of Civil Procedure was amended to add Rule 56(f). Rule 56(f) states as follows:

Rule 56. Summary Judgment

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

The committee comments to Rule 56(f) indicate that the 2010 amendment to Rule 56 codified a number of procedures which had grown up in practice prior to amendment of the Rule.

The Seventh Circuit had, in effect, followed Rule 56(f) prior to the enactment of the Rule. For instance, the Seventh Circuit had approved the granting of summary judgment for the defendant when only the plaintiff had filed a summary judgment motion. *Goldstein v. Fidelity and Guar. Ins. Underwriters, Inc.*, 86 F.3d 749 (7th Cir. 1996). Likewise, prior to the 2010 modification of Rule 56(f), the Seventh Circuit approved the *sua sponte* entry of summary judgment by the Trial Court when no summary judgment motion had been filed by either party. *Osler Institute v. Forde*, 333 F.3d 832 (7th Cir. 2003).

Rule 56(f) Requirement of Notice

While Rule 56(f) requires that the Court give a reasonable time to respond after giving notice of its intention to enter a *sua sponte* summary judgment under Rule 56(f), the Rule contains no guidance as to what time may be considered "reasonable." Likewise, the Rule gives no definition as to the nature of the notice which must be given by the Court. Even though Rule 56(f) was added to Rule 56 in 2010, there is scant case law since the addition of the Rule discussing the particular requirements of notice and reasonable opportunity to respond under Rule 56(f).

Analysis of what notice is adequate and what response time is reasonable must be gleaned from cases decided prior to the amendment of Rule 56 in 2010.

In *Simpson v. Merchants Recovery Bureau, Inc.*, 171 F.3d 546 (7th Cir. 1999), the Seventh Circuit was faced with a *sua sponte* summary judgment entered by the Court. The Trial Court in *Simpson* conducted a status hearing during which plaintiff sought the Court's permission to file an amended complaint to reflect a different theory of liability against the defendant. Plaintiff sought to assert a theory of vicarious liability in the amended complaint. The defendant rejected the plaintiff's legal position and stated its intent to file a motion for summary judgment if necessary. The Court directed the plaintiff and defendant to each provide a letter to the Court citing the cases upon which they relied. The Court directed the parties not to argue the cases, but just to cite them to the Court. The letter from the defendant included argument, contrary to the Court's direction. Plaintiff moved to strike the letter. Two days after the plaintiff filed the motion to strike, the parties appeared before the District Court and the Court proceeded to grant summary judgment *sua sponte* in favor of the defendant. The Seventh Circuit reversed, holding that the District Court failed to provide the plaintiff either proper notice, or a proper opportunity to respond to the arguments made by defense counsel. The Seventh Circuit remanded the case to provide the plaintiff a meaningful opportunity to come forward with all her evidence and present the Court with appropriate argument and law.

The Seventh Circuit has, however, determined that adequate notice may be inferred from the statements of the Court which fall short of indicating the Court is considering summary judgment. For instance, in *Osler Institute v. Forde*, neither party had filed a dispositive motion. *Osler*, 333 F.3d 836 - 837. At the pretrial conference, the Judge indicated he was concerned about the issues raised in the parties' trial briefs. Based on concerns about the legal issues, the Court vacated the trial setting and told the parties to prepare for oral argument on the issues raised in the trial briefs instead. Oral argument was heard and a month after the oral argument, the Judge issued a ruling dismissing all of plaintiff's claims. The Seventh Circuit noted that the District Court was entering summary judgment *sua sponte*, although the District Court never explicitly said those words, and the plaintiff should not have been caught "off guard" by the entry of the summary judgment. In reaching this conclusion, the

Court cited comments of the Court during the pretrial conference after submission of the trial briefs. The Court pointed to the District Judge's statement that the defendant's brief had raised issues of law that should be resolved before trial and, after deciding those questions, there may not be a trial. The Seventh Circuit opinion noted that the plaintiff did not ask for clarification or in any way show that it was confused about the District Court's comments at the pretrial conference or the oral argument in the Trial Court. Under the facts of *Osler*, the Seventh Circuit indicated that the plaintiff clearly knew the issues that were bothering the Judge and was not ambushed by an argument that it could not possibly address. The Seventh Circuit specifically held that the actions of the Judge gave the plaintiff sufficient notice that the Judge was considering summary judgment and affirmed the Trial Court's granting of the *sua sponte* summary judgment.

Prior to the 2010 amendment of Rule 56 to include Rule 56(f), Courts had recognized several exceptions to the notice requirement pertaining to *sua sponte* entry of summary judgment by the District Court. Specifically, Courts had recognized three grounds on which an exception to the notice requirement would be appropriate. They are:

1. The presence of a fully developed record;
2. Lack of prejudice; or,
3. A decision based upon a purely legal issue.

Gibson v. Mayor and Council of City of Wilmington, 355 F.3d 215, 224 (3rd Cir. 2004).

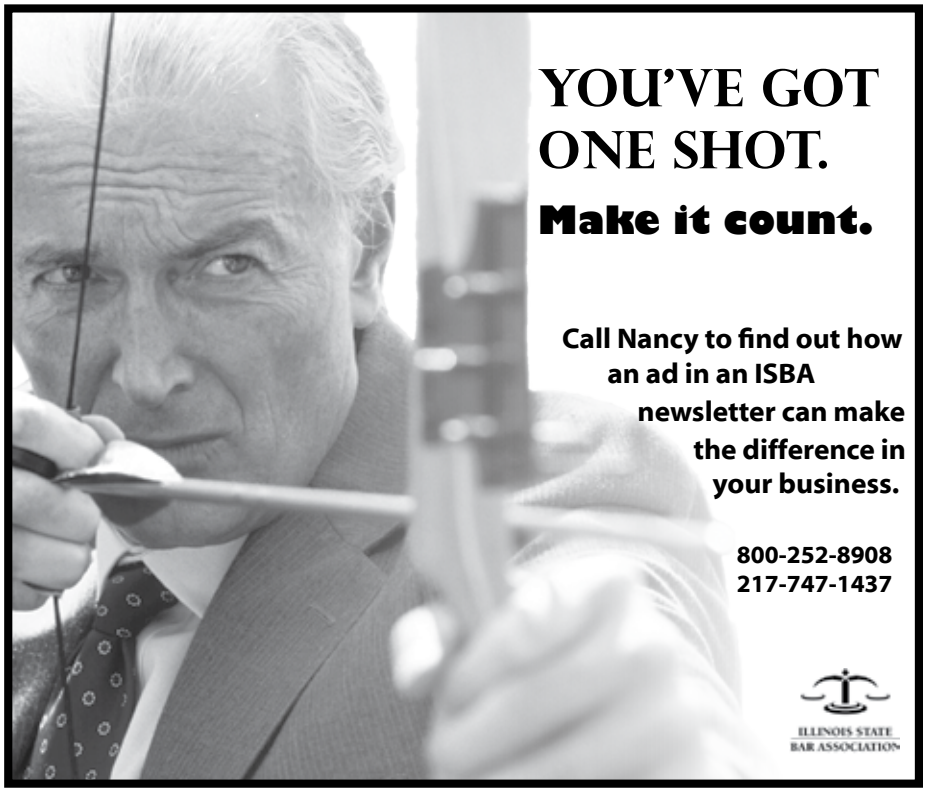
Without specifically referring to the 2010 amendments to Rule 56(f), Courts evaluating the adequacy of notice for the *sua sponte* granting of summary judgment have continued to follow these exceptions. *Minnesota Lawyers Mut. Ins. Co. v. Ahrens*, 432 Fed.Appx. 143, 147-148 (3rd Cir. 2011); *Harrison v. Cabot Oil and Gas Corp.*, 887 F.Supp.2d 588, 597-598 (M.D. Penn. 2012). Consequently, these exceptions to the Rule 56(f) notice requirements should still be considered viable.

Rule 56(f) Requirement of Reasonable Time to Respond

Neither Rule 56(f) nor the committee comments to the 2010 amendment give any specificity regarding what amount of time may be a "reasonable" time to respond to a notice from the District Court that a *sua sponte* summary judgment may be entered. Some Courts have looked to analogize to time limits contained in other sections of the Federal Rules of Civil Procedure. For instance, the Court in *Wells Real Estate Inv. Trust II, Inc. v. Chardon/Hato Rey Partnership, S.E.*, 615 F.3d 45, 52 (1st Cir. 2010), referred to the ten (10) day period then available under Rule 56(c) requiring service of a summary judgment motion ten days prior to a hearing on the motion as the appropriate minimum time available for a response to a notice of *sua sponte* summary judgment given by the Court. However, Rule 56 was subsequently amended to delete this ten-day requirement leaving no specific time in Rule 56 that can be used for determination of a "reasonable time to respond" in the context of Rule 56(f). Consequently, the requirement of the Rule is simply that the time for response must be "reasonable". It would seem, however, that a time period which affords a party the same time to respond to Court's notice of a *sua sponte* motion as is permitted under the local rules to respond to a summary judgment motion filed by a party would be an appropriate measure of a "reasonable" time to respond.

Conclusion

Rule 56(f) of the Federal Rules of Civil Procedure codifies previously existing law which permits granting *sua sponte* summary judgment by a District Court. The Rule requires that the Court give notice and a reasonable time to respond prior to a *sua sponte* entry of summary judgment by the Court. Given the holdings of Courts cited above which involve both implied notice and situations in which notice may be excused through presence of a fully developed record, lack of prejudice, or a decision based upon a purely legal issue, counsel should be attuned to actions of the Court which might indicate it may be considering a *sua sponte* grant of a summary judgment motion. Counsel should not hesitate to inquire of the Court or raise the provisions of Rule 56(f) in requesting that adequate notice and a time for response be given by the Court. Care should be taken to ensure that adequate responses are made to motions which may imply or request pretrial disposition of the case by the Court and assert uncontested facts and dispositive legal arguments. The failure to do so could result in a *sua sponte* entry of summary judgment which was not requested by the parties. ■



Prevailing party versus nominal awards: A look at *Aponte v. City of Chicago*

By Lisle A. Stalter

Simply because a judgment was entered in favor of the plaintiff may not mean the plaintiff is a "prevailing party" for an award of attorney fees. The Seventh Circuit provides insight on who is a prevailing party in *Aponte v. City of Chicago*.[1]

The Underlying Facts[2]

Plaintiff, Gilbert Aponte, filed a civil rights suit against four Chicago police officers seeking over $100,000 in damages. The complaint contained eight claims for unreasonably executing a search warrant and failing to prevent an unreasonable search. Aponte also brought an indemnification claim against the City of Chicago under state law. The evidence showed that a search of Aponte's residence, which he leased, was conducted pursuant to a warrant. Aponte claimed that significant damage was done to his property during the execution of the search warrant. Aponte's landlord paid $9,462.56 to refurnish the residence and Aponte reimbursed her. Aponte sought $25,000 in compensatory damages, $10,000 for property damages and $15,000 for emotional damages, and $100,000 in punitive damages, $25,000 from each defendant.

After two years of pre-trial litigation and a three-day trial, the jury found for Aponte on only one claim and against only one defendant and awarded him $100. The $100 award was recorded on the jury form in the space identified for compensatory damages. Aponte then sought attorney fees of $116,437.50 for the 450 hours his counsel spent working on the case. The claim for attorney's fees was based upon his prevailing party status under Section 1988.

Section 1988[3]

Section 1988 of Title 42 provides, in pertinent part:

> (b) Attorney's fees
>
> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

Aponte's claims were brought under Section 1983 of the Civil Rights Act for a search in violation of his Fourth Amendment rights. After receiving the jury verdict, Aponte sought fees for the time his counsel spent working on the case. Aponte argued that as he successfully litigated the claims against one of the defendants he was a prevailing party entitled to fees.[4] In support of his claim, Aponte asserts that since the jury rejected the opportunity to award him $1 he received a more-than-nominal award that warrants a fee award.

Defendants contested Aponte's prevailing party status and further argued that since Aponte only received minimal damages, no fee award was appropriate.

Farrar versus *Hensley*

The Seventh Circuit looked at only one issue in this case: whether the district court erred by applying *Farrar v. Hobby*[5] rather than *Hensley v. Eckerhart*[6] to Aponte's motion for attorney fees. These two US Supreme Court cases are the ones most discussed in the context of attorney fees and the prevailing party analysis.

Hensely first applied the loadstar calculation for reasonable attorney fees to conventional prevailing parties.[7] The loadstar calculation is the product of the hours reasonably expended on the case multiplied by a reasonable hourly rate.[8] But, the *Aponte* court distinguished the use of loadstar fee calculations for cases with smaller recoveries when the case was "simply a small claim and was tried accordingly."[9] Aponte claimed that since the damage award was $100 more than the $1 nominal damages awarded in *Farrar* the *Hensley* loadstar fee calculation was appropriate.

But, in *Aponte* the Seventh Circuit noted that *Farrar* does not have such a limited application and recognized that the court has applied *Farrar* to cases where the monetary award was more than the nominal $1 but was minimal compared to the total amount sought. The Seventh Circuit further recognized that *Farrar* held that a party that receives even a nominal damage award is a prevailing party that is entitled to reasonable attorney's fees. However, a reasonable fee for a nominal victor is usually zero.[10] The *Aponte* court continued the discussion of the reasonable fee for a *de minimis* victory referring to the test set forth in Justice O'Connor's *Farrar* concurrence which set forth three factors to consider: (1) the difference between the amount recovered and the damages sought; (2) the significance of the issue on which the plaintiff prevailed relative to the issues litigated; and (3) whether the case accomplished some public goal.[11] The court concluded that the logic of *Farrar* is not limited to awards of $1.[12]

In additional discussion of the application of *Farrar* the Seventh Circuit found that there is no specific "amount and nature" of an award to determine whether *Farrar* applies.[13] The court noted that the terms "nominal," "technical" and "*de minimis*" really do not differ as no dollar amount can be attributed to these "trifling" awards. The meanings of these terms are contextual and will vary on a case-by-case basis.

In concluding whether an award should be considered under *Farrar* the Seventh Circuit noted that district courts should look at the entire litigation history, including the number of victories versus unsuccessful claims, the amount of damages sought versus recovered and the time expended by the parties and the judicial resources.[14]

Farrar versus *Hensley* – which case wins

Aponte asserts that the *Farrar* test should not have been used in determine attorney fees in this case as the damage award was more than the nominal $1.

The Seventh Circuit found that, under an

abuse of discretion review, the application of *Farrar* by the district court judge was reasonable. First, on the "aim high, fall short" test, the court concluded that Aponte's victory was negligible. After two years of litigating eight constitutional claims, Aponte was awarded $100 against one defendant for which he was requesting $25,000. The court identified this award as negligible and a "paltry recovery of only 0.4%" of his requested relief—more of a loss than a victory.[15] Concluding that on the aim high, fall short factor of *Farrar* alone, the decision to not award Aponte attorney fees was reasonable.[16]

The application of *Farrar* was analyzed under a *de novo* review as well. Under the *de novo* review the Seventh Circuit court was not as generous as the district court and noted that Aponte requested $25,000 in punitive damages which was not considered in the district court's "aim high, fall short" analysis. If the punitive damages claim was considered, the award was really only .08% of the recovery sought, providing even greater support that the *Farrar* test was applicable.[17]

The Seventh Circuit rejected Aponte's assertion to presume the jury meant to award more than a nominal victory as it provided $100 in compensatory damages. In discussion, the Seventh Circuit noted that the jury verdict form only provides lines for punitive damages and compensatory damages. The court further noted that the evidence was that the damage to property was $10,000 and no item or items were shown to be $100. As such, there is no support for the position that the $100 was to compensate for property damage and at best was the jury's assessment of Aponte's "suffering, mental anguish, emotional distress, humiliation and embarrassment"—concluding that $100 is a very small reward for such harms, thus diluting the notion of compensation.[18]

In Sum

With *Aponte v. City of Chicago*, the Seventh Circuit clearly established that the application of *Farrar v. Hobby* is not limited to the $1 victory. *Farr*ar should be used to determine prevailing party attorney fees when the damages recovered are a minute fraction of the total requested. ■

Lisle Stalter is the Chief of the Civil Division in the Lake County State's Attorney's Office. She handles a variety of local government issues including representing the County in federal actions. Her primary practice areas include environmental enforcement and land use and zoning. Lisle is a member of the Illinois State Bar Association and currently serves on the Local Government Section Council and the Federal Civil Practice Section Council. She is also a member of the Association of Women Attorneys of Lake County and the Lake County Bar Association. Lisle was the recipient of the ISBA Board of Governor's Award in 2010.

1. *Aponte v. City of Chicago*, 728 F.3d 724 (7th Cir. 2013).
2. *Aponte v. City of Chicago*, 728 F.3d 725 - 26.
3. 42 U.S.C. §1988.
4. *Aponte*, 728 F.3d at 726.
5. *Farrar v. Hobby*, 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992).
6. *Hensely v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. ed. 2d 40 (1983).
7. *Aponte*, 728 F.3d 727 *citing Hensley*, 461 U.S. 433 - 37.
8. *Montanez v. Simon*, 755 F.3d 547 (7th Cir. 2014).
9. *Aponte*, 728 F.3d 728 *citing Hyde v. Small*, 123 F.3d 583 (7th Cir. 1997) (*Hyde* discusses the application of the *Hensley* decision to attorney fee awards in which plaintiff recovered $500 in damages but did not request a specific sum of money).
10. *Aponte*, 728 F.3d 727 *citing Farrar*, 506 U.S. at 115, 113 S. Ct. 566 (O'Connor concurring).
11. *Id*.
12. *Aponte*, 728 F.3d 728.
13. *Aponte*, 728 F.3d 728.
14. *Aponte*, 728 F.3d 728.
15. *Aponte*, 728 F.3d 729.
16. Recently though, the US District Court, Southern District of Illinois considered the aim high, fall short test and in its determination that plaintiff received more than minimal damages and took into consideration the jury demand, not just the relief requested in the complaint, and the offer that "plaintiff would be okay with any amount" in support of its finding of more than *de minimis* victory to support an award of attorney fees. *See Gevas v. Harrington*, 2014 WK 462616 (Sept. 16, 2014).
17. *Aponte*, 728 F.3d 730.
18. *Aponte*, 728 F.3d 730.

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Beware the errata sheet!

By Kevin Lovellette and Summer Hallaj

The deposition is an invaluable tool in litigation not only as a means to discover the facts and arguments that may be used at trial, but also as a means of preserving a witness' version of events against later recantations. But in practice, how final is a witness' deposition testimony? The answer depends on whether the case is litigated in State or federal court. Depending on the jurisdiction, errata sheets may be used to substantively alter a witness' or party's deposition testimony. It is therefore essential for government lawyers to understand the ways in which opposing counsel may utilize subsequent alterations of deposition testimony, as well as the limitations on the use of errata sheets.

The following hypothetical illustrates the type of situation in which a government lawyer may find himself or herself when an opposing party seeks to retrospectively alter the substance of a witness' original deposition testimony. Suzy, a skilled government defense lawyer, takes the deposition of the Plaintiff, who alleges that he was assaulted by a government employee. During the deposition, Suzy successfully obtains an admission by the Plaintiff that he did not actually see the person who assaulted him, does not specifically remember seeing the Defendant at the time of the assault, and cannot be sure that the Defendant was the person who assaulted him. At the end of the deposition, the Plaintiff reserves signature. Two months later, in his response to Suzy's motion for summary judgment, the Plaintiff submits an errata sheet in which the Plaintiff adds testimony that although he did not see who assaulted him, he knows the assailant is the Defendant because a friend at the scene told the Plaintiff that he saw the Defendant's name on the assailant's uniform. This is the first time that the eyewitness statement has been mentioned. Suzy wants to move to strike the errata sheet changes from Plaintiff's response, but is unsure of the extent to which Plaintiff is permitted to subsequently alter his deposition testimony under applicable law.

The answer to Suzy's dilemma is simple if the Plaintiff brought his lawsuit in State court. Supreme Court Rule 207 governs subsequent changes to deposition transcripts.[1] This rule allows deponents who have reserved signature to make corrections to their deposition transcript "based on errors in reporting or transcription."[2] Such alterations "will be entered upon the deposition with a statement by the deponent that the reporter erred in reporting or transcribing the answer or answers involved."[3] However, "[t]he deponent may not otherwise change either the form or substance of his answers."[4] Therefore, under Rule 207, Suzy should be successful in her motion to strike Plaintiff's errata sheet changes, because Plaintiff's proposed changes were clearly substantive in nature.[5]

Suzy may also move to strike the errata sheet on the basis that the changes were untimely. Under Rule 207, once the court reporter has made the transcript available for the deponent's review, the deponent has only 28 days in which to review the transcript and submit changes.[6] Therefore, if Plaintiff's errata sheet was submitted after this 28 day period, the court should not accept the changes.[7]

The resolution of Suzy's motion to strike is less clear if the Plaintiff's lawsuit was filed in federal court. Rule 30(e) governs subsequent changes of deposition testimony in a federal case.[8] This rule permits a deponent who reserved signature to review his deposition transcript and make changes "in form or substance."[9] If the deponent requests changes, the deponent must "sign a statement listing the changes and the reasons for making them."[10]

Although Rule 30 allows a deponent to substantively change his or her deposition testimony, this right is not without limit. In regard to a deponent's subsequent alterations of substantive deposition testimony, the Seventh Circuit has held, "a change of substance which actually contradicts the transcript is impermissible unless it can plausibly be represented as the correction of an error in the transcription, such as dropping a 'not.'"[11] The Seventh Circuit noted that the original version of the transcript must be retained "so that the trier of fact can evaluate the honesty of the alteration" in determining whether the substantive correction should be permitted.[12] Suzy is likely to win on her motion to strike if she convinces the federal court that the Plaintiff's requested change in testimony—that he knows that it was Defendant who assaulted him—contradicts Plaintiff's original deposition testimony that he cannot be sure who attacked him.

As under State law, the Federal Rules of Civil Procedure limit the time period within which a deponent may submit an errata sheet. Under the federal rules, a deponent must submit any changes to his deposition transcript within 30 days of being notified by the court reporter that the transcript is available for review.[13] At least one court within the Seventh Circuit has strictly construed this time limit, finding that a deponent's 30 days begins to run at the time the transcript is submitted to the deponent's attorney, regardless of when the attorney actually submits the transcript to the deponent.[14] Furthermore, Rule 30's requirement that the court reporter make the transcript "available" to the deponent is satisfied when the court reporter notifies the deponent that he may come to her office to review the transcript; the court reporter is not required to send the deponent a copy of the transcript.[15] In other words, the deponent's 30-day time period begins to run as soon as he receives the court reporter's notification that the transcript may be reviewed at the court reporter's office.[16]

Suzy has an additional ground to support her motion to strike. Suzy may argue that Plaintiff's errata sheet should be stricken because it is an improper attempt to create an issue of fact to defeat summary judgment. As a general rule, a party opposing summary judgment is not permitted to submit a contradictory affidavit to create an issue of fact.[17] This rule has been extended to prohibit the submission of errata sheets that substantively change deposition testimony in an attempt to create a question of law to defeat a motion for summary judgment.[18] Suzy should note, however, that there are two limited exceptions to this general rule: a contradictory affidavit may be submitted in response to a motion for summary judgment if the contradictory affidavit clarifies ambiguous deposition testimony or includes newly discovered evidence.[19] Newly discovery evidence is limited to evidence that could not have been discovered through the use of due diligence prior the deponent's deposition.[20]

Finally, even if Suzy's motion to strike is denied, the court accepts Plaintiff's errata sheet, and the case proceeds to trial, Suzy will likely still be permitted to impeach the Plaintiff using his unamended deposition transcript.[21] Government lawyers can use

all the rules and case law available to limit the ability of a witness to recant deposition testimony. ■

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1. ILCS S. Ct. Rule 207.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. Fed. R. Civ. P. 30(e).
9. *Id.*
10. *Id.*
11. *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000).
12. *Id.*
13. Fed. R. Civ. P. 30(e).
14. *Welsh v. R.W. Bradford Transp.*, 231 F.R.D. 297, 301 (N.D. Ill. 2005).
15. *Parkland Venture, LLC v. City of Muskego*, 270 F.R.D. 439, 441 (E.D. Wis. 2010).
16. *Id.*
17. *See e.g., Buckner v. Sam's Club, Inc.*, 75 F.3d 290, 292 (7th Cir. 1996); *Chmielewski v. Kahlfeldt*, 237 Ill. App. 3d 129, 133 (2nd Dist. 1992); *Pedersen v. Joliet Park Dist.*, 136 Ill. App. 3d 172, 176 (3rd Dist. 1985).
18. *Truly v. Sheahan*, 135 F. App'x 869, 871 (7th Cir. 2005).
19. *Buckner*, 75 F.3d 292.
20. *Yow v. Cottrell, Inc.*, No. 3:04-CV-888-DRH, 2007 WL 2229003, at *5 (S.D. Ill. Aug. 2, 2007).
21. *La Salle Nat. Bank v. 53rd-Ellis Currency Exch., Inc.*, 249 Ill. App. 3d 415, 433 (1st Dist. 1993).

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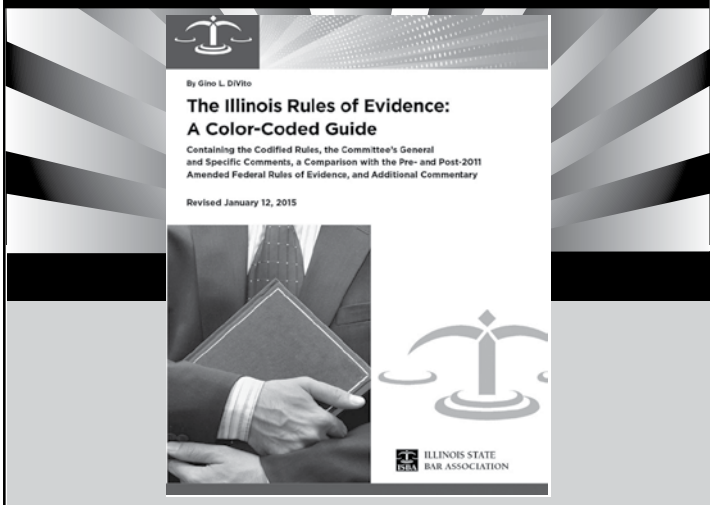

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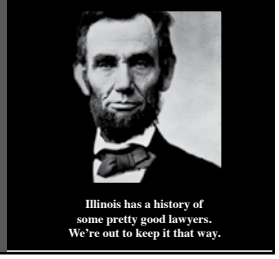

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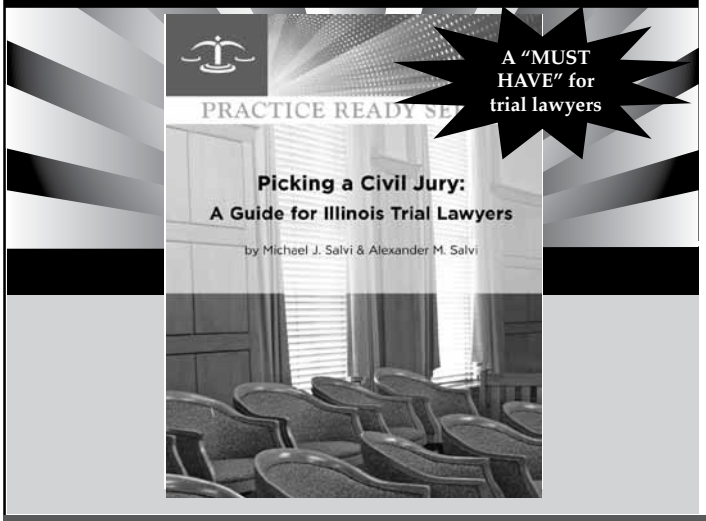

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