



THE PUBLIC SERVANT

The newsletter of the Illinois State Bar Association's Standing Committee on Government Lawyers

But, we were on a break...

By Kevin Lovellette and Summer Hallaj

Depositions comprise one of the most important yet routine elements of a government lawyer's federal civil practice. Often during the course of a deposition, an attorney defending his client may wish to consult with the client/deponent during a break. The question arises whether, and under what circumstances, an attorney may discuss the substance of their client's testimony while the client is under oath. Government lawyers should understand the current state of the law on this issue so they are prepared to address this situation if it arises during a deposition. Unfortunately, the law on this issue is far from clear.

The following hypothetical illustrates the type of situation in which a government lawyer may find him or herself during the course of a deposition. Rhonda, a diligent government lawyer, is taking the deposition of the Plaintiff, who was allegedly injured in a collision involving a government vehicle. Rhonda asks the Plaintiff whether she had taken any prescription drugs prior to the accident. The Plaintiff states, "Just a few Vicodin," at which point Richard, Plaintiff's attorney, jumps out of his seat and demands to speak with his client. After a ten minute break, Rhonda goes back

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Appellate court raises its eyebrow at Chicago's ordinance enforcement machine

By Evan Bruno

In the recent First District Appellate Court case of *Stone Street Partners, LLC, v. The City of Chicago Department of Administrative Hearings*, 2014 IL App (1st) 123654, Justice Delort explores the "deficiencies in the manner in which the City of Chicago handles in-house adjudication of ordinance violations." ¶ 1. The opinion is important for several reasons.

First, the opinion sheds light on the recent growth of Chicago's Department of Administrative Hearings (DOAH) into a powerful operation with a massive caseload. A series of legislative enactments over the past 20 years raised the enforceability of DOAH's administrative judgments to a level equal to that of judicial judgments. Public Act 90-516, effective January 1, 1998, sponsored by then-State Senator Barack Obama, gave the administrative adjudication process some "teeth"—as Obama put it during General

Assembly proceedings—by giving administrative decisions the same enforceability as a judgment entered by a court of competent jurisdiction. See 65 ILCS 5/1-2.1-8(b). This allowed DOAH to issue garnishment process and attached a debtor's assets to collect its administrative judgments. However, the enhanced enforceability of administrative judgments was not accompanied by enhanced due process procedures, such as strict adherence to the rules of evidence. The city quickly realized that this created the best of both worlds, and today DOAH's large central hearing facility at 400 West Superior Street "rivals Illinois county courthouses in its size and case volume." ¶ 10.

Second, in a point of law that state and municipal attorneys should bear in mind, the First District's opinion held that non-attorneys are not entitled to represent corporations at administra-

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on the record and asks Plaintiff whether she had taken any Vicodin prior to driving her car on the day of the accident. Plaintiff states that she misspoke earlier, and that she had not taken any Vicodin until *after* the accident. Rhonda then questions Plaintiff about Plaintiff's conversation with Richard during the break. Richard instructs Plaintiff not to answer pursuant to the attorney-client privilege. Rhonda suspects that Richard coached Plaintiff's amended answer, but she is unsure whether she has a basis to bring sanctions under federal law.

The Federal Rules of Civil Procedure establish some minimum requirements governing deposition procedure. Rule 30 requires that the examination of a deponent proceed in the same manner as an examination of a witness during trial.¹ It is unimaginable that a judge would allow an attorney to interrupt a cross examination of his client at trial in order to convene a private conference.² However, it is less certain whether an attorney may speak with his client during a previously scheduled recess during the course of an examination. The U.S. Supreme Court has held that the denial of the right to confer with counsel during a recess in a criminal trial may be, but is not always, a violation of the Sixth Amendment right to counsel.³ The Fifth Circuit appears to be the only federal circuit court to have determined whether a civil defendant has a right to confer with counsel during a recess at trial; the Fifth Circuit found that such a right exists as part-in-parcel with the right to counsel.⁴ No court in the Seventh Circuit appears to have ruled on this issue.

When it comes to depositions, Rule 30 prevents witness-coaching by prohibiting attorneys from employing argumentative or suggestive speaking objections.⁵ The Rule also restricts an attorney from instructing the deponent to not answer a question unless it is "necessary to preserve a privilege, enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)."⁶ But the Rule is silent on whether an attorney may discuss the substance of a client's testimony during a break.

There are only a few cases from Seventh Circuit courts examining the issue of whether an attorney may speak to a deponent during a break in a deposition. The courts appear split on this issue. Several courts in this

Circuit have found that private conferences are permissible, but the most recent Northern District case emphatically prohibits such conferences.

The Northern District of Illinois directly considered this issue in 2004.⁷ The Court explained that it "knows of no rule that prohibits a witness from consulting with counsel before the witness answers a question."⁸ The Court further found that where the break is requested when there is no question pending, it is unlikely that the proponent of the break would seek to influence the deponent's testimony during the break.⁹ A few years later, the Eastern District of Wisconsin came to a similar conclusion, holding that during a break in the questioning, it is permissible for an attorney to discuss with the witness the questions the attorney plans to ask once the deposition resumes.¹⁰ In 2012, the Central District of Illinois determined that a deponent's attorney may have a private conference with the deponent: (1) during a regularly scheduled recess; (2) during any recess requested by the witness, so long as no question is pending; or (3) at any time to determine whether a privilege should be invoked.¹¹

In stark contrast to its sister courts, two Northern District of Illinois courts have unequivocally held that an attorney may not privately confer with a deponent during the course of a deposition. In 1994, a Northern District court held that "private conferences during a deposition between a deponent and his or her attorney for any purpose other than to decide whether to assert a privilege are not permitted."¹² The Court refused to impose sanctions in that matter because egregious misconduct was committed by both parties' attorneys.¹³ In 2011, the Northern District again found that "once a deposition starts, counsel has no right to confer during the deposition."¹⁴ Additionally, the Seventh Circuit, in *dicta*, has denounced the use of private attorney-witness conferences during deposition breaks, stating, "[i]t is too late once the ball has been snapped for the coach to send in a different play."¹⁵

Decisions from other jurisdictions are equally conflicted. Some courts have decisively banned private conferences between a deponent and an attorney.¹⁶ The pioneer decision on this issue came from the East-

ern District of Pennsylvania, where the Court held that an attorney may not confer with a deponent during *any* recess in the deposition proceedings, including an overnight recess.¹⁷ Other courts have prohibited an attorney from speaking to a client during a break only while there is a question pending.¹⁸ And another court has held that speaking during a break initiated by the witness is proper, while doing so during a break initiated by the defending attorney is not.¹⁹

With all of the conflicting authority, it is difficult to analyze with accuracy how a government lawyer faced with these issues, such as Rhonda in our hypothetical, should proceed. Based on the most recent Northern District authority, as well as *dicta* from the Seventh Circuit, Rhonda has a sufficient basis for objecting if opposing counsel insists on conferring with the deponent during the break that counsel initiated.²⁰ Rhonda may wish to call the judge for an immediate ruling on the matter, or raise the issue later through motion practice. The Federal Rules of Civil Procedure allow for sanctions against any person who "impedes, delays, or frustrates the fair examination of the deponent."²¹ Additionally, Northern District of Illinois authority indicates that under the crime-fraud exception to the attorney-client privilege, Rhonda would be able to ask the deponent about everything the deponent discussed with the attorney during the break.²² Finally, in a situation where the deponent's testimony changes after conferring with counsel, Rhonda could request that the court perform an *in camera* examination of the witness to determine the truthfulness of the witness' testimony.²³

For Richard, as the defending attorney, under the current state of the case law, it is perhaps best for him to refrain from speaking to his client during breaks at the deposition, unless it is to determine whether a privilege should be asserted.²⁴ If Richard feels that a private conference with his client is absolutely necessary, he should certainly wait until there are no questions pending before taking a recess.²⁵

As with most issues, the final determination in any given case is up to the sound discretion of the trial judge. Until the courts take up this issue again and provide further guidance for the bar, wise government attorneys

should attempt to avoid the potential perils of speaking with a client during a break at a deposition, and keep opposing counsel from improperly influencing a deponent's testimony. ■

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Summer Hallaj is a Law Clerk with the Office of the Illinois Attorney General and currently works in the Prisoner Litigation Unit of the General Law Bureau.

1. Fed. R. Civ. P. 30(c)(1).
2. *Perry v. Leeke*, 488 U.S. 272, 281, 109 S.Ct. 594, 600 (1989) ("when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying. He has an absolute right to such consultation before he begins to testify, but neither he nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel's advice").
3. *Compare Geders v. U.S.*, 425 U.S. 80, 91, 96 S.Ct. 1330, 1337 (1976) (finding that "an order preventing [a defendant] from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct-and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment"), with *Perry*, 488 U.S. at 283-284, 109 S.Ct. at 601 (holding that a defendant does not have a right to confer with counsel during "a brief recess in which there is a virtual certainty that any conversation between the witness and the lawyer would relate to the ongoing testimony").
4. *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1118 (5th Cir. 1980); see also *Dairyland Power Co-op. v. U.S.*, No. 04-C-106, 2008 WL 5122339, * 23 (F.I.C. 2008) ("counsel shall be allowed to consult with witnesses during breaks in testimony, however, they may not discuss the testimony of any oth-

er witness that has appeared before the Court"). But see *Reynolds v. Alabama Dept. of Transp.*, 4 F.Supp.2d 1055, 1066 (M.D. Ala. 1998) (holding that a civil party does not have an absolute right to confer with counsel during short recesses, and non-party witnesses have no right to confer with their directing attorney).

5. Fed. R. Civ. P. 30(c)(2).
6. *Id.*
7. *Circle Group Internet, Inc. v. Atlas, Pearlman, Trop & Borkson, P.A.*, No. 03-C-9004, 2004 WL 406988 (N.D. Ill. Mar. 2, 2004).
8. *Id.* at *2.
9. *Id.*
10. *Ecker v. Wisconsin Central Ltd.*, No. 07-C-371, 2008 WL 1777222, *3 (E.D. Wis. Apr. 16, 2008).
11. *Murray v. Nationwide Better Health*, No. 10-C-3262, 2012 WL 3683397, * 5 (C.D. Ill. Aug. 24, 2012).
12. *Chapsky v. Baxter*, No. 93-C-6524, 1994 WL 327348, *1 (N.D. Ill. July 6, 1994).
13. *Id.*
14. *LM Insurance Corp. v. ACEO, Inc.*, 275 F.R.D. 490, 491 (N.D. Ill. 2011).
15. *Eggleston v. Chicago Journeymen Plumbers' Local Union 130*, 657 F.2d 890, 902 (7th Cir. 1981).
16. *Hall v. Clifton Precision, A Division of Litton Systems, Inc.*, 150 F.R.D. 525, 528-529 (N.D. Pa. 1993); *Plaisted v. Geisinger Medical Center*, 210 F.R.D. 527, 535 (M.D. Pa. 2002); *Ngai v. Old Navy*, No. 07-C-5653 (KSH) (PS), 2009 WL 2391282, *4 (D.N.J. 2009).
17. *Hall*, 150 F.R.D. at 529.
18. *Stratosphere Corporation Securities Litigation*, 182 F.R.D. 614, 621 (D. Nev. 1998); *McKinley Infuser, Inc. v. Zdeb*, 200 F.R.D. 648, 650 (D. Colo. 2001).
19. *Okoumou v. Horizon*, No. 03 Civ. 1606LAKH-BP, 2004 WL 2149118, *2 (S.D.N.Y. Sept. 23, 2004).
20. *LM Insurance Corp.*, 275 F.R.D. 491; *Eggleston*, 657 F.2d 902.
21. Fed. R. Civ. P. 30(d)(2).
22. *LM Insurance Corp.*, 275 F.R.D. 492.
23. *Id.*
24. *LM Insurance Corp.*, 275 F.R.D. 491.
25. *Circle Group Internet, Inc.*, 2004 WL 406988 at *2.

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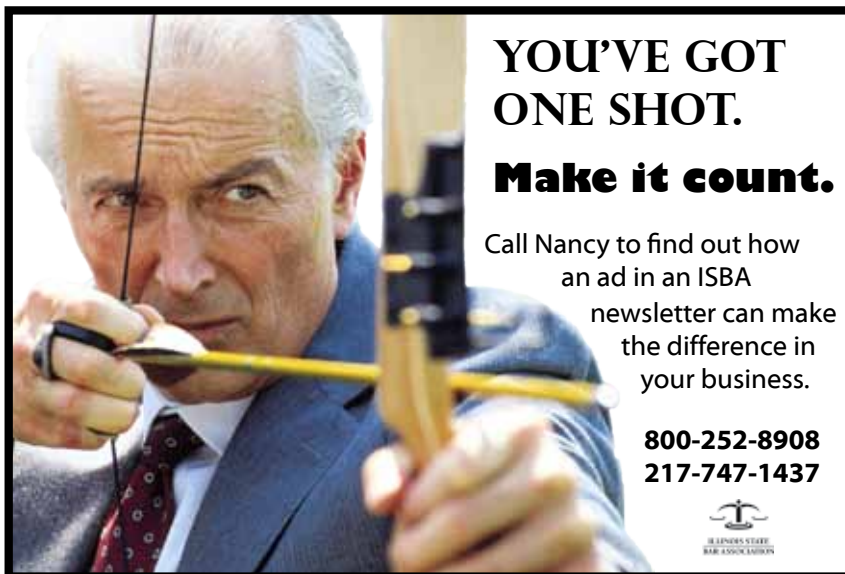
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Appellate court raises its eyebrow at Chicago's ordinance enforcement machine

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tive hearings. ¶ 16. Citing a May 2010 ISBA Board of Governor's advisory opinion, the court held that "representation of corporations at administrative hearings—particularly those which involve testimony of sworn witnesses, interpretation of laws and ordinances, and can result in the imposition of punitive fines—must be made by a licensed attorney at law." ¶ 16. Given this holding, attorneys representing State or municipal entities at administrative hearings should, as a matter of course, make a record of whether the party representing a corporation is or is not a licensed attorney. If it is revealed that the representative is not a licensed attorney, that representative's appearance is a nullity. Accordingly, the State or municipal party should move for a finding that the corporate party failed to appear and, if appropriate un-

der the circumstances, seek a default judgment.

Finally, the First District's opinion reminds State and municipal attorneys that strict adherence to the local rules and procedures may nonetheless result in reversal. The city argued before the First District that its rules and regulations specifically allow non-attorneys to represent corporations in administrative hearings. However, the court rejected that argument because although "this grant of authority may be efficacious," it "clearly usurps the authority of our supreme court to administer the practice of law." ¶ 18. As *Stone Street Partners* illustrates, State and municipal attorneys should protect judgments awarded in their favor by ensuring that those judgments are obtained in accordance with *all* applicable rules. This means routinely ques-

tioning the validity of local procedural rules in light of constitutional requirements, state statutes, and the Supreme Court rules. When in doubt, State or municipal attorneys should err on the side of caution and voluntarily provide whatever additional procedures might be necessary to allow a reviewing court to confidently determine that the opposing party's interests were adequately protected.

The *Stone Street Partners* case pulls back the curtain and strongly questions the due-process adequacy of Chicago's ordinance enforcement machine. Whether the city responds in any way is yet to be determined. Regardless, the opinion provides a useful read for any attorney involved in administrative litigation, especially attorneys who find themselves in an administrative hearing at 400 West Superior Street. ■

A brief review of the "Notifications to the Department of State Police" section of the Illinois Firearms Owners Identification Card Act: which government employees must notify the Illinois State Police and when must they notify them

By Barbara Goeben

As a result of the 2013 amendment of the Illinois Firearms Owners Identification Card (FOID) Act¹ and a renewed focus on circuit clerks' duties to report those adjudicated as mentally disabled,² a refresher may be helpful to allow government employees to determine who is required to notify, pursuant to section 8.1 of the FOID Act's "Notifications to the Department of State Police"³ provisions, either the Illinois State Police (ISP) or the Illinois Department of Human Services (DHS) of qualifying occurrences and when the notification is required. The following is a summary of who must notify the indicated agencies and when an individual must be reported.

- **Circuit Clerks:** Upon a person being adjudicated mentally disabled or upon a finding that a person has been involuntarily admitted, the circuit court is required to

direct the circuit court clerk to immediately notify the ISP and forward a copy of the court's order to ISP.⁴ The FOID Act defines "adjudicated as mentally disabled" to mean that a "person is the subject of a determination by a court, board, commission or other lawful authority that the person, as a result of marked subnormal intelligence, or mental illness, mental impairment, incompetency, condition, or disease"⁵ meets one of 13 statutory criteria, including:

- those adjudicated as a disabled person under section 11a-2 of the Probate Act;
- those found not guilty by reason of insanity;
- those found unfit to stand trial; or
- those found subject to involuntary admission to a mental health facility.⁶

Technically, only the circuit clerk is currently required to inform the ISP about this adjudication, so boards and commissions are not currently required to notify the ISP.

- **Department of Human Services along with all public and private hospitals and mental health facilities:** If a person has been a patient at a mental health facility or hospital, the hospital or facility is required to provide certain information to the ISP to determine if the person has been a patient for FOID Act purposes.⁷
- **Physician, clinical psychologist, or qualified examiner:** If a person is determined to pose a "clear and present danger" to himself, herself, or others, within 24 hours of making the determination the indicated health care professionals are required to notify DHS.⁸ In order to make

reporting easier, the DHS has recently established the Mental Health Reporting System as an on-line system to collect the required information.⁹ The FOID Act references the definitions used by the Illinois Mental Health and Developmental Disabilities Code in order to determine who is a physician, clinical psychologist, and/or qualified examiner required to report.¹⁰ Note, a "qualified examiner," under the Mental Health and Developmental Disabilities Code, can include licensed clinical social workers and some psychiatric nurses.¹¹

- **Law enforcement official or school administrator:** If the person is determined to pose a clear and present danger to himself, herself, or others, within 24 hours of making the determination either the law enforcement official or school administrator is required to notify ISP.¹² School administrators who are required to report include the principal of a public elementary or secondary school, or his or her designee, and the chief administrative officer of a private elementary or secondary school or of a public or private community

college, college, or university, or his or her designee.¹³ This section mirrors language related to school administrators' duties under the Firearm Concealed Carry Act.¹⁴ Because of the potential conflict with the Federal Family Educational Rights and Privacy Act (F.E.R.P.A.) requirements, the best practice would be to advise a school administrator to contact the school's legal counsel before disclosure.

The "clear and present danger" standard encompasses both the person's actions and communications. The person must have either communicated a "serious threat of physical violence against a reasonably identifiable victim or poses a clear and imminent risk of serious physical injury to himself, herself or another person" or demonstrated "threatening physical or verbal behavior, such as violent, suicidal, or assaultive threats, actions, or other behavior."¹⁵ Thus, reporting is focused on the individual's actions and statements and not any established diagnoses.

Section 8.1(d) does offer protection for specified government employees required to report. The physician, clinical psychologist, qualified examiner, law enforcement official, or school administrator making the

determination and his or her employer "shall not be held criminally, civilly, or professionally liable for making or not making the notification required under this subsection, except for willful or wanton misconduct."¹⁶

For further information on FOID reporting, please visit the ISP and DHS Web sites.¹⁷

- 1. 430 ILCS 65 *et al*
- 2. <www.auditor.illinois.gov/audit-reports>
- 3. 430 ILCS 65/8.1
- 4. 430 ILCS 65/8.1(b)
- 5. 430 ILCS 65/1.1
- 6. *Id.*
- 7. 430 ILCS 65/8.1(c); 740 ILCS 110/12(b)
- 8. 430 ILCS 65/8.1(d)(1)
- 9. <<https://foid.dhs.illinois.gov/foidpublic/foid/>>
- 10. 430 ILCS 65/1.1; 405 ILCS 5/1-103; 405 ILCS 5/1-120; 405 ILCS 5/1-122
- 11. 405 ILCS 5/1-122
- 12. 430 ILCS 65/8.1(d)(2)
- 13. 430 ILCS 65/1.1; 430 ILCS 66/105
- 14. 430 ILCS 66/105
- 15. 430 ILCS 65/1.1
- 16. 430 ILCS 65/8.1(d)
- 17. See <<http://www.isp.state.il.us/foid/foid-clear-present-danger.cfm>> for information from ISP's Web site and <<https://foid.dhs.illinois.gov/foidpublic/foid/>> for information from DHS's Web site.

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Tuesday, 8/19/14- Teleseminar—Planning in Charitable Giving- Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 8/20/14- Teleseminar—Planning in Charitable Giving- Part 2. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 8/20-Thursday, 8/21/14- Oakbrook, Oak Brook Hills Resort. Adult Protection and Advocacy Conference. Presented by the Illinois Department of Aging; Co-sponsored by the ISBA Elder Law Section. 10:45-4:30; 8:30-10.

Tuesday, 8/26/14- Teleseminar—Early Stage Capital for Growing Businesses: Venture Capital and Angel Investing- Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 8/27/14- Teleseminar—Early Stage Capital for Growing Businesses: Venture Capital and Angel Investing- Part 2. Presented by the Illinois State Bar Association. 12-1.

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September

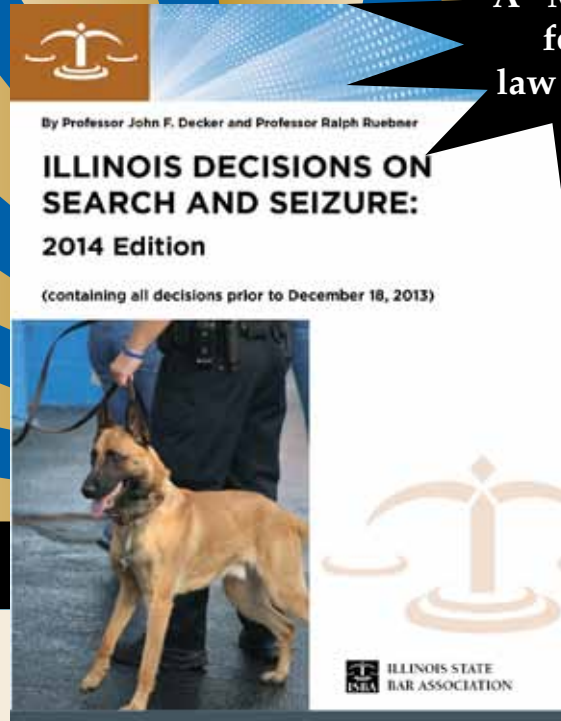
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