"The Mishawaka Redemption: Amending Civ.R. 30"
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It was 2000 and I had been practicing for about two years.

My client was from Mishawaka, Indiana, and the defendant was from Pittsburgh, Pennsylvania. My client was rear-ended on the Turnpike in Wood County. Opposing counsel was Mark Trimble, a local State Farm counsel.

I'd already worked on a couple other cases with Mark, so I knew he would bring the adjuster to the depositions. We agreed to bring the clients to Toledo for the depositions – my client first, then the defendant, back-to-back on the same day.

Unfortunately, my client had some difficulty presenting the facts clearly and succintly, and I knew she was going to be very nervous. With the adjuster in the room, I knew where this was headed: there would be a few "mistakes" that I would need to correct, so I was prepared to examine my client after Mark had finished.

Sure enough, my client was less than clear about some of the details. When Mark concluded, he was grinning like a Cheshire cat. I waited a polite pause, then said, "OK Mark, I'd like to ask my client a few questions now."

Mark was livid. He said I had no right because I hadn't "issued a cross-notice" (I still can't find that phrase anywhere in the Civil Rules). He instructed the court reporter to discontinue all recording, and threatened to not pay her if she continued. When I began my first question, he interrupted, yelled at me that this was not proper procedure, and instructed his client and adjuster to follow him and they all walked out. And before I could get the judge on the telephone, Mark had sent his client home, to Pittsburgh.

At that time, Civ.R. 30 said that "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial." My research showed that no state court had directly addressed the issue, and the only federal case directly on point went my way, without regard to "notice." I called the judge, Judge Reeve Kelsey, fully expecting a ruling allowing me to examine my client on the record and imposing sanctions on Mark.

The judge ruled that Mark had committed "harmless error" because I could use an affidavit to correct my client's mistakes, and further that Mark was correct that I should have issued a "cross-notice" if I wanted to examine my client. He further held that if I wanted to depose the defendant, I would have to go to Pittsburgh to do so. And he added that he would be considering filing an ethical grievance against me for taking a position "not supported by law."

I settled the case about two weeks later, for well less than what I expected the morning of the depositions. From that day forward, Mark was always courteous and professional, almost as if I had earned his respect by taking my lumps well.

Because the adjuster was at the deposition, an affidavit to "correct" her testimony would have been ignored for purposes of negotiating a settlement, so I felt compelled to correct the record "live," as it were. I was aware of the risk that my client might not sufficiently clarify the facts, but I felt I had to try since my client had made it clear that she did not want to go to trial, which meant that I needed to protect settlement value. In any event, the case settled, and I moved on to other cases, other defense attorneys, and other judges.

Many years later, I stumbled upon a news article about the Commission on the Rules of Practice and Procedure of the Ohio Supreme Court, which noted that a commission member had recently resigned. That prompted me, almost on a whim, to send a letter to Chief Justice Maureen O'Connor, offering to serve out the term of that commissioner. The Commission is the body that considers and submits all proposals for amendments to all the various legal rules: civil, criminal, evidence, appellate, etc.

To my amazement, I received a letter from the Chief Justice about a week later, with my appointment to the Commission.

At my first meeting, I said almost nothing, listened intently, and learned as much as I could about the process.

At my second meeting, I was prepared to propose an amendment. Can you guess what it was?

"I propose that we amend Civ.R. 30(C) to say that all parties attending a deposition may examine the witness, without regard to who called the deposition or whether the witness is a party."

The chair of the Civil Rules Committee, Frank Osborne, was taken aback: "Is that a problem? It's obviouls to me that any attorney can examine the deponent." You must understand, Frank is a legend in the Civil Procedure world: a former partner at Tucker Ellis, he is well known to many Cleveland lawyers as the Adjunct Professor of Civil Procedure at Cleveland-Marshall College of Law.

I responded with my Mishawaka story. Frank said, "I think we need more evidence that it's a problem."

Lesson One: "Tony says so" wouldn't work.

I went to the OAJ list server. Within two weeks, I had a "formal" request for the amendment from my good friend Kyle Silvers, and I also had 30 letters from practicing attorneys, across the state, with their own versions of my Mishawaka story.

I submitted the formal request and supporting letters at the next meeting. Frank asked, "But have other states addressed this issue?" I didn't know.

Lesson Two: What other states have done matters.

I did the research, and it turned out that Texas, Massachusetts, Alabama, and Maine had amended their language which resulted in indirect effects on this issue, but only Texas had explicitly resolved the issue within the rule.

I wrote a memo. Thank you, Texas (I'm pretty sure that's the only time I've ever written that in my life). And thank you Mag. Elizabeth Preston-Deavers: she decided that one federal case I mentioned earlier, *Powell v. Time Warner Cable*, which happened to be in the Southern District of Ohio.

The discussion at the next meeting of the Commission focused on *Powell* and the number of letters in support. But Frank Osborne had one more idea: "Should we also address the 'speaking objection' issue while we're looking at this rule?" Yes, we should.

Lesson Three: It's the whole rule, stupid.

Frank and I traded emails for about three weeks, but we finally agreed on amendment language. We addressed both the right to examine and the "speaking objections" issues. Effective July 1, 2017, Civ.R. 30(C) now reads, "[e]ach party at the deposition may examine the deponent without regard to which party served notice or called the deposition," and "[a]n objection shall be stated concisely in a nonargumentative and nonsuggestive manner."

I've learned that it's wise to jump in, as I did with the Commission. It's an amazing group of people who volunteer substantial time and thought to make the rules work, and who bring to bear their collective experience and wisdom. My service has reaffirmed my belief in the fundamental strength of our justice system. And the lunches are pretty good.

While I was seeking support for the proposal, I emailed Judge Kelsey and reminded him of the Mishawaka-client case and his ruling. He was very gracious and responded that "I will agree with you that the first sentence of Rule 30(C) is not very clear. Your [proposed] language is good."

And guess who was the Chair of the Civil Rules Committee on the Commission on the Rules of Practice and Procedure the day of those depositions? Judge Reeve Kelsey.