Massachusetts Lawyers Weekly

Attorney says case shows need for new rule on depos

Audio-visual transcripts would curb 'antics'

By Christina Pazzanese

For Boston attorney Frederic N. Halstrom, a case he's handling in Worcester Superior Court illustrates the increasingly rancorous tug-of-war that plaintiffs' and defense counsel routinely engage in over depositions in medical malpractice lawsuits.

In *Zhuang, et al. v. Herlihy*, Halstrom successfully sought permission from Judge Dennis J. Curran to conduct an audio-visual deposition of the defendant doctor after the initial stenographic deposition had to be suspended midstream because defense counsel registered 125 objections, disrupting the session, he says.

Halstrom says the case highlights a shortcoming in the Massachusetts Rules of Civil Procedure, which allow attorneys to conduct audio-visual depositions of non-experts upon the court's approval, but not as of right, like under the federal rules and as is allowed in most other states.

Having an audio-visual record gives greater transparency to the process and curbs the kinds of "antics" defense counsel routinely employ away from the court-room, such as asking for unnecessary bathroom breaks to conference with a witness; giving hand signals or coaching with code words and phrases; interrupting witnesses' responses or ordering them not to answer, he says.

"A deposition is supposed to be just like in trial, where you ask a question and you get an answer," Halstrom says. "I just had someone object to the word 'complete.' It's ludicrous."

In court documents filed in *Zhuang*, Halstrom argued that a video deposition would capture the physician's body language, facial expressions and the "nonverbal cues" defense counsel was giving her where mere "typewriten transcripts are silent."

Halstrom, who faults the defense bar for hosting seminars that teach lawyers how to "defend" depostions, says the problem has become widespread because it occurs away from the watchful eyes of judges.

"I think they'd be shocked at what's going on," he says.

But some think Halstrom, and the plaintiffs' bar he belongs to, are overstating the problem.

Holly M. Polglase, a civil litigator at Boston's Campbell, Campbell, Edwards & Conroy and president of the Massachusetts Defense Lawyer Association, says while an audio-visual depostion can be

"extremely helpful," it is not always necessary or appropriate, and the results can be mixed if a witness is intimidated by the process.

Although they can be "a great way to keep attorneys in line," Polglase says, she has heard no outcry for a change in the Massachusetts rules. She suspects that's because the video depositions are usually a "bargaining chip" lawyers tend to work out among themselves during negotiations.

"I don't think there's a serious problem with shenanigans at deposition," Polglase says. "Lawyers know how they're supposed to behave, and for the most part they do."

And while rudeness may be better captured on video than paper, many of the tactics Halstrom rails about – like phony bathroom breaks, witness coaching or altering key testimony – don't show up on written transcripts and aren't likely to be eradicated, she says.

"These kinds of things will still occur if it's on videotape."

'Second bite at the apple'

In Zhuang, Halstrom claims defendant Mary M. Herlihy, an OB/GYN physician at the University of Massachusetts Medical Center in Worcester, failed to offier his client an amniocentesis; provide an interpreter at each pre-natal office visit; or obtain her informed consent on whether she would submit to or forgo an amniocentesis.

The client, Ran Zhuang, a Mandarin Chinese-speaking woman, gave birth to a child in November 2007 who was diagnosed with "cri-du-chat syndrome," a genetic condition that leaves the baby "severely and permanently disabled."

The defendant maintained that Mandarin-speaking interpreters were made available at most of Zhuang's office visits to Umass Medical Center during her pre-natal care, but not at the Aug. 6, 2007, visit in which Herlihy claims Zhuang declined an amniocentesis that would have detected the condition with a "reasonable degree of certainty."

According to Herlihy's attorney, Elizabeth L.B. Greene of Mirick, O'Connell, DeMallie & Lougee in Worcester, the physician discussed an amniocentesis directly with Zhuang with a hospitalist present.

But in sworn affidavit, the plaintiff denies having the discussion or that she declined an amniocentesis.

Halstrom said there is no record of a hospitalist being present.

During Herlihy's initial deposition, Halstrom says Greene "ran afoul of the text and spirit" of Mass. R. Civ. P. (30) by objecting 125 times. The objections were not based on any privilege, he says.

According to the transcript, exchanges between counsel were sometimes contentious.

Greene: Objection.

Halstrom: And what was your objection to that question?

Greene: I'm not sure, quite frankly.

***

Greene: Many, many of my objections are to the form of your question.

Halstrom: And I'm going to ask you – I'm going to ask you now what was the objection to the form of the last question?

Greene: I'll withdraw my objection to the last question, and please excuse me, because I do not recall the question, and I don't want to waste the time having it read back. I'd like us to move on, counselor.

After the deposition was suspended, Halstrom requested the court to allow de novo testimony in an audio-visual deposition, a move defense counsel argued was unwarranted.

Videotaped depositions "promote better understanding of depositional testimony because they enable the trier of fact to gauge demeanor, veracity and credibility" in ways stenographic depositions cannot, Halstrom told the court.

When contacted by Lawyers Weekly, Greene said it would be inappropriate to comment on the case as it is still pending.

In opposing an audio-visal deposition, Greene said in court documents that Halstrom simply hoped to "try this case by deposition," denying her client the protection afforded witnesses when they testify in open court.

If the judge did grant the request, Greene requested that Halstrom also be videotaped while taking the deposition and that the video be played on a split screen for the jury along with Herlihy's testimony.

But the judge criticized defense counsel and denied Herlihy's motion for reconsideration.

"This is the defendant's second bite at the apple," Curran ruled on May 12. "A motion for reconsideration is not an opportunity to submit a second draft of a pleading".

The judge said that further pleadings on the issue by the default would result in sanctions against the filing attorney.

Herlihy is schedule to be deposed again on Aug. 9 and 11.

Rule change

Halstrom attributes the ramped up aggressiveness of defense counsel in med-mal cases to a "severe" drop-off in the number of claims filed in recent years.

In an effort to impress insurance adjusters, defense lawyers are now "putting on a show" at deposition or afterwards, trying to change key testimony in the record under the guise of the witness being "confused" about a question, he says.

"Business is so tight over med-mals, insurance companies are calling the shots now," Halstrom says.

Weston lawyer Kimberly E. Winter, president of the Massachusetts Academy of Trial Attorneys, says the rule on audio-visual depos is another example – much like the rule prohibiting expert depositions taken in the pre-trial stage of a case – of how Massachusetts inexplicably differs from what is done in most other states.

Changing the rule would be a "good idea," she says, since the technology is readily available to everyone and would increase efficiency without favoring one side over the other.

"The jury pool, the public is so accustomed to seeing audio-visuals nowadays," Winter says of the benefits video provides over paper transcripts. "Even with a good explanation from the judge, they don't really understand what we're doing."

Winter says video would also help undermind efforts by witnesses to change their answers at trial from deposition testimony, claiming to be confused by the question.

"If the jury saw them saying two different things, that would be meaningful," she says.