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Busting some myths in pursuit of a more just civil court system

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In the 1964 movie "Becket," the title character tells Henry II that there are soldiers in the crowd of a reconquered French town to encourage their enthusiasm for the king's procession upon entering the town. Dismayed, Henry asks his best friend and (at the time) Lord Chancellor, "Why must you destroy all my illusions?" to which Beckett responds, "Because you should have none." Becket knew that if the king had illusions, he could make mistakes in judgment. Likewise, myths about the law can lead to mistakes in analysis and application of the law and the procedural rules.

One of the most persistent myths in Illinois procedure is that Illinois is the only state that maintains the distinction between evidence and discovery depositions. Most recently it was referred to in testimony before the Illinois Supreme Court Rules Committee in consideration of Proposal 19-03. While its reference is likely not material to the consideration of the adoption of the proposal, its mention in this context does prove the pervasiveness of this myth and proves that nearly any discussion of Illinois deposition procedure includes this myth.

The truth is that 17 states (California, Colorado, Florida, Georgia, Kentucky, Maryland, Michigan, Minnesota, Missouri, New Jersey, Oklahoma, Pennsylvania, South Carolina, Vermont, Virginia, Washington and Wyoming) and the District of Columbia maintain some kind of dual deposition procedure. Some states employ the de bene esse deposition, others restrict the taking of "evidence" depositions (whether specially noticed or not) to those of experts, and many states recognize the purpose of a discovery deposition and an evidence deposition are largely different and thus are treated differently by the courts at trial.

A corollary to this myth is the misperception that many have that depositions in federal court are the equivalent of evidence in a trial in federal court, similar to an Illinois evidence deposition. In point of fact, the use of depositions at trial under Federal Rule of Civil Procedure Rule 32(a)(2-8) is rather similar to the use of depositions, whether taken for the purposes of discovery or for evidence, prescribed in Illinois Supreme Court Rule 212.

Turning away from depositions, but only slightly, there is a gross misperception that simply because an affidavit is offered in support of a dispositive motion that the opposing party is entitled to the deposition of the affiant pursuant to Supreme Court Rule 191(b). To obtain the deposition or take discovery, including issuing interrogatories and requests for production, the party requesting

the discovery must set forth "what the affiant believes [the affiant in support of the motion] would testify to if sworn, with his reasons for his belief." See Rule 191(b); *International Parts v. Caterpillar, Inc.*, 260 Ill.App.3d 1085, 1091 (1st Dist. 1994). In sum, the proponent of the discovery must articulate what they hope to discover and why that is necessary to oppose the motion.

There are also basic misperceptions about pleadings, including what constitutes a pleading in Illinois. Illinois law distinguishes between a motion and a pleading. 735 ILCS 5/2-603; *In re Wolff*, 355 Ill.App.3d 403, 407 (2d Dist. 2005). Under Illinois law, pleadings are a small category of documents: complaints, counterclaims (including cross-claims which are called counterclaims under 735 ILCS 5/2-608(a)), answers, including affirmative defenses, and replies to affirmative defenses. In contrast, a motion "is an application for a ruling or an order in a pending case. A pleading, in contrast, consists of a party's formal allegations of his claims or defenses." *William J. Templeman Co. v. Liberty Mut. Ins. Co.*, 316 Ill.App.3d 379, 388 (1st Dist. 2000). A motion, unlike a pleading, is not subject to dismissal under Sections 2-615 and 2-619 of the Code of Civil Procedure. What is and what is not a pleading can be important in certain situations.

In a similar vein, a party cannot both claim want of knowledge in an answer to an allegation of a complaint and at the same time deny the allegation. That is an unnecessary inconsistency because under 735 ILCS 5/2-610(b), those allegations not denied, are admitted unless there is a claim of want of knowledge. As a result of a claim of want of knowledge operates as a denial. The late Judge Milton I. Shadur particularly abhorred what he called the pleadings practices "unfortunately prevalent among significant numbers of members of the defense bar." He cited repeatedly to his decision in *State Farm Mutual Automobile Insurance Co. v. Riley*, 199 F.R.D. 276 (N.D. Ill. 2001), which articulates this and other infirmities in answers.

As an insurance coverage practitioner, it is often seen that necessary parties claim that allegations of the complaint for declaratory relief are not directed toward them and therefore no answer is necessary. Unlike many tort lawsuits, where there are discrete allegations against specific defendants related to their alleged conduct, all of the allegations are against all of the defendants in a complaint for declaratory relief; otherwise those defendants would not be necessary.

Finally, the Illinois Supreme Court, as with all supreme courts, is referred to as a court of last resort. In recent years that is entirely incorrect, especially in civil cases. The court takes only 1% to 2% of civil petitions for leave to appeal. This low acceptance rate makes the Illinois Appellate Court effectively the court of last resort in Illinois.

Just as King Henry could be effective only if he knew that the adulation he was being showered with was coerced, being disabused of legal myths leads to better and more efficient procedure and rulemaking and consequently, a more just civil justice system.
