TIPS *from the Trenches*

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DON'T TAKE THE DEFENSE WITNESS'S AFFIDAVIT AT FACE VALUE

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How often have you been presented at the eleventh hour with an affidavit from a defense colleague where a witness pops up like a magic mushroom with sworn opinions supposedly dispositive of the issue before the court? What's the plaintiff's lawyer to do? Surrender? Accept the witness's opinions? Surely no one ever wilfully testifies falsely under oath, right?

On the contrary, every affidavit ought to be tested in the light of Alabama's Rules of Evidence and Civil Procedure. Satisfy yourself that the witness is qualified by education, training, or experience to express the proffered opinions. If the witness is not appropriately qualified, move the trial court to strike the affidavit, or at least consider taking the witness's deposition so you can test and challenge the bases for the opinions.

Governing Principles

All testimony must be based on personal knowledge. Rule 602, Ala. R. Evid. ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). "[A] witness is precluded from testifying to a matter about which the witness lacks a firsthand or personal knowledge of the facts." Rule 602, Ala. R. Evid. Advisory Committee's Notes.

"If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Rule 701, Ala. R. Evid.

"Before a witness may testify regarding a matter, a foundation must be established to indicate that the witness was in a position to observe and did observe those facts with which the testimony is concerned." *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Humphres*, 293 Ala. 413, 304 So. 2d 573 (1974)).

An "affidavit must be made on personal knowledge, must set forth facts that would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matter stated." *Sanders v. Smitherman*, 776 So. 2d 68, 72 (Ala. 2000); *Black v. Reynolds*, 528 So. 2d 848-49 (Ala. 1988).

A witness's conclusory statement regarding the import of a document or verbal communications that are not introduced into evidence is not admissible." *Kingvision Pay- Per-View, Ltd. v. Ayers*, 886 So. 2d 45, 55-56 (Ala. 2003) (citing *Ex parte Head*, 572 So. 2d 1276, 1281-82 (Ala. 1990)) (holding that a witness's conclusory statements in an affidavit describing individual's relationships with partnerships on the basis of documents filed in probate court were not admissible since authenticated copies of the documents on which the conclusory statements were based were not attached to the affidavit).

"Where it appears from the face of an affidavit that the affiant had no personal knowledge of the matters to which he deposed and that he must have secured his information concerning those matters from others, then the affidavit is based on hearsay and should not be admitted." *Home Bank of Guntersville v. Perpetual Federal Sav. and Loan Ass'n*, 547 So. 2d 840, 841 (Ala. 1989) (quoting *Williams v. Dan River Mills, Inc.*, 286 Ala. 703, 246 So. 2d 431 (1971)).

These principles are the plaintiff's tools for challenging all opinion testimony. A trial court's finding of a want of credibility based upon any one or more deficiencies in the witness's foundation for expressing his or her opinions means that the opinions may not properly be considered.

Trial Courts Have Discretionary Authority to Ensure That Only Appropriately Substantiated Opinions Are Considered

Trial courts act within their discretion when ruling upon the admissibility of opinions contained within affidavits. For example, in *Swanstrom v. Teledyne Continental Motors, Inc.*, 43 So. 3d 564 (Ala. 2009), the Supreme Court held that a trial court did not exceed its discretion in ruling on a summary judgment motion by determining that an aviation- accident-reconstruction expert witness was not qualified to give his opinion regarding an alleged in-flight fire in a wrongful-death action brought by the pilot's estate and family against the manufacturers of the aircraft and its engine and fuel pump. The expert had no education or experience in fire causation or fire-origin analysis, did not know standards related to the analysis of fire patterns, and was charged with examining wreckage to determine whether any defect or damage was caused by any in-flight fire or post-flight fire, but did not provide any scientific methodology for determining whether leaking fuel could have ignited during the aircraft's flight.

In *Ex parte Wood*, 852 So. 2d 705 (Ala. 2002), the Supreme Court held that opinions expressed in an affidavit submitted in support of a motion for summary judgment premised upon a defense of state-agent immunity should be rejected when the affiant stated his opinions in conclusory terms, but failed to state the underlying factual bases substantiating such opinions.

In *Crawford v. Hall*, 531 So. 2d 874 (Ala. 1988), the Court ruled that an affidavit of a non-party was not admissible on a legal malpractice action to preclude granting the attorney's motion for summary judgment where the affiant did not state that she had personal knowledge of the matter stated in her affidavit, and did not state that her opinion was based upon established facts that she was asked to assume were true, but instead stated that her opinion was based upon her "understanding" of facts based upon her review of unidentified documents.

In *Welch v. Houston County Hospital Board*, 502 So. 2d 340 (Ala. 1987), the Court reversed a summary judgment order entered in favor of a hospital in a wrongful death action upon finding that the hospital's answers to interrogatories and opinion testimony premised upon "information and belief" were essentially hearsay and therefore insufficient to support summary judgment. The Court held "[t] he content of the deposition or answers to the interrogatories must be asserted on the *personal knowledge* of the deponent or person giving the answers, must set forth facts that would be admissible in evidence, and must show affirmatively that the deponent or person giving the answers is competent to testify to the matters asserted. ... These requirements are mandatory." *Id*. at 342 (citations omitted).

In Cases Involving Hospital Records, "Opinions" That Documents Are Exempt from Discovery by §§ 22-21-8, 6-5-333(d), and 6-5-551, Ala. Code 1975, Should Be Strenuously Challenged

In *Ex parte Fairfield Nursing and Rehabilitation Center, L.L.C.*, 22 So. 3d 445 (Ala. 2009), the Supreme Court reaffirmed the principle that the burden is on a party objecting to discovery on the basis of an alleged privilege to both prove the existence of the privilege and the prejudicial effect of disclosing the information:

> In *Ex parte Coosa Valley Health Care, Inc.*, 789 So. 2d 208 (Ala. 2000), this Court reaffirmed the principle that the party asserting the privilege under § 22-21-8 [Ala. Code 1975] has the burden of proving the existence of the privilege and the prejudicial effect of disclosing the information. 789 So. 2d at 219-20, citing *Ex parte St. Vincent's Hosp.*, 652 So. 2d 225, 230 (Ala. 1994).

Id. 22 So. 3d 445 at 448. In *Ex parte Fairfield Nursing*, an affidavit was offered to substantiate claims of privileges, but the opinion reveals that the affidavit was unchallenged by plaintiff's counsel. The Supreme Court therefore found the unchallenged opinions sufficient to cloak the documents with privilege. But what if the witness who offered opinions about quality assurance was shown not to have had any education, training, or experience to be informed about such matters?

Recall that § 22-21-8(b), Ala. Code 1975, makes examination of medical witnesses appropriate:

> Information, documents, or records otherwise available from original sources are not to be construed as being unavailable for discovery or for use in any civil action merely because they were presented or used in preparation of accreditation, quality assurance or similar materials nor should any person involved in preparation, evaluation, or review of such materials be prevented from testifying as to matters within [her] knowledge, but the witness testifying should not be asked about any opinions or data given by [her] in preparation, evaluation, or review of accreditation, quality assurance or similar materials.

Id. Section 6-5-333(d), Ala. Code 1975, likewise contains a provision making "original source" information discoverable:

> Nothing contained herein shall apply to records made in the regular course of business by a hospital, dentist, dental auxiliary personnel, chiropractor, chiropractic or auxiliary personnel, physician, physician auxiliary personnel, or other provider of healthcare and information, documents, or records otherwise available from original sources are not to be construed as immune from discovery or use in any civil proceeding merely because they were presented during proceedings of such committee.

Furthermore, language from the controlling Supreme Court medical negligence discovery opinions also warrant discovery of myriad ordinary hospital business records . For example, *Ex parte Anderson*, 789 So. 2d 190 (Ala. 2000), holds:

> ... **Records made in the regular course of business, exclusive of official committee functions, and otherwise available from their original sources are discoverable and not privileged**.

Id. 789 So. 2d 190 at 199 (emphasis added).

* * *

> Dr. Anderson argues that the statutory framework created by §§ 6-5- 551, 6-5-333, 22-21-8, 34-24-58, and 34-24-59, Ala. Code 1975, serves to absolutely insulate him, his documents, and other information concerning the Trotter case, whether obtained from him personally, from the hospital, or from other committees. We do not completely agree. **His contention regarding the material gathered from the hospital or review committees is correct; documents from those sources generated pursuant to hospital or committee business is absolutely not discoverable. See §§ 6-5-333, 22-21-8, 34-24-58, and 34-24-59, Ala. Code 1975. However, information and documents that specifically concern the Trotter incident and that**

may be obtained from Dr. Anderson himself as an "original source" are discoverable. See §§ 6-5-551 and 6-5-333, Ala. Code 1975.

Id. at 203 (emphasis added).

Some health care providers argue that *Ex parte Burch*, 730 So. 2d 143 (Ala. 1999), stands for the proposition that the "prohibition against testimony found in Ala. Code 22-21- 8 trumps Rule 613, *Ala. R. Evid.*, and applies even when testimony is sought for purposes of impeachment of witnesses by trying to elicit evidence of prior inconsistent statements." This is an incorrect interpretation of *Burch*, which actually holds just the opposite:

Section 22-21-8, however, **does not impose an absolute ban on the testimony of persons involved in those activities** ... Section 22-21-8(b) also provides this exception:

> "[no] person involved in preparation, evaluation, or review of such materials [shall] be prevented from testifying as to matters within his knowledge...."
>
> Thus, if Dr. Spires had participated in the care of the patient, or **if he had independent knowledge of the events leading to the patient's death, this Code section would not prohibit him from testifying on the basis of his own independent knowledge.**

Ex parte Burch, 730 So. 2d at 149 (emphasis added).

All these authorities enable the plaintiff's attorney to scrutinize an affiant's assertions that hospital records are exempt from discovery. Just as with other opinion testimony, challenge any witness who purports to cloak ordinary hospital business records with the label of privileged quality assurance, peer-review, or accreditation records.

The Alabama Code and Rules of Civil Procedure Give Trial Courts Express Authority to Fashion Appropriate Remedies When Opinions Expressed in Affidavits Are Not Properly Substantiated

Trial courts have plenary authority under § 12-1-7, Ala. Code 1975, to enter orders striking opinions in affidavits or permitting such witnesses to be examined by deposition. Section 12-1-7 gives courts authority to control the conduct of parties and lawyers:

§ 12-1-7. Powers of courts as to preservation of order, enforcement of judgments, etc., generally.

Every court shall have power:

(1) To preserve and enforce order in its immediate presence and as near thereto as is necessary to prevent interruption, disturbance or hindrance to its proceedings;
(2) To enforce order before a person or body empowered to conduct a judicial investigation under its authority;
(3) **To compel obedience to its judgments, orders and process** and to orders of a judge out of court, **in an action or proceeding therein**;
(4) **To control, in furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it in every matter appertaining thereto**;
(5) To administer oaths in an action or proceeding pending therein and in all other cases where it may be necessary in the exercise of its powers and duties; and
(6) To amend and control its process and orders so as to make them conformable to law and justice.

Id.

Trial courts also have authority to reject unsubstantiated opinions given Rule 37, Ala. R. Civ. P.:

Rule 37. Failure to Make Discovery: Sanctions

(b) Failure to Comply With Order.

* * *

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
(X) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

* * *

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or to comply with a properly served request for production under Rule 30(b)(5), without having made an objection thereto, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for production or inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

CONCLUSION

Our duties of zealous advocacy require that we challenge expressions of opinions harmful to our clients' claims. Fortunately, Alabama law provides many tools we can use to test the foundations of such opinions.