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Deposition Sanctions for Counsel and Witness Misconduct

Seeking and Defending Motions for Sanctions, Avoiding Misconduct

THURSDAY, SEPTEMBER 19, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Overview

- General Principles
- Tips for Taking a Deposition and Dealing with Difficult Witnesses and Defending Counsel
- Tips for Defending a Deposition, Preparing a Witness, and Dealing with Taking Counsel
- Filing and Defending Against Motions for Sanctions

The Practice of Law as a Profession

- Public opinion of lawyers is on the decline
- Only 18% of people rate the ethical standards of lawyers as "High" or "Very High," while 37% rate lawyers' ethical standards as "Low" or "Very low."
- Why does this matter?

Oaths and Civility Codes

- In 2007, California adopted its “California Attorney Guidelines Of Civility And Professionalism.”
  - “As officers of the court with responsibilities to the administration of justice, attorneys have an obligation to be professional with clients, other parties and counsel, the courts and the public. This obligation includes civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution.”
- California's attorney oath was recently amended: “As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity.”
- This was the first major modification since the oath was codified over a century ago in 1872.

Oaths and Civility Codes

- The Florida Bar enacted a Code for Resolving Professionalism Complaints, providing a process to address professionalism issues in the State.
- Florida, South Carolina, Louisiana, and Arkansas have adopted the following language in their pledge: “To opposing parties and their counsel, I pledge fairness integrity, and civility, not only in court, but also in all written and oral communications.”

Oaths and Civility Codes

- The Texas Lawyer's Creed:
  - I am a lawyer. I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this creed for no other reason than it is right.
  - I am passionately proud of my profession. Therefore, "My word is my bond."
  - I will advise my client that civility and courtesy are expected and are not a sign of weakness.
  - I will be courteous, civil, and prompt in oral and written communications.
  - I will not quarrel over matters of form or style, but I will concentrate on matters of substance.
  - I will advise my client of the contents of this creed when undertaking representation

Deposition Guidelines - D. Kan.

- Counsel are expected to cooperate with, and be courteous to, each other and deponents.
- Objections shall be concise and shall not suggest answers to or otherwise coach the deponent. Argumentative interruptions will not be permitted.
- Private conferences between deponents and their attorneys during the actual taking of the deposition are improper except for the purpose of determining whether a privilege or work product immunity should be asserted. Unless prohibited by the Court for good cause shown, such conferences may be held during normal recesses and adjournments.

Courts Are Taking It Seriously

- Snarky comments
- Interrupting counsel
- Improperly instructing witnesses not to answer
- Name-calling; disdain
- Testifying
- Coaching
- Courtroom setting without the Court

Courts Are Taking It Seriously

- *Claypole v. County of Monterey*, No. 14-CV-02730-BLF at *4 (N.D. Cal. Jan. 12, 2016): sanctioned an attorney for advising opposing counsel that she should not raise her voice because “it’s not becoming of a woman or an attorney who is acting professionally under the rules of professional responsibility.”
- *Lucas v. Breg*, No. 3:15-CV-00258-BAS-NLS, at *2 (S.D. Cal. May 13, 2016): sanctioned an attorney for statements to opposing counsel during a deposition such as “shame on you,” “you know, someone apparently didn’t fill you in on who you’re dealing with here,” and “it appears you might be hallucinating by positing the possibility that the defendants are going to win this lawsuit.”

Courts Are Taking It Seriously

- Supreme Court of Minnesota: 60-day suspension from the practice of law and a two-year supervised probation on an attorney who asked a court-appointed parenting consultant in a deposition about past allegations of sex with minors, without any good-faith basis to make the accusation.

Deposition Sanctions for Counsel and Witness Misconduct

TIPS FOR TAKING EFFECTIVE DEPOSITIONS …

… AND STAYING OUT OF TROUBLE

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Biography

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After 30 years as a former prosecutor and Big Law litigator, Michael R. Gordon, a former Co-Chair of the Litigation Department of a global AmLaw 100 law firm, opened the doors of GordonLaw LLP in May 2017 to provide focused solutions to his clients' business problems.

Some examples of Mike's cases include serving as lead counsel for a major foreign bank sued for billions of dollars in connection with the bankruptcy of a failed telecom company, lead counsel in a case in which he fended off a $100 million lender liability case against one of the five largest U.S. banks, and lead counsel in a case in which he successfully represented one of the world's largest foreign defense contractors in a multi-million dollar dispute over production costs.

Mike is a Fellow of the highly selective New York Bar Foundation, a United States District Court mediator, an active member of the American Bar Association, and a member of the New York City Bar Association's Litigation Committee and Committee on Courts of Superior Jurisdiction, which participates in the evaluation of judicial candidates.

Mike is a frequent speaker and writer on a variety of litigation topics.

GLLLP

Deposition basics

- Know your purpose in taking the deposition.
  - Learn facts you don't know
  - Confirm facts you need to know; lock in admissions
  - Assess credibility and competence
  - Send messages via Q&A for settlement purposes
  - Establish evidentiary foundations (or box out an inadmissible document)
- Know your deposition plan and the essentials of what you will ask.
- Know the themes, strengths, and weaknesses of your case.
- Know what you know and what you don't know.
  - What do you know? What do you not know? What do you think you know?
  - What do you want to learn? What do you want to confirm?
- Know the boundaries: the law, the rules, and your judge's tolerance for zealous v. hyper-aggressive lawyering.

KYJ (Know your Judge)

- You ***must*** know your judge.
- You ***must*** know your judge's tolerance for misconduct.
- If you have no personal experience with the judge:
  - Ask your partners, fellow associates, and other colleagues;
  - Ask former adversaries;
  - Ask Bar Association Committee members;
  - Do on-line research (but be careful with anonymous critiques).

The legal standard - I

- The legal standard, as established in Fed. R. Civ. P. 26:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding ***any nonprivileged matter that is relevant*** to any party's claim or defense and ***proportional to the needs of the case***, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. ***Information within this scope of discovery need not be admissible in evidence to be discoverable***.

The legal standard - II

- Fishing expeditions are permitted:
  - *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S. Ct. 385, 392 (1947) ("We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case.").
- But since 2015, the fishing tackle must match the outing:
  - *LabMD, Inc. v. Tiversa Holding Corp.*, 2019 U.S. Dist. LEXIS 139196 (W.D. Pa. Aug. 16, 2019) (Court imposes sanctions on lawyer who insisted on following a "fishing expedition" deposition despite being warned about proportionality. The Court cautioned counsel as follows: "I am going to be enforcing the amendments to the Federal Rules of Civil Procedure in terms of proportionality.").

Legitimate questioning tactics - II

- Direct approaches
  - Some paradigms
    - Ignorance of facts: "I don't know, so help me please."
    - Ignorance of subject matter: "I don't understand, so help me please."
    - Direct accusation of commission: "You did it."
    - Direct accusation of lack of knowledge: "You don't know, do you?"
    - Direct attack on competence: "You have no experience here, do you?"
    - Direct attack on bias: "You hate her, don't you?"
    - Direct question regarding sensitive matter: "You were fired, right?"
  - Repeating a question in response to evasive/non-responsive answers.
  - General, catchall questions
  - Responding to claim of privilege with demand for foundation

Hard questions are not *per se* sanctionable

Jones v. Burwell, 2016 U.S. Dist. LEXIS 141340, *3-5 (D. N.M. 2016)

> In his motion, Mr. Jones alleges that defense counsel … violated Rule 30 while depositing him … . Mr. Jones alleges that [counsel] engaged in abusive misconduct by repeatedly accusing him of not telling the truth, by demeaning and threatening him, by using a "scowl of contempt" and "exasperated tone of voice," and by pointing his finger at him throughout the day. … [Counsel] did not make any statements that would not be allowed in the presence of a judicial officer. There are no allegations that Mr. Hoses raised his voice, used obscenities, physically threated Mr. Jones, or otherwise acted in such a way that would deny Mr. Jones due process.

But obnoxious behavior is:

Shelden v. Grossman, 2003 Cal. App. Unpub. LEXIS 7183, *38-39 (Ct. App. Cal. 2003) ("Counsel's long-winded speeches, coaching of the deponent, testimony, condescending attitude towards his own client (calling her 'baby cakes') and opposing counsel, and his rude conduct and remarks only prejudice his client's cause and demean the legal profession. The referee and trial court were well within their discretion in sanctioning Davis.").

Legitimate questioning tactics - II

- Indirect approaches
  - Easing the witness into the topic.
  - Using sloppy questions to get the witness where you want her to be.
  - The "Columbo" approach (pardon the '70's TV reference).
  - Nibbling at the edges to get to the center (the sneak attack).
  - Pregnant pauses (witnesses abhor a vacuum).
  - Using pace.
  - Using sequestration

Style

- Be yourself. Please don't be a poser. You won't pull it off.
- Be strong by:
  - Knowing the laws, rules, and practices in the governing jurisdiction.
  - Knowing your judge
  - Never being afraid to push to the edge if necessary.
- Having Plan B is smart, not weak: stuff happens.
- Anticipate objections – the good, the bad and the ugly
- Anticipate your responses to objections, with law, not bluster.

The boundaries of permissible questioning

- Courts generally respect good questions.
- Good questions seek information that is relevant to:
  - Claims
  - Defenses
  - Credibility
  - Other factors that bear upon the case (i.e., grounds for disqualifying counsel for violation of advocate witness rule, inapplicability of attorney-client privilege due to applicability of crime-fraud exception).
- Bad questions:
  - Ramble or are phrased inartfully;
  - Seek irrelevant or otherwise problematic information;
  - Appear to be unnecessarily antagonistic and argumentative

Going from bad to sanctionable - I

"Martocci's disrespectful and abusive comments cross the line from that of zealous advocacy to unethical misconduct. See Florida Bar v. Buckle, 771 So. 2d 1131, 1133 (Fla. 2000) ("HN7 A lawyer's obligation of zealous representation should not and cannot be transformed into a vehicle intent upon harassment and intimidation."). Such unethical conduct shall not be tolerated."

Fla. Bar v. Martocci, 791 So. 2d 1074 (Fla. 2001)

Going from bad to sanctionable - II

- **Bad but not sanctionable:** *Berry v. Yosemite Cmty. College Dist.*, 2019 U.S. Dist. LEXIS 111802, *34-35 (July 3, 2019) ("irrelevant deposition questions does not, by itself, constitute sufficient annoyance or oppressive conduct contemplated by Federal Rule of Civil Procedure 30 … .").
- **Bad and sanctionable**:
  - **Repeated insistence on answers to off-point questions**. *Tajonera v. Black Elk Energy Offshore Operations, LLC*, 2015 U.S. Dist. LEXIS 181998 (E.D. La. 2015).
  - **Violation of deposition protective order**. *LabMD, Inc. v. Tiversa Holding Corp.*, 2019 U.S. Dist. LEXIS 139196 (W.D. Pa. Aug. 16, 2019).
  - **Lack of civility**. *Sahyers v. Prugh, Holliday & Karatinos, P.L.*, 560 F.3d 1241, 1245 (11th Cir. 2009) ("A federal court may wield its inherent powers … to guard and to promote civility and collegiality … .").

Going from bad to sanctionable - III

- **Badgering**. *Tajonera v. Black Elk Energy Offshore Operations, LLC*, 2015 U.S. Dist. LEXIS 181998, *31-32 (E.D. La. 2015) ("Unsatisfied with Hoffman's answer to the initial 'apology question,' Reich proceeded to ask it again — six more times … . In doing so, he repeatedly interrupted, argued with and lectured the witness, demanding a 'yes or no' answer to his question in an inappropriately aggressive tone.").
- **Time-wasters**. *Ferguson v. Valero Energy Corp*., 2010 U.S. Dist. LEXIS 53198, *6 (E.D. Pa. 2010) ("Despite the Court's direct instructions, Mr. Schaible asked Mr. Fitzpatrick pages of questions about topics about which the witness had no personal knowledge … . Mr. Schaible's conduct was harassing and wasteful of everyone's time.").

Going from bad to sanctionable - IV

- **Badgering**. *In re Rimsat, Ltd.*, 212 F.3d 1039, 1042-1043 (7th Cir. 2000):

  Voelker began to argue with and ask harassing questions of Lau. For instance, at one point, he asked Lau, "In the conversation you had in August of 1995, what did the Princess say to you, and what did you say to her? I want to know everything she said to you, Mr. Lau, every single word she uttered?" Voelker then began to bicker with Lau and Lau's counsel, implying that Lau intended to be dishonest in answering and intended to improperly invoke attorney-client privilege when he asked, "Are you going to answer [my question] fully and completely and honestly, or are you going to selectively answer the question and assert in your own mind, Mr. Lau, the attorney-client privilege?" Unable to get the answers he wanted regarding Lau's ability to disclose information acquired from the Princess and claiming that Lau was not a proper deposition designee, Voelker terminated the deposition without asking a single question regarding the proposed Tongasat/Rimsat compromise.

Preparing The Witness

- Take steps to avoid “coaching” a witness
- Rule 3.3 of the ABA Model Rules of Professional Conduct:
  - “lawyer shall not knowingly … offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”
  - Comment: “Thus … a lawyer [must] take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.”

Preparing the Witness

- Tell the truth
- Listen for your attorney
- Don’t offer privileged information
- Their obligation to be responsive

Conferences During the Deposition

- Two Approaches:
  - *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993)
  - Less strict approach
- Model Rule 3.4 generally prohibits assisting a witness in testifying falsely or obstructing another party's access to evidence
- Consider seeking clarification

Review the Rules

- Without the presence of a judge, attorneys are often expected to self-regulate and conduct the deposition as they would at trial under the rules of evidence.
- Attorneys may try to intimidate opposing counsel, especially if you are not on your home turf
- The best weaponry is the rules

Protecting The Witness

- Bathroom breaks
- Balancing the prohibition against speaking objections from intervening on behalf of your client
- The record reads cold -- is there a video? Describe the conduct.
- Educate the witness on the procedure

Objections and Instructions Not to Answer

- Rule 30(c)(2):
  - An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).
- Even an instruction not to answer may result in follow-up questions
- Speaking objections convey a message to the deponent -- and are easy for a court to identify in a motion for sanctions

Calling It a Day

- Rule 30(d)(3):
- (A) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.
- (B) *Order.* The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.
- (C) *Award of Expenses.* Rule 37(a)(5) applies to the award of expenses.

Calling It a Day

- Typically must be more than “relevance”
- It’s a big step

Defending the Witness

- *In re Shorenstein Hays-Nederlander Theatres Appeals* (Del. June 20, 2019)
  - The duty of counsel who is faced with a deponent's inappropriate conduct at a deposition
  - Deponent gave non-responsive, rambling, evasive answers
  - Represented by counsel who failed to control the client
  - "The deposition appears to have been a colossal waste of time and resources due to her behavior, which made a mockery of the entire deposition proceeding. Although this award of costs and fees is not challenged on appeal, we write to remind counsel that they have a responsibility to intercede and not sit idly by as their client engages in abusive deposition misconduct."
  - Recognizes the difference between a client's "unexpected, sanctionable outburst" and the "obligation to prevent their deponent from impeding or frustrating a fair examination."
  - Defending attorney "cannot simply be a spectator and do nothing."
  - Address it in prep

Reading and Signing

- Rule 30(e): permits deponents to make “changes in form or substance”
- Substantive changes are largely disfavored
- “A deposition is not a take home examination.”

Deposition-related sanctions motions

- Inherent authority: *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S. Ct. 2123, 2132 (1991) ("it is firmly established that 'the power to punish for contempts is inherent in all courts.'").
- Statutory authority
  - Fed. R. Civ. P. 30(d)(2) (Courts can sanction "a person who impedes, delays, or frustrates the fair examination of the deponent.").
  - Fed. R. Civ. P. 37(a)(3)(A) (Failure to disclose merits sanctions).
  - Fed. R. Civ. P. 37(b)(1) (contempt)
  - Fed. R. Civ. P. 37(b)(2) (list of sanctions for discovery violations)
  - Fed. R. Civ. P. 37(b)(3) (in addition to or instead of 37(b)(2) sanctions, Court "must" require the party, its lawyer, or both to pay legal fees and expenses unless the default was "substantially justified or other circumstances make an award of expenses unjust."

Fed. R. Civ. P. 37(b)(2)

- If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, "the court where the action is pending may issue further just orders."
- Such orders may include: (i) deeming facts established; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;" (iii) striking pleadings in whole or in part; (iv) staying further proceedings until the order is obeyed; (v) dismissing the action or proceeding in whole or in part; (vi) rendering a default judgment against the disobedient party; or (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Making the motion: initial steps

- Make sure you have established a foundation for the motion.
- Do not be bullied into not making your record.
- Offer your adversary a chance at salvation.
- Document your patience and reasonableness after the deposition.
- Document your good faith.
- Document your adversary's bad faith.
- Document your adversary's propensity for sanctionable conduct.
- Make sanctions a no-brainer before you start to draft your motion.

Judges don't like sanctions motions

- Judges don't like sanctions motions. Period.
- Judges don't like to play referee – or be the vice-principal.
- Judges don't like discovery motions. *See, e.g.*, rules for pre-discovery motion conferences promulgated by almost every court.
- Sanctions motions can highlight the ***movant's*** conduct. *See Bautista v. MVT Servs.*, 2017 U.S. Dist. LEXIS 79752, *39 (D. Col. 2017) ("In the end, the court concludes that hostility between the two counsel escalated over the day, and neither side sought court intervention to adjudicate the appropriateness of either the questions or responses.").
- Avoid knee-jerk reactions to the heat of the moment (thank you 80's band Asia) that you more than likely will regret.

Especially since a tie goes to the questioner

- Courts generally will side with the questioner in a close case:

Joe Gibson's Auto World, Inc. v. Zurich Am. Ins. Co. (In re Joe Gibson's Auto World, Inc.), 2010 Bankr. LEXIS 3777, *8-9 (Bankr. S.C. 2010):

> Courts have typically imposed sanctions for egregious acts of counsel during depositions. Mr. Hawkins' conduct during the deposition does not rise to this level. On the record before the Court, the only evidence available indicates that Mr. Hawkins' assertion of a right to speak with the witness pursuant to 7030-1(h) was based on his good-faith belief that he was entitled to do so. … However, the law and rules were not so clear on this point as to render his failure to so conclude as an act of bad faith.

But if you are going to make the motion … … make sure your papers are strong.

- Provide concrete examples. Specifics rule – generalizations drool.
- On-point statutory and case citations are critical.
  - But be creative. For example, although there is no specific Rule on the subject, "the making of [an] excessive number of unnecessary objections may itself constitute sanctionable conduct…." Fed. R. Civ. P. 30 advisory committee's note.
- Be concise and specific, but set the mood and provide color.
- If repetitive questioning or objecting is the problem, give a count.
- If irrelevant questioning is the problem, explain the irrelevance.
- If harassing questioning is the problem, explain the harassment.
- If the behavior was egregious, do not be shy: provide the details.

Be sure to highlight abusive behavior - I

- *Vnuk v. Berwick Hosp. Co.*, 2016 U.S. Dist. LEXIS 25693, *14-15 (M.D. Pa. 2016)

> [C]ounsel are reminded of their status as officers of this court, a status which does not change outside the presence of the judge. Any deposition conducted "under the caption of this court and proceeding under the authority of the rules of this court" carries with it the requirement that attending attorneys comport themselves with professionalism, honesty, and integrity. Thus, every witness who is deposed in a case whose captions bears the name of the undersigned is entitled to receive the same respect and fair treatment that he or she would receive if examined before me in open court. ***The mere fact that I am not present at depositions is no license to turn those proceedings into a vehicle for psychological abuse of deponents*** . …

Emphasis supplied.

Be sure to highlight abusive behavior - II

The importance of color and background:

Smith v. Golde, 224 Wis. 2d 518, 528, 592 N.W.2d 287, 292 (Ct. App. Wisc. 1999):

> The motion involved Smith's request for sanctions against Golde for taking twenty-three depositions, including those from twenty lay people, during the last week of discovery. … The court granted Smith's motion and sanctioned Golde by striking his answer … . The court's sanction was not based exclusively on the twenty-three depositions, but on the accumulation of "wholesale, repeated, flagrant and egregious violation of procedural rules and ethics on behalf of the defense."
>
> "[T]hese depositions … were an[] abuse of legal procedure … the notices, subpoenas, questions violate the rules of civil procedure and … are a breach of basic standards of decency and good conduct. …"

Disciplinary proceedings provide context

- *In re Golden*, 329 S.C. 335, 341, 496 S.E.2d 619, 622 (S.C. 1998)

  With regard to the Smith matter, the Hearing Panel concluded that Attorney's actions demonstrated

  > his total disregard and failure to show any respect for the rights of a third party. The extent, the intensity, the sarcasm and maliciousness, the unnecessary combativeness, the gratuitous threatening and intimidation, and the unequivocal bad manners of [Attorney's] conduct could have been for no purpose other than to embarrass or burden [Mr. Smith].

- *In re Vincenti,* 92 N.J. 591, 601, 458 A.2d 1268, 1274 (1983 N.J.) (“‘Vilification, intimidation, abuse and threats have no place in the legal arsenal.’ … . ‘An attorney who exhibits the lack of civility, good manners and common courtesy here displayed tarnishes the entire image of what the bar stands for.’ … .”).

Pick the appropriate poison

- Rule 37 affords many options for sanctions.
- Seek a sanction that will have the most far-reaching impact.
- Consider not seeking dollars in lieu of non-monetary relief.
- Consider seeking monetary sanctions but not expenses.
- If you seek expenses, be precise with your numbers.
- Always remember that fees on fees are not always awarded, so consider whether the motion is worth the expense.