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Putting Combative Lawyers in Their Place

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I. INTRODUCTION

This paper gives you a small sample of attorneys behaving badly and how courts around the nation have dealt with the behavior. I encourage every lawyer to make sure they know the ethical rules and professional rules that apply to depositions. It is our job to be advocates within those rules and guidelines.

II. DON'T LET PREPOSTEROUS OBJECTIONS OR COMMENTS SLIDE

In *In re Harvest Communities of Houston, Inc.*, 88 S.W.3d 343 (Tex. App.—San Antonio 2002, orig. proceeding), the appellate court agreed that a lawyer who made long, argumentative speaking objections, including some that went on for pages, could be sanctioned for violating TEX. R. CIV. P. 199.5(e). The offending attorney criticized opposing counsel's questions during deposition, calling the questions "incredible," "nonsense," "an incredible waste of time," and "preposterous." The court noted that comments like those made during deposition were not in keeping with the lawyer's responsibilities under the Texas Disciplinary Rules of Professional Conduct that require lawyers to demonstrate respect for the legal system and for the people who serve it, including other lawyers. *Id.* at 346–47 (citing TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 4, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 1998)).

The trial court ordered sanctions against an attorney for allegedly obstructionist conduct at deposition in *Sec. Nat'l Bank of Sioux City v. Day*, __ F.3d __ (8th Cir. 2015). The court found that the attorney made 115 form objections during two depositions and that most were made following unobjectionable questions. It cited the attorney's "quibble[s]" with word choice and her assertions of "hyper-technical truths." The trial court further found that many of the objections were meant to prompt the witnesses. The sanctions imposed were to create a training video consistent with the trial court's opinion and certify that she had been responsible for creating the content. The sanctions were vacated on appeal because the court had failed to give particularized notice of the unusual nature of the sanctions it intended to impose.

Specht v. Google, Inc., 268 F.R.D. 596 (N.D. Ill. 2010), arose out of a trademark infringement case. Counsel made frequent extensive speaking objections. In one such instance, the witness was asked if he understood that he had been designated as a fact witness in the case. The opposing lawyer interrupted the witness to assert a form objection "as calling for material that would constitute work product" and asserting the question was argumentative. The attorney was fined $1,000 for his extensive speaking objections and improper instructions not to answer.

III. KEEP YOUR EYES OPEN, MAKE YOUR RECORD

In *Carroll v. Jaques Admiralty Law Firm, P.C.*, 110 F.3d 290 (5th Cir 1997), the

Fifth Circuit criticized a deponent who was both a practicing attorney and defendant in the case when he used extensive vulgarity during deposition. It affirmed the trial court's sanctions and wrote:

> [The attorney/defendant deponent] knew better. Even if he was tired, hypoglycemic, and feeling put-upon by repetitive and, in his view, irrelevant questioning—assumptions which are each dubious, as the district court observed—his condition was no excuse for abusive, profane, and pugnacious behavior in his deposition. ***Such conduct degrades the legal profession and mocks the search for truth that is at the heart of the litigation process***. To assert, as does [attorney/defendant/deponent], that using vile language and fighting words during the course of an interrogation under oath do not constitute bad faith is almost as disrespectful of the legal process as his deposition conduct. [His] words and actions in the deposition did nothing to further its purpose and, indeed, subverted it to prevent his answering the questions asked. ***Through his counsel, [he] could have acted within the rules to object to questions he thought improper.*** Profanity and threats are not a good faith substitute for either answering the questions or properly objecting.

Id. at 293 (emphasis added).

In *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182 (E.D. Pa. 2008), the trial court sanctioned a lawyer for his failure to remedy his client's use of vulgar and inappropriate language throughout his deposition. The witness sought to intimidate opposing counsel with statements like "Open it up and find it. I'm not your f***ing b*****." Opposing counsel requested the witness be a little more civil or offered to do the deposition before the judge. Reading the district court's order, the cited transcript references make clear the witness's attorney made little effort to step in and stop his witness from making disparaging and hostile vulgar remarks. The court observed: "It is true that any attorney can be blindsided by a recalcitrant client who engages in unexpected sanctionable conduct at a deposition. An attorney faced with such a client cannot, however, simply sit back, allow the deposition to proceed, and then blame the client when the deposition process breaks down." *Id.* at 195.

Carroll v. Allstate Fire and Cas. Ins. Co., No. 12-cv-00007, 2014 WL 859238 (D. Colo. Mar. 4, 2014), involved another disruptive expert witness who engaged in personal attacks against the counsel questioning him. Throughout the deposition, the questioning counsel marked the record with the behavior so that it could be later presented to the court. Counsel was not sanctioned in the case, but the expert witness was excluded from testifying as a result of his obstructive behavior.

In *Dunn v. Wal-Mart Stores, Inc.*, No.2:12–cv–01660–GMN–VCF, 2013 WL 5940099 (D. Nev. Nov. 1, 2013), defense counsel moved to sanction plaintiff's counsel alleging that counsel had engaged in eye-rolling, laughing, and scoffing during deposition but the behavior was not shown

on the record and could not be considered by the court.

IV. EXPOSING ATTORNEY MISCONDUCT THROUGH THE WITNESS

In *Van Stelton v. Van Stelton*, No. C11-4045-MWB, 2013 WL 5574566 (N.D. Iowa Oct. 9, 2013), the witness continually made his own objections throughout his deposition and helped another witness in making harassing comments. When counsel asked the deponent's counsel to intercede and make the objections rather than his client, counsel refused to do so. In another deposition, the same counsel assisted in harassment with a witness. Ultimately the court ordered new depositions, expenses for the new depositions, and attorney's fees. It reserved its decision on the contempt request.

As an aside, the court issuing this order wrote a very extensive outline of appropriate deposition behavior that is a good resource and I would suggest you read it to help you when situations arise.

V. KEEP YOUR COOL

Rangel v. Gonzalez Mascorro, 274 F.R.D. 585, 591 (S.D. Tex. 2011), provides an example where neither attorney kept cool:

> Here, after reviewing the audio recording of the deposition, the Court notes that there are a few instances where Mr. Goldman grew noticeably irritated with Ms. Ceaser's improper instructions to Plaintiff Rangel. In fact, Mr. Goldman did raise his voice at Ms. Ceaser during a few of the exchanges between counsel. (See Dkt. No. 26, Audio of Plaintiff Rangel's Deposition at 51:43, 51:55, and 56:50). The Court further notes that, while Mr. Goldman did not raise his voice toward Plaintiff Rangel, it appears that the tone of Mr. Goldman's voice changed as he continued questioning her in a firm manner. (See, e.g., Dkt. No. 26, Audio of Plaintiff Rangel's Deposition at 51:45). Although the Court does not condone Mr. Goldman's conduct, under the circumstances, his actions were not so "abusive, harassing, or unprofessional" as to warrant termination of Plaintiff Rangel's deposition under Rule 30(d)(3)(A).

Also in *Dunn v. Wal-Mart Stores, Inc.*, No.2:12–cv–01660–GMN–VCF, 2013 WL 5940099 (D. Nev. Nov. 1, 2013), the court found that counsel's motion to sanction his opponent for inappropriate comments and sarcasm lacked credibility because the same portions of the transcript relied on in support of the request showed the moving counsel making equally inappropriate statements. The court denied the parties' competing motions for sanctions and cautioned: "In doing so, the court exercises its leniency to provide counsel with an opportunity to pause, recalibrate, and shift their energy to productively advancing this case in a manner befitting of their professional reputations." *Id.* at *4.

And never let a court say what the court in *Hopkins v. NewDay Fin., LLC*, No. 07-3679, 2008 WL 4657822, at *3 (E.D. Pa.

Oct. 17, 2008) had to say to the counsel litigating that case:

> Most noteworthy in these contentious depositions are two things: the attorneys' ill attitudes toward one another and their concomitant unwillingness to work together to advance discovery. The filings and deposition excerpts here are full of examples where counsel for the defense poses too broad or vague a question and counsel for the plaintiffs simply intervenes and orders the deponent to clam up–an action that usually leads to recriminations from defense counsel, etc., etc. What the court has made plain for months is that it expects the parties, as required broadly by the rules of discovery (see Advisory Committee's Explanatory Statements Concerning 1970 Amendments to Discovery Rules in Title V of the Fed.R.Civ.P.), to work together to find the solid ground within the limits imposed. A vague question like "Mr. Posner did not refuse to answer any questions?" could be focused by the lawyers to fit within such limits. Frequently, though, the attorneys for the parties fall on one another's throats before they seek to clarify, agree, and move forward with the process of this litigation.
>
> Accordingly, the court will not rule question-by-question on these disputes. To do so might only encourage more inappropriate attorney behavior. Instead, the court will give more detailed guidance on how the parties themselves can resolve these deposition disputes more productively.

VI. PULLING THE REAL TRUTH FROM A COACHED WITNESS

In *Jadwin v. Abraham*, No. No. 1:07-cv-00026-OWW-TAG, 2008 WL 4057921 (E.D. Ca. Aug. 22, 2008), the deposing counsel used two cameras: (1) focused on the witness; and (2) focused on opposing counsel. About two hours into the witness's deposition, counsel asked the witness if opposing counsel was tapping on her foot. Counsel put the fact he heard a foot tapping on the record and looked under the table to see opposing counsel's foot next to the witness's foot. Counsel asked the witness repeatedly throughout deposition about the foot tapping and the witness denied being signaled. Opposing counsel moved the camera focused on him to his feet and in doing so damaged the camera.

The court found that it was wholly inappropriate to train a camera on opposing counsel during deposition. Ultimately the court ordered a protective order against both lawyers.

Note, *Jadwin v. Abraham* provides a cautionary tale. When trying to expose a coached witness make sure not to have tunnel vision and try more than one angle of questioning to unpack the truth from the witness.