Fox Valley CLE Conference

Depositions of Company Witnesses – The Ethical Rules You Need to Know

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A Lawyer’s Responsibilities

■ To “the System”

“A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs. A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges and public officials.” SCR 20, Preamble

A Lawyer’s Responsibilities

■ To the client – “zealous advocacy”

“As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.” SCR 20, Preamble
The Tension

- “A lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of the client and at the same time assume that justice is being done.”

- “In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all ethical problems arise from a conflict between a lawyer’s responsibilities to client, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living... Within the framework of these rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude...” SCR 20, Preamble

Depositions – A Microcosm of Ethical Tension

- Good “ethics” require
  - That lawyers competently prepare a witness for deposition, explaining the witness’ role in the case and the importance and consequences of their testimony
  - That preparation not produce or result in testimony that is false, misleading or less than candid
  - That lawyers not obstruct another’s access to evidence whether in preparing a witness for deposition, conducting a deposition or defending a deposition
  - That, notwithstanding any preparation, the testimony of the witness actually be the testimony of the witness – the adversary system is a search for the truth
Depositions – A Microcosm of Ethical Tension

- But the client often tells you that it wants –
  - The witness to understand the client’s position and ensure that the testimony supports that position
  - Significant preparation and rehearsal, including “safe places” and “home bases” when the witness is uncertain or confused
  - Its lawyer to aggressively protect the witness against “trick” questions, misleading questions and “badgering” during the deposition
  - Its lawyer to intervene and get things “back on track” when the testimony is “wrong” or unexpected, either during or break or in the deposition itself
  - The opposing witness “destroyed” when its lawyer is conducting the deposition
  - The opposing party to “feel pain” and incur expense through the deposition and discovery process

Depositions – A Microcosm of Ethical Tension

- In-house lawyers face these same tensions
  - In-house lawyers play a key role in witness identification and preparation due to their knowledge of the business and the facts.
  - In-house lawyers are the intermediaries between the outside lawyer and company witnesses (particularly key executives) and may get “the real story” before the outside lawyer does.
  - In-house lawyers may be asked by company witnesses to field tough questions that the witness is not comfortable asking outside counsel.
  - If the deposition (or the case) goes poorly or in an unexpected direction, complaints from the business unit will ultimately fall to in-house counsel.
  - Disputes may involve matters in which in-house counsel was involved or provided counsel and advice.
  - In-house lawyers are part of the company and want to win!
Depositions – A Microcosm of Ethical Tension

- Until recently, this tension was routinely resolved in favor of aggressive and obstructionist discovery tactics, particularly in depositions.
- Such tactics have come to be known as “Rambo” litigation.

The tide has turned. Courts increasingly sanction aggressive, unethical and uncivil discovery conduct, with a particular focus and emphasis on depositions.
- “It is precisely when animosity runs high that playing by the rules is vital. Rules of legal procedure are designed to defuse, or at least to channel into set forms, the heated feelings that accompany much litigation. Because depositions take place in law offices rather than courtrooms, adherence to professional standards is vital, for the judge has no direct means of control.” Redwood v. Dobson, 476 F.3d 462 (7th Cir. 2007)
The Ethical Framework

■ **SCR 20:4.4(a) Respect for Rights of 3rd Persons:** In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a 3rd person, or use methods of obtaining evidence that violate the legal rights of such person.

■ **Comment:** Responsibility to a client requires a lawyer to subordinate the interests of others to those if the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

Consequences of Improper Behavior

■ **Judicial sanctions**
  - Against the party (your client)
    - Waiver of discovery limitations
    - Waiver of attorney-client privilege
    - Adverse inferences or jury instructions
    - Dismissal of claims and defenses
    - Monetary sanctions
  - Against the lawyer (you or your outside counsel)
    - Monetary sanctions
    - Censure
    - Revocation of *pro hac vice* admission
Consequences of Improper Behavior

- Reputational consequences
  - Loss of status as the “truth teller” in the case
  - Damage to your reputation in the community
  - Damage to your reputation in the company

Specific Contexts

- Preparing the Witness
- Defending the Witness at Deposition
- Private Conferences With Witness
- Obstruction by the Witness
Preparing the Witness

Attorneys have an ethical duty to prepare their witness for testimony (deposition and trial)

- SCR 20:1.1 Competence. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

- SCR 20:1.4 Communication.
  (a)(3) A lawyer shall “keep the client reasonably informed about the status of the matter.”
  (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

Comment 5: The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.

Preparing the Witness

Preparation typically (and permissibly) includes:

- Review of key facts and chronology
- Review of key documents and other evidence (including testimony) as a means of refreshing recollection or asking witness to reconsider recollection
- Rehearsing testimony
- Suggesting word choices
- Suggesting “home bases” and themes to keep in mind
- Review and discussion of applicable law and elements of the relevant claims and defenses
Preparing the Witness

■ Where’s the line?
  - Preparation vs. improper coaching?
  - SCR 20:3.3(a) Candor Toward the Tribunal: A lawyer shall not knowingly (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer… or (3) offer evidence that the lawyer knows to be false.
  - SCR 20:3.4(b) Fairness to Opposing Party and Counsel: A lawyer shall not “falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.”

“Massaging” the Facts

■ Not ethical or permissible to –
  - Rework the facts
  - Tell the witness what his or her testimony should be (as opposed to using other evidence to refresh or improve the witness’ recollection)
  - “So, what I hear you saying is . . .”
Encouraging Selective Memory

■ **Not ethical or permissible to** –
  - Tell the witness not to remember something (or not to “recall at this time”)
  - Encourage selective memory – recall the helpful details but not the rest

■ **SCR 20:3.4(f):** A lawyer shall not “request a person other than a client to refrain from voluntarily giving relevant information to another party unless (1) the person is a relative or an employee or other agent of the client; and (2) the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.”

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Encouraging Selective Memory

■ **But:** Clearly permissible and ethical to –
  - Emphasize that the witness should not guess or speculate
  - Test the witness’ memory to ensure that the witness actually recalls what he or she claims to recall
  - Demonstrate faulty memory (or a lack of recollection) to the witness through the use of other evidence
Scripting Testimony

- Unethical and impermissible to script a witness’ testimony

- “You will be asked if you ever saw any WARNING labels on containers of asbestos. It is important to maintain that you NEVER saw any labels on asbestos products that said WARNING or DANGER. . . Do NOT mention product names that are not listed on your Work History Sheets. The defense attorneys will jump at a chance to blame your asbestos exposure on companies that were not sued in your case. Do NOT say you saw more of one brand than another, or that one brand was more commonly used than another. . .”

Defending a Deposition

- Where is the line between protecting your witness against unfair and aggressive questioning and obstructing legitimate discovery?

- SCR 20:3.2 Expediting litigation: A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

- SCR 20:3.4 Fairness to Opposing Party and Counsel: A lawyer shall not:
  (a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
  (b) . . .
  (c) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
Defending a Deposition

- The applicable standards derive not only from the ethical rules, but from the applicable rules of civil procedure, local practice and common law. The ethical rules expressly contemplate supplementation by these other sources of authority.

- “The rules presuppose a larger legal context shaping the lawyer’s role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.” SCR 20, Preamble

Objections and Instructions Not to Answer

- Federal Rule of Civil Procedure 30(c)(2)
  - An objection at the time of the examination – whether to evidence, to a party’s conduct, to the officer’s qualifications, to the manner of taking the deposition – must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection.
  - An objection must be stated concisely in a nonargumentative and nonsuggestive manner.

- Rule 30(d)(2): The court may impose an appropriate sanction – including the reasonable expenses and attorney’s fees incurred by any party – on a person who impedes, delays, or frustrates the fair examination of the deponent.
“Form” vs. “Speaking”
Objections

Form Objections
- **Majority Rule**: Form objections are not only appropriate, they are the only proper objection to the form of a question that may be made at a deposition. *Cincinnati Ins. Co. v. Serrano*, No. 11-2075-JAR, 2012 WL 28071, at 5* (D. Kan. Jan. 5, 2012) (objection should be limited to “form” to avoid speaking objection, unless opposing counsel requests further clarification of the objection).
- **Minority Rule (or Bad Facts Make Bad Law Case)**: Form objections are inappropriate and obstructionist unless the basis for the objection is specified. *Security National Bank of Sioux City, Iowa v. Abbott Labs.*, No. C 11-4017-MWB, at 14-16* (N.D. Iowa July 28, 2014) (also noting contrary authority at 16-17*).

Speaking Objections
- Statement explaining the alleged problem with the question or suggesting facts to the witness before the answer
- Intended to coach the witness and prompt a particular response
- More than “form, calls for speculation” – suggests a response or means to avoid the question.
  - Rephrasing or “explaining” the question
  - Stating that question is inconsistent with prior testimony or other sources of evidence
  - “Reminding” the witness of a key date or piece of evidence to inform the witness’ answer
  - Suggesting that the witness should not answer the question (without so instructing the witness)
**“Form” vs. “Speaking”**

**Objections**

- **Speaking Objections**
  - Witness is often trained to “parrot” the objection in the answer
    - “Vague” = “Please clarify” or “please rephrase” or “I don’t understand the question”
    - “Speculative” = “I can’t answer that” or “I would be speculating” or “I would be guessing” or “I don’t know”
    - “Foundation” = “I don’t know”
    - “Mischaracterizes Testimony” = “I already answered that question” or “my answer hasn’t changed”
    - “If you know” = “I don’t know”
    - “Don’t guess” = “I would be guessing”

- **Universally recognized as inappropriate (but still commonly used)**

- **Fed. R. Civ. P. Adv. Comm. Note:** “Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond.”
### Best Practices

- Use speaking objections sparingly
- Prepare your witnesses to protect themselves and to recognize suspect questions
- Understand the local practice on “form” objections (how much is too much)
  - Check the local rules and rely on local counsel
  - Establish “ground rules” with opposing counsel in writing before the deposition or on the record

### Excessive Objections– Balancing Act

- Objections that can be cured at a deposition are waived if not asserted. This is particularly important when a witness will not appear at trial and the deposition testimony is the trial testimony.
Excessive Depositions – Balancing Act

■ Best Practice
- Ask for a continuing objection if appropriate, so as not to have objections be viewed as interfering with the questioning or obstructing testimony
- If the questioning attorney and the witness are not on same page, offer to discuss the issue outside presence of witness
- Be selective about your objections and state (succinctly) the basis for them

Instructions Not to Answer

■ Federal Rule 30(c)(2): 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).
■ Adv. Comm. Note: “Directions to a deponent not to answer a question can be even more disruptive than objections. The second sentence of new paragraph (1) prohibits such directions except in the three circumstances indicated: to claim a privilege or protection against disclosure (e.g., as work product), to enforce a court directive limiting the scope or length of permissible discovery, or to suspend a deposition to enable presentation of a motion under paragraph 3).”
Courts strictly interpret the rule and permit instructions not to answer only in those three limited and identified circumstances.

*Redwood v. Dobson*, 476 F.3d 462 (7th Cir. 2007) (attorney acted inappropriately in instructing a witness not to answer inappropriate questions yet never presenting a motion for a protective order)

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**Best Practice**

- When faced with inappropriate and harassing questions, object and adjourn to seek protective order. If you do, however, you **must** seek a protective order or risk sanctions.
- If there is a non-objectionable line of questioning that can be pursued, suggest that objectionable questions be reserved to the end of the deposition.
- Maintain your composure and resist the urge to “fight fire with fire.”
- Have your witness prepared for the possibility of improper questions and take a break if the witness is rattled or uncomfortable.
Private Conferences With Witness

- Two Salient Issues
  - Coaching is impermissible
  - Appearance of impropriety

- Ethical Framework – SCR 20:3.4(a): A lawyer shall not “unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.”

Private Conferences With Witness

- While a question is pending
  - A private (off the record) conference while a question is pending is presumptively improper.
  - This rule applies regardless of whether the witness or the attorney initiates the conference.
  - The sole exception is where the witness requires advice with respect to the potential application of a privilege.
  - If the witness insists on a conference, presume that your discussion will be discoverable.
  - Explain to the witness ahead of time that you (or your outside counsel) will not be able to help the witness interpret or respond to pending questions.
Private Conferences With Witness

- Conferences during breaks, lunch or adjournments
  - Rules differ widely by jurisdiction.
  - Many local rules prohibit discussion with witness about the deposition testimony after the deposition commences.
  - “During a civil trial, a witness and his or her lawyer are not permitted to confer at their pleasure during the witness’s testimony. Once a witness has been prepared and has taken the stand, that witness is on his or her own. The same is true at a deposition.” Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993).

Private Conferences With Witness

- But what about your duty under SCR 20:3.3 – Candor toward the Tribunal?
- Best Practice
  - No discussion while question is pending except to discuss privilege
  - Limit discussion during breaks to technique (“listen to the question, “slow down,” etc.) but first confirm that this is permissible in your jurisdiction
  - Use your judgment if the witness makes an egregious mistake or provides (knowingly or unknowingly) false testimony. Such situations present potentially conflicting legal and ethical duties.
The Obstructionist Witness – Your Duties

- The rule is clear when your client lies.

- SCR 20:3.3(a): “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. A lawyer may refuse to offer evidence . . . that the lawyer reasonably believes is false.”

What about other conduct that obstructs the deposition and the discovery process?
The Obstructionist Witness – Your Duties

- **GMAC Bank v. HTFC Corp., 248 F.R.D. 182 (E.D. Pa 2008).**
  - Witness used the word “f*%$” and variants thereof 73 times during the deposition, but only used the word “contract” (in a contract case) 14 times during the deposition.
  - The court found that the witness engaged in abusive conduct and dilatory tactics and repeatedly provided intentionally evasive answers.
  - The court emphasized that the witness’ counsel bore responsibility for this conduct: “An attorney faced with a such a client cannot, however, simply sit back, allow the deposition to proceed, and then blame the client when the deposition process breaks down.”

Questions?

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