AMERICAN INNS of COURT

Potter Stewart American Inn of Court

Professionalism in Depositions
October 15, 2013

Standards for Professionalism in the Deposition Context

Supreme Court of Ohio's "A Lawyer's Creed"

> TO THE OPPOSING PARTIES and THEIR COUNSEL, I offer fairness, integrity and civility …. **I shall strive to make our dispute a dignified one**.

Supreme Court of Ohio's "A Lawyer's Aspirational Ideals"

> As to opposing parties and their counsel, I shall aspire … [t]o treat opposing counsel in a manner consistent with his or her professional obligations and consistent with the **dignity of the search for justice**.
>
> I should:
>
> 4) **Avoid rudeness** and other acts of disrespect in all meetings, including depositions and negotiations

S.D. Ohio Local Rules, Introductory Statement on Civility

> **1. Common courtesy**. In everyday life most people accord each other common courtesies. Ordinarily these include: politeness in conversation, respect for others' time and schedules, and an attitude of cooperation and truthfulness. Involvement in the legal system does not diminish the desirability of such conduct. A litigant opposing your client, a lawyer who represents that litigant, or a Judge who decides an issue, has not thereby forfeited the right to be treated with common courtesy.

N.D. Ohio L. R. 30.1(b)(2)

> *Decorum*. Opposing counsel and the deponent must be treated with **civility and respect**.

Fed. R. Civ. P. 30(d)(3)(A)

> A party may move to terminate or limit a deposition when "it is being conducted in bad faith or in a manner that **unreasonably annoys, embarrasses or oppresses**" the deponent.

PROFESSIONALISM DOs & DON'Ts: DEPOSITIONS

Issued by the Commission on Professionalism:

If there is one area of the practice of law that consistently gives rise to an inordinate number of complaints about lack of professionalism, it is the area of depositions. Depositions, of course, are an extremely important and valuable component of our adversary system, but, if abused and mishandled, they can engender unnecessary and costly strife that impedes and undercuts the entire process. To help correct this situation, the Commission on Professionalism is publishing the following guidelines, a set of deposition "dos and don'ts." The Commission believes that if lawyers follow these guidelines — which are consistent with, and to some extent provide specific amplification of, the Supreme Court's Statements on Professionalism — lawyers will be able to use depositions to advance the legitimate interests of their clients, while, at the same time, treating all participants in the process, including deponents and opposing counsel, with courtesy, civility, and respect. It is not the Commission's intention to regulate or to suggest additional bases for discipline, but rather to facilitate the promotion of professionalism among Ohio's lawyers. In short, by adhering to these guidelines, lawyers will be acting as professionals and in the manner that the courts expect.

Therefore, as a lawyer who is scheduling, conducting or attending a deposition:

DO

- Review the local rules of the jurisdiction where you are practicing before you begin.
- Cooperate on scheduling. Rather than unilaterally sending out a notice of deposition, call opposing counsel first and cooperate on the selection of the date, time, and place. Then send out a notice reflecting the agreed upon date.
- If, after a deposition has been scheduled, a postponement is requested by the other side, cooperate in the rescheduling unless the requested postponement would be one of those rare instances that would adversely affect your client's rights.
- Arrive on time.
- Be prepared, including having multiple copies of all pertinent documents available in the deposition room, so that the deposition can proceed efficiently and expeditiously.
- Turn off all electronic devices for receiving calls and messages while the deposition is in progress.

(OVER)

- Attempt to agree, either before or during the deposition, to a reasonable time limit for the deposition.
- Treat other counsel and the deponent with courtesy and civility.
- Go "off record" and confer with opposing counsel, privately and outside the deposition room, if you are having problems with respect to objections, the tone of the questions being asked or the form of the questions.
- Recess the deposition and call the court for guidance if your off-the-record conversations with opposing counsel are not successful in resolving the "problem."
- If a witness is shown a document, make sure that you have ample copies to distribute simultaneously to all counsel who are present.
- If a deponent asks to see a document upon which questions are being asked, provide a copy to the deponent.
- Inform your client in advance of the deposition (if the client plans to attend) that you will be conducting yourself at the deposition in accordance with these "dos and don'ts."

DON'T

- Attempt to "beat your opponent to the punch" by scheduling a deposition for a date earlier than the date requested by your opponent for deposition(s) that he or she wants to take.
- Coach the deponent during the deposition when he or she is being questioned by the other side.
- Make speaking objections to questions or make statements that are intended to coach the deponent. Simply say "object" or "objection."
- Make rude and degrading comments to, or ad hominen attacks on, deponent or opposing counsel, either when asking questions or objecting to questions.
- Instruct a witness to refuse to answer a question unless the testimony sought is deemed by you to be privileged, work product, or self-incriminating, or if you believe the examination is being conducted in a manner as to unreasonably annoy or embarrass the deponent.
- Take depositions for the purpose of harassing a witness or in order to burden an opponent with increased litigation expenses.
- Overtly or covertly provide answers to questions asked of the witness.
- Demand conferences or breaks while a question is pending, unless the purpose is to determine whether a privilege should be asserted.
- Engage in conduct that would be inappropriate in the presence of a judge.

OVERVIEW OF SIXTH CIRCUIT AND OHIO STATE COURT CASELAW REGARDING SANCTIONS FOR MISCONDUCT RELATED TO DEPOSITIONS

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I. THE SUPREME COURT OF OHIO EXPECTS "PROFESSIONALISM" FROM LAWYERS IN ALL ASPECTS OF DEPOSITIONS -- LAWYER AS A WITNESS, LAWYER OFF THE RECORD, ETC. -- EVEN WHEN REACTING TO AGGRESSIVE BEHAVIOR BY OPPOSING COUNSEL; AND COURTS ARE NOT SHY TO SANCTION PATENTLY UNPROFESSIONAL CONDUCT BY A LAWYER.

Office of Disciplinary Counsel v. Jackson, 84 Ohio St. 3d 386, 704 N.E.2d 246 (1999) (per curiam).

This dispute arose between two neighbors. The neighbors' lawyers began to act uncivilly to one another, and Respondent was reported to the disciplinary board for acting unprofessionally. During the original neighborhood dispute, the relationship between the two attorneys had so deteriorated that depositions had to be taken at the courthouse so the judge would be close at hand. During one such deposition, opposing counsel accused Respondent of improper behavior during a break in the depositions.

Respondent admitted to muttering obscenities under his breath. Respondent was found in contempt and fined $500. A Disciplinary Panel then recommended that he be suspended for six months, stayed for good behavior and conduct. The Disciplinary Board approved the suspension, but stayed it so long as the Respondent completed twelve hours of Continuing Legal Education on professionalism.

The disciplinary case was appealed, where the Supreme Court of Ohio noted that Respondent used racial epithets and obscene language, even though Respondent appeared to be "react[ing] to aggressive behavior by opposing counsel." The Court commented, "part of the role of an attorney is to remove himself from the emotions of the moment and provide objective counsel and representation to clients. To perform that role, attorneys must hold themselves to the highest standards of professionalism" and "lawyers should always be cognizant of the necessity for good manners, courtesy, and discourse, both to client and other practitioners." The Supreme Court did not adopt a suspension, but stated that Defendant should receive a public reprimand and pay costs.

Office of Disciplinary Counsel v. Levin, 35 Ohio St. 3d 4, 517 N.E.2d 892 (1988).

This disciplinary case arose when Respondent attorney, the party-deponent, represented himself in a deposition, which took place in a county courthouse. "As [the] proceeding progressed, respondent's language and demeanor became increasingly abusive." The Respondent repeatedly used unprofessional terms, including but not limited to, "lying son-of-b****," "a**hole," "child and a punk," "c***sucker," "f***er", and "fat slob." Furthermore, the Respondent "threatened . . . to take his questioner's mustache off his face, to give [him] the beating of his life, to slap him across his face, and to break his head."

Disciplinary Counsel found that the Respondent's conduct violated the disciplinary rules that proscribe engaging in conduct prejudicial to administration of

justice, engaging in conduct that adversely reflects on one's fitness to practice law, failing to comply with known local customs of courtesy or practice while appearing before tribunal, engaging in undignified or discourteous conduct while appearing before tribunal, and intentionally or habitually violating any established rule of procedure in appearing before tribunal. Based on Respondent's behavior during the deposition, Respondent received a public reprimand. In addition, for disciplinary reasons beyond the scope of the Respondent's behavior in the deposition, the Respondent was indefinitely suspended from the practice of law.

II. DISCOVERY GAMESMANSHIP IS NOT TOLERATED BY THE COURTS, AND WHEN DEPOSITION CONDUCT BECOMES "FRIVOLOUS," OHIO REV. CODE § 2323.51 CAN BE USED IN ADDITION TO RULE 37.

Bowling v. Stafford & Stafford Co., L.P.A., 1st Dist. Hamilton No. C-090565, 2010-Ohio-2769 (1st Dist.).

The Plaintiffs moved for sanctions against a law firm for its frivolous conduct during discovery. The frivolous conduct included repeatedly ignoring the Plaintiffs' requests to depose a principal of Defendant, cancelling scheduled depositions of the Defendant three times, repeatedly cancelling depositions of expert witnesses, and repeatedly failing to serve Plaintiffs with copies of documents that had been filed. The court granted the motion and awarded the Plaintiffs $105,877.61 in attorney's fees. The appellate court affirmed, holding that sanctions under Ohio Rev. Code § 2323.51 could include any attorney's fees incurred in connection with a civil action in which frivolous conduct had occurred and not just those fees that were actually a result of the frivolous conduct. The Court provided the following explanation:

> "R.C. 2323.51 permits a trial court to award sanctions to any party adversely affected by frivolous conduct. The statute defines frivolous conduct as conduct by a party to a civil action that (1) serves merely to harass or maliciously injure another party to the action or is for another improper purpose, such as causing unnecessary delay or a needless increase in the cost of litigation; (2) is not warranted under existing law and cannot be supported by a good-faith argument for a modification of existing law or the establishment of new law; (3) consists of allegations or other factual contentions that have no evidentiary support or are unlikely to have support after further investigation or discovery; or (4) consists of denials or factual contentions that are not warranted by the evidence or are not reasonably based on a lack of information or belief. There is no requirement in the statute that the party seeking sanctions be the prevailing party in the underlying action." (Footnote omitted.)

III. "UNJUSTIFIED TACTICS," LIKE A WITNESSES' FEIGNING MEMORY LOSS, CAN BE SANCTIONABLE.

Evans v. Smith, 75 Ohio App. 3d 160, 598 N.E.2d 1287 (1st Dist. 1991) (per curiam).

Plaintiff, a pro se lawyer, avoided several attempts by Defendant to take his deposition, and Defendant then filed a motion to dismiss based on Plaintiff's failure to appear for his deposition. The trial court ordered Plaintiff to attend his deposition and to "'answer all proper questions or suffer dismissal.'" Plaintiff then appeared for his deposition, but Defendant believed that Plaintiff's answers were evasive, so Defendant renewed his motion for dismissal, which the trial court granted.

Plaintiff employed various tactics during his deposition designed to impede discovery. These tactics included feigning "memory losses, insisting that he could not answer certain questions regarding documents without examining the actual original documents, [and] requesting the court reporter to search through his testimony to determine if a question had already been asked and answered. . . . In light of these unjustified tactics," the trial court determined that the Plaintiff acted in bad faith and therefore dismissed his complaint. The court of appeals affirmed.

IV. FAILURE TO APPEAR AT A DEPOSITION CAN RESULT IN SEVERE SANCTIONS, PARTICULARLY UNDER RULE 37(B), AND LAWYERS MUST EMPLOY SOME PROFESSIONAL STANDARDS TO EXPLAIN OR SEEK LEAVE BEFORE RESORTING TO SUCH TACTICS.

Poulos v. State Auto. Mut. Ins. Co., 1st Dist. Hamilton No. C-020226, 2003-Ohio-2899.

Plaintiffs failed to appear for several depositions as well the hearing to compel discovery apparently because Plaintiffs' attorney was suffering from severe depression and failing to open his mail. The trial court issued an order dismissing Plaintiffs' complaint with prejudice and subsequently denied a motion for relief on the ground of excusable neglect. The appellate court affirmed, stating that counsel was not disabled to the extent that he could not have informed the court or his clients of his illness.

Alternatives Unlimited-Special, Inc. v. Ohio Dep't of Educ., Ct. of Cl. No. 2002-04682, 2005-Ohio-1283.

The court first ordered the Defendant to pay the Plaintiffs $1,500 in costs when Defendant cancelled a deposition just hours before it was scheduled to begin. When the Defendant failed to pay these costs, Plaintiff filed a motion for contempt. Defendant argued that the delay in payment was unavoidable because it intended to seek

appellate review of the court's order and such appeal could only be attempted after a final judgment was entered. The court found that this argument did not excuse the Defendant's failure to honor the court's order. The court found the Defendant in contempt and awarded Plaintiff an additional $1,000 in attorney's fees.

Newhall v. Brewer, No. C-840486, 1985 Ohio App. LEXIS 6496 (1st Dist. Apr. 24, 1985) (per curiam).

After the Defendant failed to appear for his deposition, the Plaintiffs filed a motion to compel attendance. The trial court granted this motion and set a new deposition date. Defendant, however, again failed to appear.

Plaintiffs then filed a motion for sanctions pursuant to Ohio R. Civ. P. 37(B)(2). The trial court granted the motion and entered a judgment of default in the amount of $274,672.75. It appears that the Defendant's memorandum in opposition to Plaintiffs' motion for sanctions failed to set forth any factual explanation as to why Defendant failed to appear for his deposition. The only explanation stated forth in Defendant's memorandum in opposition was that the "[Defendant] could not attend….the deposition."

The court of appeals upheld the trial court's order finding because the appellate court did not believe that the entry of default judgment was "unduly harsh or unreasonable in view of the unexplained obduracy" of the Defendant.

Midwest Sportservice, Inc. v. Andreoli, 3 Ohio App. 3d 242, 444 N.E.2d 1050 (1st Dist. 1981) (per curiam).

Plaintiffs served notice on Defendants to take their depositions. When defendants failed to appear, plaintiffs immediately filed a motion for default judgment on the grounds that defendants failed to appear at the depositions.

Defendants filed a motion to set aside the default judgment, arguing "that the judgment was contrary to law and, under the circumstances, excessive and not in the interest of justice." In support of this motion, Defendants attached an affidavit stating that their "failure to appear was based on the advice of counsel and not for the purpose of avoiding discovery." The trial court overruled this motion.

On appeal, Defendants asserted that the trial court erred in overruling their motion. Defendants asserted that a non-resident party-defendant could not be compelled to appear in the forum state merely by Plaintiff's filing a notice to take a deposition and that the severe sanction of default judgment was an abuse of discretion.

The appellate court noted that the motion to set aside the default judgment was supported only by a Defendants' affidavit that he was advised by counsel not to appear and the accompanying argument that a non-resident party-defendant could not be

compelled to appear in the forum state merely by filing a notice to take a deposition. As this argument was contrary to settled law at the time, Defendants prayed for relief essentially on grounds of excusable neglect. The appellate court found the fact that the Defendants' conduct was prompted by counsel to be irrelevant. Rather, the court held that the neglect of a party's attorney is imputed to the party for the purposes of a Rule 60(B)(1) motion.

The appellate court cautioned that "if the scheduled time and place [of a deposition] are inconvenient or present unreasonable burdens on the party to be deposed, or should the party have any other objections to the taking of his deposition, his remedy is to obtain a protective order." When a party fails to take such action, and simply fails to appear, he may be subject to sanctions.

Bass v. Jostens, Inc., 71 F.3d 237 (6th Cir. 1995).

Plaintiff did not cooperate with four different discovery orders, including a request for Plaintiff's deposition. Plaintiff's counsel stated on multiple occasions – at the eleventh hour – that Plaintiff and Plaintiff's counsel would be unavailable for Plaintiff's deposition (or that Plaintiff's availability was limited due to a hearing in a separate matter, or by Plaintiff's health). Plaintiff did not appear at her scheduled deposition, even after Defendant's counsel agreed to a modified schedule to accommodate Plaintiff's counsel's hearing in an unrelated matter.

The Eastern District of Michigan dismissed the action under Fed. R. Civ. P. 37(b) for failure to comply with discovery orders. The Plaintiff appealed, and the Sixth Circuit Court of Appeals affirmed dismissal. The Sixth Circuit reasoned:

> "The evidence does not support plaintiff's purported reasons for making such unilateral demands. Therefore, the district court properly found that plaintiff's offer to go forward with the deposition at 2 p.m. on November 5, 1993 was too little, too late. Regional Refuse, 842 F.2d at 156 ("misconduct is not any less misconduct because it is executed under a veneer of good intentions). Plaintiff's failure to appear for her deposition, like her previous repeated failures to cooperate in discovery, was willful and purposeful and not the result of plaintiff's inability to appear due to circumstances beyond her control. For these reasons, the district court properly dismissed her complaint with prejudice."

V. OTHER CASES OF INTEREST

Laukus v. Rio Brands, Inc., N.D.Ohio No. 5:07CV2331, 2013 U.S. Dist. LEXIS 40270 (N.D. Ohio Mar. 11, 2013).

Plaintiff brought a trademark infringement case against Defendant. Plaintiff, among other discovery violations, gave false testimony in his deposition on a central issue in the case and failed to correct discovery responses he knew to be inaccurate. Plaintiff's counsel also failed to correct deposition testimony he knew to be false. Plaintiff stated that he bought a flag with trademark infringement on it in 2005, although he had a receipt that he purchased it in 2004. The 2004 date was beyond the statute of limitations in the district.

The Court dismissed the complaint and awarded attorney's fees to the Defendant, holding that Plaintiff's inability to turn over documents violated a number of Federal Rules of Civil Procedure, including Rules 37(b)(2) and 16(f).

Taylor v. Medtronics, Inc., 861 F.2d 980 (6th Cir. 1988).

Plaintiff filed suit against a manufacturer, claiming that their product was defective. Defendant was unable to schedule discovery with the Plaintiff's expert and asked the court to compel discovery. The Plaintiff continued to fail to comply with orders scheduling depositions. The court then struck the Plaintiff's witness's deposition and granted summary judgment to the Defendant.

The appellate court upheld the decision under Fed. R. Civ. P. 37(b)(2) because the Defendant had to incur additional legal costs trying to schedule and prepare for a deposition that the Plaintiff was obstructing, and the Plaintiff willfully ignored court orders by not allowing Plaintiff's expert to be deposed.