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Ethical Issues That Arise In Witness Preparation And Deposition



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Overview

- Examine how ethical issues can arise during witness preparation and in depositions
- Discuss the standards and rules that govern your conduct
- Establish broad guidelines that you can follow
- Review some real world examples

Federal Standards & Rules

- ABA Civil Discovery Standards
- Model Rules of Professional Conduct
- Federal Rules of Civil Procedure
- District Court Local Rules

The ABA Civil Discovery Standards

- Each standard is intended to:
 - Eliminate unnecessary effort and expense
 - Restrict the opportunities for misusing the discovery process, and
 - Encourage a cooperative rather than adversarial approach to discovery
- Depositions are addressed in Section V, Rules 17, 18 and 19.

ABA Civil Discovery Standards

Rule 17 – Objections & Comments

- Objections - In most cases, a **short-form** objection such as leading, argumentative, form, asked and answered or non-responsive will suffice
- Sanctions - In addition to imposing sanctions, the court should consider whether the deposition misconduct warrants allowing portions of a deposition transcript or other **evidence to be admitted at trial** on the issue of the witness' credibility

ABA Civil Discovery Standards

Rule 18 – Conferring with the Witness

- An attorney should not initiate a **private conference** with the deponent during the deposition except to determine whether a **privilege** should be asserted or to enforce a court-ordered limitation on the scope of discovery
- In objecting to or seeking to clarify a pending question, an attorney for a deponent should not include any comment that **coaches** the witness or suggests an answer
- An attorney shall not instruct or permit another attorney **or any other person** to violate the guidelines set forth in this Rule.

ABA Civil Discovery Standards

Rule 19 – Corporate Representative Deposition

- **Designate** the individual who is best suited to testify
- Designate more than one witness if necessary
- Reasonably interpret the notice or subpoena
- Duty to prepare [**educate**] the witness to testify

Model Rules of Professional Conduct

- Adopted in some form in all states except California
- Are often cited in opinions levying sanctions for ethical violations

Model Rules of Professional Conduct

- **Rule 3.3(a)(4).** A 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.
- **Rule 3.4(b).** 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.

FRCP 30

Depositions by Oral Examination

- A comprehensive rule that governs almost all aspects of taking or defending a deposition
 - Examination and Cross-Examination
 - Permissible Objections
 - Instructions Not to Answer
 - Attendance and Duration
 - Review and Certification

Examples of Sanctionable Conduct

- Conduct that impedes, delays, or frustrates the fair examination of the deponent
- Conducting a deposition in bad faith
- Conducting a deposition in a manner which unreasonably annoys, embarrasses, or oppresses the deponent or party

But Also Remember FRCP 11

- Every time you file a pleading, motion or other paper, you are making certain representations and certifications to the Court
- Applies to anything presented to the Court, including exhibits:
 - Affidavits
 - Verifications
 - Deposition Transcripts

Local Rules

- Often incorporate by reference the State Bar's Disciplinary Rules of Professional Conduct
- May contain specific standards which differ from the State's Disciplinary Rules
- Each court may create its own Rules

Local Rules

Southern District of Texas

- A lawyer owes, to opposing counsel, a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves.
- A client has no right to demand that counsel abuse the opposing party or indulge in offensive conduct. A lawyer shall always treat adverse witnesses with fairness and due consideration.

Potential Consequences for Ethical Violations

➤ Sanctions

- Monetary
- Waiver of discovery limitations
- Waiver of Attorney-Client privilege
- Pleadings struck
- Adverse Inference or Jury Instruction

➤ Court's Anger – even if there is no sanction ordered, you still have to live with that Judge for the rest of the case

➤ Damage to your Professional Reputation

- Loss of License

Texas Standards & Rules

- Texas Lawyer's Creed
- Texas Disciplinary Rules of Professional Conduct
- Texas Rules of Civil Procedure

Texas Lawyer's Creed

- Is an order from the Supreme Court of Texas and the Court of Criminal Appeals
- The stated purpose is to deter abusive tactics in the practice of law
- The directives apply whenever you are practicing law
 - Even when you are practicing law in Federal Court

Texas Lawyer's Creed

Preamble

Section I – Our Legal System

Section II – Lawyer To Client

Section III – Lawyer To Lawyer

Section IV – Lawyer And Judge



Texas Lawyer's Creed

Preamble

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.

Texas Lawyer's Creed

Section II – Lawyer To Client

- I will advise my client that civility and courtesy are expected and are not signs of weakness
- I will advise my client of proper and expected behavior and to treat adverse parties and witnesses with fairness and due consideration
- I will advise my client that he has no right to demand that I abuse anyone or indulge in any offensive conduct

Texas Lawyer's Creed

Section III – Lawyer To Lawyer

- I will be courteous, civil and prompt in oral and written communications
- I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process
- I will encourage my witness to respond to all deposition questions that are reasonably understandable

Texas Disciplinary Rules of Professional Conduct

The Three Main Rules

- Candor Toward the Tribunal - § 3.03
- Fairness in Adjudicatory Proceedings - § 3.04
- Maintaining the Integrity of the Profession - Misconduct - § 8.04

Texas Disciplinary Rules of Professional Conduct

Candor Toward the Tribunal - § 3.03:

- A lawyer shall not knowingly make a false statement of material fact or law to a tribunal, and
- If he later realizes the falsity of offered material evidence, he must make a good faith effort to persuade the client to authorize correction or withdrawal of the false evidence.
 - If such efforts are unsuccessful, the lawyer must take remedial measures including disclosure of the true facts.

Texas Disciplinary Rules of Professional Conduct

Fairness - § 3.04

- A lawyer shall not:
 - Counsel or assist a witness to testify falsely
 - Pay a witness contingent upon the content of witness' testimony or outcome of the case
 - Ask questions intended to degrade a witness
 - Except where there is a reasonable belief that the question will lead to relevant and admissible evidence

Texas Disciplinary Rules of Professional Conduct

Integrity - § 8.04

➤ Lawyer shall not:

- Assist others in suborning perjury in deposition
- Assist others in creating false evidence
- Engage in conduct involving dishonesty, fraud, deceit or misrepresentation

TRCP 199.5(d)

Conduct During the Deposition

- **General Rule** – An oral deposition should be conducted in the same manner as if the testimony were being obtained in court during trial
- Counsel should cooperate and be courteous
- Witness should not be evasive or unduly delay the examination
- Private Conferences – improper except for the purpose of determining whether a privilege exists

TRCP 199.5(e)

Objections

- Permissible objections during a deposition:
 - Objection, leading
 - Objection, form
 - Objection, nonresponsive
- Ethical implications of disregarding rule
 - Repeated, long, and/or argumentative objections constitute sanctionable conduct

199.5(f)

Instructions Not to Answer

- You can instruct the witness not to answer to:
 - Preserve a privilege
 - Comply with a court order or TRCP
 - Protect the witness from abusive questions
 - Where the answer would be misleading
 - When necessary to secure a court ruling
- Instruction should be concise, non-argumentative, non-suggestive

199.5(g)

Good Faith Required

- **General Rule** - Good faith is required of both the attorney taking and defending deposition
- No questions solely to harass or mislead
- No questions for other improper purpose
- No questions without a good faith legal basis
- No objections, instructions not to answer, or suspending the deposition unless there is a good faith factual and legal basis for doing so

Broad Guidelines

What You Should Do

- Review the pertinent Standards & Rules before you schedule or attend the deposition
- When possible, schedule the deposition by agreement
- Educate your witness about the deposition process and all ethical obligations arising from same
- Prepare the witness to testify effectively, efficiently, and without evasion or perjury
- Conduct the deposition professionally and in compliance with the pertinent Standards & Rules
- Take corrective measures if fraud or perjury occurs
- Ask someone if you are not sure what you should do

Broad Guidelines

What You Should Not Do

- Schedule a deposition for an improper purpose
- Obstruct opposing counsel's access to a witness or knowingly designate the wrong witness
- Counsel your witness to give purposefully evasive or untruthful answers
- Suggest the witness give a specific answer in response to an expected question
- Make improper objections or wrongfully instruct the witness not to answer a question
- Improperly coach the witness during the deposition or on a break
- Allow your client to cause you to violate the rules

Examples of Sanctionable Conduct in Depositions



Example 1: *Florida Bar v. Rationer*

During deposition, a dispute arose regarding the opposing counsel's attempt to place an exhibit sticker on the other lawyer's laptop

- Grabbed hand, tried to run around table toward opposing counsel, berated opposing counsel
- "Take a Xanax"
- Leaned over deposition table, lambasted opposing counsel, tore up evidence sticker, flicked it in direction of opposing counsel

Example 1: *Florida Bar v. Ratiner* (Continued)

- Guilty of:
 - Misconduct
 - Disruption of Tribunal
 - Using Means to Embarrass, Delay or Burden a Third Person
 - Conduct Prejudicial to Administration of Justice
- **Sanction:** Public reprimand and a suspension of sixty days, followed by two years' probation with certain conditions

Example 2: *In re Dedefo*

During deposition, a lawyer refused to disclose the basis for the allegations in the complaint based on the work product doctrine

- Work Product Doctrine was wholly inapplicable
- The refusal prevented other parties from investigating claims and preparing defense

Example 2: *In re Dedefo* (Continued)

- **Guilty of:**
 - Failing to Provide Competent Representation
 - Obstructing an Opposing Party's Access to Relevant Evidence
- **Sanction:** Indefinite suspension with no right to petition for reinstatement for a minimum of 6 months

Example 3: *GMAC Bank*

Duty of lawyer confronted with misconduct of own witness during deposition

- The witness refused to answer questions, provided intentionally evasive answers, interposed own objections, interrupted and insulted opposing counsel
- The lawyer failed to intercede and dared opposing counsel to file a motion to compel
- The lawyer's mildly-worded requests for his witness to answer questions and not interrupt were insufficient

Example 3: *GMAC Bank* (Continued)

➤ Guilty of:

- Improperly Advising Deponent to Provide Evasive or Incomplete Answers
- Improperly Advising Deponent to Refuse to Answer
- Impeding, Delaying, or Frustrating the Fair Examination of Deponent

➤ **Sanction:** \$29,322.61 (jointly and severally against the attorney and witness)

Example 4: *Redwood*

Lawyer instructs client not to answer questions, stating only that the questions were intended to harass the client

- Court agreed questions were intended to harass; however, lawyer failed to comply with Rule 30(d)
- Under Rule 30(d), lawyer may halt deposition and ask for a protective order, but may not simply instruct the witness to remain silent

Example 4: *Redwood* (Continued)

- **Guilty of:**
 - Improperly instructing witness not to answer (lawyer had not presented motion for protective order).
- **Sanction:** Public censure for conduct unbecoming a member of the bar

Example 5: *Paramount Communications, Inc.*

Joe Jamail appears *pro hac vice* in Delaware proceeding

- “Don’t ‘Joe’ me, [expletive].”
- Instructs witness not to answer
- “You could gag a maggot off a meat wagon”
- Repeatedly calls into question opposing counsel’s competence

Example 5: *Paramount* (Continued)

➤ Guilty of:

- Improperly instructing witness not to answer certain questions
- Incivility
- Obstructing ability of questioner to elicit testimony

➤ Sanction: Consideration of conduct in event of future *pro hac vice* application by Jamail

Example 6: *Tucker v. Pacific Bell*

During deposition, lawyer made notes on a legal pad and showed it to his witness, refused to permit opposing counsel to question witness about the notes, threw away the notes after deposition, and instructed witness not to answer questions related to standing

Example 6: *Tucker v. Pacific Bell* (Continued)

➤ **Guilty of:**

- Abusing Discovery Process
- Improperly Coaching Witness During her Deposition

➤ **Sanction:** Monetary sanctions – reasonable expenses incurred as a result of attorney's abuse of discovery process

Example 7: *In re Schiff*

During deposition, lawyer was abusive toward opposing counsel

- Unduly Intimidating
- Made vulgar, obscene, sexist epithets toward opposing counsel's anatomy and gender

Example 7: *In re Schiff* (Continued)

- **Sanction:** Public censure, monetary sanctions, warning that repetition of such conduct will warrant suspension
- **Other consequences:** Attorney fired by his law firm