ATLA WINTER CONVENTION 2004
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DEPOSITION ETHICS

You have prepared your clients for deposition by reviewing with them their statements, photographs, medical and other relevant records. You have also prepared them by telling them that they should only answer the questions that they understand and they should answer honestly and truthfully.

However, prior to the deposition, as you prepare yourself, (and you should prepare yourself to understand what the defendant counsel is likely to ask), you ponder your responsibilities in this deposition. Specifically, you ask the following:

I. What is zealous advocacy versus aggressive manipulation?

II. What are the limits?

III. Boundaries--Where can you go and where can't you go?

I. ZEALOUS ADVOCACY VERSUS AGGRESSIVE MANIPULATION

Most states have a Code of Professional Responsibility or Professional Ethics by which we are bound. In Pennsylvania, we have generally adopted the American Bar Association Model Code of Professional Responsibility. The rules of professional conduct in your jurisdiction are the guiding light for your behavior.

In the preamble of the American Bar Association Model Code of Professional Responsibility, it states that :

PREAMBLE: A LAWYER'S RESPONSIBILITIES

> [1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
>
> [2] 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. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

Zealous is defined in the Webster dictionary as "ardently devoted to a purpose; fervent enthusiastic." As an advocate you have a responsibility to enthusiastically represent your client, balanced against the need to represent your client but remembering your role as an officer of the court. Remember you want to be zealous and not a zealot!

II. WHAT ARE THE LIMITS?

There are limitations in the enthusiastic representation of your client during a deposition. You may not obstruct another's access to evidence by behavior that would cause a witness or your client to fail to provide the material having potential discovery value. In depositions, discovery abuse takes place when attorneys interpose themselves and attempt to deflect questions posed or attempt to influence the testimony of their clients by "speaking objections."

A. "SPEAKING OBJECTIONS"

It is not permissible for attorneys to suggest answers to their clients during the course of a deposition. An example of speaking objections that I typically experience at depositions is "Objection! If you recall, you can answer." Generally, a client or any witness would then

say that they do not recall. This is inappropriate for a few reasons, but generally when your client has been instructed in the beginning of the deposition, they have already been told to answer the questions to the best of their recollection and to tell the truth. There is no need to interject this instruction and lead the witness not to answer a question.

Another example is, " Objection, you can answer the question if you know." After that objection the client is likely to say that they do not know. This is unacceptable.

Federal Rule of Civil Procedure 30 (d)(1) prohibits speaking objections. The applicable rule is as follows:

> **Rule 30. Deposition Upon Oral Examination**
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> (d) Schedule and Duration; Motion to Terminate or Limit Examination.
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> (1) Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30 (d)(4).
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> (2) Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.
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> (3) If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the person's responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.
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> (4) At any time during a deposition, on motion of a party or of the deponent and upon showing that the examination is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the

> deponent or party, the court in which the action is pending or th court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action was pending. Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

I practice in Philadelphia, Pennsylvania. In a case that was decided in the federal courts in Philadelphia, the court in Frazier v. Southeastern Pennsylvania Transportation Authority, 161 F.R.D. 309 (E.D. Pa. 1995), held that Rule 30(d)(1) of the Federal Rules of Civil Procedure requires that "lawyers are strictly prohibited from making comments, either on or off the record, which might suggest...a witness' answer." Id. at 315.

If your opponent seeks court intervention and the court finds that a deposition is being conducted in "bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the deponent or party," the court then has the power to make any orders necessary to prevent abuse of the deposition process, including sanctions. Fla.R.Civ.P. 1.310(d). Those sanctions may include that the deposition be retaken and that the offending party, or his counsel, pay the expenses, and imposed sanctions consisting of the expense of retaking the deposition plus those incurred in obtaining the order. See F.R.C.P. 30(d)(3).

B. INSTRUCTING A WITNESS NOT TO ANSWER QUESTIONS AT A DEPOSITION

Another circumstance that I have encountered during depositions is an attorney that will

instruct his client not to answer questions posed at depositions. The general rule is that a party may obtain discovery regarding any non privileged matter that is relevant to the pending action. In my view, Rule 30 (d) would control this situation. Rule 30 (d) clearly says that attorneys may not instruct their clients not to answer a question. The only exception to this rule is when it is necessary to preserve a privilege and/or to enforce a court directed limitation.

At a deposition, F.R.C.P. 30 (c) requires that the testimony will be taken, and it must be taken subject to any objections. Only objections to the form of the question need be made at the deposition to preserve the right to object at the trial. All other objections are preserved until the trial.

If you believe that a defense attorney is crossing over into privilege or other court prohibited territory, then even during the deposition, consider a motion to limit or terminate examination or a motion for a protective order. F.R.C.P. 30 (d)(4) permits such a motion to be filed at any time during the deposition. The point is that only the court can limit testimony if no privilege is involved. It is important to remember to object and limit testimony if a privilege is involved. If a privilege is waived once, it is waived forever and cannot be recovered!

III. BOUNDARIES

Speaking with a Client

You should not continue to interrupt a deposition to speak with your client. The Federal Rules of Civil Procedure state that depositions are to be conducted under the same rules as trial. You cannot stop the trial to talk to your client, likewise this rule applies to a deposition.

Clarification of the Question

I have often seen on both sides of the trial bar, a propensity of counsel, on their own

initiative, to restate the question of the interrogator. If you repeatedly undertake to restate the other attorney's questions and clarify them, suggesting the answer to your client through that "clarification," you risk being sanctioned by the court and establishing a reputation as an obstructionist with the court that may serve to harm you as you continue to practice in the future.

Frivolous Objections

Other inappropriate deposition conduct is frivolous objections. This does not mean that you should never object. Depending on the jurisdiction and the nature of the deposition, that is, if it is a deposition for trial, then you may need to preserve all objections on the record. Appropriate objections according to Mauet, Fundamental of Trial Techniques are as follows:

1. Argumentative
2. Vague and ambiguous
3. Asked and answered
4. Assumes facts not in evidence
5. Compound or misleading question
6. Confusing or unintelligible question
7. Misuse of hypothetical question
8. Calls for a opinion by an incompetent witness
9. Misquoting, mistakes evidence or mischaracterizing a witness' testimony

Certainly there are more examples, and I recommend you to a trial technique handbook such as Mauet, Fundamental of Trial Techniques for additional examples. However, objections should not be used to frustrate the deposition process or to prevent testimony from being taken from your client.

Constant Interruptions

Another inappropriate tactic by some attorneys is constant interruption of the interrogator with unreasonable objections. This is a tactic that is meant to frustrate the attorney, cause her to lose her patience and thought process. Remember that this too is an inappropriate device for which one can be sanctioned by the court. Also, remember if the defense attorney uses a copy of the deposition at trial as an exhibit, it can make you look bad to the jury and you may undermine your good work in the establishment of a relationship with the jury.

CONCLUSION

Remember the court is ultimately responsible for the course of the trial including discovery. If you need help, do not hesitate to go to court to seek the appropriate remedy.