

Restoring Civility to Depositions in an “Anything Goes” World

BY JEREMY R. FEINBERG

As a young lawyer in private practice, I sought and received advice from as many more seasoned lawyers at my firm as I could find. Of all the advice offered, one nugget that has stayed with me was the wisdom, “expect the unexpected in depositions. They’re like the Wild West. *Anything* can happen.” That advice has proved prophetic. Over the course of taking, defending, and attending depositions, and hearing about my colleagues’ experiences, I learned quickly that anything does happen.

When Lawyers Behave Civilly to Solve a Deposition Problem

Not all of the crazy things that happen at depositions involve incivility by lawyers. I was once told of a lawyer who, over the course of the weekend before a Monday morning deposition, had severely injured his back playing golf. For whatever reason, adjournment was not an option. The only way he was going to be able to take the deposition without being in immense pain was by lying flat on his back and staring up at the ceiling. His adversary, the deposition host, accommodated him, even arranging for a yoga mat so that the injured attorney would be more comfortable while conducting the questioning from his unusual vantage point.

I also vividly remember taking a deposition in a multi-party commercial litigation. About an hour into the examination, I was interrupted by counsel for the witness, who told me I should halt my questioning. Shocked, I asked why and saw him point to the court reporter, who had fallen asleep. She obviously was not taking down the questions and answers. We all learned, after we woke her up, that she was on prescription pain medication and that she was having trouble staying awake. (I was relieved to learn that it was neither my questioning nor my tone of voice that had lulled her to sleep!) Despite a coffee break, and encouragement, the problem repeated itself about 30 minutes later. We were fortunate that the court reporter had an audio tape system as a backup, but we remained concerned about how accurate it would be, the need to get the deposition done within the court’s discovery schedule, and the inconvenience of having to start over. So, my adversary and I put our heads together and worked out a plan for what to do with the resulting transcript, and the ground rules for completing the deposition under the un-usual circumstances. In the end, the transcript was, relatively speaking, fine.

In each of these instances, the story had a “happy ending” in that the lawyers worked together courteously and civilly to get some needed discovery done. Although either the host lawyer in the first scenario, or my adversary in the second scenario, could have made use of the unexpected twists to gain some transient advantage or, at a minimum, to prevent his opponent from being at his best, he did not, recognizing it was better for the health of the case and his own reputation, to “play fair.” After all, he too could have been on the wrong end of the problem.

Uncivil Conduct By Lawyers At Depositions

Unfortunately, not all of the twists and turns that happen in depositions are resolved so amicably. In fact, very often, the unusual deposition conduct reported in judicial decisions involves the very opposite: cases in which one lawyer behaves uncivilly, precisely to gain an advantage, cause delay, or even make a case go away by his deliberate intimidation. A couple of reported decisions from New York State Supreme Court illustrate some permutations of the problem, and also show the lack of patience and tolerance courts have for this type of conduct when it comes to their attention.

The first such decision is *Laddcapp Value Partners LP v. Lowenstein Sandler P.C.*, 18 misc. 3d 1130(A), 2007 WL 4901555 (Sup. Ct. ny Co. 2007). There, the deposing counsel (a woman) sought relief from the court under CPLR 3104, i.e., the appointment of a special referee to attend and supervise further deposition sessions in the case. According to the court, counsel (male) for a third-party defendant – over the course of three days – had repeatedly directed the witness not to answer. These directions “were, on many occasions, followed by inappropriate, insulting and derogatory remarks against [deposing counsel] concerning her gender, marital status, and competence.” *Id.* at *1. To illustrate precisely the behavior that was complained of, the court quoted liberally from the transcript, noting that the witness’s counsel had referred to deposing counsel as “dear,” and “hon,” had told the deposing counsel that she had a “cute little thing going on,” and with the witness’s assistance, had inquired into her marital status, asking why she was not wearing a wedding ring. *Id.* at 2-3. As can be seen from the other sections of the transcript the court quoted, the witness’s counsel had also made repeated speaking objections, demeaned counsel’s skill at asking questions, and generally disrupted the proceedings. *Id.* at 3-5.

Analyzing the facts before it, the court held that the witness’s counsel had violated both the Uniform Trial Court rules’ bar on speaking objections (22 NYCRR 221.1), and the “Duty of Civility and gender-neutral Conduct.” In support of this duty, the court cited not only the Practice Commentaries to the CPLR but also past cases in which attorneys had been sanctioned for similar conduct. *Id.* at *5-6. In light of these holdings, and the fact that the deposing counsel had not sought sanctions, only appointment of a special referee of future depositions, the court granted the relief requested, noting, “[i]f such objectionable conduct has merited sanctions, which [deposing counsel] does not even seek in this instance, surely guarding against future objectionable conduct by appointing a referee to essentially monitor [witness’s counsel] would not constitute improvident exercise of this court’s discretion.” *Id.* at 6.

One case that *Laddcapp* heavily relied on was an earlier decision of Supreme Court, New York County, *Principe v. Assay Partners*, 154 misc. 2d 702 (Sup. Ct. NY Co. 1992). As reflected in the *Principe* decision, one participant in the deposition, a male lawyer, said to another (a female attorney): “I don’t have to talk to you, little lady”; “[t]ell that little mouse over there to pipe down”; “[w]hat do you know, young girl!”; “[b]e quiet, little girl”; and “[g]o away, little girl.” These comments, according to the court’s review of the transcript, were joined by a number of dismissive and disparaging hand gestures. *Id.* at 704. The court noted that the justification for these comments and gestures, offered by the lawyer who had engaged in them, was “name-calling.” *Id.*

The *Principe* court deconstructed the lawyer’s behavior, recognizing that when judges, in the past, had engaged in similar, but less offensive behavior, public discipline had followed. The court reasoned that the type of discriminatory conduct at issue was “inherently and palpably adverse to the goals of justice and the legal profession.” *Id.* at 705. Comparing the behavior complained of to the standards for Part 130 sanctions (22 NYCRR 130), the court held that “[g]iven the rules applicable to professional conduct, any reasonable attorney must be held to be well aware of the need for civility, to avoid abusive and

discriminatory conduct. . . . and to generally abide by the norms of accepted practice.” Accordingly, it held that sanctions, for “frivolous conduct” were appropriate in the circumstances. *Principe*, 155 misc. 2d. at 708-709.

In *Laddcapp* and *Principe*, lawyers were sanctioned by the court after they engaged in abusive and uncivil behavior during depositions. But these cases do not reflect the only potential result of incivility in depositions. At least one reported decision publicly disciplined a lawyer who engaged in similar conduct and threatened him with suspension from the practice of law. *In re Schiff*, 190 A.D.2d 293 (1st Dep’t 1993).

In *Schiff*, while representing the plaintiff at a deposition during a personal injury action, the respondent attorney, in the words of the Appellate Division, “was unduly intimidating and abusive toward the defendant’s counsel, and he directed vulgar, obscene and sexist epithets toward her anatomy and gender.” *Id.* at 294. The court upheld the Departmental Disciplinary Committee’s recommended sanction of a public censure, rather than more severe punishment, recognizing that there were some meaningful mitigating circumstances. The court flagged the relative youth (age 28) and inexperience of the respondent attorney. It noted also that he had apologized to the target of his insults both at the disciplinary hearing and in writing, that the court had imposed monetary sanctions, and that shortly after the incident, the attorney had been fired by his law firm. *Id.* Though it affirmed the sanction of public censure, the court strongly admonished the attorney, stating, “respondent is put on notice that a repetition of such conduct will almost certainly warrant a suspension from practice” *Id.*

Uncivil Conduct By Clients At Depositions

So far, I have only discussed examples involving lawyer misconduct at depositions (and of courts that imposed sanctions for the misconduct). But what about cases in which it’s the client who become obstructive or abusive, or who otherwise hinders the deposition? At least one court has had occasion to examine this issue. The court held that, under the unusual circumstances presented, both the client/witness and the lawyer should be sanctioned for the client’s behavior – but for somewhat different reasons.

In *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182 (E.D.PA. 2008), the parties litigated what easily could have been a run-of-the-mill commercial dispute over improperly underwritten mortgage loans. But at the deposition of defendant HTFC’s owner and CEO, the case became fodder for headlines. The court foreshadowed its analysis of the witness’s and the lawyer’s conduct with the statement, “[b]ecause few depositions warrant sanctions more than this one, [the witness’s] conduct merits an extended discussion.” *Id.* at 185. In the following paragraphs, the court extensively quoted from the transcript, detailing how the witness had engaged in what the opinion called “[h]ostile, uncivil and vulgar conduct,” primarily in the form of responses to questions using variants of a common four-letter expletive beginning with “F.”

I will not quote the language here, but readers should know, before consulting that opinion, that the court spent much of the decision recounting the precise ways in which the witness had used inappropriate language, going so far as to drop a footnote acknowledging that although distasteful, it was necessary to repeat verbatim what the witness had said. *Id.* at 185 N.8. Suffice to say, the court noted that the witness had used multiple variations of that common expletive 73 times during the course of the deposition, and

by contrast, in a case that was essentially a contractual dispute, had used the term “contract” only 14 times. *Id.* at 187.

The court also detailed in several paragraphs the deponent’s “willful exploitation of the discovery process,” by engaging in such conduct as interposing his own objections, repeatedly interrupting his questioning, and even “proudly express[ing] his intent to frustrate his examination.” *Id.* Moreover, the court noted, the witness “often refused to answer questions, and when he did answer questions, provided intentionally uncooperative and long-winded answers to straightforward questions.” *Id.*

All in all, and after considering and rejecting several defenses that the witness offered for his conduct, the court held that it had ample basis to impose sanctions under 30(d)(2) and 37(a) of the Federal rules of Civil Procedure. Combining the fees incurred by deposing counsel in making the motion with the costs of wasted time flowing from the witness’s interference with the deposition, the court awarded over \$29,000 in sanctions, based solely on the witness’s conduct. *Id.* at 193-194.

The GMAC court then took the step of examining the conduct of witness’s lawyers under the same two Federal rules. (in a footnote, the court recognized that the witness had two lawyers in the room, but concluded that only the deponent’s lead counsel, who was attorney at record in the case, should be the subject of possible sanctions. *Id.* at 194 n.14). Summarizing that attorney’s conduct, the court held that counsel had “persistently failed to intercede and correct [the witness’s] violations of the Federal rules.” *Id.* at 194-95. indeed, the court reasoned, counsel had “sat idly by” as the “abusive, obstructive and evasive” actions of his client had occurred – and, when counsel did speak, “he either incorrectly directed the witness not to answer, dared opposing counsel to file a motion to compel, or even joined in [the witness’s] conduct.” *Id.* at 195 (footnotes omitted). The court rejected the lawyer’s defense that he had made sufficient efforts to curb his client’s conduct. Instead, the court said, the lawyer had limited himself to “mildly worded requests,” that had the effect of “emboldening [the client] to further flout the procedural rules” and interfere with the deposition. *Id.*

In this regard, the court acknowledged that “any attorney can be blindsided by a recalcitrant client who engages in unexpected sanctionable conduct at a deposition.” But, the court concluded, this did not let the attorney off the hook: “[a]n 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.* In this particular instance, the court held that the witness’s counsel had “ample notice” of his client’s intent to frustrate the deposition, as the client’s “first outburst and unilateral interruption of the deposition occurred a mere six minutes after the deposition had begun.” *Id.* at 196. Despite his knowledge, the court pointed out, counsel had allowed the deposition to proceed for 12 hours over two days, “much of which was an unmitigated waste of time and resources.” *Id.*

After considering and rejecting other defenses interposed by the lawyer, the court ultimately concluded that it should impose sanctions against counsel as well, making the attorney jointly and severally liable for the same sanctions previously imposed against the client. The court reasoned, among other things, that “[t]he nature of [client’s] misconduct was so severe and pervasive, and his violations of the Federal rules of Civil Procedure so frequent and blatant, that any reasonable attorney representing [client] would have intervened to curb [client’s] misconduct.” Because counsel had allowed that behavior to persist, and build upon itself, the court reasoned that it should equate counsel’s silence with endorsement and ratification of the client’s conduct. This was the functional equivalent, under the applicable Federal rules,

of advising the client to engage in that conduct. *Id.* at 197-98. The court stopped short, however, of referring the lawyer to the appropriate disciplinary committee, despite noting that his conduct had violated several of the Pennsylvania rules of Professional Conduct, “because the sanctions imposed pursuant to the Federal rules of Civil Procedure are sufficient to achieve the remedial purpose of the rules of Professional Conduct.” *Id.* at 198 n.23.

The story is still unfolding. A recent news item reflects that the disciplined lawyer is seeking reconsideration of the sanctions as to him, and to withdraw as counsel because of the conflict that the sanctions have created between him and his client. See *Shannon P. Duffy, Lawyer Hopes F-Word Means ‘Forgiven,’ Asks Court to Lift Sanctions*, *The Legal intelligencer*, may 7, 2008, available at <http://www.law.com/jsp/article.jsp?id=1202421180963> (last visited may 8, 2008). Time will tell how receptive the court will be to these arguments.

In the meantime, a reasonable lawyer may well ask how best to counsel a client such as the one whose conduct was described in such detail by the GMAC court. I want to offer two suggestions for the beleaguered practitioner in a similar situation.

First, it is imperative to keep a record of what you did in the face of client’s conduct, and how and why you did it. The best way to do so, of course, is to make whatever statements you can on the record, so the court reporter can make an accurate transcription of what happened. Obviously, it is difficult to criticize your own witness on the record, and there may be a need to have a privileged communication to keep a witness in line. To the extent possible, having a transcript can help in at least two ways. First, it can educate the court. The GMAC court rejected counsel’s argument that he had adequately intervened, at least in part, because counsel had averred that most of his efforts had taken place off the record. *Id.* at 195. There can be no doubt that it is easier to show what happened if you have a transcript to prove it. Similarly, there is a danger that undocumented attempts to rein in a client will be viewed as fictional. Second, the transcript may represent a great way to show the witness, or, if necessary, the witness’s boss or general counsel, exactly what the court will see and react to, should the witness’s behavior be the subject of a motion to compel. The very witness who is cavalier or even aggressive in the heat of the deposition may not, without a transcript to review (and/or a colleague to explain himself to) realize just how bad the behavior looks.

My other thought goes towards how to counsel the difficult witness. Lawyers who are veterans of many depositions know that not all witnesses are created equal, nor do they respond to the same efforts to moderate their behavior in the same ways. But for most witnesses and clients, the “bottom line” is a great motivating force. Explaining to the witness that the results of uncivil behavior will be more motion practice, more lawyer hours, and therefore, a much larger legal bill, may be precisely the message to convey. This is to say nothing of the loss of reputation and credibility that may follow both the witness and those aligned with him before opposing counsel and even the court. This itself can lead to longer, more protracted and more expensive litigation.

There is some hope that in New York deposition misconduct is on the decline, with the relatively new amendments to the Uniform Trial Court rules addressing deposition conduct (see 22 NYCRR 221.1 – 221.3), and the Standards of Civility (available at <http://www.nycourts.gov/jipl/standardsofcivility.pdf> [last visited may 8, 2008]). But counsel should be aware that there are potential consequences when such

uncivil behavior occurs, either because the lawyer is uncivil or abusive to opposing counsel, or because the lawyer does nothing (or not enough) to correct his witness's conduct during the deposition.

Jeremy R. Feinberg is the Statewide Special Counsel for Ethics for the New York Unified Court System. He would like to thank his colleagues Laura Smith and Erin Devaney and his friend Elizabeth Rotenberg-Schwartz for their insight and suggestions that immeasurably improved this article. The views expressed in this article are those of the author only and are not those of the Office of Court Administration or Unified Court System.