

## Standard 18 – Deposition Conduct

by Francis J. Carney

**Editors’ Note:** *A member of the Supreme Court’s Advisory Committee on Professionalism will discuss one of the new Standards of Professionalism and Civility with each issue of the Bar Journal. The opinions expressed are those of the member and not necessarily those of the Advisory Committee.*

No area of practice generates more complaints of unprofessional behavior than depositions, and there was little dispute among the members of the Advisory Committee on the need to address it. We did so in Standard 18:

*During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. “Speaking objections” designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.*

An obvious question is why create Standard 18 when we already have U.R.Civ.P. 30(d)(1):

*Any objection to evidence during a deposition shall 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 on evidence directed by the court, or to present a motion under paragraph (4).*

The Advisory Committee agreed that the 1999 amendments to Rule 30 seem to have helped to reduce obstreperous deposition behavior, but also considered that so much reported uncivil or unprofessional conduct arises in depositions, that the principles were worth repeating. The Committee members also agreed that the violation of a rule of procedure is not necessarily uncivil or unprofessional, and that a separate professionalism standard

was therefore justified.

The general idea, expressed in Rule 30(c) and many published decisions, is that a deposition should be conducted as if the witness were testifying at trial, but with no judge present and with no need to make objections except for those required by Rule 32(c)(3). At trial, you don’t get to confer with the witness before he answers a pending question, and you shouldn’t be allowed to do so in a deposition. At trial, you don’t get to break up the flow of cross examination with spurious objections; you don’t get to take a timeout to coach your witness; you don’t get to suggest answers in your objections. There’s no reason a deposition should proceed any differently.

As unpleasant as it seems, there is no such thing as “defending” a deposition under the rules, the case law, or the professionalism standards. You, as deponent’s counsel, don’t get to defend anything, except against abusive, harassing, or overreaching tactics by examining counsel. You ARE a potted plant unless you have a legitimate objection. That’s not necessarily all bad – you might as well know how your witnesses are going to hold up under cross examination, because they’re not going to have you to protect them on the stand.

We considered making the “deposition” standard more detailed as in the Florida Bar’s *Guidelines for Professional Conduct* (containing twelve admonitions about deposition practice) or in many of the other published guidelines, but we chose brevity over completeness, seeking a set of basic standards that could be put down on a single page or two. In retrospect, I wonder if

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we should have said something about examining counsel's behavior, such as this from the Florida Bar's *Guidelines*:

Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment. Counsel should not conduct questioning in a manner intended to harass the witness, such as by repeating questions after they have been answered, by raising the questioner's voice, or by appearing angry at the witness.

Florida Bar Guideline E(7).

Examining counsel can be jackasses too. But a standard could run on forever in attempting to describe every instance of incivility or unprofessionalism without covering it all. For example, I doubt that we could have anticipated the behavior in a recent New York case where the examining lawyer was sanctioned for barking like a dog at an unfriendly witness during a deposition. *Levine v. Angstrom*, NEW YORK LAW JOURNAL, May 17, 2004. Do we really need a standard for that?

The "aspirational" or "mandatory" nature of the guidelines was a source of controversy in the Advisory Committee from the start. There are those members who felt that generating another set of rules, aspirational or not, was unproductive when we already have a set of civil rules that aren't strictly enforced; why, these members say, would we be so foolish as to hope that "aspirational" standards will be followed when "mandatory" rules are ignored? They, obviously, were on the losing side of the debate.

To better make for uniform and aggressive resolution of discovery disputes, the Advisory Committee recommended that a Discovery Commissioner be appointed for the Third District, at least on a trial basis. The discovery commissioner program has been an outstanding success in Las Vegas, and we used it as our model. Our hope was to get a judicial officer dedicated to dealing with discovery disputes, one who would take the time to get to the bottom of the claims, one who would publish discovery opinions online for all to read, and one who would not be shy of awarding sanctions. Unfortunately, that recommendation is unlikely to ever see the light of day given the lack of funding.

The Advisory Committee also strongly recommended that judges get actively involved in dealing with professionalism issues, particularly in discovery disputes. Judges, listen up: this is not a problem that is going to be solved by asking lawyers to "please

get along." Obnoxious "pit-bull" litigators exist because judges allow them to exist, and clients think they want to use them. Judges can change that.

As to the need for Professionalism Standards at all, whether aspirational or mandatory, the opinions on the Advisory Committee range from those who hope standards to have some salutary effect, to those of a more pessimistic bent, like me, who see professionalism codes as a well-intentioned waste of effort, except perhaps as a teaching tool for new lawyers. In this one lawyer's view, if the judiciary is really serious about changing lawyer behavior, it's going to have to start making some very public – and very expensive – examples. The time for wrist-taps and admonitions by footnote is over. As one federal judge chided his judicial colleagues:

Judges are wont to decry the lack of civility and cooperation amongst members of the trial bar. The judiciary, however, is not without blame. For some reason, too many judges have no trouble restraining their enthusiasm for resolving discovery disputes (this puts it mildly). Obviously, if a party wants to obstruct and delay, the inability to get a decision on a discovery dispute assists the obstructor. Members of the bench should keep in mind that the word "judge" is a verb as well as a noun.

*Harp v. City*, 161 F.R.D. 398, 402 (E.D. Ark. 1995)

In fairness, the judges can't handle this alone. Each of us needs to make a personal commitment to do better, if only for the long-term good of a profession under relentless attack, only some of it deserved. We all have our "moments," but we apologize, learn from them, and move on. We dishonor the profession by condoning those lawyers who confuse aggression with competence, equate civility with weakness, and elevate personal bitterness into professional virtue. True, civil litigation isn't designed to be an enjoyable experience for parties, but the malignant toads of our profession have unnecessarily driven too many fine people out of this career. We on the Advisory Committee have tried to make a fair, if admittedly halting, start at fixing this.