

# ATTORNEY PROFESSIONALISM FORUM

## To the Forum:

I have always been curious if there are any specific ethical considerations that one needs to comply with when conducting or defending depositions. I know that court rules exist in New York which specify how an attorney is supposed to conduct or defend a deposition, but I have found that a number of my adversaries do not follow these rules. In addition, I have noticed various examples of bad behavior by attorneys in the context of depositions. What rules do I need to be aware of and what behaviors should I avoid the next time I am either conducting or defending a deposition?

Sincerely,

Conscious Counsel

## Dear Conscious Counsel:

There are two types of attorneys one will find in a deposition; the ones who know the rules and the ones who do not. Unfortunately, it is the ones who do not know the rules that often become fodder for judges intent on putting the bar on notice that obstructionist and uncivil conduct will not be tolerated in the deposition forum.

Part 221 of the Uniform Rules for the New York State Trial Courts sets forth the Uniform Rules for the Conduct of Depositions (Part 221). The Advisory Committee on Civil Practice's purpose behind the enactment of Part 221 was to "ensure that depositions [were] conducted as swiftly and efficiently as possible and in an atmosphere of civility and professional decorum." See 2006 Report of the Advisory Comm. on Civil Practice, p. 50, available at [http://www.nycourts.gov/ip/judiciarysllegislative/CivilPractice\\_06.pdf](http://www.nycourts.gov/ip/judiciarysllegislative/CivilPractice_06.pdf).

Part 221 states as follows:

### § 221.1 Objections at Depositions

(a) Objections in general. No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at

a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.

(b) Speaking objections restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

### § 221.2 Refusal to answer when objection is made

A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

### § 221.3 Communication with the deponent

An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth

in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

Many experienced counsel often bring a copy of Part 221 to depositions so that it is readily available should the need arise. Although the tactic of having the rule with you at a deposition is not a novel idea (see Patrick M. Connors and Thomas F. Gleason, *New York Practice; Uniform Rules for Conduct of Depositions*, N.Y.L.J., Sept. 18, 2006, at 3), Part 221 is just seven years old. Therefore, it is important to continually spread the word that attorneys must abide by this important regulation, which was intended to promote good behavior and curtail conduct that left unchecked interferes with depositions.

New York judges have never been shy to call out attorneys for behaving badly in depositions. One court even went so far as to give a brief yet pointed analysis of how poor attorney behavior reflects badly on the entire legal profession:

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In this court's view, this sort of gratuitous, sardonic and wholly inappropriate comment at a deposition is precisely the type of conduct that served to enhance the deterioration of professionalism and civility in civil litigation that has unfortunately become a hallmark of contemporary trial practice.

See *Adams v. Rizzo*, 13 Misc. 3d 1235(A), 831 N.Y.S.2d 351 (Sup. Ct., Onondaga Co. 2006), n.26.

Some notable decisions from the 1990s still to this day serve as cautionary tales for attorneys conducting and defending depositions. In *Principe v. Assay Partners*, 154 Misc. 2d 702 (Sup. Ct., N.Y. Co. 1992), a male attorney defending a deposition was sanctioned for calling the opposing female attorney conducting a deposition such choice words as "little lady," "young girl," and "little girl." *Id.* at 704. In *In re Schiff*, 190 A.D.2d 293 (1st Dep't 1993), the First Department held that public censure of an attorney was appropriate where the attorney engaged in conduct directed at a female opposing counsel during a deposition that was "unduly intimidating and abusive toward the defendant's counsel, [where] he directed vulgar, obscene and sexist epithets toward her anatomy and gender." *Id.* at 294. Another example is *Corsini v. U-Haul Int'l*, 212 A.D.2d 288 (1st Dep't 1995), where the First Department dismissed a case because of bad behavior displayed by the plaintiff (who also happened to be an attorney), examples of which included calling opposing counsel during a deposition "scummy," "slimy" and a "scared little man" practicing "in the sewer." *Id.* at 289. More recently, the court in *Cioffi v. Habberstad*, 22 Misc. 3d 839 (Sup. Ct., Nassau Co. 2008), relying on Part 221, chose to sanction counsel on both sides of the action to varying degrees as a result of their "unprofessional, condescending, rude, insulting and obstructive" conduct in depositions. *Id.* at 845.

Outside of New York, two cases highlighting poor behavior by attorneys during depositions stand out. In *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 51-56 (Del.

1994), a nationally known attorney was found to have conducted himself during a deposition in an "extraordinarily rude, uncivil, and vulgar" manner where such conduct "demonstrate[d] such an astonishing lack of professionalism and civility that it [was] worthy of special note . . . as a lesson for the future - a lesson of conduct not to be tolerated or repeated." While some of the words used by the offending attorney are not suitable for print in this *Journal* we can offer one: it probably would not be a good idea to repeat his suggestion that opposing counsel "could gag a maggot off a meat wagon." In another case, an attorney became well-known in the blogosphere when he was found to have engaged in "deplorable behavior" by scheduling depositions at the local Dunkin' Donuts, conducting those depositions dressed in a t-shirt and shorts, and playing video games and making inappropriate drawings of opposing counsel during deposition testimony. See *Bedoya v. Aventura Limousine & Transportation Service, Inc.*, 861 F. Supp. 2d 1346, 1370 (S.D. Fla. 2012).

The New York Rules of Professional Conduct (the RPC) do not expressly state how lawyers should behave at a deposition. However, certain provisions of both the RPC and the American Bar Association's Model Rules of Professional Conduct (the Model Rules) offer guidance as to the ethical considerations that come into play when conducting or defending depositions. For example, it has been suggested that a lawyer defending a deposition who "interpose[s] the statement 'if you know' before the [witness] answers a question, thereby signaling that the witness should deny any knowledge or recollection" may violate Rule 3.5 of the Model Rules, "which prohibits conduct that disrupts a proceeding." See Arthur D. Berger, *When the Other Lawyer Is a Bully; Choosing the Professional High Road Goes Beyond Manners. It's Also the Ethical Thing to Do*, N.Y.L.J., Dec. 12, 2005 (LEXIS, NY Library, NYLAWJ File).

Rule 8.4(g) of the RPC, which prohibits unlawful discrimination "in the

practice of law, including . . . in determining conditions of employment," is also relevant here. As noted by Professor Roy Simon, "some courts have construed the rule also to prohibit racist and sexist comments in the practice of law during trials or depositions." See Simon's *New York Rules of Professional Conduct Annotated* at 1607 (2013 ed.). Professor Simon noted that in *Laddcap Value Partners, LP v. Lowenstein Sandler P.C.*, 18 Misc. 3d 1130(A) (Sup. Ct., N.Y. Co. Dec. 5, 2007), plaintiff's counsel's conduct during a deposition, which included, amongst other things, referring to a female opposing counsel as "hon" or "girl" and questioning her marital status constituted "contumacious, abusive, and strident conduct" in violation of former Disciplinary Rule 1-102(A)(6) (the precursor to the current Rule 8.4(g) of the RPC), resulted in the court ordering a referee to supervise further depositions in the case. *Id.* at \*3. The *Laddcap* decision also relied on Part 221 to support its finding that court-supervised discovery was necessary because of the behavior of the offending attorney in the case. *Id.* at \*10-\*12.

We also suggest that lawyers take a careful look at the Standards of Civility (the Standards) (see 22 N.Y.C.R.R. § 1200, App. A) which contain several provisions about proper deposition behavior. Part VII of the Standards states that "[i]n depositions . . . lawyers should conduct themselves with dignity and refrain from engaging in acts of rudeness and disrespect." Part VII of the Standards offers a series of guidelines which are meant to encourage lawyers to act appropriately in depositions. These include:

- A. Lawyers should not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.
- B. Lawyers should advise their clients and witnesses of the proper conduct expected of them in court, at depositions and at conferences, and, to the best of their ability, prevent clients and witnesses from causing disorder or disruption.

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C. A lawyer should not obstruct questioning during a deposition or object to deposition questions unless necessary.

D. Lawyers should ask only those questions they reasonably believe are necessary for the prosecution or defense of an action. Lawyers should refrain from asking repetitive or argumentative questions and from making self-serving statements.

See Standards Part VII.

It is our view that taking the “high road” when confronted with an opposing counsel who acts inappropriately (and *not* engaging in behavior similar to that of the attorneys mentioned here) is always the best course of action. We believe that if more attorneys are knowledgeable of the rules and procedures governing deposition conduct, then disputes will be resolved more efficiently. Unfortunately, bad behavior by attorneys is a constant problem not only for the courts, but for the bar as well. In the end, such conduct only serves to hurt the profession as a whole.

Sincerely,  
The Forum by  
Vincent J. Syracuse, Esq. and  
Matthew R. Maron, Esq.,  
Tannenbaum Helpert  
Syracuse & Hirschtritt LLP

## QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am a first-year associate in a large international law firm. Over the first few months of my employment, I have received extensive training concerning the available technological resources (including email, discovery software and document systems) which I will be using in my day-to-day practice. The partners have explained to the first-year associates time and time again that we are ethically obligated to understand how technologies are utilized in connection with a given representation and that we should be intimately familiar in the usage of those technologies.

My uncle, Lou Ludite, has been a solo practitioner for almost his entire legal career spanning nearly 40 years. For the most part, his only office staff has consisted of one secretary and one paralegal. He’s never hired an associate (in his words, associates were “utterly useless”). During family holiday gatherings while I was in law school, I would share with him everything I was learning about electronic research tools and applications which I would need to master once I began practicing law. He would always tell me, “Ned, all this technology is hogwash. Real lawyers do not need email, and this whole thing with these hand held devices, they look like something that

Kirk, Spock and McCoy were playing with on *Star Trek*. It’s all unnecessary.”

Last week, Uncle Lou told me that Ted Techno, an attorney from a firm with whom he was working on a case, was repeatedly using emails and text messages to set up conferences to discuss strategy for an upcoming trial set to occur in three weeks. Uncle Lou boasted that he informed Ted that he doesn’t read or write emails and his “policy” was to have his secretary look at his emails “no more than twice a week” and for her alone to “occasionally” reply to emails intended for Lou. Uncle Lou also told me that he had decided to take a vacation in Bali and didn’t plan on returning stateside until the evening before the trial. He also said he told Ted Techno that he will be “completely unreachable” while he is away and “not even his secretary would be able to get a hold of him for any reason.”

I have been taught that good communication and responsiveness are essential practice skills for all lawyers and that one cannot practice law without using email. I very fond of my Uncle Lou and think that I should speak with him. I know that I am a novice in our profession especially when compared to my uncle, which is why I would appreciate some guidance from The Forum about whether he is behaving in a professional and ethical manner.

Sincerely,  
Concerned Nephew

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