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Deposition Misconduct: Rules, Risks, and Remedies

> **"[T]estimony of witnesses who were kicked by plaintiff's attorney while the witnesses were responding to defendants' attorney's inquiry . . . should not be considered as evidence . . . because there is no way of knowing what the testimony would have been if the witnesses had been left alone."**
> **~*West v. Irwin*, E.D. Wash. 2006**[1]

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Last year, the ABA issued a comprehensive ethics opinion discussing witness preparation generally. Formal Opinion 508 (2023), which is available on the ABA website, surveys the topic broadly along a spectrum from preparation before testimony to lawyer conduct when a witness is actually testifying. In this column, we'll address a narrower, but more common, subset of deposition misconduct that the ABA opinion touches on: improper "coaching" during depositions and improper objections intended to impede the questioner. With the former, a lawyer attempts to improperly "coach" a witness through "speaking" objections that suggest the "correct" answer[2] or signals an answer to a witness through "old fashioned" facial gestures[3] or kicks under the table[4] to newer technological-enabled techniques such as off-camera whispers during "remote" depositions.[5] With the latter, a lawyer attempts to impede legitimate questioning by repetitive "form" objections[6] or extended colloquies[7]—particularly when the deposition concerned is subject to a time limit.[8] With both, we'll look at the rules

involved, the risks to the lawyer engaging the conduct, and the remedies available to opposing counsel.

Before we do, four caveats are in order.

First, by focusing on these two areas, I definitely do not imply that these are the only issues that can arise in either depositions or discovery more broadly. RPC 4.4(a) prohibits a lawyer from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." Washington RPC 4.4(a) is based on the corresponding ABA Model Rule and the latest version of the ABA's Annotated Model Rules of Professional Conduct catalogs a wide variety of "bad behavior" during depositions and other discovery.[9] Washington's appellate courts have also long spoken to the need to "play fair" in discovery generally and with witness testimony in particular.[10]

Second, we'll focus on depositions rather than hearings or trials. Although similar conduct can occur in court, the presence of a judge often lessens the probability of similar mischief or subjects the lawyer involved to immediate judicial intervention if misconduct occurs.[11]

Third, we'll focus on civil proceedings. Although depositions can be taken in limited circumstances in criminal cases,[12] they are usually central to civil cases.

Finally, we'll focus on conduct that occurs during the deposition itself rather than before or after. That said, improper conduct preceding and following depositions is equally fraught.[13]

Rules

The rules governing deposition conduct are a blend of procedural and professional regulations. They address both improper coaching and improperly impeding the questioner.

Washington Superior Court Civil Rules 30(h)(2) and (5) speak to, respectively, objections and private consultations:

> *Objections*. Only objections which are not reserved for time of trial by these rules or which are based on privileges or raised to questions seeking information beyond the scope of discovery may be made during the course of the deposition. All objections shall be concise and must not suggest or coach answers from the deponent. Argumentative interruptions by counsel shall not be permitted.
>
> *Private Consultation*. Except where agreed to, attorneys shall not privately confer with deponents during the deposition between a question and an answer except for the purpose of determining the existence of privilege. Conferences with attorneys during normal

> recesses and at adjournment are permissible unless prohibited by the court.

Federal Rule of Civil Procedure 30(c)(2) is largely to the same effect, noting that "[a]n objection must be stated concisely in a nonargumentative and nonsuggestive manner."

Washington RPC 3.4(a) and (c), in turn, address both improperly impeding another party's legitimate access to evidence and the failure to follow court rules:

> A lawyer shall not:
>
> (a) unlawfully obstruct another party's access to evidence . . . A lawyer shall not counsel or assist another person to do any such act;
>
> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists[.]

Deposition misconduct may also trigger RPC 8.4(d), which prohibits "conduct that is prejudicial to the administration of justice[.]"[14] Depending on the circumstances, RPC 3.3(a), which addresses candor to a tribunal, may also apply if the misconduct results in false testimony.[15]

Risks

Deposition misconduct risks both court-imposed sanctions and regulatory discipline. Although not mutually exclusive, the risk of sanctions usually precedes disciplinary proceedings for two reasons.

First, the misconduct occurred in an ongoing proceeding. The deposition involved may be central to the case. Even if not, the misconduct if repeated may occur in other depositions that potentially involve critical evidence. Either way, the party on the receiving end of the misconduct will ordinarily have a strong incentive to raise it with the court. In Washington state court, sanctions are available under Civil Rule 37(a) in the context of a motion to compel and Civil Rule 37(b) if the conduct violates an order already issued by the court. Available sanctions under Civil Rule 37(a)(4) are monetary: "the reasonable expenses incurred in obtaining the order, including attorney fees[.]" Civil Rule 37(a)(2) also incorporates by reference the range of direct controls on discovery conduct included in Civil Rule 26(c) governing protective orders. Sanctions under Civil Rule 37(b) are potentially broader if the deponent is a party and the attorney's misconduct is attributed to the party—ranging from adverse inferences to (in the extreme) dismissal in addition to fees.[16] Although rare, disqualification may also

be considered under the court's inherent authority to control the conduct of counsel appearing before it.[17] Similar sanctions are available in federal court.[18]

Second, while a bar grievance is not precluded, that can be a long process and bar investigations are ordinarily deferred until ongoing litigation has concluded.[19] That said, lawyers have been disciplined for conduct that was earlier sanctioned by courts.[20]

Gladden v. State illustrates the risk of improper coaching.[21] A lawyer in Spokane whispered answers to his client while off-camera during a Zoom deposition. The court sanctioned the lawyer several thousand dollars. By the time the misconduct in *Gladden* came before the court, the parties had reached a settlement. By contrast, in a similar case from federal court in Massachusetts—*Barksdale School Portraits, LLC v. Williams*—the parties were still litigating when the misconduct surfaced.[22] The court disqualified the lawyer, referred him for professional discipline, and held that the whispered exchange—which had been recorded on Zoom—could be played to the jury.

Teck Metals, Ltd. v. London Market Insurance, in turn, involved impeding a deposition through repetitive form objections and related colloquies.[23] The federal court in Spokane found that the defending lawyer's "form" objections "after virtually every question serve no purpose other than to disrupt the orderly

flow of the deposition."[24] The court also noted derisively the many accompanying colloquies offered under the guise of "educating opposing counsel as to how to cure the question."[25] The court ordered that the witness be re-deposed and left the door open for further sanctions if lawyer continued the misconduct.

Lawyer misconduct that prejudices the client involved potentially raises further consequences beyond sanctions and regulatory discipline. If a client's case is harmed by the lawyer's misconduct—such as the order in *Barksdale* that the lawyer's recorded whispered answers could be played to the jury—it is not hard to imagine that a legal malpractice claim may follow. The misconduct may also create a disqualifying conflict for the lawyer if the client's case has been harmed by the lawyer's misconduct.[26]

Remedies

Formal remedies are available under the rules noted earlier, typically framed as motions to compel, motions for protective orders, or outright motions for sanctions depending on the circumstances. Formal motion practice, however, has inherent practical limitations short of the most egregious circumstances. Courts have noted the difficulty of gauging lawyer misconduct on the "cold record" of a deposition transcript, with the federal court in Spokane, for example, observing in a case involving speaking objections: "The Court is mindful that the

written transcript does not provide the Court with the ability to gauge the passage of time, the tone, the inflection, the attitude or demeanor of any particular speaker."[27] The same court in a different case acknowledged the occasional judicial reluctance to wade into discovery disputes: "Suffice it to say that this motion is the bane of any trial judge's existence and is often the most difficult to sort through and rule upon."[28]

Practical alternatives to formal relief will vary with the circumstances and the personalities involved. Because conferral is often required by local court rule as a predicate to a motion anyway, simply talking to the other side has no downside.[29] Offering a standing objection or a stipulation that all objections other than privilege are reserved may provide a practical solution by taking away the claimed reason for the other lawyer to interject.[30] Although more expensive, video recording a potentially problematic deposition may implicitly "clean up" an offender's behavior or at least provide a more vivid record if it does not.[31]

ABOUT THE AUTHOR

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[1] *West v. Irwin*, No. 04-CV-5012-LRS, E.D. Wash., Motion to Strike Evidence, filed March 28, 2006, at 3, denied as moot following order granting defendants summary judgment at 2006 WL 898104 at *2 (E.D. Wash. Apr. 4, 2006) (unpublished).

[2] *See generally* Karl B. Tegland and Elizabeth A. Turner, 5 Wash. Prac., Evidence Law and Practice § 103.8 (6th ed. 2023) (defining and discussing "speaking objections").

[3] *See, e.g., Hernandez v. City of Vancouver*, 657 Fed. Appx. 685, 686-87 (9th Cir. 2016) (attorney sanctioned by federal court in Tacoma for making faces and other gestures in apparent attempt to coach witnesses).

[4] *See, e.g., West v. Irwin*, *supra*.

[5] *See, e.g., Gladden v. State*, No. 20-2-00806-32, Spokane County Sup. Ct. Order Granting Defendants' Motion for Sanctions, July 8, 2021 (unpublished) (lawyer who whispered answers to witness off-camera during Zoom deposition sanctioned).

[6] *See, e.g., Teck Metals, Ltd. v. London Market Insurance*, 2010 WL 11507595 at *6 (E.D. Wash. Oct. 20, 2010) (unpublished) (repetitive "form" objections).

[7] *Id*. (comments by counsel).

[8] *See, e.g.,* King County Super. Ct. L.C.R. 26(b)(3) (generally limiting depositions to seven hours); Fed. R. Civ. P. 30(d)(1) (same).

[9] ABA, *Annotated Model Rules of Professional Conduct* at 532-33 (10th ed. 2023).

[10] *See generally Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 336-357, 858 P.2d 1054 (1993) (discussing sanctions for improperly withholding discoverable information); *see, e.g., Magana v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2010) (affirming $8 million default judgment as discovery sanction); *Engstrom v. Goodman*, 166 Wn. App. 905, 271 P.3d 959 (2012) (affirming trial court order striking improperly obtained fact witness declaration); *Matter of Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996) (discussing sanctions for improper contact with opposing expert).

[11] *See, e.g., Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012) (lawyer sanctioned for repeated speaking objections during trial); *In re Abele*, 184 Wn.2d 1, 358 P.3d 371 (2015) (lawyer sanctioned and later disciplined for misconduct during hearing).

[12] *See* CrR 4.6 (depositions in criminal cases); Fed. R. Crim. P. 15 (same).

[13] *See, e.g., Regan v. State Dept. of Licensing*, 130 Wn. App. 39, 48, 59-60, 121 P.3d 731 (2005) (noting lack of credibility when witness improperly coached before deposition); *Malmskold v. Libby, McNeil & Libby*, 31 F. Supp. 958, 960 (W.D. Wash. 1940) (noting lack of credibility when witness made substantive changes on correction sheet after deposition that appeared to be the result of coaching). Outright witness tampering is prohibited by both state (RCW 9A.72.120) and federal (18 U.S.C. § 1512) law. *See also In re Simmons*, 110 Wn.2d 925, 757 P.2d 519 (1988) (lawyer disbarred for giving whiskey to witness to dissuade testimony); *Ota v. Wakazuru*, 2023 WL 1962363 (Wn. App. Feb. 13, 2023) (unpublished) (discussing sanctions for asserted improper offer of financial incentives for deposition testimony).

[14] Although involving a hearing rather than a deposition, a lawyer was disciplined under both RPCs 3.4 and 8.4 for disruptive conduct in *In re Abele*, *supra*, 184 Wn.2d 1.

[15] *See* RPC 3.3, cmt. 1 (noting that RPC 3.3 extends to "an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition." The Washington RPCs noted in this section are based on their ABA Model Rule counterparts.

[16] *See generally* Philip Talmadge, Emmelyn Hart-Biberfeld, and Peter Lohnes, *When Counsel Screws Up: The Imposition and Calculation of Attorney Fees as Sanctions*, 33 Seattle U. L. Rev. 437 (2010) (surveying Washington sanction law).

[17] *See generally Andren v. Dake*, 14 Wn. App.2d 296, 320, 472 P.3d 1013 (2020) (discussing courts' inherent authority to sanction attorney conduct); *see also Ota v. Wakazuru*, *supra*, 2023 WL 1962363 at *9-*11 (discussing disqualification as potential sanction under court's inherent authority in case involving alleged witness tampering).

[18] *See* Fed. R. Civ. P. 30(d)(2) ("The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates fair examination of a deponent."); Fed. R. Civ. P. 37(b) (discovery sanctions for failure to comply with court order); *see, e.g., Barksdale School Portraits, LLC v. Williams*, 339 F.R.D. 341 (D. Mass. 2021) (sanctioning and disqualifying attorney who whispered answers to client during Zoom deposition).

[19] *See* ELC 5.3(d)(1)(A); *see generally In re Gillingham*, 126 Wn.2d 454, 458 n.3, 896 P.2d 656 (1995) (explaining the rationale for deferring investigations).

[20] *See, e.g., In re Abele, supra*, 184 Wn.2d 1 (lawyer disciplined for conduct that was sanctioned by the court in the underlying proceeding).

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[22] *Barksdale School Portraits, LLC v. Williams*, *supra*, 339 F.R.D. 341.

[23] *Teck Metals, Ltd. v. London Market Insurance*, *supra*, 2010 WL 11507595.

[24] *Id*. at *6.

[25] *Id*.

[26] *See In re Marriage of Wixom and Wixom*, 182 Wn. App. 881, 332 P.3d 1063 (2014) (Court of Appeals disqualified lawyer *sua sponte* who tried to shift blame for sanctions to client).

[27] *Jarvis v. Janney*, 2012 WL 13093882 (E.D. Wash. Mar. 27, 2012) (unpublished) at *2.

[28] *Teck Metals, Ltd. v. London Market Insurance*, *supra*, 2010 WL11507595 at *5.

[29] *See, e.g. Microsoft Corporation v. Immersion Corporation*, 2008 WL 11343452 (W.D. Wash. May 13, 2008) (unpublished) (denying motion for protective order on speaking objections due to failure to confer under local rule).

[30] *See, e.g., Goodman v. First Unum Life Insurance Company*, 2022 WL 2063995 (W.D. Wash. June 8, 2022) (unpublished) at *1 (standing objection).

[31] *See, e.g., Keenan v. BNSF Railway Company*, 2008 WL 1710100 (W.D. Wash. Apr. 8, 2008) (unpublished) at *2 (court reviewed video to determine whether improper coaching occurred).