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The Do's and Don'ts of Depositions
(Hot Tips to Keep Yourself Out of the Advance Sheets)[i]

I. Do Know the Rules

SCRCP 30 **Depositions Upon Oral Examination** and Family Court Rule 25 (Formal depositions shall be conducted only by stipulation or court order). Pay particular attention to 30(j) **Conduct During Depositions** because violations of this rule subject attorney and/or client to sanctions or disciplinary action. It is important to read this rule before taking or attending a deposition.

(j)(1): Deposing counsel **shall** instruct the witness to ask deposing counsel, rather than his attorney, for clarifications, definition, explanations, questions, etc. The witness **shall** abide by these instructions.

(j)(2): This section tells you what objections are **preserved** and what objections are **not preserved**.

(j)(3): Counsel **shall not** instruct a witness not to answer a question except under very limited circumstances addressed more fully in section IV of this material. Further, you have an **affirmative duty** to inform the witness to answer the question.

(j)(4): This rule is probably the most abused. "**Counsel shall not make objections or statements which might suggest an answer to a witness. Counsel's objections shall be stated concisely and in a non-argumentative and non-suggestive manner, stating the basis of the objection and nothing more.**"

(j)(5): You are not allowed to talk to your client off the record during breaks or recesses regarding the substance of the deposition, except for the limited purpose of

possibly asserting a privilege. Best practice here is not to go anywhere alone with your client during the deposition.

(j)(6): You have the right, as deposing counsel, to question the witness about any witness coaching that might have occurred during any conferences that might have occurred.

(j)(7): Any conferences between attorney and client during the deposition shall be noted on the record along with the purpose and outcome of any conference.

(j)(8): This section governs the use of documents at a deposition. It is important to note the time frame in this rule more fully discussed below in section V(4) of this material.

(j)(9): **Violation of this section can subject you to sanctions**.

See also In re Anonymous Member of South Carolina Bar, 346 S.C. 177, 188, 552 S.E.2d 10, 15 (2001):

> **"A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." Rule 407, SCACR pmbl. In depositions attorneys may face the greatest conflict between their obligations to the court and opposing counsel under Rule 3.4,6 and their obligations to their own client under Rule 1.3.7 Since depositions almost always occur without direct judicial supervision, lawyers must regulate themselves during this highly critical stage of litigation."**

II. Don't Forget the Important Preliminary Questions (Competent Representation).

Q: Have you ever had your deposition taken before?

Q: You understand you are under oath?

Q: And that means sworn to tell the truth?

Q: And even though we are in an informal setting here in this office, your answers have the same force and effect as if we were in a courtroom with a judge?

Q: Are you prepared to answer my questions today?

Q: There's nothing that will prevent you from giving me your full attention?

Q: You aren't taking any medications or suffering from any illness that will prevent you from understanding my questions or answering them fully?

Q: If you don't understand one of my questions, will you let me know?

Many of these questions will help you prevent a deponent from backpedaling at trial or later in the deposition when they say "I didn't understand your question at that time" or "I didn't realize that I was under oath or what that meant."

III. Don't Make Speaking Objections (30(j)(4)) or Allow Opposing Counsel to Control your Deposition with Speaking Objections

A speaking objection is one that has the barely concealed purpose of communicating to the witness how he or she should answer and is, in effect, witness coaching. Speaking objections are meant to coach a witness, interrupt you and the flow of your deposition, and even harass you.

SCRCP 30(j)(4) states that, "Counsel shall not make objections or statements which might suggest an answer to a witness. Counsel's objections shall be stated concisely and in a non-argumentative and non-suggestive manner, stating the basis of the objection and nothing more."

SCRCP 30(j)(2) specifies that all objections are preserved (which means they do not have to be made at the deposition) except the following objections which must be made at the time of the deposition to preserve them:

1. Errors with regard to the manner of taking a deposition (let's say at a Duncan Donuts—more on that later); objections to the form of the question or

answers, objections to the conduct of a witness or any other objections which might be cured if raised.

2. An objection necessary to assert a privilege (attorney-client; work product; trade secret protection; constitutional privileges);
3. An objection to enforce a court order which has limited the admissibility of certain evidence;
4. An objection made to present a motion to terminate or limit the deposition.
5. See also Rule 32(3) for errors and irregularities occurring at depositions and how to handle such objections.

Remember that you and opposing counsel can agree to preserve ALL objections if you want to or you can preserve only some. Waiving or preserving objections for trial favors the questioning attorney at the deposition; but remember, as the defending attorney, you can object at trial if the objections were preserved. **Make sure your stipulation with regard to waiving or preserving objections is on the record**.

Examples of objections as to form that can be made are:

1. Leading or suggestive;
2. Ambiguous or uncertain;
3. Compound;
4. Argumentative.

Also see attached excerpt from the **South Carolina Family Lawyer's Toolkit**, *Objections to the Form of the Question and Objections to the Response*. The proper

time to make objections is important. The objection should be made after the question but before the answer.

Improper Objections include suggestive statements such as:

"He can't possibly know that."

"If you know."

"If you can remember."

"The document speaks for itself."

"That question has been asked already and the witness said no."

"That question is vague. What do you mean by adultery? Are you talking about sexual intercourse?"

"Lack of foundation for that question as to whether my client has ever actually had sex with her boyfriend when they were alone in that hotel room."

Any recitation of facts that the lawyer wants to insert.

Q. [Plaintiffs' counsel]: If you had been involved in

[the decedent's] care on March 22, would you expect

there to be an entry in the chart?

[Defense Counsel]: Objection to the form of the question.

Just to remind you, we don't know if this is the whole chart.

. . .

Q. [Plaintiffs' counsel]: Would there have been also an

attending cardiologist likewise on call?

A. Yes.

Q. [Plaintiffs' counsel]: Was that Dr. Zarich that day?

A. Yes.

[Defense Counsel]: Do you know that? Be careful of that because I don't think he was on call that day, but I could be wrong.

Q. [Plaintiffs' counsel]: What was your practice back then, when you had patients come in for catheterization as to how long they would be in the hospital?

[Defense Counsel]: Objection to the form. And Mr. Faile didn't come in for a catheterization

Even objections such as "hearsay" or "relevance," as those are preserved for trial, are often made simply to stop the flow of information from the witness to deposing counsel. How do you handle these? 1) Try, "Stop right there. You've made your objection. Anything else is a speaking objection, and there aren't going to be any speaking objections today." 2) Have the rules handy to read into the record and warn on the record that the attorney's conduct is prohibited and may be subject to sanctions. 3) Recess the deposition to get the Court's involvement.

What if opposing counsel tries to control your deposition and tell you what to do: "Please rephrase the question." Ignore this and do not rephrase the question otherwise you have just agreed with opposing counsel and given him/her the upper hand. The only time you need to rephrase is if the deponent asks you to.

IV. Don't Improperly Instruct a Deponent Not to Answer

The ONLY time an attorney is permitted to instruct a witness not to answer is to preserve a privilege, enforce a protective order previously issued by the Court, or if that counsel intends to present a motion under Rule 30(d), SCRCP for a protective order.

See SCRCP Rule 30(j)(3). Note, per SCRCP30(j)(3), counsel has only five business days from the suspension or termination of the deposition to file the required motion. "Failure to timely file such a motion will constitute waiver of the objection, and the deposition may be reconvened."

V. Do Be Prepared (Competent Representation)

1. Know your deponent and your opponent. From your written discovery questions (if you have done those first) you should know if the deponent has ever given a deposition before and if so, you should have already reviewed that transcript. Research all social media sites for deponent information. Search the deponent on the internet. Do a SLED check prior to the deposition. Review all written material exchanged in discovery. Reviewing bank statements ahead of time can give you a glimpse into this person's daily life—eating out, alcohol purchases, food purchases, match.com, discretionary spending, and travel habits. Is this deponent an aggressive person or arrogant or will they provide simple truthful responses? This information will help you prepare your questions. Ask your colleagues about your opponent's conduct during depositions if you are not personally familiar with opposing counsel.
2. Know what you want to ask the witness. Hopefully, your deposition is not the only discovery tool you plan to use in the case. Your deposition should be used to prove or disprove essential elements in your case. You cannot do this unless you already know the essential elements you must prove or disprove; nor can you do this if you do not have a targeted objective for taking the deposition.

Think about the essential elements of your case. If these were your issues, what would you need to prove your case or disprove the other's case: adultery; habitual drunkenness; hiding assets; alimony; equitable division; ability to pay attorney's fees; primary caretaker; or poor parental judgment? Your deposition questions should not be cookie cutter deposition questions. The best deposition questions are short—five to seven words limited to one specific concept. The deponent will have a very hard time at trial saying "I didn't understand the question when you asked it at my deposition."

3. Listen. Listen. Listen. Do not get so stuck on your list of questions that you fail to listen to the testimony of your deponent. The unscripted follow up questions to an answer are usually the best questions asked. This will also enable you to get information without asking a question. For example, if you hesitate a few seconds between questions, the deponent may continue speaking. Also, "listening" means making eye contact with the deponent, engaging the deponent with your own body language, letting the deponent know you care enough to listen to their answers. It is also important to see a deponent's body language and demeanor because a judge will be watching it too at your trial. Your voice and body language can either help or hinder you at the deposition. If you put someone on the defensive, you are not going to get the information you need.
4. Know what documents you need. Pre-mark your exhibits if possible. Also see Rule 30(j)(8). You **shall** provide to opposing counsel a copy of all documents shown to the deponent during the deposition. You must do this either before

the deposition begins or at the same time you are showing the document to the witness. If you provide the document at least 2 days before the deposition, then the deponent and his attorney do not have the right to break and discuss the documents privately before the deponent answers the questions. If you do not give 2 days' notice, then opposing counsel and his client have the right to meet privately to discuss the documents.

5. Discuss reading and signing with your witness ahead of the deposition and know what rights you're waiving if you waive reading and signing.

VI. Don't Always Act Like a Lawyer (but remember your ethics)

1. Using big, legal words in your questions can kill your deposition. As an example, you know the grounds for divorce is called "habitual drunkenness" but using this term in your questions will probably not get you any information.

   Bad Example:

   Question: Ms. Wife, are you habitually drunk?

   Answer: No, Mr. Lawyer, I am NOT habitually drunk.

   Better Example:

   Question: Ms. Wife, do you enjoy wine?

   A: Yes.

   Q: Do you have a wine of choice? A favorite?

   A. Yes. I like Malbec.

   Q. What type of Malbec do you like? Do you have favorite brand?

A. Yes. My favorite is Alamos Malbec, 2011. (Now you can check the alcohol content 12% or 14.5% and get an idea about how much it will take to be intoxicated).

Q. How often do you enjoy a glass?

A. A few times a week.

Q. How many glasses do you have at each sitting?

A. 2-3. (Now you can calculate how many bottles she drinks in a week).

Q. How many bottles do you enjoy in a week?

A. 5-6.

Q. Do you ever drive after enjoying your 2-3 glasses?

Q. Do you enjoy these glasses of wine when the children are present?

Q. Do you feel a buzz when you drink these glasses of wine?

Q. Do you ever drink more than 2-3 glasses at a time?

(Tip: You should already have asked in written discovery about any prescribed medications and done your research about whether alcohol should be avoided while taking the medication).

Q. *Isn't it true Ms. Wife that the warning on your medication says that you should avoid alcoholic beverages because it can intensify the effect of your medication?*

A. Yes.

Q. And you are prescribed a daily dose of this medication correct?

A. Yes.

Q. So, can I assume that you are abiding by your dosage instructions?

A. Yes.

Q. Now, on these 2-3 days of the week that you enjoy your 2-3 glasses of Malbec, your medication is in your system, isn't that right?

A. Yes.

Q. Isn't it therefore possible that your 2-3 glasses of wine affects you in a different way, then someone who is not taking your medication?

And now you can start to narrow down whether or not you can make your case for habitual drunkenness by using simple terms and asking questions about the symptoms your client might have told you—slurring speech in front of the children; passing out; etc.

VII. Know the Different Questioning Techniques

There are different types of questions you can ask in a deposition. Choose your type carefully.

1. If you are trying to get information, use open-ended questions. Open-ended questions are the best questions to use at a deposition. Open-ended questions not only elicit information for you, but there is rarely an opportunity for the witness to "outsmart" you at a deposition. "Outsmarting" an attorney usually happens under cross which usually happens at trial. Open-ended questions only provide opportunities for a witness to evade, mislead or even lie which is not outsmarting you, but rather ends up getting the deponent into a deeper hole with more risk of getting caught committing perjury.

2. If you are trying to pin down a deponent's answer or particular fact, use leading questions. Leading questions should not be phrased in the negative "It was a blue car, is that not correct?" The yes or no from the witness will be a confusing answer to try to explain later to the trial judge. "It was a blue car, correct?" or "It was a blue car?" Simple, direct and unambiguous is the goal.
3. Ask questions that do not lead to an answer of "I don't understand your question."
4. If you make a mistake with a question, simply state "strike that" or "I'm going to start over." That way your corrected question will start on a new transcript line.

VIII. Don't Forget that the Transcript Will be Devoid of Potentially Important Information

There are times during a deposition that you may need to ask that the record reflect something. In a recent deposition, the deponent was yelling so loudly that others in the office could hear. This would be a time to say "Let the record reflect that the deponent is yelling loudly." At another deposition, the deponent left the room angry and never returned. This would be a time to say "Let the record reflect that the deponent left the room abruptly and has no intention of returning." Also, "let the record reflect opposing counsel is coaching his client by passing him notes on his notepad."

IX. Know How to Handle Difficult Deponents

It is imperative that you know how to handle the uncooperative, lying, forgetful, running of the mouth, withholding information deponent so that you do not ever stoop to their level. The minute you stoop to their level, you have lost your effectiveness and might as well stop the deposition. You also probably violated an ethical rule and subjected yourself to discipline (and it was all recorded). Here are some tips[1]:

1. Forgetful Deponent: I don't remember or I don't recall will be the party line of this deponent. If the deponent does not remember, this response is truthful. But if the deponent does remember, the deponent is lying to you. If you think the deponent is credible, you can try to refresh the deponent's memory with documents or by telling the deponent what others might have already testified to. You can ask the deponent if there is anything that might refresh his or her memory. You can also challenge the deponent's credibility by getting the deponent to establish a pattern that the only thing he or she doesn't remember is the most critical fact surrounding the dispute or issue. You can also point out through questions that the witness can remember a fact long before the one you are asking about.

   Q. What were you doing the night that your 5 year old child called 911 because she was scared at home alone?

   A. I don't remember.

   Q. Do you remember what time your child called 911?

   A. I don't remember, maybe 1:30 in the morning.

[1] Some of these tips were taken from T. Evan Shaeffer's *Deposition Checklists and Strategies*

Q. If the 911 transcript showed the call being made at 3:30 in the morning, would you agree that was the time?

A. Yes.

Q. At 3:30 that morning, were you working?

A. I don't remember.

Q. Were you at the movies?

A. I don't remember.

Q. Were you at a restaurant?

A. I don't remember.

Q. Isn't it true you were at your boyfriend's house?

A. I don't remember.

Q. Would the private investigator's report help you remember where you were at 3:30 a.m. on the morning in question?

One thing to remember with the forgetful deponent is that you can move to strike them from a witness list since the witness did not remember. You can also present un-contradicted testimony about the incident at trial because you will object to the deponent testifying about the incident at trial based on the deponent's sworn testimony that he/she "can't remember" the incident.

2. Talkative Deponent: Generally, a talkative deponent will help you. But sometimes, a talkative deponent can be refusing to answer your leading question with a yes or no answer; can be adding information to an answer that you did not ask for because the deponent believes the information is damaging to your case; or the witness

might be talkative about irrelevant information. You will need to repeat this as many times as it takes "Thank you but that's not the question I asked. The question was . . ." Depending on whether or not you waived certain objections, you can move to strike the answer, "I move to strike the answer as non-responsive. Here is the question again . . ." Tip: One good thing about this kind of witness is that they will usually tell you what their defense at trial will be to your line of questioning. This will give you plenty of time to prepare your cross by anticipating the defense.

3. Withholding Deponent: This is the deponent who has been told by their lawyer to only ask the question asked and not volunteer any information. Often times you will only get "yes or no" or a few words from these deponents. You will need to simply follow up with prodding but simple questions such as "and then what happened" or "and then what did he say?"
4. Uncooperative Deponent: This is the deponent who is rude and flippant. You should initially ignore the behavior and never act rude or flippant toward the deponent. Sometimes this diffuses the deponent's behavior. You could take a break and speak with opposing counsel asking him to take control of his client. Most opposing attorneys will do this because they are embarrassed by their client's behavior. This is especially true if you have a good working relationship with your colleagues. Another tactic is to tell the deponent that their behavior would not be appropriate in the courtroom in front of a judge and it is therefore not appropriate at the deposition. You can also tell the deponent that if they do not show the people in the room the proper respect, you have the right to stop the deposition and

seek the intervention of the Court and that you will ask for fees or sanctions to be imposed for the improper conduct. Finally, if you know your deponent is going to be difficult ahead of time, arrange for the deposition to be videotaped. Most people won't act up when they know they are being recorded.

5. Lying Deponent: Sometimes, you know a deponent is lying about the incident. Let's say you want to ask about an incident involving domestic violence or an incident where a parent drank too much. Ask them to tell you about the incident in reverse. Also, remember to break down your questions into as few words as possible with only one fact per question. This will prevent the lie or make the lie obvious.
6. Wiggling Out of it Deponent: Here is an example of a wiggling-out–of-it witness. These simple facts are your nuggets for impeachment and they must be clean in the deposition transcript.

Q*. You were convicted of a DUI correct?*

A. Yes, but I had to plead guilty because my attorney told me to. I wasn't drunk.

Q. I'm going to ask again. You were convicted of a DUI correct?

Another Example:

Q. You were arrested for child endangerment because you left your 2 year old daughter in the car alone, correct?

A. Yes, but I only ran into the nail salon for 10 minutes.

Q. I'm going to ask again. You were arrested for child endangerment because you left your 2 year old daughter in the car alone correct?

Another Example:

Q. You were alone with Mr. Boyfriend in the hotel room from midnight until 3:00 a.m. correct?

A. Yes, but we didn't do anything. We were sleeping.

Q. I'm going to ask again. You were alone with Mr. Boyfriend in the hotel room from midnight until 3:00 a.m. correct?

You get the point.

X. Don't Make It Personal

In re Hammer, 395 S.C. 385, 718 S.E.2d 442 (2011):

The South Carolina Supreme Court suspended an attorney for six months in 2011 in part due to his conduct during depositions he took in a case representing himself *pro se*. The underlying suspension matter involved a criminal complaint brought by the attorney's ex-wife and the attorneys' subsequent conduct during a civil suit:

> ...after the criminal charges were dismissed, respondent filed a *pro se* action against the City of Columbia alleging false arrest. In the course of representing himself in the matter, respondent subpoenaed Witness A, a former neighbor and long-time friend of both he and his former wife, to give a deposition. Witness A was not a witness to any of the matters out of which the criminal charges against respondent arose; however, Witness A had provided an affidavit in support of respondent's former wife during the divorce proceeding. Respondent also subpoenaed two other former neighbors who had supported his former wife during the divorce proceedings. Respondent admits he subpoenaed the three witnesses to take their depositions as he believed that they might have information regarding the allegations of criminal wrongdoings made by his former wife. **Respondent fails to explain why the testimony of any of these witnesses was pertinent to his suit against the City**.

Over the course of two days, respondent deposed Witness A for over five hours, including breaks. Respondent admits he asked improper questions during the deposition. **He further admits that there were times when he talked over the deponent and there were instances where he did not let Witness A finish his answer.**

In addition, respondent admits he asked a number of improper questions of Witness A. **In particular, he asked Witness A about his sexual orientation and whether he had been tested for HIV. He also asked Witness A whether he had Alzheimer's Disease when the witness' recollection was incomplete.** Respondent admits the question should not have been asked in this fashion.

Mr. Hammer told the Court that he regretted and apologized for his questions during the deposition and claimed that the stress of his divorce and of deposing a former friend who had sided with his former wife in their divorce caused his emotions to get the better of him. The Court suspended Mr. Hammer for six months but note that he was again placed in interim suspension just 21 days after he was reinstated. The Court was not pleased with Mr. Hammer noticing a deposition of a witness that did not appear pertinent to the case. Remember that we cannot notice depositions just to embarrass or harass a witness. The Court also appeared to dislike that Mr. Hammer talked over a deponent or did not let a deponent finish his answer.

XI. Do Be Respectful

Don't forget that the Civility Code requires us to "pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications" to opposing parties and their counsel. *See* http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2003-10-22-03 for the oath.

"We remind the Bar that although a deposition is not conducted in a courtroom in the presence of a judge, it is nonetheless a judicial setting. Because there is no presiding authority, it is even more incumbent upon attorneys to conduct themselves in a professional and civil manner during a deposition." *Matter of Golden*, 329 S.C. 335, 343, 496 S.E.2d 619, 623 (1998).

XII. Don't Be Vulgar or Make Racist or Sexist Remarks

In *Florida Bar v. Martocci*, 791 So. 2d 1074 (Fla. 2001), a male lawyer demeaned opposing female counsel belittling and humiliating her, with comments that she did not know the law or the rules of procedure, that she needed to go back to law school, that she was a "stupid idiot," a "bush leaguer," that depositions were not conducted according to "girl's rules," and that her client was a "nut case." That male lawyer received a reprimand and probation. *Id.* at 1074-76.

In *In re Monaghan*, N. Y. Sup. Ct. App. Div. 2d Dept No. 2001-06446 (June 3, 2002), the court censured a male lawyer for berating an African-American female attorney for allegedly mispronouncing "especially" and "established." Monaghan was censured for his "disruptive conduct during deposition." He was criticized by the court for "race-based abuse of opposing counsel" in violation of New York's standards of professional conduct.

In *Principe v. Assay Partners*, 286 N.Y.S. 2d 182 (N.Y. 1992), a male lawyer said to a colleague, "I don't have to talk to you little lady"; "Be quiet, little girl"; "Go away, little girl"; "What do you know, young girl?"; and "Tell that little mouse over there to pipe down." There, the Court held that an attorney who displays such a lack of civility, good manners and common courtesy "tarnishes the image of the legal profession." Furthermore, the Court reasoned that "an attorney's conduct . . . that projects offensive

and invidious discriminatory distinctions . . . based on race . . . or gender . . . is especially offensive." *Id.* at 185.

XIII. And, Under the Category of "It Should Go Without Saying"

Do not curse. Do not use profanity. Do not use four letter words. Do not use words that I could not type here without using some *&^#. Do not curse!

Do not show such utter disrespect for the process that you do things that should go without saying. Here are some examples from research that show some attorney's utter disrespect for the profession. These events are **true**.

MR. JAMAIL: He's not going to answer that. Certify it. I'm going to shut it down if you don't go to your next question.
MR. JOHNSTON: No. Joe, Joe—
MR. JAMAIL: Don't "Joe" me, asshole. You can ask some questions, but get off of that. I'm tired of you. You could gag a maggot off a meat wagon. Now, we've helped you every way we can.
MR. JOHNSTON: Let's just take it easy.
MR. JAMAIL: No, we're not going to take it easy. Get done with this.
. . . .
MR. JOHNSTON: Are you finished?

MR. JAMAIL: I may be and you may be. Now, you want to sit here and talk to me, fine. This deposition is going to be over with. You don't know what you're doing. Obviously someone wrote out a long outline of stuff for you to ask. You have no concept of what you're doing. Now, I've tolerated you for three hours. If you've got another question, get on with it. This is going to stop one hour from now, period. Go.

Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 52 (Del. 1994). The court noted in this case that although busy and overburdened, the courts are "but a phone call away" and would be responsive to the "plight of a party and its counsel bearing the brunt of such misconduct."

Two Florida attorneys were reported to the Court by opposing counsel for "systematically engag[ing] in inappropriate and offensive behavior." The attorneys were disqualified from the case for their "deplorable behavior" which started by noticing the deposition to be taken at Dunkin' Donuts, showing up in flip-flops and shorts, playing angry birds during the deposition and drawing pictures of male genitalia to describe opposing counsel and passing it between themselves and their client. *See* http://abovethelaw.com/2012/05/things-that-might-get-you-thrown-off-a-case-drawing-dick-pics-during-depositions-at-dunkin-donuts/.

A partner in a law firm told me about one of the other partners who loved to raise his voice and rail away at the deponent when there was no video or audio

recording. He particularly loves to bully witnesses in this manner when the other side did not spend the money for anything more than a court reporter and keyboard. **As noted earlier, if you know opposing counsel has this reputation, you may want to have the deposition audio recorded if not videotaped.**

Another attorney reported to me that while deposing a particularly rebellious and insolent teenager, the attorney said to her "**so your mother's rules are just bullshit right**?" When the case came up for trial, the *pro se* parent could not wait to tell the court how abusive the attorney was for cursing at her daughter. The court sustained the attorney's objection to the introduction of the deposition question on the grounds of relevance. The moral however is that when the attorney read the transcript it made the attorney look as though he had lost control of the situation by using that word and it made the attorney feel unprofessional.

Also, do not order your paralegal to take a deposition for you. *In re Gagne*, 396 S.C. 247, 249-50, 721 S.E.2d 781 (2011) ("Respondent had directed his paralegal to be present at the deposition on his behalf. The paralegal failed to disclose to Complainant C that he was not an attorney prior to the deposition. Complainant C began the deposition and questioned respondent's client for approximately thirty (30) minutes before, in response to a direct question, the paralegal revealed he was not an attorney. Complainant C immediately ceased the deposition.")

And, do not hit anyone at a deposition. In *In re Lovelace*, 395 S.C. 146, 147, 716 S.E.2d 919 (2011), our Court took a dim view of an attorney slapping a witness:

> Respondent represented the plaintiff in a civil suit. On April 2, 2008, the deposition of the plaintiff had just concluded and respondent was preparing to take a second deposition. The deponent in the second case was a defendant in the lawsuit. Respondent asked if anyone wanted to take a break. The defendant, who was seated across the table from respondent, said something to the effect of "No, let's get this crap over with." Respondent then stood up and pointed at the defendant's face and warned him not to speak to him in that manner. The defendant stood up and told respondent not to point his finger at him. Respondent then slapped the defendant in the face.

Note, after a 90 day, definite suspension, Mr. Lovelace has returned to the practice of law per *In Re Lovelace*, 396 S.C. 287, 721 S.E.2d 429 (2012).

For the women, it should go without saying to make sure you are not wearing something that is see through or plunges too deeply.

MS. B[redacted]: I don't believe I have any other questions.

THE WITNESS: I just have one other thing for the record. Just because I haven't been through a deposition like this. And I appreciate that you've been -- tried to keep it under control, but I have to tell you, I don't think I've ever been in a deposition where I found an attorney's attire to be inappropriate. And I just think that has to be on the record. I try to come to depositions in appropriate attire. That's not appropriate. That's my only comment.

MS. B[redacted]: How I dress, really you don't need to put that on the record nor do you need to make comments on that. I can wear whatever I would like to wear. I find it inappropriate that you're even commenting on that to be quite honest.

THE WITNESS: I'm glad you think so, but I've just never been in a deposition like this.

MS. B[redacted]: I'm trying to be nice and professional to you, but I'm really offended by your comment.

THE WITNESS: Do me a favor, wear it to court.

MS. B[redacted]: I wear whatever I want to to court, in my office, in my conference room --

THE WITNESS: Perfect.

MS. B[redacted]: -- out, or to work. I don't need a retained expert by Life Care Centers of America to tell me how to dress, sir. So with all due respect, I don't appreciate your comments at all. You're here, you're being paid for your time to answer questions, and not comment on counsel's attire.

So with that said, have a great dinner.

THE WITNESS: Thank you.

MS. B[redacted]: You're welcome.

MS. G[redacted]: Respectfully, I think he's just referring to the fact that he can see your breasts.

MS. B[redacted]: Ms. G[redacted], you can't see my breasts.

MS. G[redacted]: Well, I can. And that was what he was referring to.

THE WITNESS: I'm done for the day.

(The deposition concluded at 5:18 p.m.)

There is also some authority for courts imposing serious sanctions on a lawyer who does not restrain his client from behaving abusively during a deposition. It is improper to sit idly by and allow your client to act out at depositions. Do not allow

profanity, rude or sarcastic behavior and get "on the record" attempting to control your client and restrain the behavior.

XIV. Do Involve the Court When Necessary

A. Solutions:

SCRCP 30(j)(1) commands that, "At the beginning of each deposition, deposing counsel shall instruct the witness to ask deposing counsel, rather than the witness' own counsel, for clarifications, definitions, or explanations of any words, questions or documents presented during the course of the deposition. The witness shall abide by these instructions."

Keep Rule 30 with you at each deposition. Usually reminding misbehaving counsel of the Rules on the record is sufficient to stop the bad behavior.

If that doesn't work, recess or adjourn the deposition to file the appropriate motions or attempt to get a judge on the phone.

See attached a sample Motion for Sanctions that has excellent research and examples of witness coaching and speaking objections.

XV. Don't be Petty

When you do involve the court, don't be petty. State the objectionable conduct and the Rule that prohibits such conduct and ask for affirmative relief or face public humiliation and possibly far worse sanctions:

United States Magistrate Peggy A. Leen entered a scathing order scolding misbehaving lawyers. (Reported at: http://www.dayontorts.com/cat--misconduct-by-lawyers-during-deposition.html):

"The exchanges related in excruciating, repetitive detail in the moving and responsive papers and their attachments were painful to read. **If I was an elementary school teacher instead of a judge I would require both counsel to write the following clearly established legal rules on a blackboard 500 times:**

I will not make speaking, coaching, suggestive objections which violate Rule 30(c)(2). I am an experienced lawyer and know that objections must be concise, non-argumentative and non-suggestive. I understand that the purpose of a deposition is to find out what the witness thinks, saw, heard or did. I know that lawyers are not supposed to coach or change the witness's own words to form a legally convenient record. I know I am prohibited from frustrating or impeding the fair examination of a deponent during the deposition. I know that constant objections and unnecessary remarks are unwarranted and frustrate opposing counsel's right to fair examination. I know that speaking objections such as "if you remember," "if you know," "don't guess," "you've answered the question," and "do you understand the question" are designed to coach the witness and are improper. I also know that counsel's interjection that he or she does not understand the question is not a proper objection, and that if a witness needs clarification of a question, the witness may ask for the clarification.

Although these papers, and the conduct they relate, make me feel like a school marm scolding little boys, I am the judge whose duty it is to decide this motion. Accordingly, Mr. Kossack and Mr. Cannon are admonished for engaging in conduct which I know you know violates Rule 30(c)(2). You are better men and better lawyers than the conduct in which you have engaged illustrates."

XVI. Post Deposition

Do not overlook the importance of your post deposition analysis. Within 24-48 hours of your deposition, use your notes or thoughts to draft your cross-examination, review objections or possible objections and to make a note of any follow up discovery

that might be needed. Also note any areas that were particularly difficult for the deponent to answer in a straightforward manner or topics that made him/her defensive. Make notes of any body language and demeanor issues. Once you receive the transcript, review it and your cross and make any adjustments necessary.

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[i] Thanks to Alexia Pittas, Esq. for assisting me with researching and outlining this topic.

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