October 2023 Idaho State Bar Advocate

How Much Is Too Much? The Indistinct Line Between Advocacy and Improper Deposition Coaching

> **Once discovery began, several of the parties' lawyers quickly devolved to the kind of conduct that rightly gives the legal profession a bad name."**
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> ***~Britton v. Dallas Airmotive, Inc.***[1]

By Mark J. Fucile
Fucile & Reising LLP

Depositions lie at the heart of most civil cases and in rare instances some criminal cases. They can often "make"—or "break"—a case. Even before the rise of "remote" depositions during the Covid-19 pandemic, "speaking" objections and related lawyer misconduct during depositions occasionally crossed the sometimes indistinct line between legitimate advocacy and improper coaching. A column in these pages by the then-president of the Idaho State Bar in 2015, for example, warned of these tactics.[2] Anecdotal evidence suggests that the widespread adoption of remote depositions in the wake of the pandemic has not improved this dynamic with well publicized reports of lawyers being sanctioned for secretly communicating with their clients during depositions.[3]

In this article, we'll look at the boundary between legitimate advocacy and improper coaching in three respects. First, we'll survey the rules involved. Second, we'll note the principal risks to lawyers who cross that line. Finally, we'll discuss both informal and formal remedies available to address improper deposition coaching.

Before we dive too deeply into this topic, three caveats are in order.

First, we'll focus on conduct occurring during a deposition. As a general proposition, there is nothing wrong with thoroughly preparing a witness to give truthful testimony before a deposition.[4]

Second, we'll focus on deposition objections and related coaching rather than other forms of bad behavior occurring during depositions.[5]

Third, although similar issues can arise at trial, judicial control of the courtroom makes conduct of this kind less frequent at trials than during depositions.[6] With these boundaries in place around this analysis, let's look more deeply into the rules.

Rules

The rules governing deposition conduct—including improper coaching—are a blend of procedural and professional regulations.

Idaho Rules of Civil Procedure 30(d)(1) and (2) concisely frame the procedural limits:

> (1) *Objections*. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(4).[7]
>
> (2) *Conduct of Counsel and Party*. Counsel or any other person present during the deposition must not impede, delay or frustrate the fair examination of the deponent.

Idaho's rules are patterned on a corresponding provision in Federal Rule of Civil Procedure 30(c)(2). Idaho's rules are also similar to those in neighboring states.[8]

Idaho Rules of Professional Conduct 3.4(a) and (c), in turn, frame the primary professional rule considerations:

> A lawyer shall not:
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> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. 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[.]

Improper coaching and similar misconduct during a deposition may also trigger RPC 8.4(d), which prohibits "conduct that is prejudicial to the administration of justice[.]" All three Idaho provisions are based on their ABA Model Rule counterparts. *See generally* ABA Formal Op. 508 (2023) (discussing witness preparation, including improper coaching during depositions).

A deponent who has been coached to offer specific answers designed to shade or hide the truth is likely violating IRPC 3.4(a). Coaching by the attorney also calls into question compliance with Idaho Rule of Civil Procedure 30(d)(2) because it impedes the "fair examination" of the deponent.

Risks

Improper coaching can result in both court-imposed sanctions and regulatory discipline. Examples of sanctions as explained below could include monetary penalties, removal of *pro hac* admission, disqualification of the attorney or even outright dismissal of a claim or complaint. Whatever small advantage

may be contemplated by "coaching" is heavily outweighed by the lawyer's obligation under the rules as well as the risk of costly sanctions.

Idaho Rule of Civil Procedure 30(d)(3) authorizes a trial court to impose an "appropriate sanction" "on a person who impedes, delays, or frustrates the fair examination of the deponent." The broad spectrum of sanctions available under Idaho Rule of Civil Procedure 37(b)—ranging from monetary penalties to dismissal—is incorporated by reference into Rule 30(d)(3). Sanctions are also available in federal proceedings under Federal Rule of Civil Procedure 30(d)(2). Because a court may consider sanctions against both the offending lawyer and the lawyer's client, potentially disqualifying conflicts may result as well.[9]

Lawyers have been disciplined for violations of variants of Idaho Rules of Professional Conduct 3.4 and 8.4 for improper deposition coaching.[10] Revocation of *pro hac vice* admission by the court concerned is also an available remedy.[11]

"Speaking" objections—where the defending lawyer expands on objections to impermissibly coach the witness toward a desired answer—have long been a staple of this genre of cases.[12] For example: "Objection. Mr. Smith has already testified that he doesn't know whether the light was green or red and your question asks him to speculate." Repetitive "form" objections designed to impede the questioner during depositions have also been criticized by courts as a variant of impermissible coaching.[13] Repeatedly rephrasing questions to signal

the desired answer to the witness has also been held to constitute impermissible coaching.[14] Repeatedly taking the witness out of the room while a question is pending is a more blatant form of impermissible coaching.[15]

These older forms of impermissible coaching are now supplemented by technology-enabled methods. Whispering desired answers off-camera during remote video depositions is no different than more traditional impermissible coaching.[16] Texting or "chatting" suggested answers to a witness during a remote deposition is similarly impermissible coaching.[17] It is important to note that in a remote deposition, the microphones are often very sensitive to noise, it is easy to see a witnesses attention being redirected, and no one can text surreptitiously. If you need a further word of caution, these efforts are often easily identified, and always recorded.

While "line drawing" in this area is inherently indistinct, the case law collectively suggests that lawyers are at risk of sanctions or discipline either when objections or similar conduct are repeated to the point of impeding the opposing party's right to conduct the deposition or is a single egregious instance such as whispering answers off-camera during a remote deposition.[18]

Remedies

Idaho Rule of Civil Procedure 37(a)(4) addresses "evasive" and "incomplete" answers. Federal Rule of Civil Procedure 37(a)(3) does the same for federal proceedings. Both are framed as motions to compel. As noted

earlier, sanctions can range from monetary costs to broader remedies such as striking claims or defenses. Idaho Rule of Civil Procedure 30(d)(2), in turn, expressly prohibits counsel from impeding or otherwise frustrating "the fair examination of the deponent." Federal Rule of Civil Procedure 30(d)(3) proscribes tactics during a deposition that are done in bad faith or which "oppress" a party. Both incorporate the sanctions available under the respective versions of Rule 37.[19] Depending on the circumstances, these rules should be read in conjunction with Idaho Rule of Civil Procedure 26(c) governing protective orders and its federal counterpart, Federal Rule of Civil Procedure 26(c).

Although these formal paths may provide remedies for the worst situations, they have inherent practical limitations.[20] Courts, for example, have commented on the difficulty of assessing asserted lawyer misconduct on the "cold record" of a deposition transcript alone.[21] Similarly, even a recording may need to be "enhanced" by a technical professional to reveal impermissible whispered instructions during a remote deposition.[22]

Practical alternatives short of seeking formal relief will vary with the personalities and circumstances involved. Assuming that a simple discussion with opposing counsel does not address the situation,[23] offering a standing objection (or stipulating that all objections other than to privilege are reserved until the deposition is offered) may provide a practical solution by taking away the reason for defending lawyer to interject serial speaking objections.[24] Although

adding to the expense, noticing a deposition by video can sometimes discourage "bad behavior" by opposing counsel because, if necessary, it can be shown to the court concerned.[25] This can be especially useful if conduct such as whispering answers is involved that would not show-up on a paper transcript.

Summing Up

The poignant passage from *Britton* quoted at the outset was coupled with a sage observation by the court: "'[A]dvocacy which is both civil and professional is by far the most effective.'"[26] Well prepared witnesses don't need to be coached—whether through speaking objections or whispered suggestions—during their depositions. If opposing counsel, nonetheless, engages in impermissible coaching, both informal approaches and, if needed, formal remedies are available to address these situations. As identified within this article, attorneys can both prepare their witnesses to not need coaching and identify the telltale signs of coaching and then preserve the record as necessary to adequately protect their clients and their cases.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms, and corporate and governmental legal departments throughout the Northwest on professional ethics and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the

WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.

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[1] 2009 WL 10677843 at *1 (D. Idaho July 2, 2009) (unpublished).

[2] Tim Gresback, *Deposition Bullies, Witness Coaching and Discovery Abuse*, 58 No. 11-12 Idaho State Bar Advocate 14 (Nov./Dec. 2015).

[3] *See, e.g.,* Mike Scarcella, *Masked Lawyer Who Whispered to Client at Zoom Deposition Urges No Further Discipline*, Reuters, Nov. 29, 2021 (available at www.reuters.com).

[4] *See, e.g.,* Idaho R. Civ. P. 30(b)(6) (duty to designate corporate representative); Fed. R. Civ. P. 30(b)(6) (same).

[5] *See also* Idaho State Bar Standards for Civility in Professional Conduct; U.S. District Court L. Civ. R. 83.8 (fairness and civility).

[6] *See generally State v. Severson*, 147 Idaho 694, 718, 215 P.3d 414 (2009) (discussing "speaking objections" at trial); *Teter v. Deck*, 274 P.3d 336, 344-45 (Wash. 2012) (same).

[7] Idaho R. Civ. P. 30(d)(4) addresses motions to terminate or limit depositions.

[8] *See, e.g.,* Oregon R. Civ. P. 39D(3); Washington Civ. R. 30(h)(2); Utah R. Civ. P. 30(c)(2).

[9] *In re Marriage of Wixom and Wixom*, 332 P.3d 1063 (Wash. App. 2014) (disqualifying lawyer for conflict by attempting to shift responsibility for sanctions from lawyer to client).

[10] *See, e.g., Florida Bar v. James*, 329 So.3d 108 (Fla. 2021) (lawyer disciplined under Florida versions of ABA Model Rules 3.4(a) and 8.4(d)); *Matter of Claridge*, Arizona State Bar No. 20-2214, Final Judgment and Order (Jan. 21, 2022) (unpublished) (lawyer disciplined under Arizona versions of ABA Model Rules 3.4(a) and 8.4(d)).

[11] *See Britton v. Dallas Airmotive, Inc.*, 2009 WL 10677843 at *6 (D. Idaho July 2, 2009) (unpublished) (*Britton*) (noting the availability of revocation of *pro hac vice* admission for improper deposition coaching and related misconduct).

[12] *See, e.g., Britton, supra*, 2009 WL 10677843 at *6 n.5 (noting improper speaking objections); *Voss v. Voss*, 169 Idaho 518, 528, 497 P.3d 1138 (Idaho App. 2021) (same).

[13] *See, e.g., Britton, supra*, 2009 WL 10677843 at *6 (criticizing repeated "form" objections); *Teck Metals, Ltd. v. London Market Insurance*, 2010 WL 11507595 at *6 (E.D. Wash. Oct. 20, 2010) (unpublished) (same).

[14] *See, e.g., Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 39-40 (D. Mass. 2001) (reframing questions and using extended colloquies to impermissibly coach witness).

[15] *Id*. (also frequently leaving the room with the witness when questions were pending); *see also LM Ins. Corp. v. ACEO, Inc.*, 275 F.R.D. 490, 490-91 (N.D. Ill. 2011) (same).

[16] *See, e.g., Gladden v. State*, Spokane County, Washington Superior Court Case No. 20-2-00806-2, Sanctions Order at 2 (July 8, 2021) (unpublished) (lawyer sanctioned for

whispering answers to witness off-camera); *Shimkus v. Scranton Quincy Clinic Company, LLC*, Lackawana County, Pennsylvania Court of Common Pleas No. 19-cv-3534, Memorandum and Order at 5-6 (Dec. 7, 2020) (unpublished) (same).

[17] *See, e.g., Florida Bar v. James*, *supra*, 329 So.3d 108 (texting); *Matter of Claridge*, *supra*, Arizona State Bar No. 20-2214 (using chat function).

[18] *See, e.g., Britton, supra*, 2009 WL 10677843 at *6 (noting that while individual objections standing alone may have been permitted, repetitive "form" objections were impermissibly used to impede the deposition); *see also Wachtell v. Capital One Financial Corp.*, 2006 WL 8446017 at *8-*9 (D. Idaho May 9, 2006) (unpublished) (concluding that objections did not impede deposition).

[19] *See also* Idaho R. Civ. P. 30(d)(4) and Fed. R. Civ. P. 30(d)(3) (motions—albeit typically by the deponent—to terminate or limit depositions being conducted in bad faith).

[20] A bar complaint against the offending lawyer may be a possibility. *See generally* RPC 8.3 (addressing reporting professional misconduct). Given the timing of regulatory discipline, however, it may not be a practical solution to immediately address conduct in ongoing litigation.

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

[22] *See, e.g., Espinoza v. Hector Gabriel Chavarria and VRP Transportation, Inc*., 2022 WL 136465 at *4-*5 (W.D. Tex. Jan. 14, 2022) (unpublished) (noting difficulty of discerning alleged coaching during Zoom deposition even with enhanced audio).

[23] Conferral on discovery motions is generally required in both Idaho state and federal courts under, respectively, Idaho R. Civ. P. 37(a)(1) and U.S. District Court L. Civ. R. 37.1.

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

[25] *See, e.g., Keenan v. BNSF Ry. Co.*, 2008 WL 1710100 at *2 (W.D. Wash. Apr. 8, 2008) (unpublished) (noting the court's review of video to assess whether objections amounted to improper coaching).

[26] *Britton*, *supra*, 2009 WL 10677843 at *3 (citation omitted).