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## Ethical Depositions

Lawyers participating in depositions in Cuyahoga County should be aware of the case law and the rules that address depositions. This article discusses two Supreme Court of Ohio cases holding that the rules governing conduct before tribunals are equally applicable to depositions. The article then summarizes Cuyahoga County Local Rule 13 and the pertinent provisions of the Ohio Rules of Professional Conduct, and finally offers two conclusions.

### Supreme Court of Ohio Case Law

In *Office of Disciplinary Counsel v. Levin* (1988), 35 Ohio St.3d 4, 517 N.E.2d 892, the Supreme Court extended the rules governing conduct before tribunals to depositions. In *Levin*, the Court reviewed a case where an attorney in a deposition was profane, abusive, and unprofessional. The lawyer was charged with various ethical violations under the disciplinary rules then in effect. The Court found that in making insulting and profane remarks, the lawyer had acted before a tribunal, and thus was subject to discipline under the rules pertaining to conduct before tribunals. The lawyer, who also had engaged in separate fraudulent conduct, was indefinitely suspended from the practice of law.

In *Cincinnati Bar Assn. v. Statzer*, 101 Ohio St.3d 14, 2003-Ohio-6649, 800 N.E.2d 1117, the Supreme Court once again used the rules governing conduct before tribunals to discipline a lawyer for conduct during a deposition. A lawyer conspicuously placed nine audio cassette tapes in front of the deponent. By suggestively labeling the tapes and referring to them during the deposition, the lawyer implied that she had recorded conversations with which she could impeach and embarrass the deponent. The law-

yer also intermittently cautioned the deponent to answer truthfully or risk perjuring herself. The Court concluded that the suggestive display of the cassettes, which were actually blank or held unrelated information, was intended to mislead the deponent. After citing *Levin* for the proposition that an attorney in a deposition acts before a tribunal, the Court at paragraph 13 articulated its rationale:

Although depositions are conventionally conducted without direct judicial supervision, such proceedings are nevertheless always subject to judicial intervention and oversight under Civ. R. 30(D) (court may terminate or limit the scope of a deposition upon a showing of bad faith or harassment on the part of a deponent or party) and, thus, are within the boundaries of the judicial setting. And because there is ordinarily 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* (1998), 329 S.C. 335, 343, 496 S.E.2d 619.

The lawyer was suspended from the practice of law in Ohio for six months, but the suspension was stayed if she engaged in no further misconduct.

### Cuyahoga County Local Rule 13 Depositions

Part (A) of this rule states that witnesses, parties, and counsel shall conduct themselves at depositions in a temperate, dignified, and responsible manner.

Part (B) lists nine specific practices governing depositions:

1. Scheduling. Counsel are expected to make a timely and good faith effort to confer and agree to schedules for the taking of depositions. Except for good cause, counsel for the deponent shall not cancel a deposition or limit its length without a stipulation of the examining counsel or an order of court.
2. Decorum. Opposing counsel and the deponent shall be treated with civility and respect, and the questioner shall not engage in repetitive, harassing, or badgering questioning. Ordinarily the deponent shall be permitted to answer a question without interruption.
3. Objections. Objections are limited to (a) those which would be waived if not made pursuant to Civ. R. 32(D); and (b) those necessary to assert a privilege, enforce a court-directed limitation on evidence, present a motion under Civ. R. 30(D), or to assert that the questioning is repetitive, harassing, or badgering. No other objections shall be raised during the deposition.
4. Speaking objections. Objections which refer to the facts of the case or suggest an answer are improper and shall not be made in the presence of the deponent.
5. Instructions not to answer. Counsel may instruct a deponent not to answer only when necessary to preserve a privilege, enforce a court-directed limitation on evidence, present a motion under Civ. R. 30(B), or terminate repetitive, harassing, or badgering questioning.
6. Irrelevant and embarrassing questions. If an attorney objects to questioning on the ground that the questioning is in bad faith or unreasonably annoys, embarrasses, or

degrades the deponent, the questioning attorney should move on to other areas of inquiry, reserving the right to pursue the objected-to questions at a later time and date.

7. Conferring during questioning. While a question is pending, counsel for the deponent and the deponent shall not confer, except for the purpose of deciding whether to assert a privilege.
8. Documents. During the deposition, examining counsel shall provide other counsel with copies of all documents shown to the deponent.
9. Where a witness, party, or counsel violates any of these rules at a deposition, the court may impose sanctions under Civ. R. 37.

#### **Ohio Rules of Professional Conduct**

The preamble to the Ohio Rules of Professional Conduct describes in general a lawyer's professional responsibilities. A lawyer should use legal procedures only for legitimate purposes and not to harass or intimidate others. A lawyer also should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials.

Relevant rules, including their titles, are:

Rule 1.0 Terminology, defines "tribunal" as a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

Rule 3.1 Meritorious claims and contentions, provides that a lawyer shall not bring or defend a proceeding, or controvert an issue in a proceeding, unless there is a basis in law and fact for doing so that it is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.

Rule 3.3 Candor toward the tribunal, states that a lawyer shall not knowingly offer evidence that is false. Moreover, if a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable measures to remedy the situation, including, if necessary, disclosure to the tribunal.

Rule 3.4 Fairness to opposing party and counsel, provides that a lawyer shall not unlawfully obstruct another party's access to evidence; falsify evidence, counsel or assist a witness to testify falsely; or in pretrial procedure, intentionally or habitually make a frivolous motion or discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery requests by an opposing party.

Rule 3.5 Impartiality and decorum of the tribunal, states that a lawyer shall not engage in undignified or discourteous conduct that is degrading to a tribunal.

#### **Conclusions**

Because the Supreme Court of Ohio has held that depositions are proceedings before tribunals, lawyers participating in depositions should observe the duties of candor, impartiality, and decorum owed to tribunals.

Knowledgeable and professional lawyers will not only avoid ethical problems, but also enhance their reputations and promote confidence in our system of justice.