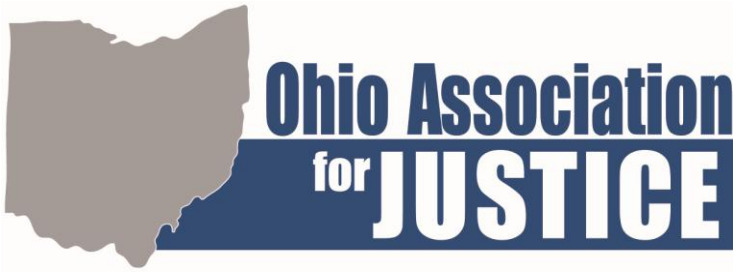

OAJ Destination CLE: Trial Tactics Seminar

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Professionalism in Depositions

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Ten Ways We Can Help Ourselves and the Profession by Being Professional

1. Mentor a young lawyer or help out a colleague.

   In 2006, the Ohio Supreme Court established a Lawyer to Lawyer mentoring program in which experienced lawyers are teamed with a lawyer just out of law school. Registration is through the Ohio Supreme Court. When young lawyers are given practical ethical guidance, all attorneys who may see them on the opposite side of a case will benefit.

   And unfortunately, many of our colleagues fall into the abyss of substance abuse and need our help. By assisting them and getting them confidential help through OLAP (Ohio Legal Assistance Program) or COLAP, we not only help the lawyer, but help their clients.

2. Help others in ways that don't help you by volunteering and doing good works.

   Coach soccer or a softball team, volunteer at a homeless shelter, volunteer at a church, synagogue or mosque, provide pro bono legal assistance to veterans, or teach literacy classes.

   Trial lawyers' reputations are not what they should be. You see that every time you talk to a jury on voir dire. Winning hearts and minds is important. David Ball dedicates an entire chapter in *David Ball on Damages 3* to this very notion.

3. Be professional in depositions.

   Too often, lawyers live out their stereotypes by exhibiting bad behavior in depositions. Too many times, a deponent will be more than happy to spread the word about "that miserable trial lawyer" who took my deposition.

   The Ohio Supreme Court committee on professionalism has outlined the Do's and Don'ts of a deposition. The advantages of following these simple rules are many, but here are three: You are more likely to get more

information from a deponent. By following the *Golden Rule*, you are more likely to be treated in the way you treat others. And you will be looked upon as one who takes the higher ground.

Here is what the Ohio Supreme Court suggests:

Do:

• Cooperate on scheduling. Rather than unilaterally sending out a notice of deposition, call opposing counsel first and cooperate on the selection of the date, time, and place. Then send out a notice reflecting the agreed upon date.

• If, after a deposition has been scheduled, a postponement is requested by the other side, cooperate in the rescheduling unless the requested postponement would be one of those rare instances that would adversely affect your client's rights.

• Arrive on time.

• Be prepared, including having multiple copies of all pertinent documents available in the deposition room, so that the deposition can proceed efficiently and expeditiously.

• Turn off all electronic devices for receiving calls and messages while the deposition is in progress.

- Attempt to agree, either before or during the deposition, to a reasonable time limit for the deposition.
- Treat other counsel and the deponent with courtesy and civility.
- Go "off record" and confer with opposing counsel, privately and outside the deposition room, if you are having problems with respect to objections, the tone of the questions being asked or the form of the questions.
- Recess the deposition and call the court for guidance if your off-the-record conversations with opposing counsel are not successful in resolving the "problem."
- If a witness is shown a document, make sure that you have ample copies to distribute simultaneously to all counsel who are present.

- If a deponent asks to see a document upon which questions are being asked, provide a copy to the deponent.

Don't:

- Inform your client in advance of the deposition (if the client plans to attend) that you will be conducting yourself at the deposition in accordance with these "dos and don'ts."
- Attempt to "beat your opponent to the punch" by scheduling a deposition for a date earlier than the date requested by your opponent for deposition(s) that he or she wants to take.
- Coach the deponent during the deposition when he or she is being questioned by the other side.
- Make speaking objections to questions or make statements that are intended to coach the deponent. Simply say "object" or "objection."
- Make rude and degrading comments to, or ad hominen attacks on, deponent or opposing counsel, either when asking questions or objecting to questions.
- Instruct a witness to refuse to answer a question unless the testimony sought is deemed by you to be privileged, work product, or self-incriminating, or if you believe the examination is being conducted in a manner as to unreasonably annoy or embarrass the deponent.
- Take depositions for the purpose of harassing a witness or in order to burden an opponent with increased litigation expenses.
- Overtly or covertly provide answers to questions asked of the witness.
- Demand conferences or breaks while a question is pending, unless the purpose is to determine whether a privilege should be asserted.
- Engage in conduct that would be inappropriate in the presence of a judge.

4. Get involved in professional organizations and in teaching Continuing Legal Education

Many organizations including the Ohio Association for Justice and the Colorado Trial Lawyers Association are committed to advocating the rights of injured people. By giving your time and talents in teaching and advocacy with the state legislature, you can help those who need you the most.

Regarding teaching, when we put together a trial college for OAJ, we stressed that we were there to help the students, and that we were there to help other trial lawyers. By training young attorneys to try cases properly and get good results and verdicts for their clients, it helps all of us.

5. Make sure we follow the standards set forth in Rules 3 and 4 of the *Ohio Rules of Professional Conduct* and make sure we hold others to the same standards.

   Rule 3.1 sets forth how lawyers are expected to act when filing lawsuits and answers. It states as follows:

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

   [2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.

   Rule 3.4 outlines this as well:

   A lawyer shall not do any of the following:

(a) unlawfully obstruct another party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) *knowingly* disobey an obligation under the rules of a *tribunal*, except for an open refusal based on a good faith assertion that no valid obligation exists;

(d) 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 request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not *reasonably believe* is relevant or that will not be supported by admissible evidence or by a good-faith belief that such evidence may exist, assert personal *knowledge* of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused;

(f) [RESERVED]

(g) advise or cause a person to hide or to leave the jurisdiction of a *tribunal* for the purpose of becoming unavailable as a witness.

6. Help your client and the case by being reasonable in written discovery.

I am witnessing a discovery battle between two defendants which is ludicrous. It has set up acrimony between the parties and will probably make the judge and the judge's staff attorney feel the same.

How can we as professional avoid this? First, avoid form discovery and ask questions which are relevant to the case. Ask the who, what, and where questions and leave the how and why questions for depositions. Second, be thorough in your responses to interrogatories and requests for production and keep idiotic form objections to a minimum. Third, be timely.

There is nothing better in a motion to compel than to state that your client was thorough, non-evasive and timely in their responses.

7. Behave in the courtroom and treat others with respect.

   All too often, juries are dismayed by lawyers' conduct in the courtroom. Many times, jurors will punish the lawyer who misbehaves. Cases are not won by being the nicest lawyer or the lawyer who treats the jurors, the courtroom staff, the judge, the other attorney and opposing witnesses with respect, but cases are lost by being the jerk.

   Likewise, behave and treat others with respect in public outside the courtroom. Nothing is more disappointing than hearing a person call one of us "a typical lawyer."

8. Be sensitive to the needs of your client.

   A few years ago, William Hurt played a hotshot surgeon who became a patient in the movie *The Doctor*. The theme of the movie is "what happens when the shoe is on the other foot."

   Remember when you, your child or a parent was a patient with a serious medical condition. Remember how you had a thirst for information and that sometimes you just wanted to hear from the doctor about what was going on even if nothing was. Remember how anxious you were to get test results.

   Remember that most clients have never had a case before and probably never will again. If the client is a frequent flier, that's another story. Take the time to help them understand the process and explain to them what is going on. Communicate with them every step of the way. If you've made a demand and the insurance company is slow to respond, call and tell the client you haven't heard anything. You will find that you will be the one initiating the communication and not the client.

9. Make sure others respect your client's privacy

   Too often, insurance companies and defense lawyers send blanket authorizations to our clients asking for all medical records regardless of whether the records are relevant to our client's injuries. A plaintiff does not

give up their right to privacy by filing a personal injury lawsuit due to the carelessness of another.

There is a professional way to address this. Rather than fight the request with motions, you can order the requested records and invite the defense lawyer to review these. He/she can copy what they want, if relevant. The defense gets what they want and the client's privacy is protected.

10. Advocate for a Full and Fair Voir Dire

This is a duty to the profession. The insurance industry, the chambers of commerce, corporate America and the politicians they support have had their opportunity to indoctrinate potential jurors through the media. When a judge restricts voir dire to one half hour or restricts the lawyers to asking questions which tell them nothing, the plaintiff has no opportunity for a fair trial.

As trial lawyers, we must advocate for a full and fair voir dire every time we go to trial. And we must be relentless. If judges will not allow this, we not only hurt ourselves, we hurt future litigants in that courtroom.

By the same token, we must ask open ended questions on voir dire and allow the jurors to speak their minds.