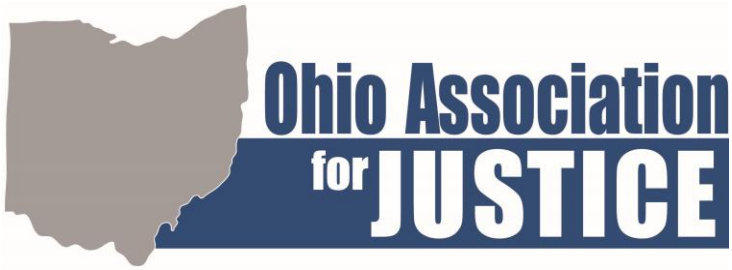

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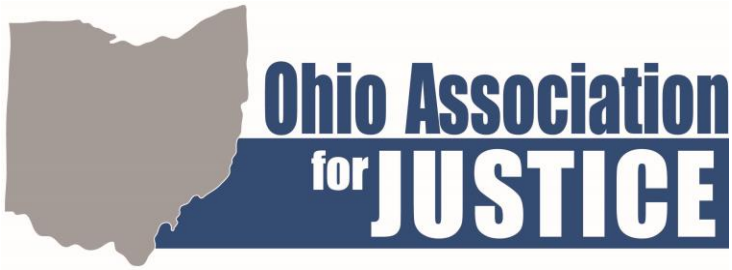

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Professional Conduct Session

Professional Misconduct - Speaking Objections

Ellen McCarthy
Cleveland, OH

DEPOSITION MISCONDUCT
SPEAKING OBJECTIONS

Ellen M. McCarthy, Esq.

Nurenberg, Paris, Heller & McCarthy
Cleveland, Ohio

1. Ethical Obligations

a. Zealous advocacy

i. Removed from the rules. Rule 1.3, Official Comment, "The reference to a lawyer's duty to act "with zeal in advocacy upon the client's behalf" is also deleted. Zealous advocacy is often invoked as an excuse for unprofessional behavior."

b. Ohio Rule of Professional Conduct 1.1

i. A lawyer shall provide competent representation to a client.

c. Ohio Rule of Professional Conduct 3.4(a)

i. A lawyer shall not unlawfully obstruct another party's access to evidence or knowingly disobey an obligation under the rules of the tribunal

(1) In Official Comment to this rule, "The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition . . . is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure . . ."

2. Pro Hac Vice

a. Rule for the Government of the Bar XII requires the applicant to state that he/she will comply with all applicable statutes, law and procedural rules, and the rules, policies and procedures of the tribunal before which the attorney seeks to practice and will be familiar with and comply with the Ohio Rules of Professional Conduct and the Rules for the Government of the Bar.

3. Federal Rule 30 - Depositions By Oral Examination

a. Rule 30(C)(2) states "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(b)(3)."

4. Local Rules

a. Cuyahoga County Local Rule 13.1

i. Speaking Objections. Counsel may interpose an objection by stating "objection" and the legal grounds for the objection. Speaking objections which refer to the facts of the case or suggest an answer to the deponent are improper and shall not be made in the presence of the deponent. Counsel shall not argue the reasons for the objections on the record.

ii. Instructions Not to Answer. Only when necessary to preserve a privilege, enforce a limitation on evidence directed by a Court, present a motion under Civil Rule 30(D) or terminate repetitive, harassing or badgering questioning.

iii. Irrelevant and Embarrassing Questions. If such an objection is made, the questioning attorney should move on to other areas

of inquiry, reserving the right to pursue the objected-to questions at a later time or date.

b. Summit County Local Rule 17.02

i. Conduct at Depositions. Witnesses, parties, and counsel shall conduct themselves at depositions in a temperate, dignified, and responsible manner.

ii. Decorum. Opposing counsel and the deponent shall be treated with civility and respect. Ordinarily the deponent shall be permitted to complete an answer without interruption by counsel.

iii. Objections. Objections shall be limited to (A) those which would be waived if not made pursuant to Ohio R. Civ. P. 32(D)(3)(a) and (b), (B) those necessary to assert a privilege, (C) those necessary to enforce a limitation on evidence directed by the court or (D) those to present a motion under Ohio R. Civ. P. 26 (C) or 30 (D). No other objections shall be raised during the course of the deposition.

iv. Speaking Objections. Counsel may interpose an objection by stating "objection" and the legal grounds for the objection. An objection to evidence during the taking of a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. Speaking objections which refer to the facts of the case or suggest an answer to the deponent are improper and shall not be made in the presence of the deponent.

v. Instructions Not to Answer. Counsel shall not instruct a witness not to answer a question except: (A) to preserve a privilege; or (B) in response to a question that is: (i) not relevant; and (ii) is not likely to lead to the discovery of admissible evidence; and, (iii) counsel instructing the witness not to answer has a good faith, reasonable belief that his or her position will be sustained by the

judicial officer with jurisdiction and on the record at the time he or she instructs the witness not to answer the basis or bases for the instruction not to answer. If a Motion to Compel, or other similar motion, is filed by the party whose counsel asked the question of the witness and it is ultimately determined by the Court that the question at issue shall be answered by the witness, then counsel who advised the witness not to answer the question shall pay the reasonable fees of the examining counsel incurred in obtaining the Court's ruling that the question shall be answered.

vi. Where a witness, party, or counsel engages in disruptive or irresponsible behavior at the deposition, the Court may order sanctions or other remedies.

c. Lorain County Local Rule 19

i. Depositions. Witnesses, parties and counsel shall conduct themselves at depositions in a temperate, dignified and responsible manner. Where a witness, party, or counsel violated any of these rules at a deposition, the Court may order sanctions or the remedies, including those sanctions available under Ohio R.Civ.P. 37.

ii. 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 complete an answer without interruption by counsel.

5. Supreme Court of Ohio Commission on Professionalism

a. Deposition Do's and Don'ts.

i. Don't coach the deponent during the deposition when he or she is being questioned by the other side.

ii. Don't make speaking objections to questions or make statements that are intended to coach the deponent. Simply say "object" or "objection."

iii. Make rude or degrading comments to, or ad hominem attacks on an opponent or deponent.

iv. Overtly or covertly provide answers to questions asked of the witness.

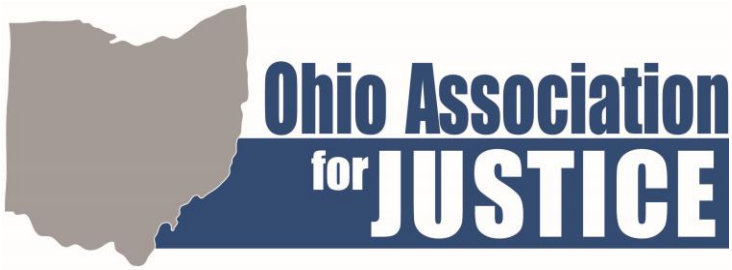
v. Engage in conduct that would be inappropriate in the presence of a Judge.

6. Failure To Act

a. Passive behavior during a deposition where one's own witness becomes unruly can result in sanctions. *GMAC Bank v. HTFC Corp*., 248 FRD 182 (ED Pa. 2008)

i. Resulted in $29,322.61 in sanctions against lawyer of client who used the f-word 73 times in a contract dispute and used the word contract only 14 times.

(1) Trial Court sanctioned the attorney for failing to take remedial steps to curb his client's misconduct and found his inaction impeded, delayed and frustrated his client's fair examination.



2015 Winter Convention
December 4, 2015

Professional Conduct Session

Professional Conduct: Approach to an Idyllic Bar

Mandy Jamison
Dayton, OH

AB INITIO

A STARTER'S GUIDE TO OPPOSING COUNSEL

Mandy A. Jamison, Esq., Dayton, OH

You learned to live for days off a good cup of coffee, graduated law school, passed the bar, and started your illustrious career. So, why is being a new lawyer so hard? There are likely a variety of reasons. But, in my experience, one of the hardest things about being a new lawyer can be summed up in two words: opposing counsel.

At times, it will seem you spend more time with opposing counsel than your own clients, or even your own family. So, it is crucial to develop good working relationships with opposing counsel as soon as possible. This will also assist you in building your reputation, which can assist in smoother dealings in the future.

Do your Homework.

It is always an excellent idea to know whom you are dealing with. Many attorneys list their professional biographies on their website. The Ohio Supreme Court provides information online about every Ohio attorney, including licensure, law school, and professional disciplinary histories. The Ohio Association of Justice's listservs is also invaluable as, unless the opposing counsel is brand new, chances are other members have dealt with him or her and can give you great insight.

Find out as much information as you can about the opposing attorney, including:

- Are they laid back or heavy handed in their practice style?
- Do they regularly grant simple extensions and stipulate to lesser motions, or do they oppose everything?
- Do they attack opposing counsel in their court filings or do they stick to facts and law?
- Do they push for settlement early on or wait until the day before trial?
- Will they abide by a court order or will they continue to throw up roadblocks if they can?
- Will they produce third parties for depositions or trial absent a subpoena?
- Are they generally responsive or do they frequently delay or ignore communications and requests?

You can better anticipate opposing counsel's tactics, and be ready to counter them, by discovering as much as possible about your opposing counsel. This helps place you in the best position to assert your client's interests without getting lost in strategic detours.

Also, be prepared for opposing counsel to research you as well.

Consideration.

We all know consideration is a bargained-for exchange sufficient to support a simple contract, but that's not all. Attorneys sometimes forget the word carries another meaning. As Merriam-Webster advises, consideration also means sympathetic regard shown to another.

Throughout the legal community, we all strive to advocate our client's interests. This does not mean we cannot be courteous and respectful to one another in doing so. The legal profession is a very small community and you may often find yourself opposing the same counsel, and, at other times, having lunch beside them.

Emotional outbursts, long delays, denying simple requests without cause, and similar behaviors will harm your new relationship with this particular counsel. Worse, it can have a negative impact on your reputation and harm future relationships with other opposing counsel. Keep your emotions in check. It is your job to advocate for your client using the law and facts. Sometimes emotion seeps into your case, and, at times, this can be helpful (i.e. arguing to a jury), but overall, your personal emotions do not belong in your client's case or in your dealings with opposing counsel. If your client expects you to put on a show, advise opposing counsel as a professional courtesy your client demands a hard approach, and still, keep dramatics to a minimum.

Finally, choose your words with care. Using statements such as "opposing counsel misrepresented" may annoy both opposing counsel and the judge. Choose a more professional approach like, "opposing counsel fails to appreciate," or "it appears opposing counsel failed to consider." The judge will understand your position, and it will not appear you are casting doubt on opposing counsel's ethics.

How Firm is too Firm?

As a new attorney, you are still developing your professional reputation. Some attorneys will attempt to "test the waters" to see how you respond. Opposing counsel may use tactics such as long delays, repeated excuses, repeated extension requests, or simply ignore you. On the other hand, some attorneys may try to figuratively run over you; they may be extremely bold in their approach, threaten to involve the court in simple matters, or attempt to dominate hearings. No matter how difficult it may seem at first, you must take control in these situations in order to protect your client's interests and protect your own reputation.

Professional courtesy is always appreciated and encouraged, but deal with it head on if the opposing counsel makes your life difficult.

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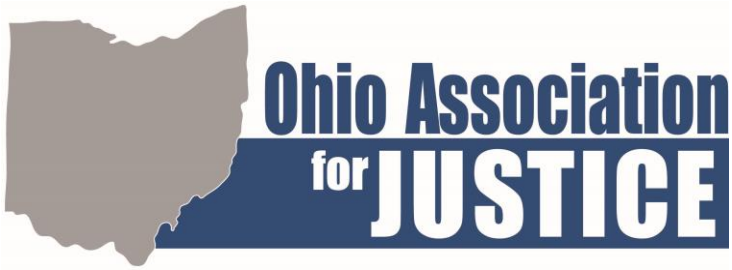
...Ab Initio Article Continued from Page 20

Simply telling opposing counsel what problems you have with their behavior may be enough (i.e. "your responses were due last month; you already had two extensions"). But, make sure your concern is genuine and not simply a complaint. Do not be afraid to ask opposing counsel if there is a reason for their particular behavior; this will help you understand their position. Even if there is a good reason, continue to advance your client's interests, but make allowances where possible. Do your best to amicably work with opposing counsel, but do not fear court intervention, and seek it when necessary. And finally, get everything in writing! Follow-up emails are a great way to confirm important communications, or to document undue delays. You never know when you may need to file your own motion to compel.

Attend Professional CLEs!

Finally, the Ohio Association of Justice hosts several CLEs throughout the year in addition to two separate conferences. There are often professionalism CLEs available during this time. Take advantage of this. Many such CLEs, particularly professionalism CLEs, touch on different approaches for dealing with opposing counsel and defense strategies. Learn as much as you can and use what you learn. This will help you better serve your clients, will assist/aide you in building a good reputation, and will greatly improve your professional day!



2015 Winter Convention
December 4, 2015

Professional Conduct Session

Substance Abuse

Tom Pitts
Akron, OH

ALCOHOL AND SUBSTANCE ABUSE ISSUES

IN TODAY'S WORLD

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Presented for the
Ohio Association for Justice
2015 Winter Convention

Metropolitan at the 9
Cleveland, Ohio
December 4, 2015

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I. The Nature of Substance Abuse.

A. Substance abuse is characterized as a disease.

1. The American Medical Association in 1956 defined alcoholism as a disease because it is:

a. A primary disorder;

b. Chronic;

c. Progressive;

d. Fatal;

e. Treatable.

2. Alcoholism is one form of substance abuse because:

a. It is a psychoactive dependence, or addiction;

b. It shares addictive behavior manifestations with other drugs of abuse including, e.g., irrational compulsion to consume, loss of control over intake, and continued use regardless of devastating adverse consequences.

c. It shares diagnostic criteria with other drugs of abuse such as sedatives, stimulants, narcotics, hallucinogens, inhalants, and cannabis-based substances including:

i. Ingestion of larger amounts over a longer period of time than intended;

ii. Persistent desire accompanied by repeated failures to moderate or abstain;

iii. Inordinate investment of time in activities related to acquiring, partaking, and recovering from effects of drug;

iv. Frequent intoxication or withdrawal at socially inappropriate times;

v. Forsaking normal life activities in favor of using;

vi. Continued use in spite of repeated social or personal consequences that user knows are directly related to use;

vii. Great tolerance for drug that increases over time as evidenced by inability to achieve intoxicated state;

viii. Withdrawal symptoms that come to be expected and considered a “normal” part of daily activity;

ix. Using to diminish or avoid withdrawal.

B. Substance abuse is a genetic, biochemical, psychosocial disease.

1. Children of addicted parents are more likely to develop addictions.

2. Ingestion of drug affects brain chemistry.

a. Initial ingestion generally produces feelings of well-being or euphoria.

b. As tolerance builds, withdrawal produces depression and anxiety.

c. Addict then must use to simply return to a “normal” state.

d. Body begins to crave substance, attempting to retain functional capabilities.

3. Psychosocial aspects.

a. There is no stereotypical personality profile on an addicted person.

b. Although frequently diagnosed with mental illness, addicts as a whole experience such disorders at approximately the same level, 10% of the population, as non-addicted persons.

c. Our society’s view of drug problems is deeply divided, on the one hand promoting the use of alcohol and tobacco, while on the other declaring “war” on other drugs of abuse.

II. The Nature of Treatment and Recovery.

A. Self-diagnosis.

1. The addict himself must reach the conclusion he is addicted.

2. The addict must possess some, if only a minimal amount of, desire to recover from his addiction.

3. The addict must seek assistance himself.

4. Information must be sought.

a. Information about the disease must be made available and impressed upon him.

b. The addict must be told about the treatable nature of his condition.

B. Self-treatment.

1. The addict must be given the tools to:

a. Maintain abstinence;

b. Prevent relapse.

2. The addict must develop and adhere to a program of recovery.

C. Self-responsibility.

1. The addict must act to:

a. Set his life in order;

b. Repair the past damage caused by his addiction;

c. Full recovery anticipates full reintegration into society;

d. Achieve long-term remission by confronting new problems without resort to use of addictive substances.

III. The Paths of Recovery.

A. Reaching a "bottom."

1. The addict's abuse continues unabated until he reaches the hopeless state of being unable to live with his drug, or conceive of living without it.

2. Such a course is usually accompanied by almost complete abandonment of or ostracism from normal social activities.

a. Near the end stage of such a path, partners and associates may have to assume responsibility for the addict's obligations.

b. Alternatively, the addict's association with a law firm may be terminated for the sake of the firm and its clients.

3. The addicted lawyer almost always comes to the attention of the disciplinary committees of local and state bar associations.

a. Repeated disciplinary complaints are often a clue to well-concealed addictive behavior.

b. When a pattern is seen developing, the grievance committee may refer the matter to an assistance committee for investigation.

i. The assistance committee endeavors to "carry the message" of recovery to the addict.

ii. However, if the person refuses to acknowledge the root of his problems as addiction, the assistance committee's hands are tied to proceed further.

c. A grievance proceeding may ultimately result in the addict, being suspended from the practice of law, in which case his associates must be prepared to assume his workload.

d. A bar association continuity committee can offer support to the solo or small practitioner in the event of suspension of disbarment.

4. When the addict "hits bottom," he may require hospitalization at a treatment facility.

5. Even if admission isn't required, the addict may be unable to maintain work activities in the early stages of recovery.

B. Intervention.

1. A successful intervention is often said to have "raised the bottom."

2. Intervention requires careful preparation.

a. Those closest to the addict–family, partners, associates, friends, clergy, doctors– meet with a psychologist or social worker and express a desire to confront the addict.

b. If it is agreed an intervention will be attempted, those to be involved meet several times with the facilitator to rehearse what will be said to the addict.

i. Simultaneously, the facilitator secures a bed at a treatment facility to which the addict will go immediately after the intervention.

ii. The addict's partners and associates review and anticipate the allocation of his work during the period of in-patient treatment.

3. The intervention is planned to occur without the addict's prior knowledge.

   a. Those who participate in the intervention assemble and the addict is brought to the meeting, usually under a pre-text.

   b. Once before the group, the addict is told the nature of the proceedings by the facilitator and asked to listen without response to the remarks of those present

   c. The addict is assured he is under no obligation and will be allowed to speak his peace at the appropriate time.

   d. The participants convey to the addict how his behavior has affected them and the facilitator then tells the addict that arrangements have been made to immediately transport him to a treatment facility.

   e. The addict is then told he must make a decision to attend treatment or not and is allowed to respond to the remarks of the participants.

4. If successful, the recovering addict is immediately taken to the treatment facility to start a program designed to restore health.

5. A bar association's assistance, grievance, and continuity committees are available to assist in the planning an execution of an intervention.

6. Intervention is not always successful, in which event the addict will follow his own path to a "bottom" or the ultimate end of untreated addiction.

IV. Untreated addiction.

A. Untreated addiction is a terminal disorder.

B. If death occurs, a local bar association continuity committee can assist in distributing the decedent's work among other practitioners should there be no partners or associates to assume the obligations.

C. Prior to death, the untreated addict may become incompetent to manage his own affairs, in which case family members may seek a guardianship through a probate court proceeding.