



CHAPTER VI
FLORIDA HANDBOOK ON CIVIL DISCOVERY PRACTICE (2016)
[ALL-IN-ONE DOCUMENT]

CHAPTER VI
PROPER CONDUCT OF DEPOSITIONS

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TABLE OF CONTENTS | CHAPTER VI | PROPER CONDUCT OF DEPOSITIONS

ID	Item	Title	Page
0600	6.00	Chapter 6 Intro	4
0601	6.01	Objections	6
0602	6.02	Examinations	8
0603	6.03	Proper Responses to Improper Conduct	9
-	n/a	Appendix	10

2016 FLORIDA HANDBOOK ON CIVIL DISCOVERY PRACTICE

CHAPTER VI PROPER CONDUCT OF DEPOSITIONS

ITEMS: 6.00 through 6.03

ITEM 6.00 | CHAPTER 6 INTRO

Starting on the date of admission to The Florida Bar, counsel pledges fairness, integrity and civility to opposing parties and their counsel, not only in court but also in all written and oral communications. Oath of Admission to the Florida Bar. The Rules Regulating the Florida Bar also prohibit a lawyer from "unlawfully obstruct[ing] another party's access to evidence," "fabricat[ing] evidence" or "counsel[ing] or assist[ing] a witness to testify falsely." Rule 4-3.4. See also Rule 3-4.3 and 3-4.4 (misconduct may constitute a ground for discipline); Rule 4-3.5 (Disruption of a Tribunal); Rule 4-4.4 (Respect for Rights of Third Persons); Rule 4-8 (Maintaining the Integrity of the Profession).

The Florida Bar's "Guidelines for Professional Conduct," promulgated jointly by the Conference of Circuit Court Judges, the Conference of County Court Judges, and the Trial Lawyers Section of the Florida Bar, specifically address deposition conduct. See Section F (2008 edition), found within the 2014-2016 Professionalism Handbook. These guidelines make clear that counsel should refrain from repetitive and argumentative questions, as well as questions and comments designed to harass or intimidate a witness or opposing counsel. Counsel are also advised not to engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer.

Let there be no doubt that violations of these rules of fairness and civility may result in significant disciplinary action. In *The Florida Bar v. Ratiner*,¹ a lawyer was publicly reprimanded by the Supreme Court of Florida, suspended for sixty days, and put on probation for two years, all for engaging in deposition misconduct. See also, *5500 North Corp. v. Willis*,² in which the Fifth District Court of Appeal approved the trial court's referral of deposition conduct issues to The Florida Bar. The appellate court noted that in terms of counsel's deposition behavior, "[w]e would expect more civility from Beavis and Butthead."

Trial Lawyers Section of the Florida Bar
Conference of Circuit Court Judges
Conference of County Court Judges

Footnotes

¹ 46 So. 3d 35 (Fla. 2010)

² 729 So. 2d 508, 514 (Fla. 5th DCA 1999).

ITEM 6.01 | OBJECTIONS

Rule 1.310(c) provides that “[a]ny objection during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner.” (Emphasis added). Speaking objections to deposition questions are frequently designed to obscure or hide the search for the truth by influencing the testimony of a witness. Objections and statements that a lawyer would not dare make in the presence of a judge are all too often made at depositions. For example:

- *“I object. This witness could not possibly know the answer to that. He wasn’t there.”*

The typical witness response after hearing that:

“I don’t know. I wasn’t there.”

- *“I object, you can answer if you remember.”*

The typical witness response after hearing that:

“I don’t remember.”

- *“I object. This case involves a totally different set of circumstances, with different vehicles, different speeds, different times of day, etc.”*

The typical witness response after hearing that:

“I don’t know. There are too many variables to compare the two.”

Objections should be asserted by stating: “I object to the form of the question.” The grounds should not be stated unless asked for by the examining attorney. When the grounds are requested, they should be stated succinctly. Coaching the deponent or suggesting answers through objection or otherwise is improper and should not occur.

Examination and cross-examination of witnesses may proceed as permitted at the trial. Rule 1.310(c). If a deponent changes his testimony after consulting with his attorney, the fact of the consultation may be brought out, but the substance of the communication generally is protected.³ Where an attorney has improperly instructed his client not to answer a question at deposition, the court may prohibit the attorney from communicating with the client concerning the topic at issue until such time as the deposition recommences.⁴

Rule 1.310(d) provides that a “*motion to terminate or limit examination*” may be made upon a showing that objection and instruction to a deponent not to answer are being made in violation of Rule 1.310(c).

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Footnotes

³ *Haskell Co. v. Ga. Pac. Corp.*, 684 So. 2d 297 (Fla. 5th DCA 1996).

⁴ *McDermott v. Miami-Dade County*, 753 So. 2d 729 (Fla. 1st DCA 2000).

ITEM 6.02 | EXAMINATIONS

Just as the objecting attorney is required to behave in a professional manner, the examining attorney has the same professional responsibility to treat opposing counsel and the witness or party being examined with respect and courtesy.

Overly aggressive, hostile and harassing examinations intending to intimidate a witness or party would not be permitted in the presence of a judicial officer and are likewise not permitted at deposition. Intentionally misleading a witness or party is similarly unprofessional and not permitted.

Rule 1.310(d) provides that a "motion to terminate or limit examination" may be made upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party.

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ITEM 6.03 | PROPER RESPONSES TO IMPROPER CONDUCT

If opposing counsel exhibits any of the behavior described above, the proper response is to object and concisely describe the improper conduct. Counsel should exhaust all efforts to resolve a dispute that threatens the ability to proceed with deposition.

If such action fails to resolve the issue, many judges permit counsel to telephone the court for a brief hearing when irreconcilable issues arise at deposition. Counsel may want to take a break during the deposition and call chambers, requesting a brief hearing to resolve the matter. This is especially true if the deposition is out-of-state and would be costly to reconvene. It helps to know the judge's preferences in this regard, but judges generally are aware that the use of this procedure—if not abused by counsel—provides an excellent opportunity to attempt to resolve issues on the spot before they develop into more costly and complex proceedings after the fact. However, it is important to note that these emergency hearings place the judge in a difficult position. Having not personally witnessed the behavior and without the aid of a deposition transcript, the judge's ability to issue a thoughtful, informed order may be limited.

A party or witness who reasonably believes that a deposition is "being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the witness or party," or that "objection and instruction to a deponent not to answer are being made in violation of rule 1.310(c)," may move to terminate or limit the deposition and immediately move for protective order. The most appropriate action would be to make such motion orally and concisely on the record at the time of the deposition, and follow promptly with a written motion for protective order. A copy of the deposition will need to be filed with the written motion. Rule 1.310(d) specifically provides that the taking of the deposition shall be suspended upon demand of any party or the deponent for the time necessary to make a motion for an order. All phases of the examination are subject to the control of the court, which has discretion to make any orders necessary to prevent abuse of the discovery and deposition process.

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APPENDIX

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Congratulations! You're now ***booked up*** on all of the guidance from Florida's Handbook on Civil Discovery Practice (2016)!