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How Low Can You Go? Analyzing Deposition Misconduct and Avoiding Common Deposition Mistakes

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HOW LOW CAN YOU GO? ANALYZING DEPOSITION MISCONDUCT AND AVOIDING COMMON DEPOSITION MISTAKES

Depositions represent a key discovery tool in litigation.[1] Attorneys typically utilize depositions for any number of reasons, such as to obtain admissions from the opposing party for use at trial, to secure testimonial evidence that eliminates or creates genuine issues of material fact for summary judgment motions, to learn about the opposing party's case, and/or to attain a preview of the other party's arguments or strategies. Attorneys may also use depositions to gain information or admissions from third parties.

As a result, attorneys must prepare diligently for depositions they are taking or defending. Despite a heavy case load or personal commitments, attorneys must properly prepare their witnesses for depositions or prepare to question a witness thoroughly. Failing to prepare a witness effectively may result in, among other things, the witness providing poor testimony that hurts the client's case, and failing to prepare for a deposition can also result in sanctions against the attorney.[2] If an attorney does not prepare adequately to take a deposition, then the deposition questions may not be as focused or organized as possible, which may lead to a longer deposition to ensure that all of the topics are eventually covered. A longer deposition means the client will spend more money than necessary to allow that client's ill-prepared attorney to complete the deposition.

Not only must attorneys diligently prepare for depositions, but they must also take steps during the deposition to make sure their witnesses (if they are defending the deposition) do not become obstreperous. If an attorney defending a deposition does not stop or subdue the testifying witness's unruly behavior, then the attorney may be sanctioned for failing to act.

Any attorney who has defended numerous depositions has either coached a witness through improper objections or other behavior, or has been tempted to do so. Coaching a witness can also result in sanctions for an attorney, and certainly telling a witness explicitly what to say during a deposition could as well.[3]

This article discusses attorney misconduct in cases from several jurisdictions that relate to the following common mistakes made concerning depositions: failure to prepare for a deposition, failure to act during a deposition, and coaching a witness. This article also provides practical insight on how to avoid these mistakes.

I. Failure To Prepare For A Deposition

A party may take the deposition of an individual who has knowledge relevant to the lawsuit. In addition, a party may take the deposition of a company. In a company deposition, known as a 30(b)(6) deposition in federal court (and sometimes referred to as a person most knowledgeable or qualified deposition in state court), a party identifies the topics that it wants the opposing party's company witness to discuss, and then the witness testifies on behalf of the entire company and speaks for the company.[4]

Rule 30(b)(6) provides that persons designated to represent an organization "shall testify as to matters known or reasonably available to the organization."[5] This means that an organization must "produce one or more 30(b)(6) witnesses who [are] thoroughly educated about the noticed deposition topics with respect to any and all facts known to [the organization] or its counsel."[6] If the persons designated by the corporation do not possess personal knowledge of the matters set forth in the deposition notice, then the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation.[7] The corporation and its counsel have a duty to prepare a witness on behalf of the corporation.[8]

Failing to prepare any type of witness, whether the witness is testifying as a company witness or as an individual, evinces a lack of diligence and, thus, violates the rules of professional conduct.[9] Also, failure to prepare a witness can result in sanctions against the attorney and dreadful

deposition testimony from the witness that can negatively affect a client's case. The following case illustrates the effects of a poorly prepared witness in the context of a 30(b)(6) deposition.

In *Int'l Ass'n of Machinists*, the first witness designated as the 30(b)(6) witness was, in the words of the district court,"woefully unprepared."[10] He "had no knowledge at all regarding any of the subjects listed on the 30(b)(6) notice, and, in fact, had not even seen the notice until it was shown to him during the deposition."[11] In addition, "he personally had undertaken no steps to prepare for the deposition and [the organization] and its counsel had not made any effort to prepare him" except for one bit of advice – they "advis[ed] him to tell the truth."[12] Moreover, this witness lacked basic knowledge regarding the organization as he was only a part-time volunteer during a period of time that was irrelevant to the case.[13]

The court transcript between plaintiff's counsel and the witness demonstrates the witness's unpreparedness and inadequacy to serve as a 30(b)(6) witness.[14]

> Q. Mr. Liu, you keep on saying I don't know. You understand you are here today as a representative of UIFA, and your answers bind UIFA. When you say I don't know, that means UIFA does not know. You understand that?
>
> A. I don't have any knowledge of what question you are asking me. I don't have the answer.
>
> Q. So when you answer I don't know, that means UIFA does not know.
>
> A. *I don't know if UIFA does know or does not know. I don't know …"*[15]

The court found that neither the corporation nor its counsel prepared the witness through "conversation or [the] review of documents" for the deposition.[16] The organization offered a second 30(b)(6) witness that was not much better than the first.[17] As a result, the organization and its counsel were sanctioned in the amount of $7,947.30.[18]

Whether an attorney is defending a witness testifying as an individual or as a corporate witness, the attorney must comprehensively prepare that witness for the deposition. Witnesses should understand that telling the truth, as they are sworn to do, is critical to avoiding impeachment at trial and penalties of perjury, but telling the truth is only one aspect of deposition preparation. Generally, attorneys should help the witness understand what the case is about, why the witness has been asked to testify (either pursuant to the other party's request or at the request of the client), and what the opposing side's themes and arguments are to allow the witness to comprehend the type of testimony that opposing counsel is trying to elicit from the witness. The attorney should also make the witness aware of its own party's themes and arguments.

Generally speaking, the content of the attorney's conversation with its client during preparation for a deposition is protected by the attorney-client privilege, provided that the privilege has not been waived in some manner, such as by allowing a third party in the room with the attorney and the client during preparation.[19]

Witnesses should be told that opposing counsel may be looking for "sound bites" and admissions to use for summary judgment motions and trial to advance the opposing side's case. Also, regardless of the perceived friendliness of opposing counsel or his/her eagerness to learn, it is not the witness's job to educate the other side. Answers provided by witnesses at deposition should be as accurate, precise, and succinct as possible. Witnesses sometimes believe if they say everything they know early in the deposition, then the deposition will end sooner. Attorneys know that the more information a witness provides, extraneous or otherwise, then the more material an attorney has to ask questions, which will likely result in a longer deposition.

Attorneys may help prepare a witness for deposition, but an attorney cannot alter a witness's testimony in preparation for a deposition.[20] In *Ibarra v. Baker*, the U.S. Court of Appeals for the Fifth Circuit upheld the lower court's verdict sanctioning two attorneys, Baker and Sanders, for improperly coaching an expert witness by telling him to use the words "high crime area" and "retaliation" to establish probable cause for arrests on behalf of the defendants, Harris County and several of its law enforcement officers, in an effort to reduce the defendants' exposure to liability.[21] The court in *Ibarra* recognized that "[a]n attorney enjoys extensive leeway in preparing a witness to testify truthfully, but the attorney crosses a line when she influences the witness to alter testimony in a false or misleading way."[22] The district court sanctioned Baker, Sanders, and Harris County in part for altering the officers' deposition testimony substantively, and for other misconduct, in the amount of $10,000, and the court also disqualified Baker and Sanders as counsel for the defendants.[23]

Although an attorney may not alter testimony of a witness, an attorney can suggest possible responses to anticipated questions during preparation for a deposition.[24] If the witness does not agree with the suggestion, then the attorney cannot force the witness to answer in that manner. The witness, regardless of what the attorney suggests, should always make sure the testimony is accurate.

The attorney should also run through mock deposition questions with the witness to help the witness adjust to the deposition process and to expose the witness to questions that the other side will likely ask. Witnesses should also either review or discuss important documents that are likely to be addressed in the deposition. Showing a witness a document, though, may subject that document to production to the opposing party, although some jurisdictions claim those documents are protected by the work product doctrine as they relate to what the attorney believes are the most relevant documents in the case.[25]

When depositions are videotaped, attorneys must provide additional advice. Sometimes depositions are videotaped when, for example, a witness may be unavailable for trial, and opposing counsel may attempt to show portions of the videotape to the trier of fact (a judge or jury) during trial. Witnesses, therefore, should present themselves in a manner that is credible and professional, which means, in part, wearing clothes that are professional. Business attire, such as a suit, is always the safest option for a witness, although some witnesses do not have suits, in which case business casual is preferred.

The attorney should also emphasize to the witness that body language is important in a videotaped deposition. For example, the witness should not lean towards the camera, which can make the witness look intimidating. Also, witnesses should not twiddle their thumbs or play nervously with a pen or some other object; this makes them appear uneasy and less credible. Instead, the witness should be sitting up straight, preferably with their hands folded on the table or on their lap. The trier of fact may believe the witness that looks and acts more credible than the witness who does neither.

Attorneys should also prepare diligently for depositions they are taking, which involves, among other things, the following: reviewing the pleadings, prior discovery (such as interrogatory responses and deposition testimony), and relevant documents to determine what topics need to be covered with a particular witness and to develop questions to ask the witness; reviewing the pleadings and pertinent case law to determine what testimony it needs from a witness to prevail in its claims or defenses and to advance its themes and arguments; and culling and organizing the relevant documents for use in the deposition.

Attorneys should create outlines that consist of specific questions for the depositions that are separated into distinct topics or categories. For example, if an attorney wants to cover duty, breach of duty, causation, and damages with a certain witness, then the attorney should divide up those topics in the outline and create questions for each topic.

Finally, attorneys taking the deposition should make enough copies of the documents it will show the witness for everyone at the deposition, including the witness, opposing counsel, and any other counsel present.

Regardless of whether an attorney is taking or defending a deposition, the attorney must always be prepared.[26]

II. Failure To Act During A Deposition

Not only can inactivity before a deposition, namely failure to prepare a witness, subject an attorney to sanctions, but passive behavior during a deposition when one's own witness becomes unruly can also expose an attorney to sanctions. In *GMAC Bank v. HTFC Corp.*, counsel for plaintiff took the deposition of the owner and chief executive officer of the defendant, Mr. Wider, in a breach of contract case.[27] The defendant witness used the f-word and variants thereof "no less than 73 times."[28] Conversely, the defendant witness used the word contract and variants thereof only fourteen (14) times.[29]

The court sanctioned the defendant's attorney, Mr. Ziccardi, for failing "to take remedial steps to curb his client's misconduct."[30] The court also sanctioned Mr. Ziccardi because his inaction "impeded, delayed, and frustra[ted] [his client's] . . . fair examination."[31] For instance, "[h]ad Ziccardi curbed Wider's abusive bullying of counsel for GMAC, counsel for GMAC would not have been forced to adjourn the deposition before its completion."[32] Moreover, the court stated that the deposition could have been completed without requiring intervention by the court "[h]ad Ziccardi warned Wider about the possibility of sanctions by providing evasive and incomplete answers."[33]

The following is the exchange before counsel for plaintiff adjourned the deposition:

> Q. Yes or no, did he ask you if you had any documents?
>
> A. Shut the f---up. Don't raise your voice to me.
>
> MR. BODZIN: We're adjourning this deposition.
>
> THE WITNESS: Good.
>
> MR. BODZIN: We're adjourning this deposition. We're going back to the Judge. We're going to let the Judge decide if this was an appropriate way for anybody to behave at a deposition. I'm not going to continue-
>
> THE WITNESS: You don't point your f---ing fingers at me. You don't raise your f---ing voice at me. And I'm going to spit right back at you.
>
> MR. BODZIN: I'm not going to continue to be subject to this harassment, this rudeness is absolutely inappropriate conduct and I'm going to adjourn this deposition right now.

THE WITNESS: Good.[34]

In another exchange, the attorney failed to stop his client's misconduct, and the court found that the attorney implicitly endorsed his client's reckless and deplorable behavior.[35]

MR. BODZIN: I'm going to ask the question again and I'll ask it a different way so as to make sure that I'm not characterizing this witness's testimony.

THE WITNESS: Get his [Ziccardi's] permission.

MR. BODZIN: I don't need his permission.

THE WITNESS: Yes you do.

Q. My question is in submitting loans originated by HTFC for purchase by GMAC, was it HTFC's policy that so long as there was an appraisal that supported the value of the property, it was not up to HTFC to report to GMAC flip activity?

MR. ZICCARDI: Same objection. Go ahead.

A. My attorney just told you to get f---ed and so did I.

MR. ZICCARDI: No.

THE WITNESS: Okay. That's for the record.

Q. First of all, your attorney didn't tell me that. You told me that and now you can answer the question.

A. Go get f---ed.

Q. You're not answering the question?

A. I did answer your question.

Q. No, that's not an answer to the question.

A. That's my answer to your question.

Q. Okay.

A. My attorney very nicely told you that he objects. F--- you. And I'm telling you on behalf of my attorney, f--- you.[36]

The court sanctioned the defense counsel and his client jointly and severally for $16,296.61.[37]

Under the Federal Rules of Civil Procedure 30 and 37, a court can sanction an attorney for advising conduct that leads to evasive or incomplete deposition responses by a witness and for conduct that "impedes, delays, or frustrates the fair examination of the deponent."[38] A court also possesses inherent power to sanction attorneys for misconduct in a court proceeding.[39] Attorneys should avoid obstreperous behavior, as well as advocating, encouraging, condoning, or even failing to stop, such behavior by their clients.

III. Coaching A Witness During A Deposition

Although an attorney should not remain passive during a deposition, they should also avoid improper activity during a deposition, such as making groundless objections, harassing the attorney taking the deposition (if one is defending the deposition), harassing the witness (if one is taking the deposition), and otherwise being obstreperous. Also, although coaching a witness, or indicating in some manner how the witness should answer a question during a deposition, may be tempting, it nevertheless remains completely inappropriate and should be avoided.

One avenue for coaching witnesses includes speaking objections. A speaking objection is"[a]n objection that contains more information (often in the form of argument [or suggestion]) than needed by the judge to sustain or overrule it."[40] Speaking objections are prohibited by the Federal Rules of Civil Procedure, which provides in relevant part that "[a]n objection must be stated concisely in a nonargumentative and nonsuggestive manner."[41]

Speaking objections are common because they allow an attorney defending a deposition to help control the questions being asked in a deposition. They are also common because sometimes the attorney asking questions does not fully understand the material or has incorrect information and, as a result, asks questions that are inherently flawed or unintentionally misleading.

If an attorney asks the well-known exemplar question, "When did you stop beating your wife?" then the attorney defending the deposition may interpose an objection such as, "Objection, assumes facts not in evidence because the defendant has never beaten his wife and therefore could not stop doing something he never did." Thus, speaking objections can help remedy a defective question or clarify a confusing question. Nevertheless, speaking objections are improper, and the remedy is proper preparation of the witness. The proper objection in that case would simply have been, "Objection, assumes facts not in evidence."

Opposing counsel may unintentionally or intentionally ask a misleading or tricky question, such as the question above, but the witness must be taught that he/she should only answer questions that are clear, and the witness should inform the questioning attorney that an answer cannot be provided if the question is inherently flawed. The attorney defending the deposition should make the appropriate objections to the form of the question, such as vague or ambiguous, thus preserving the objection for the record.[42]

An objection may alert the witness to the fact that a question is or may be defective, but objections should not be used to signal to the witness that he/she should not answer the question if the witness is able to do so. In fact, an objection is made for the record and does not prevent the witness from answering the question after the objection, unless the question calls for disclosure of privileged information.[43] Also, if opposing counsel harasses the witness, then the defending attorney should do the following: make a record of that harassment for purposes of a potential motion later (such as a motion for a protective order to prevent further deposition of the witness); instruct the witness not to answer if the harassing questions continue; and, finally, stop the deposition if the opposing counsel fails to cease the harassment.[44]

In a California case, counsel made over 300 objections during a deposition.[45] The court found that counsel coached the witness through speaking the objections, and it sanctioned the attorney in the amount of $25,607.03.[46] Similarly, in a New York case, a plaintiff's attorney made numerous suggestive objections and gave instructions to the witness, his client, not to answer.[47] The court sanctioned the attorney in the amount of $2,500.[48] Thus, speaking objections are improper tools that can result in sanctions for attorneys.

Not only can attorneys coach witnesses through speaking objections, but they can also coach witnesses through the art of foot-tapping. In *Jadwin v. Abraham*, plaintiff's counsel accused defense counsel of foot-tapping the defense counsel's witness to coach the witness about how to respond.[49] What ensued, as replayed on the record, included the plaintiff's counsel and the defense counsel fighting over and allegedly damaging personal property of the plaintiff's counsel, and plaintiff's counsel "borrowing" defendant's phone only to refuse to give it back in an apparent attempt to make defense counsel feel as plaintiff's counsel did regarding plaintiff's property.[50]

As in many cases, plaintiff's counsel and defendant's counsel each agreed to videotape the witness during the depositions in the *Jadwin* case.[51] Notably, and quite incredibly, plaintiff's counsel and defendant's counsel also agreed to videotape each other during the depositions, apparently because both counsel's behavior had become unbearable.[52]

The court ordered a protective order regarding counsel's personal property.[53] Aside from the fact that foot tapping is improper, the attorneys wasted their client's money by spending an inordinate amount of time during and after the deposition on irrelevant matters (i.e., bickering over property and refusing to return each other's property during the deposition and motion practice on these same topics after the deposition).[54]

Finally, telling a witness what to say during, let alone before, a depositiongoes far beyond impropriety. For example, in *Tucker v. Pacific Bell Mobile Services*, during a deposition, plaintiffs' counsel "wrote on a legal pad and showed it to [his witness]."[55] Plaintiffs' counsel "also instructed [his witness] not to answer questions related to her standing to bring the action and refused to permit defense counsel to question [the witness] about the notes on the legal pad."[56] After the deposition, plaintiffs' counsel threw away the notes.[57] The court sanctioned plaintiffs and their counsel for abuse of the discovery process.[58]

In another case, the parties conducted a deposition via videoconference with one party in New York and the other party in California.[59] The counsel questioning the witness saw the witness looking down at their hands, and apparently counsel sitting next to the witness was texting that witness about what to answer.[60] The court ordered that all text messages sent during the deposition were subject to discovery.[61]

IV. Conclusion

All great lawyers possess a commitment to preparation. Attorneys must prepare diligently for depositions, regardless of whether they are taking or defending the depositions. Failure to prepare properly to take a deposition can result in an inefficient deposition that wastes the client's money and everyone's time, and that failure to prepare can also lead to sanctions for the attorney. Likewise, failing to prepare a witness for a deposition, acting improperly during a deposition through coaching or telling a witness what to say, or standing idly by while one's client obstructs the deposition process, can also result in sanctions for the attorney. Moreover, deficient preparation of a witness may lead to undesirable testimony by that witness that may adversely impact the client's case.

* David Grenardo practiced law in California and Texas for three major law firms (Jones Day, DLA Piper, and King & Spalding) for nearly a decade before joining the Ave Maria faculty. He represented clients in a wide variety of complex commercial litigation matters, including contract, tort, and products liability cases. Professor Grenardo dedicated a significant part of his practice to pro bono work, which included protecting the rights of, among others, domestic violence victims, the developmentally disabled, and First Amendment litigants. He has received numerous awards for his pro bono efforts, including the Frank J. Scurlock Award, awarded by the State Bar of Texas, the Harriet Buhai Center for Family Law Pro Bono Panel Volunteer of the Year, the Wiley W. Manuel Award bestowed by the State Bar of California, the San Diego Volunteer Lawyer Program Distinguished Service Award, and was named a Texas Civil Rights Project Pro Bono Champion. He earned his B.A. from Rice University and his J.D. from Duke University School of Law. He teaches Contracts, Business Organizations, and Professional Responsibility. Professor Grenardo thanks his research assistants Trevor Thomson and Vito Roppo, Ave Maria School of Law, J.D. 2014 candidates, for all of their hard work on this article.

[1] A deposition is "[a] witness's out-of-court testimony that is reduced to writing (usu[ally] by a court reporter) for later use in court or for discovery purposes." BLACK'S LAW DICTIONARY 505 (9th ed. 2009).

[2] FED. R. CIV. P. 37(d)(1)(A).

[3] *See, e.g.*, *Hallam v. Johnson*, No. D054852, 2009 WL 4810694, at *3 (Cal. Ct. App. Dec. 15, 2009); *Tucker v. Pac. Bell Mobile Serv.*, 186 Cal. App. 4th 1548, 1550 (2010); *see also* MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (2012) (stating that "[a] lawyer shall not …falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law").

[4] CAL CIV. PROC. CODE § 2025.230.

[5] FED. R. CIV. P. 30(b)(6).

[6] *Int'l Ass'n of Machinists & Aerospace Workers v. Werner-Masuda*, 390 F. Supp. 2d 479, 487 (D. Md. 2005).

[7] *Id.*

[8] *Id.*

[9] MODEL RULES OF PROF'L CONDUCT R. 1.3 (2012) (stating that "[a] lawyer shall act with reasonable diligence in representing a client").

[10] *Int'l Ass'n of Machinists*, *supra* note 6, at 487.

[11] *Id.*

[12] *Id.* at 488.

[13] *Id.*

[14] *Id.*

[15] *Id.* (emphasis added).

[16] *Id.*

[17] *Id.* at 489.

[18] *Id.* at 491.

[19] *See, e.g., State v. Branham*, 952 So. 2d 618, 620 (Fla. Dist. Ct. App. 2007) (stating that "[a] client has a privilege…to prevent any other person from disclosing…the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client") (citation omitted).

[20] MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (2012).

[21] *Ibarra v. Baker*, 338 F. App'x 457, 472 (5th Cir. 2009).

[22] *Id.* at 465.

[23] *Id.* (finding that "Baker and Sanders [also] intentionally had released one of the plaintiff's medical records to humiliate, embarrass[,] and aggravate the plaintiffs").

[24] *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 116, cmt. d (stating that "[w]itness preparation may include rehearsal of testimony[,] and [a] lawyer may suggest choice of words that might be employed to make the witness's meaning clear, [but] a lawyer may not assist the witness to testify falsely as to a material fact") (citation omitted).

[25] *See, e.g.*, Michael Keeley & Michael D. Feiler, *You Can't Ask That! Asserting Work Product Protection For Deposition Preparation Materials*, 34 THE BRIEF 40, 40-42 (Winter 2011).

[26] Sun Tzu stated the proposition plainly: "He will win who, prepared himself, waits to take the enemy unprepared." Sun Tzu, THE ART OF WAR 19 (Lionel Giles ed., Wilder Publications 2007) (500 B.C.).

[27] *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 184 (E.D. Pa. 2008).

[28] *Id.* at 187.

[29] *Id.*

[30] *Id.* at 197.

[31] *Id.* at 185.

[32] *Id*. at 198.
[33] *Id*.
[34] *Id*. at 196.
[35] *Id*. at 195.
[36] *Id*.
[37] *Id*. at 199.
[38] FED. R. CIV. P. 30(d)(2) (stating that "[t]he court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent"); *see also* FED. R. CIV. P. 37.
[39] *See, e.g.*, *Moakley v. Smallwood*, 826 So. 2d 221, 227 (Fla. 2002) (discussing the implied power of the court).
[40] BLACK'S LAW DICTIONARY 1178 (9th ed. 2009).
[41] FED. R. CIV. P. 30(c)(2); *see* Order on Letter Request Regarding Discovery Dispute, *Jadwin v. Abraham*, No. 1:07-cv-00026-OWW-TAG, 2008 U.S. Dist. LEXIS 116780, at *8 (E.D. Cal. 2008).
[42] *See* FED. R. CIV. P. 32(d)(3) (requiring that objections to the form of the question be made during the deposition in a timely manner or else they are waived, while objections to a "deponent's competence – or to the competence, relevance, or materiality of testimony – is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time"); *Stewart v. Colonial W. Agency*, 87 Cal. App. 4th 1006, 1014–15 (2001) (stating that "questions containing errors or irregularities" must be objected to during the deposition in a timely manner or else the objection is waived).
[43] *See* FED. R. CIV. P. 30(c)(2).
[44] *See, e.g.*, FED. R. CIV. P. 30 (d)(3)(A) (stating that "[a]t any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party").
[45] *Hallam*, *supra* note 3, 2009 WL 4810694, at *3.
[46] *Id*. at *12.
[47] *Simmons v. Minerley*, 847 N.Y.S.2d 905, 2007 WL 2409595, at *1 (N.Y. Sup. Ct. Aug. 24, 2007).
[48] *Id*. at *5.
[49] *Jadwin*, *supra* note 41, 2008 U.S. Dist. LEXIS 116780, at **–5.
[50] *Id*. at *8.
[51] *Id*. at *3.
[52] *Id*.
[53] *Id*. at **9–11.
[54] There have been other cases of alleged foot tapping to coach a witness. *See, e.g.*, *Halmos v. Ins. Co. of N. Am.*, No. 08-10084-CIV-BROWN, 2011 WL 1655597, at *2 (S.D. Fla. May 2, 2011) (involving a claim that the attorney was tapping its witness on the foot in an effort to coach the witness, and opposing counsel took pictures of the alleged foot-tapping).
[55] *Tucker*, *supra* note 3, 186 Cal. App. 4th at 1550.
[56] *Id*.
[57] *Id*.
[58] *Id*.
[59] *Nagi v. Old Navy*, CIV.A. 07-5653KSHPS, 2009 WL 2391282, at *1 (D.N.J. July 31, 2009).
[60] *Id*. at **1–2.
[61] *Id*. at *6.