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New OCA rules on the conduct of depositions

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Whether we like it or not, new rules dealing with the conduct of depositions have been issued by the Office of Court Administration (OCA) and they become effective Oct. 1. The legal community was not provided an opportunity to comment on these new rules, and they were issued by the OCAwith little fanfare.

In any event, it would be prudent for all litigators to become familiar with them since they should influence your conduct and, hopefully, the conduct of your adversary at depositions that take place on Oct. 1 and thereafter.

The new rules will become incorporated as a new Part 221 of the Uniform Rules of Trial Courts and they provide as follows:

§ 221.1 Objections at Depositions

(a) Objections in general. No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.

(b) Speaking objections restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

§ 221.2 Refusal to answer when objection is made

A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefore. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

§ 221.3 Communication with the deponent

An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

According to George Carpinello, chairman of the New York State Advisory Committee on Civil Practice, these rules "embrace cardinal principles that are abused all the time. Lawyers who know better take liberties at depositions to gain a tactical advantage," and, "Judge [Jonathan] Lippman has taken the committee's recommendations and issued a 'common sense rule' that sets the parameters for depositions in black and white."

Although they claim to be new rules, there is case law from the various appellate divisions that prohibit most of the conduct prescribed by these rules.

§ 221.1 Objections to depositions

In accordance with subdivision (a) of this new rule, which incorporates CPLR 3115, the only objections that are to be made at a deposition are those provided for in subdivisions (b), (c), (d) or (e) of CPLR 3115, and which would be waived if not interposed.

CPLR 3115(b) refers to irregularities occurring in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of persons that might be obviated if objections were promptly presented.

CPLR 3115(c) deals with the disqualification of a person taking the deposition, and the objection to that person is to be promptly made or else it is waived.

CPLR 3115(d) refers to objections to the competency of witnesses and the admissibility of testimony, and how these objections are not waived by failing to object unless the objection would have obviated the problem if it had been made at that time.

CPLR 3115(e) deals with the form of written questions and an objection needs to be made or else it would be waived.

Since CPLR 3115 has been in effect for decades, and since it makes clear the type of objections required, one wonders what is the purpose of § 221.1(a) other than to simply reiterate the fact that CPLR 3115 is to be complied with by attorneys at a

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deposition.

In *White v. Martins*, 100 AD2d 805 (First Dept. 1984), the court set forth the general rule as follows: "In general the proper procedure is to permit the witness to answer all questions subject to objections in accordance with CPLR 3115; the statute contemplates that 'the deposition shall proceed subject to the right of a person to apply for a protective order. The deposition shall be taken continuously' (CPLR 3113, subd [b]; *see*, *also*, *Spatz v. Wide World Travel Serv.*, 70 AD2d 835). But there is always the possibility of questions that infringe upon a privilege, or that are so improper that to answer them will substantially prejudice the parties; or questions that may be so palpably and grossly irrelevant or unduly burdensome that they should not be answered."

The *Spatz* case cited above also concluded that: "Counsel is without authority to direct a witness to refuse to answer questions at an examination before trial," *Spatz*, 70 AD2d at 836.

This principle is reiterated in both lower courts and Appellate Divisions, including in the case of *Orner v. Mount Sinai Hospital*, 305 AD2d 307, 309 (First Dept. 2003), where the court held that: "When faced with objections at a deposition, the proper procedure is to permit the witness to answer all questions subject to objections in accordance with CPLR 3115."

Subsection (b) of § 221.1 makes speaking objections out of bounds. The objection is to be stated succinctly and not framed to suggest an answer. No one is permitted to coach the witness.

§ 221.2 Refusal to answer when objection is made

This new rule again codifies what has become fairly clear in case law in New York, (*White v. Martins*, 100 AD2d 805 [First Dept. 1984] and *Ferraro v. New York Tel. Co.*, 94 AD2d 784 [Second Dept. 1983]) and that is that there are only three exceptions to the requirement that a deponent is required to answer the questions and they are the following:

(1) To preserve a privilege or right of confidentiality;

(2) to enforce a limitation set forth in an order of a court; or

(3) when the question is plainly improper and would, if answered, cause a significant prejudice to any person.

§ 221.3 Communications with deponent

The third new rule regarding depositions deals with conferring with the deponent during the deposition. This rule is intended to prevent the attorney from conferring with the witness while a question is pending unless the parties consent to it or unless the communication is made for the purpose of determining whether the question should be answered based on the grounds set forth in Section 221.2.

Surprisingly, the Appellate Division, Fourth Department has not ruled on this issue even though our trial courts have, on a regular basis, been involved in addressing this issue.

The value of having these new rules is that there should be no dispute or issue over what exactly is a proper objection to questions and in what instance an attorney may direct a party not to answer. Although the new rule does not refer to any penalty for a violation of it, there have been instances in which a court has actually dismissed a claim due to the behavior of an attorney during a deposition, *Corsini v. U-Haul*, 212 AD2d 288 (First Dept. 1995).

In a recent ABA Section of Litigation publication entitled *Can We Talk?*, it reports on a nationwide survey dealing with the practices governing communications with witnesses while defending a deposition. In general, most, if not all, jurisdictions permit communication with a witness regarding the issue of privilege at any time during the course of a deposition; otherwise it is generally frowned upon to communicate with your witness while a question is pending.

Although there is no comparable rule in federal procedure, the Federal District Courts in the Southern and Eastern Districts provide as follows: "An attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of a deposition except for the purpose of determining whether a privilege should be asserted," Local Rule 13 for the Southern and Eastern Districts of New York.

There is no such rule in the U.S. District Courts for the Northern or Western Districts.

In my view, the primary value of having these new OCA rules is that we don't have to rely upon custom or usage in any particular judicial district or appellate division, rather, we now have uniform rules that can be relied upon in conducting depositions throughout the state.

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