

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BENJAMIN AUSLANDER,	:	No: 2:22-cv-01425-HB
	:	
Plaintiff,	:	
v.	:	
	:	
TREDYFFRIN/EASTTOWN SCHOOL	:	
DISTRICT, et. al,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this _____ day of August 2022, upon consideration of plaintiff's motion for a protective order under Fed. R. Civ. P. 30(d)(3), and any response in opposition thereto it is hereby **ORDERED** that the motion is **GRANTED** and the deposition of plaintiff Benjamin Auslander is limited as follows:

1. The remainder of the deposition of Benjamin Auslander shall not exceed one and a half hour (1.5 hrs);
2. The scope of the deposition should be limited to those facts necessary to defense of the defendants;
3. The witness shall be permitted to answer the question asked without interruption;
4. Counsel for defendants shall not argue objections with counsel;
5. Counsel for defendants shall identify all exhibits and audio recording prior to showing or playing them for the witness; and
6. Counsel for defendants shall act in a professional manner expected of those

in this profession.

BY THE COURT:

The Honorable Harvey Bartle III

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BENJAMIN AUSLANDER,	:	No: 2:22-cv-01425-HB
	:	
Plaintiff,	:	
v.	:	
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TREDYFFRIN/EASTTOWN SCHOOL	:	
DISTRICT, et. al,	:	
	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S MOTION FOR A
PROTECTIVE ORDER UNDER FED. R. CIV. P. 30(d)(3)

Plaintiff, Benjamin Auslander, files this memorandum of law in support of his motion for a protective order under Fed. R. Civ. P. 30(d)(3) to terminate or limit his deposition. ECF No. 44.

Fed. R. Civ. P. 30 governs the conducting of a deposition. It provides that “examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence.” Fed.R.Civ.P. 30(c)(1); *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 184 (E.D. Pa. 2008). A deposition is supposed to mirror the courtroom. “In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer.” Advisory Committee Notes to Fed. R. Civ. P. 30, 1993 Amendments. Similarly, a lawyer shall not “engage in conduct intended to disrupt a tribunal.” Pa. R. Prof. Conduct 3.5(d). Depositions are within the meaning of “tribunal.” *See* Comment [5] to Pa. R. Prof. Conduct 3.5. *Marino v. Usher*, 2013 WL 12146386, at *1 (E.D. Pa. Nov. 19, 2013). As one district explains:

“Any deposition conducted ‘under the caption of this court and proceeding under the authority of the rules of this court’ carries with it the requirement that attending attorneys comport themselves with professionalism, honesty, and integrity. Thus, every witness who is deposed in a case whose captions bears the name of the undersigned is entitled to receive the same respect and fair treatment that he or she would receive if examined before me in open court. The mere fact that I am not present at depositions is no license to turn those proceedings into a vehicle for psychological abuse of deponents. Any attempts to submit a deponent to the abusive treatment alleged here—whether at the hands of Attorney Steinberg or anyone else—may be grounds for sanctions against the offending attorney. It may also be grounds, on good cause shown, for a protective order pursuant to Federal Rule 26(c) ‘protect[ing] a party or person from annoyance, embarrassment, oppression, or undue burden.’”

Vnuk v. Berwick Hosp. Co., 32016 WL 907714, at *5 (M.D. Pa. Mar. 2, 2016)

When an attorney does not follow these rules, Fed. R. Civ. P. 30(d)(3) permits a party “at any time during a deposition ... [to] 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.”

Here, counsel for the defendants, Tredyffrin/Easttown School District and Arthur McDonnell (“defendants”), Brian Elias, Esquire (“Attorney Elias”) engaged in conduct that this Court would have never tolerated if it occurred before it. Attorney Elias’ conduct has repeatedly been offensive to the witness and opposing counsel.¹

Prior to the deposition beginning, Attorney Elias proceeded to berate Attorney Donohue, counsel to defendant Pacific Educational Group, related to a procedural matter between the two of them. That colloquy includes ad hominem remarks directed

¹ The deposition transcript attached at Exhibit 1 and the video of the deposition can be downloaded here: <https://www.dropbox.com/t/flKGvd9mzyRcsTVd>. It will also be delivered to the Court on a thumb drive.

at Attorney Donohue. It was inappropriate and unprofessional and set the tone for the remainder of the deposition.

Immediately after swearing in the witness, it became clear that Attorney Elias was not interested in obtaining facts relevant to the dispute. Rather, he was interested in sending a message to the plaintiff for suing the school district (and perhaps to other parents). Attorney Elias's first question was:

Q. Mr. Auslander, is it still the case that you can't take written notes very well?

Auslander Dep., p. 5:20-21. As expected to a question that assumes a fact not in evidence, and which is structured in a way that does not allow for a yes or no answer without admitting such a fact, Mr. Zimolong objected. The following colloquy occurred:

MR. ZIMOLONG: · Objection. · Objection to form.

BY MR. ELIAS:

Q. Go ahead. You answer the question.

MR. ZIMOLONG: · To the best of your knowledge. Answer the question the best you can.

THE WITNESS: · I've never made any statement about my ability to take notes.

BY MR. ELIAS:

Q. Mr. Auslander, my question to you, though, is -- it's a yes-or-no question -- is it still the case that you can't take notes very well?

MR. DONOHUE: · Objection to form.

MR. ZIMOLONG: · Objection to form.

MR. ELIAS: · Counsel, can you let me finish my question before you do your objections? Can we do that? · Can we do that? Hearing no response

I'll assume yes.²

BY MR. ELIAS:

Q. Mr. Auslander, my question to you is yes or no, is it still the case that you can't take written notes very well?

MR. ZIMOLONG: · Objection to form.

MR. DONOHUE: · Objection to the form.

BY MR. ELIAS:

Q. · You have to answer the question, sir.

MR. ZIMOLONG: · You can answer the question unless you're instructed not to answer the question.

BY MR. ELIAS:

Not you can, you have to answer the question unless you're instructed not to answer.

A. I don't know how to answer that question.

Q. Is it still the case that you cannot take written notes very well?

MR. DONOHUE: · Objection to form.

MR. ZIMOLONG: · Objection to form. Asked, answered.

MR. ELIAS: · No, it was not.

THE WITNESS: · I don't know how to answer that question.

Auslander Dep., p. 5:22-7:12. Breaking convention from typical deposition practice where counsel generally explains the rules and grounds for how questions and answers will go, Attorney Elias launches straight into an obviously objectionable question. It is no different than asking someone: "Is it still the case you beat your

² This portion of the deposition is on the video at 2:21-2:30, it is clear that both counsels believed Mr. Elias had finished his question based on his completed question and pause. He was not interrupted.

wife?" There is no way to answer this question with a yes or no without admitting the factual assumption, as Attorney Elias demanded of the witness. Attorney Elias asked the same objectionable question four times in a row and became increasingly agitated when the witness would not fall into the obvious Hobson's choice he was given.

The questioning continued:

BY MR. ELIAS:

Q. Why don't you know how to answer that question, sir?

A. Because it's a bad question.

Q. You told Mr. McDonnell you don't take written notes very well, didn't you?

MR. DONOHUE: · Objection to the form.

THE WITNESS: · I don't remember.

MR. ELIAS: · I'm going to play a recording now.

(Audio recording played.)

. . . (excluding the audio recording)

(Audio recording stopped.)

BY MR. ELIAS:

Q. That was your voice you just heard on that, right, Mr. Auslander?

A. Correct.

Q. And you made that recording, right, Mr. Auslander?

A. Correct.

(Audio recording played.)

. . . (excluding the audio recording)

(Audio recording stopped.)

COURT REPORTER: · I'm sorry, I don't know if you want to go off the record, but I'm not able to keep up with that.

MR. ELIAS: · Then don't worry about it.

COURT REPORTER: · I'm just going to make notes that it's there.

MR. ELIAS: · It was played.

COURT REPORTER: · I'm sorry if this is -- this is on the video. · Perhaps we could translate -- transcribe later.

MR. ZIMOLONG: · I'll just put on the record that the witness was -- there was a recording that was played for the witness.

MR. ELIAS: · She can do that. · You don't need to do that, Wally.

MR. ZIMOLONG: · Did you include that in the record?

(Court reporter nods in the affirmative.)

MR. ZIMOLONG: · Thank you.

MR. ELIAS: · Include what in the record?

MR. ZIMOLONG: · My statement.

MR. ELIAS: · Try not to make any statements. You're just here to object.

Auslander Dep., p. 7:13-10:10.

Here, context is important. Attorney Elias never identified the recording. He just began playing it. Attorney Zimolong was ensuring what the official transcript would reflect regarding the audio recording that was just played. Because the audio recording was never identified and the court reporter was seemingly confused, he wanted to ensure the record reflected that an audio recording was played. This was a simple exchange made to ensure that the court reporter maintained an accurate

transcript and to clarify an apparent confusion based on Attorney Elias unorthodox approach. It was met with utter contempt and blatant disrespect. In response, Attorney Elias tells Attorney Zimolong: "Try not to make any statements. You're just here to object." It's hard to imagine the Court allowing Attorney Elias to make such a statement in open court. But this was only the *start* of the deposition.

Attorney Elias's harassing approach continued. He continued to ask a derivative of the note taking question:

Q. And you also heard yourself tell Mr. McDonnell that you don't take written notes very well, didn't you?

MR. DONOHUE: · Objection to form.

MR. ZIMOLONG: · Objection to form.

THE WITNESS: · So at that moment –

BY MR. ELIAS:

Q. Mr. Auslander, it's a yes-or-no question.

MR. ZIMOLONG: · The witness has to be permitted –

MR. ELIAS: · Wally, Wally, Wally, stop it.

MR. ZIMOLONG: · Brian, the witness needs to be permitted to answer.

MR. ELIAS: · He –

MR. ZIMOLONG: · This deposition -- I'm putting on the record now that I believe this deposition is being taken in bad faith. · It's being -- it is being taken to unreasonably annoy, embarrass, and oppress the deponent.

MR. ELIAS: · I can read from the Rule 26 as well.

MR. ZIMOLONG: · It's not Rule 26 that I'm reading from, Brian. You can continue with the question. We continue with the question -- with

the objections.

MR. ELIAS: · I can; is that right? Thank you for your permission, Wally.

MR. ZIMOLONG: · And we'll -- we'll see how this proceeds, but if it proceeds any longer I'm going to enforce my rights under Rule 37.

MR. ELIAS: · Wally, you can do whatever you want. · This case is about the recordings I'm playing. *For you to think that this is oppressing and harassing, it's laughable, just like everything.*

THE WITNESS: · So –

MR. ELIAS: · *Mr. Auslander, stop talking. Is laughable. I'm going to continue on.*

Auslander Dep., p. 11:5-12:22 (emphasis added). Here, Attorney Elias is refusing to allow the witness to answer questions, he tells him to “stop talking,” and tells Attorney Zimolong that he is “laughable . . . just like everything is laughable.”³ Again, counsel cannot imagine under any circumstance when such behavior would occur or be appropriate in court. Only 12 pages into the deposition, with the first 4 being formalities, Attorney Elias has harassed the witness with repetitive and improper questions and has insulted Attorney Zimolong several times.

Attorney Elias continued to badger the witness with repeated questions, interrupted the deponent so that he could not fully answer, and argued with objections raised. He then turned to questions regarding a discovery dispute between the parties. The short of it is that defendants asked for Auslander’s cell phone so they

³ What is reflected in the video, but not the transcript, are instances of Attorney Elias mockingly laughing when an objection is made.

could make a *full* copy of *all* contents. Plaintiff objected to this discovery request.⁴ So, at the deposition Attorney Elias asked to see Mr. Auslander's phone. This demand is entirely inappropriate. This too would never be permitted in open court. Attorney Zimolong again objected and instructed the witness not to provide his phone. Auslander Dep., p. 16:23-17:7.

Shortly thereafter, Attorney Zimolong objected to a question early and the following colloquy occurred:

Q. And Mr. McDonnell didn't tell you, This is your half hour, this is it, this is your only window, no –

MR. ZIMOLONG: · Objection to form. You can answer.

MR. ELIAS: · Pardon me, I didn't finish.

MR. ZIMOLONG: · Sorry. · Sorry, Brian.

MR. ELIAS: · I don't need a sorry. I just need you to stop.

Auslander Dep., p. 21:2-11.⁵ Attorney Elias could not accept a well-intentioned apology. Instead, he remained combative. This exchange precipitated another warning from Attorney Zimolong related to suspension of the deposition due to Attorney Elias's unprofessional behavior.

MR. ZIMOLONG: · Brian, if you're not going to act in a professional

⁴ Plaintiff's objection states "Plaintiff objects to this request because it is overly broad, not proportional to the needs of the case, and seeks documents protected by numerous privilege and privacy laws, including, without limitation the attorney-client privilege, work product doctrine, and spousal privilege. The request is so broad, it would include privileged communications with counsel, personal emails, text messages, private photos with no relation to this dispute, call logs with no relation to this dispute, proprietary information, search histories, and other personal and protected privileged information. *See Riley v. California*, 573 U.S. 373, 403, (2014) ("Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life.") The request is unprecedented in scope. It would reduce the discovery process to one that simply requires a party to turn over his entire paper file or computer for copying."

⁵ On the video deposition there is a pause in Attorney Elias' question. It is clear Attorney Zimolong believed he had completed his question and lodged an objection. Video Depo. 11:29-11:39.

manner -- we're in a deposition in a litigation in the United States District Court for the Eastern District of Pennsylvania.

Everyone in this room except you, including your associate, is acting professionally and respectfully, and if it keeps up -- this is on video -- if it keeps up, we're terminating this deposition.

I'm not going to sit here and subject the witness, myself, Mr. Donohue, or anyone else to your unprofessional conduct. It's plainly apparent that you're acting unprofessionally in this case.

So continue with your questioning or this deposition is over.

MR. ELIAS: · All done? · All done? · All done?

Hearing nothing –

THE WITNESS: · Counselor Elias, there was no time –

BY MR. ELIAS:

Q. Mr. Auslander, no question is pending.

Auslander Dep., p. 21:14-22:11. Attorney Elias taunts opposing counsel: “All done? All done? All done?” Again, such behavior is unprofessional and would never be permitted by this Court if counsel were before it. It should be noted all of this behavior occurred within the first *fifteen minutes* of the deposition. This was not a long-drawn-out deposition where counsel was getting frustrated. Attorney Elias’ treated the swearing of the witness as the opening bell and proceeded to conduct himself accordingly.

Plaintiff has already included more detail than he would care to include in a motion of this sort. However, context is important. As such, Plaintiff encourages the Court to simply watch the video deposition and determine if Attorney Elias’ conduct during even the first 15 minutes of the deposition is appropriate behavior for the

courtroom. Attorney Elias badgered the witness with repeated questions, argued over objections, instructed the witness to “stop talking,” told counsel “I don’t need a sorry. I need you to stop.” over an inadvertent objection during a question, and then taunted counsel.

Needless to say, the deposition does not get better. Attorney Elias asked what documents the witness brought with him and Attorney Zimolong asked to review the documents before making them an exhibit to ensure there was no attorney client protected information within the folder. Auslander Dep., p. 24:1-25:16. In response to Attorney Zimolong taking the folder from the witness to review the documents for privilege, Attorney Elias stated: “Okay. Well, then we’re going to have to – then we’ll have to watch and make sure you don’t remove anything.” Auslander Dep., p. 24:17-19. Attorney Elias could have simply requested that all non-privileged contents in the folder be produced after the deposition. Instead, he launched into another tantrum. This one questioning the integrity and ethics of Attorney Zimolong, in front of his client, without any justification.

Attorney Elias continued to question the witness about audio recordings. But inexplicitly Attorney Elias refused to identify the recordings prior to playing them to the witness over the objection of both Attorney Zimolong and Attorney Donohue. Auslander Dep., p. 30:21-33:13. After playing the recording, Attorney Elias again asked the witness to go into his phone to obtain information. Attorney Zimolong again objected. Attorney Elias again appeared to begin to question the witness regarding his phone and Attorney Zimolong, frustrated with the consistent unprofessional

nature of the deposition, interrupted and instructed the witness not to answer. Attorney Elias interrupted his objection. Attorney Zimolong then noted his warning to terminate the deposition and Attorney Elias stated:

MR. ELIAS: · Wally, your warnings are out of line, improper, and of no meaning to me. You can do whatever you want.

This is not a prison. This is not an arrest. You guys are free to get up and leave and have the ramifications flow therefrom.

Auslander Dep., p. 41:3-8. Thereafter, Attorney Zimolong suspended the deposition to seek a protective order. In response, Attorney Elias stated: “Grab yourself a tissue on the way out.” Auslander Dep., p. 43:7-8. That phrase perhaps best encapsulates Attorney Elias’ conduct. Such unprofessional conduct should not be tolerated in any federal district court.

Plaintiff recognizes the significance of suspending the deposition to seek this protective order. However, the opening colloquy makes it clear that Attorney Elias was not conducting this deposition in good faith to seek facts relevant to the defense of Mr. Auslander’s claims. He was seeking to annoy, oppress, and harass Mr. Auslander during the deposition. His unprofessional behavior towards the witness and counsel, unfortunately, required Plaintiff to suspend the deposition to seek a protective order.

Rule 30 requires counsel to treat the witness at a deposition as if it were being taken in open court and in front of the judge. The Court’s review of the deposition video and transcript should be conclusive that Attorney Elias’s conduct did not comply with Rule 30.

Plaintiff seeks a protective order to protect the witness in a re-opened deposition. A limited duration will help Attorney Elias focus on the important questions necessary to obtain the facts relevant to his client's defenses. The scope should be limited to those facts necessary to defend his client. Attorney Elias should be instructed to allow the witness to answer the question asked without interruption, to not to argue objections with counsel, to identify exhibits before introduction or playing recordings, and to act in a professional manner expected of those in this profession.

Respectfully submitted,

Dated: August 29, 2022

/s/ Nicholas R. Barry

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CERTIFICATE OF SERVICE

I hereby certify the foregoing has been filed electronically and is available for viewing and downloading from the Electronic Case Filing System of the United States District Court for the Eastern District of Pennsylvania. I further hereby certify that, in accordance with Fed. R. Civ. P. 5, service has been made upon counsel of record via ECF.

Date: August 29, 2022

/s/ Walter S. Zimolong, Esquire