What To Do if You Suspect Witness Coaching

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To the Forum:

I am a recently admitted New York lawyer. I was involved in a case in which parties were disputing ownership of a historical artifact from a foreign country that had mysteriously disappeared from a museum. I was taking a remote online deposition of an opposing witness, a curator of the museum where the artifact was last known to have been. He was represented by local counsel in the foreign country, who was off camera; only the witness was on camera. While English was not his first language, he spoke well enough that a translator was not used, but I could tell that he was uncomfortable speaking English. His counsel spoke fluent English. I began the questioning with elementary questions about the witness' name, location, background, and so on, questions that did not directly pertain to the dispute in the case.

From the beginning, the witness began to do something curious: after I would ask a question, he would remain silent for a few moments, staring in the general direction of the camera, then answer, and then he would stare off to his side, in the direction where I knew his counsel to be. I was not sure what to make of this. I know that it is unethical for counsel to coach his or her client during deposition, but I had never seen it done before, and so did not know quite what it looked like in practice. I was willing to chalk the oddity up to the witness' lack of proficiency in English.

When I got to the substance of the dispute, and the disappearance of the artifact, the peculiarities escalated. The witness started to take noticeably longer to answer my questions, and, upon finishing his answers, immediately turned to look in his counsel's direction. A handful of times he looked toward his counsel before or during his answer. Much worse, his counsel started to aggressively interfere in his answering. I would ask an appropriate and relevant question about the witness' knowledge of the museum's treatment of the artifact, and before the witness could answer, his lawyer would jump in, object that his client had no way of knowing the answer, and instruct his client either not to answer, or to answer with "I don't know." This happened multiple times, with varying reasons given for the objection: that his client was too high up to know the specific details of the artifact's treatment by other employees, or that his client had not been at the museum long enough to know. There were even a few times where the witness, after beginning an evasive answer to a question, would stumble over his English and pause, and then his lawyer would jump in and make the same objection, explaining that his client's hesitation in answering was due to lack of personal knowledge, and he would then direct his client to not answer further. Opposing counsel also made a slew of objections based on lack of foundation and the form of my questioning.

At first, I tried to reformulate my questions to somehow satisfy opposing counsel, but as he kept objecting, I got tougher and told the witness that I demanded that he answer my question as asked. Opposing counsel objected again, and the witness told me that he would not answer on advice of his counsel, parroting his counsel's reason: lack of personal knowledge, or lack of foundation, or bad form. There was even an instance where, after a break in which the witness' camera and microphone

were off, the witness came back and immediately gave an unprompted short speech about how he was not going to answer questions about how museum employees other than himself treated the artifact.

The result of the deposition was that the witness dodged many important substantive questions that he simply refused to answer. As both the witness and the attorney were in a foreign country, I didn't believe any order from a New York judge would have teeth, and that I would have to seek judicial intervention in the foreign country, an expensive and time-consuming process.

In any event, what troubled me was whether and to what extent the witness' counsel had improperly coached him. When the witness was looking to the side, or while his camera was off during break, was opposing counsel signaling to him as to how to answer? Was there any way for me to prove it? And considering that the witness repeated his counsel's objections to me, were such objections just subtle means of suggesting an answer to the witness? What tricks should I be on the lookout for in the future?

Sincerely,
N. Ept

Dear Mr. Ept:

Your question touches on something that many lawyers have experienced for themselves: depositions can sometimes feel like the gunfight at the O.K. Corral.

Depositions often present situations where the so-called adversarial process can start to really become adversarial. While there are many who will tell you that the rules applying to trials must be followed at depositions, the problem is that there is no judge to keep control or to shame participants into acting with civility. Put candidly, many lawyers are often nervous about the prospect of a clumsy witness letting slip into the record something that they perceive, albeit out of perhaps needless paranoia, to be mortally wounding to their preciously cultivated presentation of the facts. The lawyer defending the deposition peppers the questioning lawyer with the same vapid objections over and over until there is a blow-up. And, of course, no matter how loudly the lawyers may scream at each other, the court reporter is probably still transcribing each sentence of the exchange in nice little lowercase letters ending in a period, obscuring from future readers any embarrassing breach of decorum that might have taken place.

The point is that if you are a lawyer doing the questioning at a deposition, it is not just the witness' deposition; it is your deposition, and, keeping with the Wild West analogy, if order is to be maintained so that you can get on with your important work, you are going to have to be not just the lawyer, but the lawman, protecting your line of questioning from the bad actors who lie in wait to derail it.

Counsel for the witness may try to trip you up by instructing the witness not to answer your question. This can take the form of impermissible witness coaching. Preliminarily, let us be clear: witness coaching is not permitted by the Rules of Professional Conduct.[1] The New York Rules of Professional Conduct make clear that rules regarding the conduct of an attorney before a tribunal apply to conduct during depositions.[2] A lawyer must not, therefore, undermine the integrity of a deposition, including by eliciting false testimony from his own client.[3]

It matters not where the lawyer is in the world. In your case he was in another country. Still, a lawyer who is appearing in, and participating in, a New York action, before a New York tribunal, although that be in a remote deposition, is still subject to the New York Rules of Pro-

fessional Conduct as to his conduct toward the tribunal.[4] So don't worry – these rules have teeth even though the witness and his lawyer are in a foreign country.

Lawyers are not permitted to pass notes to a client witness during a deposition and, in our view, will cross the proverbial red line if a lawyer tries to instruct a client witness on how to answer a particular question. Arguably, there may be good reason for the attorney to interject – including attempting to undo the witness' perjury, or to correct an obvious mistake, either one that is so important that its correction is needed and appreciated by the other side (like a witness' grossly misrepresenting, through ignorance, which specific company in a conglomerate he works for), or one that is so trivial that no one will take offense at the lawyer's input ("you mean Tuesday, not Monday"). Such interjections are innocuous and may be welcomed. But barring that, it should be obvious that a lawyer can neither feed a friendly witness a string of answers to question after question, nor coach the witness on even a single question. Doing so is both a breach of court rules and ethical rules. This is because a witness' answer enters the evidentiary record produced by the disclosure stage in a case, and so a lawyer's manipulation, which is really a form of evidence tampering, is an activity that a lawyer, as an officer of the court, may not engage in.

It is also true that a witness cannot normally decline to give an answer, save for those specific exceptions set forth in 22 N.Y.C.R.R. Section 221.2, which states that a witness must answer all questions, except:

> (i) to preserve a privilege or right of confidentiality.
>
> (ii) to enforce a limitation set forth in an order of a court.
>
> (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person.

Only a few kinds of objections are permitted in depositions, like form and lack of foundation. But if the witness can, he is required to answer notwithstanding objections, and upon his refusal to answer, the questioning lawyer can take the dispute to the judge, who is likely to compel answers. Thus, it is a violation of court rules, and an ethical violation, for a lawyer to instruct a deponent not to answer a question, unless the question falls into one of those three limited exceptions mentioned above, or be otherwise justified by CPLR Rule 3115. 22 N.Y.C.R.R. Section 221.2 makes this explicit: "An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision."

Lawyers can get themselves into trouble when they tell witnesses, "Don't answer that question." And, sadly, it is amazing that many lawyers simply do not understand the rules that limit the use of such an instruction at a deposition. A deponent cannot refuse to answer a question on the grounds that the question was already asked and answered.[5] Relevancy is not a basis on which to instruct a witness not to answer.[6] Excessive form objections are also discouraged and even sanctionable.[7]

In the event that a court does find that an attorney has obstructed a deposition, the court has practical measures that it can take. For example, the court may mandate that a further deposition takes place.[8] And it may appoint a special referee to oversee remaining depositions in the case pursuant to CPLR 3104, with costs of the referee possibly charged to the wrongdoing party.[9] The court may also impose sanctions on "any party or attorney" in a civil action under 22 N.Y.C.R.R. Section 130-1.1 when that attorney's objections or interruptions are characterized as frivolous.[10]

So, a lawyer cannot overtly tell a deponent what to say, and cannot, without good reason permitted by the rules, tell a witness not to answer. There are however certain lawyers who try to use a more subtle and nuanced way to violate the ban on witness coaching, thereby incurring the same judicial counteraction mentioned above – by interrupting or objecting with an intimation to the deponent of what his answer should be. This is ordinarily disallowed by court rules and ethical rules. In fact, 22 N.Y.C.R.R. Section 221.1(b) states: "Every objection raised during a deposition shall be … framed so as not to suggest an answer to the deponent … ." A lawyer can violate this rule in a few ways. One is by interrupting to follow up a questioner's question with the line "if you recall," "if you know," or "don't guess."[11] Another is by interrupting before the witness can answer, to state that the witness would not know the answer to the question.[12] Yet another is by interrupting before the witness can answer, to state what the witness ostensibly knows.[13] The lawyer's framing the interruption as a form objection requesting clarification of the question does not absolve him of the gratuitous suggestive material within the spoken objection. That is, he cannot say "objection to form because the witness would not know the answer to the question as asked." Nor can he gratuitously ask for clarification in a way that telegraphs to the witness what to say.[14] Another impropriety is to make such a lengthy barrage of the same objection that the witness adopts the objection as his answer to questions.[15] And of course, a lawyer may not secretly instruct a deponent on what to say during a break in the deposition.

Such witness coaching is a violation of New York Rules of Professional Conduct 3.3 (Conduct Before a Tribunal) and 3.4 (Fairness to Opposing Party and Counsel).[16] It is of course a violation even if it goes undetected by the other side. Sometimes witness coaching by means other than a lawyer's objections or interruptions is hard to detect. Especially when a deposition is conducted online; the questioning lawyer often cannot see exactly what the witness' lawyer is doing during the deposition.

Hidden witness coaching may come in the form of a lawyer's passing handwritten notes to his deponent client; texting his client; typing a note on his computer screen that his client can read; nodding, mouthing words, or writing notes to the side off camera; mumbling into the witness' ear; squeezing the witness' hand or straight-up instructing the witness on what to say during a break. All of it is improper but it can be difficult to detect. However, if proven, it is taken very seriously.[17]

So then, Mr. Ept, what should you have done in your deposition? First, as we see it, the non-party witness' counsel was clearly beyond the pale of acceptable behavior. He repeatedly interrupted your deposition before the witness could answer, instructing him not to answer, or instructing him to say, "I don't know." He even interrupted the deponent mid-answer to tell him to change his testimony to "I don't know." This was unambiguously wrong of him. His repeated objections infected the mind of the deponent, who began to parrot the same bad objections back at you. He also made a slew of form and foundation objections, probably sanctionable frivolous conduct per the cases above cited. And the result was that the witness refused to answer many important questions. It sounds as if you muddled through to the end without raising a confrontation with your adversary, resulting in much wasted time. While that is a serviceable approach inasmuch as it leaves you with a written record that you can then take to a judge and get at least a new deposition, you could have done better.

You need to remember that you are the master of your deposition, that you ask the questions, that the witness is legally required to answer them, and that there are almost no valid objections that can be made at a deposition – privilege, form, maybe foundation, and little else. You should not compromise, because the witness may not be available to testify at trial, especially in this case where the witness is a non-party residing in another country. So do not let your adversary bully you. As long as you remain civil about it, there is nothing wrong with being commanding and assertive, and telling him that his objections to form are frivolous, that your questions are properly worded, that he is illegally and unethically putting answers into the witness' mouth, that the deponent is required by law to answer, that his unprofessional conduct is being recorded, and that if he and the deponent continue to obstruct then you will halt the deposition and take the written transcript, and video record if available, to the judge, and have him or her compel the witness to answer, with a request for costs paid for the motion and the continued deposition. Remember: you are the lawman.

As for your suspicions that your deponent's counsel was signaling answers to him from off screen and instructing him on what to say during a break, it is unfortunately clear that you lacked hard proof of this. You had your suspicions and you had your grounds for suspicion: that the deponent kept looking off screen and gave a speech about refusing to answer questions immediately after coming back from a break. If you have such a suspicion, the most important thing to do is to document it in the record. If the witness keeps looking toward his lawyer, ask the witness what he is looking at and whether he is being coached, get his answer on record, and instruct him to stop looking off screen and to look at you, and if necessary and possible, halt the deposition and resume it in person with all persons in one room for you to monitor.

If you see him with papers in front of him, immediately halt the deposition, ask him what those papers are, and demand to be given a copy of them. If you hear your deponent receiving a string of text messages, demand to know who is texting him, and demand that he put his telephone away. If you believe that his lawyer has been coaching him during the break, then ask him about that, and instruct him that such coaching is improper. Do not be deterred from asking because of attorney-client privilege – it does not protect improper witness coaching. If the witness' counsel requests a break in the middle of a very specific unfavorable line of questioning, then demand that he tell you why – he must do so. If the

deponent comes back from a break and wants to change an answer, grill him on why. If the witness' counsel is making repeated form objections, ask him what the grounds for them are – he must tell you.

Put as much of this into the transcript as possible. You may be able to read it to the jury at trial, and if the witness' testimony becomes adverse, you can minimize the impact through recitation of the record. You may not be able to prove that the witness' counsel is coaching him, but you will have evidence toward it, and who knows – maybe the lawyer or the deponent will slip up and tell you something that you can take to a judge. You should never surrender to their insidious tactics. If you keep up the pressure on them and keep them aware of where the ethical and legal red lines are, then you will get the most out of the deposition and will be in the best position to achieve a win for your client.

Sincerely,
The Forum, by
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QUESTION FOR THE NEXT FORUM

To the Forum:

I am a longtime New York lawyer, and a very busy one. I am writing because I have recently had to deal with the use of artificial intelligence to record conversations and meetings. AI has made it easy to create transcripts of conversations, especially on Teams or Zoom calls. All one has to do is press a button and, like magic, the result is a record of the conversation that includes transcripts and summaries that recognize voices to determine who is speaking. Some of this technology even edits out foul language. I am concerned that the use of this technology creates risks and all sorts of ethical pitfalls. I know that I cannot record conversations with clients without their consent, but what rules apply when clients record conversations with me? Do I have an obligation to discuss the use of AI and its risks, including attorney-client privilege issues? Additionally, is this something that I should address in my engagement letters?

The use of AI technology to create notes and transcripts is not limited to attorney-client conversations. I know that my clients are being told that handwritten notes are old fashioned and that they should buy hardware that automatically creates transcripts of all conversations and meetings. Some of my clients are also using AI to summarize documents and meetings, which are sometimes sent to me, but I am concerned that they may become discoverable and whether they are privileged materials.

I recognize that the rules regarding the use of AI in the situations that I have outlined are rapidly evolving, but I would appreciate guidance from you that would put me on the right track.

Sincerely,
G O. Skynet

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Endnotes

1. N.Y. RPC 3.4(a) and its Comment [1].
2. N.Y. RPC 3.3, Comment: [1] (because a deposition is "an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority").
3. *Id.*, Comments [5]-[6].
4. *See* N.Y. RPC 8.5(b)(1) (("For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits")). *Cf. id.*, Comment [1] ("the conduct of a lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the conduct occurs"), and Comment [7] ("The choice-of-law provision applies to lawyers engaged in transnational practice").
5. *Rodriguez v. Goodman*, 2015 N.Y. Slip Op. 31412(U) (Sup. Ct., New York Co., 2015).
6. *Brightman v. Corizon, Inc.*, 72 Misc. 3d 1213(A) (Sup. Ct., New York Co., 2021).
7. *Phillips Auctioneers v. Grosso*, 2023 N.Y. Slip Op. 31051(U) (Sup. Ct., New York Co., 2023) ("Although objections to the form of the question are permitted under CPLR 3115(b), [attorney's] form objections were excessive. In fact, she asserted over 100 form objections, which is an independent basis for sanctions alone").
8. *Terzi v. Fortune Home Builders*, 2009 N.Y. Slip Op. 30871(U) (Sup. Ct., New York Co., 2009).
9. *Slapo v. Winthrop Univ. Hosp.*, 186 A.D.3d 1281, 1283-1283 (2nd Dep't 2020).
10. *Freidman v. Fayenson*, 41 Misc. 3d 1236(A) (Sup. Ct., New York Co., 2013); *Ortega v. Rockefeller Ctr. N. Inc.*, 2014 N.Y. Slip Op. 33667(U) (Sup. Ct., New York Co., 2014) (imposing costs of motion and of continued deposition).
11. *Freidman* (ruling that statements of this type are improperly coaching or suggestive because they prompt the witness to say "I do not recall").
12. *Rodriguez.*
13. *Id.*
14. *Guggenheim Sec. v. Falcon's Beyond Glob.*, 2025 N.Y. Slip Op. 33769(U) (Sup. Ct., New York Co., 2025) (lawyer said, in response to a question to the witness, "Post closing?," prompting the witness to adopt his words and ask, "Post closing?").
15. *Id.* (witness started to make form and asked-and-answered objections that his lawyer had been making).
16. *Sciara v. Surgical Assoc.*, 32 Misc. 3d 904 (Sup. Ct., Erie Co., 2011).
17. *See Fla. Bar v. James*, 329 So. 3d 108 (Fla. 2021) (attorney suspended for 91 days for texting deposition answers to his deponent client; he accidentally sent some texts to the questioning attorney, who forced disclosure of all texts).