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Chapter 7

# Defending the Client's Deposition

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A lawyer defending a client's deposition is like a parent watching his or her child play a sport. Like a parent sitting in the bleachers, defending counsel is primarily an observer at their client's deposition. Although the rules of civil procedure provide tools to prevent abuse by the questioner and to protect the record, the defending lawyer's participation in a deposition is minimal. Counsel's desire to see the deponent succeed, or at least not fail, produces a heightened sense of anxiety arising from their lack of control over the client's performance. Counsel cannot control critical factors such as the questioner's demeanor (within reason), the questions, the client's answers, or the client's emotional response.

Before undertaking to defend a deposition, counsel needs to know the rules of the jurisdictions in which they practice. Too often lawyers agree to "usual stipulations" and assert "objections to the form" without confirming precisely what those vague terms of art mean. The usual stipulations vary from jurisdiction to jurisdiction, and there is a split of authority among the jurisdictions on permissible objections at depositions. This chapter will address both issues before suggesting some strategies counsel should employ when defending depositions.

Preparing for and defending a client's deposition can also be a bonding experience that strengthens the attorney–client relationship. Defense counsel's presence, demeanor, and advice are important elements to "suc-

cessfully" defending a client's deposition. Clients need to know they are not alone in this process, and that they have the support of competent counsel who is confident in their ability.

## What Are the "Usual Stipulations"?

Most lawyers claim to know the "usual stipulations" and never ask the content. When a dispute arises, however, it becomes readily apparent that the parties' understandings of that term of art differ in material respects. If there is any doubt that the parties agree on what the "usual stipulations" are, the parties should address that issue *before* the deposition.

The purpose of the "usual stipulations" is to force objections to the form of a question at the time of the deposition when the issue can still be corrected. *Pergo v. Bruister*, 2014 WL 3779640, at *1 (S.D. Miss. 2014). The "usual stipulations" mean that the parties will reserve, not waive, their objections until trial, *except for objections as to form*. At least one commentator has argued that the "usual stipulations" are a significant deviation from the Federal Rules of Civil Procedure and many states' rules, because problems other than the form of the question are correctable at the deposition. For example, not laying a proper foundation for an opinion. By agreeing to the "usual stipulations," a party preserves more of his opponent's objections. *Deposition Traps*, *ABA Journal*, James W. McElhaney (September 24, 2006). These differing views about this common practice can materially affect a case and must be addressed at the outset.

## What Do the Rules of Civil Procedure Allow?

### *Deposition Objections*

The rules of civil procedure do not create an independent "form" objection. Instead, they describe a category of objections—such as to the form of a question—that a party must raise at the deposition. Federal Rule of Civil Procedure 30(c)(2) governs deposition objections. The pertinent portion of that rule states as follows:

> [a]n objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner.

Fed. R. Civ. P. 30(c)(2). The advisory committee notes expound on this rule and clarify the types of objections that must be noted on the record. Specifically, the advisory committee notes state that:

> [w]hile objections may, under the revised rule, be made during a deposition, they ordinarily should be limited to those that under Rule 32(d)(3) might be waived if not made at that time, *i.e.*, objections on grounds that might be immediately obviated, removed, or cured, such as to the form of a question or the responsiveness of an answer.

Fed. R. Civ. P. advisory committee's note (1993 amendments). Federal Rule 32(d)(3) states that:

> [a]n objection to an error or irregularity at an oral examination is waived if:
>
> (i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and
>
> (ii) it is not timely made during the deposition.

Fed. R. Civ. P. 32(d)(3)(B).

### Some jurisdictions permit, or even require, a defending party to give the examining party the right to cure the objection

In some jurisdictions, courts require defending lawyers to specify the nature of their objections at the deposition. For example, one court has commented as follows:

> [Some] contend that the objection should be limited to the words "I object to the form of the question." The Rule, however, is not so

> restrictive. Rather, it simply provides that the objection must be "stated concisely in a nonargumentative and nonsuggestive manner."… [T]he general practice in Iowa permits an objector to state in a few words the manner in which the question is defective as to form (*e.g.*, compound, vague as to time, misstates the record, etc.) This process alerts the questioner to the alleged defect, and affords an opportunity to cure the objection.

*Rakes v. Life Investors Ins. Co. of Am.*, 2008 WL 429060, at *5 (N.D. Iowa, Feb. 14, 2008); *Cincinnati Ins. Co. v. Serrano*, 2012 WL 28071, at *5 (D. Kan., Jan. 5, 2012) ("Although the [rules] talk about objections based on the 'form' of the question (or responsiveness of the answer), this does not mean that an objection may not briefly specify the nature of the form objection (*e.g.*, 'compound', 'leading', assumes facts not in evidence")); *Sec. Nat'l Bank of Sioux City, Iowa, as Conservator for J.M.K., a Minor v. Abbott Lab.*, 299 F.R.D. 595, 602 (N.D. Iowa 2014) ("[L]awyers are required, not just permitted, to state the basis for their objections. Moreover, 'form' objections are inefficient and frustrate the goals underlying the Federal Rules… Because they lack specificity, 'form' objections do not allow the examiner to immediately cure the objection. Instead, the examiner must ask the objector to clarify, which takes more time and increases the amount of objection banter between the lawyers.").

However, even these jurisdictions prohibit "speaking objections," which are universally prohibited. A speaking objection occurs when an objecting lawyer expounds on the bases for their objection. For instance, "Objection, hearsay" is a proper, non-speaking objection. However, "Objection, the last assertion by Mr. Jones was an out of court statement by Ms. Day, said in the hotel room, that Mr. Jones allegedly heard, that he never testified to in a deposition, and that is now being offered for the truth of Ms. Day's statement" is an impermissible speaking objection. *Sec. Nat'l Bank*, 299 F.R.D. at 603.

### Other jurisdictions prohibit anything other than an unspecified objection to the form during a deposition

Some jurisdictions appear to take the position that unspecified form objections are preferable because they are concise, which is consistent with the

language in Rule 30. In these jurisdictions, counsel should avoid saying anything more than "Objection, form." *Offshore Marine Contractors, Inc. v. Palm Energy Offshore, LLC*, 2013 WL 1412197, at *4 (E.D. La. Apr. 8, 2013) ("The Court finds that the behavior of counsel for OMC does not warrant sanctions here. Indeed, most of the objections by OMC's counsel are simple form objections with no unwarranted, lengthy speaking objections."); *Serrano*, 2012 WL 28071, at *5 ("But such an objection [to a vague question] to avoid a suggestive speaking objection should be limited to an objection 'to form', unless opposing counsel requests further clarification of the objection."); *Druck Corp. v. Macro Fund (U.S.) Ltd.*, 2005 WL 1949519, at *4 (S.D. N.Y. Aug. 12, 2005) ("Any 'objection as to form' must say only those four words, unless the questioner asks the objector to state a reason."); *Turner v. Glock, Inc.*, 2004 WL 5511620, at *1 (E.D. Tex. Mar. 29, 2004) ("All other objections to questions during an oral deposition must be limited to 'Objection, leading' and 'Objection, form.' These particular objections are waived if not stated as phrased above during the oral deposition."); *Auscape Int'l. v. Nat'l. Geographic Soc'y*, 2002 WL 31014829, at *1 (S.D. N.Y. Sept. 6, 2002) ("Once counsel representing any party states, 'Objection' following a question, then all parties have preserved all possible objections to the form of the question unless the objector states a particular ground or grounds of objection, in which case that ground or those grounds alone are preserved."); *In re St. Jude Med., Inc.*, 2002 WL 1050311, at *5 (D. Minn. May 24, 2002) ("Objecting counsel shall say simply the word 'objection', and no more, to preserve all objections as to form.").

### How many objections are too many?

The rules leave it to a lawyer's judgment, subject to a reviewing court's discretion, to determine if objections are asserted for a proper purpose. As long as the objection is proper, and it's asserted for a proper purpose, there is no set limit on the number of objections a party can assert. Case law suggests erring on the side of fewer objections. However, if a defending lawyer finds herself objecting frequently during a deposition, she needs to carefully evaluate why. If it's one of those rare occasions when a deposing lawyer, or conditions at the deposition, are hostile, defense counsel needs to be prepared to

contact the court for assistance or, if necessary, to terminate the deposition and file a motion for protective order.

Defending counsel cannot use objections to impede, delay, or frustrate the fair examination of a witness during a deposition. The comments to Rule 30 state that a lawyer can be sanctioned for making "an excessive number of unnecessary objections." Fed. R. Civ. P. 30, advisory committee's note (1993 amendments); *Craig v. St. Anthony's Med. Ctr.*, 384 F. App'x 531, 533 (8th Cir. 2010). Unfortunately, what constitutes an "excessive number" of objections varies from case to case. *Id.* (affirming a monetary sanction against a lawyer who made "a substantial number of argumentative objections together with suggestive objections" that "impeded, delayed, or frustrated [a] deposition"); *Van Pilsum v. Iowa State Univ. of Sci. & Tech.*, 152 F.R.D. 179, 181 (S.D. Iowa 1993) (sanctioning a lawyer who had "no justification for… monopoliz[ing] 20 percent of his client's deposition" and whose objections "were for the most part groundless, and were only disputatious grandstanding").

### *Defending Counsel Cannot Coach a Witness During a Deposition*

A lawyer cannot comment on questions in any way that may affect the witness's answer. Any objection that is argumentative or suggests an answer is improper under Fed. R. Civ. P. 30(c)(2). *Specht v. Google, Inc.*, 268 F.R.D. 596, 598 (N.D. Ill. 2010). One court has said that:

> [t]he Federal Rules of Evidence contains no provision allowing lawyers to interrupt the trial testimony of a witness to make a statement. Such behavior should likewise be prohibited at depositions, since it tends to obstruct the taking of the witness's testimony. It should go without saying that lawyers are strictly prohibited from making any comments, either on or off the record, which might suggest or limit a witness's answer to an unobjectionable question.

*Hall v. Clifton Precision*, 150 F.R.D. 525, 530–31 (E.D. Pa. 1993).

Despite the language of the rule, witness coaching is a prevalent practice at depositions. Some means of coaching have become so prevalent that many lawyers don't recognize it. Examples of objections courts have deemed impermissible witness coaching include such commonplace objections as:

- Objection vague;
- Calls for speculation;
- Ambiguous;
- Calls for hypothetical;
- If you know;
- If you understand the question;
- Don't feel like you have to guess;
- You are not obligated to assume facts;
- If the answer is "no," just say "no"; and
- Any other words or phrases that suggest, in one way or another, how a question should be answered.

*Id.* at 528–29; *Specht*, 268 F.R.D. at 598–99; *McDonough v. Keniston*, 188 F.R.D. 22, 24 (D. N.H. 1998); *Cordova v. United States*, 2006 WL 4109659, at *3 (D. N.M. July 30, 2006); *Serrano*, 2012 WL 28071, at *5; *Philips v. Mfr.s Hanover Trust Co.*, 1994 WL 116078 (S.D. N.Y. Mar. 29, 1994); *Oleson v. Kmart Corp.*, 175 F.R.D. 560, 567 (D. Kan. 1997); *Alexander v. F.B.I.*, 186 F.R.D. 21, 52–53 (D. D.C. 1998); Peter M. Panken & Mirande Valbrune, *Enforcing the Prohibitions Against Coaching Deposition Witnesses*, 17 No. 5 Prac. Litigator, 15–16 (2006).

Another example of impermissible witness coaching occurs when a lawyer asserts a clarification-inducing objection. Lawyers cannot object because they believe a question is vague or unclear. The witness must decide for herself whether she understands the question. If a defending lawyer believes a witness has misunderstood the question, she can address that on cross-examination. One court facing this issue stated that:

> Only the witness knows whether she understands a question, and the witness has a duty to request clarification if needed. This duty is traditionally explained to the witness by the questioner before the deposition. If defending counsel feels that an answer evidences a failure to understand a question, this may be remedied on cross-examination.

*Serrano*, 2012 WL 28071, at *5; *Hall*, 150 F.R.D. at 528–29 ("If the witness does not understand the question, or needs some language further defined or some documents further explained, the witness can ask the deposing lawyer to clarify or further explain the question. After all, the lawyer who asked the question is in a better position to explain the question than is the witness's own lawyer."); Panken & Valbrune, *Enforcing the Prohibitions Against Coaching Deposition Witnesses*, at 15–16 ("It is improper for an attorney to interpret that the witness does not understand a question because the lawyer doesn't understand a question. And the lawyer certainly shouldn't suggest a response. If the witness needs clarification, the witness may ask the deposing lawyer for clarification. A lawyer's purported lack of understanding is not a proper reason to interrupt a deposition.").

Defending counsel are also prohibited from becoming an intermediary that interferes with the question and answer format the Rules contemplate. This frequently occurs when defending counsel try to interpret questions for the witness. According to one court:

> The underlying purpose of a deposition is to find out what a witness saw, heard, or did—what the witness thinks. A deposition is meant to be a question and answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interrupting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness—not the lawyer—who is the witness.

*Hall*, 150 F.R.D. at 528; *Alexander*, 186 F.R.D. at 52–53 ("[i]t is highly inappropriate for counsel for the witness to provide the witness with responses to deposition questions by means of an objection" or to "rephrase or alter the question" asked of the witness); Panken & Valbrune, *Enforcing*, *supra*, at 16 ("[C]ounsel is not permitted to state on the record an interpretation of questions, because those interpretations are irrelevant and are often suggestive of a particularly desired answer.").

## Counsel's Role

Although the letter and spirit of the Rules of Civil Procedure leave little room for defending counsel to participate in the deposition, defense counsel's role is still vital in the client's eyes. Defense counsel's main objective is to support the client, and give her confidence that her interests are being protected. As one commentator described it, "[t]he deponent should sense, feel, and know that the defending attorney is there to protect him." Dennis R. Suplee, *The Deposition Handbook: Strategies, Tactics and Mechanics* (Trial Practice Library), 185 (Wiley Law Publications 2002). Clients need to know they are on a winning team. If they feel confident that they are prepared and able to complete the process, they are more likely to do well.

Clients often mimic their counsel's confidence. If counsel is calm, confident, and prepared, the client is more likely to be relaxed and convey the same characteristics at the deposition. Much of this confidence comes from adequate preparation before the deposition. During the deposition, however, clients are acutely aware of counsel's responses and anxiety. If counsel becomes anxious or aggravated, it creates anxiety which can diminish the client's confidence.

### *Counsel Needs to Be an Active Listener*

Body language sends powerful messages to your client. All too often, defending lawyers focus on other work, look out the window, or simply daydream when defending depositions. Witnesses sense counsel's disengagement, which can reduce their confidence, make them feel unimportant, or make them think the process is not important because their lawyer isn't taking it seriously. Counsel needs to sit close to the witness and remain alert, making eye contact with the questioner and/or their client throughout the deposition (no matter how dull and monotonous it is).

### *Don't Destroy the Witness's Confidence by Being Critical*

Counsel needs to remain positive throughout the deposition. Remaining positive during some depositions is difficult, but it's important for counsel to focus on what a successful outcome looks like, and not on undesirable

outcomes they want to avoid. By helping the client focus on the desired outcome, rather than speaking in terms of what "not to do," counsel can lessen the chance that the witness will do the very thing they don't want to because they are hyper focused on it.

Every lawyer has prepared a witness to "not do" or "not say" something in particular, only to have them say or do that very thing within the first ten minutes of a deposition. Frequently, the client isn't even aware he or she has done or said it. Counsel has to fight the urge to express their frustration during a break. The testimony is on the record, and can be dealt with, if at all, on cross-examination. Keep the message positive and boost the client's confidence. Counsel can still provide tips during breaks, but it's best to frame them in terms of how the client did well when he or she did "X," not how he or she needs to stop doing "Y."

### *Cross-Examining the Client*

The conventional wisdom cautioning against questioning one's own client has given way to a more pragmatic approach. Each circumstance and witness is different, and counsel need to make this determination based on the dynamics of each particular case. If the witness has given testimony that is vague, is likely to lead to an inaccurate record, or create false impressions, counsel should strongly consider correcting that on the record rather than waiting to do so at trial, through a motion, or with an affidavit. If counsel waits to address it later, the witness may be unavailable, a clarifying affidavit may be stricken, or any number of calamities can prevent correction. The safest course of action is to address the issue while the witness is present with a court reporter and opposing counsel.

### *Take Care of the Client*

Depositions are stressful. Witnesses are frequently so anxious to get through that they will put off restroom breaks, ignore hunger, or endure headaches or other physical discomforts in their effort to finish faster. Make sure the client knows he or she has the right to take a break at any time and for any reason. Be watching for signs of fatigue, hunger, or distress. If the client

doesn't ask for a break, counsel should. A good rule of thumb is to break every hour.

During breaks, encourage the client to leave the deposition room. Have him or her walk around, and let the client know that he or she can use that time to consult with counsel. Finally, caution the client against interactions with opposing counsel or parties. Small talk can reveal additional information that can lead to a longer deposition.

For lengthy depositions, consider insisting on a lunch break. It's important to keep the witness comfortable and alert. Sometimes lawyers who regularly work through lunch assume their witnesses don't need lunch either. However, if a witness is experiencing hypoglycemia and undergoing the stress of a deposition, he or she is not likely to perform at his or her best. Even if the witness doesn't ask for one, counsel should strongly consider taking a lunch break. This break gives the client an extended time away from the questioner to unwind, consult with counsel, and renew his or her energy.

## Conclusion

With trials becoming less and less frequent, depositions are one of the few opportunities most clients have to see their lawyers in action. Although stressful, client depositions present counsel with the chance to strengthen the client relationship and demonstrate their abilities.

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