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Deposition objections: Are you saying too much? Or too little?

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Courts and the practicing bar have made great strides in recent years in policing and punishing discovery abuses. Rather than using the discovery process as an opportunity to obstruct the other side and coerce a favorable outcome by driving up litigation costs, most counsel now approach discovery as a truth-seeking exercise aimed at ensuring a free flow of information. Under the watchful eye of the federal bench, recent reforms to the Federal Rules and a new focus on containing the cost of E-discovery have begun to curtail some of the worst discovery abuses.

But one area of discovery outside of close judicial supervision still operates like the wild west, and continues to bring out the worst in some counsel: defending oral depositions. This area is particularly challenging because guidance from the bench has been sparse and, to a large extent, contradictory. As a result, lawyers are left wondering: after I have prepared my witness and gotten her to the deposition, what is my job, and how do I do it effectively and ethically?

A recent federal court decision by Judge Mark Bennett from the Northern District of Iowa brings a new urgency to this question. *Security Nat'l Bank of Sioux City v. Abbot Labs.*, 299 F.R.D. 595, 604 (N.D. Iowa 2014). In a seventeen-page opinion, the Court excoriated counsel's conduct at a deposition, and concluded *sua sponte* that the attorney involved should be sanctioned. The opinion includes the ominous admonition that "lawyers should consider themselves warned" and that similar improper conduct in the future "will invite sanctions." *Id.* at 604.

The opinion identified three areas in which counsel's behavior was inappropriate. First, the court criticized counsel for interposing an excessive number of "form" objections, while stating no basis for the objection. At the same time, however, the court also criticized counsel for "interject[ing] in ways that coached the witness to give a particular answer" and "excessively interrupt[ing]" the depositions." *Id.* at 600. And therein lies the conundrum. The opinion appears to be criticizing counsel both for saying too little, and also for saying too much. How are counsel to navigate this potential minefield?

Here it is helpful to return to the relevant rule. Federal Rule of Civil Procedure 30(c)(2) provides that

> An 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.

Thus, all objections must be "concise," "nonargumentative," and "nonsuggestive." A minority of courts have interpreted this language to require that lawyers state nothing more than a general "form" objection.[1] Anything more, these courts believe, may impermissibly clue the witness in about how to respond. For example, an attorney who objects that a question "calls for speculation" may thereby remind the witness to testify about only facts, thus allowing the attorney to coach the witness.

The better view, according to Judge Bennett, is that any objection must give the questioning attorney enough information to be able to remedy any deficiency. As Fed. R. Civ. P. 32(d)(3)(B) provides, any objection is waived if it relates to a deficiency "that might have been corrected at that time," thus indicating that communicating a potential deficiency to the questioner is the whole point of the exercise. Generalized "form" objections leave the questioner guessing about the basis of the objection, failing in

that purpose and achieving little more than cluttering the transcript.

But here is the catch: Judge Bennett also noted that even an unadorned "objection to form" can improperly coach the witness:

> Counsel's "form" objections also emboldened witnesses to quibble about the legal basis for certain questions—*e.g.*, "That would be speculation"— and to stonewall the examiner—*e.g.*, "Not going to answer." In short, these objections were suggestive and amounted to witness coaching, thereby violating Rule 30.

Security Nat'l, 299 F.R.D. at 606. These comments present counsel defending a deposition with a bit of a quandary. If even a simple "form" objection can improperly coach the witness, won't a more fulsome statement of the objection coach the witness even more? And if so, how can one both put opposing counsel on notice of the nature of the objection, and also avoid impermissible coaching?

Judge Bennett supplies part of the answer, which is to object judiciously—that is, only when there is something truly objectionable. Thus, "[u]nless a question is truly so vague or ambiguous that the defending lawyer cannot possibly discern its subject matter, the defending lawyer may not suggest to the witness that the lawyer deems the question to be unclear." *Id.* at 605. To avoid coaching, "[l]awyers may not object simply because *they* find a question to be vague, nor may they assume that the witness will not understand the question." *Id.*

But as all lawyers know, ambiguity is in the eye of the beholder. There is thus some doubt as to whether this principle will curb impermissible witness coaching.

A fuller solution derives from the witness preparation session. Counsel should ensure that a witness understands the purpose of objections during the deposition, and should be instructed not to change her answer or ask for clarification simply because a lawyer has objected. And although it is acceptable to tell a witness to answer carefully any objectionable question, the lawyer must be sure that the witness will not have any automatic reaction to an objection.

Perhaps more important, during the deposition, the lawyer must monitor the witness's answers and make sure that no such automatic response is apparent. In *Security National*, for example, the witness repeatedly responded to Counsel's "form" objections by asking for a clarification or simply stating "not going to answer." *Id.* at 606. Of course, even the best witness may slip into such a pattern, in which case the lawyer should call for a break and gently remind the witness that an objection does not necessarily mean the witness should avoid trying to answer.

As the decision in *Security National* shows, these issues are no trivial matter, and missteps in this area can lead to significant sanctions. To be sure, the sanction in *Security National* was not particularly heavy handed—the offending counsel simply had to prepare an instructional video teaching his colleagues proper behavior when defending depositions—but it should be enough to make all lawyers take notice of potential abuse in this area.

Moreover, federal courts in Illinois have shown a willingness to impose appropriate sanctions when counsel steps over the line. In *Specht v. Google, Inc.*, 268 F.R.D. 596, 598 (N.D. Ill. 2010), for example, Judge Leinenweber imposed a monetary sanction for behavior not dissimilar from that in *Security National*. More recently, Magistrate Judge Johnston cited *Security National* when resolving a deposition dispute. *Hulina v. Marengo Rescue Squad*, Case No. 12 CV 10424 (N.D. Ill. Aug. 6, 2014).

All counsel should remember that professionalism and courtesy in discovery matters are important not only when the judge is watching. Appropriate behavior while defending depositions is just as important, and will ensure that attorneys do not impede—inadvertently or otherwise—the important truth-seeking function of the discovery process. ■

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1. *See, e.g.*, *Offshore Marine Contractors, Inc. v. Palm Energy Offshore, L.L.C.*, No. CIV.A. 10-4151, 2013 WL 1412197, at *4 (E.D. La. Apr. 8, 2013); *Cincinnati Ins. Co. v. Serrano*, No. 11-2075-JAR, 2012 WL 28071, at *5 (D. Kan. Jan. 5, 2012); *Druck Corp. v. Macro Fund (U.S.) Ltd.*, No. 02 CIV.6164(RO)(DFE), 2005 WL 1949519, at *4 (S.D.N.Y. Aug. 12, 2005); *Turner v. Glock, Inc.*, No. CIV.A. 1:02CV825, 2004 WL 5511620, at *1 (E.D. Tex. Mar. 29, 2004); *Auscape Int'l v. Nat'l Geographic Soc'y*, No. 02 CIV. 6441(LAK), 2002 WL 31014829, at *1 (S.D.N.Y. Sept. 6, 2002); *In re St. Jude Med., Inc.*, No. 1396, 2002 WL 1050311, at *5 (D. Minn. May 24, 2002).