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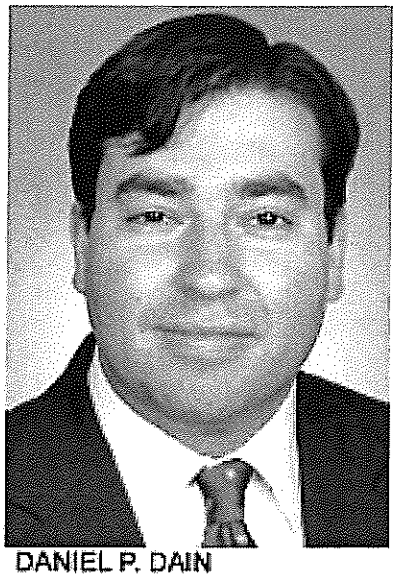
Focus On Civil Practice

Deposition Objections Used To Coach Witnesses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By Daniel P. Dain

The scenario is probably familiar to all deposition examiners.

It might go something like this: You ask a question to which the witness does not provide a responsive answer. You try the question again, perhaps changing the wording somewhat. Opposing counsel objects: "Asked and answered." The witness is on notice: Be careful, don't give any new information, don't contradict yourself. The witness replies, "I think that I have already answered the question."

Further persistence by the examiner does not pay off. Discovery is frustrated.

Attorneys defending depositions resort to a panoply of objections and other devices to subtly or not so subtly signal to the witness how to respond to a question or to be on guard or to hide behind a lack of knowledge.

Both the Federal and Massachusetts Rules of Civil Procedure seem to ban such techniques. Federal Rule of Civil Procedure 30(d)(1) states:

"Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4)."

Federal Rule of Civil Procedure 30(d)(4) states, in relevant part:

"At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted *in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party*, the court ... may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition. ..." (Emphasis added.)

Massachusetts Rule of Civil Procedure 30(c) is similar.

And yet the practice of objecting in a suggestive manner persists. What are these objections and other devices, and how have courts dealt with them in practice?

A Partial Roster Of Tricks

- **Asked and answered ...**

There is no rule that an examiner may not ask a question twice, or more than twice. Indeed, asking the same question at different times in an examination may be a good way to test the memory and credibility of the witness.

The defending attorney, fearful of a contradictory answer, is inclined to object on the basis of asked and answered to signal to the witness to be careful and make sure you answer the question the same way.

The objection likely comes out of the rule that the examiner may not "*unreasonably* ... annoy, embarrass, or oppress the deponent ..." Asking the same question multiple times could clearly, at some point, rise to the level of witness harassment.

Yet Rule 30(d)(3) imposes on the defending attorney the obligation to suspend the deposition at that point. Short of suspending the deposition, instructing the witness not to answer a question because it has been "asked and answered" is improper. See, e.g., *Athridge v. Aetna Casualty and Surety Co.,* 184 F.R.D. 200, 208 (D.D.C. 1998); *McDonough v. Keniston*, 188 F.R.D. 22, 25 (D.N.H. 1998).

Even when not accompanied by an instruction not to answer, courts have looked askance at the "asked and answered" speaking objection. See, e.g., *Betts v. United Airlines, Inc.,* 1998 WL 1792475, *1 (N.D. Cal., Aug. 14, 1998); *El-Yafi v. 360 East 72nd Owners Corp.,* 1995 WL 276140, *1 (S.D.N.Y. May 11, 1995).

In *Applied Telematics, Inc. v. Sprint Corp.,* 1995 WL 79237, *2 (E.D. Pa. Feb. 22, 1995), the court noted that in complex cases, deposition questions may overlap or be "slightly repetitive," and objecting on the grounds of "asked and answered" serves only to prolong the deposition.

- **Answer only if you know ...**

This is a common and seemingly innocuous comment and usually is not even made in conjunction with the word "objection." Who could argue that the witness should answer if he does

not know?

Yet it is a way to signal to the witness not to answer the question and witnesses often take the hint by answering the question with "I don't know." Thus, in *Betts v. United Airlines, Inc.,* 1998 WL 1792475, *2 (N.D. Cal., Aug. 14, 1998), the court found the following objection inappropriate:

Q: And is that the only comment that was made during your training about the difference between the shuttle and the main line flyer?

[Defending attorney]: If you recall.

The witness: I don't. I really don't recall.

Where courts have found a pattern of such signaling, they have not hesitated to impose sanctions on the offending lawyer. Thus, in ordering defense counsel to pay costs and re-produce a witness, the court in *City of New York v. Coastal Oil of New York, Inc.,* 2000 WL 97247, *2 (S.D.N.Y. Jan. 28, 2000), stated that "[r]eview of the entire transcript also shows that defense counsel often made objections which had the appearance of coaching the witness by continually reminding the witness by stating, 'if you know,' or 'if you remember.'"

Similarly, the court in *Learning International, Inc. v. Competence Assurance Systems Inc.,* 1990 WL 204163, *2-3 (S.D.N.Y. Dec. 13, 1990), imposed sanctions after noting that "[counsel] also objected in such a way as to suggest to witnesses that they should withhold information of which they were not absolutely certain but which could have led to the discovery of admissible evidence." The court referred to objections such as: "You don't have to speculate. Answer only if you know."

- **You are mischaracterizing his testimony ...**

Caselaw is clear that it is not proper to instruct a witness not to answer a question simply because the question may mischaracterize previous testimony of the witness. See *Bigoni v. Pay 'n Pak,* 1988 WL 125887, *2 (D. Or. Nov. 23, 1988) (finding that a question may mischaracterize the witness's testimony is not a sufficient ground to instruct a witness not to answer a deposition question); *City of New York v. Coastal Oil New York, Inc.*, 2000 WL 97247, *7 (S.D.N.Y. Jan. 28, 2000) (ordering the re-opening of deposition and that offending counsel pay for costs after counsel repeatedly instructed witness not to answer questions, including on the ground that the examiner was "mischaracterizing [the witness's] testimony").

Also obviously improper is where the defending counsel objects that the question mischaracterizes previous testimony, then states on the record what the prior testimony was, thereby signaling to the witness to answer the pending question consistently with the lawyer's "objection." See *Armstrong v. Hussman Corp.,* 163 F.R.D. 299, 302 & n.14 (E.D. Mo. 1995).

- **Do not guess or speculate ...**

There is no rule that an examiner may not ask a witness to guess or speculate. The objection likely grows out of the evidentiary rule of witness competence. A fact witness may only testify at

trial as to what the witness has personal knowledge.

Therefore, a deposition answer based on a guess or speculation likely would not be admissible at trial. Yet, the rules permit inquiry into areas that would not be admissible at trial, as long as the questions "appear[] reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

A good practice when faced with such an objection is to state clearly that you want the guess or speculation, then inquire into the process through which, or the basis on which, the guess or speculation was made.

You may indeed learn that the witness does have personal knowledge of the matter of the inquiry, or you may discover other avenues (witnesses, documents) for further discovery.

- **You can answer, but only if you understand the question ...**

This is a funny objection since obviously a witness cannot answer a question the witness does not understand. The subtle intent of the objection, however, is to signal to the witness to be careful, to take into account every part of the question.

In preparing witnesses for their deposition testimony, I always tell the witness not to get too much into a rhythm answering questions for it is in such circumstances that the examiner lays the best unanticipated traps.

The "only if you understand" comment by defending counsel is typically used to break the rhythm and slow the witness down.

A good discussion of this practice is set forth in *Hall v. Clifton Precision,* 150 F.R.D. 525, 530 (E.D. Pa. 1993), a frequently cited case regarding deposition abuses. The court noted that objections — particularly the "I don't understand the question" interjection — are frequently interposed [improperly] for the purpose of disrupting the "rhythm of a deposition."

Other courts have similarly disapproved of the "only if you understand" objection. See *Quantachrome Corp. v. Micromeritics Instrument Corp.,* 189 F.R.D. 697, 700 (S.D. Fla. 1999) ("If the witness is confused about a question, or if a question seems awkward or vague to the witness, the witness may ask the deposing counsel to clarify the question. ... Surely they are intelligent enough to know when they do not understand a question."); *Calzaturficio S.C.A.R.P.A. S.P.A. v. Fabiano Shoe Co.,* 201 F.R.D. 33, 39 (D. Mass. 2001) ("Despite [the defending attorney's] protestations that he was often seeking just to clarify the questions, the record reveals otherwise.").

A variant of the "only if you understand" objection is the objection seeking clarification or definition for terms used in a question. Courts have likewise found such speaking objections both suggestive and disruptive. See, e.g., *Betts v. United Airlines, Inc.,* 1998 WL 1792475, *2 (N.D. Cal. Aug. 14, 1998).

I typically turn this objection around to the witness and ask for the witness's definition, but

repeated objections asking for terms to be defined can be very disruptive.

- **The document speaks for itself ...**

This is one of the most common objections, or, indeed, bases for instructing a witness not to answer during a deposition. However, a party may inquire how a witness interprets or understands a document.

Lawyers understandably get quite nervous when questions get into the content of documents. The objection, however, is a short cut when the defending lawyer has not properly prepared the witness for the deposition.

"With respect to relevant documents, it is not a valid objection in the deposition of a witness who has or may have some relevant knowledge concerning the document or its subject matter, that the document 'speaks for itself.' The questioning attorney ordinarily is entitled to inquire of a witness concerning his or her relevant knowledge concerning the contents and subject matter of a document." *Collins v. Int'l Dairy Queen, Inc.,* 1998 WL 293314, *2 (M.D. Ga. June 4, 1998). See also *City of New York v. Coastal Oil New York, Inc.*, 2000 WL 97247 (S.D.N.Y. Jan. 28, 2000) (ordering that the deposition be reopened and offending counsel pay for costs in part because of counsel's instructions to the witness not to answer questions on the ground that the questions referred to documents that speak for themselves).

When Courts Have Stepped In

While courts have increasingly been willing to impose sanctions for improper deposition conduct, a review of when courts have imposed such sanctions indicates that they only step in when the conduct is particularly egregious.

Courts frequently count the number of objections or lines of soliloquy as part of the analysis. See, e.g., *Pilsum v. Iowa State University of Science and Technology*, 152 F.R.D. 179, 180 (S.D. Iowa 1993) ("In fact, of the 4025 lines of transcript, only seventy percent contain questions by Mr. Young and answers by Ms. Van Pilsum. The balance is discussion, argument, bickering, haranguing, and general interference by [the defending attorney] (818 lines) and response by Mr. Young (340 lines) ..."); *Damaj v. Farmers Ins. Co.,* 164 F.R.D. 559, 560 (N.D. Okla. 1995) ("The Court notes that in the deposition of Mr. Banks which consists of 102 pages, defense counsel interposes objections on 64 of those pages, many of the objections take up a good part, if not all, of the page in question."); *Learning Int'l, Inc.,* 1990 WL 204163, *3 (S.D.N.Y. Dec. 13 1990) ("of the 91 pages of testimony ... [counsel] appears on 75."); *Calzaturficio,* 201 F.R.D. 33, 39 (D. Mass. 2001) (among the litany of indiscretions, counsel "asserted the 'asked and answered' objection 81 times"); *Morales v. Zondo,* 2001 WL 474230 (S.D.N.Y. May 4, 2001) ("[The defending attorney] appears on more than 85 percent of the pages of the deposition transcript (216/241) with statements other than an objection as to form or a request to the court reporter to read back a question."); *Betts,* 1998 WL 1792475, *1 (N.D. Cal., Aug. 14, 1998) ("[The defending attorney] spoke 587 times — an average of once every 97 seconds ...").

I could not find any published opinions where a lawyer was sanctioned or a deposition reopened because of only a few improper objections.

What Is A Lawyer To Do?

It would be easy for a lawyer to conclude based on the kind of quantitative analysis engaged in by courts that it is acceptable to make speaking objections as long as the lawyer does not make too many of them.

If the Southern District of New York found it unacceptable that the defending attorney in *Morales v. Zondo* made improper objections on 85 percent of the pages of the deposition transcript, would the court have found the behavior acceptable if the improper objections had only appeared on 60 percent of the pages? Forty percent of the pages? Five percent of the pages?

Indeed, if the defending attorney can get away with it and if speaking objections really do give the defending attorney an advantage in depositions, then must not the attorney resort to them as part of the attorney's zealous advocacy?

The easier answer is that such behavior appears to be prohibited by the rules of professional conduct. For example, Rule 3.4 of both the American Bar Association Model Rules of Professional Conduct and the Massachusetts Rules of Professional Conduct state: "A lawyer shall not: (a) unlawfully obstruct another party's access to evidence ..."

The tougher answer is that making speaking objections should not be necessary when defending a well-prepared witness. A well-prepared witness should not need reminding that he should listen carefully to every question, should think about his answer before speaking, should seek clarification if the question is confusing or if terms lack definition, and should answer only the question asked.

The flip side is what should the examining lawyer do if the defending lawyer engages in these sorts of subtle and not-so-subtle witness coaching techniques?

I have identified some methods above, such as asking a witness for his own definition to a term objected to as being vague or undefined.

If a defending lawyer is indeed frustrating the discovery process, then a good first step is to go off the record and, outside of the witness's presence, remind the defending lawyer about the requirement of stating objections succinctly.

This method gets the point across without the on-the-record confrontation likely to lead the defending attorney to simply dig-in, fearful of appearing bullied in front of his client.

Unfortunately, private admonitions to defending attorneys are often not enough. In such cases the interrogating attorney may face a dilemma.

Should the interrogating attorney suspend and seek court intervention, risking that an adverse ruling may limit the interrogating attorney's ability to resume the deposition?

Or should the interrogating attorney continue to the end of the deposition, perhaps seeking

sanctions later, at the risk of letting the defending attorney coach his witness into a record that will be hard to rebut even if later the court permits a reopening of the deposition?

One middle ground might be to call the court during a break in the deposition. (Before doing so, it is advisable to ask the court reporter to mark on the transcript any exchanges that you want to bring to the court's attention.)

Although it offered no good solutions, the court in *Cholfin v. Gordon,* 1995 WL 809916 *3 n.2 (Mass. Super. Ct. Mar. 22, 1995), did at least recognize why calling the court in the middle of a deposition may not offer an immediate resolution.

In that case, the court excerpted extensively from a particularly problematic deposition. During the deposition, the interrogating attorney called the court during a break but found that the court was not immediately available and therefore resumed the deposition.

The court reported that "[a] short time later, however, the clerk called back to say that the Court was available at 2:30 that afternoon to hear the parties if they could not resolve their differences earlier. Although it is unrealistic to expect instant access to the Court for resolution of problems that occur during depositions — instant access necessarily requires interrupting other matters then in orderly progress — this case amply illustrates the desirability of prompt access."

It is unclear from the court's statement whether it made itself available that day for a telephonic conference and ruling, or whether the parties had to travel to the court that afternoon.

There are no easy solutions. Courts may justifiably be concerned that making themselves more available for telephonic consultations during depositions will discourage litigators from resolving disputes themselves.

Perhaps if trial courts, or even local bar associations, published guidelines about proper deposition practices, there might be less misunderstanding about how far the defending attorney may go in making speaking objections.

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