OBJECTIONS TO DEPOSITION QUESTIONS IN STATE COURT

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In federal court, deposition objections are more limited than in Indiana state court. The differences between Indiana Trial Rule 30 (C) and Federal Rule of Civil Procedure 30 (c) are more than superficial. Nevertheless, even in state court depositions, improper objections and instructions not to answer can make the deposition take longer, cost more, and can result in unnecessary hearings on motions to compel or for protective orders. It also unnecessarily breeds acrimony.

There may be many reasons that a lawyer objects in a state court civil deposition but there are only three legitimate reasons: to stop improper conduct, to not waive the objection, or to instruct the witness not to answer.

To Stop Improper Conduct

The first legitimate reason to object in a deposition is to stop improper conduct. An example is persistence in asking questions that are not relevant nor reasonably calculated to lead to the discovery of admissible evidence. Of course, the scope of discovery is broader than whether the evidence will ultimately be admissible at trial. Trial Rule 26(B)(1) provides that "Parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the pending action, ... [or] reasonably calculated to lead to the discovery of admissible evidence."

Nevertheless, Trial Rule 26(C) promises protection from annoyance, embarrassment, oppression, or undue burden or expense. Questions not relevant nor reasonably calculated to lead to the discovery of admissible evidence are an annoying waste of time. Often this type of

question seeks to embarrass the deponent, and is therefore “oppressive.” Asking enough of them can also cause the deposition to last longer and thus cost more, which is an undue expense.

Another example of improper conduct is an unreasonable lack of civility. Sometimes this is intentional but often it is not. It is sad but true that sometimes lawyers simply lose their composure. The case can be vexing, the client ungrateful, the hours long, all the close calls go against you and you cannot get a break. However, whether intentional or not, an unreasonable lack of civility is improper.

Trial Rule 30(D) provides that any party or deponent can suspend (not terminate) the deposition and seek court protection from an examination "... conducted in bad faith or in such a manner as *unreasonably* to annoy, embarrass, or oppress the deponent or party...." (emphasis added) Under Trial Rule 30(D) the court may terminate the deposition or "... limit the scope and manner of the taking of the deposition as provided in Rule 26(C)."

Applying the standard of Trial Rule 30(D) is not easy. By implication an examination is allowed to *reasonably* annoy, embarrass, or oppress.

> This is, perhaps, an implicit recognition that few depositions, particularly those where the deponent is a party, are not to some extent annoying, embarrassing or oppressive, at least in the subjective estimation of the individual being examined. The rule is not designed to stop an uncomfortable but relevant interrogation or to forestall the elicitation of testimony damaging to a party's case.

Smith v. Logansport Community School Corp. 139 F.R.D. 637, 646 (N.D. Ind. 1992).

The combination of Trial Rule 26(C) and Trial Rule 30(D) appear designed to stop two types of behavior. The first is an examiner's persistence, no matter how civil, in asking questions that are not relevant nor reasonably calculated to lead to the discovery of admissible evidence. The second can be generally described as an unreasonable, most likely unnecessary, lack of civility.

The objection here is also a warning that if the improper conduct does not stop the deposition will be suspended. Obviously, suspending the deposition would be a last resort and subjects whoever loses a subsequent motion to possible sanctions under Trial Rule 37(A)(4). This is where experience pays off. The success of stopping what appears to one as improper conduct and completing the deposition can be as much a matter of method as of substance.

To Not Waive the Objection

The second legitimate reason to object is to not waive the objection if the deposition is later used as evidence.

Trial Rule 32(A) provides that deposition testimony can be used "... so far as admissible under the Rules of Evidence applied as though the witness were then present and testifying, ..." In addition, Trial Rule 32(B) provides that "…objections may be made … to receiving in evidence any depositions or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying."

These parts of Trial Rules 32(A) and 32(B) mean that all objections under the rules of evidence apply when using depositions as evidence. *Zeppa v. Cress*, 406 N.E.2d 1252, 1253 (Ind. Ct. App. 1980). However, they do not mean that all objections under the rules of evidence apply when the deposition is being taken.

This is because Trial Rule 32(B) also provides that it is subject to the provisions of Trial Rule 32(D)(3). The salient provisions of Trial Rule 32(D)(3)'s two subsections, (a) and (b), are very similar and provide that the only objections to deposition questions which are waived if not made during the deposition are objections to the form of the question or answer, in the conduct of parties, and to any

ground or error which might be obviated, removed, or cured if presented at the time. *See, Wynder v. Longergan,* 286 N.E.2d 413, 415 (Ind.App. 1972).

Objections to questions that can be cured at the deposition mostly relate to the form of the question and to foundation. Objections to the form of the question include some objections specifically mentioned in the Indiana Rules of Evidence and some objections only known at common law. These include: ambiguous, argumentative, assuming facts not in evidence, compound, leading, calls for a legal conclusion, inappropriately calls for a narrative, misstating or mis-characterizing the evidence, and vague.

Objections to the form of the question must be made at the deposition since the form of the question can then be changed. *Mundy v. Angelicchio,* 623 N.E.2d 456, 461 (Ind. Ct. App. 1993)(legal conclusion). The same usually is true of objections to foundation. Lack of foundation may include objections based on authentication and personal knowledge of a lay witness (guess, speculation, conjecture). But it may not, if by raising the objection promptly, the lack of deponent's knowledge could not be cured.

There is a question whether foundation in this sense also includes qualifications of an expert and the reliability of an expert's scientific principles. Currently, there is no clear guidance from our Court of Appeals as to whether an expert's qualifications go to competency (which is not waived by not objecting), or to foundation (which can be waived by not objecting). *See, Osborne v. Wenger,* 572 N.E.2d 1343, 1345 (Ind. Ct. App. 1991)(Staton, dissenting)

However, it would seem under the overall framework of T.R. 32(D)(3) that if the qualifications or principles could be established at the deposition then failing to object to them should waive such objection. Until more decisions deal with this issue the safest practice is to consider qualifications and

principles foundational and object at the deposition to preserve your objection. If you forget to object, then argue they go to competency.

This does not mean that when you take the deposition of another party's expert you have to object to your own questions as having inadequate foundation. "A party does not make a person his own witness for any purpose by taking his deposition." T.R. 32(C). This means that the questioning lawyer is not bound by the answers given. *Wynder*, at 415. This even applies to an objection that the answer is non-responsive, which objection can only be made by the questioner. *NIPSCO v. Otis*, 280 N.E.2d 378 (Ind. Ct. App. 1969). But "[e]videntiary trial restrictions such as being bound by the answers of your witness and failing to object to non-responsive answers are not part of discovery procedures." *Wynder*, at 416. Thus, only the non-questioning lawyer's failure to object can waive an objection to the form of a question or an answer, and then only if the matter could have been cured at the deposition.

Note that the Court in *Osborne* held that the burden was on the party later attempting to use the deposition testimony to establish that any objection to it had been waived.

Repetitive assertions of unnecessary objections may appear to have an improper motivation such as coaching or intimidating the witness, disrupting the questioner or the witness, or generally obstructing the discovery process. If that is the case, it is obviously improper and should subject the objecting party to sanctions. *See e.g.s, Hall v. Clifton Precision*, 150 F.R.D. 525, 530 (E.D. PA. 1993); *Kelvey v. Coughlin*, 625 A.2d 775 (RI. 1993)

To Instruct the Witness Not to Answer

In the discussion above about objections, nothing has been said about the witness not answering the question. Sometimes deponents are unsure what to do after an objection has been made. This is especially true for those witnesses not represented by counsel. If the deponent seems unsure of what to

do after an objection, one of the lawyers will eventually break the silence and tell the deponent that they are to answer the question.

This is based on Trial Rule 30(C) which provides that when an objection is made the question "shall be answered unless the attorney instructs the deponent not to answer, or the deponent refuses to answer ...." However, Trial Rule 30(C) does not indicate when it is proper for a deponent not to answer and there appears to be no Indiana appellate decision on this issue.

In the absence of state law, Indiana state courts look to federal decisions for guidance in interpreting our rules of procedure which are similar to the federal rules. *E.g., Jackson v. Russell*, 491 N.E.2d 1017, 1018 (Ind. Ct. App. 1986).

However, as previously stated, Indiana Trial Rule 30(C) has deviated significantly from the language of Federal Rule of Civil Procedure 30(c). The federal rule clearly restricts instructions not to answer to three situations: (1) to preserve a privilege, (2) to enforce a court-ordered limitation, and (3) to present a motion to terminate or limit further deposition testimony. The Indiana rule is not so specific. It merely prescribes the manner in which unanswered questions may be certified for use by the questioner in bringing a motion to compel an answer under Trial Rule 37(A).

Certainly objections based on privilege justify an instruction not to answer because otherwise the privilege is waived. Some examples of this are the more common privileges of accountant-client, attorney-client, husband-wife, clergy-member, peer review, and physician-patient. It should also include “trade secrets” under I.C. 24-2-3-1, *et seq.*, and the "privilege" against self-incrimination, which applies to civil as well as criminal proceedings, including depositions. *Northside Sanitary Landfill, Inc. v. Bradley*, 462 N.E.2d 1321, 1325 (Ind. Ct. App. 1984).

However, a more difficult question is the propriety of an instruction not to answer when the objection is not based on privilege. It would seem that beyond privilege, the most appropriate standard

in Indiana state court for instructing a witness not to answer would go back to stopping improper conduct. There are occasions when an overly aggressive questioner will ask a "when did you stop beating your wife" type of question, which cannot be answered in any meaningful way (assuming no evidence the deponent is a wife-beater). This type of question goes beyond the bounds of what is "reasonably calculated to lead to the discovery of admissible evidence." In this situation, asserting an objection but requiring an answer to the question is unfair to the deponent and does nothing to assist pre-trial discovery's "search for truth."

As stated before, one type of improper conduct is an examiner's persistence, in asking questions that are not relevant and not reasonably calculated to lead to the discovery of admissible evidence. For example, when a defendant denies knowledge of what treatment a personal injury plaintiff received after they left the scene of an accident, it is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence to ask the defendant "So you were not concerned enough to educate yourself about what you had done to this other human being, were you?"

The "when did you stop beating your wife" type of question is usually objectionable on several other bases: ambiguous, argumentative, assumes facts not in evidence, and mischaracterizes or misstates the evidence. Requiring an answer to such a question serves no legitimate purpose.

In these rare circumstances, an instruction not to answer an irrelevant and unfair question is proper. Leaving these circumstances to Indiana trial judges to determine their propriety appears to Indiana's preference, over the more rigid federal rule concerning instructions not to answer. State court judges are permitted discretion in deciding issues of discovery and relevance, and those decisions are only susceptible to appellate review for an abuse of that discretion. *Bradley*, 462 N.E.2d at 1326.

Again Trial Rule 30(D) provides that the remedy to stop such improper questioning is to suspend the deposition and seek court protection from such an examination. It also implies that the remedy includes instructing the witness not to answer. If the deposition is going to be suspended the witness will obviously not be answering the question.

Like suspending the deposition, refusing to answer a deposition question subjects whoever loses a subsequent motion on the issue to possible sanctions under Trial Rule 37. T.R. 30(C). Therefore, it should not be done without careful consideration, and not without first attempting to informally resolve the dispute at the deposition as required by T.R. 26(F). As with stopping improper conduct, the success of stopping what appears to be improper questioning and completing the deposition can be as much a matter of method as of substance.

In Summary

The Indiana rule of thumb is that no objections should be made to deposition questions unless the objection is to stop improper conduct, protect privileged information, or if what is objectionable can be cured at the deposition. Mostly what can be cured at the deposition relates to the form of the question, to the form of the answer, and to foundation. Finally, regardless of an objection, a deponent should answer the question unless the matter is privileged, or unless instructing the witness not to answer is necessary to stop what is clearly improper questioning after an informal attempt at resolving the dispute has failed.

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