WHEN IS IT PROPER TO OBJECT IN A DEPOSITION OR TO INSTRUCT A WITNESS NOT TO ANSWER?

by Mark A. Lienhoop

Some lawyers spend a lot of time in depositions. Despite this it seems many do not know when it is proper to object in a deposition or when it is proper to instruct a witness not to answer. This can make the deposition take longer, cost more, and can result in unnecessary hearings on motions to compel or for a protective order. It also unnecessarily breeds acrimony.

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

To Save Time

The first legitimate reason to object is a practical one and is often more an interjection than a formal objection. Good lawyers do it all the time. For example, the non-questioning lawyer may be willing to agree to something that would make questions about it unnecessary. Or, the non-questioning lawyer may clear up something immediately so that one question on cross does not show that the last hour of direct was wasted, based on a misunderstanding.

The possible scenarios are endless but the important point is that the non-questioning lawyer is acting in good faith and not merely to disrupt or put-down the examiner. That is why this type of interruption usually works best when the non-questioning lawyer has a reputation as being trustworthy. Perception of the non-questioning lawyer's motives is often as much a matter of method as it is of substance.

To Stop Improper Conduct

The second legitimate reason for a lawyer to object is to stop improper conduct. An example is persistence in asking questions that are not 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, ... It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Nevertheless, Trial Rule 26(C) promises protection from annoyance, embarrassment, oppression, or undue expense. Questions not reasonably calculated to lead to the discovery of admissible evidence are an annoying waste of time, often seek information embarrassing the deponent, and if carried far enough can be 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 times 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 can be long, all the close calls go against you and you can not 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...." 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. IN. 1992). What the combination of Trial Rule 26(C) and Trial Rule 30(D) appear designed to stop are two types of behavior. The first is an examiner's persistence, no matter how civil, in asking questions that are not 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 really 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 on the issue to sanctions under Trial Rule 37. This is where experience pays off. The success of stopping what appears to one as improper conduct and completing the deposition can be, again, as much a matter of method as of substance.

To Not Waive the Objection

The third legitimate reason to object is to not waive the objection if the deposition is later used. There are two main categories here, objections to questions and all other objections.

Basically, objections to anything other than a question are waived unless made as soon as possible. Objections to notice are waived unless made promptly in writing. T.R. 32(D)(1).

Objections to the qualifications of the court reporter are waived unless made as soon as could reasonably be discovered. T.R. 32(D)(2). Objections to the manner of taking the deposition, in the form of the answer, in the oath or affirmation, and in the conduct of parties are waived unless made at the time. T.R. 32(D)(3)(b). There is a special rule regarding objections to written questions submitted under Trial Rule 31. T.R. 32(D)(3)(c). Objections to the way "the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer..." are waived unless a motion to suppress is made with reasonable promptness after "such defect" should have been discovered. T.R. 32(D)(4).

The above seems to cover a lot but in practice these objections are seldom used. The deposition objections most often made are objections to questions.

Whether an objection to a question has been waived is an issue only if the deposition is later used. The two main ways depositions are later used are with motions for summary judgment or at trial. Trial Rule 56(C) allows the use of depositions regarding motions for summary judgment. Trial Rule 32(A) provides for the use of depositions under the following circumstances: any deposition can be used for impeachment, the deposition of any party can be used for any purpose, and the deposition of any other witness can be used for any purpose if the parties agree or if the court finds that the witness is sufficiently unavailable.

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, ..." This means that objections under the rules of evidence apply to deposition testimony. *Zeppa v. Cress*, 406 N.E.2d 1252, 1253 (Ind.App. 1980). But when should objections to deposition questions be made?

Trial Rule 32(B) appears to cover this question but it actually has little effect. It provides that objections to questions can be made when the deposition testimony is offered, as if the witness was present and testifying live. But it also says that this is subject to the provisions of T.R. 32(D)(3). It is really T.R. 32(D)(3) which controls when objections to deposition questions should be made. Trial Rule 32(D)(3) has two subsections, (a) and (b). These subsections are very similar. Essentially they say that any objections other than as set out above in this article are not waived unless what is objectionable could have been cured at the deposition. *See, Wynder v. Longergan*, 286 N.E.2d 413, 415 (Ind. Ct. App. 1972). This includes competency (of a witness or testimony), relevancy, and materiality. T.R. 32(D)(3)(a). Subsection (b) has the catch-all language "... and errors of any kind...."

This means that in depositions, objections such as the following are ordinarily not proper: best evidence rule, collateral source, competency (of a witness or testimony), hearsay, improper impeachment, materiality, opinion, parol evidence, and relevancy. Under the Indiana Rules of Evidence, relevancy includes the areas of asked and answered or cumulative or repetitive, character, habit and routine, subsequent remedial measures, offers to compromise, payment of medical expenses, and insurance.

Unless there is a good faith attempt to save time or to stop improper conduct, the above are not proper objections to deposition questions unless what is objectionable can be cured at the deposition. If the above objections are not proper then making them may appear to have an improper motivation such as coaching the witness, disrupting the questioner, or generally obstructing the discovery process. This is obviously improper and can 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).

Objections to questions that can be cured at the deposition mostly relate to the form of the question and to foundation. Trial Rule 32(D)(3)(b) specifically states that objections to the form of the question are waived unless made at the time.

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, confusing, 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 is true of objections to foundation.

Foundation should include authentication and personal knowledge of a lay witness (guess, speculation, conjecture).

There is a question whether foundation in this sense also includes qualifications of an expert and the reliability of an expert's scientific principles. The learned judges of our Court of Appeals apparently disagree 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) 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 a question, 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.

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 is clear 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, T.R. 30(C) does not say 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).

The federal courts are adamant that after the objection is made the deponent must answer the question unless the question calls for "privileged" information. *E.g.s, Smith v. Logansport Community School Corp.*, 139 F.R.D. 637, 647 (N.D. IN 1991); *Intern. U. of Elec., Etc. v. Westinghouse Elec. Corp.,* 91 F.R.D. 277, 279 (D.C. 1981).

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 the "privilege" against self-incrimination, which has been held to apply to civil as well as criminal proceedings, including depositions. *Northside Sanitary Landfill, Inc. v. Brudley,* 462 N.E.2d 1323, 1325 (Ind. Ct. App. 1984). It should also apply to "trade secrets" under I.C. 24-2-3-(1-8).

Other state court systems that have addressed this issue agree. One that is typical is Rhode Island. Its state court rules, like ours, are patterned after the federal rules. The Supreme Court of Rhode Island has held:

> The only instance, we repeat, the only instance in which an attorney is justified in instructing a deponent not to answer is when the question calls for information that is privileged.

Kelvey v. Coughlin, 625 A.2d 775, 776 (R.I. 1993) (emphasis original).

The rule in Indiana should be the same. In short, the witness should answer unless there is some constitutional, statutory, or common law right to keep the information confidential.

Like suspending the deposition, refusing to answer a deposition question subjects whoever loses a subsequent motion on the issue to sanctions under T.R. 37. T.R. 30(C). If a deponent not represented by counsel improperly refuses to answer a question, the deponent should be advised that the improper refusal subjects the deponent to sanctions and to having to return to answer the question another day.

In Summary

Based on the above, the rule of thumb is that no objections should be made to deposition questions unless there is a good faith effort to save time or stop improper conduct, 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 and to foundation. Finally, regardless of an objection, a deponent should answer the question unless it would breach a legally recognized right to confidentiality. The only other alternative is to suspend the deposition and seek a protective order as allowed by Trial Rule 30(D).

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