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Rules of deposition conduct are not to be overlooked

By: Daniel I. Small March 10, 2015

In the last several columns, I've written about the ethics of witness preparation. One key extension of those challenges is ethical conduct in defending the actual deposition. Lawyers must understand the rules governing conduct, consider how best to work within them, and explain it all clearly to the witness — not easy tasks under the best of circumstances, much less in an adversarial deposition.

Sometimes, the impropriety is clear for all to see. Sadly, there are plenty of videos floating around the Internet of outrageous conduct in depositions. One of the best known comes from a Texas deposition involving attorneys Joe Jamail, representing the plaintiffs, and Edward Carstarphen, representing defendant Monsanto. The whole exchange is too long and embarrassing to quote here, but one sample will do:

Jamail: You don't run this deposition, you understand?

Carstarphen: Neither do you, Joe.

Jamail: You watch and see. You watch and see who does Big Boy … And don't be telling other lawyers to shut up. That isn't your goddamned job, fat boy.

Carstarphen: Well, that's not your job, Mr. Hairpiece.

Jamail's shameful conduct led to a change in the Texas rules, dubbed the "Jamail Rule," severely limiting lawyer conduct in depositions.

Beyond the extremes, there are three areas that raise the most common conduct issues: Speaking issues, instructions not to answer, and conferences with counsel. Let's take a brief look at each one.

1) Speaking objections

Generally, the Federal Rules of Civil Procedure require that "an objection must be stated concisely in a nonargumentative and nonsuggestive manner." Fed. R. Civ. P. 30(c)(2). In most depositions, substantive and evidentiary objections are reserved for trial. So with few exceptions, what remain are form objections.

The Florida Rules of Court prohibit "objections or statements which have the effect of coaching the witness, instructing the witness concerning the way in which he or she should frame a response, or suggesting an answer to the witness." (S.D. Fla. L.R. Gen. Rule 30.1). That bright line can get blurred, however, since in many jurisdictions lawyers who object to form are allowed — either on their own, or if their objection is questioned — to give a further basis.

One of the best reviews of common speaking objections comes from U.S. Magistrate Judge Kenneth Gale, in Cincinnati Insurance Company v. Serrano, 2012 WL 28071 (D. Kan). Gale highlighted the following objections:

• **Vague** — Usually "a speaking objection disguised as a form objection … . Only the witness knows whether she understands a question, and the witness has a duty to request clarification if needed."

Another court imposed sanctions for counsel's repeated statement that "I don't think she understands what you mean." Cholfin v. Gordon, 1995 WL 809916 (Mass.).

• **If you know** — Serrano found that various versions of this were "raw, unmitigated coaching, and are never appropriate." The witness has already taken an oath to tell "nothing but the truth"; if he doesn't know, he should say so.

• **Speculation** — "[A] foundation objection and not a form objection. It also tends to coach the witness to respond

that she does not know the answer." Whether or not speculation becomes admissible later at trial, it may well lead to relevant evidence at the discovery stage.

• **Suggestive** — Also, "an improper speaking objection." Its only object can be to warn the witness not to agree.

2) Instructions not to answer

While there can be debate over the definition and impact of speaking objections, the impact of an instruction not to answer on the right to discovery is much more direct. The Advisory Committee notes that the federal rules state: "directions to a deponent not to answer can be even more disruptive than objections." As a result, the rules — and courts — are stricter than what some counsel practice.

"A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the Court, or to present a motion under Rule 30(d)(3)." Fed. R. Civ. P. 30(c)(2). These are narrow exceptions and should be carefully considered.

3**) Conferences with counsel**

Courts have struggled more with limitations on — and abuses of — conferences with counsel. On one end of the spectrum, the court found that "a civil litigant has a constitutional right to retain hired counsel" and a "rule prohibiting a litigant from consulting with his attorney during breaks and recesses in the litigant's testimony impinges on that right." Potashnick v. Port City Constr. Co., 609 F. 2d 1101, 118 (5th Cir. 1980).

Yet there is no question that such conferences can be abused. In one of the most often-cited cases, a court in Pennsylvania held that "a deposition is meant to be question and answer conversation between the deposing lawyer and the witness," and thus there was no absolute right to conferences during the deposition. Hall v. Clifton, 150 F.R.D. 525, 528 (E.D. Pa. 1993).

In Plaisted v. Geisinger Medical Center, 210 F.R.D. 527 (M.D. Pa. 2002), the court stated it would "adopt the guidelines for attorney behavior at depositions announced in Hall." Id., at 522. Based on those guidelines, the court allowed "plaintiffs' counsel to pose questions to [defendant's employee] about any discussion that may have taken place during the two breaks defense counsel improperly took during his deposition." Id., at 535.

However, "several cases have held that the Hall case goes too far … [and] … declined to adopt the Hall court's strict requirements." Murray v. Nationwide Better Health, 2012 WL 3683397 (C.D. Ill. 2012).

Conferences that take place while a question is pending are universally prohibited, unless they are conducted to protect a privilege. Beyond that, courts have tried to balance the competing considerations.

For example, one court found that a prohibition on conferences during breaks "is appropriate and customary during the actual deposition," but refused to extend it over a multiple-day deposition. United States v. Phillip Morris, 212 F.R.D. 418 (D.C. 2002). See McDermott v. Miami Dade County, 753 So. 2d 729 (1st Dist. Fla. 2000) (precluding a lawyer from conferring with his client about details of her alleged injury after the lawyer improperly interrupted the deposition).

Because of the varying rules governing attorney conduct during a deposition, every practitioner must be knowledgeable on the rules of his or her jurisdiction. As with all the rules, the key is to create a record to control, or to address, any abuses. The rules are in place to help both the witness and the lawyer anticipate problems that may arise and prepare accordingly.

More than 50 years ago, one court recognized that "[i]t is usual and legitimate practice for ethical and diligent counsel to confer with a witness whom he is about to call prior to his giving testimony." Homdi v. Fire Assoc. of Philadelphia, 20 F.R.D. 181, 182 (S.D.N.Y. 1957).

Recognizing the importance of witness preparation is one thing; appreciating its challenges is another.

Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. A former federal prosecutor, he is the author of the American Bar Association's "Preparing Witnesses" (4th Edition, 2014). On April 30, he will host "Witness Prep 101" at the Social Law Library in Boston. Visit www.socialaw.com/witness or email

dan.small@hklaw.com for more information.

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10 Milk Street, Suite 1000,

Boston, MA 02108

(800) 451-9998