Litigators -- Don't make "speaking" objections and make sure you follow the rules if you tell a witness not to answer a question at a deposition

By Louis G. Adolfsen

If you're a litigator, you take and defend depositions. You've surely been at depositions where your adversary suggested you don't know how to ask a question. You've also heard objections that are really speeches. You may have gone to battle on the record as to whether your adversary can tell the witness not to answer. Maybe you have been sought to have your adversary pay costs for directing a witness not to answer. On the other hand, maybe you surely defended a deposition where you found a question to be, in your view, palpably improper. Maybe you've made a speech or two yourself.

Litigators know there are strict rules both in State and Federal court about making speeches at depositions and directing a witness not to answer. But in the heat of battle the rules are sometimes forgotten or ignored.

The Federal Rules

Under the Federal Rules of Civil Procedure, Rule 30(c)(2), on the subject of objections, the rule states: "An objection at the time of the examination… must be noted on the record but the examination still proceeds; the testimony is taken subject to any objection."

More significantly, the rule states: "An objection must be stated concisely and in a non-argumentative and non-suggestive manner." The rule concludes with one of the most controversial issues at depositions: "A person may instruct the 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).

Rule 30(d)(3) contemplates a motion to terminate or limit a deposition "on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party."

State Rules

New York State, like other states, has uniform rules for the conduct of depositions. Section 22.1(a) of Uniform Rules, entitled "Objections at Depositions" provides in pertinent part …

> All objections made at a deposition shall be made by the officer before whom the deposition is taken and the answer shall be given and the deposition shall proceed to the objections and to the right of a person to apply for appropriate relief …

Section 221.1(b), entitled "Speaking Objections Restricted" provides in part:

> Every objection raised during a deposition shall be stated *succinctly* and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis or error or irregularity. Except to the extent permitted by [court rules] during the course of the examination persons in attendance shall not make statements or comments that interfere with the question. (Emphasis added).

Section 221.2 requires a deponent to answer all questions except to preserve a privilege or right of confidentiality or when the question is plainly improper and would if answered, cause significant prejudice to any person. The section states:

> An attorney shall not direct a deponent not to answer except as provided in Rule 3115 or this subdivision. Any refusal

to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefore.

What happens if you "push the envelope!"

A recent dispute in New York illustrates the potential for sanctions being imposed upon an attorney who makes objections and otherwise is believed to have "misbehaved" at a deposition. The New York Law Journal reported on Wednesday November 4, 2009 of an October 30 decision by a New York City Civil Court Judge, Peter H. Moulton, who ordered Robert L. Arleo an attorney from Haynes Falls, New York to pay a $750.00 fine to the plaintiff, after Mr. Arleo told his client not to answer questions during a court ordered deposition. According to Judge Moulton, despite a warning, Attorney Arleo continued to interrupt the deposition with objections. The judge concluded that Mr. Arleo's actions "were undertaken primarily to delay or prolong the resolution of litigation and were completely without merit in the law."

Mr. Arleo, said he plans to appeal and showed his view of the subject when he stated: "what the judge doesn't understand is I have a right to defend my client."

Attorney Arleo, who has been my adversary and is a zealous advocate, is no stranger to disputes with Judges. The New York Law Journal reported on January 10, 2010 that Eastern District Judge Denis R. Hurley refused to recuse himself from a suit against a debt collector ruling that the Robert Arleo's "dissatisfaction by judicial rulings" is not a sufficient basis to transfer the case to another judge.

And you better not comment on your adversary's ability or her gender!

Another illustration is Laddcap Value Partners, LP v. Lowenstein Sandler, 2007 N.Y. Slip Op. 52538(U), where Supreme Court Justice Carol Robinson Edmead ordered a court appointed referee to supervise further depositions in the case because of the questioning of the attorney and in particular his remarks to opposing counsel.

In her decision, Judge Edmead quotes liberally from the objections and colloquy at the deposition of a witness, Robert B. Ladd of Laddcap Value Partners, who was being defended by Attorney Thomas B. Decea.

One of Mr. Decea's objections to opposing counsel, who was taking the deposition, Michelle Rice, was as follows:

> This is not a white collar interview that you're sitting her interviewing something with your cute little thing going on."

Ms. Rice responded: "my cute little thing?"

Mr. Decea then stated:

> This is a deposition that has rules about what kinds of questions you can ask and how to ask them. You have led him the entire morning, you led him all day Monday when you have no reason to lead him. If you want to lead him to get into a subject area I can understand that I'll let that go but when you get to the subject area ask him non-leading questions.

Obviously Ms. Rice objected, the dispute continued and motion practice ensued. As Judge Edmead explained: Rice's motion is predicated by the behavior of Decea during the three days of depositions of the witness. Rice pointed out that during the course of the witness's deposition, Decea repeatedly directed the witness not to answer certain questions posed to him which were on many occasions, followed by inappropriate, insulting, and derogatory remarks against Rice concerning her gender, marital status, and competence. Although both counsel agreed that all objections except those as to form were preserved, Decea made numerous speaking objections, and threatened to leave the deposition in response to such leading question. Rice also contended that Decea asked her several times, off the record, whether she was married.

Justice Edmead concluded that "it was improper for Decea to direct the witness not to answer where none of the ground in 221.2 were stated." The judge found that none of the grounds existed. She

also commented that "Decea's objections to form were accompanied by speeches which clearly exceeded what was necessary to preserve the objection."

Finally, Judge Edmead commented that one of the goals of the CPLR is to promote "efficiency, civility and professional decorum at the deposition session and to create an environment in which objections to not cause constant interruption and delay."

Judge Edmead also commented: "That Decea claims he knows of no rule requiring attorneys to be civil is baffling and the Court is not swayed by Decea's pledge to behave at future depositions." Thus, Judge Edmead ordered future depositions to be supervised by court appointed referee.

So what do you do?

What we learned from both the matters is that there are boundaries that the courts will enforce. Any attorney who is experienced in litigation has encountered attorneys who make speaking objections and otherwise comment on the ability or style of other attorneys taking a deposition. Plainly these comments are improper and yet they happen all across the country every day. These cases illustrate, however, that if somebody pushes too hard, courts will order sanctions or supervise the depositions.

For an attorney facing this kind of conduct, the appropriate manner for handling it is to point out to the adversary that the "speaking" objections and a direction not to answer a question are all in violation of court rules. Try to resolve it then and there, on the record. Be firm but not sanctimonious. If the adversary persists, the attorney taking the deposition should then say, on the record, that "I warned you" and that the deposition cannot continue. Then walk out. This is a big step. Don't take it lightly and mean it. Most important is the follow through. March right off to court and seek sanctions.

Now let's take the adversary's side. If the questions are truly improper, say that briefly on the record. Say you are compelled to direct the witness not to answer. Rule 30(d)(3) of the Federal Rules of Civil Procedure provides for a motion to terminate or limit a deposition "on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the

deponent or party." State practice provides the same remedy. Make a succinct record, say the deposition cannot continue and follow the instructions above.

As these cases show, all may be fair in love and war, but that rule does not apply to depositions.

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