Deposition Disasters and How to Avoid Them

By Charles R. Gallagher III

Sadly, we have all had deposition disasters where the conduct of the witness or opposing attorney has impaired meaningful discovery. Whether this conduct includes improper objections, witness coaching and an argumentative tone, it frustrates an inquiry into the knowledge of the witness.

"Objection, irrelevant; I am directing the witness not to answer….."

Attorneys may not direct the witness not to answer a question unless the question seeks privileged information or information subject to a protective order. Fla.R.Civ.P. 1.310(c) states, "all objections during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under subdivision (d).

Prior to the 1996 amendment to Fla.R.Civ.P. 1.30, attorneys were altogether forbidden from directing the witness not to answer a question. See *Jones v. Seaboard Coastline Railroad Co.,* 297 So. 2d 861 (Fla. 2d DCA 1974). While an attorney may now certainly direct the witness not to answer to questions which invade on attorney-client privilege, the attorney may not direct the witness to refuse answering questions which are irrelevant, vague, confusing or otherwise objectionable.

Finally, the Standards for Professional Courtesy for the Sixth Judicial Circuit, require that attorneys not direct a deponent to refuse to answer questions unless they seek privileged information, are manifestly irrelevant, are calculated to harass, or are not calculated to lead to admissible evidence.

"What did you and your lawyer talk about during the break?"

The witness can confer with his or her attorney during the deposition (and breaks) unless a court order has been entered prohibiting it. However, the lawyer may not coach the witness in any conference. *Rule 4-3.4, Rules Regulating The Florida Bar; Thompson v. State,* 507 So. 2d 1074 (Fla. 1987); *Haskell Company v. Georgia Pacific Corporation,* 684 So. 2d 297 (Fla. 5th DCA 1996). Additionally, there is no recognized exception to the privilege for a communication between an attorney and client which occurs during a break in deposition. If a deponent changes his/her testimony after consulting with counsel, the fact of the consultation may be brought out, but the substance of the communication remains protected.

"Objection, I think what the witness means is that he did make payment…"

Everyone knows the speaking objections are not permitted. Since the (sparse) case law on speaking objections addresses its peril in terms of jury bias, one needs to re-frame the issue in a deposition context where they can be used to coach the witness. Trawick cites *Hall v. Clifton Precision,* 150 F.R.D. 525 (Pa. 1993) highlighting the danger of coaching by speaking objection. See Trawick, Fla. Prac. & Proc. § 16:6 (2011 ed.). While counsel cannot make argumentative or leading speaking objections, it is entirely appropriate to assert a form objection where the question is confusing. In that case opposing counsel may ask for specifics to ensure that the witness understands the question.

Since there is no body of case law on deposition speaking objections, bar associations and the trial courts have enacted rules and guidelines in order to curb such abuses. See Guidelines for Professional Conduct-Florida Bar Trial Lawyers Section ("Counsel defending a deposition should limit objections to those that are well-founded and permitted by the rules of civil procedure or applicable case law .... While a question is pending, counsel should not, through objections or otherwise, coach the deponent or suggest answers. Should any lawyer do so, the courts are urged to take stern action to put a stop to such practices and to serve as a deterrent to others).

Finally, the Standards for Professional Courtesy for the Sixth Judicial Circuit require that attorneys "limit objections to those that are well founded and necessary to protect a client's interest." Further it mandates that while a question is pending, attorneys will not, through objections or otherwise, coach the deponent or suggest answers.

"That's it, We're done here, We are moving to terminate!"

A party or the deponent may suspend the deposition if the examination is being conducted in bad faith or in an unreasonably annoying, embarrassing or oppressive manner pursuant to Fla.R.Civ.P 1.130(d). The motion to terminate should be made orally during the examination and a written motion filed thereafter. At that point the court can rule on the objection. The objecting attorney should provide opposing counsel an opportunity to proceed with the balance of the deposition before actually suspending the testimony.

So the next time you find yourself in the middle of a deposition disaster, you are now armed with some tools to salvage your captive time with the witness and make the most of a volatile deposition.