ENFORCING THE PROHIBITIONS AGAINST COACHING DEPOSITION WITNESSES

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I. The Problem

Attorneys should prepare parties and witnesses they represent prior to depositions by opponents. But there are limitations on how much attorneys can do once the deposition starts.

Consider the following scenario:

You are deposing plaintiff, who has filed an age discrimination lawsuit against your client and getting some very useful answers. Plaintiff's counsel begins to become obstreperous, dominating the record using a myriad of devices to coach the witness and interrupt the deposition, including:

(1) Requests to go “off the record,” or asks to talk to the client “for a minute,” invariably claiming the need to clarify or “interpret” the question for plaintiff.

(2) Instructing the witness not to answer.

(3) Arguing over the meaning of simple words.

(4) Constantly making objections which are speeches used to coach the witness.

(5) Stating, “I don’t understand the question,” and miraculously, it turns out plaintiff doesn’t understand the question either or rephrasing the question to suggest an answer by stating, “Let me see if I understand the question. . . .”
Simply stated, these devices are prohibited because:

(1) Nothing should be “off the record” unless all the attorneys agree. If there is an “off the record” conversation the conversation should be placed on the record in the form of a summary. Additionally, the deponent may be asked what was said “off the record.”

(2) Under Federal Rules of Civil Procedure (“Rule”) 30(d)(1), a deponent can only be instructed not to answer a proper question if it invades only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4) [that the examination is being conducted in bad faith or in such manner as reasonably to annoy, embarrass or oppress the deponent or party]. There is no basis in the rules for instructing a non-client witness not to answer a question. If an attorney continues to instruct a witness not to answer, opposing counsel may make a motion before the court to compel the answer.

(3) The difficult lawyer may try to steer the testimony of the deponent by arguing over the meaning of simple words.

(4) Under Federal Rules of Civil Procedure Rule 30(d)(1), objections are allowed but must be concise and not used to suggest the answer.

(5) It is improper for an attorney to interpret that the witness does not understand a question because the lawyer doesn’t understand a question. And the lawyer certainly shouldn’t suggest a response. If the witness needs clarification, the witness may ask the deposing lawyer for clarification. A lawyer’s purported lack of understanding is not a proper reason to interrupt a deposition. In addition, counsel is not permitted to state on the record an interpretation of questions, since those interpretations are irrelevant and are often suggestive of a particularly desired answer.

II. The Federal Rules of Civil Procedure and Advisory Committee Notes

Fed. R. Civ. P. 30(d) addresses such abuses, providing that:

(1) Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation
directed by the court, or to present a motion under Rule 30(d)(4).

* * * 

(3) If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney’s fees incurred by any parties as a result thereof.

(4) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Moreover, the 1993 Amendments to the Rule provide that:

Subdivision (d). The first sentence of new paragraph (1) provides that any objections during a deposition must be made concisely and in a non-argumentative and non-suggestive manner. Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond. While objections may, under the revised rule, be made during a deposition, they ordinarily should be limited to those that under Rule 32(d)(3) might be waived if not made at that time, i.e., objections on grounds that might be immediately obviated, removed, or cured, such as to the form of a question or the responsiveness of an answer. Under Rule 32(b), other objections can, even without the so-called “usual stipulation” preserving objections, be raised for the first time at trial and therefore should be kept to a minimum during a deposition.
Directions to a deponent not to answer a question can be even more disruptive than objections. The second sentence of new paragraph (1) prohibits such directions except in the three circumstances indicated: to claim a privilege or protection against disclosure (e.g., as work product), to enforce a court directive limiting the scope or length of permissible discovery, or to suspend a deposition to enable presentation of a motion under paragraph (3).

In extreme cases, a court may impose the sanctions in 28 U.S.C. § 1927:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys’ fees reasonably incurred because of such conduct.

III. Statutory Regulation of Consultation between the Attorney and a Witness During Deposition

Different federal courts have taken various approaches to how attorney-client communication during depositions is treated.

One common approach is to prohibit any conference between the attorney and the client during the deposition except for conferences to determine whether a privilege should be asserted. Rule 30.6 of the Local Civil Rules of the Southern and Eastern Districts of New York which is only applicable in the Eastern District provides:

An attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted.

Other districts opt not to place a blanket prohibition against attorney-client communication during depositions and draw distinctions instead between conferences

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