Dealing With Problems at Depositions

by Gianfranco A. Pietrafesa

This article presents various situations that occur frequently at depositions and addresses how to deal with them. Each scenario sets forth an excerpt from a deposition, which includes a question by the examining attorney and an objection by the defending attorney.[1] A discussion of the law governing the issue follows each scenario, including whether the question and the objection are proper. The objective of the article is to identify possible problems that may arise at depositions, and to set forth the governing law to facilitate the resolution of the issues between counsel.

Scenario 1

The first scenario involves questions seeking information about meetings or discussions with counsel in preparation for a witness giving testimony at a deposition.

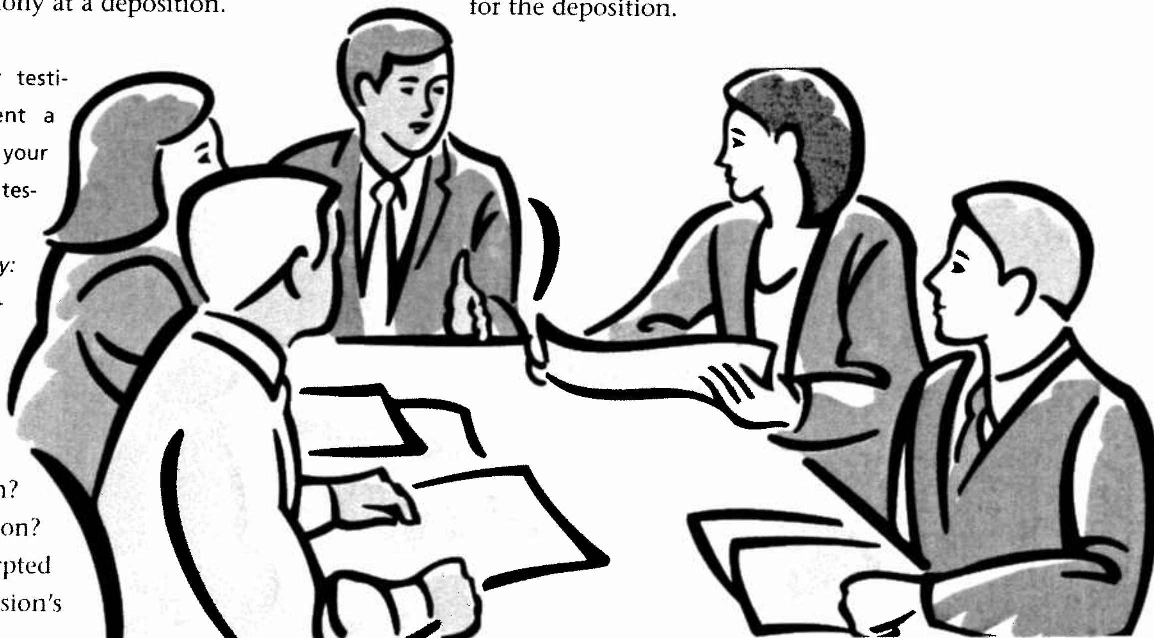
Question: Before your testimony today, you spent a number of hours with your attorney preparing your testimony, didn't you?
Defending Attorney: Objection — attorney-client privilege.

Does the question seek attorney-client privileged information? Is it an improper question? This scenario was excerpted from the Appellate Division's decision in *Daisey v. Keene Corp.*,[2] where the court stated that there is "nothing improper in inquiring as to whether plaintiff met with his attorney prior to trial or during a break."[3] The court, noting the attorney-client privilege objection, explained that "[t]he specific question objected to did not ... seek the contents of the meeting or do anything more than ask if plaintiff has met with counsel prior to testifying."[4] The Appellate Division held that the objection was properly overruled by the trial court.[5]

Therefore, questions on whether the witness has met with counsel to prepare for a deposition are not improper because they do not seek privileged communications.

Scenario 2

This scenario involves questions seeking details concerning the witness's meeting or discussion with counsel to prepare for the deposition.



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Question: Did you meet with anyone to discuss or prepare for this deposition?
Answer: I met with my attorney.
Question: When did that meeting take place?
Answer: Yesterday.
Question: Where did the meeting take place?
Answer: At his office.
Question: How long did that meeting last?
Defending Attorney: Objection. This is getting absurd. Don't answer; the question calls for attorney-client privileged information.

Are the questions improper? In other words, do they seek privileged information? Is the defending attorney correct? Or is he simply uninformed about the scope of the attorney-client privilege?

The attorney-client privilege is set forth in New Jersey Rule of Evidence 504.[6] It provides in pertinent part that "*communications* between lawyer and his client in the course of that relationship and in professional confidence, are privileged, ..."[7] Based on the language of the rule alone, it should be clear that "[t]he privilege only proscribes disclosure of 'communications' between attorney and client."[8]

Therefore, questions seeking details or facts surrounding the attorney-client relationship, including questions about meetings to prepare for a deposition, are not improper. Only communications are entitled to protection under the privilege. This was explained in *LTV Securities Litigation*[9] as follows:

> Last, and at the risk of confusing by stating the obvious, information concerning the factual circumstances surrounding the attorney-client relationship has no privilege, at least so long as disclosure does not threaten to reveal the substance of any confidential communications. The attorney-client privilege does not encompass such nonconfidential matters as the terms and conditions of an attorney's employment, the purpose for which an attorney has been engaged, the steps which an attorney took or intended to take in discharging his obligation, or any of the other external trappings of the relationship between the parties.[10]

Based on the foregoing, it should be clear that the information requested in the questions in Scenario 2 are not privileged and, therefore, the questions are not objectionable. Indeed, they are relatively harmless when compared to the factual information that may be obtained pursuant to the decision in *LTV*. The subject questions do not seek the disclosure of privileged communications; they seek only the facts or details surrounding the communication — where the meeting took place, when, how long the meeting lasted, etc.

Scenario 3

The third scenario also involves a question about a meeting between a witness and counsel to prepare for a deposition.

Question: Was anyone else present when you met with your attorney to prepare for your deposition?
Defending Attorney: Objection. The question seeks attorney-client privilege information.

Is the defending attorney correct? Similar questions were the subject of the court's decision in *Arthur Treacher's Franchise Litigation*.[11] There, the defending attorney objected to, among other things, questions seeking the identity of persons present at certain meetings.[12] The court noted that the "questions generally pertaining to the meetings held...were apparently asked in an attempt to ascertain whether or not the privilege was being invoked properly."[13] The court held that "[t]hese questions did not seek to elicit any confidential information but rather were aimed at establishing the applicability, or lack thereof, of the privilege."[14]

The question in Scenario 3 was aimed at determining the identity of other persons present at the meeting between the witness and counsel to determine whether the attorney-client privilege protects the communications, or whether the presence of a third party renders the privilege inapplicable or results in a waiver of the privilege.[15] Therefore, the question in Scenario 3 is permissible because it does not seek privileged information. Instead, the question is aimed at determining whether the privilege even applies.

Scenario 4

This scenario also involves the attorney-client privilege.

Question: What did you tell your attorney about the accident?
Defending Attorney: Objection. The question seeks the disclosure of attorney-client privileged information.

Is the defending attorney correct? The New Jersey Court Rules provide that "[n]o objection shall be made during the taking of a deposition except those addressed to the form of a question or to assert a privilege ..."[16] It is obvious that this, at least on its face, is improper because it seeks the disclosure of a confidential communication between client and lawyer. OK, so this was an easy problem to deal with. However, consider the next scenario.

Scenario 5

The fifth scenario involves a defending attorney's objections to various questions. It concerns the propriety of speaking objections.

Question: Were you present at the July 1996 meeting where Mrs. Smith and Miss Jones discussed the subject contract?

Answer: I was there for part of the meeting, but I think I left early.
Question: What did she say about the contract at that meeting?
Defending Attorney: Objection as to form; the question is ambiguous. Whom do you mean by "she"? Mrs. Smith or Miss Jones?
Question: What did Mrs. Smith say?
Defending Attorney: Objection. What did Mrs. Smith say about what? The witness cannot possibly remember everything that was said at a meeting that took place over five years ago. Can you be more specific?
Question: What did Mrs. Smith say about the contract?
Answer: I don't recall; the meeting took place some time ago.

Are the defending attorney's objections proper? The first objection is proper because the question is ambiguous. The attorney made his objection as to the form of the question and stated the grounds for the objection. In this case, he also clarified his objection to assist the examining attorney. It was permissible to do so because it did not suggest an answer to the witness.

The second objection, however, is improper because it is a speaking objection; that is, an objection that suggests the answer or the manner of answering, or provides a warning to the witness. In the excerpted deposition, the defending attorney's speaking objection warned the witness about the question and suggested how to answer the question, which is improper and impermissible.

The New Jersey Court Rules provide that

[a]n objection to the form of a question shall include a statement by the objector as to why the form is objectionable so as to allow the interrogator to amend the question. No objection shall be expressed in language that suggests an answer to the deponent.[17]

This language was added to the New Jersey Court Rules in 1996 to combat the problem of speaking objections.[18]

Therefore, it should be clear that speaking objections are no longer tolerated by the court. If the defending attorney continues to utter speaking objections, the questioning attorney may seek appropriate relief from the court, even through a telephone application during a deposition, to combat such abuse.[19]

Scenario 6

This scenario concerns the propriety of discussions between the witness and counsel during a deposition.

Question: What did you do immediately after the July 1996 meeting?
Examining Attorney: Let the record reflect that the witness and counsel are whispering with one another.

Is it proper for the witness and his attorney to begin whispering with one another after the examining attorney asks a question? At first blush, the obvious answer is that it is improper for them to do so. However, it may depend on the situation.

The New Jersey Court Rules provide:

Once the deponent has been sworn, there shall be no communication between the deponent and counsel during the course of the deposition while testimony is being taken except with regard to the assertion of a claim of privilege, a right to confidentiality or a limitation pursuant to a previously entered court order.[20]

If the witness asserts a valid privilege, then there is probably no harm resulting from the conference. However, if the witness answers the question rather than asserting a privilege after consulting with counsel, then there is an implication that the defending attorney provided the answer or otherwise coached the witness. In cases where the witness answers the question, the witness or his attorney should state on the record the nature of their discussion; meaning, for example, that the discussion concerned whether the witness should assert a claim of privilege.

Although the potential for abuse is present, the nature of the question, the explanation of the conference and the answer to the question will likely determine whether there has been a violation of the court rules. In any event, the examining attorney should make a statement of the record when the witness and counsel confer with one another, especially when the conferences are beyond the hearing of the court stenographer. If such conduct continues, without any assertion of privilege, etc., the examining attorney should seek appropriate relief from the court.[21]

Scenario 7

This scenario also involves a conference between the witness and counsel. However, this conference takes place during a break in the deposition.

Question: Did you and your attorney discuss your deposition during the lunch break?
Answer: Yes.
Question: What did you discuss?
Defending Attorney: Objection. Attorney-client privilege.
Examining Attorney: The court rules prohibit communications during a deposition; therefore, I am entitled to know about the nature of the discussion.
Defending Attorney: The rules do not prohibit conversations during breaks. Next question please.

Who is right? As noted, the New Jersey Court Rules provide that "there shall be no communication between deponent and counsel during the course of the deposition *while testimony is being taken...*"[22] Therefore, the language of the

rule clearly supports the position of the defending attorney. The leading commentator on the court rules has written that there is nothing improper about discussing a deposition during a break.[23]

Moreover, in the *PSE&G* case, the court noted that "[a]lthough it may be appropriate to question the witness as to whether or not he had discussions with counsel in preparation of the witness's testimony, the nature of those conversations is protected by the privilege."[24] Therefore, it is improper to ask about what was discussed between the witness and counsel. In such situations, the questioning attorney need only ask the witness whether he or she wants to change or modify any answers given to questions prior to the break.[25]

It is possible, however, to convince the court to prohibit conversations between deponent and counsel during breaks in depositions. For example, in *PSE&G*, the court held:

> In the present cases, the court believes that the following restrictions should apply to the depositions of the defendant directors: once the deposition commences there should be no discussions between counsel and the witness, even during recesses, including lunch recess, until the deposition concludes that day. However, at the conclusion of the daily deposition, counsel and the witness should be permitted to confer and to prepare for the next day's deposition.[26]

An application for such a restriction is decided on a case-by-case basis, based on the specific facts presented to the court. Without special circumstances, however, it will be the rare case for the court to justify a prohibition on conferences during breaks.

Scenario 8

The last scenario involves a witness's review of documents to prepare for a deposition and the examining attorney's demand to inspect the documents.

> *Question:* Did you review any documents to prepare for this deposition?
>
> *Answer:* Yes.
>
> *Question:* Which documents did you review?
>
> *Defending Attorney:* Objection. The specific documents selected for this witness's review are protected by the attorney work-product doctrine. In addition, all of the documents reviewed were produced to you in discovery.

Is the questioning attorney entitled to inspect the specific documents reviewed by the witness? The answer is not entirely clear in New Jersey.

The basis for the request to review the documents appears to be found in New Jersey Rule of Evidence 612, which provides in pertinent part that

> [i]f the witness has used a writing to refresh the witness' memory *before* testifying, the court in its discretion and in the interest of justice may accord the adverse party the same right to the writing as that party would have if the writing had been used by the witness while testifying.[27]

The "same right" includes the right to inspect and use the writing to examine the witness.[28] Rule 612 apparently applies to depositions through the court rule that provides that "[e]xamination and cross-examination [at depositions] may proceed as permitted in the trial of actions in open court,..."[29] Therefore, if a witness reviewed a document to refresh his or her memory before testifying, then the examining attorney *may* be entitled to a copy of the document.

Until 1998, the New Jersey state court did not address this particular issue in a reported decision. Then, in *PSE&G,* the court held that documents used to refresh a witness's recollection must be produced:

> Any documents that the witness uses to refresh the witness' recollection, either in preparation for the deposition or during the deposition, must be produced. The fact that the document may have been turned over to plaintiffs' counsel in discovery is immaterial. The actual document that the witness used to refresh the witness's recollection is the document that counsel is entitled to see.[30]

The *PSE&G* court did not, however, cite any legal authority to support its decision. Nor did it perform any analysis of the issue. We do not know why or how the court reached its decision. This is unfortunate because an analysis of the issue would have greatly benefited the bar, especially in light of the Third Circuit's 1985 decision in *Sporck v. Peil,*[31] which holds to the contrary.

The Third Circuit's decision in *Sporck* holds that if the documents reviewed by the witness in preparation for testifying are selected by the attorney, then the identity of the specific documents is protected by the attorney work-product

doctrine.[32] The court held that "the selection process itself represents... counsel's mental impressions and legal opinions as to how the evidence in the documents relates to the issues and defenses in the litigation."[33]

Therefore, based on *Sporck*, the examining attorney would not be entitled to the identity of the specific documents selected by the defending attorney because it would infringe on the attorney work-product doctrine. However, *PSE&G* entitles the examining attorney to the identity of the documents reviewed by the witness. The decisions obviously conflict.

Even under *Sporck,* however, there is a way to obtain the identity of documents. If the witness testifies that a document refreshed his or her memory, and that it influenced or supports his or her testimony, then the specific document must be identified because it is no longer entitled to protection under the work-product doctrine.[34] The *Sporck* court explained that the questioning attorney should first question the witness about a subject and then ask whether any document was used to refresh the witness's memory on the subject, or whether any document influenced or supports his or her testimony.[35] Under this approach, the defending attorney's work-product — the selection of particular documents — is not implicated, and the examining attorney is entitled to inspect the documents.[36] In other words, the documents selected by the defending attorney are not disclosed; instead, the witness identifies the documents that refreshed his or her memory or that influenced or support his or her testimony.

Based on the *PSE&G* decision, it would appear that the examining attorney is entitled to inspect the specific documents reviewed by the witness to refresh his or her recollection. However, *PSE&G* is only a trial court decision and the decision on the issue borders on being *dictum*. The better approach may well be found in *Sporck* because it does not implicate the attorney work-product doctrine. However, this federal court case is not binding in the state court. As a result of the foregoing conflict, it is certainly an issue that should be addressed and clarified by the Appellate Division or by the Supreme Court's Civil Practice Rules Committee.

Conclusion

Counsel should be prepared to confront these problems at depositions. This article presents New Jersey law on the issues. Counsel should also consult other publications on depositions to learn how to deal with these and other problems that arise at depositions.[37]

Endnotes

1. Some of the deposition excerpts are fictional; others are based on actual depositions, or on trial testimony in reported decisions, which have been edited for clarity.
2. 268 N.J. Super. 325 (App. Div. 1993).
3. *Id.* at 333-34.
4. *Id.*
5. *Id.* at 335. *See also PSE&G Shareholder Litigation,* 320 N.J. Super. 112, 118 (Ch. Div. 1998) ("it may be appropriate to question the witness as to whether or not he had discussions with counsel in preparation of the witness's testimony, ...").
6. N.J.R.E. 504; N.J.S.A. 2A:84A-20.
7. N.J.R.E. 504(1) (emphasis added).
8. Richard J. Biunno, *New Jersey Rules of Evidence* (Gann 2000), Comment 3 to N.J.R.E. 504 [hereinafter "Biunno"].
9. 89 F.R.D. 595 (N.D. Tx. 1981).
10. *Id.* at 603 (citations omitted).
11. 92 F.R.D. 429 (E.D. Pa. 1981).
12. *Id.* at 432.
13. *Id.* at 435.
14. *Id.*
15. *See, e.g.,* Biunno, Comment 5 to N.J.R.E. 504.
16. Rule 4:14-3(c).
17. *Id.*
18. *See* PSE&G, 320 N.J. Super. at 116-17.
19. *See* Rule 4:14-4. A discussion of the procedure to seek relief from the court and the types of relief available are beyond the scope of this article.
20. Rule 4:14-3(f).
21. *See* Rule 4:14-4.
22. Rule 4:14-3(f) (emphasis added).
23. *See* Sylvia B. Pressler, New Jersey Court Rules (Gann 2001), Comment 7 to Rule 4:14-4 ("Since the rule speaks only to 'while the deposition is being taken,' it clearly does not address consultation during overnight, lunch and other breaks."). *See also* Gianfranco A. Pietrafesa, Voice of the Bar, "Rule Doesn't Bar Conferences with Deponent During Breaks," 146 N.J.L.J. 911 (December 9, 1996).
24. *PSE&G*, 320 N.J. Super. at 118.
25. *See id.* ("If a witness changes his deposition testimony after consultation with counsel, then a different question may be presented.").
26. *Id.* at 117-18.
27. N.J.R.E. 612 (emphasis added).
28. *See id.*
29. Rule 4:14-3(a).
30. *PSE&G*, 320 N.J. Super. at 118.
31. 759 F. 2d 312 (3d Cir. 1985).
32. *Id.* at 315.
33. *Id.*
34. *Id.* at 317-18.
35. *Id.* at 318.
36. *Id.*
37. There are several very good books on deposition procedures, including Dennis R. Suplee and Diana S. Donaldson, *The Deposition Handbook 2d* (John Wiley & Sons, Inc.); David M. Malone and Peter T. Hoffman, *The Effective Deposition: Techniques and Strategies That Work 2d* (NITA); Henry L. Hecht, *Effective Depositions* (ABA).

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