DEALING WITH PROBLEMS AT DEPOSITIONS

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ADVANCED DEPOSITIONS IN NEW JERSEY

IV. DEALING WITH PROBLEMS AT DEPOSITIONS

A. MAKING OBJECTIONS AS TO THE FORM OF THE QUESTION.

1. Vague Question
2. Ambiguous Question
3. Compound Question
4. Argumentative Question
5. Question Calls for Speculation
6. Question Asked and Answered
7. Question Mischaracterizes Prior Testimony
8. Question Assumes Facts Not in Evidence

B. ASSERTING PRIVILEGE DURING A DEPOSITION.

C. INSTRUCTION NOT TO ANSWER THE QUESTION.

D. DISCOVERY OF DOCUMENTS USED TO PREPARE A WITNESS FOR DEPOSITION.

E. INQUIRING ABOUT MEETINGS AND DISCUSSIONS BETWEEN WITNESS AND COUNSEL TO PREPARE FOR DEPOSITION.

1. Questions about Meetings to Prepare for Deposition
2. Questions Seeking Details about Meetings with Counsel
3. Questions about Persons Present at Meetings
4. Questions about Communications
5. A Word about Speaking Objections

F. CONFERENCES AND DISCUSSIONS BETWEEN WITNESS AND COUNSEL DURING DEPOSITION.

1. Discussions between Witness and Counsel during Deposition
2. Discussions between Witness and Counsel during Breaks in Deposition

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These materials present various situational problems that occur regularly at depositions, and how to deal with them. Each scenario sets forth an excerpt from a hypothetical deposition that includes a question by the examining attorney and an objection by the defending attorney. A discussion of any applicable law governing the issue follows each scenario, including whether the question and the objection are proper. The objective of these materials is to identify and explain possible problems that may arise at a deposition in order to facilitate the resolution of the issues between counsel.

A. MAKING OBJECTIONS AS TO THE FORM OF THE QUESTION.

This section of the materials reviews a number of the common objections made at a deposition to the form of the question. The deposition scenarios in this section are extracted, with some modifications, from two excellent texts on depositions: David M. Malone and Peter T. Hoffman, The Effective Deposition—Techniques and Strategies That Work 2d (NITA 1996) [hereinafter "Malone &

Hoffman"], and Henry L. Hecht, Effective Depositions (ABA 1997) [hereinafter "Hecht"]. While on the subject, a good text on objections is Ashley S. Lipson's Is It Admissible? (James Publishing 1999).

As a preliminary matter, let's review why an attorney makes an objection to the form of a question, even though the witness is still required to answer the question. See, e.g., Fed. R. Civ. P. 30(c) ("All objections made at the time of the examination … shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections."). An objection to must be made at a deposition or it is waived. See Fed. R. Civ. Pro. 32(d)(3)(B) ("[e]rrors and irregularities occurring at the oral examination … in the form of the questions or answers, … and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.)"; N.J. Court Rule 14:16-4(c)(2) (same, except that the New Jersey rule uses "timely" instead of "seasonably"). See also Hecht at 355-358. In other words, an attorney cannot make an objection at trial unless the objection was made at the deposition. Therefore, an attorney is stuck at trial with the deposition answer to a poorly formed deposition question. If the attorney objected at the deposition, and the examining attorney did not rephrase the question based on the objection, then the attorney can object to the question and answer at the trial.

1. Vague Question

A question is vague if it is not clear what is being asked. For example:

Question: How large is your company?

Defending Attorney: Objection as to form – vague.

The question is vague because it is not clear what "large" means. In other words, it is not clear what is being asked. Is the question asking for gross revenues, net profits, total assets, number of employees, etc.? See Malone & Hoffman at 188.

If the examining attorney was seeking an answer about gross revenues and the witness testifies as to the number of employees, the examining attorney will obviously follow up with more specific questions to get the witness to testify about gross revenues. Or, upon hearing the objection, the examining attorney may cure the vague question before the witness answers it by rephrasing the question to make it more specific.

2. Ambiguous Question

An ambiguous question is similar to a vague one. A question is ambiguous if it is not clear what is being asked because it uses a term that is unclear, unfamiliar or unspecific. For example:

Question: When Jeter met Rodriguez, did he give him the papers?

Defending Attorney: Objection as to form – ambiguous.

The question is ambiguous because if the witness answers "yes," we do not know whether Jeter gave the papers to Rodriguez, or vice versa. See Malone & Hoffman at 189 n. 10. The question is also ambiguous because (at least based on this brief factual scenario) we do not know what "papers" the question refers to. See Hecht at 359.

3. Compound Question

A question is a compound question when it combines two questions into one. For example:

> *Question*: Did you write the letter and mail it?
>
> *Defending Attorney*: Objection as to form – compound question.

The question is a compound question because if the witness answers "yes," it is not clear whether the witness wrote the letter or mailed the letter or both. The two questions should be separated into two separate questions. See Hecht at 360. See also Malone & Hoffman at 189.

4. Argumentative Question

A question is argumentative when the examining attorney argues with the witness or comments on the testimony. For example:

> *Question*: Did you inform the plaintiff that the extended warranty was optional?
>
> *Answer*: Yes, I told him it was optional.
>
> *Question*: What did you tell him?

Answer: I told him that "the extended warranty is optional."

Question: In those exact words?

Answer: Yes.

Question: You really don't remember the exact words you used, do you?

Defending Attorney: Objection as to form – argumentative.

The last question is argumentative because it argues with the witness or comments on his testimony. See Hecht at 359-360.

5. Question Calls for Speculation

A question calls for speculation when it seeks information not in the witness's personal knowledge, such as asking a witness what another person was thinking. See Hecht at 361. For example:

Question: What Mr. Steinbrenner was thinking when he signed Carl Pavano?

Defending Attorney: Objection as to form – the question calls for speculation.

Why does the question call for speculation? Because it asks the witness to answer a question about something that is not in his personal knowledge – what someone else was thinking.

The examining attorney should first ask the following questions: "Do you know what Mr. Steinbrenner was thinking when he signed Carl Pavano?" "How do

you know what he was thinking?" If the witness's testimony reveals that he has personal knowledge, then the examining attorney can ask the question above. Or, the question can be rephrased to ask the witness to speculate, which is proper:

> *Question*: Tell me, what do you think Steinbrenner was thinking when he signed Carl Pavano?

This question is proper because it informs the witness that the examining attorney wants the witness to speculate. See Malone & Hoffman at 189-190. See also id. at 72-73.

6. Question Asked and Answered

A question that has already been asked and answered should not be asked again. For example:

> *Question*: How fast were you driving at the time of the accident?
>
> *Answer*: 55 miles per hour.
>
> * * *
>
> *Question*: Now, how fast did you say you were driving at the time of the accident?
>
> *Defending Attorney*: Objection as to form – asked and answered.

Obviously, the question has already been asked and answered. Why is it being asked again? Perhaps because the examining attorney is hoping for a different (i.e., better) answer. Or, perhaps the attorney simply forgot the answer. However, despite the objection, the witness will still have to answer the question, unless the

questions become so repetitive that they rise to the level of harassment, in which case the defending attorney may have to seek a protective order from the court. See Section C, *infra*.

7. Question Mischaracterizes Prior Testimony

A question that mischaracterizes the witness's prior testimony is improper and objectionable. For example:

> *Question*: How fast were you driving at the time of the accident?
>
> *Answer*: 55 miles per hour.
>
> *Question*: When you were speeding at 55 miles per hour …
>
> *Defending Attorney*: Objection – the question mischaracterizes the witness's testimony.

The second question mischaracterizes the witness's prior testimony by adding the word "speeding" into the question – the witness did not testify that he was speeding, that is simply the examining attorney's (improper) characterization of the testimony. See Malone & Hoffman at 190. See also Hecht at 360-361.

8. Question Assumes Facts Not in Evidence

A question may be improper if it assumes facts not "in evidence," meaning that the witness has not testified about the "facts" in the question. For example:

> *Question*: When you delivered the package to Giambi …
>
> *Defending Attorney*: Objection – the question assumes facts not in evidence.

If there has been no testimony that the witness delivered a package to Giambi, then the question assumes a fact – that the witness delivered a package to Giambi – that is not "in evidence." The objection is proper. The examining attorney can cure the problem by rephrasing the question or by first asking whether the witness did in fact deliver such a package. See Malone & Hoffman at 190.

B. ASSERTING PRIVILEGE DURING A DEPOSITION.

Both the Federal Rules of Civil Procedure and the New Jersey Court Rules provide that "[p]arties may obtain discovery regarding any matter, not privileged, …" (emphasis added). Fed. R. Civ. P. 26(b)(1); N.J. Court Rule 4:10-2(a). They also provide:

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. (emphasis added)

Fed. R. Civ. P. 26(b)(5); N.J. Court Rule 4:10-2(e).

There are a number of privileges in the New Jersey Rules of Evidence. See N.J.R.E. 501 through 517, codified at N.J.S.A. 2A:84-17 through 2A:84-32. The Federal Rules of Evidence do not, *per se*, include privileges. However, many

privileges are recognized by common law. For example, the attorney-client privilege is one of the oldest recognized common law privileges. See Swindler & Berlin v. United States, 524 U.S. 399, 403 (1998). It is also probably the most common privilege asserted at a deposition.

The following is the leading explanation of the factors comprising the attorney-client privilege:

> (1) the asserted holder of the privilege is or sought to become a client: (2) the person to whom the communication was made (a) is the member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal preceding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-359 (D. Mass. 1950). The attorney-client privilege is codified in New Jersey. See N.J.R.E. 504, codified at N.J.S.A. 2A:84-20.

A defending attorney's objection to a question based on the attorney-client privilege satisfies the requirement of expressly claiming the privilege. It does not, however, end the inquiry. As explained in Sections E and F, *infra*, an examining attorney is entitled to know the circumstances surrounding the attorney-client privilege to determine whether the assertion of the privilege is appropriate. See, e.g.,

Fed. R. Civ. P. 26(b)(5); N.J. Court Rule 4:10-2(e). The examining attorney is not, however, entitled to know *what* was said and by whom.

Why do defending attorneys object to questions seeking information protected by a privilege such as the attorney-client privilege and why do they instruct their witnesses to assert the privilege by not answering these questions (discussed in the next section)? A judge is not present at a deposition and may not be available by telephone to rule on such an objection made during a deposition. Therefore, if a question requests information that is privileged, the defending attorney must object to the question, and instruct the witness not to answer, to preserve the privilege. Otherwise, if the witness answers the question, the privilege will be waived and the witness may be required to testify about matters that *were* privileged..

C. INSTRUCTION NOT TO ANSWER THE QUESTION.

When can an attorney instruct a witness not to answer a question at a deposition? Federal Rule of Civil Procedure 30(d)(1) provides in pertinent part that "[a] person may instruct a deponent not to answer [a question] only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under Rule 30(d)(4)." A motion under Federal Rule of Civil Procedure 30(d)(4) is for a protective order to prohibit a deposition conducted in bad faith, or one to annoy, embarrass or oppress the witness. See Fed. R. Civ. P. 30(d)(4).

The New Jersey Court Rules are similar:

> No objection shall be made during the taking of a deposition except those addressed to the form of a question or to assert a privilege, a right to confidentiality or a limitation pursuant to a previously entered court order. … Subject to R. 4:14-4, an attorney shall not instruct a witness not to answer a question unless the basis of the objection is privilege, a right to confidentiality or a limitation pursuant to a previously entered court order. …

N.J. Court Rule 4:14-3(c).

N.J. Court Rule 4:14-4, like Federal Rule of Civil Procedure 30(d)(4), allows a party or deponent to seek a protective order:

> At any time during the taking of the deposition, on formal motion or telephone application to the court of a party or of the deponent and upon a showing that the examination or any part thereof is being conducted or defended in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party, or in violation of R. 4:14-3(c) or (f), the court may order the person 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 R. 4:10-3. … Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion or telephone application for an order. …

As noted in Part A of the materials, *supra*, can a defending attorney object to a question on the grounds that it has been asked and answered several times? No, unless the questioning rises to the level of being unreasonable, thus entitling the

defending attorney to instruct the witness not to answer in order to seek a protective order or other relief from the court.

Accordingly, an attorney can instruct a witness not to answer a question only to:

- Preserve a privilege;
- Preserve a right to confidentiality (such as to protect a trade secret, at least in actions in the Superior Court of New Jersey);
- Enforce a limitation on evidence in accordance with an order or other ruling by the court; or
- Present a motion or other application to the court for a protective order.

The reader interested in learning more about instructions not to answer should consult Hecht at 371-376 and Malone & Hoffman at 100-102 and 195-197.

D. DISCOVERY OF DOCUMENTS USED TO PREPARE A WITNESS FOR DEPOSITION.*

Consider the following exchange at a deposition concerning 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.

* Sections D, E and F of these materials are based on Gianfranco A. Pietrafesa, "Dealing With Problems at Depositions," New Jersey Lawyer Magazine (December 2001), reprinted in 3C New Jersey Practice–Civil Practice Forms (5th ed.) § 35.12 (West).

> *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 examining attorney entitled to inspect the specific documents reviewed by the witness? The answer is not entirely clear and depends on whether the lawsuit is in federal or state court 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." N.J.R.E. 612 (emphasis added). See also F.R.E. 612. The "same right" includes the right to inspect and use the writing to examine the witness. See id. The evidence rule apparently applies to a deposition through the court rule that states that "[e]xamination and cross-examination of deponents may proceed as permitted in the trial of actions in open court, ..." N.J. Court Rule 4:14-3(a). Accord Fed. R. Civ. Pro. 30(c). Therefore, if a witness reviewed a document to refresh his memory before testifying, then the examining attorney may be entitled to a copy of the document.

The New Jersey state court did not address this particular issue in a reported decision until 1998 when a trial 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.

PSE&G Shareholder Litigation, 320 N.J. Super. 112, 118 (Ch. Div. 1998).

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, 759 F. 2d 312 (3d Cir. 1985), 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. Id. at 315. 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." Id.

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; however, it may be possible to still argue in state court that the documents are protected from disclosure if selected by the defending attorney by using the Sporck attorney-work product argument.

Even under Sporck, however, there is a way to obtain the identity of documents. If the witness testifies that a document refreshed his memory and that it influenced or supports his testimony, then the specific document must be identified because it is no longer entitled to protection under the work-product doctrine. Id. at 317-18. The Sporck court explained that the examining 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 testimony. Id. at 318.

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. Id. In other words, the documents selected by the defending attorney are not disclosed; instead, the witness identifies the documents that refreshed his memory or that influenced or support his 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 recollection. However, PSE&G is a trial court decision and is not binding on other courts. Moreover, the trial court's decision on the issue borders on being dictum. The better approach may well be found in Sprock because it does not implicate the attorney work-product doctrine. However, this federal court case is not binding on a state court.

The reader interested in learning more about the discovery of documents used to prepare a witness for a deposition should consult Hecht (Chapter 9) at 205-227 and Malone & Hoffman at 115-117.

E. INQUIRING ABOUT MEETINGS AND DISCUSSIONS BETWEEN WITNESS AND COUNSEL TO PREPARE FOR DEPOSITION.

As noted in Sections B and C, *supra*, certain questions at a deposition involve assertions of the attorney-client privilege, and an instruction not to answer. This section of the materials examines several common situations relating to witness and counsel having meetings and discussions to prepare the witness for a deposition.

1. Questions about Meetings to Prepare for Deposition

Is it permissible to ask questions seeking information about meetings or discussions with counsel in preparation for a witness giving testimony at a deposition? Consider the following question:

> *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., 268 N.J. Super. 325 (App. Div. 1993), 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." Id. at 333-34. 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." Id. The Appellate Division held that the objection was properly overruled by the trial court. Id. at 335. See also PSE&G, 320 N.J. Super. at 118 ("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, ...").

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

2. Questions Seeking Details about Meetings With Counsel

How about questions seeking details about a witness's meeting or discussion with counsel to prepare for the deposition? Are they proper? Consider the following questions:

> *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?

As noted, the attorney-client privilege is set forth in New Jersey Rules of Evidence. See N.J.R.E. 504, codified at N.J.S.A. 2A:84A-20. It provides in pertinent part that "communications between lawyer and his client in the course of that relationship and in professional confidence, are privileged, …" N.J.R.E. 504(1) (emphasis added). 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." Richard J. Biunno, New Jersey Rules of Evidence, Comment 3 to N.J.R.E. 504 (Gann Law Books) [hereinafter "Biunno"].

Therefore, questions seeking details or facts surrounding the attorney-client relationship, including questions about meetings to prepare for a deposition, are proper. Only "confidential communications" are entitled to protection under the privilege. This was explained in LTV Securities Litigation, 89 F.R.D. 595 (N.D. Tx. 1981), 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.

Id. at 603 (citations omitted). See also Anthony J. Bocchino and David A. Sonenshein, Deposition Evidence – Objections, Instructions Not to Answer and Responses – Law and Tactics, at 26-29 (NITA 2005) (this text explains why the examining attorney is entitled to know the facts or details surrounding the attorney-client privilege).

Based on the foregoing, it should be clear that the information requested in the questions in this scenario is 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.

3. Questions about Persons Present at Meetings

Likewise, consider the following exchange 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 privileged information.

Is the defending attorney correct? Similar questions were the subject of the court's decision in Arthur Treacher's Franchise Litigation, 92 F.R.D. 429 (E.D. Pa. 1981). There, the defending attorney objected to, among other things, questions seeking the identity of persons present at certain meetings. Id. at 432. 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." Id. at 435. 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." Id.

The question in this scenario was aimed at determining the identify 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. See, e.g., Biunno, Comment 5 to N.J.R.E. 504. Therefore, the question is permissible because it does not seek privileged information. Instead, the question is aimed at determining whether the privilege even applies.

4. Questions about Communications

How about a question such as the following?

> *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? As noted, 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 …" N.J. Court Rule 4:14-3(c). It is obvious that this question, at least on its face, is improper because it seeks the disclosure of a confidential communication between client and lawyer. Okay, this was an easy one. However, consider the next scenario.

5. A Word about Speaking Objections

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

> *Question*: Were you present at the July 2001 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 nearly 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." N.J. Court Rule 4:14-3(c). See also Fed. R. Civ. P. 30(d)(1) ("Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner."). The foregoing language in the New Jersey Court Rules was added to combat the problem of speaking objections. See PSE&G, 320 N.J. Super. at 116-17. Therefore, it is clear that speaking objections will not be tolerated by the court. See, e.g., Wolfe v. Malberg, 334 N.J. Super. 630 (App. Div. 2000) (court imposed significant sanctions against defending attorney for flagrant violations of Rule 4:14-3(c)). If the defending attorney continues to utter speaking objections, the examining attorney may seek appropriate relief from the court, even through a telephone application during a deposition, to stop such conduct. See N.J. Court Rule 4:14-4; Fed. R. Civ. P. 30(d)(4).

F. CONFERENCES AND DISCUSSIONS BETWEEN WITNESS AND COUNSEL DURING DEPOSITION.

Section D covered meetings and discussions between witness and counsel before a deposition. This section reviews the propriety of discussions between the witness and counsel during a deposition.

1. Discussions between Witness and Counsel during Deposition

Are discussions between the witness and counsel during the actual taking of a deposition proper?

> *Question*: What did you do immediately after the July 2004 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.

N.J. Court Rule 4:14-3(f). See also Fed. R. Civ. P. 30(d)(1); Hall v. Clifton Precision Tools, 150 F.R.D. 525 (E.D. Pa. 1993).

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 on 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. See N.J. Court Rule 4:14-4.

2. Discussions between Witness and Counsel during Breaks in Deposition

Are conferences between the witness and counsel during a break in the deposition proper?

> *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 …" N.J. Court Rule 4:14-3(f) (emphasis added). 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. See Sylvia B. Pressler, New Jersey Court Rules, Comment 7 to N.J. Court Rule 4:14-4 (Gann Law Books) ("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).

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." PSE&G, 320 N.J. Super. at 118. Therefore, it is improper to ask about what was discussed between the witness and counsel. In such situations, the examining attorney need only ask the witness whether he wants to change or modify any of his answers given to questions prior to the break. See id.

("If a witness changes his deposition testimony after consultation with counsel, then a different question may be presented.").

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.

Id. at 117-18.

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.

* * *

Readers interested in learning more about depositions should consult one or more of these excellent books on the subject:

- David M. Malone and Peter T. Hoffman, The Effective Deposition: Techniques and Strategies That Work 2d (NITA);

- Henry L. Hecht, Effective Depositions (ABA);

- Dennis R. Suplee and Diana S. Donaldson, The Deposition Handbook 2d (John Wiley & Sons, Inc.).

SELECTED PROVISIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE GOVERNING OBJECTIONS AT DEPOSITIONS

RULE 30 – DEPOSITION UPON ORAL EXAMINATION

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections

Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence except Rules 103 and 615. … All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections. …

(d) Schedule and Duration; Motion to Terminate or Limit Examination.

(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).

(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.

RULE 32 – USE OF DEPOSITIONS IN COURT PROCEEDINGS

(d) Effect of Errors and Irregularities in Depositions.

(3) As to Taking of Deposition.

(A) …

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

SELECTED PROVISIONS OF THE NEW JERSEY COURT RULES GOVERNING OBJECTIONS AT DEPOSITIONS

RULE 4:14 – DEPOSITIONS UPON ORAL EXAMINATION

4:14-3 Examination and Cross-Examination; Record of Examination; Oath; Objections

(a) Examination and Cross-Examination. Examination and cross-examination of deponents may proceed as permitted in the trial of actions in open court, but the cross-examination need not be limited to the subject matter of the examination in chief.

(c) Objections. No objection shall be made during the taking of a deposition except those addressed to the form of a question or to assert a privilege, a right to confidentiality or a limitation pursuant to a previously entered court order. The right to object on other grounds is preserved and may be asserted at the time the deposition testimony is proffered at trial. An 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. Subject to R. 4:14-4, an attorney shall not instruct a witness not to answer a question unless the basis of the objection is privilege, a right to confidentiality or a limitation pursuant to a previously entered court order. All objections made at the time of the examination to the qualifications of the officer taking the deposition or the person recording it, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. …

(f) Consultation With the Deponent. 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.

4:14-4. Motion or Application to Terminate or Limit Examination or for Sanctions.

At any time during the taking of the deposition, on formal motion or telephone application to the court of a party or of the deponent and upon a showing that the examination or any part thereof is being conducted or defended in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party, or in violation of R. 4:14-3(c) or (f), the court may order the person 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 R. 4:10-3. If the order made terminates the examination, it shall be resumed thereafter only upon further order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion or telephone application for an order. The provisions of R. 4:23-1(c) shall apply to the award of expenses incurred in making or defending against the motion or telephone application.

RULE 4:16 – USE OF DEPOSITIONS; OBJECTIONS; EFFECT; ERRORS AND IRREGULARITIES

4:16-4 Effect of Errors and Irregularities in Depositions

(c) As to Taking of Deposition.

(1) …

(2) Objections Waived. Except as otherwise provided by R. 4:14-3(c), errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented are waived unless timely objection thereto is made at the taking of the deposition. …

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