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Objecting To The Form Of Deposition Questions

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As a preliminary matter, why does an attorney make an objection to the form of a question at a deposition when the witness is required to answer the question? In this regard, *Federal Rule of Civil Procedure* 30(c) provides in pertinent part that "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."

The answer to the question is that an objection must be made at a deposition or it is waived. For example, *Federal Rule of Civil Procedure* 32(d)(3)(B) provides in pertinent part that "Errors 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." *See also* Henry L. Hecht, *Effective Depositions* (ABA 1997), at 355-358 [hereinafter "Hecht"].

In other words, an attorney cannot make an objection at trial unless the objection was made at the deposition. Therefore, an attorney will be stuck at trial with the deposition answer to an improper or poorly phrased deposition question. If the defending attorney objected to the question at the deposition, and the examining attorney did not rephrase the question based on the objection, then the defending attorney will be able to object to the use of the deposition question and answer at the trial.

The objective of this article is to explain ten common objections to the form of the question made during depositions. Hypothetical deposition scenarios are used to illustrate the issues. The deposition scenarios are extracted, with some modifications, from the three excellent texts on depositions noted in this article.

1. The 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. Does the "large" refer to gross revenues, net profits, total assets, number of employees, etc.? *See* David M. Malone and Peter T. Hoffman, *The Effective Deposition—Techniques and Strategies That Work 2d* (NITA 1996), at 188 [hereinafter "Malone & Hoffman"].

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. The 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 Laura met Lisa, did she give her the papers?
>
> Defending Attorney: Objection as to form – ambiguous.

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

3. The Compound Question

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

> Question: Did you write the letter to Marc and mail it too?
>
> 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

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at 360. *See* also Malone & Hoffman at 189.

4. The 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. The Question Calling 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 was Julie thinking when she hired the plaintiff?
>
> 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 Julie was thinking when she hired the plaintiff?" "How do you know what she 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 Julie was thinking when she hired the plaintiff?

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. The Question Mischaracterizing 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; rather, that is simply the examining attorney's (improper) characterization of the testimony. *See* Malone & Hoffman at 190. *See also* Hecht at 360-361.

7. The Question Assuming 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 Debbie ...
>
> Defending Attorney: Objection – the question assumes facts not in evidence.

If there has been no testimony that the witness delivered a package to Debbie, then the question assumes a fact—that the witness delivered a package to Debbie—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.

8. The Question Calling for a Legal Conclusion

A question calls for a legal conclusion when it asks a witness to draw a legal conclusion from certain facts. For example:

> Question: Was Susan driving the car negligently?
>
> Defending Attorney: Objection – the question calls for a legal conclusion.

A question calling for a legal conclusion improperly asks the witness to testify about the legal significance of an action (or a document). Such a question is im-

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proper because it is the finder of fact, and not the witness, who is supposed to draw a legal conclusion from the facts; here, whether Susan was negligent. Therefore, a legal conclusion from a witness is not helpful to the finder of fact. *See* Thomas A. Mauet, *Fundamentals of Trial Techniques* (Little Brown 1988), at 348 [hereinafter "Mauet"].

9. The Leading Question

A question is leading if it suggests or contains the desired answer. For example:

> Question: Did Jennifer scream after being confronted by the defendant?
>
> Defending Attorney: Objection – leading question.

The above question is a leading question because it contains the desired answer—that Jennifer screamed when confronted by the defendant. *See* Mauet at 347. A non-leading question would be:

> Question: What did Jennifer do after being confronted by the defendant?

If a defending attorney does not object to a leading question during a deposition, he will waive his client's right to object to the leading question at trial in the event that the examining attorney attempts to use the deposition question and answer at trial. Therefore, a defending attorney should consider objecting to leading questions during depositions.

Generally, leading questions are permitted only during the examination of an adverse or hostile witness, regardless of whether the witness is testifying on direct or cross examination. In other words, an attorney may not use leading questions on the cross-examination of his own witness, but may use leading questions on the direct examination of his adversary.

10. The "Asked and Answered" Question

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 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.

An understanding of the proper use of objections to the form of questions at a deposition will both facilitate the resolution of the issues between attorneys at depositions and preserve the defending party's right to make objections at trial in the event that the examining attorney seeks to use the deposition testimony at trial.

Deposition Testimony

May not be used at trial if the defending attorney properly objected and the question eliciting the testimony:

1. was not clear as to the information sought;
2. was unclear in its terminology;
3. combines two or more questions;
4. comments on the testimony;
5. asks about matters beyond the witness's personal knowledge;
6. changes the witness's prior testimony;
7. assumes something not in evidence;
8. asks about the legal significance of a matter;
9. suggests a desired answer; or
10. covers the same ground again.

Remember this in making your deposition designations and objections thereto.