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BS Objections at Depo

I'm in federal court (USDC EDCA). Opposing Counsel (OC) attended a depo I was conducting of a witness (ex–employee of defendant) who had hired his own counsel to defend his depo. OC started making form objections to my questions even though he was NOT representing the witness or defending the depo. I warned him several times on the record that he was not permitted to object on behalf of witness who had his own attorney sitting right there. Interestingly, witness's own atty did not object or join in OC's objections initially. Then he began joining OC's objections. I adjourned the depo when OC refused to stop making form objections to my questions. Of course, when OC made his objections, he turned them into long colloquoys and speaking objections rather than stating them "concisely" as Rule 30 requires. The intent, of course, was to obstruct and disrupt my depo. Eventually, OC ended up tag-teaming with the witness's lawyer so that with every question, I was getting a chorus of speaking objections from both of these lawyers. Meanwhile the witness was being evasive as all get-out and was enjoying the mayhem that was threatening to erupt. Boy, that depo was a fun way to spend a Saturday afternoon!

I want to bring a motion for protective order against OC JUST TO SEND A MESSAGE TO HIM. I've got a whole slew of depos coming up and so far, OC has already forced me to file a depo-related motion for protective order. This would be my second one against him. OC loves to engage in all sorts of violations of FRCP Rule 30 with gleeful abandon. I want to make sure he doesn't think he can get away with his obstructive tactics in the critical depos coming up. Problem: where does it state in caselaw or otherwise that OC who attends depo of a witness who is NOT BEING REPRESENTED BY OC must not make form objections to my questions?. In other words, OC is NOT defending the depo, he's just attending as representative of a party, and is in fact entitled to x–examine the witness once I'm done. Where's the rule that states OC should therefore be sitting quietly in the corner, with his mouth shut?

Am I smoking something here?

Gene

Is civil different from criminal? I never practice civil litigation (transactional non–criminal, yes, but no civil lit), but in criminal law you are absolutely entitled to object to any question in any proceeding that wasn't asked on behalf of your client by you or another lawyer on your team. Is this different from criminal? The question of the objections being BS aside, I don't see why he wouldn't be able to object if the question is improper and would put something on the record that would hurt him and

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he doesn't think should be there.

John

I'm afraid you are. There is no such rule, and any attorney is absolutely permitted to object. You want to use the depo against OC's client, not against the deponent. When you go to use the depo to support summary judgment or at trial, who would object? OC. Now he certainly cannot use speaking objections, but he definitely can, and should, object if the questions are objectionable.

Andy

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n the EDCA the magistrates do not take kindly to obstructive speaking, lengthy objections.

Sure the guy has the right to make the objections, but not the right to make them as described.

Most of the magistrates here (EDCA) are former litigators and know what is going on.

A motion filed appropriately following the required meet and confer sessions and perhaps another try at getting the lawyer to behave civilly will establish a sufficient record for the magistrate to do the right thing. Sanctions are not uncommon here and if the objecting lawyer is acting as described he will likely find himself at best writing a personal check to the court.

Paul

For what it is worth, I have been in a few situations in federal court where I represented a company as a joint defendant with another company and although I let the other company's counsel take the lead in objecting during depositions of that company's employees, I have objected to protect the interests of my client. In one of those cases, OC made some noise about it, but didn't actually do anything about it. I don't know of any case law either way, but I don't think that there is anything wrong with it in theory, in fact I think it is completely appropriate. For example, there may be privilege issues that the ex employee doesn't care about or that his attorney is not attuned to, but which the corporation's attorney does see and has to protect. There may also be valid objections to form, for the same reason. For example, the deposing attorney may ask a question that the ex employee has no basis for answering, but he may answer it anyway and his attorney may not know that he has no basis for it. A "lacks foundation" objection would be appropriate from the corporation's attorney in that case. I'm sure that there are many instances where the company's attorney may have a valid objection that s/he needs to make to protect the company, and an ex employee does not have the same interests as the company in that regard and his attorney has no obligation to protect the company's interests and depending on the circumstances of the case, the company's interests and the ex employee's interests may actually be in

conflict.

That said, the same rules would apply in this situation as any other. Brief, non abusive, non leading objections stated concisely, and without disrupting the deposition. If OC is violating those principles, then I think you have the same right to move for a protective order as you would if he were actually defending the deposition. There is no need for both attorneys to make the same objections, though. At the beginning of the deposition, you should agree with OC and the deponent's counsel that an objection by either of them will be considered an objection by both. That has been the approach I have taken and it has worked fine.

Mitch

Great responses all around, both on and off list. Thanks so much everyone.

I'm probably still going to bring a motion, but based on all the speaking objections/colloquoy rather than OC's objecting on behalf of witness. I realize OC had the right to object to protect his client's interests (privacy/privilege in particular), but I did NOT know he could object to the same extent as if he were representing the witness and defending him. That is definitely good to know.

Thanks again all.

Gene

I think you're wrong about OC being there for decoration. When you say OC, I assume you mean the lawyer who is representing the party (plaintiff or defendant) who is adverse to your client and not the witness. The lawyer "defending" the depo is OC.

It's been quite some time since I did litigation, but at the time, the rule was that objections as to form were waived unless made at the depo. All other objections were preserved without objection (except say for questions asking for privileged info). Therefore, if the question posed to the witness is improper as to form (say, leading), OC MUST object at the depo, or your improperly formed question and the answer could be read into evidence at trial. It's too late to object at trial as to form. The time to object is at the depo where the question can be rephrased and the problem solved.

It's OC's party who is going to trial, and OC has to try the case. The depo provides evidence. They are the ones who are hurt by questions improper as to form going into the record. What the devil does the witness's counsel (WC) care about how the trial goes? In fact, you could argue that WC has no right to make objections as to the form of the question if OC doesn't. Even if that were the case, which it may not be, it still would not be true for certain objections (question is ambiguous or question mischaracterizes a document the witness is being asked about). IMO, OC was right to make objections as to form.

None of this justifies speaking objections. Nor does it justify objections as

to form that are bogus.

Unfortunately you may not have created a good enough record for the judge to issue some kind of order if many of your questions *were* objectionable as to form. Maybe you need to wait until the next depo. Do your research on obstructive behavior. Send OC a letter beforehand objecting to his failing to make concise objections, cite case law showing some kind of bad result for lawyers doing so, state your expectations that in the future his objections will not be speaking objections, and let OC know that you will bring a motion for protective order if they are. Then when OC makes an objection as to form in the depo, restate the question in proper form (if in fact the form was objectionable), and if that new depo is similarly disrupted, you will have a better record.

Richard

This excerpt shows a little of what I'm dealing with in depo with OC:

Defense counsel coached the deponent to give misleading answers. When plaintiff's counsel asked Ms. P for her estimate of how many people were in Defendant's payroll department, she answered she didn't know (Ms. P later testified that she is a member of Defendant's 6 person payroll department). Plaintiff's counsel then asked her for her estimate. Deponent began to answer, "My estimate ", but Mr. OC immediately cut her off and insisted: "If she doesn't know, she doesn't know". Ms. P, having been told how to answer by Mr. OC, then changed her answer to "I don't know." P Deposition, 28:23 29:14. When plaintiff's counsel asked again for deponent's estimate, before deponent could answer, Mr. OC interjected: "She can't do that. She doesn't know. Move on." [emphasis added]. Ms. P then dutifully testified she had no basis for knowing how many people there are in Defendant's payroll department. P Deposition, 29:16 30:13. None of Mr. OC's statements in this regard stated any objections or instructions not to answer on privilege grounds. They had no proper purpose whatsoever and were intended to coach the witness how to respond. As Mr. OC well knew, his assertion that "She can't do that. She doesn't know" was wrong as later proven in the deposition. Ms. P not only was able to estimate how many people there were in Defendant's payroll department, of which she is a member, she gave the exact number: six (including Ms. P). P Deposition, 84:20 25. She testified that Defendant's entire HR department (including the 6 person payroll department) is housed in a single trailer that sits on the Defendant campus. P Deposition, 84:4 10. She also recited the names of the other five payroll employees with ease: "In the payroll department we have an employee named XXX. We have XXX. We have XXX. Myself. XXX. And XXX." P Deposition, 88:9 12. Later, Mr. OC launched into an extended and improper harangue criticizing the relevance of plaintiff's line of questioning that had impeached Ms. P: "Well, we could debate what it has to do with the lawsuit, counsel. You might explain to us what the size of the human resources office has to do with P's claims, but we're not even going there because I know you can't..So we're going to spend a lot of time. Ask her how big the building is. Ask her. I mean, take your time." P Deposition, 86:19 87:2.

Gene

Gene

Good job pushing the "estimate" question. I go even further and tell witnesses to speculate if they need to but to tell me they are speculating. Then follow up with what leads to that speculation. OC always, or usually has a cow over it but so what. My instructions at the beginning of a deposition always say that if they are speculating or guessing to let me know. I never tell them I do not want them to guess or speculate but simply to tell me when they are. You can usually tell when they are doing one of those things and ask them even if they don't tell you up front. Good luck with the magistrate. We have some good ones here who will not be happy with the problems you are facing.

Paul

Gene,

No you are not smoking anything but OC had every right to object. In fact, had he not done so, he might have waived any objections. He would be able to object at trial. If you noticed, the Rule even allows him to instruct not to answer if he has a valid reason for doing so. As to speaking objections, he was dead wrong and you should file your motion with several examples of his objections. As a practical matter, they ganged up on you and probably saw they were upsetting you so bad that they kept on. Then the witness seemed to join in. Unless it is really overboard keep going and focus on the witness. If the obections are coaching the witness then you have no other choice but to stop and seek and order. Sometimes you might be able to get a magistrate judge on the phone to stop the conduct right there.

Rob

Hi Gene,

One word: Video. It is wonderful for helping to either intimidate OC into playing correctly or, alternatively, it is much better to show the judge his behavior and demeanor when seeking costs.

Good luck,

Frank

Thanks for the comments guys.

Frank, believe it or not, this was all videotaped. OC doesn't seem to care. I'm not sure my magistrate is actually going to do anything about it, unfortunately. I have had 4 motions to compel/prot order in front of her, one of them I filed in December of 2007. She has yet to rule on any of them and my discovery cutoff is in less than 2 months.

Cheers,

Gene

You know, that is the really troublesome aspect of civil litigation in the modern era. The court rules impose discovery cutoffs and the courts enforce them but NOT the rules of discovery. Unscrupulous practitioners take full advantage of the telescoped time limits and the failure of the courts to sanction discovery shenanigans with stonewall tactics as to written discovery and obstructive deposition tactics, as you describe. There is rarely time to bring more than one round of motions to compel or for protective order before the discovery cutoff, and even if you file such motions, properly supported with meet and confer efforts and certificates, etc., the courts seldom do more than throw up their hands and complain: "Can't you two just talk to one another and work this out between you?"

To the unscrupulous discovery is just a game, with rare downside risks for deliberately ignoring the rules.

Steve

Yes, OC has a perfect right to object to the form of questions. As someone else mentioned, all objections except as to form and privilege are preserved. Objections as to form are waived if not made for the reason stated earlier: if the objection is not made then the examining counsel does not have an opportunity to rephrase the question to make it non objectionable. (FWIW, privilege objections are waived simply because one cannot UN ring a bell).

Now as to what to do with objections as to form: OC makes the objection. You rephrase if you believe it is necessary and if you can. You ask again. If there is not a problem with the form of your question OR you don't care whether the answer is admissible at trial (e.g. you are using the info as a path to find out something that IS admissible), then you go on and ask your objected to question(s) to your heart's content. Remember, there is no judge in the room (typically) to rule on these PITA objections. He has made his objection for later determination by the court, if necessary. That's all he gets he does not get to keep interrupting or disrupting until you abandon the line of inquiry or ask the question the way HE wants it.

The ONLY times an attorney can instruct a witness not to answer are when (1) the answer is protected by some recognized privilege, or (2) it really is beyond the scope of discoverable information (admissible or REASONABLY CALCULATED to lead to the discovery of admissible evidence). Otherwise, you can call on Ms. Payroll lady to guess, estimate, look into her crystal ball or whatever to tell you how many other employees are in payroll. Her testimony will not be ADMISSIBLE unless it is based on personal knowledge, but that does not make what she has to say un discoverable. (consider the possibility that she comes in to trial crystal clear on something. It might be good that you have her testimony (not OC's testimony) that she doesn't know.

And just for kicks and grins, remember that in doing the balancing test required under F.R.Evidence 103(b) the judge can CONSIDER INADMISSIBLE EVIDENCE to determine whether some other piece of evidence is admissible.

I know this is not always easy (ESPECIALLY not easy for my hot headed self), but the best way to handle this crap is to calmly move on. When a witness heads OC or WC instruction not to answer something get the witness to testify specifically that she is refusing to answer based on counsel's instructions. When counsel absolutely obstructs you from going down a road you need to go down you can make one of at least 2 good choices: (1) make a record about the obstruction; reserve on the record your intent to adjourn the dep to another time to inquire about those areas after judge rules; then move on to any other areas you need to ask about that he is not going to block; then file your motion (2) or don't waste any more time/money on that particular day; make a record of what line is being obstructed; adjourn the deposition; and file your motion.

Apropos to nothing here is a clip of two Mississippi lawyers and a witness who just could not get along and another that is just an amusing witness:

http://www.youtube.com/watch?v=RjtnRmy0H-U

http://www.youtube.com/watch?v=td-KKmcYtrM

There are some other ones that come up with the search term 'deposition.'

Neil

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