



LEWIS WAGNER
ATTORNEYS

For the Record: Proper & Improper Deposition Objections

June 3, 2022

Purpose

- Deposition Objections Serve Two Purposes
 - Alert attorney taking deposition to issues
 - Preserve the objection for judge at trial

Not the Purpose: To Determine Who is the Toughest in the Room



Procedure

- Objection should be specific and state the basis for the objection
 - There are eight categories of objections that Indiana courts have held are waived if not “seasonably made” during the deposition and cannot later be made at trial if the deposition is introduced:
 - Competency of witness
 - Competency, relevancy, or materiality of testimony
 - Manner of taking deposition
 - Form of questions or answers
 - Errors in oath or affirmation
 - Conduct of parties
 - Other form of defect
 - Form or written questions submitted under Rule 31
- Wynder v. Logan*, 286 N.E.2d 413, 415 (Ind. Ct. App. 1972)

Procedure


- Federal Rule 32(d)(3)(A), however, provides that objections to relevance or materiality of testimony are not waived by failure to object during the deposition

What is the Scope of Relevancy?



Issues of Relevancy

- Objections to relevancy are rarely appropriate in light of broad scope of discovery and even more rarely a proper basis for an instruction not to answer or to suspend the deposition
 - *See Knowles, Trustee of Bricklayer's of Indiana Retirement Fund v. Dodds Masonry Const. Co., Inc.*, No. 1:19-cv-00443, 2020 WL 6287678 (S.D. Ind. July 14, 2020) (granting motion to compel renewed deposition where witness was improperly instructed not to answer questions on relevancy grounds).

- 
- Irrelevant questions that “unnecessarily touch sensitive areas or go beyond reasonable limits,” however, may justify an instruction not to answer.
 - *Henman v. Ind. Harbor Belt. R. Co.*, No. 2:14-cv-434, 2015 WL 6449693 (N.D. Ind. Oct. 22, 2015) (denying motion to compel witness to answer irrelevant and sensitive deposition questions and granting protective order regarding same).

Proper Form of Objections

- Deposition objections “must be stated concisely in a nonargumentative and nonsuggestive manner.” F.R.C.P. 30(c)(2)
- Speaking objections are frowned upon or outright barred
 - Ind. Commercial Court Handbook, p. 58
 - *Ello v. Brinton*, No. 2:14-cv-299, 2017 WL 56316 (N.D. Ind. Jan. 5, 2017) (chastising counsel for repeated speaking objections)


Improper Objections

- Numerous objections to delay proceedings may result in additional time to examine the witness. *Indianapolis Airport Authority v. Travelers Property Cas. Co. of America*, 2015 WL4458903 (S.D. Ind. July 21, 2015)



Other Improper Objections: “Suggestive” Objections

- F.R.C.P. 30(d) requires objections to be “concise” and “non-argumentative”
 - Instructions to a witness that they may answer a question “if they know” or “if they understand the question” are considered “coaching” or “suggestive” and are never appropriate. *Cincinnati Ins. Co. v. Serrano*, 2012 WL 28071 at *5 (D. Kan. Jan. 5, 2012).
 - Also may not rephrase the question to “help[] the witness formulate answers.” *Hall v. Clifton Precision, a Div. of Litton Systems, Inc.*, 150 F.R.D. 525, 528 (E.D. Pa. 1993).


- 
- Deposition objections that are excessive in length, number, or both may result in an extended deposition or sanctions
 - *Indpls. Airport Auth. v. Travelers Property Cas. Co. of America*, No. 1:13-cv-01316, 2015 WL 4458903 (S.D. Ind. July 21, 2015)
 - A simple objection to the form of the question is generally sufficient to preserve an objection

Instructions Not to Answer/Deposition Suspension

- F.R.C.P. 30(c) provides the general rule that following an objection, the testimony should be provided subject to the objection.
- There are exceptions to the general rule
 - Privilege
 - Court Ordered Limitation
 - Rule 30(d)(3)
 - *Henman* Irrelevancy

Deposition Suspension/Termination

- Rule 30(D) – both state and federal – provides the grounds for suspending a deposition “being conducted in bad faith or in such manner as [to] unreasonably annoy, embarrass, or oppress the deponent or party...”
- Grounds for suspension of deposition include: insistent questioning regarding privileged matters (*Broadbent v. Moore-McCormack Lines*, 5 F.R.D. 220 (E.D. Pa. 1946)); questioning that had gone “too far afield” (*Pittsburg Plate Glass Co. v. Allied Chemical Alkali Workers of America*, 11 F.R.D. 518 (N.D. Oh. 1951)); and insistent questioning regarding inappropriate subject matter (*Bythewood v. Unisource Worldwide, Inc.*, 413 F.Supp.2d 1367 (N.D. Ga. 2006)).

- 
- Proper procedure when suspending a deposition under Rule 30(d) is to ensure that the basis for the suspension is stated clearly on the record and the “immediately” apply to the court for a protective order.
 - *Smith v. Logansport Comm. School Corp.*, 139 F.R.D. 637, 643 (N.D. Ind. 1991)
 - Suspension should be a last resort only after efforts to resolve the issue with opposing counsel have failed and attempts to obtain assistance from the court are unsuccessful.
 - Southern District Local Rule 30-1 states that a party may properly recess a deposition to submit an objection to the court by phone if the objection could cause the termination of the deposition and can be resolved without submitting materials to the court