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## Handling Depositions With Confidence



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**HANDLING DEPOSITION INTERRUPTIONS: RULE 30(C) AND THE ART OF WAR**

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## **HANDLING DEPOSITION INTERRUPTIONS: RULE 30(C) AND THE ART OF WAR**

### **I. INTRODUCTION**

Deposition practice in Massachusetts has undergone significant changes in the last five years. Underlying these changes is the premise that a deposition is an extension of a judicial proceeding, and must therefore be conducted accordingly. See Cholfin v. Gordon, Middlesex Sup. Ct., Civil Action No.: 94-3623 (1995). Traditionally, civil litigators have attempted to gain an upper hand in representing their clients at depositions by employing tactics designed to frustrate the interrogating party's line of questioning and to assist their clients in formulating a favorable answer. While some lawyers continue to attempt to gain an advantage at depositions with improper instructions not to answer and suggestive objections, Mass. R. Civ. P. 30(c) is now specifically geared to prevent such conduct. Moreover, trial court decisions addressing improper conduct by counsel at depositions demonstrate that conduct that is not permissible in the courtroom during the questioning of a witness will not be tolerated at a deposition.

Mass. R. Civ. P. 30(c) states in pertinent part:

Any objection to testimony during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. Testimony to which objection is made shall be taken subject to the objections. Counsel for a witness or a party shall not instruct a deponent not to answer except where necessary to preserve a privilege or protection against disclosure, to enforce a limitation on evidence directed by the Court or stipulated in writing by the parties, or to terminate the deposition and present a motion to the Court pursuant to Rules 30(d) or 37(d).

The Reporter's Notes explain that the rule was amended to address the lengthy objections and colloquy that often frustrated depositions by suggesting how the deponent should respond.

Despite the amendment, suggestive objections and "off the record" conferences continue where

permitted by the interrogating attorney. These tactics, first popularized by the ancient Chinese general Sun Tzu in his classic book, The Art of War, are no longer permissible in Massachusetts deposition practice.

## **II. Speaking Objections:**

### ***“The Highest Form of Generalship Is to Balk the Enemy’s Plans.”***

The two most common purposes of a deposition are to find out what potentially relevant information a witness possesses and to freeze the deponent’s testimony for later use at trial. Counsel representing the deponent may seek to frustrate these objectives by making speaking objections that re-direct a line of questioning or suggest the “correct” answer to the deponent. For example, counsel may improperly re-direct a line of questioning by making a seemingly harmless request for clarification of a pending question that narrows the time or scope of the inquiry. However, when the interrogating attorney acquiesces by rephrasing questions in response to requests for clarification, the deponent is permitted to answer questions that are filtered by his/her lawyer. See Exhibit A, at p. 8, 12, 32, 36. While the deponent’s lawyer may have a meritorious objection to the form of the question, the gratuitous remarks may have the effect of permitting the deponent to complete the deposition without ever answering the question as originally framed by the interrogating lawyer. This not only precludes an effective examination of the witness, but also signals to opposing counsel that the interrogating attorney may be vulnerable to more aggressive tactics.

For instance, the plaintiff in a personal injury action may be asked whether he has *ever* had an injury to the affected body part other than the accident giving rise to the lawsuit. Plaintiff’s counsel is often tempted to ask suggestive “questions” or requests for clarification that

will divert the interrogating attorney's line of questioning. ("counsel do you mean before the accident"... "other than the injury referenced in the medical records we produced?"... "including any subsequent injuries?"). While the question simply seeks to discover whether there is another traumatic event that could explain the medical treatment, the speaking objection precludes an effective examination of the witness by limiting the scope of the inquiry.

**"If Your Opponent is of Choleric Temper, Seek to Irritate Him."**

This tactic is often carried out in the conference room by verbose speaking objections that are ripe with verbal cues that suggest the "correct" answer. Furthermore, the suggestive verbal cue may remind the witness to respond to the question as rehearsed in the pre-deposition "script." Common examples are specifically addressed in the 2001 Reporter's Notes to Rule 30(c) (i.e., "if you remember," "if you understand," or "if you have personal knowledge"). Following these inappropriate objections, the witness will invariably parrot the objection by testifying, "I don't remember," "I don't understand," and "I have no personal knowledge." See Exhibit A, at p. 8-9, 175.

While polite requests for clarification appear less adversarial, suggestive objections are more likely to result in argumentative colloquy between counsel that divert the interrogating attorney's attention from an effective examination of the witness. When the interrogating attorney "takes the bait" instead of seeking a protective order, the deposition transcript becomes cluttered with the inevitable debate over the improper "coaching" of the witness, rather than a focused examination of the deponent. See Exhibit A, at p. 22-23. If permitted by the interrogating attorney, the deposition may spiral downward to its ultimate conclusion, filled with *ad hominem* attacks between counsel. See Exhibit A, at p. 34, 103, 179-80.

This type of obfuscation is simply not permitted and is sanctionable. Decisions of the Superior Court since the amendments to the rule demonstrate that the amendments put “teeth” into the rule. In Lease Resolution Corp. v. Aut-A-Wash, Inc., Norfolk Sup. Ct., Civil Action No.: 92-1767, the Court (Lauriat, J.) awarded sanctions of \$5.00 per word as liquidated attorneys fees and expenses for unnecessarily cluttering the record with argumentative statements and objections. Furthermore, in Murello v. Federal Financial Co., Essex Sup. Ct., Civil Action No. 97-1956, the Court (Whitehead, J.), entered sanctions against offending counsel by awarding the interrogating party his costs and attorneys’ fees as a result of repeated speaking objections. Additionally, the Murello Court assessed \$1,000 in court costs as a result of the needless motion practice necessitated by improper conduct at the deposition. The harsh sanctions and scathing comments from the bench are not surprising in light of the clear intent of Rule 30(c) .<sup>1</sup> Before losing control of the deposition, interrogating counsel should seek court intervention when confronted with such misconduct.

### **III. Instructions Not to Answer:**

#### **“If Your Opponent Is of Superior Strength, Evade Him.”**

A related problem that arises in depositions is the groundless instruction to the deponent not to answer the pending question. The amendments to Rule 30(c) and the Reporter’s Notes deal equally with instructions not to answer. Instructions not to answer are permitted only (1) to preserve a recognized privilege; (2) to protect against a harmful disclosure, such as the work product doctrine; (3) to enforce limitations on evidence pursuant to a previously entered Court

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<sup>1</sup> The entire motion hearing transcript in the Murello case is available through Massachusetts Lawyers Weekly. See Lawyers Weekly No.12-011-99

order or stipulation by the parties; or (4) to suspend the deposition to seek a protective order on the basis that the examination is being conducted in bad faith or in an unreasonable manner to annoy, embarrass or oppress the deponent. While there may be some debate as to the types of information that may justify a refusal to answer to protect against a harmful disclosure, the Rule makes abundantly clear that no such instruction not to answer may be made without seeking a protective order from the Court.

The instruction not to answer will be justified only in those situations where “serious harm” would be caused by the disclosure of the information. See Paparelli v. Prudential Insurance Co. of America, 108 F.R.D. 727, 730 (D. Mass. 1985), citing International Union of Electrical Radio and Machine Workers v. Westing House Electric Corporation, 91 F.R.D. 277 (D. D.C. 1981). Serious harm may result by the disclosure of trade secrets, privileged or otherwise confidential material. See id. In those situations, an instruction not to answer may be proper but the party who instructed the witness not to answer must immediately seek a protective order. See Dominick v. Troscoso, 1996 W.L. 408 769 (Mass. Sup. Ct., 1996) (Grabau, J.) (sanctions awarded against deponent’s counsel for instruction not to answer question seeking to elicit identity of persons deponent spoke with concerning deponent’s designation as 30(b)(6) deponent of defendant).

While it is not always clear as to the grounds that will be deemed sufficient to justify an instruction not to answer, there is no doubt that relevance is not one of them. Where a reasonable dispute exists as to whether an instruction not to answer is properly grounded, seeking a protective order from the Court is essential to avoid running afoul of Rule 30(c). Any ambiguity

related to whether an instruction not to answer is justified will likely be resolved against the party refusing to answer.

This problem is illustrated in Long v. Roy, 1999 W.L. 355801 (Mass. Sup. Ct. 1999) (Gants, J.). In Long, the plaintiff asserted a wrongful death action arising from the alleged medical malpractice of the defendant doctor in failing to diagnose the plaintiff's illness. At the deposition of the defendant doctor, the doctor was asked questions about the potential causes of the decedent's death and his opinions concerning the symptoms that ultimately lead to the decedent's death. The doctor was instructed not to answer these questions to protect against the disclosure of expert opinions beyond the scope permitted by Mass. R. Civ. P. 26. No protective order was sought by the defendant.

The Court held that the instruction not to answer was improper without terminating the deposition and seeking a protective order from the Court. While the Court acknowledged that there is no clear Massachusetts precedent as to whether the defendant doctor could be compelled to provide expert testimony against himself, the refusal to answer was improper without immediately seeking a protective order from the Court. Therefore, while defense counsel acted in good faith and with a sufficient legal basis in light of the unsettled Massachusetts law on the subject, the Court ordered that the deposition be resumed and that defense counsel pay the plaintiff his attorneys' fees and costs incurred as a result of the instruction not to answer. The award of sanctions may have been averted had defendant's counsel initiated a motion for a protective order as required by Rule 30(c).

#### **IV. Improper Conferences with Witness:**

**"When Overmatched, Avoid the Enemy or Flee from Him."**

Without the aid of suggestive objections and instructions not to answer, a witness may begin to hemorrhage information that is “off the script.” When the witness begins to flounder, the deponent’s counsel may suggest that it is a good time for a lunch break, or in some cases, to suspend the deposition for the day to permit counsel to tend to some urgency of recent invention. One veteran of the deposition wars once unilaterally suspended a deposition, correctly observing that “there is nothing in the rules that says I have to work through dinner,” ignoring the fact that it was 3:00 p.m. Other zealous advocates may attempt to make substantive advances on the merits of their case by suggesting that the personal injury plaintiff is “too fatigued” or “in too much pain” to tolerate further examination.

The deponent’s attempt to confer with counsel or to suspend the deposition should not be permitted. The 2001 Reporter’s Notes recognize this tactic as a blatant attempt to make an end run around the 1998 amendments. Simply put, the rules do not permit conferences with counsel except where appropriate to preserve a privilege or protection against disclosure. See Reporter’s Notes to Rule 30(c) (2001); see also Hall v. Clifton Precision, 150 F.R.D. 525 (1993). The purpose of the rule is to ensure that the testimony taken during a deposition is completely that of the deponent, rather than a version of the testimony which has been edited or glossed by the deponent’s lawyer. See id. While a lawyer has the right and duty to prepare a client for a deposition, the right to counsel is tempered during the deposition by the underlying goal of the discovery rules, which is getting to the truth. See id.

It should be noted that the proscription against conferences with a witness may also preclude such conferences at coffee breaks and lunch recesses. In Hall v. Clifton, *supra*, the trial court went so far as to hold that any such conferences between the witness and counsel during

breaks would not be protected by the attorney-client privilege. The prohibition against private conferences also applies to conferences about documents shown to the witness during the deposition. When a witness is shown a document at a deposition, he has no right to consult with counsel concerning the contents of the document before responding to questions concerning the document. Once again, the witness has no more rights to the advice of counsel after being sworn than he/she would have if testifying in the courtroom.

**V. Conclusion**

**“Supreme Excellence Consists in Breaking the Enemy’s Resistance Without Fighting.”**

Demonstrating a firm understanding of Rule 30(c) at depositions will most always lead to the withdrawal of speaking objections and improper instructions by obstreperous counsel. Faced with the options of near-certain sanctions for continued obfuscation or acquiescence in permitting an unimpeded examination of the deponent, the overbearing advocate must capitulate. The failure to draw a line in the sand and insist upon compliance with Rule 30(c) will serve as an invitation for repeated defiance of the rules, and preclude the interrogating attorney from conducting an effective examination of the witness.