IDAHO STATE BAR

President's Message

Deposition Bullies, Witness Coaching and Discovery Abuse

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The deposition has been noticed up. The witness is sworn. The lawyer is making great headway:

Q: Just before the crash you were traveling at about 35 mph?

A: Yes.

Q: The speed limit was 25 mph?

A: Yes.

Q: And when you entered the intersection, your light was red, correct?

Just before the witness concedes this vital point and agrees, the defending lawyer interrupts the client and blurts: "If you remember."

This scenario is played out too often. What's the problem? It's cheating.

Somehow it has become acceptable in some circles to interrupt a deposition just when the discovery tree is bearing juicy fruit. By interrupting, the defending lawyer is impermissibly coaching the witness. In essence the lawyer tells the witness, "Your testimony is killing us. I advise you to say that you don't remember — try to follow my lead." If this type of coaching does not strike you as inappropriate, imagine if a lawyer interrupted a witness in front of a jury with an "if you remember." The judge would likely come unglued and the jury would resent the interjection. What, then, has become of our discovery process that we tolerate this improper witness coaching?

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Coaching is often caused by insufficient witness preparation. Instead of giving the witness an idea of the likely questions prior to the deposition, the lawyer fails beforehand to prepare the witness and tries to save the day with improper coaching. Another cause for coaching is that some lawyers do not know it is wrong. Attorneys hate to sit back and be silent as their case goes down the tubes. In desperation some lawyers regress to coaching. I urge judges to impose swift and severe sanctions when this occurs. Deposition abuse, however, is not limited to witness coaching.

Idaho Rule of Civil Procedure 30(d)(1) states: "Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner." Unfortunately, this rule is routinely violated. Some bullies try to derail a deposition with a critique of the other lawyer's method: "Your question is a bad one because it's ambiguous and my client doesn't know if you are talking about the initial contact or after the third car entered the intersection. If you ask a clear question my client will give a clear answer." An inquiring lawyer has a right to get an answer to a question — even if the question is awkwardly asked. Once the defending lawyer coaches or adds other improper comments, the deposition is at the crossroads. The inquiring lawyer must think quickly. If, in response, the inquiring lawyer loses control and ups the emotional ante, a full-blown deposition mud fight can break out. For example, the inquiring lawyer often joins the uncivil fray: "Don't tell me what questions to ask, young lady. I've been at this since you were in grade school!" Now the original offender likely escapes consequence because the counterpart has answered the unprofessionalism with more unprofessionalism. How do we avoid this all too common breakdown of civility?

Fundamentally, we must know the rules for depositions. Unfortunately, many lawyers mistakenly believe depositions are minor league practice for major league evidentiary trial objections. Many lawyers do not know — or conveniently forget — the grounds for objecting are *extremely* limited at a deposition. Deposition objections are frowned upon for good reason. We want information to be efficiently gathered; a deposition too encumbered with objections becomes worthless. One valid objection at a deposition is that the question calls for privileged information. This is not very common. Privilege objections usually do not cause a problem.

A second legitimate ground for an objection, however, is a great source of deposition abuse. It is the "form of the question" objection. Our rules permit this interruption for a critical policy reason. If a deposition witness later dies or moves away and becomes unavailable, the deposition can be introduced at trial as substantive evidence. Suppose, however, the deposition witness is asked a question that would be objectionable at trial, such as a question that is compound, argumentative, or assumes facts not in evidence. At trial the Court would either have to exclude the answer or allow it notwithstanding its evidentiary flaw. To avert the harsh extremes our rules allow the lawyer at deposition to object to the form of the question so the inquiring lawyer has an opportunity to "cure" the defect, by rephrasing the question, and ask it without the flaw. If the defect in the deposition question is not "cured," then the answer will likely be inadmissible at trial.

Other objections are routinely — but improperly — made at depositions. For example, objections such as hearsay and relevance which go to the *admissibility* of the answer cannot be cured by rephrasing the question. No objection needs to be made at the deposition; admissibility can be taken up in court. Unfortunately, lawyers are not using the form objection for its intended purpose. Instead, form objections are being made to disrupt the flow and impact of a deposition. Like witness coaching, it's cheating. To ameliorate this abuse, we should allow a lawyer to waive the opposition's obligation to make the form objection. Many lawyers, like me, would rather risk trial inadmissibility to gain a deposition unencumbered by incessant objections.

The most effective way to stop deposition abuse is to gently remind your adversary at the outset that you will not, during the adversary's depositions, interrupt legitimate questions by coaching. Once your deposition gets underway, if the other lawyer objects, look not at the lawyer but the witness and gently say, "Please answer the question." Repeat the question if necessary, but don't look at the other lawyer — stay locked on the witness.

Bullies not only are abusive at depositions but also in written discovery. Suppose a party seeks a copy of any written statement the plaintiff made at the scene of the crash. All too often the following type of specious response is made to a request for production under rule 34(a). Here's a typical response: "Objection. The question is vague and ambiguous. It also seeks work-product material and invades the attorney/client privilege. In addition, the question is overly burdensome and cumulative and violates the state and federal constitutions. Without waiving said objection, please see the attached statement given to the police officer."

This type of discovery bully uses boilerplate gobbledygook to hedge: maybe I'm hiding evidence, maybe I'm not. I am giving you something. If I am hiding evidence and I get busted I'll try like heck to hide my thievery of justice under my boilerplate objections. Besides, you can't file a motion to compel on every case — you won't be able to afford it. Judges are reluctant to intercede and I will play that to my advantage.

Discovery abuse is so rampant I sometimes don't even request it because it isn't worth the bother. In Oregon there are no interrogatories. Nor does Oregon have expert or lay witness disclosure. I cannot say Idaho's level of justice is better. We sometimes have legitimate discovery disputes that require us to make objections and seek a protective order. By and large, however, discovery abuse has diminished the honor of our process: let's restore it.

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