

Objection!

The strategy, art, and irritation inherent to deposition objections


Cooper

By Miles B. Cooper

"What did you do next?" The lawyer was deposing the defendant driver about the incident itself.

"Objection! He's already told you that he was not on his cell phone or texting and that after the collision, after first calling 911, he then immediately went and rendered aid to your client," the defense counsel blathered.

"Sir, did you understand my question?"

"Yes," the witness said.

"Then you can go ahead and answer it," the lawyer said. Defense counsel launched into another lengthy speaking objection. The lawyer turned to defense counsel. "Let's go off the record. I'd like to chat with you outside…"

Mountains of decisions in a moment

Deciding whether to object seems simple. Object or don't. Binary, right? Not one bit, and why objecting is difficult to master. Objecting is an entire decision tree, overlaid against case strategy, made in a millisecond. First: Is the question objectionable? Does it violate some evidentiary rule, a right to privacy, or is its form flawed? Second: If it is objectionable, does one care enough about the issue to object? Third: Will objecting simply draw more attention to the issue, and if one allows it to slide by, does one create appellate problems?

Deposition objections

The best way to avoid objections is to prepare your witness. That does not mean tell the witness what to say. It does mean detailed preparation that addresses what is fair game (and isn't). And while all objections but for form are preserved, it is better to keep objectionable, damaging information out of the hands of the other side at deposition rather than forge motions in limine.

Which leaves form objections. The most common: "vague," and "compound." Embrace form objections with love, and rarely make them. A friendly opposing counsel objecting "Vague!" helps clean up a poorly-phrased question in the moment. Do the same for them? Only if it helps your client.

I will let the objection pass around me and through me

Sometimes opposing counsel is not so friendly though. Like those who object to every question. They sigh, and mutter, and insinuate (or flat out state) that your questions are inane. Much of this behavior can be ignored. How does one ignore it? First: Recognize this is a strategy. Maintain confidence in yourself. Second: Wall off the defense lawyer. Don't respond to the objection. Keep eye contact with the witness and keep your body squarely facing the witness. Don't look at defense counsel. Don't acknowledge counsel's existence. Without changing tempo or tone, ask the witness to answer the question. If the witness can't remember it, ask the court reporter to repeat it. But don't lose eye contact. Objection bullies then tend to quiet down when they can't get a fight going.

Speaking of which

Speaking objections are a different problem, however. Defense lawyers sometimes use them to tell a witness what to say. Figuring out how to respond involves another decision matrix. First, is the subject area peripheral or critical? If peripheral, ignore the objections. If critical, and the objections are guiding the testimony, start laying a foundation. First offer a standing objection for this area. When this is refused, continue questioning to get the speaking objections laid out. Maintain your cool while trying to get more ridiculous objections. Then recess and take it up with the judge.

We'll fix it in post

Video depositions are their own beast. They are for recording just how obnoxious speaking objections can be. They also require a movie director's focus. Objections are typically not played at trial. If you want to play the video (instead of reading the transcript), make sure the objector is not talking over the question or answer. If in doubt, re-ask the question. If defense counsel complains about it being asked and answered, explain you need a clear record.

Outro

Back to our lawyer and obstreperous defense counsel. The lawyer walked with defense counsel down the hall and out of earshot from the defendant. "I'm frustrated," the lawyer started, "We've had cases together in the past, and I respect the work you do. I understand you're trying to do the best you can for your client, and that your client may not be the best witness. I recognize you know the case really well. But when you use speaking objections in a manner that seems like you're feeding the witness the answer, it is not okay with me. That doesn't go over well anywhere, but particularly not in federal court, where we are venued in this case. I'd like to be able to finish the deposition today. But if we can't work through this, I'll have to ask the judge to weigh in…"

The deposition resumed a few minutes later. The speaking objections, while not completely gone, were vastly reduced.

Miles B. Cooper is a partner at Emison Cooper & Cooper LLP. *He represents people with personal injury and wrongful death cases. In addition to litigating his own cases, he associates in as trial counsel and consults on trial matters. He has served as lead counsel, co-counsel, second seat, and schlepper over his career, and is a member of the American Board of Trial Advocates. Cooper's interests beyond litigation include trial presentation technologies and bicycling (although not at the same time).*

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