EFFECTIVE USE OF OBJECTIONS AT DEPOSITION AND TRIAL

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EFFECTIVE USE OF OBJECTIONS AT DEPOSITION AND TRIAL

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OBJECTIONS DURING DEPOSITIONS

Rey O. Villanueva, Esq.
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OBJECTIONS DURING DEPOSITIONS

- R.4:14-3(c): Objections. No objection shall be made during the taking of a deposition except those addressed to the form of a question or to assert a privilege, a right of confidentiality or a limitation pursuant to a previously entered court order. The right to object on other grounds is preserved and may be asserted at the time the deposition testimony is proffered at trial. An objection to form of a question shall include a statement by the objector as to why the form is objectionable so as to allow the interrogator to amend the question. No objection shall be expressed in language that suggests an answer to the deponent.

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OBJECTIONS DURING DEPOSITIONS

- Subject to R.4:14-4, an attorney shall not instruct a witness not to answer a question unless the basis of the objection is privilege, a right to confidentiality or a limitation pursuant to a previously entered court order.

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OBJECTIONS DURING DEPOSITIONS

- In sum – In order to curb deposition abuses resulting in an unnecessarily protracted deposition process and harassment of witnesses, paragraph (c) prohibits the making of any objection during the course of the taking of the deposition except objections based upon the (1) form of the question, (2) privilege or other right of confidentiality, (3) protective orders previously entered.

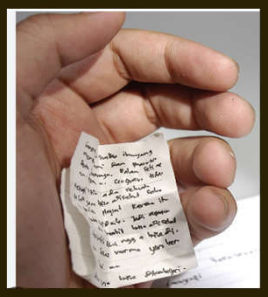
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OBJECTIONS DURING DEPOSITIONS

- Objections based on form must be explained and made in such a manner as not to suggest the answer. *See* Wolfe v. Malberg, 334 N.J. Super. 630, 634 (App. Div. 2000).
- As to the mandatory nature of the requirement that an objection to the form of the question include an explanation of the objectionability of the question. *See* In re PSE&G Shareholder Lit., 320 N.J. Super. 112, 118-119 (Ch. Div. 1998).

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OBJECTIONS DURING DEPOSITIONS



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OBJECTION TO FORM

- Ambiguous/Vague Overbroad – Question capable of being interpreted in more than one sense. N.J.R.E. 102, 403, 611
- Argumentative – Question is really a demand by counsel for witness to agree with a conclusion or arguing with witness. N.J.R.E. 102, 403, 611
- Assumes Facts Not In Evidence – Question contains a fact(s) not previously testified to by any witness, or not otherwise in the record. N.J.R.E. 102, 403, 611
- Compound – More than one question within question asked, so answer can be misunderstood. N.J.R.E. 102, 403, 611
- Conclusion – Lay witness may only testify from personal knowledge/perception. Qualified expert may give conclusion, including on ultimate issue, but not guilt, liability, or "net opinion." N.J.R.E. 602, 701-704

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OBJECTION TO FORM

- Confusing – Question contains unfamiliar words or disjointed phrases likely to confound or mislead. Similar to "unintelligible". N.J.R.E. 102, 403, 611
- Foundation/Predicate (Lacking) – Failure to lay prerequisite for testimony/exhibit. N.J.R.E. 402, 403, 602, 701-703
- Improper Question/Form – Use if know improper, but unsure of objection or why unreliable/problematic. N.J.R.E. 102, 403, 611, RCP 4:14-3(c); 4:16-4
- Leading – Form of the question suggests the answer, and evidence rules do not permit use. N.J.R.E. 611(c)
- Narrative – Question overly broad in scope in scope (substance/time) allowing witness to ramble/present improper testimony (hearsay/opinion, etc.) before objection can be made. N.J.R.E. 102, 402-403, 611
- Speculation – Question calls for conjecture and allows witness opinion without personal knowledge. N.J.R.E. 402-403, 602, 701

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OBJECTIONS BASED ON PRIVILEGE

- Privileged – Question calls for information violative of privilege
  - Spousal – N.J.R.E. 501
  - Attorney- Client – N.J.R.E. 504
  - Work Product - RCP 4:10-2 (c)
  - Psychologist – Patient – N.J.R.E. 505
  - Physician-Patient – N.J.R.E. 506
  - Marital Communication – N.J.R.E. 509

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OBJECTIONS BASED ON PRIVILEGE

- Counsel may object to questions call for disclosure of privileged materials and may instruct the witness not to answer.
- If the attorney-client privilege is asserted by counsel, the boundaries of the privilege may have been lost:
  - Where did the conversation take place?
  - Who was present during the conversation?
  - Did you tell or do you know of anyone else who was told about the conversation?
  - Questions regarding whether the deponent spoke to the attorney in preparation for the deposition can be asked.
  - *See In Re PSE&G Shareholder Lit.*, 320 N.J. Super. 112, 118-119 (Ch. Div. 1998). – "attorney-client privilege is not absolute"

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OBJECTIONS BASED UPON CONFIDENTIALITY

- Objections during the taking of a deposition addressed to a right of confidentiality are permitted. Counsel should be aware of and object to questions that call for disclosure of confidential material, such as confidentiality agreements or non-disclosure agreements.

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OBJECTIONS BASED ON COURT ORDER

- An attorney may instruct a deponent not to answer a question in order to comply with or enforce a previously entered court order.

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SPEAKING OBJECTIONS

- No objection shall be expressed in language that suggests an answer to the deponent
- A "speaking objection" occurs when an attorney goes beyond stating the legal ground for the objection.
- R. 4:14-3(c) – "no objection shall be expressed in language that suggests an answer to the deponent."
- Federal Rules of Civil Procedure 30 (d) – "any objection during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner."

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SPEAKING OBJECTIONS

- Improper Speaking Objections
  - "does not understand the question"
  - "if you remember"
  - "if you know"
  - "don't guess"
  - "you've answered the question"
  - "do you understand the question"

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WHAT TO DO WHEN OBJECTION IS MADE

- Rephrasing the question: After opposing counsel has objected to your question you can:
  - Ignore the objection and direct the deponent to answer the question
  - Rephrase the question

  - IF YOU DO NOT REPHRASE THE QUESTION AND THE OBJECTION IS SUSTAINED AT TRIAL, YOU WILL NOT BE ABLE TO UTILIZE THE DEPONENT'S ANSWER AT TRIAL

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WHAT TO DO WHEN OBJECTION IS MADE



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WHAT TO DO WHEN OBJECTION IS MADE

- If the opposing counsel instructs the witness not to answer, and the question concerns an important matter, counsel should consider calling the court for immediate adjudication.
- A telephone application to the court is permitted when there is a perceived violation of R. 4:14-3(c) or R. 4:14-3 (f).
- Motion to Compel deponent to answer previously objected questions and for attorney's fess and costs.
- R.4:14-3(f) – provides that once the deponent has been sworn, there shall be no communication between the deponent and counsel "during the course of the deposition while testimony is being taken except with regard to the assertion of a claim of privilege, a right to confidentiality or a limitation pursuant to a previously entered court order.
- What about multi-day depositions?

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CONSULTATION WITH THE DEPONENT DURING THE DEPOSITION

- In Re PSE&G Shareholder Lit. at 118: In the present cases, the court believes that the following restrictions should apply to the depositions of the defendant directors: once the deposition commences there should be no discussions between counsel and the witness, even during recesses, including lunch recess, until the deposition concludes that day. However, at the conclusion of the daily deposition, counsel and the witness should be permitted to confer and to prepare for the next day's deposition.

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OBJECTIONS TO PHYSICAL EVIDENCE

- Authentication (Lacking) – Proponent of evidence has failed to prove exhibit is what it is claimed to be. N.J.R.E. 402, 602, 901-902
- Best Evidence Rule (Original Document Rule) – When rule applies original document must be offered, or its absence accounted for.
- Confidentiality: Quinlan v. Curtis-Wright Corp. 204 N.J. 239 (2009)
- R.4:17-7 – not reasonable available or discoverable by the exercise of due diligence
- R. 4:23-2 – Failure to Comply with Court Order

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OBJECTIONS TO EXPERT TESTIMONY

- The net opinion rule, mandates that experts "be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable." Lanrigan v. Celotex Corp., 127 N.J. 404 (1992) An expert's conclusion "'is excluded if it is "'based merely on unfounded speculation and unquantified possibilities.'" Grzanka v. Pfeifer, 301 N.J. Super. 563, 580, 694 A.2d 295 (App.Div.1997) (quoting Vuocolo v. Diamond Shamrock Chem. Co., 240 N.J. Super. 289, 300, 573 A.2d 196 (App.Div.), *certif. denied*, 122 N.J. 333, 585 A.2d 349 (1990)), *certif. denied*, 154 N.J. 607, 713 A.2d 498 (1998).

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OBJECTIONS TO EXPERT TESTIMONY

- As the Appellate Division noted, when an expert speculates, "he ceases to be an aid to the trier of fact and becomes nothing more than an additional juror." Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540, 670 A.2d 24 (App.Div.), *certif. denied*, 145 N.J. 374, 678 A.2d 714 (1996), *overruled on other grounds,* Jerista v. Murray, 185 N.J. 175, 883 A.2d 350 (2005). By definition, unsubstantiated expert testimony cannot provide to the factfinder the benefit that *N.J.R.E.* 702 envisions: a qualified specialist's reliable analysis of an issue "beyond the ken of the average juror." Polzo v. County of Essex, 196 N.J. 569 (2008): *see N.J.R.E.* 702. Given the weight that a jury may accord to expert testimony, a trial court must ensure that an expert is not permitted to express speculative opinions or personal views that are unfounded in the record.

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OBJECTIONS TO EXPERT TESTIMONY

- The use of hypothetical questions in the presentation of expert testimony is permitted by *N.J.R.E.* 705, "provided that the questions include facts admitted or supported by the evidence." Biunno, Weissbard & Zegas, *Current N.J. Rules of Evidence*, comment 4 on *N.J.R.E.* 705 (2014) (citing Wilsey v. Reisinger, 76 N.J. Super. 20, 25, 183 A.2d 717 (App.Div.), *certif. denied*, 38 N.J. 610, 186 A.2d 308 (1962)). As this Court noted in Stanley Co. of America v. Hercules Powder Co., "[t]he opinions of experts must be based either upon facts within their own knowledge which they detail to the jury or upon hypothetical questions embracing facts supported by the evidence upon which the expert opinion is sought." 16 N.J. 295, 305, 108 A.2d 616 (1954) (citing Beam v. Kent, 3 N.J. 210, 215, 69 A.2d 569 (1949)); *see also* Savoia v. F. W. Woolworth Co., 88 N.J. Super. 153, 162, 211 A.2d 214 (App.Div.1965).

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OBJECTIONS TO EXPERT TESTIMONY

- "Expert opinion is valueless unless it is rested upon the facts which are admitted or are proved." Stanley, *supra*, 16 N.J. at 305, 108 A.2d 616 (citing Bayonne v. Standard Oil Co., 81 *N.J.L.* 717, 722, 78 A. 146 (E. & A.1910)); *see also* State v. Sowell, 213 N.J. 89, 100, 61 A.3d 882 (2013) (holding that hypothetical question in criminal case must be limited to facts presented at trial); *accord* State v. Nesbitt, 185 N.J. 504, 519, 888 A.2d 472 (2006); State v. Odom, 116 N.J. 65, 78-79, 560 A.2d 1198 (1989). Consequently, "a hypothetical question cannot be invoked to supply the substantial facts necessary to support the conclusion." Stanley, *supra*, 16 N.J. at 305, 108 A.2d 616 (citations omitted); *Wilsey, supra*, 76 N.J. Super. at 25, 183 A.2d 717.

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OBJECTIONS TO EXPERT TESTIMONY

- In Townsend v. Pierre, 221 N.J. 36 (2015), the New Jersey Supreme Court barred Plaintiff's liability expert, who opined that the "large shrubbery" in front of the property created a "visual barrier and obstruction to the safe intersection sight distance at the intersection." The expert further asserted that the restricted substandard and unsafe intersection sight distance was a significant contributing cause of the accident. Townsend, 221 N.J. at 59. The Court barred this expert's opinion because such opinion was premised on the rejection of uncontroverted testimony. Specifically, the expert's causation opinion was in direct contradiction the testimony of the driver, who testified that shrubbery on the property initially obscured her view when she was stopped at the stop sign at the intersection, but that she edged forward, starting and stopping four times until her view of oncoming traffic was unimpeded. Id.

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OBJECTIONS TO EXPERT TESTIMONY

- In discussing the use of hypothetical questions, the New Jersey Supreme Court rejected the hypothetical question suggested by the Appellate Division, namely for the expert to assume that the driver was unable to see clearly to her left before she made the turn. The New Jersey Supreme Court reasoned that the hypothetical question would lack the requisite foundation in the facts and is premised on a rejection of uncontroverted testimony. Id.

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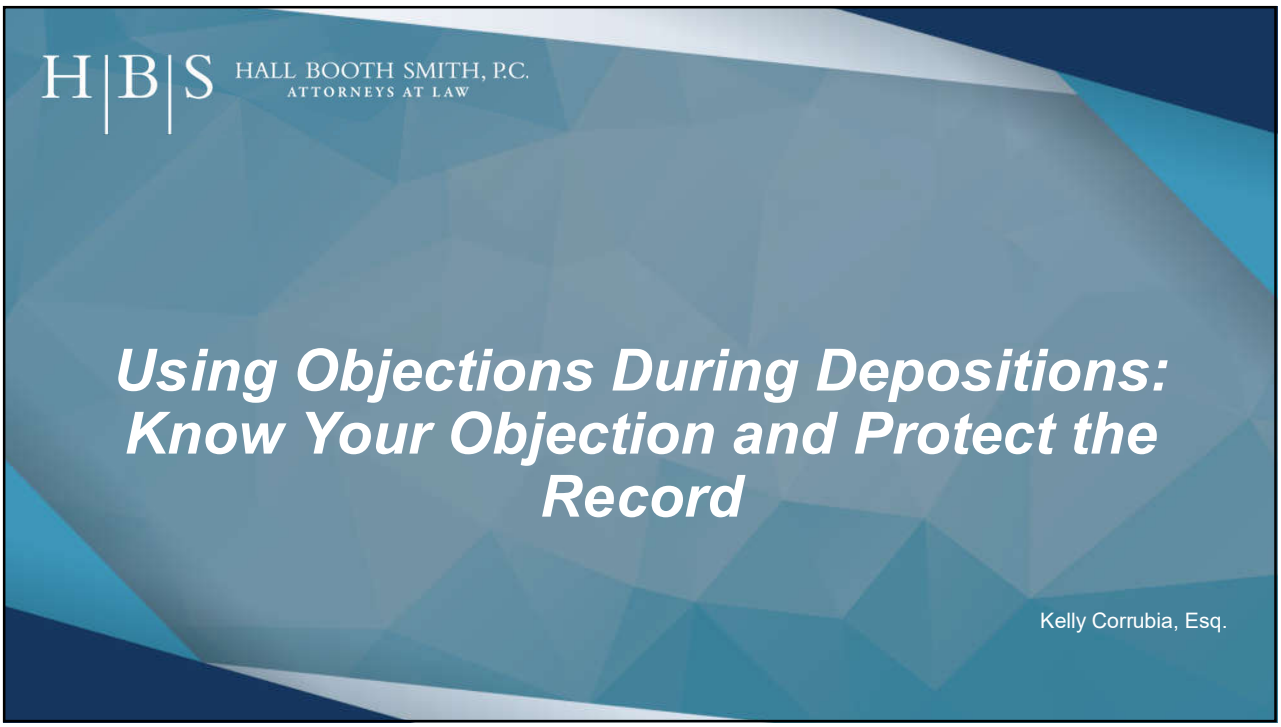
Thank You

Any Questions or Comments:

Please e-mail me at rvillanueva@grsl.com



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HALL BOOTH SMITH, P.C.
ATTORNEYS AT LAW
Using Objections During Depositions: Know Your Objection and Protect the Record
Kelly Corrubia, Esq.

1

Objections Permitted During a Deposition



Objections Permitted During a Deposition

- Rule 4:14-3(c): “[N]o objection shall be made during the taking of a deposition except those addressed to…”:
  - The form of a question;
  - An issue of privilege;
  - An issue of confidentiality;
  - A “limitation” imposed by “a previously entered court order.”

Trial objections do not need to be made at a deposition and are not permitted:

- *Relevance*
- *Asked and answered*
- *Speaks for itself*
- *Hearsay*

Identifying and Objecting on the Basis of Privilege

Privileges are identified in New Jersey Rules of Evidence 501-507:

- NJRE 501: Privilege of the Accused (N.J.S.A. 2A:84A-17)
- NJRE 502-503: Self-incrimination (N.J.S.A. 2A:84A-18 & -19)
- NJRE 504: Lawyer-client privilege (N.J.S.A. 2A:84A-2)
- NJRE 505: Psychologist-Patient Privilege (N.J.S.A. 45:14B-28)
- NJRE 506: Patient and Physician Privilege (N.J.S.A. 2A:84A-22.1)
- NJRE 507: Utilization Review Committees of Certified Hospital or Extended Care Facility (N.J.S.A. 2A:84A-22.8)
- NJRE 508: Newsperson's privilege (N.J.S.A. 2A:84A-21)
- NJRE 509: Marital Privilege (N.J.S.A. 2A:84A-22)

Identifying and Objecting on the Basis of Privilege

(*Continued)*

- NJRE 510: Marriage and Family Therapist privilege (N.J.S.A. 45:B-29)
- NJRE 511: Cleric-Penitent Privilege (N.J.S.A. 2A:84A-23)
- NJRE 512: Religious Privilege (N.J.S.A. 2A:84A-24)
- NJRE 513: Political Vote (N.J.S.A. 2A:84A-25)
- NJRE 514: Trade Secret (N.J.S.A. 2A:84A-26)
- NJRE 515: Official Information (N.J.S.A. 2A:84A-27)
- NJRE 516: Identity of Informer (N.J.S.A. 2A: 84A-28)
- NJRe 517: Victim Counselor Privilege (N.J.S.A. 2A:84A-22.13)

Identifying and Objecting on the Basis of Privilege

Be prepared: Would a protective order be appropriate prior to beginning the deposition?

N.J. Court Rule 4:10-3:
"On motion by a party or by the person from whom discovery is sought, the court, for good cause shown or by stipulation of the parties, may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following: "

N.J. Court Rule 4:10-3: On motion by a party or by the person from whom discovery is sought, the court, for good cause shown or by stipulation of the parties, may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:

(a) That the discovery not be had;
(b) That the discovery may be had only on specific terms and conditions, including a designation of the time or place;
(c) That the discovery may be had only by a method of discovery other than that selected b the party seeking discovery;
(d) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
(e) That discovery be conducted with no one present except persons designated by the court;
(f) That a deposition after being sealed be opened only by order of the court;
(g) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
(h) That a party simultaneously file specified documents or information eclose din sealed envelopes to be opened as directed by the court…

Attorney-Client Privilege (N.J.R.E. 504)

The privilege belongs to the client:

"….The privilege shall be claimed by the lawyer unless otherwise instructed by the client or his representative; the privilege may be claimed by the client in person, or if the client is incapacitated or deceased, by his guardian or personal representative. Where a corporation or association is the client having the privilege and it has been dissolved, the privilege may be claimed by its successors, assigns or trustees in dissolution."

Attorney-Client Privilege (N.J.R.E. 504)

V.K. ex rel Pezzezella vs. New Jersey Mfrs. Ins. Co., 2013 WL 4503367 (A-5681-11T4, App. Div. Aug. 26, 2013) (unpublished)

- When can the privilege be pierced?
- In claim arising from case for bad faith, NJM counsel was held to be entitled to ask about knowledge of settlement demands and offer conveyed to the claimant, but actual conversations plaintiff had with her counsel was not necessarily "fair game."
- A blanket assertion of privilege was inappropriate under the circumstances of the case, and the claim asserted.

Objections on the Basis of Confidentiality

- ***Examples:***
  - **Trade secrets**
  - **Confidential research**
  - **Confidential business formulations**
  - **Financial Status**
    - ***Herman v. Sunshine Chem. Specialties, Inc., 133 N.J. 329 (1993):*** **Discovery of financial information regarding a punitive damages claim.**

Objections to the Form of the Question



Objections to the Form of the Question

Example of Form Objections:

- **Compound question.**
- **Question is vague or confusing.**
- **Question is leading.**
- **Legal conclusion.**
- **Summary of prior testimony.**
- **Rephrasing the witness' testimony.**
- **Question is based on untrue or unproven facts.**

Objections to the Form of the Question

N.J. Court Rule 4:14-3: **"No objection shall be expressed in language that suggests an answer to the deponent."**

Objections to the Form of the Question

N.J. Court Rule 4:14-3 (f): **"Once the deponent has been sworn, there shall be no communication between the deponent and counsel during the course of the deposition while testimony is being taken except with regard to the assertion of a claim of privilege, a right to confidentiality or a limitation pursuant to a previously entered court order."**

- ***In re PSE&G Shareholder Litigation, 320 N.J. Super. 112 (1998)***

Discontinuing the Deposition

- **Avoid: Risk a motion for reimbursement of costs and fees.**
- **Sanctions are rare: Mahmoud v. Koeck, 2011 WL 9825 (App. Div. Aug. 6, 2010 (unpublished).**

COURTESY TO COUNSEL AND WITNESS:

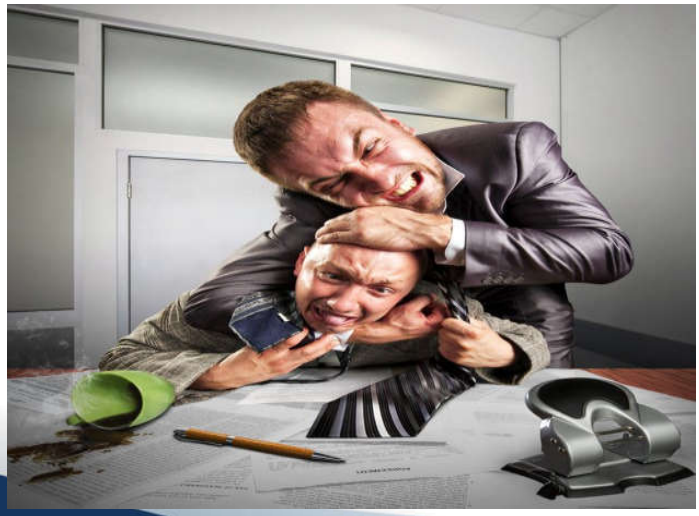
BALANCING AN ADVERSARIAL PROCEEDING WITH ETHICS AND PROFESSIONALISM

- ***RPC 3.2*: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration all persons involved in the legal process."**
- ***Mruz v. Caring, Inc., 107 F. Supp. 2d 596 (D.N.J. 2000)***
- ***In the Matter of Vincenti, 114 N.J. 275 (1989)***

HBS Presentation
Slide 17

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COURTESY TO COUNSEL AND WITNESS:



The Use of Objections at De Bene Esse and Discovery Depositions

Mitchell J. Makowicz, Jr.

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Objecting at Trials v. Objecting at Depositions

- Discovery Deposition- the purpose is to gather information. These depositions can elicit testimony that would be inadmissible at trial as long as it is reasonably calculated to lead to admissible evidence.
- Trials- the purpose is to present evidence and one should pursue every necessary objection to the form and the substance of the questions.
- De bene esse deposition- though taken in circumstances similar to discovery depositions, it is trial testimony. The rules of trial apply to these depositions- not the rules of discovery depositions. R. 4:14-9.

The Importance of Objections

- Discovery depositions can be used to contradict or impeach the testimony of the witness at the time of trial, or for any other purpose permitted by the Rules of Evidence. R. 4:16-1(a).
- Objections to the form of a question at a discovery deposition must be made, so as to put the interrogator on notice and to give the interrogator the opportunity to amend the question. R. 4:14-3(c).

The Importance of Objections

- No objection shall be made during the taking of a discovery deposition except those addressed to the form of a question, or to assert a privilege, a right to confidentiality, or a limitation pursuant to a previously entered court order. R. 4:14-3(c).
- For this reason, objections to form must be made at discovery depositions in order to preserve such objections at trial. Conversely, objections to substance must not be made.

De Bene Esse Depositions

- An audio/visually-recorded deposition of a treating physician or expert witness may be used at trial in lieu of testimony whether or not such witness is available to testify. R. 4:14-9(e).
- Treat the deponent as if he or she was being questioned in a courtroom, but no judge is present.
- All evidentiary objections need to be made during the course of the de bene esse deposition. This includes objections to both the form of the question and the substance of the proffered testimony. R. 4:14-5(f).
- If there is an objection, stop the video recording so the discussion can take place while still on the stenographer's record.
- Rulings on objections will be made pursuant to a motion or, more commonly, at the time of trial.

Discovery Depositions

- Objections are limited by type to four, and only four types: (a) objection to the form of a question; or (b) to assert a privilege; or (c) to assert a right to confidentiality; or (d) to assert a limitation pursuant to a previously entered court order. R. 4:14-3(c).
- Waived objections: errors in the manner of conducting the deposition, in the form of the questions or answers, in the conduct of parties, and other errors that may have been removed or cured if promptly objected to during the deposition. R. 4:16-4(c)(2).
- Objections to the competency of a witness or to the competency, relevance or materiality of testimony are not waived, unless the error could have been removed if objected to at that time. R. 4:16-4(c)(1).
- The right to object on other grounds may be asserted at the time of trial if the deposition testimony is offered into evidence. R. 4:16-2.

Continuing Objections

- Every objection needs to be placed on the record in order to preserve it.
- Standing or continuing objections are not effective. See V.K. v. N.J. Mfrs. Ins. Co., Nos. A-4681-11T4, A-4682-11T4, 2013 N.J. Super. Unpub. LEXIS 2111, at *27 (App. Div. Aug. 26, 2013).
- Instead, attorneys should make an objection to every specific question to avoid the risk of waiving that objection.
- The court rule requires that the basis of the objection shall be placed on the record at the time of the deposition. In practice, it is not necessary if the basis is obvious; but if not obvious, it should always be placed on the record.

Communication with Counsel

- Once the deposition begins and the deponent has been sworn, attorneys cannot consult with the deponent during the course of the deposition. R. 4:14-3(f).
- Exceptions: to determine if a claim of privilege, a right to confidentiality, or a court ordered limitation applies.
- Example: if the witness is about to testify as to what he discussed with a spouse, the attorney can speak to the witness about the context of the conversation to determine whether to assert the spousal privilege.

Instructions not to Answer

- Rule 4:14-3(c) specifically sets forth the three—and only three—reasons for an instruction not to answer a question.
- Nowhere in the rules is there authority to instruct a witness not to answer by asserting "asked and answered." To the extent that anyone believes that to be the case, R. 4:14-4 provides that application may be made to the Court for an order to answer the question.
- Rule 4:14-3(c) says that, "subject to R. 4:14-4," an attorney shall not instruct a witness not to answer. My reading: if the objection is that the question is designed to annoy, embarrass or oppress, the instruction is merely to provide an opportunity to obtain a court order.
- The interrogator is entitled to a statement as to why an instruction not to answer is given, so that an application may be made to the court for an order to compel. Ask specifically: what privilege? What right to confidentiality? What court order?

Problem with Rule 4:14-3(c)

- The rule is the modern-day equivalent of the Oracle at Delphi.
- Rules should be clear and definitive- not all things to all people.
- Purpose: to prohibit the abuses by attorneys defending depositions from suggesting answers to witnesses. That is the over-arching, essential purpose of the rule.

Problem with Rule 4:13-3(c)

- If this is not true: why does the rule say:
  - "No objection shall be expressed in language that suggests an answer to the deponent," but then also say:
  - "An objection to the form of the question shall include a statement by the objector as to why the form is objectionable so as to allow the interrogator to amend the question."
- There is nothing in the rule about the witness hearing the objection- in fact, at trial, the witness is not a party to sidebar discussions of objections and does not hear the legal objections and arguments of counsel.
- Why, then, would a witness at a deposition have a "right" to hear an objection? Simple answer: there is no such right anywhere in the Rules.

R. 4:14-3(c) and Abuses of the Rules

- Amendments to R. 4:14-3(c) were enacted effective September 1, 1994, to prevent and prohibit discovery abuses during depositions. "[A]n attorney shall not instruct a witness not to answer a question unless the basis of the objection is privilege, a right to confidentiality or a limitation pursuant to a previously entered court order." R. 4:14-3(c).
- If a deponent fails to answer a question or gives an incomplete answer at a deposition, the discovering party may complete or adjourn the deposition before applying for an order compelling an answer. R. 4:23-1.
- "An evasive or incomplete answer is to be treated as a failure to answer." R. 4:23-1(b).
- If the deposition is conducted or defended in bad faith or in such a manner as to annoy, embarrass or oppress the deponent or in violation of R. 4:14-3(c) or (f), a formal motion or telephone application can be made to the court for an order to terminate the deposition or to limit the scope or the manner of it. R. 4:14-4. Note that pressing a witness for a responsive answer is not "harassing a witness." It is good lawyering.

- Rules are to be followed- followed when taking and defending depositions. In essence- “do unto others as you would have them do unto you.” Luke 6:31, Matthew 7:12.
- Why this is important: comply with rules, as you would have others comply with rules.

Incomplete or Evasive Answers

- Rule 4:23-1(b): "Evasive or Incomplete Answer. For the purposes of this subdivision, an evasive or incomplete answer is to be treated as a failure to answer."
- "Yes" or "no" questions: The only responsive answers are "yes," or "no;" or, the witness can aver that "I cannot answer the question yes or no." Anything else is not solicited, not responsive, and constitutes a failure to answer.
- What the interrogator wants to know is often different from what the witness wants to say. There is nothing in the Court Rules that gives a witness the right to say what they want to say, but the Court Rules do obligate a witness to responsively answer questions.

Incomplete or Evasive Answers

- Lifescan, Inc. v. Jeffrey Smith, et al., Case 2:17-cv-05552 and 19-8761 (Decided 4/14/23).
- Special Master Judge Cavanaugh:
  - "Defendant indeed spoke words, but did not provide answers."
  - The witness "has presented with seemingly pertinent questions which, by any rational analysis, called for a simple 'yes' or 'no,' or 'I don't know,' or 'I don't recall' response- or a reasonable variation thereof. But defendant failed often to choose any of those options…"
  - "Posing follow up questions to evasive or disingenuous answers does not constitute harassment."
  - "often, defendant interjected statements and asides which had no bearing on what was asked."
  - "[Defendant] regularly maintained that a question had been 'asked and answered' and requested that the court reporter read back his answer, rather than actually providing a direct response."

Incomplete or Evasive Answers

- Additional unsolicited information: an evasive answer, which is a failure to answer.
- Example: chimpanzee.

Improperly Suggesting the Answer

- An objection to the form of a question shall include a statement by the objector as to why the form is objectionable so as to allow the interrogator to amend the question. No objection shall be expressed in language that suggests an answer to the deponent." R. 4:14-3(c).
- These two sentences seemingly conflict with each other because any statement by the objector will likely influence the witness' answer and will always have the capacity of producing mischief.
- Examples: "objection, complex question"; "objection, answer if you remember"; "objection- I (counsel) do not understand the question."

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Probable Intent and Procedure

- Courts have not addressed this issue because procedurally, there is no practical mechanism to have this issue heard by an appellate court.
- It needs to get before an appellate panel. If there is such a ruling and published opinion, those violating the letter and spirit of the rules will stop doing so.
- Tell the other attorney to first only object to the form of the question without stating the specific reason. Merely saying “objection to form” puts the interrogator on notice of an issue with the question.

Probable Intent and Procedure

- If the attorney does not rephrase the question, wait until the witness answers or steps out of the room before providing an explanation for the objection.
- This will avoid coaching witnesses and putting words into their mouths, and it will prevent allegations that defending counsel - intentionally or unintentionally- is violating the rules.
- The obligation is to put the other attorney and the court on notice as to the reason for the objection and that the objection may be pressed at trial. It is not to notify or educate the witness.

My Practice:

- Cite the rule to opposing counsel, and ask them not to state the basis of the objection in the potential presence of the witness before the witness answers.
- There is no reason under the Court Rules for counsel to refuse to comply.
- If counsel insists upon making such statements in the presence of the witness before the witness answers, the only logical reason is because the attorney wants the witness to hear the basis of the objection. I believe- by definition- that is a knowing and intentional violation of R. 4:14-3(c).

Contact Information

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About the Panelists…

Rebekah Conroy, Stone Conroy LLC in Florham Park, New Jersey, is an experienced trial attorney who represents businesses and individuals in diverse matters. Her practice is focused in complex business litigation including contract and franchise disputes, products liability actions, shareholder and intra-family financial disputes, and the representation of attorneys in ethics proceedings. She also defends clients in white-collar criminal matters involving charges of bank and wire fraud, commercial bribery, health care fraud and other financial crimes.

Admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Southern District of New York, and the Third and Federal Circuit Courts of Appeal, Ms. Conroy is First Vice President of the Association of the Federal Bar of New Jersey (AFBNJ) and regularly participates in volunteer legal activities. She is a member of the American and New Jersey State Bar Associations, and has served as a volunteer attorney for Trial Lawyers Care, where she has provided *pro bono* legal representation to 9/11 victims and their families. Ms. Conroy is also a volunteer attorney with the District of New Jersey's federal prisoner re-entry program, ReNew. She has lectured for ICLE, AFBNJ and other organizations, and is the recipient of several honors.

Ms. Conroy received her B.A. from The George Washington University and her J.D. from Benjamin N. Cardozo School of Law.

Kelly P. Corrubia is a Partner in Hall Booth Smith, P.C. in Paramus, New Jersey, and concentrates her practice in a wide range of litigation defense, including insurance, premises liability and general liability; and also represents clients in public entity cases and insurance coverage matters. She defends insurance companies, businesses and individuals in personal injury and liability claims arising from automobile accidents, premises accidents, Title 59 claims and Section 1983 claims.

Ms. Corrubia is admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Third Circuit Court of Appeals. She is a board member and Director of the New Jersey Defense Association and a member of a number of local bar associations as well as the Defense Research Institute, the Brennan-Vanderbilt American Inns of Court, and the Justice Robert Clifford American Inns of Court. She has previously presented on insurance claim and auto injury topics.

Ms. Corrubia received her B.A. from The College of New Jersey and her J.D., *magna cum laude*, from Seton Hall University School of Law, where she also received a Chancellor Scholarship, was a member of the Order of the Coif and won the Raymond Del Tufo Constitutional Law Award. She served as a judicial intern for the Honorable Daniel P. Mecca, Superior Court of New Jersey, and.was a judicial law clerk to the Honorable Robert P. Contillo, Superior Court of New Jersey.

Mitchell J. Makowicz, Jr., Certified as a Civil Trial Attorney by the Supreme Court of New Jersey, is a Shareholder in Blume Forte Fried Zerres & Molinari P.C. in Chatham, New Jersey. Concentrating his practice in medical malpractice, product liability, premises liability and other personal injury cases, he has secured recoveries for many clients in matters involving plastic

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Mr. Makowicz is a member of the New Jersey State and Morris County Bar Associations as well as the New Jersey Association for Justice. He has lectured on civil practice and is the recipient of several honors.

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Thomas J. Manzo is a Partner in Szaferman, Lakind, Blumstein & Blader, P.C. in Lawrenceville, New Jersey, and Co-Chair of the firm's Personal Injury Department. He represents plaintiffs in complex personal injury matters including automobile and slip and fall accidents, victims of crime, abuse and neglect, and product liability matters.

Mr. Manzo is admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey, the Third Circuit Court of Appeals and the United States Supreme Court. He is a Trustee of the New Jersey State Bar Association, Chair of the NJSBA Civil Trial Bar Section and Co-Chair of the Legislative and Meeting Arrangements and Program Committees. He is also Treasurer of the New Jersey State Bar Foundation and a member of the Mercer County Bar Association, has lectured for the NJSBA and has written briefs and argued on behalf of the NJSBA, for which he has received NJSBA *Amicus* Awards in 2022 and 2023.

Mr. Manzo received his B.A., *summa cum laude*, from Rutgers College, Rutgers University, where he was elected to *Phi Beta Kappa*, and his J.D. from Seton Hall University School of Law. He was Law Clerk to the Honorable Clarkson S. Fisher, New Jersey Superior Court, Appellate Division.

Honorable Christopher D. Rafano, J.S.C. is a Superior Court Judge, Middlesex County, and sits in New Brunswick, New Jersey. During his judicial tenure he has held assignments in the Family and Civil Divisions, and was appointed to the bench in 2013.

Judge Rafano is a former Middlesex County Freeholder and served as Deputy Director and Director of the board. He is also a former municipal prosecutor for several Middlesex County communities and a former Councilman for the Borough of South River. He was also a Partner in the South River law firm of Rafano & Wood, P.C.

Judge Rafano received his B.A. from Villanova University and his J.D. from Pennsylvania State University's Dickinson School of Law.

Rey O. Villanueva is a Shareholder in Golden, Rothschild, Spagnola, Lundell, Boylan, Garubo & Bell, P.C. with offices in Bridgewater, New Jersey, and New York City. He concentrates his practice in general liability, construction, labor and employment, and municipal/traffic matters.

Admitted to practice in New Jersey and New York, Mr. Villanueva is a member of the New Jersey State and Somerset County Bar Associations. In 2014 he completed his OSHA Outreach Training program class for the construction industry. He is the recipient of several

honors, including being named "Attorney of the Year, East Coast Region" in 2015 by the Old Republic Construction Program Group.

Mr. Villanueva received his B.A from The George Washington University and his J.D. from Brooklyn Law School. He was Judicial Law Clerk to the Honorable Daniel P. Mecca, PJ.S.C., Superior Court of New Jersey, Law Division, Bergen County.

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