Outside Counsel

'Objection to Form'—What's the Problem With That?

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How about this for a grabber in a judicial opinion: "Something is rotten. But it's not in Denmark….Rather it's in discovery in modern federal civil litigation…." With this leadoff, a U.S. District Court judge in Iowa chronicled deposition conduct that resulted in an unusual and very public sanction. What, exactly, was the problem? The District Court in *Security National Bank v. Abbott Laboratories*,[1] focused on counsel's: (1) use of "form" objections; (2) attempts to coach witnesses; and (3) repeated interruptions and attempts to clarify questions posed by opposing counsel. The decision has lessons for practitioners, even if they never practice in federal court in Iowa.

One unfortunate dynamic was the court's preconceptions about large out-of-state law firms, and the large out-of-state law firm lawyer whose deposition conduct came under scrutiny. The judge observed, for example, that virtually all of the discovery sanctions he previously imposed or threatened to impose were against "lawyers from out-of-state law firms." He noted that those "out of state large firms…waste tons of time" [and]…[have] to be 'put on the clock' because the 'only thing they know how to do is to obstruct things.'"[2]

And the District Court wondered if pretrial stipulations were "some kind of novel concept since [counsel in question] apparently didn't learn that at Rambo litigation school." The court contrasted that kind of behavior with a more genteel Iowa practice, where attorneys "have a long and storied tradition and culture of civility that is…taught at the state's two law schools…and describing someone as an Iowa lawyer almost always connotes that lawyer's high commitment to civility and professionalism."

But it was the sanction in this matter, one the court termed "out of the box," that could make any lawyer sit up straight. The court, without any motion from opposing counsel, ordered the sanctioned attorney to "write and produce a *training video* in which Counsel, or another partner in Counsel's firm, appears and explains the holding and rationale of this opinion, and provides specific steps lawyers must take to comply with its rationale in future depositions in

any federal and state court."[3] That sanction was reversed. But the remainder of the District Court's decision, and what the court considered to be sanctionable conduct, was otherwise undisturbed by the U.S. Court of Appeals for the Eighth Circuit.

Form Objections

The Abbott Labs decision came about in connection with a product liability claim against a baby formula manufacturer. The latter was represented by lawyers from Chicago, and associated with one of those "large out of state firms." The District Court found that in two depositions, "Counsel objected to the 'form' of the examiner's question at least 115 times." The problem, wrote the court, was the bare objection: "objecting to "form" is like objecting to "improper"—it does no more than vaguely suggest that the objector takes issue with the question. It is not itself a ground for objection, nor does it preserve any objection."

So, in the Northern District of Iowa federal court, "lawyers are *required*, not just permitted, to state the basis for their objections."[4] And just so there was no misunderstanding, the District Court cautioned that "lawyers should consider themselves warned: Unspecified 'form' objections are improper and will invite sanctions if lawyers choose to use them in the future." Those mandated "form plus" objections were not, the District Court emphasized, to be speaking objections. Lawyers should be succinct, as required by the Federal Rules of Civil Procedure: "For example, "Objection, hearsay" is a proper objection."[5]

The District Court did not sanction on this ground, "because there is authority [in other jurisdictions] validating 'form' objections." New York practitioners should note that on this point, at least one U.S. District Court in New York requires only objections to form, without more.[6] Others permit, but usually do not require, objections that include a basis.[7]

Coaching Witnesses

On the question of coaching witnesses, counsel was on shakier ground, and would be in trouble in a number of courts. Among other problems, she engaged in the pernicious "if you know" prompt following a question. The court was unsparing about the obvious:

> When a lawyer tells a witness to answer "if you know," it not so subtly suggests that the witness may not know the answer, inviting the witness to dodge or qualify an otherwise clear question. For this reason, instructions to a witness that they may answer a question "if they know" or "if they understand the question" are raw, unmitigated coaching, and are never appropriate.[8]

Unsurprisingly, U.S. District Courts in New York are in agreement on this point.[9] One court stated flatly that "speaking objections that cue a witness how to answer (or avoid answering) a question are prohibited,"[10] while another ordered defense counsel to pay the costs of an additional deposition, noting "that defense counsel often made objections which had the appearance of coaching the witness by…stating 'if you know' or 'if you remember.'"[11] And

New York federal courts similarly hold that an attorney's failure to understand a question is not a basis to interrupt a deposition.[12] There, "the witness should make the determination as to whether a question is clear and answer to the best of his or her ability."[13]

Along related lines, the Iowa District Court pointed out that "Counsel often directly coached the witness to give a particular, substantive answer,"[14] including questions that were purportedly "'vague,' called for 'speculation,' were 'ambiguous,' or were 'hypothetical.'" According to the District Court, "[t]hese objections usually followed completely reasonable questions. But, after hearing these objections, the witness would usually ask for clarification, or even refuse to answer the question."[15]

Again, New York federal courts concur about this kind of deposition conduct. One court warned counsel "that they must refrain, when making an objection, from stating that a question is vague, ambiguous or calls for speculation. *** There should not be any comment that a question is speculative. Elaboration is permitted only where examining counsel requests the basis of the objection."[16]

Interruptions

Counsel can be sanctioned for speaking up excessively:

> Counsel's interruptions while defending depositions were grossly excessive. Counsel's name appears at least 92 times in the transcript of [one] deposition (about once per page), and 381 times in the transcript of the [second] deposition (approaching three times per page). Counsel's name appears with similar frequency in the other depositions that Counsel defended. And, as I noted earlier, nearly all of Counsel's objections and interruptions are unnecessary and unwarranted. These excessive and unnecessary interruptions are an independent reason to impose sanctions.[17]

That's not unique to Iowa. New York federal district courts have either similarly sanctioned deposition interruptions, or weighed such interruptions as a factor in deciding whether to impose Fed. R. Civ. Proc. 30 sanctions. One judge, for example, ordered sanctions for various deposition misbehavior, which included interruptions, and stated that counsel's interruptions were pervasive, and "clearly intended to cause problems for [the examining attorney] in his examination. [Counsel] appears on more than 85 percent of the pages of the deposition transcript (216/241) with statements other than an objection as to form or a request to the court reporter to read back a question."[18]

While declining to impose sanctions, another court observed that "[t]he sheer volume of unwarranted objections was such that it interfered substantially with [the examiner's] ability to obtain information from [the witness]. Measured solely by the language of the rule, [counsel's] conduct did indeed verge on frustrating the fair examination of [the witness]"[19]

Lessons Learned

Practitioners should note that the Eighth Circuit's opinion "assumed" that counsel's behavior was improper, even as it declined to decide that issue.[20] The District Court decision was reversed only because: 1) counsel's conduct was too remote in time[21]; and 2) counsel never received adequate notice of the District Court's "unusual" sanction.[22]

But really, who needs this? The District Court opinion was public and damaging, as the appeals court recognized. Some 22 years after the Federal Rules of Civil Procedure were revised to require that deposition objections be made concisely and in a non-argumentative and non-suggestive manner,[23] this decision reminds practitioners that they flirt with reputational damage and embarrassment when they engage in the kind of deposition conduct that led to the sanctions imposed in the Iowa District Court, and that have similarly been sanctioned in New York federal courts.

Endnotes:

1. *Security National Bank v. Abbott Laboratories*, 299 F.R.D. 595, 598, fn. 8 (N.D. Ia. 2014), rev'd, *Security National Bank v. Jones Day*, No. 14-3006, 2015 WL 5042248 (8th Cir. Aug. 27, 2015).

2. *Security National Bank v. Jones Day*, No. 14-3006, 2015 WL 5042248, *1 (8th Cir. Aug. 27, 2015) (*Jones Day*).

3. *Abbott Labs*, 299 F.R.D. at 609 (emphasis added).

4. *Abbott Labs*, at 602 (emphasis in original).

5. *Abbott Labs*, at 603.

6. *Druck Corp. v. Macro Fund (U.S.)*, No. 02 CIV. 6164 (RO) (DFE), 2005 WL 1949519, at *4 (S.D.N.Y. Aug. 12, 2005) ("Any 'objection as to form' must say only those four words, unless the questioner asks the objector to state a reason.")

7. *Abu Dhabi Commercial Bank v. Morgan Stanley & Co*., 2011 WL 4526141, at *8 (S.D.N.Y. Sept. 21, 2011) ("Objections should generally be limited to the statement "objection as to form and the basis for such objection, i.e., compound question…."); *Auscape Int'l v. Nat'l Geographic Soc'y*, No. 02 CIV. 6441 (LAK), 2002 WL 31014829, at *1 (S.D.N.Y. Sept. 6, 2002) ("Once counsel representing any party states, 'Objection' following a question, then all parties have preserved all possible objections to the form of the question unless the objector states a particular ground or grounds of objection, in which case that ground or those grounds alone are preserved.")

8. *Abbott Labs*, at 607.

9. See, e.g., *Musto v. Transp. Workers Union*, No. 03 CV 2325 (DGT) (RML), 2009 WL

116960, *1 (E.D.N.Y. 2009) ("well settled that it is inappropriate for an attorney to influence or coach a witness during a deposition.")

10. *Fort Worth Retirement Fund v. J.P. Morgan Chase*, No. 09 Civ. 3701 (JPO) (JCF), 2013 WL 6439069, *4 (S.D.N.Y. 2013) (internal quotations omitted).

11. *City of New York v. Coastal Oil New York*, No. 96 Civ. 8667 (RPP), 2000 WL 97247, *2 (S.D.N.Y. 2000).

12. *Meyer Corp. v. Alfay Designs*, No. CV 2010 3647 (CBA) (MDG), 2012 WL 3536987, *3 (E.D.N.Y. Aug. 13, 2012) ("it is not counsel's place to interrupt if a question is perceived to be potentially unclear to the witness. Rather the Federal Rules of Civil Procedure provide two mechanisms to correct or clarify deposition testimony, namely cross-examination and thorough submission to the witness for review.") (citations and internal quotations omitted); *Phillips v. Manufacturers Hanover Trust Co*., No. 92 CIV. 8527 (KTD), 1994 WL 116078, *4 (S.D.N.Y. March 29, 1994).

13. *Phillips v. Manufacturers Hanover Trust Co*., at *4.

14. *Abbott Labs*, at 607.

15. *Abbott Labs*, at 604.

16. *Meyer Corp. v. Alfay Designs*, at *4.

17. *Abbott Labs*, at 609.

18. *Morales v. Zondo*, No. 00 Civ. 3494 (AGS), 2001 WL 474230, *54 (S.D.N.Y May 4, 2001); see also *Sicurelli v. Jeneric/Pentron*, No. 03 CV 4934 (SLT) (KAM), 2005 WL 3591701, *9 (E.D.N.Y. Dec. 30, 2005)*9 (ordering sanctions where "[c]ounsel's conduct frustrated the fair examination of the witnesses by disrupting their depositions and unnecessarily creating a contentious and unpleasant atmosphere.")

19. *Phillips v. Manufacturers Hanover Trust Co.*, at *4.

20. *Jones Day*, at *8 ("[a]ssuming without deciding that there was sanctionable conduct here, defense counsel has already suffered 'inevitable financial and personal costs….'")

21. *Jones Day*, at *6 ("sanctions should be imposed within a time frame that has a nexus to the behavior sought to be deterred.") (internal quotations omitted).

22. *Jones Day*, at *8 ("Once information about an unusual sanction appears in public, the damage to the subject's career, reputation, and future professional opportunities can be difficult if not impossible to repair.")

23. Fed. R. Civ. P. 30, Notes of Advisory Committee on Rules—1993 Amendment ("Subdivision (d). The first sentence of new paragraph (1) provides that any objections during a deposition must be made concisely and in a non-argumentative and non-suggestive

manner.")

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