“But The Examination Still Proceeds”: A Primer On Surviving the Difficult Deposition

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Some of the more important lessons a litigator can learn are lessons learned the hard way. These include the frustrating hours wasted in depositions where opposing lawyers and witnesses skilled in the art of obfuscation hold court. Speaking objections, verbal assaults on the examining lawyer, evasive non-answers, comments suggesting answers, repeated consultations among defending lawyer and witness—these are just some of the time-honored tactics employed in the name of zealous advocacy. They are designed to throw even the most determined legal bloodhound off the scent.

¹ The views expressed herein are those of author and are not necessarily shared by Richards, Layton & Finger, P.A. or its clients. The author wishes to thank Jason J. Rawnsley and Jaclyn C. Levy for their assistance.
Too often, the tactics work. The examiner takes the bait and argues for pages on end over the speaking objection. She responds in kind to the verbal assault (“I sure told him”). She is stumped by the evasive non-answer, or fails to follow up. The suggestive comments or repeated consultations between witness and counsel are simply ignored.

The result is often a transcript filled with snappy but useless colloquy, and little else.

One of the most useful legal education programs I ever attended was taught by David Malone, in which he outlined a system for surviving the difficult deposition. The approach is civil and straightforward. I have used it to great effect for more than 20 years and can attest: It works. The essence of the approach is summed up in the saying “less is more.” It relies not on fancy arguments, or on cases or rules but instead on a keen understanding of the purpose of a deposition, and on a healthy dose of common sense.

This brief article first reviews some of the rules that should be “top of mind” when encountering the difficult witness or opponent. A few cases are then considered, both for a sense of how courts react and to set the stage for the introduction of a more practical approach. David’s common sense system, as morphed by application (or as otherwise distorted by me) is then discussed. My best advice is to pay close attention to the latter portion of this article, where David’s approach is summarized.

A. Some Pertinent Rules.

1. “But the Examination Still Proceeds.”

In the federal courts, the principal rule governing depositions by oral examination is Federal Rule of Civil Procedure 30. We each may have our favorite part of the rule, but mine is the following snippet that appears at subsection (c)(2), which discusses objections: “. . . but the examination still proceeds . . . .” That phrase sums up the entire process. It reminds us that we are there not to make eloquent argument, nor to ensure that our opponent rues the day he opened his mouth. We are there, simply, to ask questions and take answers. No matter what, “the examination still proceeds.”

It is important to note that Rule 30(c)(2) contains no requirement that the examiner actually respond, in substance or in any other way, to an objection, which “must be stated concisely in a nonargumentative and nonsuggestive manner.” Fed. R. Civ. P. 30(c)(2). It also must not be forgotten that the defending lawyer is not evil simply because he objects. Indeed, he often is required to object, lest he waive the objection.3 Remember, the purpose of a proper objection is generally to put the examiner on notice that the defender sees some problem with the question that could be cured at the time of examination, and that he is reserving the right to argue later that the question and the answer should be stricken. For this the

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3 “An objection at the time of the examination—whether to evidence, to a party’s conduct, to the officer’s qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection.” FED. R. CIV. P. 30(c)(2).
examiner should be thankful, and should give the non-argumentative and non-suggestive objection due consideration, before deciding to ignore it.

So save the argument. There is no requirement that you make it at the deposition. Consider amending your question and then rephrase, or just ask the witness to “answer, please.” If this leaves you feeling insecure, then, at most, say something like “we disagree. You may answer the question.” Remember, in all events, “the examination still proceeds . . . .” Repeat this mantra to yourself the next time someone challenges you to verbal combat in the deposition room. You will be back on track in no time.

2. As It ‘Would At Trial.’

Federal Rule of Civil Procedure 30(c)(1) sets the stage for the manner in which a deposition should be conducted: “The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615.” (emphasis added). How often do we hear, at trial, long speaking objections designed to suggest answers to a witness (or concepts to a jury)? In what courtroom do judges tolerate (for long) verbal assaults by the lawyers on one another, or abusive conduct by a witness? These things are generally well out of bounds in most well run courtrooms.

Thus, if you would not do it (or get away with it) at trial, do not do it in a deposition. And if somebody does it to you, use this portion of the rule (and this argument) in response, on what should be the rare occasions on which you seek protection from a court. In my experience, judges (who generally hate these disputes) quickly latch on to the point. See LM Ins. Corp. v. ACEO, Inc., 275 F.R.D. 490, 491 (N.D. Ill. 2011) (“Because a deposition generally proceeds as at trial, Rule 30(c)(1), Federal Rules of Civil Procedure, courts have uniformly held that once a deposition starts, counsel has no right to confer during the deposition, with perhaps one narrow exception, which is not applicable here.”); GMAC Bank v. HTFC Corp., 248 F.R.D. 182, 186 (E.D. Pa. 2008) (granting sanctions against defendant for: “1) engaging in hostile, uncivil, and vulgar conduct; 2) impeding, delaying, and frustrating fair examination; and 3) failing to answer and providing intentionally evasive answers to deposition questions”); Landers v. Kevin Gros Offshore, L.L.C., 2009 WL 2046587, at *4 (E.D. La. July 13, 2009) (“The record demonstrates that counsel . . . repeatedly failed to conduct his examination . . . as he would at the trial and denied [the witness] the same rights and privileges due a witness testifying in court at a trial. Sanctions will be imposed.”); Luangisa v. Interface Operations, 2011 WL 6029880, at *6 (D. Nev. Dec. 5, 2011) (“Examination and cross-examination of witnesses during depositions should proceed as it does at trial.”).

Attention should also be paid to the exceptions to the “as at trial” rule: The examination proceeds as it would at trial under the Federal Rules of Evidence, except Rules 103 and 615.” (emphasis added). Fed. R. Civ. P. 30(c)(1). Rule 103 is entitled ‘Rulings on Evidence’ and addresses how a point is preserved

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4 Never forget, someday a judge may read the transcript. Courts sometimes remind lawyers of this and in more than one case have addressed conduct viewed as abusive, sua sponte. See Paramount Commc’ns Inc. v. QVC Network Inc., 637 A.2d 34, 52 n.23 (Del. 1994) (“We raise this matter sua sponte as part of our exclusive supervisory responsibility to regulate and enforce appropriate conduct of lawyers appearing in Delaware proceedings.”); In re Fuqua Indus., Inc. S’holder Litig., 752 A.2d 126, 135 (Del. Ch. 1999) (“The deposition transcript speaks for itself. The examples excerpted above are merely a sampling of numerous speaking objections and off-the-record consultations employed by him during the course of the deposition.”).

5 Federal Rule of Evidence 615 governs the exclusion of witnesses (‘sequestration’) at trial.
when an objection is raised and ruled upon at trial. But objections noted on the record during depositions are preserved and not ruled upon unless or until raised at trial. Suspending the application of Federal Rule of Evidence 103 in the deposition context thus serves to reaffirm that no response to the speaking (or other) objection is necessary. Since there is no judge present (absent a mid-deposition call to the court) there can be no ruling, so (again) save the argument. And if you do call the court, the judge will likely not care to listen while the reporter reads back the pages of pointless colloquy.

3. **Objections Must Be “Nonargumentative and Nonsuggestive.”**

As mentioned earlier, the Rules require that objections raised during a deposition be “nonargumentative” and “nonsuggestive.” Fed. R. Civ. P. 30(c)(2). The two terms cannot be found in most “spell check” programs, but they are meant to convey the following: The defending lawyer is entitled to preserve the objection on the record, but he is not entitled to get in your way. “Nonargumentative” means just that—no argument. Nonsuggestive means that he cannot suggest an answer to the witness. Courts today are generally on board with these concepts. See Specht v. Google, Inc., 268 F.R.D. 596, 598 (N.D. Ill. 2010) (“Objections that are argumentative or that suggest an answer to a witness are called ‘speaking objections’ and are improper under Rule 30(c)(2).”); Amari Co. v. Burgess, 2009 WL 1269704, at *1 (N.D. Ill. Apr. 30, 2009) (“The gist of this rule is simple: unless the attorney claims the question calls for privileged information, the attorney must only state his objection and allow the client to answer.”); JSR Micro, Inc. v. QBE Ins. Corp., 2010 WL 1338152, at *10 (N.D. Cal. Apr. 5, 2010) (“Rule 30(c)(2) makes very plain that these objections were not a proper basis for an instruction not to answer. Nor were they stated in a nonargumentative and nonsuggestive manner.”).

The form in which objections must be stated varies somewhat from court to court. Many courts limit defending parties to simple, declarative statements, such as ‘objection, form’ unless the examiner asks for the basis. See Turner v. Glock, Inc., 2004 WL 5511620, at *1 (E.D. Tex. Mar. 29, 2004) (“As stated in Local Rule CV–30 . . . objections to questions during an oral deposition must be limited to ‘Objection, leading’ and ‘Objection, form.’”); Tuerkes-Beckers, Inc. v. New Castle Assocs., 158 F.R.D. 573, 575 (D. Del. 1993) (“Objections as to the form of the question should be limited to the words ‘Objection, form.’ All other objections should be limited to the word ‘Objection’ and a brief identification of the ground, preferably in no more than three words.”). Some courts permit a one- or two-word explanation of the basis, at the time of form objection, such as: “Objection, compound.” See 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 . . . .”” (quoting the Honorable Shira Scheindlin’s Suggested Rule of Discovery Practice)).

The question, however, is not what the rules say since the rules are available for all to read. The question is how does one enforce these limits, while still filling the maximum number of transcript pages with meaty testimony and avoiding unnecessary colloquy? This is where the system taught by Dave Malone comes in, as reviewed in Section C of this article.

4. **‘Impedes, Delays or Frustrates the Fair Examination.’**

A brief word about Rule 30(d)(2) is in order. When a “person” (note that this includes the nonparty witness) “impedes, delays, or frustrates the fair examination of the deponent” the court is expressly authorized by Federal Rule of Civil Procedure 30(d)(2) to “impose an appropriate sanction—including the reasonable expenses and attorney’s fees incurred by any party . . . .” So the remedy is there, if you truly need it. But in most cases, if you get to this point, you’ve essentially already lost. You have shown your hand, the witness has stopped talking and you have lost time. Your ground assault has ground to a halt. Worse, you will be forced to miss yet another of your daughter’s dance recitals while you spend yet
another day dealing with this discourteous, uncivil [fill in the blank]. The free flow of information will have ceased.

5. Why Depositions Are So Important.

Finally, before we turn to the cases, a few thoughts about why depositions are so important in the resolution of civil disputes. We know that the vast majority of civil cases never make it to trial.6 Depositions are the evidentiary basis for the resolution of most of these disputes. See GMAC Bank, 248 F.R.D. at 185. The drafters of the rules apparently recognized this, as the rules that apply to depositions establish a structure that is intended to encourage the free flow of information. See Fed. R. Civ. P. 30. Anything that promotes the free flow of information is generally viewed as good. Anything that impedes that information flow is generally viewed as bad. See, e.g., Fed. R. Civ. P. 30(d) advisory committee’s note (1993) (“Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond.”); Luangisa v. Interface Operations, 2011 WL 6029880, at *7 (D. Nev. Dec. 5, 2011) (recognizing widespread judicial criticism of “‘Rambo litigation tactics’ designed to interfere with or prevent the elicitation of meaningful testimony and disrupt the orderly flow of a deposition:); Phillips v. Mfrs. Hanover Trust Co., 1994 WL 116078, at *3 (S.D.N.Y. Mar. 29, 1994) (stating that repeated objections during deposition “clearly did hamper the free flow of the deposition”).7

In short, the deposition—when used properly—is (and was designed to be) the most powerful truth-seeking tool in the civil litigator’s toolbox. It allows for ‘live’ questioning and follow up. Fed R. Civ. P. 30(c). The permissible scope is much broader than would be permitted at trial. Fed. R. Civ. P. 26(b)(1) (allowing discovery of relevant, inadmissible information so long as it is “reasonably calculated to lead to the discovery of admissible evidence.”). Deposition testimony is “unfiltered”—your opponent cannot help the witness or (if you follow the rules) otherwise interfere. If you ask, you are entitled (when deposing an entity) to a witness with knowledge. A deposition lets you “test drive” the car: You get to explore new areas and theories, to try lines of cross that you might never try at trial, or to go “unplugged”—completely off the beaten path in the search for truth, to the beat of your own drummer (or acoustic guitar), so long as you stay within the wide swath of legitimate discovery permitted by the Federal Rules.

Witnesses give wonderful gifts to examiners who do this well.

B. Some Cases.

So, let’s look at a few of the train wrecks.

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6 It is estimated that more than 98% of all civil cases filed in the federal courts are settled or otherwise disposed of prior to trial. GMAC Bank, 248 F.R.D. at 185. As stated in a seminal case on deposition practice, Hall v. Clifton Precision, 150 F.R.D. 525, 531 (E.D. Pa. 1993): “The significance of depositions has grown geometrically over the years . . . . The pre trial tail now wags the trial dog.”

7 Exceptions to this include, of course, valid objections and instructions not to answer on the basis of attorney client or other valid, applicable privileges.
1. **Paramount: Deposition Misconduct as an Ethical Issue.**

A case from Delaware shows what can happen, even when the examining lawyer (hereinafter ‘EL’) does not complain about the conduct of the difficult defending lawyer (hereinafter ‘DL’). In *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994), the Delaware Supreme Court considered an interlocutory appeal taken during expedited litigation arising from a contest for control of Paramount Communications, Inc. This sort of litigation is bone-crushing. The lawyers worked day and night for weeks. Numerous depositions were quickly scheduled and held. The appendix filed in the Delaware Supreme Court totaled 7521 pages—some 15 volumes—much of which consisted of deposition transcripts.

Buried in that massive record was a bit of colloquy, captured on the transcript of the deposition of Paramount (through one of its directors), that caught the eye of a Delaware Supreme Court Justice. The result was the now-famous ‘Addendum’ to the court’s opinion, in which the court *sua sponte* raised the subject of professionalism in deposition practice, both in Delaware and throughout the nation. The Court’s ‘Addendum’ described the exchange as “[o]ne . . . worthy of special note as . . . a lesson of conduct not to be tolerated or repeated.” *Id.* at 52. The excerpt is repeated *verbatim*, in the court’s Addendum. Portions relevant to this article are repeated here:

Q: (By [EL . . .]) Okay. Do you have any idea why Mr. [X] was calling that material to your attention?
DL: Don’t answer that. How would he know what was going on in Mr. [X]’s mind? Don’t answer it.
EL: Go on to your next question.
DL: He’s not going to answer that. Certify it. I’m going to shut it down if you don’t go to your next question.
EL: No, Joe—
DL: Don’t ‘Joe’ me, asshole. You can ask some questions, but get off of that. I’m tired of you. You could gag a maggot off a meat wagon. Now, we’ve helped you every way we can.
EL: Let’s just take it easy.
DL: No, we’re not going to take it easy. Get done with this.
EL: We will go on to the next question.
DL: Do it now.
EL: We will go on to the next question. We’re not trying to excite anyone.
DL: Come on. Quit talking. Ask the question. Nobody wants to socialize with you.
EL: I’m not trying to socialize. We’ll go on to another question. We’re continuing the deposition.
DL: Well, go on and shut up.
EL: Are you finished? . . .

* * *

DL: I may be and you may be. Now, you want to sit here and talk to me, fine. This deposition is going to be over with . . .
EL: Are you finished?
WITNESS: Come on, Mr. [EL], move it.
EL: I don’t need this kind of abuse.

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8 The conduct at issue in these cases and its treatment by the courts, are important to this article. The names of the lawyers and witnesses are not, and so are replaced by ‘EL,’ ‘DL’ and ‘Witness.’
WITNESS: Then just ask the next question. . . .

* * *

DL: You understand me? Don’t talk to this witness except by question. Did you hear me?

Id. at 53–54.

In addressing the conduct, the Delaware court characterized the matter as an ethical issue, though the DL was from another state, not admitted in Delaware (pro hac vice or otherwise), and thus beyond the power of the court to discipline. Nonetheless, the court analyzed the conduct under Delaware’s disciplinary rules and suggested that in similar cases “the use of the trial court’s inherent summary contempt powers may be appropriate.” Id. at 55.

All well and good, but none of this helped the examining lawyer fill transcript pages with meaty testimony from a willing witness. Particularly in an expedited case, where there simply was not time to interrupt the deposition, present a motion to the court and then redepose the witness, the remedies suggested in the Court’s Addendum were inadequate to address the immediate injury to the examining lawyer’s client. So what’s the poor EL to do?

2. Serrano: The Improper Speaking Objection[s].

What is, and is not, an improper “speaking objection” was recently the subject of a thoughtful opinion by a United States Magistrate Judge, in Cincinnati Insurance Co. v. Serrano, 2012 WL 28071 (D. Kan. Jan. 5, 2012). In Serrano, the examining lawyer sought an order directing two defending lawyers to “discontinue their use of interruptions and speaking objections.” Id. at *1. The DLs denied the allegations of improper conduct, but one sought “instruction from the Court on how to properly preserve a form objection under [the Court’s guidelines, and the Federal Rules].” Id. The deposition colloquy is quoted extensively in the opinion, including the following excerpts:

EL: If you were told . . . that the Serranos would accept a hundred thousand dollars of policy limits to settle their claims against your son Derek as a result of the accident, would you have let Cincinnati Insurance Company know that?

DL 1: Objection. Calls for speculation on the part of the witness since Cincinnati never offered the money. But if you’re guessing, if you know.

EL: And just so we’re clear. This is the first deposition that you’ve attended in this litigation, Mr. [DL 1], but the deposition guidelines call for objecting to form only, and if I feel like the form—I need to get a clarification of your objection then I will ask for it.

DL 1: Okay. Objection. Calls for speculation on the part of the witness.

EL: That’s a speaking objection. That’s in violation of the deposition guidelines, it’s also in the scheduling order.

* * *

DL 1: Karl thinks you’re supposed to just say objection. Form—to the form is correct.

EL: That is correct. That’s exactly what the deposition guidelines call for.
DL 2: Well, I think you have to make an objection—
DL 1: That way you get to chance to cure it.
DL 2: That addresses the form. It’s not worth really debating, but—I don’t think the
courts allow an unspecified objection as to form. I think you have to call—
DL 1: You have to preserve it somehow and that way you can cure it if you like.
EL: And you can object to form and that’s the way you cure it, and if I need
clarification of your objection I’ll ask for clarification.

* * *

DL 1: Yeah. I get it. I don’t think I violated that.
EL: I think by virtue of your objection you’re suggesting something to the witness.
DL 1: I don’t.
DL 2: Overruled. Both overruled.
EL: Was there an answer given to the question?
DL 1: Not so far.

Id. at *1–2.

The lengthy discussion (only a portion appears here) is fascinating but one might legitimately wonder
whether the clients involved should be asked to pay the cost of the debate transcript (not to mention the
cost of the attorney time). Perhaps the most significant portion of the discussion came near the end, when
the defending lawyer essentially claimed victory: “Q. Was there an answer given to the question? A.
‘[n]ot so far.” Id. at *2. The exercise had strayed far from its purpose: Questions to, and answers from,
the witness.

Other excerpts from the deposition in Serrano focus on common objections that may not appear to be
suggestive, but in fact are. These include objections that questions are “vague” or “call for speculation,”
and the ubiquitous, “if you know”:

[EL: Do you believe that Mr. Young should have asked for authority to offer the
policy limits earlier than he did[?]]
DL 1: Objection. Improper foundation. Calls for speculation on the part of the witness,
DL 2: Same objection.
Witness: I don’t know what Mr. Young did. Or when he did it.]

* * *

Q: Do you believe that [the truck driver’s] insurance carrier should have at some
point paid policy limits to [M.S.]?
DL 2: I’m going to object. It’s really getting repetitive. It’s becoming harassment.
DL 1: Objection. Improper foundation. Calls for speculation on the part of the witness.
Argumentative. And answer, if you know.
Witness: I don’t know.

Id. at *3–4.

In his opinion, the magistrate judge carefully parsed the onslaught of objections. After reviewing Federal
Rule 30(c)(2) and the Deposition Guidelines of the United States District Court for the District of Kansas,
the court had little trouble in concluding that, (i) the “calls for speculation” objection is a foundation
objection, not a form objection, which need not be stated at the time of the deposition and “tends to coach
the witness to respond that she does not know the answer[;]” (ii) an “improper foundation” objection “is a
relevance objection and need not be made at the time of the deposition” under Federal Rule of Civil
Procedure 32;10 (iii) instructions to a witness to answer “if they know” or “if they understand the
question” “are raw, unmitigated coaching, and are never appropriate”; and (iv) “[a]n objection that a
question is ‘vague’ is usually . . . a speaking objection disguised as a form objection.” Id. at *4–5. The
court expressed, however “no definitive opinion concerning whether ‘objection to form’ would preserve
an objection under Rule 32, but expect[ed] that it would be adequate if the question’s defect was in that
broad category and if the deposing attorney failed to request clarification at the deposition.” Id.

Finally, the court in Serrano concluded that objections that questions are “harassing or argumentative” are
only appropriate “as a prerequisite . . . to bringing a motion to terminate or limit the deposition under Rule
30(d)(3).” Id. at *5.

It is good to have the guidance. But the deposition apparently broke down. How might this have been
avoided in the first place?

3.  **GMAC Bank: When the Witness Disrupts.**

To paraphrase the court in *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 184 (E.D. Pa. 2008), uncivil
conduct by a witness at a deposition is “less discussed . . . but nonetheless just as pernicious” as
misconduct by counsel. The *GMAC Bank* case thus addresses “the duty of counsel who is confronted by
uncivil conduct by his own witness.” Id.

The colloquy is too lengthy, and far too colorful, to repeat in *haec verba* here, though excerpts relevant to
our point are included below. Somehow the examining lawyer preserved (and kept his cool) through 12
grueling hours, during which the ‘f-word’ “and variants thereof” were used by the witness no fewer than
73 times. Id. at 187. The court’s “impression” was that the “language was chosen solely to intimidate
and demean” the examining lawyer. Id. According to the court, this was “confirmed” by the witness’s
“repeated references to himself as ‘the professor’ and a ‘doctor of law,’ and repeated expressions of his
belief that [the examining lawyer was] a ‘joke’ and a ‘[f___ing] idiot.’” Id. at 187.

Early in the deposition, the following exchange took place:

Q.  Do you know—
A.  No, I don’t know. Be specific.
DL:  Let him finish the question.
Q.  Sir, if you can’t be a little more civil—
A.  I am very civil.
Q.  —in how you respond to my questions—
A.  I am very civil.
Q.  What we can do is we can have this deposition in front of a judge.
A.  We can do that.
Q.  And the judge can—
A.  Let’s do that.
Q.  No, no. We’re not going to—

10 The Court may have been referring to Federal Rule of Civil Procedure 32(b), which permits an
objection to be made to deposition testimony at the time of trial if the testimony “would be inadmissible if
the witness were present and testifying.”
A. Let’s do that; this way he can rip your a-- out.
Q. We’re not going to do that, sir, okay.
A. Then don’t f---in’ threaten me, a--hole.
Q. Well, sir, I would appreciate it if you would control your language in light of the people that are present in the room and I would appreciate it if you would be a little more courteous, okay.
A. I’m very courteous.
Q. Okay. Now—
A. Let’s go in front of a judge and shut up.
Q. Sir—
A. Shut your mouth.

_Id._ at 186–87.

Later, the following exchange:

Q: Sir, were you involved in flipping that property?
A: You tell me.
Q: Sir, I’m going to ask the questions. You’re going to answer the question.
A: I just responded with a question.
Q: Were you involved in flipping the property at 207 North Rutherford?
A: You tell me. And you provide that evidence to the court.
Q: It doesn’t work that way, sir.
A: Yes, it does. That’s my answer. Listen, we can go around in circles and you’ll end up with the same answer. You tell me. You’re that good. You’re hired by GMAC.
Q: Sir, my question is, and I expect an answer.
A: I can’t recall.
Q: Were you involved in flipping 207 North Rutherford?
A: I can’t recall. I’m involved in flipping you.

_Id._ at 190.

Things did not improve on the second day of the examination:

Q: Well, I will represent to you . . . that I served Mr. Finger with a subpoena for all of the records of the closings on those loans, including the records of payments and disbursements.
A: And you’re shooting blanks.
Q: Are you very pleased with yourself, sir?
A: Yes, I am.
Q: Because you’re trying to perpetrate a fraud and hide it?
A: Go f---k yourself, Bob. Now, you’re going to have to wait.
Q: Sir, if you keep walking out--
A: Shut the f---k up.

* * *

[ Witness leaves the room. ]

_Id._ at 188.
The court imposed sanctions. In a thorough and analytical opinion, the court required that the witness be deposed again, under the supervision of a magistrate judge. *Id.* at 193. The witness and his lawyer were held jointly and severally liable for the examining party’s fees and expenses incurred in presenting the motion, and in preparing for and conducting “the portion of the deposition sessions . . . that was frustrated by” the witness’s conduct. *Id.* at 194. In sanctioning the defending lawyer, the court was critical of the fact that he (according to the opinion) “sat idly by,” “incorrectly directed the witness not to answer,” and was observed (on at least one occasion) “chuckling at [the witness’s] abusive behavior toward [examining] counsel . . . .” *Id.* at 195 & n.17. “An attorney faced with such a client cannot . . . simply sit back, allow the deposition to proceed, and then blame the client when the deposition process breaks down.” *Id.* at 195 (citation omitted).

But again: Was there something that might have been done by the examining lawyer, at the time of the examination, to minimize the abusive conduct (as unlikely as that may seem) and thereby maximize the information flow? This is where system taught by Dave Malone comes in.

### C. A Common Sense Approach to the Difficult Deposition.

At this point, a few themes should be apparent. First, discovery works best when information flows freely. When witnesses are comfortable, information flows more freely than when they are not comfortable. Information flow is interrupted (it generally stops) when the lawyers are arguing with one another. Normal people (i.e., witnesses) clam up when lawyers squabble. They become especially reticent to speak when somebody calls the court in the middle of a deposition.

Second, depositions tend to roll off the track when the lawyers start speaking to one another, or when they speak to the witness in a form other than by questions. Less direct communication between the lawyers, and fewer statements directed at the witness, generally result in more pages of transcript devoted to meaningful discovery.

Third, nothing in the Federal Rules (or elsewhere, so far as we know) requires the examining lawyer to respond to objections (including speaking objections) made by the defending lawyer on the record of a deposition. In almost all cases the examining lawyer waives nothing if he does not respond.

Finally, question style directly effects the examiner’s ability to stimulate the flow of information. In general, leading questions are viewed as confrontational. They put words in the mouth of the witness. When the question is viewed as argumentative, the witness and his lawyer may react in a fashion that limits the free flow of information. Open, non-leading questions generally have the opposite effect. They invite the witness to teach.

#### 1. The One Word Approach.

The system taught by Dave Malone for dealing with the defending lawyer who obstructs builds on these principals. It can be summed up in one word: “Don’t.” “Do not play his game.” The Effective

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11 There are many goals that can be pursued in a deposition. These include, in addition to discovery, (i) setting up impeachment, (ii) pinning down specific testimony necessary for a motion, or to establish the elements of a claim, (iii) boxing witnesses in, or out on specific matters, (iv) preservation of testimony for trial, (v) assessment and settlement, (vi) and many others. It is generally agreed that different techniques (including, for example, the use of leading questions, or carefully structuring an examination to limit the testimony given) may be appropriate, depending on the purpose of the examination.
Deposition (Rev’d 3rd Ed.) at 165. Do not acknowledge the objection. Do not respond. Do not even look at the obstructor. Id. “In short, behave as if opposing counsel were dead and no longer involved in the deposition.” Id. Maintain a polite and calm demeanor. Focus only on the witness. And say, in a pleasant voice (with a slight smile), “Mr. Smith, you may answer.”

This works. It takes patience, but it absolutely, positively works. The beginning may be rocky but within the first 45 minutes or so, if the examiner sticks with the system, the loquacious defending lawyer simply recedes into the background. Rapport is developed with the witness and soon she ignores the defending lawyer too. A rhythm develops, “question, statement, you may answer, response.” Then “question, answer, question, answer.” The rhythm evolves into a conversation. The examiner’s outline and notes are pushed away and she drops the “lawyer act.” No one hears the objections anymore. The court reporter is forgotten. Information flows freely.

Sometimes the defending lawyer refuses to be ignored. In these cases the “one word approach” is more flexible. Malone recommends a simple acknowledgment. Again, without diverting your attention from the witness say, simply: “The objection is noted. You may answer.” Again, this works like a charm. Before long, the “objection is noted” part fades away. Sometimes, so does the “please answer.” Again, a conversation evolves.

There are cases that call for more drastic measures. For example, the objection that the question is vague, or lacks sufficient specificity suggests to the witness that she should evade. Again, do not respond to the objector. Consider involving the witness: “Do you understand the question?” If the witness says no, then ask her what she does not understand, and why. Then ask the witness to fill in the blanks: Ask for her understanding of the term or concept at issue, and use her definition. See id. at 169. Soon, the “ambiguous” or “vague” objections will cease.

In short, use your wits. Do not argue or respond, just ask the next question.

If all else fails (including an informal, off-the-record discussion with counsel) then bring on the lawyer stuff. But recognize that when you do this you will likely destroy whatever rapport had been developed with the witness. The conversation, and the information flow, will (at least temporarily) cease. But if the deposition is headed south anyway, make your record. Without looking at opposing counsel state: “Let the record reflect that counsel’s objection was suggestive, designed to coach the witness, and in violation of Federal Rule of Civil Procedure 30.” Then, to the reporter: “Please mark this point in the record so that we may retrieve it quickly should we need to approach the court.” Then add, to the witness: ‘You may answer.’ See id. at 169–71. Privilege objections (based on the attorney-client or other testimonial privileges) are an entirely different matter. An instruction not to answer is permitted “only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under [FRCP] 30(d)(3).” FED. R. CIV. P. 30(c)(2). When privilege objections are made, and instructions not to answer issued, the examiner has

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12 Never follow up with: “Now, Mr. Smith will you [or would you] answer?” This invites the witness to decline to answer, in light of the objection.

13 Dropping the “lawyer act” is an art form. It requires the avoidance of “lawyer words.” It involves the use of open, non-leading questions that allow the witness to teach, while only occasionally and subtly inserting a leading question to nail down a point. It requires that one display courtesy. It includes the demonstration of appropriate empathy and the use of non-verbal cues such as “head nodding,” pausing, and showing interest. It requires the examiner to learn how to press a witness without appearing to press. Control is established when necessary, but it is done politely.

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idea since arguments made on the fly in these situations tend to be less than well considered, and witnesses thereafter (generally) shut down. Better to move on to other question areas (if possible) and present a motion later, if required.


Without intending to ‘Monday morning quarterback’ the lawyers actually involved in these excerpts (nor to rationalize conduct found by a court to be improper), one might consider the (admittedly hypothetical) impact of this approach in the context of the deposition excerpts quoted previously. In the Paramount case for example, the examining lawyer faced open hostility from his opponent. But what might have happened had the examining lawyer, at the outset, simply moved to his next question when the improper instruction not to answer was given, rather than direct his response to the defending lawyer (“No Joe—“). Could the examiner have rephrased? (“Do you know why Mr. X was calling that material to your attention?”). Would this have resulted in more productive examination (and minimized the eruption)?

In Serrano, could the examining lawyer have elicited more testimony, when confronted by the improper speaking objection, by simply directing the witness to respond: “You may answer”? Rather than engage in colloquy in front of the witness, would an off-the-record discussion, outside of the witness’s presence, been sufficient to get the message across to the two DLs? If the witness continued to evade (in response to the improper and suggestive “calls for speculation” objection) could the response have been: “I’m not asking you to speculate. I’m simply asking whether, given what you know, you believe that the . . . insurance carrier should have at some point paid policy limits . . . .?” And if the answer were “I don’t know” perhaps another question: “What would you want to know, in order to answer that question?”

Perhaps nothing could have been done to control the disruptive witness in the GMAC Bank case. But it should be noted that early in the first excerpt from that deposition the examining lawyer directed a statement, rather than a question, to the witness: “Q: Sir, if you can’t be a little more civil—.” The examiner then threatened to “have this deposition in front of a judge.” It is hard to know what came before, but the examiner and witness were plainly off track thereafter. Would a question have been better? Similarly where the examiner asked whether the witness was involved in “flipping that property” and the witness said “You tell me. And you provide that evidence to the court” was the witness really saying ‘that question is argumentative’? Would basic questions regarding the dates of purchase and sale been more productive? And when the examining lawyer accused the witness of ‘trying to perpetrate a fraud and hide it’ should we be surprised that the free flow of information might be diminished?

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Things sometimes happen in a deposition that no examination approach or technique can prevent or stop—requiring resort to the courts for relief. But experience shows that when counsel remains focused

little choice but to make her record (by exploring the factual basis for the privilege assertion) and present a motion to the court, typically after finishing the examination on other matters.

15 The suggestion that these techniques (and others) were not employed at other points in these depositions (whether on or off the record) is not intended. The use of the excerpts is intended solely to help illustrate the approach suggested in this article.

16 Of course, there is nothing wrong with asking for speculation in a deposition. It may not be admissible at trial, but it is certainly discoverable at a deposition, under Federal Rule 26.
on the essence of the process (questions to and answers from the witness), and has a firm grasp of the rules, even the most difficult of depositions can be an effective truth seeking opportunity.