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Mired in Obstructionism:[1] One Judge's Creative Sanction For Witness Coaching During Depositions

by Kathleen J. St. John

In the Spring 2011 issue of the *CATA News*, Ellen Hirshman hosted a roundtable discussion on Speaking Objections At Depositions.[2] Three plaintiffs' lawyers, one defense lawyer, and a Common Pleas Judge discussed obstructionist tactics during depositions and how to deal with them.[3] These attorneys noted that while speaking objections are an infrequent problem for the seasoned litigator, they still do happen, and once they have taken place "the damage is done and the witness's response has been shaped accordingly. The question then arises, what relief, what sanctions, am I entitled to from the Court?"[4]

Recently, a federal judge imposed a creative sanction on a lawyer who engaged in excessive speaking objections. In *Sec. Nat'l Bank v. Abbott Labs.*,[5] Judge Mark W. Bennett of the United States District Court for the Northern District of Iowa ordered the offending 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 or state court."[6]

The decision illustrates the obstructive tactics litigators are sometimes confronted with, and a novel solution one court imposed to discourage their recurrence.

A. The *Sec. Nat'l Bank* Case.

1. Background.

Sec. Nat'l Bank was a product liability action on behalf of a young child who suffered brain damage after consuming baby formula allegedly tainted by harmful bacteria. During trial, the judge, *sua sponte*, filed a show cause order as to why he should not sanction one of the defense attorneys for a "serious pattern of obstructive conduct" exhibited during depositions.[7] The show cause hearing was postponed until after the verdict – which was returned in favor of the defendant Abbott Laboratories.

The offending attorney, a partner in a large law firm, was represented in the sanctions hearing by another partner, whom the court described as "one of the best trial lawyers I have ever encountered."[8] The attorney urged that sanctions by a federal judge would seriously affect the offending attorney's otherwise outstanding career, and "should be imposed, if at all, with great hesitation."[9] The court did not disagree, but believed the facts warranted sanctions. Judges, the court stated, "so often ignore [obstructionist] conduct, and by doing so we reinforce – even *incentivize* –obstructionist tactics."[10]

2. The Improper Conduct.

The court found the offending attorney to

have engaged in three categories of obstructive tactics: excessive use of form objections, witness coaching, and "ubiquitous interruptions and attempts to clarify questions posed by opposing counsel."[11]

The least of these offenses – but still disturbing to the court – were the "at least 115" form objections raised by the attorney in two depositions.[12] Although the court believed that objecting to "form" without stating a basis for the objection was improper, it declined to sanction counsel for these objections because other courts have held them to be proper.[13] The court found, however, that the excessive "form" objections "facilitated" the witness coaching and other interruptions, and, to that extent, "amplified" the sanctionable nature of that other conduct.[14]

As for the witness coaching, the conduct fell into several categories. First, there were the "clarification-inducing objections" that caused witnesses to request clarification of "otherwise cogent questions.[15] Objections such as "vagueness," "calls for speculation," "ambiguous," or "hypothetical" served as cues for the witness to avoid the examiner's question. At times, the results bordered on the comical as in the following excerpt:

> Q. Is there – do you believe that there's – if there's any kind of a correlation that could be drawn from OAL environmental samples to the quality of the finished product?
>
> COUNSEL: Objection; vague and ambiguous.
>
> A. That would be speculation.
>
> Q. Well, if there were high numbers of OAL, Eb samples in the factory, wouldn't that be a cause for concern about the microbiological quality of the finished product?
>
> COUNSEL: Object to the form of the question. It's a hypothetical; lacks facts.
>
> A. Yeah, those are hypotheticals.
>
> . . .
>
> Q. Would that be a concern of yours?
>
> COUNSEL: Same objection.
>
> A. Not going to answer.
>
> Q. You're not going to answer?
>
> A. Yeah, I mean, it's speculation. It would be guessing.
>
> COUNSEL: You don't have to guess.[16]

Elsewhere, the clarification-inducing objections caused the witness to give "the seemingly Pavlovian response, 'Rephrase'" and evoked "a tag-team match, with counsel and the witness delivering the one-two punch of 'objection' -- 'rephrase[.]'"[17] Such objections, the court noted, are improper as they seek to create confusion in the witness's mind that may not otherwise exist. The court explained:

> Lawyers may not object simply because *they* find a question to be vague, nor may they assume that the witness will not understand the question. The witness – not the lawyer – gets to decide whether he or she understands a particular question[.][18]

Next, there were the "if you know" or "if you understand the question" objections that predictably result in the witness having a sudden deficit of knowledge or understanding. For instance:

> Q. ... Is there any particular reason that that language is stated with respect to powdered infant formula?
>
> COUNSEL: If you know. Don't – if you know.
>
> A. No, I – no, not to my knowledge.
>
> COUNSEL: If you know. I mean, do you know or not know?
>
> A. I don't know.[19]

The "if you know" or "if you understand the question" objections, the court noted, "'are raw, unmitigated coaching, and are never appropriate.'"[20]

Then, there were the objections in which the attorney defending the deposition became both examiner and witness. These included instances where counsel reinterpreted or rephrased the examiner's question, supplied the witness with additional information, or responded to the examiner's question before the witness responded. Most outlandish among these was the moment when the offending attorney *disagreed* with the witness's answer, causing the witness to change her testimony:

> Q. My question is, was that a test – do you know if that test was performed in Casa Grande or Columbus?
>
> A. I don't.
>
> COUNSEL: Yes, you do. Read it.
>
> A. Yes, the micro – the batch records show finished micro testing were acceptable for the batch in question.[21]

The court found all of these objections "allowed [the offending attorney] to commandeer the depositions, influencing the testimony in ways not contemplated by the Federal Rules."[22] Each obstructionist tactic defeated the very purpose of the deposition as a "question-and-answer session between the examiner and witness[.]"[23] The court was not persuaded by the offending

attorney's argument that the objections were designed to steer opposing counsel "to the correct ground" when he "was on the wrong track factually" or to "speed up the process by helping to clarify or facilitate things" when "things got bogged down."[24] The court stated: "It is not for the defending lawyer to decide whether the examiner is on the 'wrong track,' nor is it the defending lawyer's prerogative to 'steer [the examiner] to the correct ground.'"[25]

Finally, the court addressed the category of excessive interruptions – a category encompassing much of what was already discussed but that provided "an independent reason to impose sanctions."[26] The court noted that the offending attorney's name appeared at least 92 times – or once per page – in the transcript of one deposition; and 381 times – or almost three times per page – in the transcript of another deposition. "By interposing many unnecessary comments, clarifications, and objections," the court stated, "Counsel impeded, delayed, and frustrated the fair examination of witnesses during the depositions Counsel defended."[27]

3. The Sanction.

Although the offending conduct would justify monetary sanctions, the court was "less interested in negatively affecting Counsel's pocketbook than... in positively affecting Counsel's obstructive deposition practices" and "deterring others who might be inclined to" engage in similar practices.[28] Hence, the "outside-the-box" sanction of creating a training video explaining the "holding and rationale of this opinion."[29]

The video was to be written and produced by the offending lawyer; and that lawyer or another partner in the firm was to appear in the film. Once approved by the court, the completed video was to be provided to all lawyers in the firm who engaged in state or federal litigation or who worked in any practice group in which at least two of the lawyers had filed an appearance in any state or federal case in the United States. The sanctioned lawyer then had to file an affidavit with the court certifying compliance with the court's order, along with a copy of the email notifying the appropriate lawyers in the firm about the video.

B. Conclusion.

The *Sec. Nat'l Bank* case presents an extreme example of obstructionist tactics used by some attorneys in depositions. The court in that case acknowledged that occasional instances of the conduct described in its decision would not warrant sanctions.[30] Indeed, as discussed in the prior issue of the *CATA News*, "sometimes the talking objection is absolutely essential to prevent abusive questioning. So when a judge is confronted with this question, it's not a one-side question. He has to get to the heart of the matter, as to what the interactions were and what the real situation was in the deposition."[31]

As of the writing of this note, the *Sec. Nat'l Bank* sanctioning order is on appeal in the Eighth Circuit Court of Appeals, and the order is stayed. But the opinion has caught the attention of practitioners,[32] and, regardless of the outcome on appeal, remains a rich source of authority to cite when seeking sanctions for excessive obstructionist conduct in depositions. ■

End Notes

1. "Discovery – a process intended to facilitate the free flow of information between parties – is now too often mired in obstructionism." *Sec. Nat'l Bank v. Abbott Labs.*, 299 F.R.D. 595, 596 (N.D. Iowa 2014).
2. *Speaking Objections At Depositions: A Roundtable Discussion*, hosted by Ellen H. Hirshman, CATA News, Spring 2011, pp. 12-17.
3. The plaintiffs' attorneys were Gerry Leeseberg of Leeseberg & Valentine in Columbus, Ohio; Steve Collier of Connelly, Jackson & Collier, in Toledo, Ohio; and Toby Hirshman, then of Linton & Hirshman in Cleveland, Ohio.The defense attorney was Bill Bonezzi of Bonezzi, Switzer, Murphy, Polito & Hupp in Cleveland, Ohio. The judge was Richard McMonagle of the Cuyahoga County Court of Common Pleas.
4. Gerry Leeseberg, quoted in *Speaking Objections At Depositions, supra*, at p. 14.
5. 299 F.R.D. 595 (N.D. Iowa 2014).
6. *Id.* at 610.
7. *Id.* at 598.
8. *Id.* at 597.
9. *Id.*
10. *Id.* (emphasis by the court).
11. *Id.* at 598.
12. *Id.* at 600.
13. *Id.* at 603.
14. *Id.* at 603-604.
15. *Id.* at 604.
16. *Id.*
17. *Id.* at 605.
18. *Id.* (citing *Cincinnati Ins. Co. v. Serrano*, No. 11-2075-JAR, 2012 U.S. Dist. LEXIS 1363, 2012 WL 28071, at *5 (D. Kan. Jan. 5, 2012)).
19. *Id.* at 607.
20. *Id.* (citing *Serrano*, 2012 U.S. Dist. LEXIS 1363, 2012 WL 28071, at *5).
21. *Id.* at 608.
22. *Id.*
23. *Id.* (citing *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993)).
24. *Id.* at 608-609.
25. *Id.* at 609.
26. *Id.* (citing *Fed. R. Civ. P. 30*, advisory committee notes (1993 amendments)).
27. *Id.*
28. *Id.*
29. *Id.* at 610.
30. *Id.*
31. Toby Hirshman, as quoted at p. 15 of *Speaking Objections at Depositions,* n. 1, *supra.* Compare, *Cuyahoga County Local Rule 13.1(B)(3)(f)* (permitting objections "necessary to assert that the questioning is repetitive, harassing, or badgering").
32. *See, e.g.*, Joe Patrice, Biglaw Firm Ordered To Make A Video Apologizing For Discovery Abuses, July 30, 2014 at 5:37 p.m., http://abovethelaw.com/tag/june ghezzi/