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Footnote Eight and the Objection to the Form of the Question

*A child should always say what's true
And speak when he is spoken to,
And behave mannerly at table;
At least as far as he is able.*

Robert Louis Stevenson, A Child's Garden of Verses: Whole Duty of Children (1885).

Like any good parent figure, the Supreme Court of South Carolina wants its attorneys practicing in South Carolina to play fairly with one another. The Court reminded the Bar as much with its amendment to Rule 30(j), SCRPC in 2000. "The intent of the amendment [was] to help eliminate conduct tending to interfere with or impede depositions." Rule 30, SCRPC (Note to 2000 Amendment). "The net effect of the rule has been to

restore the truth-seeking function of depositions and to ensure that the 'witness comes to the deposition to testify, not to indulge in parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record.'" Sidebar, The Hon. Gary Hill, ~~Rule 30(j), Charlie McCarthy and the potted plant~~, S.C. Lawyer p. 26 (September 2005), quoting Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993). The principal example of this change is the intended disappearance of the speaking objection and the elevation of the "objection to the form of the question" in the listening attorney's repertoire for making objections at a deposition. But what does this objection mean?

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After several, very informal surveys at depositions, of co-workers, and over lunches, I can safely conclude that no two attorneys define the objection to the form of the question the same. Nonetheless, the general consensus to this unnatural objection is that one knows the objection when they hear the offending question that compels the listening attorney to object to the form of the question preceding it. Indeed, an objection to the form of the question is an objection to the mode, errors, or irregularities as to the taking of depositions only—it does not address content. See Rule 32(d)(3), SCRCP. Unless specifically restricted by an applicable privilege or to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense, the scope of discovery is very broad to include “any matter... which is relevant to the subject matter involved in the pending action.... [including information that is] inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” Rule 26(b)(1), SCRCP; and see generally Rule 26(c), SCRCP. “Evidence is relevant if it has *any tendency* to make more likely, or less likely, any fact

that is of consequence to the litigation.” Boyd v. U. of Md. Medical Sys.tem, 173 F.R.D. 143, 148 (D. Md. 1997) (Emphasis in original). (Referencing the Federal Rule of Evidence 401 which is identical to Rule 401, SCRE.).

Although the objection to the form of the question is not a gatekeeper restricting the introduction of certain testimony in a deposition, it serves the important role of preparing the deposition for its eventual use at trial. The purpose for requiring objections to the form of questions and answers in depositions is “to give questioning counsel an opportunity to rephrase the question, lay a better foundation, or clarify the question so that evidence will not be rejected at trial because of inadvertent omissions or careless questions.” Hemeyer v. Wilson, 59 S.W.3d 574, 581 (Mo. Ct. App. 2001) (citation omitted). Stated another way, requiring objections to the form of questions and answers made during the process of taking a deposition ensures “that the deposition retains some use at the time of trial; otherwise counsel would be encouraged to wait until trial before making any objections with the hope that the testimony, although relevant, will be excluded because of the

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manner in which it was elicited.” State v. Bailey, 714 N.E.2d 1144, 1151 (Ind. Ct. App. 1999) (citation omitted); see also Mundy v. Angelicchio, 623 N.E.2d 456, 461n.7 (Ind. Ct. App. 1993) (citation omitted). Indeed, although some testimony from the deposition transcript may be addressed at trial regarding admissibility, the way a question is asked at the deposition must be contemporaneously objected to or the right to challenge the form of the question may be waived. Cooks v. O’Brien Properties, Inc., 710 A.2d 788, 796 (Conn. Ct. App. 1998) (“[U]nless reserved by agreement, objections as to form (leading questions, opinion, or unresponsive answers)... are generally waived if they could have been cured by prompt presentment.”). Both the South Carolina and the Federal Rules of Civil Procedure state that:

Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented,

are waived unless seasonable objection thereto is made at the taking of the deposition.

Rules 32(d)(3)(B), FRCP & SCRPC.

In this light, the Maryland District Court in the case of Boyd v. University of Maryland Medical System outlined ten examples of proper objections to the form of questions at a deposition. The source of these proper objections comes in part from the Local Discovery Guidelines from the Federal District Court in Maryland. See “Local Rules” at <http://www.mdd.uscourts.gov/> The Boyd court states in footnote eight of the opinion that the “most frequent grounds for objecting to the form of a question,” in order to prevent waiver of the objections, are:

- (1) the question is too broad or calls for an excessive narrative answer;
- (2) the question is compound;
- (3) the question has been asked and responsively and completely answered;
- (4) the question calls for conjecture, speculation or judgment of veracity;
- (5) the question is ambiguous, imprecise, unin-



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telligible or calls for a vague answer;

(6) the question is argumentative, abusive or contains improper characterization;

(7) the question assumes as true facts in dispute or not in evidence;

(8) the question misquotes a witness,' earlier testimony;

(9) the question calls for an opinion from a witness not qualified to give one; and

(10) the question is leading under circumstances where leading questions would not be permitted by Rules 611(c) of the South Carolina and Federal Rules of Evidence. ²

Boyd, 173 F.R.D. 143, 148 (D.Md 1997). And while it is presumptively improper for an attorney to state his or her reason behind the objection to the form of a question, she or she should be prepared to specifically state specifically the reason behind the objection if asked. An improper objection to the form could open the door for sanctions. Everyone should be familiar with the case of In the Matter of Anonymous Member of the South Carolina Bar, 346 S.C. 177, 552 S.E.2d 10 (2001). Those who are not should find a copy and read it at least twice before their next depo-

sition. The Court in Anonymous made it clear that improper conduct warrants sanctions against the offending attorney and, in some instances, the supervising attorney as well. These sanctions can include:

(1) all penalties available to the judge upon a finding of contempt of court;

(2) specifying that designated facts be taken as established for purposes of the action;

(3) precluding the introduction of certain evidence at trial; ¹

(4) striking out pleadings or parts thereof;

(5) staying further proceedings pending the compliance with an order that has not been followed;

(6) dismissing the action in full or in part;

(7) entering default judgment on some or all the claims; or

(8) an award of reasonable expenses, including attorney fees.

Anonymous at 194, 552 S.E.2d at 18. The basis for this and other rules of civil procedure is to preserve civility in the profession. The Federal Fourth Circuit has At least one court commented on the difficulty of maintaining



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proper decorum in a setting outside the presence of a judge:

The setting for a deposition mimics trial, with one important difference: a court reporter is present, testimony is taken under oath, counsel are present to zealously represent their clients, yet when the inevitable occurs, a difference of opinion regarding the propriety of a question, there is no judge to rule on the dispute. Instead, counsel are expected to rise above their roles as advocates for a particular party, and, acting as officers of the court, resolve their differences on the spot without outside intervention.

Boyd v. U. of Md. Medical System, 173 F.R.D. 143, 144 (D.Md 1997).

The following are examples of *improper* objections to make at a deposition:

- “speaking” objections (to prevent witness coaching);
- brief suggestive interjections (to prevent witness coaching);
- interjections by the witness's attorney such as “if you remember” and “don't speculate” (because they suggest to the witness how to

answer the question);

- a witness's attorney cannot object to a question just because the attorney does not understand the question;
- a witness's attorney cannot state for the record their his or her interpretations of questions (because they are “irrelevant and improperly suggestive to the deponent”);
- a witness's attorney cannot rephrasing questions for the witness;
- the objection “asked and answered” is improper unless the witnesses attorney believes the repetitive questioning is approaching the level of harassment and the attorney will be making a motion for a protective order Rule 30(d), SCRPC.

Anonymous, at 191-193, 552 S.E.2d at 17-18. Notably, the objections to the form of the question as outlined by Boyd are not precluded by Anonymous.

So, speak your objection to the form of the question at your next deposition if you must, but think before you speak.



¹ The Boyd court specifically references the Local Discovery Guidelines, Guideline 5(d) (D. Md. 1995) as the principal behind this example of a proper objection. Guideline 5(d) states that it is “presumptively improper to instruct a witness not to answer a question during the taking of a deposition unless [a privilege or protective order is being asserted].” The guideline continues by stating that it is “also presumptively improper to ask questions clearly beyond the scope of discovery permitted by [the general rules of discovery], particularly of a personal nature, and continuing to do so after objection shall be evidence that the deposition is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the deponent or party,” which itself is prohibited.

² Rule 611 is identical in the South Carolina and Federal Rules of Evidence:

(c) Leading Questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

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