

Objecting in Depositions--Avoiding Waiver

by Abigail B. Cella

Although many of us attend depositions on a regular basis, and at one time or another learned the rules concerning deposition conduct, a refresher never hurts. I decided to explore the topic of objecting in depositions after several of my colleagues and I were in disagreement over whether “object to form” is sufficient to preserve objections or the specific error (*e.g.*, asked and answered, misleading, *etc.*) must be stated. After reviewing the Indiana and Federal Rules and related case law, it appears that the safest approach is that--if any timely objection can be made at a deposition--counsel should make a specific and concise objection or risk waiving the point.

It is well settled that depositions may be used at trial or a hearing, so long as the deposition is admissible under the Rules of Evidence. *See* Indiana Trial Rule 32(A). To that end, Indiana Trial Rule 32(B) allows objections to the use of depositions at trial or a hearing for any reason that would require the exclusion of the evidence if the witness were then present and testifying. Trial Rule 32(D)(3) then limits subsection (B), providing in part that errors and irregularities in the form of the questions or the answers are waived unless reasonable objection is made at the taking of the deposition. What is clear is that a complete failure to object to the form of questions is a waiver. *See Richmond Gas Corp. v. Reeves*, 302 N.E.2d 795, 808 (Ind. Ct. App. 1973) (holding that appellant waived any error arising from improper hypothetical questioning, because no objection was made when the deposition was taken and that trial court did not commit reversible error in allowing portions of deposition to be read into evidence).

This same subsection also has a catch-all provision stating that errors of any kind that might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection is made at the deposition. Even objections that are usually not waived by failure to make them at the deposition (*e.g.*, competency of a witness or testimony, or relevancy or materiality of testimony) still may be waived if the ground for the objection might have been obviated or removed if presented at that time. Indiana Trial Rule 32(D)(3)(a). The overarching theme of Trial Rule 32(D)(3) appears to be that objections will be waived if they could have cured the error at the time of the deposition.

Common “form of question” objections include: the question is ambiguous and unintelligible, asked and answered, argumentative, assumes facts not in evidence, the question is compound, the question mischaracterizes the deponent’s prior testimony, and there is a lack of proper foundation for the question. Therefore, “object to form,” without specifying which of the foregoing form objections counsel is invoking, may very well be an unreasonable objection, given the broad range of such objections.

Indiana Trial Rule 30 (governing depositions upon oral examination) is also instructive. Trial Rule 30 provides, in part, that “[w]hen there is an objection to a question, the objection and reason therefor *shall* be noted.” Emphasis added. Thus “object to form” would be the objection, and “the question is misleading” for example, would be the reason therefor.

Wynder v. Lonergan, 286 N.E.2d 413 (Ind. Ct. App. 1972), is often cited in this context; however, when *Wynder* is read in conjunction with Trial Rule 32, some differences are noted. Again, Trial Rule 32(D)(3)(a) provides certain objections that cannot be waived unless the ground for the objection could be obviated, *etc.*, and 32(D)(3)(b) provides objections that are waived, including errors of any kind that could be obviated. However, the court in *Wynder* lumped all of the objections listed in Trial Rule 32(D)(3)(a-c) (*i.e.*, competency of a witness;

competency, relevancy, or materiality of testimony; manner of taking the deposition; form of questions or answers; errors in the oath or affirmation; conduct of parties; other form defects; and form of written questions submitted under Rule 31) into the same category: “the kinds of objections which require seasonable objections.” *Id.* at 415. The court explained that inadmissible deposition testimony cannot be waived by failing to object when the deposition is taken unless the testimony falls within one of the eight categories from 32(D)(3)(a-c), and even then, waiver may not attach if a seasonable objection could not have cured the defect. *Id.*

Osborne v. Wenger, 572 N.E.2d 1343 (Ind. Ct. App. 1991), is the other leading case on this issue. In *Osborne*, the court ruled that an objection regarding the competency of the evidence, specifically the admissibility of the opinion of the expert witness, was not waived. *Id.* In context, this meant that the party asserting waiver had to prove that the witness indeed possessed the necessary credentials to render his opinion admissible, which she failed to do and the opinion was therefore excluded. *Id.* at 1344-45. *Osborne* is perhaps most interesting for its dissent.

In the dissent, Judge Staton explained that he would have held that where deposition testimony is to be used in lieu of live testimony at trial, the objection to the competency of the witness to testify to a particular subject is an objection which might have been obviated and would be waived if not made at the deposition. *Id.* at 1349. (Of course, the Indiana Court of Appeals has since stated that the Indiana Trial Rules do not recognize a distinction between discovery depositions and trial depositions. *Hagerman Constr., Inc. v. Copeland*, 697 N.E.2d 948, 953 (Ind. Ct. App. 1998)).

Part of Judge Staton’s reasoning was based on the Sixth Circuit’s opinion in *Bahamas Agricultural Industries, Ltd. v. Riley Stoker Corp.*, 526 F.2d 1174, 1181 (6th Cir. 1975), which outlined the rationale behind Federal Rule of Civil Procedure 32 as follows:

If the objection could have been obviated or removed if made at the time of the taking of the deposition, but was not made, then that objection is waived. The focus of the Rule is on the necessity of making the objection at a point in the proceedings where it will be of some value in curing the alleged error in the deposition. When a party waits until trial to object to testimony in the deposition, the only manner in which to cure the deposition is to bar the objectionable portions from the trial. It is important that objections be made during the process of taking the deposition, so 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, would be excluded altogether because of the manner in which it was elicited.

Interestingly, two years later, the Sixth Circuit’s “rationale” in *Bahamas* was taken from the dissent in *Osborne* and cited in a footnote by the Indiana Court of Appeals in *Mundy v. Angelicchio*, 623 N.E.2d 456 (1993). In *Mundy*, the court held that if the doctor’s statements at his deposition were impermissible legal conclusions, then Mundy waived any error by failing to object to the form of the question and answer when the deposition was taken. *Id.* at 461-62. The court reasoned that the error would have been in the form of the question and answer and could have been easily cured if promptly presented at the time. *Id.* Unfortunately, the court did not elaborate on the exact objection that would have preserved the objection (*i.e.*, “object to form” or “object to form based on legal conclusion”).

Six years after *Mundy*, the Sixth Circuit's "rationale" in *Bahamas* was cited again by the Indiana Court of Appeals in a footnote in *State v. Bailey*, 714 N.E.2d 1144, 1151 (Ind. Ct. App. 1999). And as discussed below, even the Seventh Circuit has found the Sixth Circuit's reasoning on this point to be instructive. See *Kirschner v. Broadhead*, 671 F.2d 1034, 1037-38 (7th Cir. 1982).

It is helpful to consider federal case law, given the scant decisional law in Indiana concerning deposition conduct and the fact that the language of Trial Rule 32 is similar to that of its counterpart in the Federal Court system (Federal Rule of Civil Procedure 32(d)(3)(B) provides that an objection to an error or irregularity at an oral examination is waived if it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time, and it is not timely made during the deposition). See *Bryant v. Lake County Trust Co.*, 334 N.E.2d 730, 735 (Ind. Ct. App. 1975) (in interpreting state rule governing intervention, court could consider cases interpreting federal intervention rule because state rule was similar to federal rule). As aptly stated by the Pennsylvania District Court for the Eastern District: "Currently at bar is an issue on which, despite its presence in nearly every case brought under the Federal Rules of Civil Procedure, there is not a lot of caselaw: the conduct of lawyers at depositions." *Hall v. Clifton Precision, a Div. of Litton Sys., Inc.*, 150 F.R.D. 525, 526 (E.D. Pa. 1993).

In *Hall*, the court discussed the propriety of "speaking objections" from a deponent's own lawyer and private conferences between the deponent and her lawyer; however, the court also addressed proper objections during a deposition. *Id.* at 528-31. In a footnote, the court actually encouraged counsel not to repeatedly interrupt the deposition to make objections to the competency, relevancy, or materiality of deposition testimony, because under Rule 32(d)(3)(A), these are generally preserved for trial. *Id.* at 528. Drawing on the Committee Notes and proposed amendments to Federal Rule 32, the court further stated:

[O]bjections and colloquy by lawyers tend to disrupt the question-and-answer rhythm of a deposition and obstruct the witness's testimony. Since most objections, such as those grounded on relevance or materiality, are preserved for trial, they need not be made. As for those few objections which would be waived if not made immediately, they should be stated pithily.

Id. at 530 (citing Proposed Amendments, H.R.Doc. No. 74, at 261-63; and Fed. R. Civ. P. 32(d)(3)). This appears to be in contrast with Indiana precedent encouraging conduct which would retain the usefulness of depositions at trial.

Although there is not much Seventh Circuit case law on this issue, it appears to be more in line with Indiana precedent. In *Oberlin v. Marlin American Corp.*, the Seventh Circuit agreed that the use of leading questions during the cross-examination of a party by his own attorney, if it was objectionable, was so at the time the deposition was taken, and the error might have been cured if an objection had then been stated. 596 F.2d 1322, 1328 (7th Cir. 1979). However, the court also agreed with the Indiana district court's decision to nonetheless exclude certain leading questions and their responses under Federal Rule of Evidence 611(a) and held that this exclusion was a proper exercise of the district court's discretionary control over the mode of interrogating witnesses and presenting evidence under Rule 611(a) (which entrusts to the trial court the ultimate authority to see that a trial accomplishes its fundamental truth-seeking purpose). *Id.* at 1329. The court observed that the better practice would be for the deposition taker to state all

objections during the course of taking the deposition. *Id.*

Likewise, in *Kirschner v. Broadhead*, the Seventh Circuit held that the Indiana district court erroneously excluded portions of a deposition on the grounds that the narrative form of the answers were unresponsive and inadmissible, because such objections were not made at the time of the deposition and were therefore waived. 671 F.2d 1034, 1037-38 (7th Cir. 1982). Just like the Indiana Court of Appeals, the Seventh Circuit found the Sixth Circuit's opinion in *Bahamas* instructive (see above for full citation of the Sixth Circuit's rationale). *Id.*

The court explained that the district court's failure to admit the deposition testimony kept the jury from hearing the deponent's version of the facts, because illness precluded him from testifying at trial, and that this result is precisely what rule 32(d)(3)(B) is designed to prevent: a total exclusion of evidence on grounds which could have been remedied at deposition but cannot be at trial. *Id.* at 1038. The court concluded that if it were to exclude the deposition testimony, "we would encourage the tactics condemned in *Bahamas Agricultural Industries*." *Id.* (How could this have been remedied? Well, upon objection, the deponent would have conformed his answers to the questions, and the limited nature of the answers would have prompted the deponent's counsel to develop omitted portions of the story on cross-examination.)

What does all that mean? The overarching theme, at least from the Indiana Trial Rules and related case law and Seventh Circuit case law, is that if an objection will cure or remove a defect at the time of the deposition, it should be made at that time with specificity. Further, anything that retains the usefulness of the deposition for trial is encouraged.

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