

In *MTU of North America, Inc. v. Raven Marine, Inc.*, 475 So.2d 1063 (La. 1985) a witness was asked what he would have done as director of research and testing. He refused to answer on the grounds that the question sought irrelevant information. His counsel objected to the question as being impossible to answer and instructed him not to answer any more questions about that subject.

Another witness was asked to refer to his records and state whether there was any indication that a certain party did not carry out scheduled maintenance properly. Counsel for that witness instructed him not to examine his files for this purpose on the ground that the witness could be required to answer questions only and not to perform work for the adverse party.

The Supreme Court held:

Discovery under the Louisiana rules is extremely broad in scope, encompassing any unprivileged matter which is relevant to the action before the court, even if the information requested would not be admissible at trial, provided that it appears reasonably calculated to lead to the discovery of admissible evidence. La.C.C.P. art. 1422. The Louisiana rule governing scope of discovery is identical to the first paragraph of Federal Rule of Civil Procedure 26(b)(1). Accordingly, well reasoned jurisprudence and commentary interpreting and applying the federal rule provide useful precepts in applying La.C.C.P. art. 1422. See *Allen v. Smith*, 390 So.2d 1300 (La.1980).

There is nothing in the language of La.C.C.P. art. 1422 to require a decision that the opinions, conclusions or contentions of a party may never be discovered. Instead, the criteria of the rule are whether it is practicable and feasible to answer the inquiry and, if so, whether an answer might expedite the litigation by either narrowing the area of controversy or avoiding unnecessary testimony or providing a lead to evidence. See *Moore's Federal Practice* par. 26.56[3]; *Wright and Miller, Federal Practice & Procedure: Civil Sec. 2167* (1970); *McClain v. Mack Trucks, Inc.*, 85 F.R.D. 53, 59 (D.C.Pa.1979); *Scovill Manufacturing Co. v. Sunbeam Corp.*, 357 F.Supp. 943, 948 (D.C.Del.1973); *Luey v. Sterling Drugs, Inc.*, 240 F.Supp. 632, 636 (D.C.Mich.1965). A hypothetical question makes a tentative assumption in order to draw out and test the knowledge, opinions, conclusions and contentions of the interrogee. The determinative test, therefore, is not the form of the question or whether "fact" or "opinion" is sought, but whether it is practicable to require discovery and whether to do so would serve the purpose of the rules. *United States v. Meyer*, 398 F.2d 66, 73 (9th Cir.1968); *Long, Discovery and Experts Under the Federal Rules of Civil Procedure*, 38 F.R.D. 111, 150 (1965).

Applying these precepts, we conclude that the question asked Dr. Dinger was calculated reasonably to lead to admissible evidence. In essence, he was asked to give his opinion or conclusion as to what corporate action he would have advised regarding a special warranty provision similar to the one which defendants

contend was given to them. It was logical to assume that Dr. Dinger, as the senior corporate officer most knowledgeable of product capability, possibly would have been consulted on all special provisions of product warranty. Therefore, although Dr. Dinger testified he was not responsible for warranties and could not recall such a provision having been submitted to the board, the interrogating attorney was entitled reasonably to draw out and test Dr. Dinger's memory, knowledge and conclusions. See Wright & Miller, *supra*, Sec. 2037 n. 52. The inquiry reasonably could have stirred Dr. Dinger's memory of a forgotten board decision, or uncovered informal practices or discussions tantamount to the formulation of a company policy, or led to discovering occasions in which Dr. Dinger gave informal advice on warranties outside the board room. Any of these avenues would have been germane to whether special warranties had been given with the engines purchased by defendants.

Consequently, the attorney for the MTU corporations erred in sealing off the area of inquiry by instructing Dr. Dinger not to answer the question asked or any further inquiries about the special warranty. Furthermore, the trial judge's apparent conclusion that supplemental depositions should be ordered and that the MTU corporations should pay expenses and attorney's fees incurred in obtaining the order because their opposition to the motion was not substantially justified cannot be characterized as improper. . . There was no abuse of discretion here because the cutting off all further inquiry as to the special warranty was clearly uncalled for and only a further deposition can reopen this subject to proper discovery.

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An attorney clearly is not authorized to terminate a deposition or to dictate the manner and scope of its taking. See *Ralston Purina Co. v. McFarland*, 550 F.2d 967, 973-74 (4th Cir.1977). If he has objection merely to admissibility, the deponent must answer the question and the objection will be preserved and ruled on when and if the deposition is presented. La.C.C.P. art. 1451; Wright & Miller, *supra*, Sec. 2113 at 419, n. 22. When a deponent wishes to assert an objection that the question seeks privileged information, his only course is to decline to answer, lest the privilege be destroyed. *Eggleston v. Chicago Journeymen Plumbers, Etc.*, 657 F.2d 890, 902-903 (7th Cir.1981); Moore, *supra*, par. 37.02[2]. The authorities are divided, however, on whether relevancy is a ground for refusal to answer without seeking court guidance. Moore, *supra*, paragraphs 30.59 & 37.02; *Eggleston*, *supra*, at 903 (refusing to answer irrelevant questions may be justified); *International Union of Electrical, Radio, & Machine Workers v. Westinghouse Electric Corp.*, 91 F.R.D. 277 (D.C.D.C.1981) (objections based merely on irrelevance should be noted and the question answered); *W.R. Grace & Co. v. Pullman, Inc.*, 74 F.R.D. 80 (D.C.Okla.1977) (objections based on relevancy should be noted on the record and the question answered); *Preyer v. United States Lines, Inc.*, 64 F.R.D. 430 (D.C.Penn.1973) (evidence objected to on the basis of irrelevance shall be taken subject to

objections).

In *Watson v. Illinois Central Gulf Railroad*, 327 So. 2d 518 (La. App. 1st Cir. 1976), after a partial trial on the merits, the court and the parties agreed that the testimony of the remaining witnesses would be taken by deposition. During the cross-examination of one witness, plaintiffs' counsel asked him a question which opposing counsel considered objectionable and the witness was instructed not to answer. Thereupon, plaintiffs' counsel stated to those present that he was adjourning the deposition to seek a court order directing the witness to answer the question.

Thereafter plaintiffs did file a rule directed to defendants to show cause why the witness should not be compelled to answer the question and why defendants should not be taxed with all costs of these proceedings, including reasonable attorney's fees.

The court held:

Specifically, the issue before us is whether, in the taking of evidence by deposition for completion of a trial, a party who instructs a witness not to answer a question which such party believes is objectionable, is liable for reasonable expenses, including attorney's fee, incurred in obtaining an order compelling the deposed witness to answer the propounded question. Insofar as we can determine this issue is *res novo*.

It cannot be seriously contended that the testimony sought was for discovery purposes or that the instruction of relators' counsel to the witness being deposed was within the purview of C.C.P. Article 1511. By its terms, Article 1511 covers the taking of a discovery deposition and is limited in its application to pretrial production of evidence. In the rule respondents herein sought an order to force the witness to answer the question and to recover costs and attorney's fee under Article 1511. The provisions thereof do not apply to the instant situation.

Respondents argue in their brief that C.C.P. Article 1454 empowers the trial court to award attorney's fee as it did herein.

Our consideration of Article 1454 leads us to conclude that LSA-C.C.P. Article 1454 controls the issue. This Article, *inter alia*, provides a procedure whereby an aggrieved party, such as plaintiffs, may seek a protective order of the trial court to either limit or suspend the examination.

For Article 1454 to be available to either a party or the deponent, there must be a showing that the examination was being conducted in bad faith, or in such manner as unreasonable to Annoy, embarrass or Oppress the deponent or party. If such a showing is made the court is empowered to issue such order as is necessary to correct the abuse. The court may order the officer conducting the examination to cease the taking of the deposition, or it may limit the scope and manner of the taking of the deposition as provided in Article 1452. This Article provides the

means for limiting or ceasing an overly broad interrogation of a witness by either the witness or the party aggrieved by such examination. And, as in the instant matter, the court may issue an order directing the witness to answer the question asked by plaintiffs' counsel.

Under the provisions of C.C.P. Articles 1426 and 1429, relators were fully protected by an overly broad examination or cross-examination insofar as the competency, relevancy or materiality of such testimony is concerned. With the relators fully protected by these codal provisions, we deem it oppressive to plaintiff-respondents for relators' counsel to instruct the witness not to answer the question he thought objectionable. This unreasonably provoked the suspension of the deposition. Under LSA-C.C.P. Article 1454, the court was empowered to impose upon the relators the obligation of paying the cost of filing the motion and a reasonable attorney's fee. Cf., *Brasseaux v. Girouard*, 214 So.2d 401 (410--411) (La.App.3rd Cir. 1968), writs refused 253 La. 60, 216 So.2d 307.

One excellent approach was undertaken in a recent case in the United States District Court for the Middle District of Louisiana. In *Lewis v. National Tea Company*, 89-366-A a discovery squabble ensued when defense counsel 1) instructed a defense witness not to answer whether he had any personal objection to plaintiff's counsel obtaining a copy of his three statements regarding the accident, and 2) instructed him not to respond to plaintiff's request to draw a rough diagram of the accident scene.

Judge John Parker upheld the magistrate-judge's imposition of sanctions due to the necessity for plaintiff's counsel to apply for a protective order "directing defendant's counsel to refrain from interrupting depositions, unilaterally removing witnesses from the deposition room to discuss answers to pending questions posed by plaintiff's counsel, and instructing witnesses not to answer questions. (A copy of the magistrate-judge's ruling and the court's opinion are attached, along with a set of "Deposition Guidelines" implemented by the magistrate-judge obviously as a result of the numerous discovery skirmishes in the case.)

2. I need to talk to my lawyer before I answer that.

A comment like that will surely pique the interest of any lawyer. Do you let them go outside and talk? Can you stop them?

What if they do it after every question? Every third question?

In a much-publicized case, *Hall v. Clifton Precision*, Civ. A. No. 92-5947, United States District Court, E.D. Pennsylvania, July 29, 1993 (attached), the court addressed these issues at length and held:

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 case law: the conduct of lawyers at depositions. More specifically, the questions before the court are (1) to what extent may a lawyer confer with a client, off the record and outside earshot of the other lawyers, during a deposition of the client, and (2) does a lawyer have the right to inspect, before the deposition of a client begins, all documents which opposing counsel intends to show the client during the deposition, so that the lawyer can review them with the client before the deposition?

.....

At the beginning of the deposition, Mr. Stewart described the deposition process to Mr. Hall. During that description, he told Mr. Hall, "[c]ertainly ask me to clarify any question that you do not understand. Or if you have any difficulty understanding my questions, I'll be happy to try to rephrase them to make it possible for you to be able to answer them." Deposition of Arthur J. Hall, at 5-6. Mr. Todd then interjected, "Mr. Hall, at any time if you want to stop and talk to me, all you have to do is indicate that to me." *Id.* at 6. Mr. Stewart then stated his position: "[t]his witness is here to give testimony, to be answering my questions, and not to have conferences with counsel in order to aid him in developing his responses to my questions." *Id.*

During the brief, unfinished deposition, there were two interruptions. The first occurred when, according to Mr. Todd, Mr. Hall wished to confer with him about the meaning of the word "document." Nevertheless, when the deposition resumed, Mr. Hall asked Mr. Stewart about the meaning of "document." *Id.* at 9-10. The second interruption occurred when Mr. Stewart showed a document to Mr. Hall and began to ask him a question about it. Before Mr. Stewart finished his question about the document, Mr. Todd said, "I've got to review it with my client." *Id.* at 18. Mr. Stewart stated his objection "to Mr. Todd reviewing with his client documents that Mr. Hall is about to be questioned on in this deposition." *Id.* The parties then contacted the court, which ordered that the deposition be adjourned until the question of attorney-client discussion during the deposition could be resolved. That afternoon, the court held a conference with both counsel

about their conduct at the deposition. At the conference, Mr. Todd asserted that an attorney and client have the right to confer with one another at any time during the taking of the client's deposition. At the end of the conference, the court requested counsel to submit letter briefs on the issue, which they have done.

The Federal Rules of Civil Procedure give the court control over the discovery process. Rule 26(f) authorizes the court, after a discovery conference, to enter an order "setting limitations on discovery" and "determining other such matters ... as are necessary for the proper management of discovery." Such a conference may be called by the court itself or upon a motion by one of the parties. The Advisory Committee Notes point out that Subdivision (f) was added to Rule 26 in 1980 because the Committee believed that discovery "abuse can best be prevented by intervention by the court as soon as abuse is threatened."

Rule 30 governs oral depositions. Rule 30(c) states: "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial." Rule 30(d) gives the court the power to terminate or limit the scope of a deposition "on motion of a party" if the court finds that the deposition is being conducted in "bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party." All phases of the examination are subject to the control of the court, which has discretion to make any orders necessary to prevent the abuse of the discovery and deposition process. See, 8 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure ss 2113, 2116 (1971).

Rules 37(a)(2) and 37(a)(3) permit a party to seek, and the court to grant, an order which compels a deponent to respond to a question or to give a less evasive or more complete response.

Taken together, Rules 26(f), 30, and 37(a), along with Rule 16, which gives the court control over pre-trial case management, vest the court with broad authority and discretion to control discovery, including the conduct of depositions. It is pursuant to that authority and discretion that I enter this Opinion and Order.

Plaintiff's counsel has submitted no citation, no case law, in support of his argument that an attorney and client may confer at their pleasure during the client's deposition. On the other hand, defendant has submitted orders from numerous courts holding that such conversations are not allowed. Those courts have held that private conferences between deponents and their attorneys during the taking of a deposition are improper unless the conferences are for the purpose of determining whether a privilege should be asserted.

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One of the purposes of the discovery rules in general, and the deposition rules in particular, is to elicit the facts of a case before trial. Another purpose is to even the playing field somewhat by allowing all parties access to the same information,

thereby tending to prevent trial by surprise. Depositions serve another purpose as well: the memorialization, the freezing, of a witness's testimony at an early stage of the proceedings, before that witness's recollection of the events at issue either has faded or has been altered by intervening events, other discovery, or the helpful suggestions of lawyers.

The underlying purpose of a deposition is to find out what a witness saw, heard, or did--what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness--not the lawyer--who is the witness. As an advocate, the lawyer is free to frame those facts in a manner favorable to the client, and also to make favorable and creative arguments of law. But the lawyer is not entitled to be creative with the facts. Rather, a lawyer must accept the facts as they develop. Therefore, I hold that a lawyer and client do not have an absolute right to confer during the course of the client's deposition.

Concern has been expressed as to the client's right to counsel and to due process. A lawyer, of course, has the right, if not the duty, to prepare a client for a deposition. But once a deposition begins, the right to counsel is somewhat tempered by the underlying goal of our discovery rules: getting to the truth. Under Rule 30(c), depositions generally are to be conducted under the same testimonial rules as are trials. During a civil trial, a witness and his or her lawyer are not permitted to confer at their pleasure during the witness's testimony. Once a witness has been prepared and has taken the stand, that witness is on his or her own.

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These considerations apply also to conferences initiated by the witness, as opposed to the witness's lawyer. To allow private conferences initiated by the witness would be to allow the witness to listen to the question, ask his or her lawyer for the answer, and then parrot the lawyer's response. Again, this is not what depositions are all about--or, at least, it is not what they are supposed to be all about. If the witness does not understand the question, or needs some language further defined or some documents *529 further explained, the witness can ask the deposing lawyer to clarify or further explain the question. After all, the lawyer who asked the question is in a better position to explain the question than is the witness's own lawyer. There is simply no qualitative distinction between private conferences initiated by a lawyer and those initiated by a witness. Neither should occur.

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These rules also apply during recesses. Once the deposition has begun, the preparation period is over and the deposing lawyer is entitled to pursue the chosen line of inquiry without interjection by the witness's counsel. Private conferences are barred during the deposition, and the fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules. Otherwise, the same problems would persist. A clever lawyer or witness who finds that a deposition is going in an undesired or unanticipated direction could simply insist on a short recess to discuss the unanticipated yet desired answers, thereby circumventing the prohibition on private conferences. Therefore, I hold that conferences between witness and lawyer are prohibited both during the deposition and during recesses.

The same reasoning applies to conferences about documents shown to the witness during the deposition. When the deposing attorney presents a document to a witness at a deposition, that attorney is entitled to have the witness, and the witness alone, answer questions about the document. The witness's lawyer should be given a copy of the document for his or her own inspection, but there is no valid reason why the lawyer and the witness should have to confer about the document before the witness answers questions about it. If the witness does not recall having seen the document before or does not understand the document, the witness may ask the deposing lawyer for some additional information, or the witness may simply testify to the lack of knowledge or understanding. But there need not be an off-the-record conference between witness and lawyer in order to ascertain whether the witness understands the document or a pending question about the document.

As mentioned above, the majority of federal courts which have issued deposition guidelines have held that a private conference between witness and attorney is permissible if the purpose of the conference is to decide whether to assert a privilege. With this exception I agree. Since the assertion of a privilege is a proper, and very important, objection during a deposition, it makes sense to allow the witness the opportunity to consult with counsel about whether to assert a privilege. Further, privileges are violated not only by the admission of privileged evidence at trial, but by the very disclosures themselves. Thus, it is important that the witness be fully informed of his or her rights before making a statement which might reveal privileged information. However, when such a conference occurs, the conferring attorney should place on the record the fact that the conference occurred, the subject of the conference, and the decision reached as to whether to assert a privilege.

Having discussed off-the-record witness-coaching, I now turn to a related concern: on-the-record witness-coaching through suggestive objections. Without guidelines on suggestive objections, the spirit of the prohibition against private conferences could be flouted by a lawyer's making of lengthy objections which contain information suggestive of an answer to a pending question. The Supreme

Court has recently addressed the issue of suggestive objections in the Proposed Amendments to the Federal Rules of Civil Procedure and Forms, H.R.Doc. No. 74, 103rd Cong., 1st Sess., at 50-52 (Apr. 22, 1993).

Proposed Amended Rule 30(d) reads:

(1) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion pursuant to paragraph (3).

(2) By order or local rule, the court may limit the time permitted for the conduct of a deposition, but shall allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another party impedes or delays the examination. If the court finds such an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

The Federal Rules of Evidence contain no provision allowing lawyers to interrupt the trial testimony of a witness to make a statement. Such behavior should likewise be prohibited at depositions, since it tends to obstruct the taking of the witness's testimony. It should go without saying that lawyers are strictly prohibited from making any comments, either on or off the record, which might suggest or limit a witness's answer to an unobjectionable question.

In short, depositions are to be limited to what they were and are intended to be: question-and-answer sessions between a lawyer and a witness aimed at uncovering the facts in a lawsuit. When a deposition becomes something other than that because of the strategic interruptions, suggestions, statements, and arguments of counsel, it not only becomes unnecessarily long, but it ceases to serve the purpose of the Federal Rules of Civil Procedure: to find and fix the truth.

.....

. . . Counsel should never forget that even though the deposition may be taking place far from a real courtroom, with no black-robed overseer peering down upon them, as long as the deposition is conducted under the caption of this court and proceeding under the authority of the rules of this court, counsel are operating as officers of this court. They should comport themselves accordingly; should they be tempted to stray, they should remember that this judge is but a phone call away.

(Attached are the Hall decision and two articles discussing it.)

3. What did he tell you?

Q: “Has anyone told you how this explosion occurred?”

A: “Yes.”

Q: “Who?”

A: “A lawyer friend of mine who I went to high school with. I talked to him the

Q: “So what did he say caused the explosion?”

(Hey! I think that’s privileged! Or is it?)

(If it is, do you know how to protect it?)

“Objection, attorney-client privilege!”

Well that’s not enough under the Federal Rules. Under Federal Rule 26(b)(5):

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

The comments to Rule 26 state as follows:

Paragraph (5) is a new provision. A party must notify other parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.

The party must also provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection. Although the person from whom the discovery is sought decides whether to claim a privilege or protection, the court ultimately decides whether, if this claim is challenged, the privilege or protection applies. Providing information pertinent to the applicability of the privilege or protection should reduce the need for in camera examination of the documents.

The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if

the items can be described by categories. A party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden. In rare circumstances some of the pertinent information affecting applicability of the claim, such as the identity of the client, may itself be privileged; the rule provides that such information need not be disclosed.

The obligation to provide pertinent information concerning withheld privileged materials applies only to items "otherwise discoverable." If a broad discovery request is made - for example, for all documents of a particular type during a twenty year period - and the responding party believes in good faith that production of documents for more than the past three years would be unduly burdensome, it should make its objection to the breadth of the request and, with respect to the documents generated in that three year period, produce the unprivileged documents and describe those withheld under the claim of privilege. If the court later rules that documents for a seven year period are properly discoverable, the documents for the additional four years should then be either produced (if not privileged) or described (if claimed to be privileged).

In an excellent work on the subject of foundations, *Evidentiary Foundations*, Second Edition, by Edward J. Imwinkelried, The Michie Company, 1989, the author states:

“So he won’t tell me, I’ll just take the deposition of the lawyer.”

Not so fast, Bucko. Article 508 of the Louisiana Code of Evidence provides a procedural vehicle which an attorney can use to prohibit his being subpoenaed to provide information subject to the attorney-client privilege.

If an attorney is subpoenaed to a trial or a deposition he may follow the provisions of Article 508 to require that there be a contradictory hearing before the court to have a judge make a positive finding that the information sought is not subject to a privilege and all of the elements of the article are also present.

Art. 508. Subpoena of lawyer or his representative in civil cases

A. General rule. Neither a subpoena nor a court order shall be issued to a lawyer or his representative to appear or testify in any civil or juvenile proceeding, including pretrial discovery, or in an administrative investigation or hearing, where the purpose of the subpoena or order is to ask the lawyer or his representative to reveal information about a client or former client obtained in the course of representing the client unless, after a contradictory hearing, it has been determined that the information sought is not protected from disclosure by any applicable privilege or work product rule; and all of the following:

- (1) The information sought is essential to the successful completion of an ongoing investigation, is essential to the case of the party seeking the information, and is not merely peripheral, cumulative, or speculative.
- (2) The purpose of seeking the information is not to harass the attorney or his client.
- (3) With respect to a subpoena, the subpoena lists the information sought with particularity, is reasonably limited as to subject matter and period of time, and gives timely notice.
- (4) There is no practicable alternative means of obtaining the information.

B. Waiver. Failure to object timely to non-compliance with the terms of this Article constitutes a waiver of the procedural protections of this Article, but does not constitute a waiver of any privilege.

C. Binding effect of determination; notice to client. The determination that a lawyer-client privilege is not applicable to the testimony shall not bind the client or former client unless the client or former client was given notice of the time, place, and substance of the hearing and had an opportunity fully to participate in that hearing.

D. Scope. Nothing in this Article is intended to affect the provisions of Code of Civil Procedure Articles 863 and 1452(B).

4. “This deposition is over! We’re leaving!”

As the day goes on your opponent has become more and more obnoxious, annoying, harassing and oppressive than usual. The straw breaks the camel’s back when she asks, “Before your slip and fall, had you ever had sex with anyone other than your wife?”

(She can’t ask that, can she? We’re not alleging loss of consortium. I’ve got to stop her. But it’s not privileged. It’s not relevant, but that’s not enough to instruct him not to answer. What do I do?)

You want to grab your witness and walk. What do you do?

In *MTU of North America, Inc. v. Raven Marine, Inc.*, 475 So.2d 1063 (La. 1985) the court held as follows:

An attorney clearly is not authorized to terminate a deposition or to dictate the manner and scope of its taking. See *Ralston Purina Co. v. McFarland*, 550 F.2d 967, 973-74 (4th Cir.1977). If he has objection merely to admissibility, the deponent must answer the question and the objection will be preserved and ruled on when and if the deposition is presented. La.C.C.P. art. 1451; *Wright & Miller, supra*, Sec. 2113 at 419, n. 22.

....

At any time during the taking of a deposition, if a party or a deponent believes that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or a party, he may move the court in which the action is pending to stop or limit the scope and manner of the deposition as provided for under a protective order. La.C.C.P. art. 1444. Under this rule, therefore, upon a showing of good cause, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more orders which La.C.C.P. art. 1426 specifically lists.

An attorney who attempts to protect a deponent from oppression without seeking a court order does not forfeit the right to request relief in the event his adversary moves the court to compel discovery. If the court denies the motion to compel in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to La.C.C.P. art. 1426. See La.C.C.P. art. 1469(2).

Nonetheless, La.C.C.P. art. 1469 requires that good cause be shown for a protective order, placing the burden on the party seeking relief to show some plainly adequate reason therefore. There must be a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements, in order to establish good cause. The existence of good cause for a

protective order is a factual matter to be determined from the nature and character of the information sought weighed in the balance of the factual issues involved and a comparison of the consequential hardships caused by granting or denying the order. Wright & Miller, *supra*, Sec. 2035; Fed.Proc. Lawyers Ed. Sec. 26.70; Moore, *supra*, par. 26.72; Marrese v. Am. Academy of Orthopaedic Surgeons, 706 F.2d 1488, 1493 (7th Cir.1983) vacated on other grounds, 726 F.2d 1150 (7th Cir.1984); Glick v. McKesson & Robbins, Inc., 10 F.R.D. 477, 479 (D.C.Mo.1950).

Remember what the court said in *Hall, supra*:

. . . Counsel should never forget that even though the deposition may be taking place far from a real courtroom, with no black-robed overseer peering down upon them, as long as the deposition is conducted under the caption of this court and proceeding under the authority of the rules of this court, counsel are operating as officers of this court. They should comport themselves accordingly; should they be tempted to stray, they should remember that this judge is but a phone call away.

It is always good practice, however, that, if it looks like somebody is going to terminate the deposition and remove the witness, a request should be made to the cooler heads in the room to attempt to continue to depose the witness on non-objectionable areas. Sometimes tempers cool and you can get the deposition concluded. But even if they don't, you can still stay out of the sensitive areas and possibly acquire everything you need from this witness. You may not get another chance.

5. Your Client Lied in Her Deposition

After the deposition, your client comes up to you and tells you that she really did have a conviction for DWI but “forgot about it” until after the deposition was over. What is your obligation?

In *Louisiana State Bar Association v. White*, 539 So. 2d 1216 (La. 1989) the court stated as follows:

At a pre-trial deposition in his worker's compensation case Wellborn revealed two of his jobs but did not disclose the others. However, at trial Wellborn fully disclosed his employment on all four jobs. After Wellborn's credibility was impeached with his prior inconsistent deposition, the trial judge indicated he might refer the matter to the district attorney for investigation.

.....

White denied telling Wellborn to give false testimony on his deposition. He said he told Wellborn to tell the truth. White admitted that he was aware that Wellborn had testified falsely by concealing two of his jobs during his deposition. Further, White conceded that he did not call upon his client to correct his deposition testimony or take any step to inform the court or opposing counsel of the perjury. White testified, however, that he told Wellborn before trial that he "might as well tell them everything--the truth--because they are going to check."

Under DR 7-102(A)(4) and (7), which White is charged with violating, a lawyer is prohibited from knowingly using perjured testimony or false evidence and from counseling or assisting his client in conduct that the lawyer knows to be illegal or fraudulent. We find that the evidence is clear and convincing that White violated these rules. It is unlikely that Wellborn would have lied during his deposition if White had in fact instructed him to tell the truth. It is even more unlikely that he would have perjured himself so selectively without his attorney's assistance. White's failure to disclose the perjury to the court or to the opposing counsel indicates his complicity. Moreover, by allowing the perjury to remain concealed so as to possibly influence settlement or the development of the trial, White knowingly made use of the false evidence.

Also see attached article from the ABA Journal on the same subject.

6. “I’ll just introduce this deposition at the trial.”

Can You introduce it?

The Louisiana Code of Civil Procedure Art. 1450 and FRCP Rule 32 set forth the rules.

Is he a party?

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Louisiana Code of Evidence applied as though the witnesses were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Article 1442 or 1448 to testify on behalf of a public or private corporation, partnership, or association, or governmental agency which is a party may be used by an adverse party for any purpose.

Is he a witness?

The Code of Civil Procedure states:

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(a) That the witness is unavailable;

(b) That the witness resides at a distance greater than one hundred miles from the place of trial or hearing or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(c) Upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Rule 32 of the Federal Rules states:

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead; or

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

A deposition taken without leave of court pursuant to a notice under Rule 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition; nor shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.

Is he an expert?

The Code of Civil Procedure states:

However, any party may use the deposition of an expert witness for any purpose upon notice to all counsel of record, any one of whom shall have the right within ten days to object to the deposition, thereby requiring the live testimony of an expert. The objecting counsel of record shall pay in advance the fee, reasonable expenses, and actual costs of such expert witness associated with such live testimony. The fees, expenses, and costs specified in this Subparagraph shall be subject to the approval of the court. The provisions of this Subparagraph do not supersede Subparagraph (A)(3) nor Code of Evidence Article 804(A). However, the court may permit the use of the expert's deposition, notwithstanding the objection of counsel to the use of that deposition, if the court finds that, under the circumstances, justice so requires.

7. “No questions.”

Be careful. We all take hundreds of depositions, assuming that they are just “discovery” depositions and are not all that important since this witness will come to the trial. In a very large majority of cases, and when you least expect it, that witness will **not** be able to come to trial for various reasons. That “discovery” deposition will be his testimony and will be read to the jury. Assume from the beginning that there’s a chance that this deposition may be used at trial. Many are. Many are not. But you should at least think about what would happen if that witness is dead, moved, can’t be found or is a doctor who refuses to come to trial unless you pay him some outrageous fee.

What if the other lawyer, whom you assumed would not be asking any questions, starts asking a bunch of pointed questions? Well, it may be a warning sign. If a deponent’s counsel begins an extensive examination of his own client or a favorable witness, it may indicate that he is concerned about the possibility of death or unavailability or that the deponent is likely to be unavailable at trial and thus he may be perpetuating his testimony.

You must adjust your tactics accordingly. This will mean careful attention to the cross-examination to preserve objections of form and those which are obviated, and if necessary, conducting a redirect examination to obtain contradictions, admissions, or further testimony which can be introduced at the trial. If there is a doubt, he should err on the side of assuming that the deponent’s testimony is being preserved for use at trial.

8. “You mean I can change what I said?”

You have the right to read and sign the deposition, but can you change your answers? This issue was recently addressed at length in an article by Gayla Moncla in *Around the Bar*, the monthly publication of the Baton Rouge Bar Association. It is reproduced below:

9. “Let’s go off the record.”

Be careful. If you’re going to have a fight, have it on the record. If you don’t, everyone there will be at the mercy of their memories, and, as you well know, memories of who did what and who said what in the heat of battle are very unreliable and people tend to remember it the way they would have liked it to have transpired as opposed to how it actually transpired.

If an attorney says “let’s go off the record,” that should be a warning sign for you to insist that you stay on the record so that the Court can read what really transpired.

Louisiana Code of Evidence Article 607 (D) (2) states that a witness' credibility may be impeached by evidence of a prior inconsistent statement as follows:

Other extrinsic evidence, including prior inconsistent statements and evidence contradicting the witness' testimony, is admissible when offered solely to attack the credibility of a witness . . .

Article 613 states as follows:

Except as the interests of justice otherwise require, extrinsic evidence of bias, interest, or corruption, prior inconsistent statements, conviction of crime, or defects of capacity is admissible after the proponent has first fairly directed the witness' attention to the statement, act, or matter alleged, and the witness has been given the opportunity to admit the fact and has failed distinctly to do so.

Article 801 (d) (1) states as follows:

Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

(a) Inconsistent with his testimony, and was given under oath subject to the penalty of perjury at the accused's preliminary examination or the accused's prior trial and the witness was subject to cross-examination by the accused;

(b) Consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive;

(c) One of the identification of a person made after perceiving him, and which confirms the testimony of the declarant that he had made an identification, except that in cases of amnesia resulting from physical injury from the criminal act, any other person may testify to an out of court identification; or

(d) Consistent with the declarant's testimony and is one of initial complaint of sexually assaultive behavior.

So we know it can be done, but how do we do it?

One of the most effective ways to undercut the testimony of a witness is to show that what he said before trial contradicts what he is saying now.

Unfortunately, as adept as most of us are at finding these little land mines, when it comes to finishing off the witness and showing that he is a liar before the jury - just at the moment of the kill - we cut him loose with something that sounds like this:

Q. What color was the light facing the cement truck?

A. The driver of the cement truck that hit the lady had a red light.

Q. A red light. A **red** light?! Are you sure?

A. Yes.

(Aha! He testified in his depo that it was green. I'm sure of it. Watch my brilliant impeachment with his depo.)

Q. Do you recall having your deposition taken at my office on June 3, 1994?

A. Yes.

Q. And you said at the deposition that it was green, didn't you?

A. I don't know. It was red.

Q. But you were asked in the deposition what color the light was, weren't you?

A. I don't know.

Q. Read it right here (pointing).

A. OK. (Witness is reading, mumbling) "What color was the light?" Now I don't know **whose** light you was talking about here.

Q. And you said it was green, didn't you?

A. If you was asking about the **car** - that's for the **car**. Were you asking about the car? I thought you meant the **car**. I was all shook up and scared with all them lawyers and all - but the light was red, it matched the driver's red shirt and the cement truck was red and I thought that was pretty odd, all them's being red and all.

Q. Your testimony today is that the light was red, and your testimony at the deposition as that the light was green.

A. It was red, I told my wife when I got home - you can ask her - I says "This truck and the driver's shirt was the same color of red - like a uniform - and he runs a red light - go figure."

So what have you accomplished? You lost control of the witness and you lost the impact of your impeachment.

Let's try it a better way:

Q. Mr. Jones, you testified just now that the light for the cement truck was red, isn't that true?

A. Yes.

Q. And as you sit here today you recall that it was red at the time of the accident, is that correct?

A. Yes, Sir.

Q. Now, Mr. Jones, do you recall that on the 12th of June 1994 we took your deposition?

A. Somewhere around there, yes.

Q. Only a couple of weeks after the accident?

A. Yes.

Q. At my office?

A. Yes.

Q. And you were under oath and the court reporter took down everything you said?

A. Yes.

Q. And I asked you if you recalled the accident?

A. Yes, sir.

Q. And you said that it was fresh in your mind?

A. Yes, it was.

Q. Do you recall that I asked you about the color of the light that the cement truck had?

A. Yes, I guess so.

Q. And at that time I asked you this very question, and I'm going to read it to you and read you your answer and now I'm going to show you your testimony on page 147, please read along with me:

(read loudly and clearly)

Question: Were you able to see the traffic light for the cement truck?

Answer: Yes

Question: What was the color of the light for the cement truck?

Answer: His light was green.

Q. Mr. Jones, did I read the questions and answers correctly?

A. Yes, sir.

Done. No room to weasel out of the answer. All leading questions. All "yes" and "no" answers. He belongs to you. You own him. You made your point. You also proved that the depo was close in proximity to the accident and that at that time he had a clear memory of the accident.

Don't fall into the trap of asking him, "Which one is correct, then or now?" or if he was lying then or lying now. You can cover that in your closing.

July 3, 1996