DEPOSTION OBJECTIONS…

and Objectionable Conduct that may Result in Sanctions or Other Disciplinary Action of which you do not want to be the Object.

Video Link

- CHRISTOPHER W. LOBIANCO, ESQUIRE

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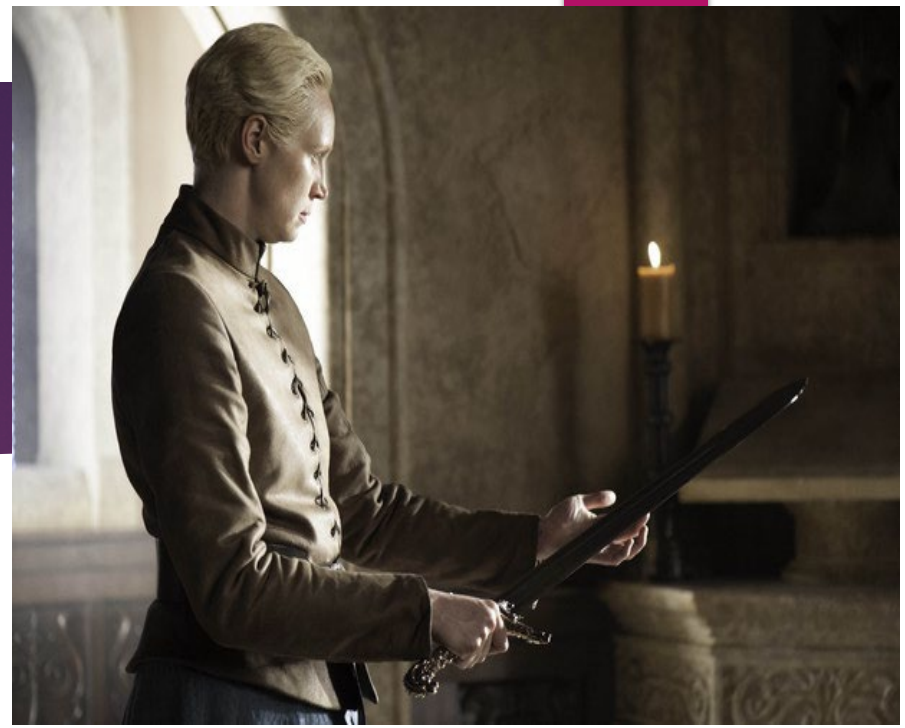
WHAT IS THE PURPOSE OF A DEPO ANYWAY? WHY DOES IT MATTER?

- **Purposes of Depositions?**
  - - Use at trial or in support of a motion hearing (including impeachment).
  - - Perpetuate or preserve testimony of a witnesses. Fla. Fam Law R. 12.290 (deposition before action or appeal); Sec. 90.804(1) (witness unavailable).
  - - Discovery- obtain information, facts, learn about other witnesses or evidence.
  - - Demonstrate and/or ascertain strengths and weaknesses of certain positions or claims (settlement).
- **Reason this matters**
  - Depositions are considered a DISCOVERY TOOL- very broad scope. Fla. Fam Law R. 12.280.
  - In some cases…a deposition may be read into the record/entered at trial.

Conflicting purposes can create confusion for lawyers as to appropriate practice and conduct

HOW DO WE BEHAVE LIKE GOOD OATH-KEEPERS?



Start with the Rules of course!

- **Depositions are a discovery tool first and foremost**

  Fla. R. Fam Law Pro 12.280(c)

  Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows. (1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party... It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

- **QUIZ TIME**- What is an objection that is almost never appropriate for a deposition?

RULES CONTINUED: Guidance (sort of)

- **FLA R. 12.310(c). Depositions Upon Oral Examination…**
  - Any objection during a deposition must be stated concisely and in a nonargumentative and nonsuggestive 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 under subdivision (d).

    - Taken directly from Rule 30 of the Federal Rules of Procedure.

  - EASY- Just say "Objection FORM!"

NOT SO FAST MY FRIEND!

- Not all courts (mostly Federal) agree that the "form" objections are sufficient… sufficiency may also have to do with the type of objection or potential use of the testimony.
- Some Federal Courts don't like the stand alone "form" objection:
  - *The Security National Bank of Sioux City, IA v. Abbot Labs*, 299 F.R.D. 595, 597-8 (N.D. Iowa 2014).

    "In my view, objecting to "form" is like objecting to "improper"—it does no more than vaguely suggest that the objector takes issue with the question. It is not itself a ground for objection, nor does it preserve any objection... Moreover, "'form' objections are inefficient and frustrate the goals underlying the Federal Rules. The Rules contemplate that objections should be concise and afford the examiner the opportunity to cure the objection. *See* Fed. R. Civ. P. 30(c)(2) (noting that 'objection[s] must be stated concisely');" - U.S. District Judge Mark W. Bennett"

    See also Henderson v. B&B Precast & Pipe LLC, 2014 WL 4063673 (M.D.Ga. 2014)

BUT THEN THERE IS THIS…

- *Druck Corp. v. Marco Fund Ltd.* (U.S.) Ltd. 2005 WL 1949519 (S.D.N.Y. 2005). "Any 'objection as to form' must say only those four words, unless a questioner asks the objector to state a reason."
- *In re: St. Jude Med. Inc.,* 2002 WL 1050311 at *5 (D. Minn. 2002).

  "Objection counsel shall simply say the word 'objection' and no more, to preserve all objections."

  [Note- these were parts of "case management" style orders within these cases.]

LET'S BRING IT CLOSER TO HOME

- **FLORIDA TRIAL LAWYERS DISCOVERY HANDBOOK (2021)**
  - **CH. 5: PROPER CONDUCT OF DEPOSITIONS**

- Starting on the date of admission to The Florida Bar, counsel pledges fairness, integrity and civility to opposing parties and their counsel, not only in court but also in all written and oral communications.

- The Rules Regulating the Florida Bar: Rule 4-3.4. and Rule 3-4.3 and 3-4.4 (re: "fabricating" evidence; "assisting a witness in falsifying evidence…." Rule 4-3.5 (Disruption of a Tribunal); Rule 4-4.4 (Respect for Rights of Third Persons); Rule 4-8 (Maintaining the Integrity of the Profession).
  - Florida Bar Guidelines for Professional Conduct- Section F on deposition conduct.

    https://www.floridabar.org/prof/regulating-professionalism/presources002/

FLA BAR ON THE TOPIC OF OBJECTIONS

The Florida Bar Professional Guidelines:

"Counsel defending a deposition should limit objections to those that are well founded and permitted by the Florida or Federal Rules of Civil Procedure or applicable case law. Counsel should remember that most objections are preserved, and need be interposed only when the form of the question is defective or when privileged information is sought. When objecting to the form of a question, counsel simply should state: "I object to the form of the question." The grounds should not be stated unless asked for by the examining attorney. When the grounds are requested, only the underlying legal basis for the objection should be stated and nothing more (i.e., counsel should not coach the witness or suggest any answers). (Emphasis added).

BACK TO THE HANDBOOK… Wait? What?

The Proper Form of Objections

- "Rule 1.310(c) provides, in part, that '[a]ny objection during a deposition must be stated concisely and in a nonargumentative and nonsuggestive manner.' The Florida Rule is derived directly from Rule 30... The proper form of a deposition objection is to make an objection to the form of the question and then briefly state the specific form problem, such as, 'objection as to form, leading', 'objection as to form, compound question', or, 'objection as to form, argumentative.'"
  - This allows for the objection to be stated in a nonargumentative and nonsuggestive form and gives the questioning attorney the opportunity to correct the asserted defect at the time of the deposition
    - Speaking objections to deposition questions are not permitted. They are designed to obscure or hide the search for the truth by influencing the testimony of a witness. They are, by definition, objections that are argumentative or suggest answers. Objections and statements that a lawyer would not dare make in the presence of a judge should not be made at depositions.

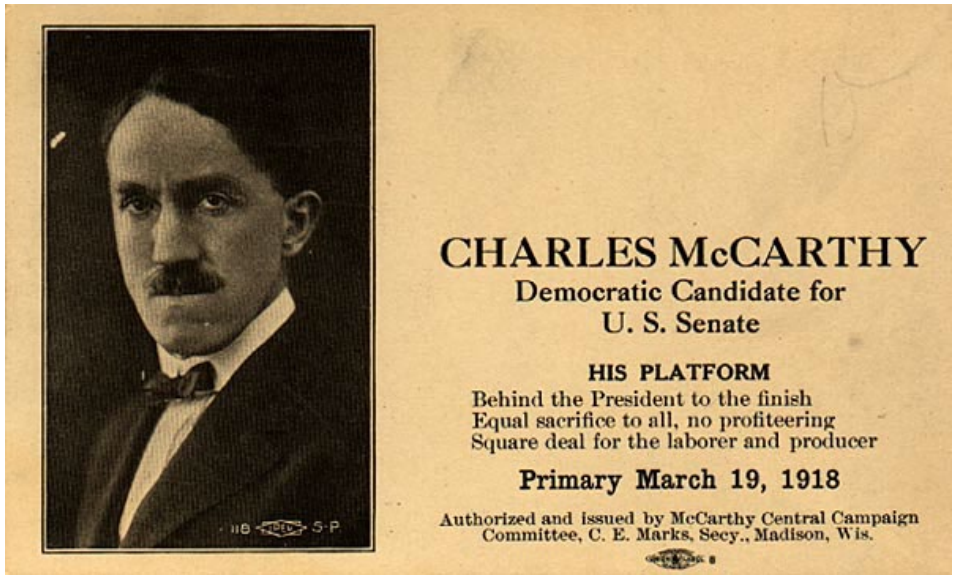
EXAMPLES

- “OBJECTION! That question violates Article I Section 12 of the Florida Constitution and my client’s right to privacy… she does not have to tell you who else lives in her home…”
  - Witness might then say- “None of your business” or even feel empowered not to tell the struth.
- “OBJECTION! That question is ambiguous…what do you mean who *lives* there? What do you define as *lives*.”
  - Witness might then say- “I don’t understand” or “I do not know.”
- “OBJECTION! That calls for speculation, she could not possible know that answer…”
  - Witness might then say- “I could not know for sure” or “I don’t want to guess” or simply “IDK.”

DISCOVERY HANDBOOK CHAPTER 5 CONTINUED

- ‘It has been stated that, “the witness comes to the deposition to testify, not to indulge in a parody of Charles 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’

  - Hall v. Clifton Precision, A Div. of Litton Sys., Inc.,150 F.R.D. 525 (ED. PA. 1993).



IMPROPER CONDUCT AND WHAT TO DO (from the handbook)

- Improper conduct:

  Inappropriate objections- Speaking objections/Instructing deponent not to answer)

  Rule 1.310(d) provides that a "motion to terminate or limit examination" may be made upon a showing that objection and instruction to a deponent not to answer are being made in violation of Rule 1.310(c).

  Unprofessional Conduct- "Overly aggressive, hostile, and harassing examinations intending to intimidate a witness or party… Intentionally misleading a witness or party…

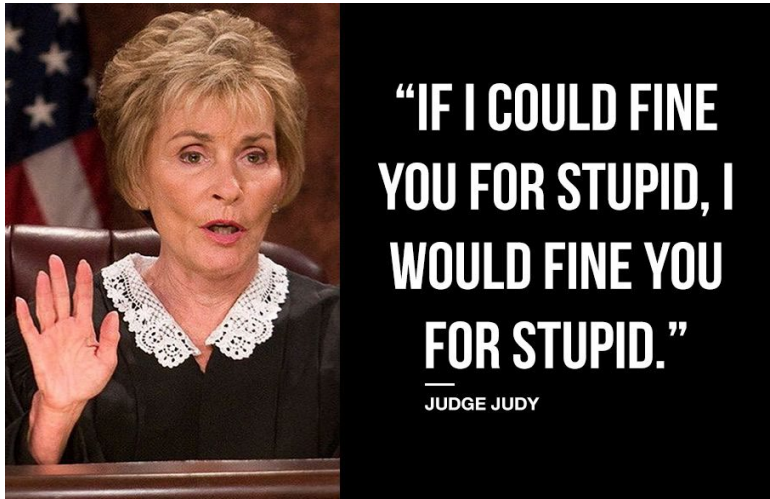
  Rule 1.310(d) provides that a "motion to terminate or limit examination" may be made upon a showing that the examination is being conducted in bad faith or in such a manner as to unreasonably to annoy, embarrass or oppress the deponent or party.

WHAT TO DO CONTINUED

- Attorneys should "exhaust all efforts" to resolve any disputes during a deposition and correct behavior.
- If issues cannot be resolved, some courts allow you to take a break and "phone the judge" in chambers.
- If you must terminate the deposition:
  - State the motion orally, and concisely, on the record.
  - Follow up with a timely written motion for protective order.
  - File the transcript and set a hearing.
  - R. 1.310 "deposition shall be suspended upon demand of any party or the deponent for the time necessary to make a motion for an order."

SANCTIONS- Don't let this happen to you

- *Security National Bank of Sioux City, Iowa v. Abbott Labs,* 299 F.R.D. 595 (N.D. Iowa 2014).
  - Defense counsel got a bit "overzealous" during several depositions.
  - Federal District Judge sanctioned attorney by ordering her to write and produce a VIDEO on improper deposition conduct, including "unspecified form objections," instructing witnesses not to answer and witness coaching.
    - Could not find the video.
    - Turns out she got it overturned on appeal.



Child Hearsay Evidence

IMPORTANT RULES AND STATUTES TO KNOW

Testimony and Attendance of a Minor Child

Absent a prior court order based on good cause, the Florida Family Law Rules of Procedure establish a general rule prohibiting children's depositions, testimony, and even appearance at family law proceedings.

Under Rule 12.407(a):

> **Prohibition**. Unless otherwise provided by law or another rule of procedure, children who are witnesses, potential witnesses, or related to a family law case, are prohibited from being deposed or brought to a deposition, from being subpoenaed to appear at any family law proceeding, or from attending any family law proceedings without prior order of the court based on good cause shown.

Conflict Between the Rules and the Evidence Code: Who Wins?

And, Rule 12.010(a)(2) provides:

> All actions under these rules shall also be governed by the Florida Evidence Code, which applies in cases where a conflict with these rules may occur.

Hearsay Definitions

Section 90.801(1)(b), Fla. Stat., defines "hearsay":

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Who is a “declarant”?

Section 90.801(1)(a), Fla. Stat., defines “declarant”:

A “declarant” is a person who makes a statement.

Hearsay Rule

Section 90.802 states the general hearsay rule:

Except as provided by statute, hearsay evidence is inadmissible.

Hearsay Evidence

"Inadmissible hearsay cannot be competent, substantial evidence." *Damask v. Ryabchenko*, 329 So. 3d 759, 764 (Fla. 4th DCA 2021) (finding vocational assessment report inadmissible; vocational assessor did not testify, and her "out-of-court opinions as to the father's employability were classic hearsay").

Exceptions to Hearsay

§ 90.803:

Hearsay exceptions; availability of declarant immaterial

Hearsay Exception: Statement of Child Victim

§ 90.803(23)

(a) **Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness**, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 17 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, **is admissible in evidence in any civil or criminal proceeding if**:

Safeguards of Reliability

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of **reliability**. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; **and**

Section 90.803(23) continues…

2. **The child either:**

a. Testifies; or

b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).

“Other Corroborative Evidence”

The other corroborating evidence requirement “assures that a defendant will not be convicted solely on the basis of the hearsay testimony.” *State v. Townsend*, 635 So. 2d 949, 957 (Fla. 1994).

Specific Findings of Fact

The court must make specific findings of fact, on the record, of the basis for its ruling. § 90.803(23)(c), Fla. Stat.

A "mere conclusion that a child's statements are reliable or a mere restatement of the statute in a boilerplate fashion is insufficient." *State v. Townsend*, 635 So. 2d 949, 957 (Fla. 1994).

Objections to Admissibility

To preserve the issue for appellate review:

You must object to the legal sufficiency of the trial court's findings on reliability. *E.g.*, *Coleman v. State*, 315 So. 3d 166 (Fla. 1st DCA 2021).

A general hearsay objection is not enough. *Castro-Menendez v. State*, 330 So. 3d 1054 (Fla. 1st DCA 2021).

Statutory Exceptions in Family Law

Keeping Children Safe Act: § 39.0139, Fla. Stat.

Court-Ordered Social Investigations: § 61.20, Fla. Stat.

Keeping Children Safe Act

Section 39.0139(4) entitles a parent or caregiver who seeks to resume contact with the child victim to an evidentiary hearing

(a) Before the hearing, the court shall appoint a guardian ad litem, if one has not already been appointed.

(b) At the hearing, the court "may receive and rely upon any relevant and material evidence submitted to the extent of its probative value," including "written and oral reports or recommendations from the Child Protection Team, the child's therapist, the child's guardian ad litem, or the child's attorney ad litem, if one is appointed, even if these reports, recommendations, and evidence *may not be admissible* under the rules of evidence"

Social Investigation and Recommendations

Section 61.20, Fla. Stat., governs **when** a court may order a social investigation and study.

Admissibility of Hearsay: Social Investigation Study

NOTE:

"The court may consider the information contained in the study in making a decision on the parenting plan, and the technical rules of evidence do not exclude the study from consideration."

§ 61.20(1), Fla. Stat. (2024)

What about the Report of a Guardian Ad Litem?

Section 61.403, Fla. Stat., governs the powers and authority of a guardian ad litem.

The guardian ad litem may address the court and make oral or written recommendations. § 61.403(5), Fla. Stat.

The guardian ad litem "shall file a written report which may include recommendations and a statement of the wishes of the child." *Id.*

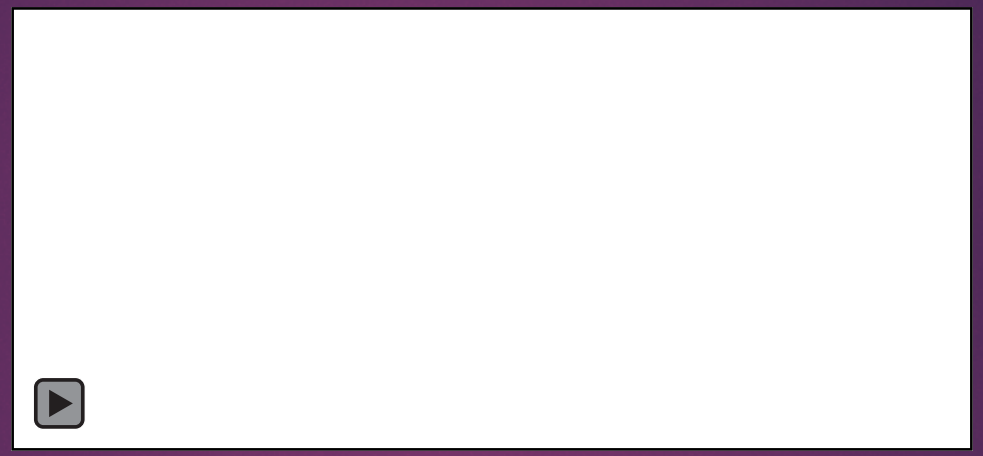
Guardian Ad Litem's Report = Inadmissible Hearsay

The guardian ad litem's report usually contains hearsay.

Unlike the statute governing social investigations, section 61.403 does *not* include a hearsay exception. Instead, the hearsay rules found in the Florida Evidence Code apply. *Scaringe v. Herrick*, 711 So. 2d 204, 205 (Fla. 2d DCA 1998).

The report itself is an out-of-court statement and is hearsay if offered to prove the truth of its contents. *See generally* 1 Fla. Prac. Evidence § 103.4, n.7 (2024).

TRIAL OBJECTIONS



- Renae Kenny, Esquire

GROUP 3 – GROUP LEADER HOLLY E. FULTON, ESQUIRE

Prepare, Prepare, Prepare!!!!

Any trial attorney must familiarize themselves with the types of objections in court and how to use them appropriately. In addition, they MUST anticipate how these objections are likely to come up in their case. Attorneys should consider the legal and factual issues, as well as the anticipated testimony of the witnesses, to help prepare for objections.

It is important to not only be able to make timely and legally based objections but also, to be able to respond to them and adjust your questioning when an objection against you is sustained.

Objections usually fall into two categories: substantive and style. Style objections focus on the way the question is asked or presented while substantive objections focus on a violation of the rules of evidence.

Important purpose of objections:

- *prevent introduction of improper or prejudicial evidence/testimony
- *maintain trial's fairness and preserve integrity of legal process
- *create a clear record
- *disrupt opposing counsel's momentum
- *control the flow of information/guide the focus towards evidence that is beneficial to your case

Common Style/Form Objections

Argumentative

Asked and Answered

Ambiguous/Confusing/Vague/Misleading Question

Call for Narrative

Assumes Facts not in Evidence

Leading

Compound

Misstates Evidence/Misquotes Witness

Calls for Speculation

Non-Responsive (move to strike)

Common Substantive Objections:

- **Relevance**
- **Hearsay**
- **Prejudice outweighs Probative value**
- **Foundation**
- **Authentication**
- **Lacks Personal Knowledge**
- **Speculation**

- **Impermissible Character Evidence**
- **Impermissible opinion of a lay witness**
- **Improper Impeachment**
- **Privileged**
- **Confusing or Misleading**
- **No question pending/volunteered**

Rule 611 – Mode and Order of Examining Witnesses and Presenting Evidence

(a) **Control by the Court; Purposes**. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(b) **Scope of Cross-Examination**. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

(c) **Leading Questions**. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and

(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Rule 611 is essential for maintaining order in the courtroom, ensuring that trials proceed efficiently, and safeguarding the dignity and rights of witnesses. It reflects the balance between the need for thorough examination and the need to conduct trials in a manner that is respectful, efficient, and focused on uncovering the truth.

Argumentative:

When you hear the words “Objection! Argumentative” you may think it means that the attorney is arguing but that is not really what the objection means.

Argumentative is a legal term that means something similar to “drawing conclusions.” It means the questioner is likely trying to offer a conclusion of what the evidence MEANS rather than simply asking for the facts or eliciting any NEW information. Since it is the factfinder’s responsibility to decide whether to believe or find any testimony or evidence credible or persuasive, it is improper to draw conclusions about the facts (**Until Closing Argument)** in questioning or testimony.

This objection is often made when the questions directed to the witness attempt to influence the witness’ testimony by inserting the attorney’s interpretation of the evidence into the question. These questions are not meant to elicit any new information.

Examples:

Q: “Do you mean to tell me that…”

Q: “You expect this Court to believe that…”

Leading Questions:

FRE 611(c) • "Objection. Counsel is leading the witness"

Leading questions should not be used on direct examination. Ordinarily, courts allow leading questions:

(1) on cross-examination

(2) when a party calls a hostile witness (ask court's permission to treat as a hostile witness)

(3) when the subject of direct is preliminary/uncontested

(4) when the witness is having trouble understanding questions or is young or infirm. (maybe)

A leading question is one that puts the desired answer in the mouth of a witness by suggesting the answer!

Examples:

"At what time did you see Michael? "vs. "You saw Michael at 3:00 p.m., right?"

"Did you see Michael at 3:00 p.m.?" • Are close-ended Qs inherently leading? • **A question calling for a 'yes' or 'no' answer is a leading question only if, under the circumstances, it is obvious that the examiner is suggesting that the witness answer the question one way only, whether it be 'yes' or 'no**

Improper Opinion of a Lay Witness:

Regarding lay witnesses, they must answer questions in the form of statements. They can testify about what they saw, heard, felt, tasted, or smelled. Usually, the judge doesn't let them express their opinions or draw conclusions, but there are times when they allow it.

Under the Federal Rules of Evidence (FRE), a court will permit a person who isn't testifying as an expert to testify in the form of an opinion.

- According to FRE 701, a judge can allow a layperson to offer an opinion if it meets the two following conditions:
- Their opinion is rationally based on their perception
- Their opinion helps explain/understand the witness's testimony
- Not based on scientific, technical, or other specialized knowledge

Must first lay a foundation for the lay witness opinion testimony. You must demonstrate that the witness opinion has value and comes from firsthand knowledge.

Some examples of potential lay opinion testimony?

- A person's identity
- A person's state of mind/emotional state
- Demeanor, mood, or intent
- Identification of handwriting
- Intoxication or sobriety
- Health, sickness, or injury
- Speed, distance, and size
- Handwriting

Lay opinions that are NOT rationally based on their perception would be SPECULATION.

Misstates evidence/misquotes witness:

Definition:

A question that misstates and distorts evidence or misquotes a witness is improper, whether this is done during the examination of witnesses or during closing arguments.

***Examples*:**

Misstatements and misquotes usually occur in two types of situations. First, a lawyer in a question refers to evidence produced earlier during the trial, but does so inaccurately. Second, some lawyers habitually repeat a witness' last answer as part of the next question, but again, do so inaccurately.

Q. You hit the man, didn't you?

A. Yes.

Q. After attacking him, what happened?

Where inaccurate repetition occurs, a prompt objection is essential.

Narrative:

A long narrative answer is objectionable because it allows a witness to inject inadmissible evidence into the trial without giving opposing counsel a reasonable opportunity to make a timely objection. By requiring the direct examiner to ask a series of specific questions to which the witness can give reasonably succinct answers, opposing counsel will have a reasonable opportunity to object.

The Federal Rules have no specific rule on narrative answers. FRE 611(a) gives the Court broad discretion to control the mode of interrogating witnesses.

Examples:

Q. Tell the Court what happened that day.

Q. Tell us what you know about the Plaintiff.

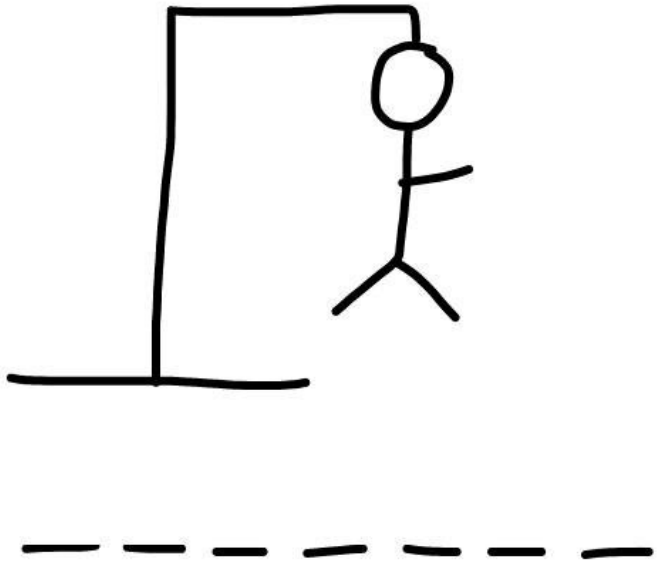
Q. Is there anything else you desire to say? (Held to be a narrative question in *State v. Knowles*, 946 S.W.2d 791, 795 (Mo.Ct.App.1997)

Each of these questions potentially calls for a long narrative answer. A timely objection will force the proponent to ask specific questions that will break the narrative into manageable segments.

Sometimes witnesses will "take off" on an otherwise proper question and go way beyond what the answer reasonably calls for. The moment you detect this happening, object. (*Narrative or possible Non-responsive*) One or two objections which are sustained will usually train the witness not to give narrative answers.

Narrative Continued……

On the other hand, narrative objections should not automatically be made whenever an appropriate situation arises. Often narrative answers are an ineffective way of presenting a direct examination. If the witness' answers ramble or appear disorganized, making an objection will only help opposing counsel regain control over their witness.



Hearsay

Hearsay. Florida Statutes Sections 90.801-90.806, Peterka v. State, 640 So.2d 59 (Fla. 1994)

(Hearsay rule prevents admission of out-of-court statements to prove fact through extrajudicial statements, but out-of-court statement may be admitted for a purpose other than proving truth of matter asserted if statement is relevant to prove a material fact and is not outweighed by any prejudice).

When it's not hearsay – The statement is not being offered for the truth of the matter asserted. Instead, it is being offered to show that the statement was made. The making of the statement in question is relevant to show:

1. The effect on the person who heard the statement
2. A prior inconsistent statement
3. An operative legal fact or verbal act
4. The knowledge of the declarant.

Exceptions: Most common for Family Law

1. Then existing mental or emotional condition
2. Then existing physical condition
3. Excited Utterance
4. Statement for purposes of medical diagnosis or treatment
5. Statement of child victim
6. Spontaneous statement

7. Statement against interest
8. Reputation as to character
9. Records of regularly conducted activities

   (Business Records- Affidavit and Notice)
10. Judgement of previous conviction
    (get certified copies)
11. Admissions

FLORIDA EVIDENTIARY TRIAL OBJECTIONS

TRIAL-OBJECTIVES-OBJECTIONS-HEARSAY-IMPEACHMENT-DOCUMENTARY-EVIDENCE-Ervin-Gonzalez.pdf