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HOW TO OBJECT WHEN YOU'RE OBJECTING (AND OTHER DEPOSITION TIPS)

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PEOPLE
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If you have ever taken a deposition in a Missouri case, you have probably heard a fellow practitioner lodge an objection "to the form of the question." You may have even heard the abbreviated version of the objection, i.e., "Object to form" or the still shorter "Form." Perhaps you have made these objections yourself.

These are mistakes. Missouri courts hold that a boilerplate objection "to the form of the question" — without more detail — is not sufficient to preserve an objection to the admissibility of the deposition testimony at trial.[1]

GENERAL OBJECTIONS TO "FORM" ARE LACKING IN SUBSTANCE

So why do many attorneys continue to assert this insufficient, generic objection? The explanation stems from the language of Missouri Supreme Court Rule 57.07(b)(4), describing which objections are waived if not raised during a deposition:

An objection to the competency, relevancy, or materiality of testimony is not waived by failure to object before or during the deposition. Errors and irregularities in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind that might be cured if promptly presented are waived unless seasonable objection thereto is made during the deposition.[2]

While the rule *requires* objections to the form of questions to be raised during a deposition, it does not specify *how* the objection must be made.

As Missouri courts have made clear, the grounds for objecting to the form of a question must be specifically stated during the deposition. This is because the purpose of Rule 57.07(b)(4) is "to give questioning counsel an opportunity to rephrase the question, lay a better foundation, or clarify the question so that evidence will not be rejected at trial because of inadvertent omissions or careless questions."[3] To have any value, an objection to the form of a question must be specific enough to allow questioning counsel to cure the question by rephrasing it, laying a better foundation, or clarifying it.[4] In other words, it must

be a specific objection and not a general one.[5]

WHICH OBJECTIONS GO TO THE FORM OF THE QUESTION?

To identify *which* specific objections must be raised during a deposition, it helps to distinguish the *form of the question* from the *content of the answer*.[6]

Objections to the *form of the question* include:

- argumentative;[7]
- asked and answered;[8]
- assumes facts not in evidence;[9]
- calls for a narrative response;[10]
- calls for legal conclusion;[11]
- compound;[12]
- leading;[13]
- overly broad;[14] and
- vague, indefinite, or speculative.[15]

These objections speak to the form of the question, because the questioning attorney can cure the objection by rephrasing the inquiry. Therefore, these objections may not be stated simply as to "form," but must be specifically and seasonably asserted during the deposition. Otherwise, any objection to admissibility at trial, based on the form of the question, is waived.

By contrast, when the *content of an answer* is objectionable, the basis for objection cannot be cured by rephrasing the question and need not be raised during the deposition at all. The most common of these objections are:

- opinions or conclusions the deponent is not qualified to give;[16]
- comments on the credibility of other witnesses;[17]
- calls for speculation;[18]
- relevance;[19] and
- hearsay.[20]

Unlike improper questions, these errors cannot be obviated, removed, or cured by rephrasing a question. For example, if a lay deponent is not qualified to offer a certain opinion, it is not due to the form of any particular question; rather, it is a function of the witness' lack of qualifications and the complexity of facts involved.[21] Similarly, the admissibility of hearsay does not depend on the questioner's conduct; instead, the question of whether hearsay is admissible depends on the content and nature of the hearsay testimony itself.[22] Therefore, these objections need not be raised during a deposition in order to be preserved for trial.

SPECIFIC OBJECTIONS VERSUS "SPEAKING" OBJECTIONS

Although Rule 57.07(b)(4) requires a minimum level of specificity to preserve "form" objections, neither the rule nor Missouri courts have imposed a cap on the amount of specificity allowed. Thus, a practitioner could interpret this as license to assert "speaking objections," defined as objections which are either argumentative or suggest an answer to the deponent.

Missouri law contains no specific prohibitions against speaking objections, but they are discredited and disallowed by the majority of judges.[23] Indeed, the best lawyers have "no need for argumentative and speaking objections."[24] Speaking objections can be avoided if attorneys state the grounds for their objections "succinctly and specifically . . . without unnecessary argument."[25]

Therefore, in order to properly preserve an objection to deposition testimony, attorneys should neither object to the mere "form" of the question, nor waste unnecessary time and resources through argumentative or suggestive objections. Instead, Missouri attorneys should object to the form of the question on specific grounds, like the examples listed in the previous section, with enough detail to allow questioning counsel to rephrase the question and thereby cure the basis for the objection.[26]

DISTINCTIONS BETWEEN FEDERAL AND MISSOURI DEPOSITIONS

Federal Rule of Civil Procedure 32(d) is similar to Missouri Rule57.07(d). It provides that deposition testimony will not be excluded on the basis of an improper question unless a seasonable objection to the form of the question is raised during the deposition.[27] The same kinds of objections are available in federal court as in state court, and attorneys may properly object to the form of questions that assume facts not in evidence;[28] assert facts in the form of questions;[29] calls for the witness to speculate;[30] are confusing,[31] compound,[32] repetitive,[33] leading,[34] or argumentative;[35] or which have been asked and answered.[36] Further, federal courts also maintain the distinction between the objections to the form of the question and the content of the answer.[37]

However, unlike Missouri, federal rules explicitly limit the form and content of deposition objections. Federal Rule of Civil Procedure 30(c)(2) states, "An objection must be stated concisely in a non-argumentative and nonsuggestive manner."[38] Federal courts generally interpret Rule 30(c)(2) as proscribing "speaking objections," which federal courts define as "objections that coach a deponent or otherwise shape a deponent's answers."[39]

Federal courts are divided on how to apply this rule. Some jurisdictions hold that any "form" objection during a deposition should be phrased as, "Objection to form," without further explanation of the basis for the objection, unless the questioning attorney requests it.[40] These courts find that attorneys who explain the objection when opposing counsel has not requested an explanation are in

violation of Rule 30(c)(2).[41] Other jurisdictions hold that a simple objection to "form" during a deposition will not preserve the objection at trial, and the objecting attorney *must* concisely explain the basis for the objection, subject to the requirements of Rule 30(c)(2).[42] These jurisdictions construe objections to the form of the question as a *category* of objection and not a freestanding objection.[43]

Federal courts situated in Missouri including the Eighth Circuit and the United States District Courts for the Eastern and Western Districts of Missouri have not addressed the proper phrasing of "form" objections directly. However, the Eastern District imposed sanctions in a case where an attorney repeatedly made lengthy and argumentative objections.[44] The attorney appealed, but the Eighth Circuit affirmed the sanctions.[45] More recently, the Western District took issue with an attorney who repeatedly interjected by advising deponents to answer questions only "if they know."[46] Attorneys practicing in these jurisdictions would be wise to adhere to the general principle that objections must "succinctly and simply state the legal basis for the objection, with no additional commentary."[47]

CHANGES TO MISSOURI RULES GOVERNING DEPOSITIONS

The Missouri General Assembly recently enacted changes to the discovery rules, which became effective on August 28, 2019.[48] These amendments redefined the scope of discovery and imposed new limits on written interrogatories[50] and requests for admissions.[51] The legislation also altered the procedures for taking depositions in civil cases. Under the revised Rule 57.03, a party must obtain the court's leave before taking more than 10 depositions[52] or re-deposing a witness.[53]

Further, the rules contain new restrictions on the conduct of depositions. Depositions are now limited in duration to one day of seven hours, unless the parties stipulate otherwise.[54] Trial courts may extend the time for examination "if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination."[55] Judges may also impose appropriate sanctions "on a person who impedes, delays, or frustrates the fair examination of the deponent," including reasonable expenses and attorney's fees incurred by any party.[56] These changes echo the language of Federal Rule of Civil Procedure 30(d), which similarly limits depositions and authorizes sanctions if the deposition is unfairly delayed.[57] Given the new time limitations and potential for sanctions, attorneys and their clients should take care at depositions to avoid excessive, unsubstantiated, or otherwise improper objections that would impede, delay, or frustrate a fair examination.

CONCLUSION: HOW TO PROPERLY OBJECT TO THE FORM OF THE QUESTION

Missouri courts require that objections be specific, so attorneys objecting to the form of a question in state court depositions must cite a specific basis, as previously outlined. In order to avoid accusations of delay or impediment under the amended Rule 57.03(b)(5), attorneys should avoid “speaking objections” and state the specific basis or bases for the objection concisely.

Alternatively, Missouri practitioners could stipulate that all objections to the form of the question are preserved simply by saying, “I object to the form of the question,” on the record during the deposition, unless the questioning attorney requests further explanation of the specific basis. Merely entering this stipulation on the record at the deposition would not bind a trial judge, who could ultimately overrule general form objections at trial. For the stipulation to have any effect, attorneys should seek the court’s approval in advance through a consent order entered at the start of discovery.

Absent such a stipulation, Missouri attorneys should hew to the general principle that deposition objections should be succinct, specific, and without unnecessary argument.

NOTES

1. *See Keller v. Anderson Motor Service, Inc.,* 652 S.W.2d 735, 737 (Mo. Ct. App. E.D. 1983) (specific objection during deposition to form of question preserved objection to admissibility at trial); *see also State v. Ponder,* 950 S.W.2d 900, 910 (Mo. Ct. App. S.D. 1997) (“I object to the form of the question” was a general objection that preserved nothing.).
2. Rule 57.07(b)(4), Mo. R. Civ. Pro. (emphasis added).
3. *Lauck v. Price*, 289 S.W.3d 694, 698 (Mo. Ct. App. E.D. 2009) (quoting *Seabaugh v. Milde Farms, Inc.*, 816 S.W.2d 202, 210 (Mo. *en banc* 1991)).
4. *Seabaugh*, 816 S.W.2d at 210.
5. *See Firestone v. Crown Center Redevelopment Corp.,* 693 S.W.2d 99, 107 (Mo. *en banc* 1985) (“Grounds not specified in an objection are waived.”).
6. *See Hemeyer v. Wilson*, 59 S.W.3d 574, 580-81 (Mo. Ct. App. E.D. 2001) (distinguishing objections to form of questions versus content of answers).
7. S*ee, e.g., State v. Savory,* 893 S.W.2d 408, 410-11 (Mo. Ct. App. W.D. 1995) (argumentative questions were improper in their form); Black’s Law Dictionary (11th ed. 2019) (defining “argumentative” as “Stating not only facts, but also inferences and conclusions drawn from facts.”).
8. *See, e.g., U.S. v. Collins*, 996 F.2d 950, 952 (8th Cir. 1993); State v. Bolanos, 743 S.W.2d 442, 449 (Mo. Ct. App. W.D. 1987) (questions

were properly limited where they had been asked and answered).

9. *See, e.g., State v. Johnson*, 477 S.W.3d 218, 229-30 (Mo. Ct. App. W.D. 2015) (form of question was improper where it assumed facts not in evidence); *see also State ex rel. State Highway Commission v. Blue Ridge Baptist Temple, Inc.*, 597 S.W.2d 236, 240-41 (Mo. Ct. App. W.D. 1980) (question was objectionable where it assumed a material fact not in evidence); *State v. Creason,* 847 S.W.2d 482, 488 (Mo. Ct. App. W.D. 1993) (improper to phrase question so as to assume as fact matter of which there was no evidence).
10. *See, e.g., Knowles*, 946 S.W.2d at 795 (question that calls for narrative response is defective in its form).
11. *See, e.g., Jones v. Jones*, 658 S.W.2d 483, 487 (Mo. Ct. App. W.D. 1983) (form of question objectionable where called for conclusion from witness not qualified to offer opinion testimony).
12. *See, e.g., State v. Debold*, 735 S.W.2d 23, 26 (Mo. Ct. App. E.D. 1987) (question was improper in form where it asked for two answers).
13. *See, e.g., Denny v. Guyton,* 40 S.W.2d 562, 577 (Mo. *en banc* 1931); *see Bergsieker v. Schnuck Markets, Inc.,* 849 S.W.2d 156, 165 (Mo. Ct. App. E.D. 1993) (objection to the form of the question sustained when specified as leading); *see also McClelland v. Ozenberger*, 841 S.W.2d 227, 231 (Mo. Ct. App. W.D. 1992) (defining leading as a question “which instructs the witness how to answer on material points.”).
14. *See, e.g., State v. Cole*, 719 S.W.2d 345, 347 (Mo. Ct. App. S.D. 1986) (question that broadly asked whether witness committed any illegal activity, rather than a specific crime, was overly inclusive and broad).
15. *See, e.g., State v. Knowles*, 946 S.W.2d 791, 795 (Mo. Ct. App. W.D. 1997) (questions that are vague or speculative are defective in form).
16. *See, e.g., State v. Ford*, 454 S.W.3d 407, 414-15 (Mo. Ct. App. E.D. 2015) (trial court erred in permitting lay witness to offer opinion that required expertise); *see also Vecchio v. Schaefer,* 245 F.R.D. 642, 642 (W.D. Mo. 2007) (objection to admissibility of impermissible expert testimony was not waived, because it did not go to form of question).
17. *See, e.g., State v. Link*, 25 S.W.3d 136, 143 (Mo. en banc 2000) (witness may testify to specific facts that discredit another witness, as long as witness does not comment directly upon the truthfulness of another witness).
18. *See Hemeyer*, *supra* note 6 at 580-81 (objection was not waived as to speculative nature of deponent’s testimony, because deponent lacked personal knowledge of the subject, and the defect could not have been cured by laying additional foundation or rephrasing the question); *see*

also Cincinnati Ins. Co. v. Serrano, 2012 WL 28071, *4-5 (D. Kan. January 5, 2012) (objection that calls for speculation is a foundation objection and not a form objection).

19. Rule 57.07(b)(4), Mo. R. Civ. Pro.
20. *Lauck, supra* note 3 at 698 (hearsay objection was not an objection to the form of a question, but the content of the answer).
21. *See Ford, supra* note 16 at 414-15.
22. *Iid.* (hearsay objection was not waived if not raised during deposition).
23. *See, e.g., State v. Mitchell*, 847 S.W.2d 185, 186-87 (Mo. Ct. App. E.D. 1993) (trial court had authority to preserve order in courtroom by requiring sidebar for "speaking objections"); *State v. Steele*, 314 S.W.3d 845, 853-54 (Mo. Ct. App. W.D. 2010) (noting speaking objection was improper); *see also* Glenn E. Bradford & James R. Wyrsch, *Making the Record in the Trial Court*, 64 J. Mo. B. 284, 288 (2008).
24. Raymond E. Williams, *Doing Even Better Together-Final Thoughts*, 75 J. Mo. B. J. 164 (2019).
25. 28 Mo. Prac., Mo. *Crim. Prac. Handbook*, § 29:5 (Hon. Robert H. Dierker) (Jan. 2019).
26. *Keller, supra* note 1 at 737 ("The important feature of objection at deposition is that the matter be 'seasonably' called to the attention of questioning counsel so that he can avoid the results of his inadvertence or carelessness.").
27. Fed. R. Civ. Pr. 32(d)(3)(B) ("An objection to an error or irregularity at an oral examination is waived if . . . it relates to . . . the form of a question or answer . . . or other matters that might have been corrected at that time . . . and it is not timely made during the deposition.").
28. *See, e.g., Berger v. U.S.*, 295 U.S. 78, 84-87 (1935).
29. *See, e.g., Williams v. Mensey,* 785 F.2d 631, 638-39 (8th Cir. 1986).
30. *See, e.g., U.S. v. Hewitt*, 663 F.2d 1381, 1390-91 (11th Cir. 1981) (improper to ask witness if his opinion of defendant would be different if he knew defendant had committed the acts for which defendant was on trial).
31. *See, e.g., Wright v. Hartford Acc. & Indem. Co.*, 580 F.2d 809, 810 (5th Cir. 1978) (testimony properly excluded where question was complicated and resulted in ambiguous answer).
32. *See, e.g., RightCHOICE Managed Care, Inc. v. Hospital Partners, Inc.,* 2019 WL 23291570, *3 (W.D. Mo. July 22, 2019) (slip copy) (prohibiting lengthy speaking objections in lieu of short objections, e.g., "compound

question”).

33. *See, e.g., U.S. v. Dowdy*, 960 F.2d 78, 80 (8th Cir. 1992) (trial court properly imposed sanctions when attorney ignored court’s rulings on repetitive questions).

34. *U.S. v. Fenner,* 600 F.3d 1014, 1022 (8th Cir. 2010) (trial judge has wide latitude to permit leading questions).

35. *See, e.g., U.S. v. Cash*, 499 F.2d 26, 29 (9th Cir. 1974) (argumentative statement in the form of a question was improper in form).

36. *See, e.g., U.S. v. Markham*, 537 F.2d 187, 197 (5th Cir. 1976) (“The reach and thrust of the questions was identical. No abuse of discretion occurred when the trial court refused to permit further examination on the subject.”)

37. *See, e.g., NGM Ins. Co. v. Walker Const. & Development, LLC,* 2012 WL 6553272, *2-3 (E.D. Tenn. December 13, 2012) (discussing examples of objections to the form of a question)

38. Fed. R. Civ. Pr. 30(c)(2). Note that Rule 30(c)(2) was formerly Rule 30(d)(1).

39. *RightCHOICE Managed Care, supra* note 32 at *3; see *Craig v. St. Anthony’s Medical Center*, 384 Fed.Appx. 531, 532-33 (8th Cir. 2010) (court could award sanctions where argumentative objections, suggestive objections, and directions to a deponent not to answer disrupted, unduly prolonged, and unfairly frustrated deposition testimony).

40. *Damaj v. Farmers Ins. Co., Inc.*, 164 F.R.D. 559, 561 (N.D. Okla. 1995); *Auscape Int’l v. Nat’l Geographic Soc’y,* 2002 WL 31014829, at *1 (S.D.N.Y. Sept. 6, 2002); *Turner v. Clock, Inc.,* 2004 WL 5511620, at *1 (E.D. Tex. Mar. 29. 2004); In re St. Jude Med. Inc., 2002 WL 1050311, at *5 (D. Minn. May 24, 2002); *Meyer Corp. US v. Alfay Designs, Inc.*, 2012 WL 3536987. at *4 (E.D.N.Y. Aug. 13, 2012); *Quantachrome Corp. v Micromeritics Instrument Corp.,* 189 F.R.D. 697, 701 n.4 (S.D. Fla. 1999); *Applied Telematics, Inc. v. Sprint Corp.,* 1995 WL 79237, at *1 (E.D. Pa. Feb. 22, 1995); *see also Fort Worth Emps.’ Ret. Fund v. J.P. Morgan Chase & Co.,* 2013 WL 6439069, at *4 (S.D.N.Y. Dec. 9, 2013); *Tuerkes-Beckers, Inc. v. New Castle Associates,* 158 F.R.D. 573, 575 (D. Del. 1993) (“Objections as to the form of the question should be limited to the words ‘Objection, form.’”).

41. *See, e.g., Valencia v. City of Santa Fe,* 2013 WL 12180535, at *2 (D.N.M. Jan. 11, 2013) (long, unsolicited explanations for objections failed to conform to the “concise, nonargumentative, and nonsuggestive” requirements of Rule 30(c)(2) where they apparently influenced the witness’ answers, justifying sanctions).

42. *Vargas v. Fla. Crystals Corp.,* 2017 WL 1861775, at *6 (S.D. Fla. May 5, 2017); *Fletcher v. Honeywell Int'l, Inc.*, 2017 WL 775852, at *1 (S.D. Ohio Feb. 28, 2017); *Sec. Nat 'l Bank of Sioux City, Iowa v. Abbott Labs.,* 299 F.R.D. 595, 602-03 (N.D. Iowa 2014); *Henderson v. B&B Precast & Pipe, LLC,* 2014 WL 4063673, at *1 (M.D. Ga. Aug. 14, 2014); *Ethox Chem., LLC v. The Coca-Cola Co.*, 2016 WL 7053351, at *7 (D.S.C. Feb. 29, 2016); *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, 2011 WL 4526141, at *8 (S.D.N.Y. Sept. 21, 2011).
43. *See Security Nat. Bank of Sioux City, Iowa v. Abbott Laboratories,* 299 F.R.D. 595, 598-99 (N.D. Iowa 2014), r*eversed on other grounds* by *Security Nat. Bank of Sioux City, IA v. Day,* 800 F.3d 936 (8th Cir. 2015); *Cincinnati Ins. Co. v. Serrano, supra* note 16 at *4-5 (D. Kan. January 5, 2012); *RightCHOICE Managed Care, supra* note 32, at *3 (citing *Serrano, supra* note 18 at *5).
44. *Craig v. St. Anthony's Medical Center,* 2009 WL 690210, *2 (E.D. Mo. March 12, 2009) (imposing sanctions on attorney who made multiple, lengthy objections during a deposition and instructed his client not to answer); *see Armstrong v. Hussmann Corp.,* 163 F.R.D. 299, 302-303 (E.D. Mo. 1995) (sanctioning attorney who not only objected to question that mischaracterized client's prior testimony, but also provided his own summary of his client's testimony); *see also Security Nat. Bank of Sioux City, IA v. Day,* 800 F.3d 936 (8th Cir. 2015) (agreeing with district court's basis for sanctions against attorney who repeatedly made unspecified "form" objections during deposition, but reversing sanctions in part).
45. *Craig v. St. Anthony's Medical Center,* 384 Fed.Appx. 531, 532-33 (8th Cir. 2010).
46. *RightCHOICE Managed Care, supra* note 32, at *3 (citing Serrano, supra at note 18 at *5) ("The Court also notes the suggestiveness inherent in telling deponents to answer only 'if they know,' and therefore directs [counsel] to cease using this qualification.")
47. *Craig, supra* at note 44 at *2.
48. *See* Mo. Leg. S.B. 224 (2019 regular legislative session) (effective Aug. 28, 2019); *see also* Mo. Const. art. V, § 5 (authorizing General Assembly to annul or amend the Missouri Supreme Court Rules "by a law limited to the purpose").
49. Rule 56.01(b)(1) (discovery requests must be "proportional to the needs of the case"); 49 compare to Fed. R. Civ. Pr. 26(b)(1).
50. Rule 57.01(a), Mo. R. Civ. Pro. (limiting parties to no more than 25 written interrogatories, including all discrete subparts); compare to FED. R. CIV. PR. 33(a)(1).

51. Rule 59.01, Mo. R. Civ. Pro. (limiting parties to no more than 25 written requests for admission).
52. Rule 57.03(a)(2)(A)(i), Mo. R. Civ. Pro.
53. Rule 57.03(a)(2)(A)(ii), Mo. R. Civ. Pro.
54. Rule 57.03(b)(5)(A), Mo. R. Civ. Pro.
55. *Id.*
56. Rule 57.03(b)(5)(B), Mo. R. Civ. Pro.
57. Fed. R. Civ. Pr. 30(d). Note that federal courts have declined to impose monetary sanctions for deposition delays unless the complaining party also requests additional time to examine the deponent. *See, e.g., Gustafson v. Bi-State Development Agency of the Missouri-Illinois Metropolitan District,* 2019 WL 5579265, *2 (E.D.Mo. Oct. 29, 2019) (certain deposition objections were "inappropriate" but did not justify sanctions, where deponent answered each question asked of her); *Dapron v. Spire, Inc. Retirement Plans Committee,* 329 F.R.D. 223, 228 (E.D.Mo. 2019) (sanctions inappropriate when second deposition was unnecessary).
58. *See* 28 Mo. Prac., *Mo. Crim. Prac. Handbook,* § 29:5 (Hon. Robert H. Dierker) 58 (Jan. 2019); *Craig, supra* at note 44 at *2.