# ATLA DOCKET

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## *Discovery & Depositions: Best Practices*

# DOCKET

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lawyer's interpretation is not relevant and is often suggestive of a particularly desired answer.]

Another form of witness coaching that is very common is "Asked and Answered" [which is not really an objection]. The proper objection is 'cumulative", but Judges are so used to the cumulative nature of evidence being objected to at trial by saying "asked and answered" that it has effectively become accepted as a proper way to raise the objection. However, remember that is an objection for trial and is not a proper objection during a deposition except in the extremely rare instance where it rises to the level of being harassing. Remember that your approaching an important concept from different angles does not constitute objectionable conduct, nor is it objectionable to repeat a question when the witness has evaded answering the question.

Also, excessive objections are prohibited. Please refer to the Advisory Committee Notes to FRCP Rule 30 and the Addition To Reporter's Notes, 1997 Amendment of the ARCP. From both of these, it is clear that "[t]he making of an excessive number of unnecessary objections may itself constitute sanctionable conduct." If excessive objections during a deposition disrupt the information-seeking process, this conduct may be sanctionable under FRCP Rule 30(d)(2) and under ARCP Rule 30(d)(3). Rule 30(d)(3) states:

> If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorneys' fees incurred by any parties as a result thereof.

The *Hall* case cited above explains why witness coaching is improper. In that decision Judge Robert Gawthrop precisely summarized as follows:

> 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. Prohibited witness coaching includes coaching under the guise of meritorious objections as well as blatant instructions. Despite the Federal Rules' prohibition on witness coaching, some lawyers prompt witnesses to give particular, desired answers to the examiner's questions in numerous subtle and not-so-subtle ways.

Other ways that unscrupulous attorneys coach their witnesses include written notes to the witness and via text messages (especially in the age of Zoom or other similar video depositions where the witness and the questioning attorney are not in the same room). When these occur, you as the questioning attorney have three (3) choices (if warning them has not worked). They are:

1. Continue the deposition and document each instance of improper action by the defending attorney (seeking sanctions thereafter);
2. Terminate the deposition to file a motion for sanctions; and
3. If you have a Judge who will allow it, call the court. Only use this as a very last resort as most courts are not likely to provide much help and explaining items to the court over the phone is usually not a very good way to get the assistance needed. The only time that a Judge is likely to assist is if he has seen this before from the same attorney (usually in your case from previous sanction hearings).

**Objecting Properly**

So, what objections are proper and when? Objections to correctable evidentiary and foundational errors should be made at the time that they may be corrected, i.e whether it is the form of the question, lack of a foundation or any other immediately correctable error, make it at the time that it occurs or as soon thereafter that you realize it. Rules 32(d)(3) of the FRCP and the ARCP require lawyers to raise objections to evidentiary issues during the deposition if the ground for the objection can be corrected at the deposition. Try to make them promptly so that the Court will not decide that you waited several hours to make them and, thus, have waived them. But, even if you realize a few seconds after an answer is given that the question was improper make the objection then because most courts will say that it would have only taken a minute or two to go back to correct and, therefore, the prejudice, if any, is minor and it could have been obviated then. Therefore, the Court is not likely to say that you have waived that objection.

At times, these objections are to the competence to testify due to the lack of a foundation for such testimony are hard to discern whether they should be raised at the deposition. If you have a question, then raise it at the deposition in the proper manner so that you know it is preserved. Once again, we could go far afield and beyond the bounds of this article. Therefore, if you have questions regarding these matters refer to the FRCP and the ARCP in the 600s to determine these issues. Just remember that if it can be corrected at the deposition even by extensive questioning, then it should be raised then.

How does the defending attorney object properly. If the lawyers are ethical and want to do it properly, then they should raise objections carefully and know the applicable law on what is necessary. Suffice it to say that I have yet to see a Court in Arkansas that has said you did not raise the objection properly which related to the

# Penalties for Not Properly Responding to Written Discovery

by Tim Watson, Esquire

An old attorney (probably several) once said, "When you have the law, cite the law. When you have the facts, cite the facts. When you have neither, be the loudest person in the room." In simple iteration, the job of an attorney is to apply the law to the facts. In order to do that, we must first find the facts and support them with proof. Effective application of the rules of discovery allows us to support our facts so that when we find ourselves in a courtroom, we can effectively cite both the law and the facts and aren't left simply shouting.

You have submitted written discovery, you have waited thirty days (plus three if the discovery was not personally served[1]), and you have had no responses from the opposing party. If you have narrowed your discovery to matters that have any relevance at all, depending on the form of written discovery you have provided to the opposing party, you have several options, all of them great for your client.

In most circumstances the initial tools to gather support for your case are the first set of interrogatories, requests for production, and, sometimes, requests for admission. A party may generally inquire into any matter that is relevant to any issue in the pending action. Arkansas Rules of Civil Procedure (ARCP) 26(b) and 33(c). Importantly, parties may inquire into issues that may themselves be inadmissible; it is not a valid objection to an interrogatory that the information sought might be inadmissible. ARCP 26(b)(1).

A party who has received interrogatories, requests for production and/or requests for admission must do one of four things within the next 30 days (plus three): (1) they may produce thorough and substantive responses, (2) they may move for an extension of time to provide answers and responses, (3) they may move for a protective order limiting their obligation to answer or respond pursuant to Rule 26(c), or (4) they may object.

If a party fails to respond or object to interrogatories in a timely manner without taking any other action, that party waives the right to object to any interrogatory posed to him or her absent a showing of "good cause". ARCP 33(b)(4). Arkansas courts are loath to find good cause in the absence of a legitimate and timely objection. The Arkansas Supreme Court has routinely held that the failure to serve an

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answer, object or obtain a protective order in timely response to interrogatories constitutes a waiver of any privilege a party might otherwise be entitled to assert.[2] Furthermore, a party cannot attempt to walk along the middle of the road by providing only partial or evasive answers; incomplete responses are treated as a complete failure to respond.[3] The result is that the responding party may be compelled to provide a substantive response and suffer the imposition of sanctions for not doing so earlier.

With regard to requests for production the rule differs slightly in that ARCP 34 does not explicitly provide that a party who fails to answer or object (or seek a protective order or an extension) waives the right to object. Rule 34 provides, rather, that the party submitting the request may move for an order compelling production pursuant to ARCP 37 for any request objected to or for failure to respond. The court's analysis in response to a motion to compel production when there has been a failure to timely produce is substantially similar to the court's treatment of a failure to respond to interrogatories; the party objecting or failing to respond must show good cause to avoid an order to compel production and further sanctions.

Requests for admission are another animal altogether. Rule 36 provides that a party may request an opposing party to admit to statements or opinions of fact, o*r the application of law to any fact,*[4] with regard to any relevant matter. Requests for admission may not be part of the same document as interrogatories and requests for production but must be separately served. ARCP 36(c). Furthermore, unlike interrogatories and requests for production, both the requests for admission and the responses must be filed. ARCP 36(c). A failure to timely respond to a request for admission deems the matter admitted. ARCP 36(a). Any matter admitted is conclusively established unless the court allows for withdrawal or amendment of the admission. ARCP 36(b). A party who wishes to avoid a deemed admission must show excusable neglect for a failure to timely respond, and the bar is high.[5]

Other than those explicit consequences for the failure to respond to discovery set forth in Rules 33, 34, and 36, most direct sanctions associated with the failure to respond are set forth in Rule 37.

For a more complete analysis of the process for and considerations surrounding the filing of a motion to compel, see elsewhere in this publication Jim Lyons' excellent series "How to File a Motion to Compel." Assuming you have put Mr. Lyons' advice into practice and are in position to obtain an order to compel complete answers to interrogatories and/or complete production in response to your requests, Rule 37 further provides that the court "shall" (not may) order the party *or his attorney or both of them* to pay the moving party reasonable expenses, including attorney's fees, for having to bring the motion to compel. ARCP 37(a)(4)(A). Furthermore, the party that has failed to timely answer or object has placed themselves in danger of several heavy sanctions if that party fails to comply with the Court's order to provide substantive responses. In the event a party fails to obey a motion to compel, the court may designate certain facts established, it may refuse to allow the delinquent party to present evidence of any claim or defense; it may order pleadings stricken, the action dismissed or direct entry of a default judgment; it may hold the delinquent party in contempt; and/or it may enter *any other orders that it may find just.* ARCP 37(b)(2)(A-D). Arkansas courts have shown exuberance in their willingness to impose the sanctions described in the Rule.[6]

In fact, a court may impose sanctions even in the absence of an order to compel.[7] And such sanctions are entirely in the court's discretion, and that discretion is broad; there is no requirement that the court find willful or deliberate disregard before imposing sanctions.[8] That is worth repeating: the Arkansas Supreme Court has routinely upheld decisions by trial courts to impose sanctions for a failure to obey an order to compel even where the failure was not willful or deliberate.

Understanding these rules and their application is essential to both building your case and protecting your client, not just from intrusive discovery but from an avoidable loss. The need to carefully and thoughtfully draft your written discovery so that it is reasonably tailored to elicit relevant information is imperative and cannot be overstated, but the rules and the court's application of these rules suggest a preference to promote rather than hinder discovery. Studying them and putting them into practice will ultimately only benefit your clients, which is, after all, our purpose.•

**Endnotes**

1 ARCP 6(d) – the "mailbox rule" provides an additional three days to respond if not personally served with discovery.

2 *Young v. Young,* 316 Ark. 456, 458, 872 S.W.2d 856, 857 (1994)

3 *Memphis Scale Works, Inc. v. McNorton,* 2020 Ark. App. 77, 595 S.W.3d 412

4 However, a request that attempted to discover what legal conclusions the opposing parties' attorney intended to draw from those facts was found to be improper; *In re Dailey,* 30 Ark. App. 8, 784 S.W.2d 258 (1989)

5 *Allen v. Kizer,* 294 Ark. 1, 740 S.W.2d 137 (1987); *Barnett Rest. Supply v. Vance,* 279 Ark. 222, 650 S.W.2d 568 (1983) *office distractions and secretarial errors typically not an excuse for lateness*

6 Arkansas courts have repeatedly upheld severe sanctions for flagrant discovery violations. *See, Nat'l Front Page, LLC v. State ex rel. Pryor,* 350 Ark. 286, 86 S.W.3d 848 (2002) (approving trial court's entry of default judgment where *pro se* defendant failed to answer any discovery requests, failed to appear at a hearing on a motion to compel, and failed to appear for trial); *Viking Ins. Co. of Wisconsin v. Jester,* 310 Ark. 317, 836 S.W.2d 371 (1992) (upholding lower court's striking the defendant insurance company's answer and entering a default judgment where [**5] defendant, after being ordered to produce its entire claim file, withheld portions containing pertinent information); *Coulson Oil Co. v. Tully,* 84 Ark. App. 241, 139 S.W.3d 158 (2003) [*4] (affirming the circuit court's sanction of striking the defendant's answer where the defendant included untruthful information in its discovery responses).

7 *Lake Village Health Care Center, LLC v. Hatchett ex rel. Hatchett,* 2012 Ark. 223, 407 S.W.3d 521

8 *S. Coll. of Naturopathy v. State ex rel. Beebe,* 360 Ark. 543, 203 S.W.3d 111 (2005); *Calandro v. Parkerson,* 333 Ark. 603, 604, 970 S.W.2d 796, 797 (1998); *Cook v. Wills,* 305 Ark. 442, *8, 808 S.W.2d 758 (1991).