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THE AMORPHOUS "FORM" OBJECTION

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Every attorney who has litigated in Texas at any time during her practice must have run into the notorious, and often misunderstood, "Objection, form." This objection is used almost exclusively during the deposition upon oral examination and is a specifically prescribed objection to questions under Rule 199.5(e) of the Texas Rules of Civil Procedure.[1]

This Article will address "Objection, form" and analyze its amorphous nature, its potential problems and pitfalls, and suggest the best uses and practices for this objection.

I. BRIEF HISTORY

Prior to 1999, it was not uncommon for practicing attorneys to make running, argumentative, long, and obstructive objections that were designed (i) to throw the opposing attorney off her game; (ii) to prevent relevant information from reaching the jury; or (iii) to achieve both of these objectives.[2] The excessive use of objections and gamesmanship during the process of discovery and procuring deposition testimony seemed acceptable as it did not affect the lawyer's ability to "sell" her case to the jury and be an effective advocate for her client. The role of the trial lawyer was,

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1. TEX. R. CIV. P. 199.5(e).

2. *See, e.g.*, *In re* Harvest Communities of Houston, Inc., 88 S.W.3d 343, 346–47 (Tex. App.—San Antonio 2002, no pet.) (providing a particularly egregious example of a practitioner improperly using objections); JAMES L. MITCHELL, DEALING WITH OBSTREPEROUS WITNESSES OR COUNSEL 1, 5 (2005), *available at* http://www.paynemitchell.com/objectfiles/PMLG.Web.Data.Publication/33/Dealing%20With%20Obstreperous%20Witnesses.pdf ("The term 'Rambo litigation' was coined as a result of the conduct of attorneys in Texas . . . .").

and still is, to be an effective advocate for her client's cause and to be vigilant to trial errors in order to properly flag them in the record for appeal.[3] However, an attorney who constantly objects in an effort to flag every single error may undermine her standing before the jury and appear petty and dishonest.[4] Thus, long, argumentative objections were used more frequently at the pretrial, discovery stages of any litigation than during trial.

The Texas Supreme Court decided to change this practice, presumably when it grew tired of its docket being filled with discovery disputes, and, on November 9, 1998, signed an order modifying the Texas Rules of Civil Procedure.[5] The modifications and changes focused heavily on discovery, specifically on objections to discovery, and, thereby, created a more modern and friendlier discovery system.[6]

The 2013 amendments to the Texas Rules of Civil Procedure, adopted by the Texas Supreme Court on February 12, 2013, and in force as of March 1, 2013, did not change the basic discovery rules adopted in 1999, although the 2013 amendments modified the scope of discovery for certain cases under Rules 190 and 194, governing discovery limitations and requests for disclosure.[7]

II. THE RULES

The rules adopted by the Texas Supreme Court in 1998 stood in stark contrast to the pre-1999 rules, particularly with regards to their specificity. For instance, the rules now contain very specific discovery rules; so specific in fact, that they even explain how to answer the discovery requests.[8]

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3. ALEX WILSON ALBRIGHT, TEXAS COURTS: A SURVEY 4 (2011), *available at* http://imprimaturpress.com/imgs/160.pdf.

4. *See id.* at 4–6 (arguing that a good trial attorney "must cultivate a split personality" by trying to coax a favorable verdict from the jury while also making a record of errors).

5. Final Approval of Revision to the Texas Rules of Civil Procedure, Misc. Docket No. 98-9196, at ¶¶3–4 (Tex. 1998), *available at* http://www.supreme.courts.state.tx.us/miscdocket/98/98-9196.pdf; Nathan L. Hecht, *Revision to the Texas Rules of Civil Procedure Governing Discovery*, 61 TEXAS B.J. 1139, 1139–40 (1998).

6. *See* NATHAN L. HECHT & ROBERT H. PEMBERTON, A GUIDE TO THE 1999 TEXAS DISCOVERY RULES REVISIONS at G-2 to G-3 (1998), *available at* http://www.supreme.courts.state.tx.us/rules/tdr/disccle37.pdf (noting that the 1999 rules revision were the result of a multi-year study and provide "ample access to information, reducing abuse and misuse, streamlining and simplifying procedures, fairly accommodating the diverse interest").

7. Final Approval of Rules for Dismissals and Expedited Actions, Misc. Docket No. 13-9022, at 10–13 (Tex. 2013), *available at* https://www.supreme.courts.state.tx.us/miscdocket/13/13902200.pdf; *Final Approval of Rules for Dismissal and Expedited Actions*, 76 TEX. BAR J. 221, 225–26 (2013), *available at* http://d27vj430nutdmd.cloudfront.net/21412/148203/148203.19.pdf.

8. *See, e.g.*, TEX. R. CIV. P. 196.2(b) (providing four pre-made responses to requests for production).

Regarding discovery objections, Rule 199.5(e) of the post-1999 Texas Rules of Civil Procedure is quite exacting. The Rule specifies in detail the requirements for the objections that a party may raise to questions asked during a deposition upon oral examination.[9] The Rule states:

> **Objections.** Objections to questions during the oral deposition are limited to "Objection, leading" and "Objection, form." Objections to testimony during the oral deposition are limited to "Objection, nonresponsive." These objections are waived if not stated as phrased during the oral deposition. All other objections need not be made or recorded during the oral deposition to be later raised with the court. The objecting party must give a clear and concise explanation of an objection if requested by the party taking the oral deposition, or the objection is waived. Argumentative or suggestive objections or explanations waive objection and may be grounds for terminating the oral deposition or assessing costs or other sanctions. The officer taking the oral deposition will not rule on objections but must record them for ruling by the court. The officer taking the oral deposition must not fail to record testimony because an objection has been made.[10]

This rule provides for only three kinds of objections.[11] Two objections are designed to attack the question, and these are "Objection, leading" and "Objection, form."[12] The other objection is designed to attack the testimony of the witness, and this is "Objection, nonresponsive."[13]

III. THE USES AND NATURE OF "OBJECTION, FORM"

An objection to the form of a question is a generic objection. It is a "catch-all" objection that is meant to include several different defects or problems with the question. The commentary to the 1999 changes to the Texas Rules of Civil Procedure indicates that at least five different objections are covered under "Objection, form."[14] These five objections are based on the fact that the question may elicit speculative

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9. *See* TEX. R. CIV. P. 199.5(e) (establishing "Objection, leading" and "Objection, form" as the only permissible objections to questions during an oral deposition, "Objection, nonresponsive" as the only permissible objection to testimony during the oral deposition, and requirements to make a proper objection).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *See* TEX. R. CIV. P. 199, cmt. 4 ("An objection to the form of a question includes objections that the question [1] calls for speculation, [2] calls for a narrative, [3] is vague, [4] is confusing, or [5] is ambiguous.").

testimony, may call for a narrative answer, is vague, is confusing, or is ambiguous.[15]

In addition, the form objection has also been used to oppose questions and documents, for example, an affidavit, which avers testimony or facts as to which the witness lacked personal knowledge or that may be hearsay.[16] This was the situation in *Camacho ex rel. Fraker v. Wilemon Property Co.*[17] *Wilemon Property* is a premises liability case in which the plaintiff, to defeat the defendant's summary judgment motion, filed the affidavit of a witness who was testifying as to the condition of the premises which caused the plaintiff's injuries—an erect piece of metal rebar protruding vertically from the cement lot.[18] The defendant objected to the affidavit, contending that the affidavit contained hearsay statements and the witness lacked personal knowledge.[19]

The court, in analyzing whether the plaintiff produced any evidence of probative force to raise a fact issue on each of the elements of its claim, stated that "[h]earsay is an objection to the *form* of the affidavit rather than its substance . . . [, and] [l]ack of personal knowledge is also a *form* objection."[20] However, because the defendant had failed to obtain a ruling on the objection, the court of appeals did not decide whether the objection was proper.[21]

Additionally, the form objection has been used to complain about questions that assume facts in dispute or not in evidence; that are argumentative; or that, in some other way, misrepresent the witness's testimony.[22] In *St. Luke's Episcopal Hospital v. Garcia*, the relator, Saint Luke's Episcopal Hospital, sought a writ of mandamus to vacate a court's order overruling its objections to a deposition on written questions and subpoena deuces tecum filed by the Texas Medical Center.[23] The order overruled objections based on attorney-client privilege, work-product privilege, party-communications privilege, among others, and directed the relator to produce the requested documents.[24]

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15. *Id.*

16. *See* Hofland v. Williamsburg Two Homeowners Ass'n, No. 05-02-00820-CV, 2002 WL 31730966, at *4 (Tex. App.—Dallas Dec. 5, 2002, no pet.) (referring to objections to an affidavit); Camacho *ex rel.* Fraker v. Wilemon Prop. Co., No. 05-99-01883-CV, 2001 WL 706262, at *3 (Tex. App.—Dallas June 25, 2001, no pet.) (same).

17. *Wilemon Prop. Co.*, 2001 WL 706262, at *3.

18. *Id.* at *1–2.

19. *Id.* at *3.

20. *Id.* (emphasis added).

21. *Id.*

22. St. Luke's Episcopal Hosp. v. Garcia, 928 S.W.2d 307, 309 (Tex. App.—Houston [14th Dist.] 1996, no writ) (quoting 5 TEXAS CIVIL TRIAL GUIDE § 100.23(3)(c) (W.V. Dorsaneo III & Earl Johnson, Jr. eds., 1989)).

23. *Id.* at 308.

24. *Id.*

In determining whether the writ should issue, the court of appeals stated the following about an objection to the form of a question:

> [Objections to form] usually involve the following objections: "(1) assumes facts in dispute or not in evidence; (2) is argumentative; (3) misquotes a deponent; (4) is leading; (5) calls for speculation; (6) is ambiguous or unintelligible; (7) is compound; (8) is too general; (9) calls for a narrative answer; and (10) has been asked and answered."[25]

Finally, the Fourteenth Court of Appeals in *Garcia*, while concluding that the trial court abused its discretion, impliedly found that objections related to privilege are substantive, as opposed to objections to form, which are procedural.[26]

A similar ruling in the substantive or procedural nature of the form objection was delivered in *Fernandez v. Peters*.[27] In this case, the court highlighted the difference between substantive and procedural objections by explaining that "[u]nlike objections to defects in form, objections to defects of substance may be raised for the first time on appeal."[28]

Thus, the form objection has a wide variety of uses, and it is not necessarily restricted to those listed in the commentary to the 1999 changes to the Texas Rules of Civil Procedure. It is also an objection that may be waived if (i) the objection is not stated as required and prescribed by the Texas Rules of Civil Procedure—"Objection, form"—and (ii) no ruling on the objection is obtained from the court, as this is a procedural objection.[29]

IV. WHAT TO DO WHEN FACED WITH "OBJECTION, FORM"?

We are at a deposition table. We have taken care of the formalities, and we are getting into the questions that actually matter for the case. We ask a question, and, before the witness could answer, we hear, "Objection, form." What do we do?

In essence, as we have seen, "Objection, form" does not provide specific information; does not give any guidance as to the particular defect in the question; and does not provide any

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25. *Id.* at 309 (citing 5 TEXAS CIVIL TRIAL GUIDE, *supra* note 22, § 100.23(3)(c)).

26. *See id.* at 310 ("[R]elator has no objection to the form of TMC's written questions . . . . [R]elator's primary objections are substantive objections relating to privilege.").

27. Fernandez v. Peters, No. 03-09-00687-CV, 2010 WL 4137491, at *4 (Tex. App.—Austin 2010, no pet.) (memo. op.).

28. *Id.* (citing Trostle v. Combs, 104 S.W.3d 206, 214 (Tex. App.—Austin 2003, no pet.)).

29. *See* TEX. R. CIV. P. 199.5(e) ("These objections are waived if not stated as phrased during the oral deposition."); Camacho *ex rel.* Fraker v. Wilemon Prop. Co., No. 05-99-01883-CV, 2001 WL 706262, at *3 (Tex. App.—Dallas June 25, 2001, no pet.) ("Because Wilemon failed to obtain a ruling on its form objections, they are waived on appeal.").

indication as to what is the nature, need, or basis for the objection. As such, the form objection is the one objection that requires an explanation from the objecting party or it leaves the deposing party clueless as to what the complaint is about.[30] Thus, some specificity should be asked from the objecting party.

Specificity for an objection is not a novel concept. In fact, Rule 193 of the Texas Rules of Civil Procedure requires it, and general, unspecific form objections have been considered too vague to be sustained.[31] The court in *Superior Trucks Inc. v. Allen* indicated that objections should be specific and distinct.[32] The *Superior Trucks* court reasoned that a form objection "does not specifically inform the trial court of the nature of the defect" in issue.[33]

For that reason, the attorney taking a deposition must make a strategic decision when faced with a form objection: should she let the witness answer the question or request immediate support for the objection. Both options have pros and cons.

The first option is letting the witness answer the question despite the objection. I believe this is the better practice because the witness has not had much time to think about the question and will most likely answer candidly. If the attorney taking the deposition interrupts the witness to ask the objecting counsel for support for the objection, she may break the flow of the question and answer. The witness then has time to think about what she said before or to harmonize her story.

The second option is to request support for the objection prior to receiving an answer from the witness. A request for immediate support for the objection is strategically useful as it adds an element of surprise. Generally, opposing counsel is not expecting an immediate request for support and will be forced to think on her feet and on the record. It also allows both counsel to have their evidence on record prior to going before the judge on a discovery motion before or during trial. Another reason for asking for immediate support is to avoid giving opposing counsel the opportunity to find support for her objection later. If given the

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30. *Cf.* Superior Trucks, Inc. v. Allen, 664 S.W.2d 136, 148 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (discussing the need for specificity when making a form objection in the context of a jury charge).

31. *See* TEX. R. CIV. P. 193.2 ("The party must state specifically the legal or factual basis for the objection . . . ."); *see also Allen*, 664 S.W.2d at 148 ("Objections to a charge must be specific and distinct and a form objection which does not specifically inform the trial court of the nature of the defect in a special issue, will not preserve error." (quoting Mahan Volkswagen v. Hall, 648 S.W.2d 324, 330 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.) (citations omitted)).

32. *Allen*, S.W.2d at 148.

33. *Id.*

opportunity after the deposition is over, opposing counsel may support her objections on any viable ground that a form objection may be based; as we have seen, there may be many.

Other options are to obtain a ruling from the court during the deposition or to file a Motion for Ruling on the Objections. Obtaining a ruling during the deposition is relatively simple. Most courts allow for an attorney to request a ruling from the court via phone. The judge will typically hear the objection, hear both parties' arguments, and rule on the objection. This ruling will then be reflected in the deposition record and will be final.

Although this option may seem tempting due to its immediate results, its use should be carefully weighed against its benefits. Contacting the court unexpectedly and requesting a ruling from the judge is an imposition on the court and may backfire. The judge may be occupied with other matters and will have to attend to the dispute unprepared. The objection may seem petty or the support insufficient, which would undermine the attorney's credibility and rapport with the court. The ability and opportunity to argue your position may also be undermined by the fact that the argument has to be made remotely. Other problematic issues may be that legal authority has not been researched, and counsel taking the deposition will also have to prepare arguments on the spot and on record.

After the deposition is over, the attorney taking the deposition may file a Motion for Ruling on the Objections under Rule 199.6 of the Texas Rules of Civil Procedure.[34] At such time, the objecting party must "present any evidence necessary to support the objection."[35] This mechanism, however, gives the opposing counsel a better opportunity to support her objections.

All these options allow the deposition record to reflect fully the basis and nature of the objection.

Thus, in my opinion, it is advisable for counsel taking the deposition to do one of the following:

1. Let the witness answer, and then request for the basis of the objection;
2. Do not let the witness answer, and immediately request for the basis of the objection;
3. Contact the court, and request a ruling on the objection, at the moment the objection is made; or

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34. *See* TEX. R. CIV. P. 199.6 ("Any party may, at any reasonable time, request a hearing on an objection or privilege asserted by an instruction not to answer or suspension of the deposition; provided the failure of a party to obtain a ruling prior to trial does not waive any objections or privilege.")

35. *Id.*

4. File a Motion for Ruling on the Objections under Rule 199.6 at which time the judge should decide on each and every one of the objections.

Counsel must also consider the rules included in the Texas Rules of Civil Procedure regarding the waiver of deposition objections, which may well cause many objections to be waived, and evidence, which was objected to, be admitted.[36]

Thus, the seemingly safest way to address the "Objection, form" issue is option 1, which allows the attorney taking the deposition the opportunity to lock-in opposing counsel's argument in support of the objection, while reserving its own arguments opposing the objection. Later, after the attorney taking the deposition has had an opportunity to research and prepare adequately, a Motion for Ruling on the Objections under Rule 199.6 would allow for final resolution of the objection.

V. CONCLUSION

In conclusion, "Objection, form" is a malleable, amorphous legal creature that is widely used in Texas. However, only a few practitioners actually know how to proceed when faced with it. Most simply ignore it. As soon as it is uttered by opposing counsel, the deposing counsel acts as if it did not happen. This is not a good strategy.

As the form objection has so many facets, ignoring it or reserving the request for support and reasoning behind the objection for a later hearing or to the pre-trial stage only gives the opposing counsel the opportunity to support its objection and have it sustained, excluding the evidence the deposing attorney was trying to introduce.

When faced with "Objection, form," remember the "three Rs": response, request, and reason. This will allow you to prevent abuses, continue with your deposition, and effectively protect the evidence and the record for future trial use.

36. *See* TEX. R. CIV. P. 199.5(e).