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# Maintaining deposition decorum

## THE ROLE OF DISCOVERY MOTIONS IN A POST-COVID-19 WORLD; HOW TO HANDLE IMPROPER DEPOSITION OBJECTIONS

As a result of the COVID-19 pandemic, there has been a significant shift in how depositions are conducted. Prior to the pandemic, most depositions were taken with attorneys, witnesses and the court reporter all physically present in the same location, which could be a downtown law office on a Friday afternoon, a court reporter's empty conference room, or a cramped (too small) medical office.

However, COVID-19 forced the legal community to adapt, leading to the widespread adoption of remote, video- conferenced depositions. This transformation brought about several conveniences, but it also exposed a concerning trend of increasing misconduct during remote depositions. Lawyers now have the ability to attend depositions from the comfort of their own office or home, with the witness located in another city, some other part of California, or another part of the country.

The time-saving benefits and convenience for attorneys are evident, as they no longer need to contend with the two-hour commute to attend a deposition that takes an hour or two. In fact, there are many young attorneys with four years or less experience who have never attended an "in person" deposition.

Unfortunately, the shift in deposition logistics has given rise to disconcerting tactics by some attorneys. While deposition misconduct did not emerge in the post-COVID era, there appears to be an increasing prevalence of such behavior. Some attorneys now seem comfortable in engaging in conduct through the protection of a remote deposition that they would not engage in if actually present in the same conference room with opposing counsel.

Litigation attorneys need to discourage and deter deposition misconduct by using the tools that have been provided to them in the Discovery Code – motions for protective order and motions to compel seeking meaningful sanctions. As Associate Justice William Bedsworth stated in *Kim v. Westmore Partners Inc.* (2011) 201 Cal.App.4th 267, 293-294.

> Lawyers and judges of our generation spend a great deal of time lamenting the loss of a golden age when lawyers treated each other with respect and courtesy. It's time to stop talking about the problem and act on it. For decades our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded that lips cannot do the job; teeth are required. In this case, those teeth take the form of sanctions … (F)or serious and significant departures from the standard of practice, for departures such as dishonesty and bullying, such steps are necessary … It is time to make it clear that there is a price to pay for cynical practice.

(*Ibid*.)

### Most deposition objections are not waived

To address deposition misconduct, the first step is for all counsel to understand the permissible parameters of deposition objections. The California Discovery Act is clear regarding the scope of proper and improper deposition objections. California Code of Civil Procedure, section 2025.460, subdivision (c) states that "[o]bjections to the competency of the deponent, or to the relevancy, materiality, or admissibility at trial of the testimony or of the materials produced are unnecessary and are not waived by failure to make them before or during the deposition." Only deposition objections based "on the ground that it is privileged or that it is a protected work product," (Code Civ. Proc., § 2025.460, subd. (a)) or "to the form of any question or answer" are waived if not made during the deposition. Proper objections to the form of the question encompass issues such as argumentative, compound, vague and leading questions. It is important to note though that leading questions are permitted when the deponent is an adverse witness.

As explained in a well-regarded practice guide, counsel should "*not* interpose objections on the ground of hearsay, opinion evidence, materiality, etc. Nothing is gained because these are not valid grounds for objecting to discovery." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2021) ¶ 8:729.1 (emphasis in original).) The Los Angeles County Superior Court Guidelines for Civility in Litigation similarly provides that:

> (7) Counsel defending a deposition should limit objections to those that are well founded and necessary for the protection of a client's interest. Counsel should bear in mind that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought.

(Superior Court of California, County of Los Angeles Guidelines for Civility in Litigation, Chapter Three Civil Division, Appendix 3.A, Section (e), Depositions.)

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In line with these principles, "irrelevance alone is an insufficient ground to justify preventing a witness from answering a question posed at a deposition." (*Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006, 1014.) As *Stewart* observed, a deposition may be suspended if the examination reaches the point where counsel's intent is to harass, annoy, embarrass or oppress. (*Id*. at 1015.) "The fact that suspension is available only where an interrogation into improper matters reveals an underlying purpose to harass, annoy, etc., indicates that witnesses are expected to endure an occasional irrelevant question without disrupting the deposition process." (*Ibid*.)

Instructions not to answer are improper *unless* the question implicates a privilege, privacy, or a legal contention. (*Id*. at 1014-15; *Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255, 1259 [legal contention questions can only be served as interrogatories].) Thus, if an attorney defending a deposition seeks to preclude the deponent from answering a question on grounds of relevance, the attorney may not instruct the deponent not to answer; rather, the attorney must suspend the deposition and promptly seek a protective order. (*Stewart*, *supra*, 87 Cal.App.4th at 1015.)

The Federal Rules of Civil Procedure are also unambiguous as to the limited circumstances in which a deponent can be instructed not to answer. "A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)." (Fed. Rules. Civ. Proc., Rule 30(d)(3).) "[I]nstructing a witness not to answer a question because it calls for inadmissible facts is sanctionable." (*BNSF Ry. Co. v. San Joaquin Valley R. Co*., 2009 WL 3872043, *2 (E.D. Cal. Nov. 17, 2009) (citations omitted).)

## Examples of improper deposition objections

All attorneys who take depositions can point to examples of meritless objections. The Los Angeles County Superior Court Guidelines for Civility in Litigation cautions that litigators "should not, through objections or otherwise, coach the deponent or suggest answers," "not engage in conduct in deposition that would not be allowed in the presence of a judicial officer," and "should refrain from self-serving speeches during deposition." (Superior Court of California, County of Los Angeles Guidelines for Civility in Litigation, Chapter Three Civil Division, Appendix 3.A, Sections (e)(8)-(11).)

Improper deposition conduct includes:

- Repeatedly stating a litany of pointless objections to straightforward questions in order to obstruct the deposition.

Q: Do you know [witness name]?

[Defense counsel]: Objection. Relevance 352. Vague. Ambiguous. Overbroad. Uncertain. Lacks foundation. Calls for speculation and subject to all of the objections set forth in Exhibit 2."

Q: Did the same person host the training on both occasions that you received the PIM-testing training?

[Defense counsel]: Objection. Relevance 352. Vague. Ambiguous. Overbroad. Lacks foundation. Calls for speculation. Subject to the objections, you may answer.

- Improperly stating string objections, including those based on relevance, Evidence Code section 352, and "improper reptile" – an objection that has no basis in the California Evidence Code or California case law – in order to obstruct the deposition.

Q: Are you aware of any presentations that [company X] has provided to any of its employees with respect to safety concerns posed by skylights?

[Defense Counsel]: Objection. Relevance 352. Improper reptile. Vague. Ambiguous. Overbroad. Assumes facts not in evidence. Incomplete hypothetical. Lacks foundation. Calls for speculation, an expert opinion, and a legal conclusion.

- Improper objections not to answer based on calling for expert opinion.

Q: [To witness who "designed" a traffic control plan]: Would you agree with me that you're not qualified to draft a traffic control plan?

[Defense counsel]: Calls for an expert opinion. Instruct him not to answer.

- Objecting to a line of questioning before a question is asked.

Q: Let's look back at what we marked as Exhibit 15. Do you have that in front of you still, sir? The lease agreement.

A: Yes. Yes, I do.

[Defense counsel]: We're going to object to this whole line of questioning.

[The witness]: Yes. Yes, I have it.

[Plaintiff's counsel]: Why don't you wait for a question before issuing an objection.

[Defense counsel]: Okay. Well, you keep asking him about this document. And it's a legal document so... But go ahead.

[Plaintiff's counsel]: I've asked him about a document that he signed. So, I can do that."

- Coaching a witness during a deposition, including brazenly engaging in side discussions and whispers to their client while on the record.

Q: So you haven't looked for any inspection records related to your purchase of the subject property. Is there anyone that would have that information?

A: I have to check.

[Defense counsel]: I don't think he understands the question.

[Plaintiff's counsel]: He's answered the question. So, if you have follow-up questions later, you're welcome to, but I'm going to keep going. And if you need to clarify at any point in time, that's fine too.

Q: If you wanted information, [To Defense counsel], you're having a conversation with him that we can't hear while we're on the record… Counsel.

[The witness]: Because I never need it. I never needed the inspection reports."

Video-conferenced proceedings have also introduced a new level of misconduct that would not occur in person. The Florida Supreme Court suspended an attorney for 91 days for texting his client coaching instructions during a workers' compensation deposition. (*The Florida Bar v. Derek Vashon James*, No. SC20-128 (November 18, 2001), https://cases.justia.com/florida/supreme-court/2021-sc20-128.pdf?ts=1637251347.) In

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Arizona, an attorney was suspended for 60 days for using the "Chat" feature in a remote proceeding to instruct his client on how to answer questions that were posed. (*In the Matter* https://www.azcourts.gov/Portals/101/2021/CLARIDGE%20PDJ%202021-9088.pdf?ver=MC9grhQGbj3dKF_KKJJFHg%3d%3d.)

## Attorneys need to bring deposition misconduct to the trial court's attention and seek meaningful sanctions

***Motions for protective order to address disruptive and obstructive deposition conduct***

When an attorney engages in persistent obstructive behavior, improper coaching and/or making speaking objections, without an instruction not to answer, attorneys need to make a record and move for a protective order and seek monetary sanctions.

Courts also have the inherent power to ensure that the rights of all of those before them are safeguarded, and to "insure the orderly administration of justice." (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 266.) In order to control the conduct of opposing counsel, Code of Civil Procedure section 2025.420 sets forth the requirements and grounds for a protective order arising out of a deposition:

> (a) *Before, during, or after* a deposition, any party . . . may promptly move for a protective order. . . .
>
> (b) The court, for good cause shown, may make any order that justice requires to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. This protective order may include, but is not limited to, one or more of the following directions: […]
>
> (5) *That the deposition be taken only on certain specified terms and conditions.*

[Emphasis added].

In order for the court to address counsel's conduct, provide a full copy of the deposition transcript for the court to review. In the notice provide an overview of the conduct, and in the points and authorities provide specific examples of the misconduct. For example, for the conduct outlined above:

- Objections to the majority of questions, including objecting to entire lines of questioning before a question was even asked, resulting in *at least 266 objections over 4.75 hours on the record*;
- In addition to reframing nearly 60 questions, counsel also instructed the deponent not to answer at least 15 times on grounds of relevance and Evidence Code section 352.
- Improper coaching of the witness during questioning:
  - *side conversations* with the witness while he was providing answers;
  - *lengthy speaking objections* and self-serving speeches; and
  - *frequent interruptions* during questioning and talking over others, resulting in a record filled with "simultaneous cross talk" notations.

In the motion for protective order, request that the court sanction opposing counsel due to the past conduct, and admonish counsel to refrain from similar conduct in the future. A discovery referee may need to be appointed to control such conduct. Sanctions can be awarded under Code of Civil Procedure section 2025.420, subdivision (h) for requiring the motion for protective order to be brought. Additionally, sanctions can be based on the deposition misconduct for "(e) Making, without substantial justification, an unmeritorious objection to discovery," and "(f) Making an evasive response to discovery."

While the issue of depositions sanctions may not be commonly documented in the California appellate courts, there are several instances of courts imposing such sanctions within the federal district courts. (*Lucas v. Breg*, 2016 WL 2996843 *2-4 (S.D. Cal. May 13, 2016) [sanctions for deposition conduct that included speaking objections, improper commentary disrupting the deposition, and improper instructions not to answer]; *Claypole v. County of Monterey*, 2016 WL 14557 *3-5(N.D. Cal. Jan. 12, 2016) [sanctions for deposition conduct that included long speaking objections, coaching witness, cutting off witness, and disrespectful conduct by stating to opposing counsel "don't raise your voice at me. It's not becoming of a woman …"]; *Lund v. Matthews*, 2014 WL 517569, at *4-6 (D. Neb. Feb. 7, 2014) [sanctions for coaching objections including whispering into deponent's ear and instructing not to answer based on "asked and answered"]; *Deville v. Givnadan Fragrances Corp.*, 419 F. App'x. 201, 207 (3rd Cir. 2011) [upholding sanctions for abusive, unprofessional and obstructive conduct during deposition]; *Specht v. Google, Inc.*, 268 F.R.D. 596, 598-599, 603 (N.D. Ill. 2010) [imposing sanctions for speaking objections that obstructed the deposition]; *BNSF Ry. Co. v. San Joaquin Valley RR Co.*, 2009 WL 3872043, *3 (E.D. Cal. Nov. 17, 2009) [imposing sanctions for frequent unnecessary and inappropriate objections].)

In most depositions, counsel may raise some inappropriate objections, which can usually be addressed during the deposition. But when counsel consistently crosses the line, through repeated and persistent improper conduct in an obvious strategy to disrupt and obstruct the deposition, stronger measures are required. In such cases, adjourn the deposition, and seek a protective order to bring the conduct to the court's attention. To deter future misconduct, meaningful sanctions against counsel who only seek to disrupt and obstruct should be sought.

***Motions to compel should be brought when there are repeated instances in a deposition of improper instructions not to answer***

California Code of Civil Procedure section 2025.480, subdivision (a) states in relevant part that "[i]f a deponent fails to answer any question or to produce any document, […], the party seeking discovery may move the court for an order compelling that answer or production." The motion must be

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brought within 60 days after completion of the records. (*Id*. at 2025.480(b).) Section 2025.480, subdivision (i) further provides that "[i]f the court determines that the answer or production sought is subject to discovery, it shall order that the answer be given or the production be made on the resumption of the deposition." Monetary sanctions may be awarded for unsuccessfully making or opposing a motion to compel. (*Id*. at 2025.480(j).)

The grounds to instruct a witness not to answer a deposition question are limited. Counsel can instruct a witness not to answer questions to prevent disclosure of information that is privileged or is protected work product. (Code Civ. Proc., § 2025.460, subd. (a).) "The burden of establishing that a particular matter is privileged is on the party asserting the privilege." (*San Diego Professional Ass'n v. Superior Court* (1962) 58 Cal.2d 194, 199.) Counsel can also instruct a witness not to answer legal contention questions which are more properly served as interrogatories. (*Rifkind*, *supra*, 22 Cal.App.4th at 1258-1263.)

Increasingly, attorneys are improperly instructing their clients not to answer questions in order to obstruct legitimate discovery. Remote, video-conferenced depositions have emboldened attorneys who seek to prevent damaging admissions from their client to state dozens of instructions not to answer based on a litany of improper deposition objections. As an example, defense counsel below instructed a witness to answer based on 12 different grounds – none of which were a proper basis to instruct a witness not to answer.

> Q: Would you agree that [Company A] must take into account safety when determining the location of its telecommunication enclosures?
> [Defense counsel]: Objection. Relevance 352. Improper reptile. Vague. Ambiguous. Overbroad. Lacks foundation. Calls for speculation. Assumes facts not in evidence. Incomplete hypothetical. Calls for an expert opinion and a legal conclusion and ultimate issue to be determined by the trier of fact. On those grounds, I'm instructing the witness not to answer.

To discourage such conduct, it's essential to file motions to compel. In one case, we were taking the deposition of the person who was identified as having designed a traffic control plan, and the plan itself represented that it was drafted in compliance with the M.U.T.C.D. Naturally, numerous questions were asked in deposition pertaining to the qualifications of the deponent to draft a traffic control plan, and whether or not certain deficiencies of the traffic control plan were in compliance with the published traffic control standards of the M.U.T.C.D. as represented on the plan. During the deposition, the witness was instructed not to answer 26 times based on the questions calling for expert opinion.

After engaging in the meet and confer process, both on the record and in subsequent communications, defense counsel refused to change her position regarding the instructions not to answer. A motion to compel was brought, and the court ruled that the objections and instructions were not proper on the basis that objections based on competency, relevancy materiality or admissibility at trial are not waived at deposition. A second deposition, with reasonable follow-up, was ordered for the questions the witness had refused to answer.

Counsel who obstruct a deposition and improperly instruct their clients not to answer legitimate deposition questions will only be deterred through a motion to compel. A second deposition should be ordered, with defense counsel paying the deposition costs. For egregious and repeated misconduct, sanctions against the attorney should be requested.

As one federal district court noted, "regardless of whether a judge would have permitted such questions, … counsels' role during a deposition does not include the authority to essentially rule on their own objections and determine whether such questions need to be answered." (*Lucas*, *supra*, 2016 WL 2996843 at *4.)

## Conclusion

Attorneys should adhere to fundamental deposition protocol, demonstrating respect towards opposing counsel, the court reporter, and deponents. In most cases, objections need not be raised during the deposition, except for issues pertaining to privilege and the form of the question. Instructions not to answer questions should be rare and limited to only privileged matters and legal contention questions. Additionally, when deposition misconduct is evident, it should be addressed promptly, even requiring judicial intervention if needed. Although courts disfavor discovery motions, clear deposition misconduct should not be ignored, and must be strongly rebuked.

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