

RESOLUTION 04-03-2007

DIGEST

Depositions: Limitation on Objections

Amends Code of Civil Procedure section 2025.330 to limit speaking objections, speeches, breaks to coach witnesses, and instructions not to answer during depositions.

RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 2025.330 to limit speaking objections, speeches, breaks to coach witnesses, and instructions not to answer during depositions. This resolution should be disapproved because it would prevent counsel from legitimately interacting and providing effective representation to his or her client.

Some states, like Arizona, Massachusetts, Colorado, Florida, Utah, Texas, Vermont, West Virginia, Nevada, Wyoming, and New Mexico, have strict rules on attorney conduct and interaction with their client during depositions. The trend started with *Hall v. Clifton Precision*, (E.D. Pa. 1993) 150 F.R.D. 525, in which the Eastern District of Pennsylvania ruled that lawyers and witnesses may not confer during a deposition, even during breaks, unless to consider an issue of privilege. The court held further that to the extent that such conferences do occur, the attorney client-privilege is waived and the substance of the conference is fair game for inquiry by the deposing attorney. (*Hall, supra*, 150 F.R.D. at p. 529.)

However, other states are leery of strict rules prohibiting attorney-client discussions during depositions. The *Hall* decision has been seen as going too far and violating the right to counsel if adhered to strictly. (*Stratosphere Corp. Securities Litigation* (D. Nev. 1998) 182 F.R.D. 614, 620-621.) So long as attorneys do not demand a conference between questions and answers, the court indicated that it was confident that the search for truth would adequately prevail. (Dain, Daniel P., *Limits on Deponent's Right to Confer with Counsel During a Deposition*, Boston Bar Journal (November/December 2004), at p. 24.) Some limitation on speaking objections may be reasonable and called for, but as in the *Hall* decision, this resolution goes too far in limiting the witness's counsel's ability to represent adequately his or her client during the deposition.

SECTION/COMMITTEE REPORT

COMMITTEE ON THE ADMINISTRATION OF JUSTICE DISAPPROVE

The State Bar of California's Committee on Administration of Justice (CAJ) opposes this resolution.

This resolution would put witnesses in jeopardy during a deposition. Attorneys are familiar with deposition procedures and therefore have an advantage over lay witnesses. When a witness is deprived of the effective assistance of counsel, the advantage to the opposing attorney is increased. This resolution would deprive attorneys defending depositions of the tools needed when the attorney taking a deposition attempts to take advantage of a witness.

This resolution interferes with the attorney client relationship by eliminating the ability of an attorney to advise a client. Prohibiting an attorney who is defending a deposition from talking to his or her client (absent specified circumstance) but permitting the deposing attorney to talk to his or her client at the same deposition is simply not fair. Subdivision (d)(4) of the resolution may also result in an invasion of work product, to the extent it would require an attorney to state the reasons for a communication with a client.

Depositions are designed to obtain accurate testimony. Certainly, some attorneys may interject more in a deposition than opposing counsel would like. However, CAJ believes that some attorneys may also take advantage of a statute that prohibits a vigorous defense at a deposition. Under this resolution, opposing counsel would, for example, be able to lead a witness through a series of objectionable leading questions, and opposing counsel could not do anything except continually assert an objection as to the “form of the question.” After opposing counsel had led the witness through the objectionable questions, he or she could then ask permissible questions that have a foundation based upon the answers previously given. CAJ questions whether this will, in fact, result in more accurate testimony. Another potential result of this resolution is that defending counsel may feel a need to aggressively protect a client by continually asserting, pursuant to subdivision (d)(3), that many questions are “plainly improper” and that answering will “cause significant prejudice.” This option does not appear to advance the overall goals this resolution.

CAJ believes that the existing system may not be perfect, but that abuses can be adequately addressed under the existing rules and statutes. Ultimately, this resolution will create more problems than it is trying to solve.

This position is only that of the State Bar of California’s Committee on Administration of Justice. This position has not been adopted by the State Bar’s Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend section 2025.330 of the Code of Civil Procedure to read as follows:

- 1 §2025.330
- 2 (a) The deposition officer shall put the deponent under oath or affirmation.

3 (b) Unless the parties agree or the court orders otherwise, the testimony, as well as
4 any stated objections, shall be taken stenographically. If taken stenographically, it shall be
5 by a person certified pursuant to Article 3 (commencing with Section 8020) of Chapter 13 of
6 Division 3 of the Business and Professions Code.

7 (c) The party noticing the deposition may also record the testimony by audio or
8 video technology if the notice of deposition stated an intention also to record the testimony
9 by either of those methods, or if all the parties agree that the testimony may also be recorded
10 by either of those methods. Any other party, at that party's expense, may make an audio or
11 video record of the deposition, provided that the other party promptly, and in no event less
12 than three calendar days before the date for which the deposition is scheduled, serves a
13 written notice of this intention to make an audio or video record of the deposition testimony
14 on the party or attorney who noticed the deposition, on all other parties or attorneys on
15 whom the deposition notice was served under Section 2025.240, and on any deponent whose
16 attendance is being compelled by a deposition subpoena under Chapter 6 (commencing with
17 Section 2020.010). If this notice is given three calendar days before the deposition date, it
18 shall be made by personal service under Section 1011.

19 (d) Examination and cross-examination of the deponent shall proceed as permitted
20 at trial under the provisions of the Evidence Code and subject to the provisions of this
21 subdivision.

22 (1) No objections may be made at a deposition except those which would be waived
23 if not interposed. All objections made at a deposition shall be noted by the officer before
24 whom the deposition is taken, and the witness must answer, and the deposition shall proceed
25 subject to the objections and to the right of a person to apply for appropriate relief pursuant
26 to section 2025.420.

27 (2) Every objection raised during a deposition must be stated succinctly and framed
28 so as not to suggest an answer to the deponent. An objection on any ground to the form of
29 the question must be stated as "objection to form" or similar neutral words. At the request
30 of the person asking a question, and only at such request, the person objecting must make a
31 clear statement describing the defect in form or other basis of error or irregularity. Except to
32 the extent permitted by this section or to adjourn a deposition for the purpose of making a
33 motion pursuant to section 2025.420, during the course of the examination persons in
34 attendance must not make statements or comments that interfere with the questioning.

35 (3) Notwithstanding subdivision (1), the deponent may refuse to answer a question,
36 but only (A) to preserve a privilege or right of confidentiality, (B) to enforce a limitation set
37 forth in an order of a court, (C) when the question is plainly improper and would, if
38 answered, cause significant prejudice to any person, or (D) when the deponent is testifying
39 as a designated person most knowledgeable and the subject matter of the question is outside
40 the deponent's designation. An attorney must not direct a deponent not to answer a question
41 except for the reasons set forth in this subdivision. Any refusal to answer or direction not to
42 answer shall be accompanied by a succinct and clear statement of the basis therefor. If the
43 deponent does not answer a question, the examining party shall have the right to complete
44 the remainder of the deposition.

45 (4) An attorney must not interrupt the examination for the purpose of
46 communicating with the deponent unless all parties consent or the communication is made
47 for the purpose of determining whether the question should not be answered on the grounds

48 set forth in subdivision (3), and in such event the attorney must state the reason for the
49 communication succinctly and clearly.

50 (e) In lieu of participating in the oral examination, parties may transmit written
51 questions in a sealed envelope to the party taking the deposition for delivery to the
52 deposition officer, who shall unseal the envelope and propound them to the deponent after
53 the oral examination has been completed.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS

Existing Law: Provides that depositions will be conducted “as permitted at trial” but does not explicitly limit attorney interference with the deposition process that would not be permitted at trial.

This Resolution: Explicitly limits speaking objections, speeches, breaks to coach witnesses, and instructions not to answer. It forbids attorney explanations of objections unless requested by the examining attorney. It preserves the right to instruct not to answer when a question invades a previously ordered limit on the scope of examination or when divulging the information would make meaningless the right to judicial determination of a privilege or similar right. The resolution is adapted from Part 221 of the Uniform Rules for New York State Trial Courts. Similar rules exist in Arizona, Colorado, Florida, Massachusetts, Nevada, New Mexico, South Carolina, Texas, Vermont, West Virginia, and Wyoming.

The Problem: Deposition conduct of some attorneys has gone from bad to worse in the last several decades. Too many depositions are an embarrassment to the profession and a threat to the civil justice system. Examining counsel often are forced to decide whether to proceed in the face of disruptive speeches and witness-coaching or to pursue the delaying, expensive, and uncertain process of seeking sanctions or the appointment of a master to preside over depositions.

The problem we address here is *not* a matter of courtesy or civility, nor is it local or concentrated in any particular field of practice or side of cases. Rather, a toxic and numerically significant minority has adopted a style of violating the “as permitted at trial” concept by interfering with the production of truthful evidence, most often from their own clients, clients’ employees, and friendly third-party witnesses. Implicitly and sometimes explicitly, young lawyers are offered this behavior as a model of how to “protect” the record.

Other states have adopted rules that spell out what lawyers may do and must not do while participating in the core evidence-production process of a deposition. California attorneys who have experienced those rules are finding that they work, even in places like New York that are famous for contentiousness. As a matter of self-respect, the profession in California must put an end to obstruction of truth in depositions.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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