

Compelling the Participation of Recalcitrant Witnesses at Deposition

DEPOSITIONS CAN BE time-consuming and expensive, especially when opposing counsel interferes by interposing meritless objections and instructions not to answer. If possible, it is best to resolve these issues on the record. When opposing counsel instructs the witness not to answer a question, ask for the basis of the instruction. If the grounds are something other than that the answer would call for privileged information, the instruction is typically improper. A deponent is obligated to answer a question at deposition “unless it pertains to privileged matters or deposing counsel’s conduct has reached a stage where suspension is warranted.”¹ If the answer does not call for privileged information (e.g., attorney-client), meet and confer with opposing counsel on the record about the merits, or lack thereof, of the instruction. Sometimes it may be appropriate to consider calling the judge to intervene in resolving the dispute immediately. If the court’s assistance is required, call when the judge is not likely to be on the bench and ask the clerk if the judge is willing to hear the matter informally. In order to determine whether the court will entertain such a request, ask for the judge’s permission early in the case to call should disputes arise during depositions.

If calling the judge does not appeal to you and if opposing counsel refuses to budge on the instruction not to answer, your recourse is filing a motion to compel. It is important to point out that completing the deposition on other matters does not waive the right at a later time to move for an order compelling the answer or production of information sought.²

If a deponent fails to answer a question, the deposing party may adjourn the deposition and file a motion to compel.³ While the motion to compel must be “made no later than 60 days after the completion of the record of the deposition,”⁴ seeking an order on an ex parte basis is preferable since the facts of the deposition will still be fresh in your mind and make the partner on your case happy. Indeed, ex parte orders may be obtained to control deposition scheduling.⁵

As you prepare your moving papers, keep in mind that when a deponent refuses to answer any question he “bears the burden of justifying such refusal on the motion to compel.”⁶ If the deponent cannot satisfy this burden, the court “shall order that the answer be given...on the resumption of the deposition.”⁷ Moreover, the motion should indicate that parties have wide latitude to conduct discovery by taking depositions. As with discovery generally, deposition questions may relate to “any matter, not privileged, that is relevant to the subject matter...if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.”⁸ Through unwarranted objections and improper instructions not to answer, opposing counsel and the deponent plainly interfere with legitimate discovery efforts.

A case on point is *In re Marriage of Lemen*.⁹ In *Lemen*, the witness, Goodman, appeared for deposition and was represented by attorney Dorsey. Goodman refused to answer 28 questions at the deposition.¹⁰ The deposing party moved to compel answers and sought sanctions against Dorsey and Goodman. The trial court granted relief, find-

ing “Dorsey’s conduct...went beyond his duty to protect Goodman from harassment and that he was a harassing element at the deposition.”¹¹ The appellate court affirmed and determined that “[t]he conduct of Goodman and Dorsey appears part of a calculated course to frustrate the achievement of the legitimate purposes of discovery.”¹²

If opposing counsel used objections and instructions to stifle discovery, as the attorney in *Lemen* was found to have done, say this in your brief and request that the court order the deponent to respond to the questions he or she wrongfully refused to answer at the deposition and that deponent appear at the continuation of the deposition.

When filing a motion to compel deposition answers or an ex parte application for an order compelling deposition answers, include with the moving papers a proposed order and a separate statement of deposition questions and responses at issue. Pursuant to California Rule of Court 3.1345, “[a]ny motion involving the content of a...response to [a deposition question] must be accompanied by a separate statement” that includes “[t]he text of the” deposition question, “[t]he text of [the] response,” and a “statement of the factual and legal reasons for compelling further responses.”

The exact question and response must be stated in the separate statement that accompanies the moving papers. Therefore, a copy of the deposition transcript should be available when the motion is being drafted. Accordingly, consider ordering the transcript on an expedited basis so the matter can be presented to the court as soon as possible. If the deponent was instructed not to answer basic, nonprivileged, and plainly relevant questions, and if the trial date is rapidly approaching, spending the extra money to expedite the transcript is a good investment for you and your client.

Although a judge would rather see you and your adversary work out disputes arising at depositions informally, sometimes seeking court intervention is the only viable remedy. Follow these steps to file a strong motion to compel and get the answers you deserve. ■

¹ *Stewart v. Colonial W. Agency, Inc.* 87 Cal. App. 4th 1006, 1015 (2001).

² CODE. CIV. PROC. §2025.460(d)

³ *Id.*

⁴ CODE. CIV. PROC. §2025.480(b).

⁵ CODE. CIV. PROC. §2025.270(d); *Parker v. Wolters Kluwer U.S., Inc.* 149 Cal. App. 4th 285, 295 (2007).

⁶ WEIL, ET AL., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶8:814 (2012). See also *San Diego Prof'l Ass'n v. Superior Court* 58 Cal. 2d 194, 199 (1962).

⁷ CODE. CIV. PROC. §2025.480(e).

⁸ CODE. CIV. PROC. §2017.010; see *Kalaba v. Gray*, 95 Cal. App. 4th 1416, 1423 (2002).

⁹ *In re Marriage of Lemen*, 113 Cal. App. 3d 769 (1980).

¹⁰ *Id.* at 776.

¹¹ *Id.* at 776-78, 782.

¹² *Id.* at 782-83.

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