EVIDENCE LAW

Appropriate Objections in a Deposition

By
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Have you ever taken a deposition and had your opponent continually assert inappropriate objections? One after the other: "Irrelevant;" "hearsay;" "assumes facts not in evidence," "calls for an opinion." Obnoxious, isn't it?

Or worse yet, an attorney makes speaking objections blatantly designed to coach the witness, such as: "Calculated to mislead the jury into believing his side of the story, *i.e.*, that the cardiologist failed to review the abnormal EKG and focused exclusively on the mucus in the lungs, when in fact the evidence suggests that the EKG was not conducted until after this witness examined the patient. I instruct the witness not to answer on the grounds that doing so would be prejudicial."

Considering that depositions cost a thousand dollars or more to take and sometimes require weeks or months to convene, inappropriate objections can be pretty infuriating. This begs the question: Which objections are appropriate in a deposition?

The first thing to remember is that depositions are for conducting discovery. And the scope of permissible discovery includes "any matter not privileged, that is relevant to the subject matter involved . . . [that is] itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." Code of Civil Procedure §2017.010.

Therefore, at all times during a deposition, be attuned for questions that seek information that is privileged, not relevant to the subject matter or that are not reasonably calculated to the discovery of admissible evidence. Objections to such questions, if well-taken, are most likely to be proper.

Privileges are fairly easy to grasp and "not reasonably calculated" questions are those questions that could only logically uncover inadmissible matter. The harder concept to understand is "not relevant to the subject matter." This is not the same thing as "relevancy" as a test for "admissibility," as used in Evidence Code §350. Rather, "relevant to the subject matter" for purposes of discovery is best thought of as helpful for evaluating the case, preparing for trial or facilitating settlement. *Gonzalez v. Superior Court* (*City of San Fernando*) (1995) 33 Cal. App.4th 1539, 1546.) Also, there is a

balance that comes into play when probing into irrelevant matter. Courts consider whether the benefit of allowing the discovery outweighs the burden. See, *Bridgestone/Firestone v. Superior Court* (*Rios*) (1992) 7 Cal.App.4th 1384, 1391.

The main thing to remember is that the scope of permissible discovery is very broad. "Reasonably calculated to lead to the discovery of admissible evidence" means that you are allowed to probe into areas that may themselves not be admissible, if doing so would shed light on other evidence that is admissible. See, *Greyhound Corp. v. Superior Court* (*Clay*) (1961) 56 Cal.2d 355, 384. Therefore, the scope of proper grounds for objecting to questions in a deposition is narrower than at trial.

For example, it is permissible to ask a deponent questions that call for hearsay, information that might itself be technically irrelevant to an issue or that calls for an opinion, even from a lay witness. The answers to those questions might be inadmissible at trial, but might lead to follow-up questions that uncover admissible evidence. Thus, objections such as "hearsay," "irrelevant" and "calls for an opinion" are generally improper in a deposition.

Case law specifically allows asking questions that call for hearsay in a deposition because it might lead to other admissible evidence. *Smith v. Superior Court* (*Alfred*) (1961) 189 Cal.App.2d 6, 11-12. Likewise, it is permissible to seek information that is cumulative, so an objection on that ground would be improper. *TBG Ins. Services v. Superior Court* (*Zieminski*) (2002) 96 Cal.App.4th 443, 448. The one exception to this general rule involves discovery taken from non-parties, against whom fishing excursions far afield of the issues are not likely to be permitted.

Asserting a privilege is a proper objection in a deposition. Such privilege objections include attorney-client (Evid. Code §950), doctor-patient (Evid. Code §990), psychotherapist-patient (Evid. Code §1010), clergy-penitent (Evid. Code §1030), self-incrimination (Evid. Code §940), spousal communications (Evid. Code §980), trade secrets (Evid. Code §1060), tax returns (*Webb v. Standard Oil* (1957) 49 Cal.2d 509, 513-514), matters discussed in mediation (Evid. Code §1152), and others.

The next group of proper objections in a deposition involve objections to the form of the question. Under Code of Civil Procedure §2025.460, subdivision (b), unless objections to the form of a question are raised in the deposition, they are waived. Such objections include assertions that the question is ambiguous, confusing, compound, calls for an undue narrative, calls for speculation, is argumentative or leading.

These objections need not be controversial. If your opponent objects to the form of your questions, do not butt heads about whether the objection was proper or not. Simply rephrase your question and move on.

I have seen defense attorneys intimidate plaintiffs and inexperienced plaintiffs' attorneys in depositions by taking out a copy of the complaint and asking the plaintiff to explain the legal contentions. These are improper questions in a deposition and objections to them would be well-taken. See, *Rifkind v. Superior Court* (*Good*) (1994) 22 Cal.App.4th 1255, 1259. Asking the plaintiff questions about factual contentions from the complaint, however, is permissible.

I have also seen attorneys instruct their clients not to answer questions following objections. This is only proper if the objection involves a privilege. Indeed, Code of Civil Procedure §2025.460, subdivision (a) actually requires you to object to a question and instruct your client not to answer in order to preserve the privilege objection or it is waived.

But instructing a witness not to answer a question on any other grounds is improper. *Stewart v. Colonial Western Agency* (2001) 87 Cal.App.4th 1006, 1015. It is also annoying, since it impedes the flow of information and tends to embolden the witness to look to the lawyer for a side door any time the questions get tough.

Other proper grounds for objection in a deposition include objections to defects in the deposition notice, defects regarding the oath or affirmation, and objections involving misconduct by a party, an attorney for a party or the court reporter.

Knowing the difference between proper and improper objections in a deposition will make you a better lawyer.

Proper Deposition Objections	Improper Deposition Objections
Attorney-client privilege	Irrelevant
Work-product doctrine	Hearsay
Doctor-patient privilege	Assumes facts not in evidence (when
Psychotherapist-patient privilege	question is trying to discover the missing
Clergy-penitent privilege	facts)
Privilege against self-incrimination	Calls for an opinion
Spousal privilege	Calls for cumulative responses
Trade secrets	Leading question (for background basics to
Taxpayer's privilege	save time)
Matter discussed in mediation	Lacks foundation (when question is trying to
Improper conduct coaching the witness	discover the foundational facts)
Not reasonably calculated to lead to the	Offer to compromise
discovery of admissible evidence	Payment in compromise

Ambiguous Confusing Compound Calls for an undue narrative Calls for speculation Argumentative Leading Defects in the deposition notice Defects regarding the oath or affirmation Misconduct by a party, counsel or the court reporter Asked and answered Incompetent witness Lacks foundation (when foundational facts do not exist or are beyond the scope of permissible discovery) Assumes facts not in evidence (when facts do not exist or are beyond the scope of permissible discovery) Improper impeachment Improper rehabilitation	Subsequent remedial or safety measures Liability insurance Similar acts or occurrences