

CIVIL PROCEDURE

Deposition Hell and What to Do About It

by Andrew P.P. Dunk III, Column Editor

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I was recently in a deposition of my client in a fairly simple auto accident case. About the third hour into the deposition, I had learned where my client went to elementary school, the names of my client’s childhood friends and pets, and a lot of other stuff about my client having absolutely nothing whatsoever to do with the auto accident. My mood was changing from a bit miffed to downright angry. To keep my cool, I found myself fantasizing about how much fun it would be to “accidentally” spill my coffee on the defense attorney or do something to end this painful deposition, but I digress.

The defense attorney asked my client, “Just before the collision, were you listening to the radio?” I was relieved when my client said, “No.” But then the next question was “*If you had been listening to the radio, what would you likely have been listening to?*” Again the visions of spilling coffee danced through my head. Periodically, my client would look at me with that “aren’t-you going-to-do-something-about-this look,” but what could I do? This was just a deposition, right? And we all know that the Discovery Act allows for broad questioning during a deposition.

I continued making my objections as I watched the hours tick by. Soon the questions would have to actually deal with the accident. I contemplated instructing my client not to answer the questions, but I knew that it wouldn’t be appropriate unless the question dealt with privilege or privacy. *Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App. 4th 1006, 1015. I thought about stopping the deposition and seeking a protective order, but what if the judge disagreed with my position? I decided that there had to be an effective way to deal with this. I began to think, “Just what does this right of privacy cover?” Would my private and secret collection of Marilyn Monroe photos in my closet be protected? Does it matter that I’ve kept them private and never shown them to anybody? Wouldn’t my client’s possible selection of music which she might listen to in her car be nobody’s business and thus be protected? I had to know so I could deal with this situation in the future, so I gave myself a refresher course by hitting the books and starting with the Code of Civil Procedure (“C.C.P.”).

The Scope of Discovery in Depositions

The Discovery Act allows for broad discovery. “Unless otherwise limited by order of the court ... any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved ... if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence ... “ C.C.P. §2017.010. In order to determine if a deposition question is proper, we need to ask ourselves:

1. Does the question seek information that is “relevant to the subject matter involved?”
2. Does the question seek information reasonably calculated to lead to discovery of

- admissible evidence?
3. Does the question seek information which is privileged?

Relevant to the Subject Matter Involved

What is relevant to the subject matter? Unfortunately the code does not define this. It is broader than relevancy and includes things that are only tangentially related to the action. The courts will resolve any doubts in favor of allowing the discovery. *Mercury Interactive Corp. v. Klein* (2007) 158 Cal. App. 4th 60. If the information might assist a party in evaluating the case, preparing for trial, or even facilitating settlement, it's discoverable. *Garamendi v. Golden Eagle Ins. Co.* (2004) 116 Cal. App.4th 694.

California Evidence Code §210 defines relevant evidence as “evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” But the discovery rules are broader and allow discovery of evidence which is "relevant to the subject matter." So before you think about suspending the deposition to get a protective order, make sure that the question can't possibly lead to the discovery of admissible evidence or be helpful in preparation for trial. *Forthmann v. Boyer* (2002) 97 Cal. App.4th 977. Given the broad scope of permissible discovery, I imagine my creative opposing attorney could have come up with some argument to show that the names of my client's childhood friends could possibly lead to the discovery of admissible evidence. Perhaps my client's sixth-grade schoolmate might remember a fight my client got into in which she was held in a choke hold which could be the pre-existing cause of my client's neck injuries!

This “relevant to the subject matter” standard is what allows plaintiffs to discover a defendant's insurance coverage because the amount of insurance would be important in a settlement analysis and is thus “relevant to the subject matter.” *Laddon v. Sup.Ct.* (1959) 167 Cal. App. 2d 391, 396. Obviously, the defendant's wealth would also be important in a settlement analysis and thus be “relevant to the subject matter,” but that information would violate the defendant's right of privacy. *Doak v. Sup. Ct.* (1968) 257 Cal. App. 2d 825, 827–828.

Reasonably Calculated to Lead to Discovery of Admissible Evidence

This phrase is at least a bit more definitive. It clearly shows that admissibility is not the test and one can use reason, logic and common sense to figure this out. *Lipton v. Sup. Ct. (Lawyers' Mut. Ins. Co.)* (1996) 48 Cal. App. 4th 1599, 1611. In ruling on a motion to compel, the court “can only attempt to foresee whether it is possible that information in a particular subject area could be relevant or admissible at the time of trial.” *Maldonado v. Sup. Ct. (ICG Telecom Group, Inc.)* (2002) 94 Cal. App.4th 1390, 1397.

Given the policy favoring broad discovery, the “relevance to the subject matter” and “reasonably calculated to lead to discovery of admissible evidence” are going to be liberally applied so it is extremely risky to suspend a deposition on this basis alone. We have to tolerate these “fishing expeditions.” But even so, the way they fish has to be done properly.

If you find that the lawyer asking the questions is repeating the same question over and over or being argumentative, you might then have grounds to suspend the deposition and seek a protective order.

Even harassing questions will not justify an instruction not to answer a question – only a question seeking privileged information or invading the witness’s right of privacy will justify a refusal to answer.

If you find that the deposing attorney is harassing the witness or is taking the deposition in a manner which “unreasonably annoys, embarrasses or oppresses” the witness, you can suspend the deposition. This is done by simply telling the deposition officer that you are suspending the deposition to seek a protective order. The deposition officer must suspend taking testimony upon such a demand. C.C.P. §2025.470.

By the way, it is not necessarily abusive for two lawyers to question the deponent. Although tag-teaming of lawyers usually isn’t allowed in trial, the Discovery Act does not prohibit this in a deposition. *Rockwell Int’l, Inc. v. Pos-A-Traction Industries* (9th Cir. 1983) 712 F. 2d 1324, 1325.

Also, asking a witness to perform physical acts at a videotaped deposition is not abusive. For example, a witness may be asked to act out the way something happened, or draw a diagram or give a handwriting exemplar, etc. C.C.P. §2025.480(a); *Emerson Elec. Co. v. Sup. Ct. (Grayson)* (1997) 16 Cal. 4th 1101, 1113.

Lastly, even if the asking party already has the information from other sources like interrogatory responses, they can still ask for the information at deposition. *TBG Ins. Services Corp. v. Sup. Ct. (Zieminski)* (2002) 96 Cal. App. 4th 443, 448, *City of King City v. Community Bank of Central California*. (2005) 131 Cal. App. 4th 913, 933.

Appropriate Privileges to Assert in Deposition

When a question seeks privileged information, it is appropriate to instruct the witness not to answer. In fact, you **must** instruct the witness not to answer or the privilege is waived. C.C.P. §2025.460(a). Appropriate privileges are spelled out in the Evidence Code. They include:

- The attorney client privilege (Evid. Code §954);
- The attorney work-product privilege (C.C.P. §2018.030(b));
- Marital communications (Evid. Code §980);
- The doctor-patient privilege (Evid. Code §994);
- The psychotherapist-patient privilege (Evid. Code §1014);
- The penitent privilege (Evid. Code §1033);
- The clergyman privilege (Evid. Code §1034);
- The sexual assault victim-counselor privilege (Evid. Code §1035.8);
- The 5th Amendment privilege against self incrimination (U.S. Constitution).

Other Appropriate Objections

Objections to the form of the question are proper. The following is not an all-inclusive list, but such objections would include:

- Vague, ambiguous, unclear and uncertain;
- Compound;
- Calls for speculation;
- Argumentative;

- Calls for expert or legal opinion;
- Leading; and
- Calls for a narrative answer.

An objection that every plaintiff lawyer should use is based upon *Rifkind v. Sup. Ct. (Good)* (1994) 22 Cal. App. 4th 1255. *Rifkind* is a case you **need** to read if you defend depositions. Basically, the *Rifkind* objection applies to questions asking a deponent to explain his or her contentions in the case. Questions which ask for “each and every basis you contend supports your position” are not appropriate for depositions. Sneaky defense lawyers often disguise these questions in ways you might not recognize as asking for contentions. For example, the following questions would all be inappropriate under *Rifkind*: tell me the names of all the witnesses to the incident; identify all the documents that support your position; what are your damages from the incident? How has the accident affected your life?

The Right of Privacy

The constitutional right of privacy is a bit nebulous, but you must object and instruct your client not to answer or it is waived. The right of privacy comes from both the U.S. Constitution and the California Constitution. Even though the U.S. Constitution doesn't actually say there is a right of privacy, case law holds that one exists. [*Roe v. Wade*, (1973) 410 U.S. 113]. The California Constitution provides broader rights of privacy. Even relevant, non-privileged information may be subject to the right of privacy.

It is important to note that the privacy protection is not absolute and the court will have to weigh the right of privacy against the need for the discovery and balance the interests involved. If the court finds that there is a compelling interest, the court can order the discovery. *John B. v. Sup. Ct. (Bridget B.)* (2006) 38 Cal. 4th 1177, 1199.

But just what kind of stuff is protected by the right of privacy? There are hundreds of cases dealing with the right of privacy, but in a nutshell, the right of privacy prevents inquiry into one's private affairs. This is very broad and can cover a lot of things. For example, each of the following types of information has case law stating it would be protected under the right of privacy:

- Personal financial information;
- Tax returns, checks, statements, or bank account information.
- Third party's financial information;
- Medical records;
- Psychotherapy records;
- Third party's medical records;
- Membership in associations including religious, political, economic, or social;
- Marital and/or sexual relationships;
- Arrest records;
- Insurance claims files [also protected under *Insurance Code* §791.01 et seq. and §791.13].
- Juvenile court records;
- Trade secrets;
- Your clients' identities [*Hooser v. Superior Ct.* (2000) 84 Cal. App. 4th 997];
- A person's estate plans;

- Confidential settlements of prior lawsuits;
- Personnel records from employer;
- Newspaper reporter's confidential source of information;
- Official information [*United States v. Reynolds* (1953) 345 U.S. 1];
- Home address, unlisted phone number, fax number [*Pioneer Electronics (USA), Inc. v. Superior Court*, (2005) 128 Cal. App. 4th 246];
- Mental processes of legislators [*Sutter's Place v. Superior Court* (2008) 161 Cal.App.4th 1370].

In personal injury matters, a plaintiff who puts his or her medical condition at issue waives the doctor-patient privilege [Evid. Code §996], however, he or she still has a right of privacy to the records. By putting certain injuries at issue, a plaintiff does not automatically waive their entire lifetime of medical records and only the records pertaining to the physical and mental conditions related to the incident are discoverable. *Britt v. Sup. Ct. (San Diego Unified Port Dist.)* (1978) 20 Cal. 3rd 844, 864. Also, even though a personal injury plaintiff seeks pain and suffering as damages, this does not make the plaintiff's psychiatric records at issue. It is only if a plaintiff asserts more emotional distress injuries than are normally associated with a "garden variety" personal injury does a defendant possibly get these records. *Davis v. Sup. Ct. (Williams)* (1992) 7 Cal. App. 4th 1008, 1016.

Often we try to get the names and contact information of witnesses to support our case and we are met with privacy objections. In *Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, the court held that witnesses are usually required to participate in civil discovery and that such information should be disclosed. The court ordered the information to be produced without obtaining consent from the witnesses: "A percipient witness's willingness to participate in civil discovery has never been considered relevant — witnesses may be compelled to appear and testify whether they want to or not." *Id.* at 1251–1252.

We might also the names of other people with similar complaints against the same defendant. Defendants hate to give this information out and will fight on this, but an easy way to get this is to require the defendant to notify the people and ask if they would be willing to talk to other plaintiffs about their claim. What plaintiff wouldn't want to help other plaintiffs? *Pioneer Electronics (USA), Inc. v. Sup. Ct. (Olmstead)* (2007) 40 Cal. 4th 360, 367.

I can now rest knowing that my private Marilyn Monroe photo collection will remain my little secret.