

Checklist for Defending a Deposition

Sunday, March 21, 2010 by Harlan J. Zaback

This is a checklist to help new attorneys understand how to best handle defending a deposition. Although it may sound like an overwhelming task at first, having this checklist handy will most assuredly help ease any anxieties new attorneys may have about the process.

If the Deponent is “Friendly” (Likely to provide testimony that is helpful to your client’s case)

- If the deponent is your client or the witness has not retained counsel for this matter, meet with the deponent *at least* 45 minutes before the deposition is set to take place.
- Explain the deposition process and kindly request that they pause for a couple of seconds before answering any questions so you can have time to raise any relevant objections.
- Explain to them that they are required by law under penalty of perjury to answer all questions, even ones you may object to UNLESS the objection raised is asserting a privilege. If the objection is asserting a privilege instruct them that they MUST NOT answer the question.
- Tell them to answer with verbally intelligible responses such as “yes” or “no” in order to keep the official transcript record clean.
- Answer any questions/concerns they may have. If they are not your client, ONLY answer questions/concerns they may have about the deposition process itself, nothing about legal or factual issues about the case.
- If they are NOT your client, explicitly disclaim to them that you are not in fact their attorney.

Objections

- Only objections relating to the form of the question and objections based on privilege are waived if they are not timely asserted during the deposition—that is, after the question is asked and before it is answered. (*California Code of Civil Procedure §2025.460(a)*). Objections regarding relevance, foundation, competency of the witness, and hearsay are not waived even if not timely asserted at the deposition. There is no reason to assert these objections at a deposition as this could only “clue in” counsel’s opponent to clean up the question so that it can be used at trial.
- Remember! The deponent is required to answer questions even if they are objected to based on their form, but MUST NOT be answered if a privilege objection is asserted.

- **Objections based on the form of the question**

- Vague and ambiguous
- Compound
- Argumentative
- Harassing
- Calls for speculation
- Assumes facts not in evidence
- Calls for narrative

- **Objections based on privilege**

- Attorney-Client Privilege
- Work-Product Doctrine
- Patient-Treater Privilege
- Privacy Privilege

- When opposing counsel finishes their questioning, you have the right to ask questions of your own. Consider beforehand what questions may be appropriate and necessary, and make a note during the deposition if there are any areas of testimony you need to explore.

Enter Into Stipulation at the End of the Deposition

- This will formally end the deposition. A model stipulation looks like the following:
 - I propose that we agree to:
 - relieve the reporter of his/her statutory duty to maintain custody of the original transcript.
 - after it has been transcribed, the reporter shall send the original transcript [by UPS, FedEx, DHL, or the equivalent] to the witness at [witness's office or residence address].
 - the witness shall have 30 days within which to read and review the transcript, make any changes that he/she deems appropriate and list any such changes on the errata page provided by the reporter.
 - upon completion of the review and listing the changes, if any, the witness shall then sign the transcript under penalty of perjury where indicated at the end of the transcript.
 - the reporter shall provide a preposted and preaddressed envelope so that the witness may then send the reviewed, corrected, and executed original transcript and errata page to [counsel].

- [counsel] will maintain custody of the original executed transcript and will agree to produce it and lodge it with the court at the time of trial or for any motion for which it may be required upon reasonable request.
 - [counsel] will also advise all other counsel in writing of any changes, corrections, additions, or deletions made by the witness at the time of the review of the transcript and will provide all counsel with a copy of the errata and signature pages within 10 days of counsel's receipt of the original executed transcript from the witness.
 - should the original executed transcript not be reviewed, corrected (if necessary), or signed by the witness within that time frame, or should the original executed transcript later become lost or otherwise unavailable, the parties agree that a certified copy may be used for all purposes, as if it were a duly executed and corrected original transcript.
- Congratulations, you have now successfully defended your first deposition! This process will only get easier with time and experience.

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