

## How to Maintain Your Balance while Defending Depositions

**DEFENDING DEPOSITIONS** can be a complex balancing act for which most new attorneys are unprepared. Law schools tend to gloss over depositions in a civil procedure class. Reference books tend to focus on the technical details and not discuss the tensions among the deposing attorney, the defending attorney, and the deponent. You can minimize the damage to your client's case during a deposition with thorough preparation and by balancing your duty to your client against these tensions.

First, it is imperative to prepare your client for the deposition. You may have interviewed your client at the beginning of the case, but you probably did not subject him or her to a challenging series of questions on the details. Begin the preparation by advising your client to tell the truth, and review the usual deposition admonitions.<sup>1</sup> It is also a good idea to discuss the evidence with your client early. Be careful about showing your client any physical evidence (such as documents or photos), because it is potentially discoverable.<sup>2</sup> You should then review the testimony that is essential to the case. I often take on the role of the deposing attorney and question my client on the weakest parts of the case. I will then review the testimony that the deposing counsel will want to elicit to hurt my client's position. Before the preparation is over, I remind the client that there is no requirement to memorize anything.

Even after a thorough preparation, your client will likely say and do things that you expressly instructed against. Clients will forget to wait for your objections and will volunteer information. When it happens, do not yell at your client or kick him or her under the table. However, you may make notes about a client's personality and ability to testify for trial.

You have limited options when defending a deposition. One is that you can object to the form of the question.<sup>3</sup> This usually occurs when the question could have more than one meaning or is misleading. However, before objecting, you should consider whether you want to alert the opposing counsel that the question was unclear. By objecting, you give the opposing counsel an opportunity to eliminate the ambiguities that could render the question and resulting answer meaningless. On the other hand, a sloppy question can lead to a sloppy answer that does not help the client. Another option is to instruct your client not to answer<sup>4</sup> when the questioning concerns topics protected by an evidentiary privilege.

During a deposition, some attorneys will make speaking objections (objections that go beyond stating the cause of the objection) and coach clients, despite rules to the contrary.<sup>5</sup> Speaking objections can range from a quick explanation as to why the question was vague to long dissertations on the rules of evidence. Often, a speaking objection is used to coach the deponent. Interruptions are also used to throw the deposing attorney off course or slow the pace of questioning.

As the attorney defending the deposition, you need to balance your duty to your client to your ethical and legal obligations. The goal of defending a deposition is for it to end quickly and to limit the amount of damage to your client's case. Making speaking objections or harassing the opposing attorney will usually make the deposition longer. The

opposing attorney will get angry and focus on what is being obstructed. Coaching and speaking objections often highlight the weak areas of your client's case, which does not serve your client's interest.

### Ethical Considerations

You should not employ abusive deposition tactics, but you also have an ethical obligation to competently represent your client. The Los Angeles County Bar Association Professional Responsibility and Ethics Committee published a formal ethics opinion confirming that an attorney has a duty to advocate for the best interest of the client during a deposition, and that may include consulting with a client who is confused or unable to give a complete or accurate response. Otherwise, "[T]he client could become the victim of the unscrupulous attorney who asks unfair, inappropriate or 'trick' questions that are themselves designed to harass the witness or to obtain distorted and conflicting testimony."<sup>6</sup>

The duty to competently represent your client and the general rule against coaching tends to be the source of most conflict during depositions. The deposing attorney may become upset if questioning is being interrupted, and the defending attorney may be concerned that the client is being tricked into giving inaccurate testimony. At the same time, the defending attorney must not do anything to conceal, distort, or misrepresent the facts that are required to be disclosed.<sup>7</sup>

However well the defending attorney manages this tension, the conduct of the deposing attorney may simply go too far. If the deposing attorney becomes abusive, you may have to terminate the deposition and seek a protective order.<sup>8</sup> This usually occurs when the deposing attorney harasses your client. The defending attorney will want to balance the cost of time and energy involved in getting a protective order against the severity of the other attorney's unprofessional behavior. Do not leave without first giving a warning on the record.

Most depositions occur outside the presence of a judge or referee. This is why unprofessional behavior and improper tactics are common. Defending attorneys must balance their obligations to the client with their legal and ethical obligations to allow testimony. The defending attorney must also balance the cost of obtaining a protective order and unprofessional behavior. The key is to always remain calm, civil, and professional. ■

<sup>1</sup> See KEVIN J. DUNNE, DUNNE ON DEPOSITIONS §6:8 (Thomson Reuters/West 2008).

<sup>2</sup> EVID. CODE §771.

<sup>3</sup> CODE CIV. PROC. §2024.460(b).

<sup>4</sup> CODE CIV. PROC. §2025.460(a).

<sup>5</sup> See, e.g., L.A. SUP. CT. R. 7.12(e)(8), (10).

<sup>6</sup> L.A. County Bar Ass'n Prof'l Responsibility & Ethics Comm., Ethics Op. No. 497.

<sup>7</sup> BUS. & PROF. CODE §6068(d); CAL. RULES OF PROF'L CONDUCT R. 5-220.

<sup>8</sup> CODE CIV. PROC. §2025.470.

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