

# **MOST FREQUENTLY ASKED QUESTIONS RE: DEPOSITIONS**

## **LAW AT YOUR FINGERTIPS**



- 1. CAN I ASK THE DEPONENT TO REENACT AN EVENT OR DRAW:** Yes. A Deposition is no different than trial and a deponent may be asked to do anything at a deposition that he/she would be asked to do at trial. The court's power to order a deponent "to answer any question" (CCP § 2025.480(a) includes ordering *nonverbal responses*, such as drawings, reenactments, etc. . [*Emerson Elec. Co. v. Sup.Ct. (Grayson)* (1997) 16 C4th 1101, 1113].
- 2. IF A WITNESS TESTIFIED HE/SHE REVIEWED DOCUMENTS TO REFRESH HER RECOLLECTION FOR A DEPOSITION, MUST THAT DOCUMENT BE PRODUCED?** Yes. See Evidence Code §771. See also: *International Ins. Co. v. Montrose Chemical Corp. of California* (1991) 231 Cal.App.3d 1367, 1372-1373;
- 3. WHAT IS THE LATEST I HAVE TO OBJECT TO A DEPOSITION?** Three (3) days prior to the deposition. The written objection must be hand served. [C.C.P. §2025.410(a)(b).
- 4. CAN I TAKE A DEPOSITION OF A PARTY WHO RESIDES OUT OF STATE:** Yes. See "Interstate and International Depositions and Discovery Act" [C.C.P. §§2029.100-2029.900].
- 5. CAN I REQUEST DOCUMENTS TO BE PRODUCED AT A DEPOSITION [EVEN THOUGH I PREVIOUSLY REQUESTED THEM AND FAILED TO FILE A MOTION TO COMPEL]?** YES. See: *Carter v. Superior Court* (1990) 218 Cal.App.3d 994, 997 [party who missed deadline for compelling inspection under C.C.P. §2031.010, et. seq., may compel inspection at deposition]. The materials or documents requested must be described with "reasonable particularity" [C.C.P. §2025.220(a) (4)]. See also: *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216 [definitions and descriptions were harassing and improper; demands were so overbroad it in effect asked for everything in custodian's possession relating to the litigation].
- 6. WHAT IS THE GEOGRAPHICAL LIMIT FOR A DEPOSITION OF A PARTY?** 75 miles from the deponent's residence or [at the option of the deposing party] no more than 75 miles from the county where the action is pending at a place within 150 miles of the deponent's residence [C.C.P. §2025.250(a)]. Parties may stipulate to allow a deposition beyond these limits and the court may also order a deposition to be taken beyond the limits [C.C.P. §2025.250(a), 2025.260(a)]. If deposition of a party in another state, can be noticed no more than 75 miles from deponent's residence [CP §2026.010(b)]. However, a nonparty can not be forced to travel beyond these limitations for a deposition.
- 7. CAN I GIVE ADVICE DURING THE DEPOSITION TO MY CLIENT DURING THE DEPOSITION AS TO HOW TO ANSWER A QUESTION?** NO. This may be considered to be improper "coaching" and sanctions may be imposed. See: *Tucker v. Pacific Bell Mobile Services* (2010) 186 Cal.App.4th 1548, 1562 [counsel wrote notes to client during deposition then disposed of notes; counsel sanctioned for "coaching"].
- 8. IF I NOTICE A DEPOSITION AND THE OPPOSITION NOTICES A DEPOSITION TO START PRIOR TO MINE, DO I HAVE PRIORITY?** NO. There is no such thing as "deposition priority" under the Discovery Act, and local rules are preempted [Cal. Rules of Court, Rule 3.20(a)]. However, a motion for protective order may be sought [CCP § 2019.020(b)].
- 9. WHEN CAN DEPOSITION NOTICES BE SERVED:** Plaintiffs may not serve notices of depositions until 20 days after service of summons or appearance of defendant. C.C.P. §2025.210(b).
- 10. MAY MORE THAN 1 ATTORNEY FOR A PARTY ATTEND A DEPOSITION?** YES, however there is no "tag team" questioning allowed [I.e., only one attorney may ask questions as to distinct topics]. See: *Rockwell Int'l, Inc. v. Pos-A-Traction Industries* (9<sup>th</sup> Cir. 1983) 712 F.2d 1324, 1325, applying California law.

## **11. WHAT KINDS OF OBJECTIONS MAY/MUST BE ASSERTED AT A DEPOSITION?**

A person may object to the form of the question [compound, uncertain, calls for a narrative, argumentative, call for speculation, leading question, etc.] Such objections must be made on the record at the deposition so as to not waive the objection [CCP §2025.460(b)]. Improper objections at a deposition are relevancy, hearsay, lack of foundation. *Greyhound Corp. v. Sup.Ct. (Clay)* (1961) 56 C2d 355, 392. Right to privacy not waived even if not raised at deposition. *Boler v. Sup.Ct. (Everett)* (1987) 201 CA3d 467, 472. Where a deposition question seeks discovery of privileged information, counsel must interpose a specific objection and instruct the deponent not to answer in order to preserve the privilege. [See CCP § 2025.460(a)]. It is generally improper, however, for counsel to instruct a witness not to answer on any other ground. [See *Stewart v. Colonial Western Agency, Inc.* (2001) 87 CA4th 1006, 1015].

**12. HOW CAN I USE THE DEPOSITION AT TRIAL?** [C.C.P. §2025.620] Deposition evidence is admissible against any party present at the deposition, or who had *notice* thereof and did not serve a valid objection. Only an “adverse party” may use another party's deposition for “any purpose” [the adverse party can simply pick up the transcript and read the deposition testimony directly into evidence]. The deposition of an independent witness may be used to impeach or contradict live testimony given by that witness at time of trial. [CCP § 2025.620(a)]. As long as the witness is still on the witness stand, no foundation is required (i.e., the deposition need not be shown to the witness, nor need the witness be given a chance to explain any inconsistencies therein). The cross-examiner can simply read into evidence the contradictory testimony given at the time of deposition. [Ev.C. § 770(b)]. If the deponent is dead, unavailable because of illness, resides more than 150 miles from courthouse, or otherwise disqualified may be used [CCP §2025.620(c)]. See also CCP §2025.340(m) – notice required as to what portions may be used at trial.

**13. HOW MUCH TIME DO I HAVE TO GIVE TO NOTICE A DEPOSITION?** A deposition notice must be served on all persons who have appeared in the action [C.C.P. §2025.240(a)]. If the deposition notice is seeking “employment records” or “personal records of a consumer” [by subpoena] then a copy of the deposition notice must be served on that person as well [unless he/she is already a party to the action]. [C.C.P. §2025.240(b)]. 10 days notice is required [plus 5 days if served by mail; plus 10 days if served in another state and 20 days if served in another country]. [C.C.P. §§2025.270(a), 2016.050, 1013(a)]. **NOTE:** If it is a deposition for personal records of a consumer, it cannot proceed until 20 days after the deposition subpoena is issued [C.C.P. §2025.270(c)].

**14. WHAT IS A DEPOSITION OF THE “PERSON MOST QUALIFIED”?** A deposition notice sent to the person “most qualified” must include the topic or matters the deponent will be asked about. The entity/party will then be required to designate and produce the person “most qualified” to testify on its behalf having knowledge of such matters. The person designated must testify as to “the extent of any information known or reasonably available to the deponent”. [C.C.P. §2025.30]. If documents are also requested, someone in authority [or the witness] is required to make an inquiry of everyone who might be holding responsive documents or everyone who knows where such documents might be held [current employees only]. *Maldonado v. Superior Court* (2002) 115 Cal.App.4th 137, 142.

**15. WHAT MUST BE IN A DEPOSITION NOTICE?:** It must contain the date, time and place of the deposition [C.C.P. §2025.220(1),(2)]; the name of the deponent [C.C.P. §2025.220(a)(3)]; if it is to be recorded by audio or video technology, it must so state [C.C.P. §2025.220(a)]; and, if the deposing party intends to use a video recoding of the deposition of a doctor or other expert in lieu of live testimony, it must be stated in the Notice [C.C.P. 2025.220(a)(6); CRC 3.1010(a)(1)].

**16. ARE “CONTENTION” QUESTIONS PERMISSIBLE AT A DEPOSITION?** NO. For example, it is an improper legal conclusion to ask a party “Do you contend X’s conduct was negligent”, and if so, state all facts, witnesses and documents that support your contention. Contention interrogatories are not permitted at a deposition. However, it is permissible to ask a party/deponent to provide the factual basis for a certain event -- such as how he or she became aware of it, his or her knowledge about it, and for similar information of a factual nature. *Rifkind v. Superior Court* (199) 22 Cal.App.4th 1255, 1259.

**17. CAN PARTIES BE BANNED FROM DEPOSITIONS?** Not in California state courts. A court has no power to grant a protective order barring a party from attending another's deposition even on a showing that the deponent will feel “intimidated” by the party's presence at the deposition. [*Willoughby v. Sup.Ct. (Lui)* (1985) 172 CA3d 890, 892. However, under Federal Rules they may be [See *Galella v. Onassis* (2nd Cir. 1973) 487 F2d 986, 997].

**18. SHOULD I STIPULATE TO “RELIEVE REPORTER OF DUTIES UNDER THE CODE”?** NO. There are many duties a court reporter has after the deposition has been concluded. Counsel may reach their own agreements as to deposition [original may be sent to witness for signature/changes; deposing party to be notified of any changes within \_\_\_ days; if not so notified deposition shall be admitted as taken; counsel shall agree to provide original deposition at trial if requested, etc.]