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PERSPECTIVE

California allows attorneys to cast a wide net in discovery, but there are limits

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Disputes between counsel during a deposition are as old as the deposition process itself. In an arbitration, an arbitrator or discovery referee is often faced with similarly high-stakes disputes. This article addresses the propriety of objections and conduct during depositions. Apart from arbitrations, it is applicable to any California deposition practice in a California state court.

The scope of permissible questions and objections is often misunderstood; although broad, it is not without limits. Under California Code of Civil Procedure § 2017.010, "[A]ny party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." This has been described as an "expansive scope" of discovery. *Emerson Electric Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1108. The discovery standard of "relevant to the subject matter" is to be applied liberally. *Colonial Life & Accident Insurance Co. v. Superior Court* (1982) 31 Cal.3d 785, 790. For the purposes of discovery, information is "relevant to the subject matter" if it might reasonably assist a party in evaluating the case, preparing for trial or facilitating settlement thereof. *Gonzalez v. Superior Court* (1995) 33 Cal.App.4th 1539; *Lipton v. Superior Court* (1996) 48 Cal. App.4th 1599.

Addressing the common objection that a question "calls for a fishing expedition," the court in *Norton v. Superior Court* (1994) 24 Cal.App.4th 1750, 1761 provides that "[c]alls for a fishing expedition is not a proper objection" and that "courts have affirmed at least some level of permitted 'fishing.'" The court went on to state that it is impactable to fully define trial relevance at the discovery stage. "Therefore, the party seeking discovery is entitled to substantial leeway. Furthermore, California's liberal approach to permissible discovery generally has led the courts to resolve any doubt in favor of permitting discovery. In doing so, the courts have taken the view if an error is made in ruling on a discovery motion, it is better that it be made in favor of granting discovery of the nondiscoverable rather than denying discovery of information vital to preparation or presentation of the party's case or to efficacious settlement of the dispute."

Stewart v. Colonial Western Agency, Inc. (2001) 87 Cal.App.4th 1006, 1014-1015 addresses objections to deposition questions. First, the court noted that even when questions seek to elicit irrelevant evidence, irrelevance alone is an insufficient ground to justify preventing a witness from answering a question posed at a deposition. Code of Civil Procedure § 2025.460 divides objectionable questions into three categories. The first is questions seeking privileged information. As to such matters, a specific objection to its disclosure must be timely made during the deposition. In such an instance, an objection coupled with an instruction not to answer in order to protect disclosure of privileged information is appropriate. The second category is questions that contain errors or irregularities that might be cured if promptly brought to counsel's attention. For example, errors in the form of the question

are waived unless a specific objection to them is timely made during the deposition. The *Stewart* court affirms that an instruction not to answer is inappropriate; counsel should not instruct the deponent not to answer unless the objecting party demands suspension of the deposition to obtain a protective order. Otherwise, the taking of the deposition proceeds subject to the objection. The third category is questions regarding irrelevant and immaterial matters or competency of the witness. The *Stewart* court provides that such objections are unnecessary and are not waived by failure to make them before or during the deposition. "In other words, the deponent's counsel should not even raise an objection to a question counsel believes will elicit irrelevant testimony at the deposition. Relevance objections should be held in abeyance until an attempt is made to use the testimony at trial."

Code of Civil Procedure § 2025.470 provides that a deposition may be suspended if any deponent or party attending the deposition demands the suspension in order to obtain a protective order "on the ground that the examination is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses that deponent or party." As described in *Stewart*, deposing counsel's insistence on inquiring into irrelevant areas could justify suspension under this standard, but only if it reaches the point where it could legitimately be said that counsel's intent was to harass, annoy, embarrass or oppress.

Taken as a whole, a deponent should not be instructed not to answer a question unless it pertains to privileged matters or deposing counsel's conduct has reached a stage where suspension is warranted. "The fact that suspension is available only where an interrogation into improper matters reveals a bad faith purpose or an intent to harass, annoy, etc., indicates that witnesses are expected to endure an occasional irrelevant question without disrupting the deposition process." *Stewart*, supra, 87 Cal. App.4th 1006 at 1014.

Another issue that may arise is the coaching of the witness during a deposition by counsel. In *Tucker v. Pacific Bell Mobile Services* (2010) 186 Cal.App.4th 1548, a witness was shown notes on a pad by counsel. When asked what he read, the witness was instructed not to answer, although counsel did not state a specific objection, only calling it a "ridiculous question" and later "irrelevant." Later, counsel did assert an objection based on attorney-client privilege. Although counsel was asked to preserve the notepad, he disposed of it. The trial court assessed monetary sanctions; the appellate court affirmed, providing that the trial court was "well within its discretion" in awarding sanctions.

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