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FEATURE: TO ANSWER THE QUESTION . . . OR NOT?

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TEXT:

[*32] **"Although we have not as yet reached** the point where the participants at a deposition will be required to be licensed by the state boxing commission [citation], we note with dismay the ever growing number of cases in which most of the trappings of civility between counsel are lacking." *Townsend v. Superior Court*, 61 Cal.App.4th 1431, 72 Cal.Rptr.2d 33 (1998). This comment on the growing lack of civility in the legal profession came in a case where a deposition degenerated into a verbal brawl.

Some definitions of civility are "good breeding; politeness; consideration; courtesy." *Webster's New Twentieth Century Dictionary, Second Edition*, p.332. Good breeding, politeness, consideration, and courtesy are things that are, by their nature, out of the reach of the rules that the law imposes on lawyers attending depositions. Those rules cannot force a lawyer to have been brought up well or to be genuinely polite. However, those rules can at least provide some prophylactic protection against incivility at depositions and do something to prevent the type of verbal carnage that took place in the *Townsend* case.

Generally, information is discoverable if it "is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." *Code of Civil Procedure* § 2017. "These [discovery] rules are applied liberally in favor of discovery [citation], and (contrary to popular belief), fishing expeditions *are* permissible in some cases." *Gonzalez v. Superior Court*, 33 Cal.App.4th 1539, 39 Cal.Rptr.2d 896 (1995).

It is against this backdrop of liberal discovery policy that the courts have analyzed *Code of Civil Procedure* §§ 2025(m)(1) through 2025(m)(3). Those sections and the cases that have interpreted them govern the conduct of lawyers at depositions. This is accomplished by establishing rules about what objections are appropriate at a deposition and when an instruction not to answer a deposition question is allowed.

Section 2025(m)(1) states: "The protection of information from discovery on the ground that it is privileged or that it is a protected work product under § 2018 is waived unless a specific objection to its disclosure is timely made during the deposition." The nature of privileged information is generally such that not only must it be kept out of evidence, but its disclosure to anyone at any time must be prevented. In fact, in recognition of this fact, when deciding the outcome of a claim of privilege, the court generally "may not require disclosure of information claimed to be privileged . . . ." *Evidence Code* § 915.

So, in order to prevent the divulgence of privileged information at any time, including at the time of a deposition, the courts have interpreted *Code of Civil Procedure* § 2025(m)(1) as [*33] giving license to attorneys to instruct deponents not to answer deposition questions, the answer to which would involve the disclosure of privileged information. *See I.E.S. Corp. v. Superior Court*, 44 Cal.2d 559, 283 P.2d 700 (1955); and *Stewart v. Colonial Western Agency, Inc.*, 87 Cal.App.4th 1006, 105 Cal.Rptr.2d 115 (2001).

Examples of privileges are the lawyer-client privilege (*Evidence Code* § 954); the physician-patient privilege (*Evidence Code* § 994); the privilege to protect the secrecy of one's vote (*Evidence Code* § 1050); the psychotherapist-patient [*34] privilege (*Evidence Code* § 1014); and the privacy privilege (as embodied in the right of privacy contained in *California Constitution* Article 1, § 1.)

Code of Civil Procedure § 2025(m)(2) states: "Errors and irregularities of any kind occurring at the oral examination that might be cured if promptly presented are waived unless a specific objection to them is timely made during the deposition. These errors and irregularities include . . . those relating to . . . the form of any question or answer." Objections to the form of a question include, "is ambiguous, uncertain or not readily understood; is compound; calls for a narration or lengthy explanation; calls for speculation and conjecture; is argumentative; [and] is leading suggestive to questioner's own client or witness." (Weil and Brown, *California Practice Guide Civil Procedure Before Trial*, P8:721.)

So, an appropriate objection to the form of a deposition question is permitted and required for the preservation of the objection. But, note that an instruction not to answer a question is not allowed when it is based on an objection to the form of a question. *Stewart v. Colonia Western Agency, Inc.*, 87 Cal.App.4th 1006, 105 Cal.Rptr.2d 115 (2001).

Code of Civil Procedure § 2025(m)(3) states: "Objections to the competency of the deponent, or to the relevancy, materiality, or admissibility at trial of the testimony or of the materials produced are unnecessary and are not waived by failure to make them before or during the deposition." Such objections are automatically preserved, so they need not be made at depositions. Instructions not to answer deposition questions that are subject to such preserved objections are not allowed. *Stewart v. Colonia Western Agency, Inc.*, 87 Cal.App.4th 1006, 105 Cal.Rptr.2d 115 (2001). "Taken as a whole, these provisions [the relevant portions of *Code of Civil Procedure* § 2025] clearly contemplate that deponents not be prevented by counsel from answering a question unless it pertains to privileged matters or deposing counsel's conduct has reached a stage where suspension [of the deposition] is warranted." *Stewart v. Colonia Western Agency, Inc.*, 87 Cal.App.4th 1006, 105 Cal.Rptr.2d 115 (2001).

Suspension is governed by *Code of Civil Procedure* § 2025(n). That section allows any party attending a deposition or the deponent to suspend the deposition for the purpose of seeking a protective order on the ground that "the [*35] examination is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses that deponent [who is seeking the protective order] or party [who is seeking the protective order]." If a lawyer so suspends a deposition, he or she has in effect instructed the witness to answer no further questions.

The court shall impose monetary sanctions against whichever party loses the motion for a protective order, unless the court finds that the losing party acted "with substantial justification" or other circumstances render the imposition of sanctions "unjust." *Code of Civil Procedure* § 2025(i).

Local courts have weighed in on the subject of appropriate deposition behavior. For instance, *Los Angeles Superior Court Rule* 7.12(e)(7) cautions: "Counsel defending a deposition should limit objections to those that are well founded and necessary for the protection of a client's interest. Counsel should bear in mind that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought." *Los Angeles Superior Court Rule* 7.12(e)(9) states: "Counsel should not direct a deponent to refuse to answer questions unless they seek privileged information or are manifestly irrelevant or calculated to harass."

There has been some question about whether sanctions could be imposed for the violation of local discovery rules. *California Rules of Court Rule* 981.1(a) has theoretically declared all local rules related to discovery to be "null and void." However, in *Stewart v. Colonial Western Agency, Inc.*, 87 Cal.App.4th 1006, 105 Cal.Rptr.2d 115 (2001) the court stated at footnote 3: "Counsel would be well advised to conform their behavior to the rules [of the Los Angeles County Superior Court that relate to the taking of depositions], which have the force of law."

In any case, failure to follow such professional standards that are imposed by the court through its local rules may be sanctionable under *Code of Civil Procedure* § 2023 as a discovery abuse. (Weil and Brown, *California Practice Guide Civil Procedure Before Trial*, P8:712.)