

Source: Civil Litigation/Handling Depositions (Action Guide)/Introductory Material

Handling Depositions

Richard C. Raines

Judge's Perspective
the Honorable James J. Marchiano,
Associate Justice, California Court of Appeal, First Appellate District

February 2007

Scope of Guide

This Action Guide provides step-by-step procedures for planning the deposition, noticing the deposition, preparing questions, conducting the deposition, videotaping the deposition, responding to objections, and using the deposition at trial. Information is also provided for the attorney who is not noticing the deposition, including how to object to the deposition notice, how to prepare the client for the deposition, and objections that can properly be raised at the deposition.

Abbreviations

| | |
|---------------------------|--|
| Civil Discovery | <u>California Civil Discovery Practice (4th ed Cal CEB 2006)</u> |
| Civ Proc During Trial | <u>California Trial Practice: Civil Procedure During Trial (3d ed Cal CEB 1995)</u> |
| Creating Plan | <u>Creating Your Discovery Plan (Cal CEB Action Guide February 2007)</u> |
| Direct & Cross | <u>Effective Direct & Cross-Examination (Cal CEB 1986)</u> |
| Expert Witness | <u>California Expert Witness Guide (2d ed Cal CEB 1991)</u> |
| Handling Expert Witnesses | <u>Handling Expert Witnesses in California Courts (Cal CEB Action Guide May 2006)</u> |
| Laying a Foundation | <u>Laying a Foundation to Introduce Evidence (Preparing & Using Evidence at Trial) (Cal CEB Action Guide April 2006)</u> |

About the Authors

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Cutoff Dates

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Shepard's California Citations at 39 C4th 772, 142 CA4th 72, 165 L Ed 2d 940, 456 F3d 133, 436 F Supp 2d 1364;

Shepard's United States Citations at 165 L Ed 2d 940, 457 F3d 1238, 430 F Supp 2d 1105;

We reviewed California and federal statute citations for amendments and repeals through these cutoffs:

California statutes through Stats 2006, ch 910.

Federal statutes through 120 Stat 1172.

We try to add significant statutory and judicial developments, subsequent histories of cases, and other matters such as new forms and regulations after legal editing is done, but you should not assume that all developments after the listed cutoff dates have been included.

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When Planning Deposition

STEP 1. REVIEW LIMITATION ON NUMBER OF DEPOSITIONS

ONE-DEPOSITION RULE AND EXCEPTIONS

If you deposed or had notice of a deposition of a natural person, including a party, you *may not take a subsequent* deposition of that witness *unless* (CCP §2025.610(a)-(b)):

Stipulation

- a. Parties stipulate to a subsequent deposition; and
- b. Any nonparty deponent consents to being deposed again; or

Court Order

Court grants your motion to take another deposition because you established good cause, *e.g.*, after first deposition plaintiff had surgery that was not anticipated at time of first deposition.

JUDGE'S PERSPECTIVE

Courts are reluctant to grant a second deposition without *significant* good cause; many judges believe that interrogatories can be used for follow-up information in lieu of subjecting a party or a witness to a second deposition

NOTE

Documents can be obtained from opposing parties through requests for inspection and from third parties through subpoenas. Do not forget to meet and confer with opposing counsel *before* you move for an additional deposition. See CCP §§2023.010(i), 2023.020.

WHEN RULE DOES NOT APPLY

You are not precluded from taking a subsequent deposition of a natural person when (see CCP §2025.610(c)):

- a. Deponent who previously testified on a corporation's behalf on particular matters under CCP §2025.230 is also a percipient witness of other facts related to the litigation; or
- b. Court order under CCP §485.230 authorizes plaintiff to reexamine deponent for limited purpose of discovering identity, location, and value of deponent's property for an attachment order.

Further Research: See CCP §§2025.010-2025.620; California Civil Discovery Practice §5.15 (4th ed Cal CEB 2006). See also steps 2 and 6, below.

NOTE

Because you are normally allowed only one deposition of a natural person, make sure before noticing deposition that you have obtained all information, documents, and other available data necessary to take a meaningful and complete deposition.

Source: Civil Litigation/Handling Depositions (Action Guide)/When Planning Deposition/STEP 2. DETERMINE WHETHER YOU WANT TO TAKE ORAL DEPOSITION

STEP 2. DETERMINE WHETHER YOU WANT TO TAKE ORAL DEPOSITION

REVIEW WHOSE DEPOSITION YOU MAY TAKE

You may take an oral deposition in California of "any person," whether (CCP §2025.010):

- a. A party or nonparty;
- b. A natural person, even if you do not know that person's name (see step 15, below); or
- c. An organization, *e.g.*, corporation, partnership, association, or governmental agency (CCP §2025.230; see step 15, below). If you describe "with reasonable particularity" the subject matter you expect to cover, the organization must designate to testify its "most qualified":
 - (1) Officer;
 - (2) Director;
 - (3) Managing agent;
 - (4) Employee; or
 - (5) Agent.

NOTE

Before deposing the president or chief executive officer of an organization or top governmental officials, you may be required to show that the same facts cannot be obtained by other means. See Nagle v Superior Court (1994) 28 CA4th 1465, 34 CR2d 281; Liberty Mut. Ins. Co. v Superior Court (1992) 10 CA4th 1282, 13 CR2d 363.

JUDGE'S PERSPECTIVE

If witness is a member of a law enforcement agency, *e.g.*, local police department:

- You must comply with Govt C §68097.2 by paying, in advance, \$150 toward reimbursement of actual cost of officer's salary and travel expenses; and
- You should try to schedule deposition at officer's convenience.

NOTE

For discussion of subpoenas of law enforcement agency members, including special provisions for California Highway Patrol members (Govt C §§68097.3-68097.4), see California Civil Discovery Practice §5.71 (4th ed Cal CEB 2006).

REVIEW DISCOVERY PLAN

In light of the "one-deposition rule" (see step 1, above), determine how an oral deposition of an available "person" (for discussion of reviewing whose deposition you may take, see above) fits into your overall discovery plan:

- a. Analyze goals of taking deposition (for discussion of deposition goals, see below); and
- b. Compare with other discovery methods to:
 - (1) Determine whether deposition is most appropriate device; and
 - (2) Consider timing in relation to other discovery.

NOTE

On how to develop your discovery plan, see [Creating Your Discovery Plan \(Cal CEB Action Guide February 2007\)](#). See also [step 6](#), below.

JUDGE'S PERSPECTIVE

You will want to notice opposing party's deposition *first* to have an opportunity to learn everything you can from that party *before* your client is deposed.

To avoid problems with the "one-deposition rule," you will also want to defer deposition until you have obtained significant information from other discovery methods.

Although the discovery statute abolishes automatic priority (*i.e.*, unofficial rule that all discovery is delayed until party first noticing deposition completes it), court may still allow for priority. See [CCP §§2019.020, 2025.420\(b\)](#).

NOTE

For example, if plaintiff in construction case asked for production of daily job/field logs, but defendant sought to take plaintiff's deposition before production date, court might grant plaintiff's request to delay deposition until after logs had been produced, especially if they were necessary to refresh recollection.

DETERMINE GOALS

Analyze why you want to take deposition, *e.g.*, to:

"Freeze" Testimony

Record testimony of opposing party or third party witnesses for more effective cross-examination at trial.

Test Credibility

Observe witnesses' credibility and probable impression on jury, *e.g.*, to help you evaluate likelihood of settlement or your success at trial.

JUDGE'S PERSPECTIVE

In most trials, your *client's* credibility and rapport with jury are the most important factors in determining whether you prevail (not your charm and advocacy).

Use parties' depositions to assess their credibility and jury appeal.

Preserve Evidence

Preserve testimony from witnesses who you suspect may, by the trial date, become unfriendly, unavailable, or no longer be your client's employees.

Gather Information

Gather information, *e.g.*:

- a. About physical evidence that you have already examined or that you want deponent to produce at deposition (see [step 7](#), below); or
- b. To support or oppose motions for summary judgment or summary adjudication.

Lay Foundation or Authenticate Documents

Establish foundation for admissibility of physical evidence or documents, *e.g.*, authenticate business records through custodian or other qualified witness. See [Laying a Foundation to Introduce Evidence \(Preparing and Using Evidence at Trial\) \(Cal CEB Action Guide April 2006\)](#).

Promote Settlement

Promote settlement by educating:

- a. Opposing party about strengths of your case; and
- b. Your client about weaknesses of the case.

CONSIDER WHEN NOT TO TAKE DEPOSITION

In some situations you may *not* want to take a witness's deposition, *e.g.*:

Friendly Witness

If you know that the witness is friendly and available, you do not *need* to take his or her deposition unless that witness's testimony is the only way to prove facts essential to your case. If so, you cannot afford to take a chance on witness's unavailability at trial. See Note below.

JUDGE'S PERSPECTIVE

If you depose the friendly witness, deposition commits witness to minute details, and if witness deviates from those details while testifying at trial, opposing counsel is armed with impeachment testimony from *your* deposition.

Expense

A deposition is expensive, and its cost may outweigh its benefit, *e.g.*, in a smaller case that may settle without need for deposition.

Already Have Statement

If you already have a detailed statement from the witness that is helpful to your case, you do not *need* a deposition, *e.g.*, defendant's real property manager previously stated that landslides on hill had occurred on prior occasions, unless statement is crucial to your case. See Note below.

JUDGE'S PERSPECTIVE

If you take deposition of a witness who has already made a helpful statement:

- You risk witness's diluting or retreating from the information in prior helpful statement.
- Deposition may prepare a hostile witness for trial by demonstrating your style and questions you may ask at trial.

NOTE

If the statement is *crucial* to your case, take deposition to use at trial if witness is unavailable.

CONSIDER DEPOSITION BY WRITTEN QUESTIONS

Consider whether a deposition *by written questions*, although rarely used, is more appropriate. See [CCP §§2028.010-2028.080](#). See also [Civil Discovery §§5.162-5.164](#). See [Appendix E](#) for outline of steps in taking deposition by written questions.

Advantages

You may want to use written deposition because, *e.g.*:

- a. It is often less costly, especially when witness resides at distant location; and
- b. It is a good way to obtain limited and specific information, *e.g.*, to authenticate documents.

Disadvantages

You may *not* want to use written deposition, because, *e.g.*:

- a. Answers are not spontaneous, because witness and attorney see questions before deposition; and
- b. Exchange of questions and objections is time-consuming, particularly when information sought is controversial.

APPLY GOALS

If you decide you want to take an oral deposition, use goals to help you:

a. Decide:

- (1) Scope of deposition;
- (2) Timing of deposition;
- (3) Sequence of depositions, *e.g.*, information from one witness may aid you in deposing another; and
- (4) Whether you want to request documents to be produced at deposition (see [step 7](#), below); and

b. Develop questions to meet your goals. See [step 35](#), below.

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Source: Civil Litigation/Handling Depositions (Action Guide)/When Planning Deposition/STEP 3. DETERMINE EFFECT OF TRIAL COURT MANAGEMENT RULES ON TIMING OF DEPOSITIONS

STEP 3. DETERMINE EFFECT OF TRIAL COURT MANAGEMENT RULES ON TIMING OF DEPOSITIONS

TRIAL COURT DELAY REDUCTION ACT

The Trial Court Delay Reduction Act of 1990 (Govt C §§68600-68620) charges the Judicial Council to (Govt C §68603(c)):

- a. Adopt court rules to reduce delays in litigation; and
- b. Establish a differential classification system for managing cases based on their relative complexity.

Judges, Not Lawyers or Litigants, to Control Pace of Litigation

The Civil Case Management rules are in Cal Rules of Ct 3.700-3.771, 10.900-10.910, and require all courts to, *e.g.*:

- a. Actively manage litigation from the filing of the first document to the final disposition of the action (Govt C §68607(a); Cal Rules of Ct, Standards of J Admin 2.1(b));
- b. Eliminate any elapsed time other than reasonably required for pleadings, discovery, and court events (Cal Rules of Ct, Standards of J Admin 2.1(a)); and
- c. Adopt a firm policy against continuances, to the maximum extent possible and reasonable, in all stages of the litigation (Govt C §68607(g)).

NOTE

Although court may adopt local case management rules, court lacks authority to shorten certain statutory time periods. Govt C §68616. The California Civil Discovery Act (CCP §§2016.010-2036.050) governs deadlines for individual discovery methods. Govt C §§68616(f), 68620(c).

GENERAL CIVIL CASES SUBJECT TO CASE MANAGEMENT RULES

Case management rules apply to all "general civil cases" filed in the trial courts (Cal Rules of Ct 3.712(a), 3.720), *i.e.*, all civil cases except (Cal Rules of Ct 1.6(4)):

Exceptions

- a. Probate, guardianship, and conservatorship proceedings;
- b. Juvenile and family law proceedings, including proceedings under divisions 6-9 of the Family Code, the Domestic Violence Prevention Act (Fam C §§6200-6389), and the Uniform Interstate Family Support Act (Fam C §§4900-5005);
- c. Freedom from parental custody and control proceedings;
- d. Adoption proceedings;
- e. Small claims proceedings;
- f. Unlawful detainer proceedings; and
- g. Other civil petitions, *e.g.*:
 - (1) Petition for writ of mandate;
 - (2) Petition to prevent harassment, elder abuse, or workplace violence;
 - (3) Petition for name change;
 - (4) Election contest petition;

- (5) Petition for relief from late claim;
- (6) Temporary restraining order;
- (7) Appointment of receiver; and
- (8) Release of property from lien.

Uninsured Motorist Cases

To allow for arbitration of plaintiff's claims, case management rules do not apply to uninsured motorist cases *until* 180 days after court designates case as uninsured motorist case. Cal Rules of Ct 3.712(b).

Coordinated Cases

- a. Case management rules do not apply to any case included in a petition for coordination (Cal Rules of Ct 3.712(c)); however
- b. If petition for coordination is granted, court may establish case progression plan or treat case as exceptional case under Cal Rules of Ct 3.714(c) (see below). Cal Rules of Ct 3.712(c).

UNDERSTAND DELAY REDUCTION PROCEDURES

To meet delay reduction and case management goals, court will evaluate each case and either (Govt C §68607(c); Cal Rules of Ct 3.714(a); Cal Rules of Ct, Standards of J Admin 2.2):

- a. Assign case to court's regular case management program;
- b. Exempt case as an exceptional case; or
- c. Assign case to court's plan for uncomplicated cases.

Factors Considered

In making this determination, court will consider (Cal Rules of Ct 3.715(a)):

- a. Type and subject matter of action;
- b. Number of causes of action or affirmative defenses alleged;
- c. Number of parties with separate interests;
- d. Number of cross-complaints and their subject matter;
- e. Complexity of issues, including issues of first impression;
- f. Difficulty in identifying, locating, and serving parties;
- g. Nature and extent of anticipated discovery;
- h. Number and location of percipient and expert witnesses;
- i. Estimated length of trial;
- j. Whether some or all issues can be arbitrated or resolved through some other alternative dispute resolution process;
- k. Statutory priority for issues;
- l. Likelihood of review by writ of appeal;
- m. Amount in controversy and type of remedy sought, including measures of damages;
- n. Pendency of other actions or proceedings that may affect case;
- o. Nature and extent of anticipated law and motion proceedings;

- p. Nature and extent of injuries and damages;
- q. Pendency of underinsured claims; and
- r. Any other relevant factors.

UNDERSTAND CASE DISPOSITION TIME GOALS

Depending on which "program" (see above) your case is assigned to, the court will manage it to achieve specified case disposition time goals.

Case Management Program

Court will manage its unlimited civil cases assigned to "regular" case management program so that (Cal Rules of Ct 3.714(b)(1)); Cal Rules of Ct, Standards of J Admin 2.2(f)(1)):

- a. 75 percent are disposed of within **12 months** of filing;
- b. 85 percent are disposed of within **18 months** of filing; and
- c. 100 percent are disposed of within **24 months** of filing.

NOTE

In meeting these case disposition time goals, court is guided by factors in Cal Rules of Ct 3.715(a) (listed above).

Exceptional Cases

- a. If, after evaluating case using factors listed in Cal Rules of Ct 3.400 and 3.715, court finds that case involves "exceptional circumstances" that will prevent it from being disposed of within case disposition time goals of Cal Rules of Ct 3.714(b), court may exempt case from those time goals. Cal Rules of Ct 3.714(c)(1).
- b. In such cases, court must (Cal Rules of Ct 3.714(c)(2)) establish case progression plan to ensure timely disposition with goal of disposing of case within **3 years**.

Uncomplicated Cases

Using the factors listed in Cal Rules of Ct 3.715(a), court may by local rule institute case management plan for uncomplicated cases amenable to disposition within **6 to 9 months** after filing. Cal Rules of Ct 3.714(d)(1).

UNDERSTAND ROLE OF LOCAL RULES

a. Each court must:

- (1) Adopt local case management rules consistent with case management rules of Cal Rules of Ct 3.720-3.735 and Cal Rules of Ct, Standards of J Admin 2.1 (Cal Rules of Ct 3.711);
- (2) Use procedures adopted by local court rules to evaluate every case based on factors listed in Cal Rules of Ct 3.715(a) and on other information it deems relevant (Cal Rules of Ct 3.714(a)); and
- (3) Adopt local internal case management and calendaring system that will advance goals of delay reduction (Cal Rules of Ct 10.900).

b. However, local rules cannot require shorter periods for:

- (1) Serving notice or other documents (Govt C §68616(c)); and
- (2) Discovery procedures (Govt C §68616(f)).

REVIEW REQUIREMENTS FOR CASE MANAGEMENT CONFERENCE

In all general civil cases (see Cal Rules of Ct 1.6(4)), court must set a case management conference to review case no later than **180 days** after filing of initial complaint. Cal Rules of Ct 3.721.

Cases Exempt From Case Management Review

Certain cases are exempt from "regular" case management review (Cal Rules of Ct 3.721):

- a. Complex cases (Cal Rules of Ct 3.750-3.751);
- b. Uninsured motorist cases (Cal Rules of Ct 3.712(b));
- c. Coordinated cases (Cal Rules of Ct 3.712(c));
- d. Cases deemed exceptional (Cal Rules of Ct 3.714(c));
- e. Cases deemed uncomplicated (Cal Rules of Ct 3.714(d));
- f. Short cause cases (Cal Rules of Ct 3.735(b)); and
- g. False Claims Act (Govt C §§12650-12656) cases (Cal Rules of Ct 2.573(e)).

Notice of Conference

Unless court otherwise orders, it must give all parties notice of case management conference date (Cal Rules of Ct 3.722(b)):

- a. Time and manner of which may be provided for by local rule; but
- b. No later than **45 days** before date of conference.

Conference Management Statement

No later than **15 calendar days** before date set for case management conference, each party must file conference management statement and serve it on other parties in case. Cal Rules of Ct 3.725(a).

Mandatory Judicial Council Form

- a. Party must use Judicial Council Form CM-110 (Case Management Statement) (Cal Rules of Ct 3.725(c));
- b. All applicable items must be completed on form (Cal Rules of Ct 3.725(c)); and
- c. Any two or more parties may file a joint statement (Cal Rules of Ct 3.725(b)).

Personal Appearance at Conference

Counsel for each party must appear personally, *unless* local rule or written local policy allows telephone appearances at case management conferences. Cal Rules of Ct 3.722(c).

NOTE

Counsel must not only be familiar with case but must also be prepared to discuss and to commit to party's position on issues listed in Cal Rules of Ct 3.724 and 3.727. Cal Rules of Ct 3.722(c).

PREPARE CASE CALENDAR

As soon as possible after case begins, develop discovery calendar based on when case management conference will take place and on local rules that apply to your case.

Duty to Conduct Discovery Diligently

Because court must schedule case management conference no later than **180 days** (or about **6 months**) after filing of initial complaint (Cal Rules of Ct 3.721), it will expect that substantial discovery will have been completed before conference.

Duty to Meet and Confer

Parties must meet and confer no later than **30 calendar days** before date set for initial case management conference to consider each issue to be considered at case management conference. Cal Rules of Ct 3.724.

NOTE

Depending on when complaint is served and when defendants appear (see Govt C §68616), you have only **5 months** at most to develop discovery to the point that you can make intelligent decisions when you meet and confer with other counsel before case management conference.

Effect of Case Management Order on Discovery

Court is likely to establish timing, scope, issues, and deadlines for completing any remaining discovery before trial. After conference, case management order controls subsequent proceedings in action. Cal Rules of Ct 3.730.

STRATEGY FOR DISCOVERY

Counsel should gather information on subjects early in discovery that will be addressed both at case management conference and at time counsel meet and confer (see Cal Rules of Ct 3.724, 3.727), *e.g.*:

Understand Case Management Issues

- a. Likelihood of parties' agreeing to Alternative Dispute Resolution (ADR);
- b. Discovery issues anticipated to remain unresolved before case management conference;
- c. Whether issues in case can be narrowed by eliminating any claims or defenses by motion or otherwise;
- d. Possibility of counsel stipulating to uncontested facts and issues;
- e. Any insurance coverage issues that may affect resolution of case;
- f. Nature of plaintiff's injuries;
- g. Amount of damages sought, including any special or punitive damages;
- h. Estimated length of trial;
- i. Whether case should be bifurcated;
- j. Parties' readiness to participate in settlement negotiations; and
- k. Date by which discovery is expected to be completed.

NOTE

It is a good idea to meet with client before case management conference to review status of discovery, client's position on conference issues, and client's level of commitment to the litigation, including possible settlement or trial.

Setting Depositions

Because delay reduction goal of most cases is disposition within **1 year**, counsel should initiate discovery demands intelligently and respond promptly to other parties' discovery requests, *e.g.*:

- a. Schedule essential depositions only, *e.g.*:
 - (1) Reflect on each deposition's goals (see step 2, above);
 - (2) Coordinate deposition with other discovery methods, *e.g.*, interrogatories and inspection demands (see step 6, below); and
 - (3) To avoid delay, follow statutory procedures carefully (see steps 8-18, below); and
- b. Prepare thoroughly before taking or defending deposition (see step 29, below).

NOTE

You do not have much flexibility to complete discovery, *e.g.*, you may not be able to allow opposing party additional time to respond to discovery requests.

JUDGE'S PERSPECTIVE

Courts presume that each case will be completed within 1 year unless exceptional circumstances warrant a later trial date.

The court usually sets a discovery schedule, including early depositions of nonexperts. The court cannot require an early exchange of experts (see *County of Los Angeles v Superior Court* (1990) 224 CA3d 1446, 1456, 274 CR 712), but will use its management skills to persuade parties to stipulate to earlier expert depositions when needed for case resolution.

Further Research: See *Creating Your Discovery Plan* (Cal CEB Action Guide February 2007).

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Source: Civil Litigation/Handling Depositions (Action Guide)/When Planning Deposition/STEP 4. WEIGH ADVANTAGES AND DISADVANTAGES OF VIDEO RECORDING DEPOSITION

STEP 4. WEIGH ADVANTAGES AND DISADVANTAGES OF VIDEO RECORDING DEPOSITION

CONSIDER ADVANTAGES

At Deposition

Video recording a deposition often has many benefits to examining counsel, *e.g.*:

- a. Generally, deponent is more impressed with the solemnity of the occasion and may give complete and candid answers;
- b. Counsel may behave better at a recorded deposition, and you can expect fewer objections and other interruptions;
- c. The camera may reduce the possibility of opposing counsel's "coaching" witness;
- d. Recording the deposition may enhance the credibility of testimony given; and
- e. Recording is returned to you promptly, unlike stenographic transcript, which may take as long as a month.

At Trial

During trial, advantages of having video recorded a deposition include:

- a. You may use an audio- or video-recorded deposition at trial as you would any other deposition (see [step 39](#), below); and
- b. You can use the video-recorded deposition of an *available* expert witness ([CCP §2025.620\(d\)](#)) and therefore accommodate a reluctant or busy expert by preserving that expert's testimony on video.

JUDGE'S PERSPECTIVE

Video recording a treating doctor's deposition is less expensive than paying for the doctor's time in court and allows counsel to present the testimony at a logical time during trial, rather than presenting live testimony out of order to accommodate the doctor's schedule. A disadvantage of video recording, however, is that you are committed to what is in the recording even if developments during trial might have otherwise led you to emphasize or deemphasize aspects of the doctor's live courtroom testimony.

NOTE

If you are considering video recording an available expert, be sure to include this information in your notice of deposition (for discussion of intent to record deposition, see [step 15](#), below) even if you might change your mind. See also Handling Expert Witnesses in California Courts, step 22 (Cal CEB Action Guide May 2006).

CONSIDER DISADVANTAGES

At Deposition

There are several disadvantages to video recording a deposition, *e.g.*:

- a. Your costs of taking a deposition will be greater than taking a stenographically recorded deposition (*e.g.*, cost of camera operator).
- b. Because depositions are usually recorded stenographically *and* video recorded (see [step 13](#), below), you will incur the cost of *both* camera operator and court reporter:
 - (1) Parties can stipulate not to have video-recorded deposition stenographically recorded (see [CCP §2025.330\(b\)](#)); but
 - (2) If deposition is worth the cost to video record it, it is probably also worth recording stenographically; and
 - (3) If you plan to use deposition at trial, you *must* have a written transcript. See [step 39](#), below.

c. Your office or usual place for taking depositions may not be suitable for video recording (see [step 13](#), below, and [step 32](#), below), and you may need to arrange for an alternative site.

d. You may spend additional time during deposition, *e.g.*, waiting for electronic storage unit to be changed, adjusting microphones.

At Trial

a. At trial, a disadvantage to having video recorded a deposition is that your time and cost to plan the orderly presentation of the video recording at trial may be greater than using a written deposition transcript, *e.g.*:

(1) Time to view and edit the recording (see [step 39](#), below);

(2) Time and cost to arrange the equipment and make sure it is operating properly and is visible to judge and jury.

b. Be prepared with an alternative plan if judge excludes all or portions of recording. See [CCP §2025.340\(m\)](#). See also [step 39](#), below.

NOTE

A deponent may be required to perform a physical reenactment of an event at a video-recorded deposition. *Emerson Elec. Co. v Superior Court* (1997) 16 C4th 1101, 68 CR2d 883.

DECIDE WHETHER YOU WANT TO VIDEO RECORD DEPOSITION

If advantages of video recording deposition outweigh disadvantages, advise all other parties of your intention. See [step 13](#), below; for discussion of intent to video record deposition. See also [step 15](#), below. See [steps 13](#), [15](#), [18](#), and [39](#), below, and [Appendix D](#) for additional procedures if you video record the deposition.

JUDGE'S PERSPECTIVE

[Code of Civil Procedure §2025.330](#) allows *any* party, with proper notice and at that party's expense, to use video technology to record a deposition. A non-deposing party is entitled to make a video record even when a deposing party elects not to do so

Further Research: See [CCP §§2020.310-2020.510](#), [2025.010-2025.620](#), [2028.010-2028.080](#); [California Civil Discovery Practice §§5.75-5.84](#) (4th ed Cal CEB 2006); [California Expert Witness Guide §9.22](#) (2d ed Cal CEB 1991); [Effective Direct & Cross-Examination Update §§9.21-9.22](#) (Cal CEB).

Source: Civil Litigation/Handling Depositions (Action Guide)/When Planning Deposition/STEP 5. CONSIDER DEPOSITION BY TELEPHONE OR VIDEO CONFERENCE

STEP 5. CONSIDER DEPOSITION BY TELEPHONE OR VIDEO CONFERENCE

WHEN AVAILABLE

Examining Party

A party may take an oral deposition by telephone, video conference, or other remote electronic means, as long as examining party (CCP §2025.310; Cal Rules of Ct 3.1010(a)):

- a. Serves notice of examination by telephone, video conference, or other electronic means with the deposition notice or subpoena;
- b. Makes all arrangements for any other party to participate in deposition in equivalent manner; and
- c. Ensures that any party may be present at deposition personally without giving prior notice.

Other Parties

Any party may appear and participate in oral deposition by telephone, video conference, or other remote electronic means, as long as party (CCP §2025.310; Cal Rules of Ct 3.1010(b)):

- a. Serves written notice of such appearance at least **3 court days** before deposition by:
 - (1) Personal delivery; or
 - (2) Facsimile; and
- b. Makes all arrangements for so appearing by telephone, video conference, or other remote electronic means.

WHO BEARS EXPENSE

Each party who appears at deposition by telephone, video conference, or other remote electronic means must pay all expenses incurred by it or properly allocated to it. Cal Rules of Ct 3.1010(a)-(b).

PARTY DEPONENT MUST BE PRESENT

Party deponent *must* appear at deposition in person and be in presence of deposition officer. CCP §2025.310; Cal Rules of Ct 3.1010(c).

NONPARTY DEPONENT MAY TESTIFY BY TELEPHONE

Nonparty deponent may appear at deposition by telephone, video conference, or other remote electronic means, as long as court (CCP §2025.310; Cal Rules of Ct 3.1010(d)):

Court Order

- a. Gives approval; and
- b. Makes findings that:
 - (1) Good cause exists; and
 - (2) There is no prejudice to any party.

How Deponent Sworn

Before giving testimony, nonparty deponent must be (Cal Rules of Ct 3.1010(d)):

- a. Sworn in presence of deposition officer; or

b. Sworn by other means as:

- (1) Stipulated by parties; or
- (2) Ordered by court.

Appearance of Other Parties

Any party may be personally present at deposition of nonparty deponent. Cal Rules of Ct 3.1010(d).

NOTE

By motion of any person, court in specific action may make such other orders as it deems appropriate. Cal Rules of Ct 3.1010(e).

WHEN TO USE

Taking or appearing at an oral deposition by telephone, video conference, or other remote electronic means is appropriate if:

- a. It is convenient for deponent or parties, *e.g.*, deponent resides at distant location;
- b. You seek limited and essentially neutral information, *e.g.*, authentication of documents; or
- c. You represent a party with dispute on issues or facts to which deponent will testify, *e.g.*, you represent defendant in case with multiple parties.

WHEN NOT TO USE

Examine deponent in person, or appear physically at deposition, if:

- a. It is important to view demeanor of witness to assess his or her credibility at trial; or
- b. Witness may testify on subjects that are crucial to your case.

Example: Opposing counsel may be physically present with out-of-state deponent during a telephonic deposition and able to communicate off the record without your knowledge. Although local counsel could appear on your behalf to observe proceedings, it would be better to depose a witness in person if the information you seek is controversial enough to make such tactics likely.

Source: Civil Litigation/Handling Depositions (Action Guide)/When Planning Deposition/STEP 6. DECIDE WHETHER TO COMPLETE OTHER DISCOVERY BEFORE DEPOSITION

STEP 6. DECIDE WHETHER TO COMPLETE OTHER DISCOVERY BEFORE DEPOSITION

COORDINATE WITH OTHER DISCOVERY

Determine whether you would benefit from receiving discovery responses or examining physical evidence *before* the deposition.

INTERROGATORIES

WHEN APPROPRIATE

Consider serving interrogatories before noticing a deposition to:

- a. Reveal corporate hierarchy;
- b. Identify witnesses; or
- c. Obtain background information not available from deponent or through informal investigation.

LIMITATIONS ON INTERROGATORIES

Interrogatories drafted by counsel and interrogatories promulgated by Judicial Council are treated differently, *i.e.*, you may serve (CCP §2030.030(a)(1)-(2)):

- a. *Unlimited* relevant Judicial Council form interrogatories; but only
- b. *55* specially prepared interrogatories, *unless* you attach a declaration showing that you need additional interrogatories because of the (CCP §2030.040(a)(1)-(3)):
 - (1) Complexity or quantity of existing and potential issues;
 - (2) Financial burden if required to pursue this information through oral deposition; or
 - (3) Expedience of using interrogatories to provide responding party with opportunity to conduct investigation of files or records to provide information you seek.

JUDGE'S PERSPECTIVE

Interrogatories provide useful background information and should usually be sent out early so that you can review responses before deposition of opposing party.

TYPE OF INTERROGATORIES TO USE

If possible:

- a. Use Judicial Council form interrogatories to secure background data and other appropriate information (Judicial Council Forms FI-120, FI-128-FI-130 are in California Judicial Council Forms Manual 9A-5—9A-32 (Cal CEB 1981)); and
- b. Reserve your specially prepared interrogatories for specific matters pertaining to case.

NOTE

Judicial Council Form interrogatories may not always be appropriate. For example, a Judicial Council Form interrogatory requiring identification of witnesses interviewed by counsel and from whom statements were obtained was held to invade qualified attorney work product. *Nacht v Lewis Architects, Inc. v Superior Court* (1996) 47 CA4th 214, 54 CR2d 575.

Further Research: See CCP §§2030.010-2030.410. See also Creating Your Discovery Plan (Cal CEB Action Guide February

2007).

FOLLOW PROCEDURES

For requirements for serving interrogatories, see CCP §2030.080; Obtaining Discovery: Initiating and Responding to Discovery Procedures (Cal CEB Action Guide March 2007); California Civil Discovery Practice, chap 7 (4th ed Cal CEB 2006).

REQUESTS FOR ADMISSION

WHEN APPROPRIATE

Consider serving requests for admission:

- a. To verify information and limit issues *before* deposition; or
- b. To obtain follow-up admissions *after* deposition.

LIMITATIONS ON REQUESTS FOR ADMISSION

Whether or not requests for admission relate to genuineness of documents determines how many may be served:

a. *Unlimited* requests for admission of *genuineness of documents* are permitted, as long as they do not subject responding party to (CCP §2033.030(c)):

- (1) Unwarranted annoyance;
- (2) Embarrassment;
- (3) Oppression; or
- (4) Undue burden and expense; but

b. *55* requests for admission *not relating to genuineness of documents* are permitted, unless you attach a declaration for additional requests showing need for requests because of complexity or quantity of issues in the case (CCP §§2033.030(a)-(b), 2033.040-2033.050). For discussion of limitations on interrogatories, see Note, above.

FOLLOW PROCEDURES

For requirements for serving requests for admission, see CCP §2033.070; Civil Discovery, chap 9.

DOCUMENT OR PHYSICAL EVIDENCE PRODUCTION OR INSPECTION

WHEN APPROPRIATE

You will conduct a more effective deposition when you can review documents or physical evidence before deposition, *e.g.*:

a. If case involves numerous documents, as in business litigation, you can:

- (1) Use documents to prepare for deposition; and
- (2) Organize documents to use while questioning deponent.

b. If case involves real property, machinery, or other physical evidence, you will be familiar with the site or evidence in order to formulate questions for deponent.

JUDGE'S PERSPECTIVE

Arrange to have photographs taken of real property or other physical evidence *as soon as possible* because:

- Having photographs to use at trial is very effective; and

- Photographs will help you when taking depositions.

If changes in evidence occur over time (*e.g.*, ongoing landslide), have photographs taken at appropriate stages of the changes.

Make sure physical evidence is preserved and is not tampered with when consultants and experts inspect it during the course of the litigation.

NO NUMERICAL LIMITATIONS ON PRODUCTION

There are no limitations on number of documents demanded, *i.e.*:

a. You may make *unlimited* demands for documents and other physical evidence for information to develop questions at deposition (CCP §2031.010); but

b. You should avoid demands that are (CCP §2031.060(b)):

- (1) Unduly burdensome and expensive; or
- (2) Annoying, embarrassing, or oppressive.

SECURE PHYSICAL EVIDENCE FROM PARTY

Select appropriate method to obtain physical evidence *before* deposition, *e.g.*:

Written Demand

Written demand may be made under CCP §2031.010:

- a. For inspection of documents or tangible things; or
- b. To permit entry on land.

Sample Form: See Civil Discovery §8.123.

JUDGE'S PERSPECTIVE

A party can be compelled to produce records located in another state if they are under that party's control. *Boal v Price Waterhouse & Co.* (1985) 165 CA3d 806, 810, 212 CR 42

Written Stipulation

Written stipulation made and enforceable under CCP §2016.030 may, *e.g.*:

- a. Specify with as much particularity as possible items or categories of items to be inspected; and
- b. Set forth:
 - (1) Time;
 - (2) Place;
 - (3) Manner; and
 - (4) Location of inspection.

Sample Form: See Civil Discovery §8.122.

NOTE

You can usually use a stipulation concerning *any* discovery procedure.

Deposition of Party's Records Custodian

Before deposing someone with personal knowledge, consider noticing deposition of custodian to appear and produce records for

inspection and copying. CCP §2025.280(a). See steps 7, 15, below.

SECURE EVIDENCE FROM NONPARTY

Serve deposition *subpoena* for production of documents by custodian of records or other qualified witness for *copying only*. CCP §§2020.020, 2020.410, 2025.280(b); on how to proceed, see step 16, below.

SECURE EVIDENCE FROM EXPERT

To obtain evidence from expert:

a. *For reports only*: Include in your expert witness demand (CCP §2034.210(a)) a demand for mutual and simultaneous production for inspection and copying of all discoverable reports and writings made by a disclosed expert "in the course of preparing that expert's opinion." CCP §2034.210(c).

Sample Form: See Handling Expert Witnesses in California Courts, Appendix A (Cal CEB Action Guide May 2006).

b. *For expert's "entire file"*:

(1) Stipulate with opposing counsel; or

(2) Serve CCP §2020.510 deposition subpoena for personal appearance and production of documents and things on expert in addition to deposition notice under CCP §§2025.220-2025.240. See step 16, below.

NOTE

Some practitioners recommend that, to be sure you obtain the entire file, you use *both* a deposition subpoena and a deposition notice.

JUDGE'S PERSPECTIVE

Be sure to obtain expert's billing records for time spent on the case and the charges. Billing records may be useful on cross-examination of expert to:

- Demonstrate how little time expert actually spent; or
- Learn what expert did not review.

FOLLOW PROCEDURES

For requirements for inspection demands, see CCP §§2031.010-2031.040; Civil Discovery, chap 8.

Further Research: See Civil Discovery §§7.2-7.54, 8.2-8.69, 9.2-9.42.

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Source: Civil Litigation/Handling Depositions (Action Guide)/When Planning Deposition/STEP 7. DETERMINE WHETHER YOU WANT PRODUCTION OF DOCUMENTS AND THINGS AT DEPOSITION

STEP 7. DETERMINE WHETHER YOU WANT PRODUCTION OF DOCUMENTS AND THINGS *AT DEPOSITION*

REVIEW WHEN PRODUCTION AVAILABLE

You may compel deponent to bring documents and other tangible things to deposition by serving:

Party

A deposition notice that describes with reasonable particularity any materials or category of materials to be produced by the party deponent (CCP §2025.220(a)(4)); or

Nonparty

A subpoena on a nonparty deponent that requests:

a. The attendance and testimony of deponent *and* production of (CCP §2020.510(a)):

- (1) Business records;
- (2) Other documents; and
- (3) Tangible things; or

b. Business records for copying without attendance and testimony. CCP §§2020.410-2020.440.

DETERMINE WHEN PRODUCTION APPROPRIATE

Although it is usually better practice to obtain documents *before* deposition (see step 6, above), you will want deponent to produce records at deposition when, *e.g.*:

a. You are deposing an individual:

- (1) On behalf of a large entity, *e.g.*, a state agency or corporation;
- (2) Who is not the same person who verified the response to your prior demand for production of documents; and
- (3) Who may have additional records not already produced; or

b. You have waived the right to production of documents by failing to make a timely motion to compel documents following a demand for production, *i.e.*, within **45 days** after response is served. CCP §2031.310(c); *Carter v Superior Court* (1990) 218 CA3d 994, 997, 267 CR 290.

Form: For deposition subpoena to compel appearance and production of documents and things, see Appendix I.

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Source: Civil Litigation/Handling Depositions (Action Guide)/If Deposition of Party or Nonparty Lay Witness (Without Motion to Compel)/STEP 8. REVIEW WHEN YOU CAN SCHEDULE DEPOSITION

If Deposition of Party or Nonparty Lay Witness (Without Motion to Compel)

STEP 8. REVIEW *WHEN* YOU CAN SCHEDULE DEPOSITION

EARLIEST DATE FOR DEPOSITION

Plaintiff

Plaintiff may serve a deposition notice *without leave of court* on any date **20 days** after (CCP §2025.210(b)):

- a. Serving summons on any defendant; or
- b. Appearance by any defendant.

NOTE

To take an earlier deposition, see step 28, below; CCP §2025.210(b). The 20-day "freeze" on discovery also applies to deposition subpoenas for business records only. See California Shellfish, Inc. v United Shellfish Co. (1997) 56 CA4th 16, 64 CR2d 797.

Defendant

Defendant may serve a deposition notice *without leave of court* at any time after *earlier of* (CCP §2025.210(a)):

- a. Being served; or
- b. Appearing.

JUDGE'S PERSPECTIVE

Do not delay in initiating discovery:

- When you have sufficient background information, gain the tactical advantage of taking opposing party's deposition first.
- Courts are inclined to recognize priority when counsel has been diligent in sending out a deposition notice despite language in CCP §2019.020(a) abolishing priority. See, *e.g.*, Los Angeles Ct R 7.12(e)(3).
- If a deposition may last more than 1 day, you should advise opposing counsel and clear available dates well in advance.

WHEN TO SCHEDULE AND NOTICE DEPOSITION

Generally, schedule deposition of party or party-affiliated witness at least (CCP §§1013, 2016.050, 2025.270(a)):

- a. **10 days** after you personally serve deposition notice;
- b. **15 days** after you serve notice by mail to a California address (10 days plus 5 calendar days for mailing);
- c. **20 days** after you mail to out-of-state address (10 days plus 10 calendar days for mailing);
- d. **30 days** after you mail to foreign address (10 days plus 20 calendar days for mailing);
- e. **10 days plus 2 court days** after you serve notice by fax (stipulation required), express mail, or another method of overnight delivery.

JUDGE'S PERSPECTIVE

You must usually schedule deposition of a law enforcement officer by delivering two copies of deposition subpoena to officer's immediate superior at public entity where officer is employed, or to an "agent designated by that immediate superior to receive

that service." Govt C §68097.1(a).

NOTE

For discussion of subpoenas of law enforcement agency members, including special provisions for California Highway Patrol members (Govt C §§68097.3-68097.4), see California Civil Discovery Practice §5.71 (4th ed Cal CEB 2006).

Exception for Unlawful Detainer Action

In unlawful detainer case, schedule deposition (CCP §2025.270(b)):

- a. *At least 5 days* after service of notice; but
- b. No later than **5 days** before trial.

Exception for Nonparty

If deponent is a nonparty, serve deposition subpoena *in sufficient time* to allow deponent "reasonable opportunity" to (CCP §2020.220(a)):

- a. Travel to deposition location;
- b. Locate and produce any designated:
 - (1) Business records;
 - (2) Documents; and
 - (3) Tangible items.

NOTE

Although CCP §2020.220(a) does not define "reasonable opportunity," unless the deponent must travel a considerable distance or locate and produce voluminous documents, it is probably reasonable to give at least the notice that is required for oral depositions of parties.

Exception for Consumer or Employment Records

If you seek a consumer's "personal records" under CCP §1985.3 or employment records under CCP §1985.6, deponent should be served with subpoena at least **20 days** before deposition. CCP §2025.270(a). On procedures for production of consumer records, see steps 19-22, below. On procedures for production of employment records, see steps 23-25, below.

NOTE

Although CCP §2025.270(a) refers to "issuance" rather than "service" of subpoena, the prudent approach is to provide 20 days' notice following service.

Exception for Copying Nonparty's Business Records

If you seek *only* production of nonparty's business records for copying, schedule a date for compliance by the *later* of (CCP §2020.410(c)):

- a. **20 days** after deposition subpoena is issued; or
- b. **15 days** after it was served.

No Exception for Party Deposition With Records

You need not give party deponent any additional notice, *i.e.*, schedule deposition **10 days** after you personally serve notice (CCP §2025.270(a)), *if*:

- a. You ask deponent to bring records to deposition (see CCP §§2025.220(a)(4), 2025.280(a); step 7, above); and
- b. The records are not consumer or employment records.

DISCOVERY CUTOFF

Lay Witnesses

Start deposition *no later* than **30th day** before *initial* trial date unless (CCP §§2024.010, 2024.020(a)):

- a. Court orders otherwise (CCP §2024.050); or
- b. Parties agree *in writing* to an extension (CCP §2024.060).

NOTE

Discovery is considered completed on the day a response is due or on the day a deposition begins. If these dates fall on a Saturday, Sunday, or holiday, the last day is the next successive court day. CCP §2016.060. As a practical matter, however, do not wait until the 30th day before initial trial date to begin deposition.

Expert Witnesses

Start deposition *no later* than **15th day** before initial trial date (see Note above), unless (CCP §2024.030):

- a. Court orders otherwise (CCP §2024.050); or
- b. Parties agree *in writing* to an extension (CCP §2024.060).

NOTE

After a mistrial, order granting a new trial, or remand for a new trial, discovery is reopened and the last date for completing discovery is **15 days** before date initially set for a new trial of the action. Fairmont Ins. Co. v Superior Court (2000) 22 C4th 245, 92 CR2d 70.

Before Judicial Arbitration

Before judicial arbitration, start deposition no later than **15 days** before date set for arbitration hearing unless court orders otherwise for good cause. Cal Rules of Ct 3.822(b).

Time Limitation

Case referred by court to arbitration after case management conference may not begin within **210 days** after the complaint is filed. Govt C §68616(g). See Cal Rules of Ct 3.722(a), 3.727(6), 3.728(2).

NOTE

You *cannot* conduct a deposition after arbitration (except for expert deposition under CCP §§2034.410-2034.470), absent a stipulation or court order on a showing of good cause. CCP §1141.24.

WHEN COURT ORDERS CHANGE

If you or any other party or deponent make a motion and show good cause, court may shorten or extend time for scheduling deposition. See CCP §2025.270(c); step 28, below.

NOTE

Most counsel will stipulate that discovery is to remain open *after* a nonbinding arbitration hearing up to 30 days before initial trial date. Such a stipulation should be made in open court or in writing well in advance of arbitration hearing.

Further Research: See Appendix F for checklist of dates and deadlines when handling depositions.

STEP 9. DETERMINE PROPER LOCATION FOR DEPOSITION OF CALIFORNIA DEPONENT

NATURAL PERSON DEPONENT

When deponent is a natural person, *whether or not a party*, you have option of taking deposition within *either* (CCP §2025.250(a)):

- a. **75 miles** of deponent's residence; or
- b. **150 miles** of deponent's residence and in the forum county.

Exception

You may make a motion to conduct deposition at a more distant location if natural person deponent is (CCP §2025.260(a)):

- a. A party; or
- b. An officer, director, managing agent, or employee of a party.

Further Research: See *Glass v Superior Court* (1988) 204 CA3d 1048, 1052, 251 CR 690. See also step 27, below.

ORGANIZATION PARTY DEPONENT

When deponent is an organization *and* a party, you can take deposition within *either* (CCP §2025.250(b)):

- a. **75 miles** of organization's principal executive or business office in California; or
- b. **150 miles** of that office and in the forum county.

NOTE

Even if an organization party deponent is located outside California, you might obtain an order to take deposition in California. See *Glass v Superior Court, supra*. See also step 27, below.

ORGANIZATION NONPARTY DEPONENT

When deponent is a nonparty organization, you *must* take deposition within **75 miles** of organization's principal executive or business office in California (CCP §2025.250(c)), *unless* the organization:

- a. Consents to a more distant location; or
- b. Has not designated a principal office, in which event you may take deposition at a location within either:
 - (1) The forum county; or
 - (2) **75 miles** of any California executive or business office of the organization.

Source: Civil Litigation/Handling Depositions (Action Guide)/If Deposition of Party or Nonparty Lay Witness (Without Motion to Compel)/STEP 10. REVIEW HOW TO OBTAIN DEPOSITION IN CALIFORNIA

STEP 10. REVIEW HOW TO OBTAIN DEPOSITION IN CALIFORNIA

DEPOSITION OF A PARTY

Notice

Serve a deposition notice (CCP §2025.220; see step 15, below) on deponent and all other parties who have appeared in the action to require (CCP §2025.280(a)):

a. *Attendance and testimony* of any deponent who is:

- (1) A party; or
- (2) An officer, director, managing agent, or employee of a party; and

b. *Production* at deposition of any document or tangible item for you to inspect and have copied.

JUDGE'S PERSPECTIVE

You may not depose a corporate president or other official at the highest level of corporate management if you cannot show that the official has unique or superior personal knowledge of discoverable information. A corporation's functioning could be disrupted if its president has to appear for a deposition when a lower-level employee has discoverable information. Liberty Mut. Ins. Co. v Superior Court (1992) 10 CA4th 1282, 13 CR2d 363.

NOTE

If you notice the deposition of a party organization that has an office in California and describe with reasonable particularity the matters you want to explore (CCP §2025.230), a court might order the organization to produce for deposition in California (see CCP §2025.250) the officers, agents, or employees who are most qualified to testify on those matters, *even if they reside outside California*. The deposition of the *organization* (which is doing business in the state and has availed itself of California court jurisdiction), not of the people, is being taken. See Glass v Superior Court (1988) 204 CA3d 1048, 1053, 251 CR 690.

Stipulation

Agree by *written* stipulation to (CCP §2016.030):

- a. Timing;
- b. Location; and
- c. Manner of depositions.

NOTE

Some local rules *require* you to try to arrange a mutually convenient date for deposition. See Los Angeles Ct R 7.12(e)(2).

DEPOSITION OF NONPARTY

Use Subpoena *and* Notice

Serve *both*:

a. Deposition subpoena on *deponent* (CCP §2020.310 or §2020.510) to require any nonparty deponent to either (CCP §2025.280(b)):

- (1) Attend and testify (CCP §2020.310; see Appendix H); or
- (2) Attend, testify, and produce any document or tangible thing for inspection and copying (CCP §2020.510; see Appendix I);

and

b. Copy of deposition notice *and* deposition subpoena on all *parties* who have appeared in the action. CCP §2025.240(c).

NOTE

If you do not take all steps necessary to secure witness's attendance, *e.g.*, personally serve proper subpoena, you are subject to sanctions. CCP §2025.320. See generally *Rosen v Superior Court* (1966) 244 CA2d 586, 591, 53 CR 347.

JUDGE'S PERSPECTIVE

If witness is a member of a law enforcement agency, it is a good idea to:

- Attach a copy of relevant documents, *e.g.*, accident report, to subpoena; and
- Arrange to meet with the officer before deposition to review relevant documents.

NOTE

For discussion of subpoenas of law enforcement agency members, including special provisions for California Highway Patrol members (Govt C §§68097.3-68097.4), see California Civil Discovery Practice §5.71 (4th ed Cal CEB 2006).

Use Subpoena Only

If you want deponent to produce business records for copying and inspection *only*, serve a *deposition subpoena* on (CCP §§2020.410-2020.440; see Appendix J):

- a. Deponent; and
- b. All parties who have appeared in the action.

NOTE

If you ask deponent to produce a consumer's "personal records" under CCP §1985.3 or an individual's "employment records" under CCP §1985.6, serve deponent *and* consumer (or employee) with additional documents. See CCP §§1985.3(b), 1985.6(b). See steps 19-22 (consumer) and steps 23-26 (employment), below.

Further Research: See Civil Discovery §§5.50-5.131.

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Source: Civil Litigation/Handling Depositions (Action Guide)/If Deposition of Party or Nonparty Lay Witness (Without Motion to Compel)/STEP 11. REVIEW HOW TO OBTAIN DEPOSITION IN ANOTHER STATE OR TERRITORY SUBJECT TO UNITED STATES JURISDICTION

STEP 11. REVIEW HOW TO OBTAIN DEPOSITION IN ANOTHER STATE OR TERRITORY SUBJECT TO UNITED STATES JURISDICTION

WHEN AVAILABLE

You or any other party can obtain discovery by oral deposition of a *party* or a *nonparty* in (CCP §2026.010(a)):

- a. Another state; or
- b. A territory or possession subject to United States jurisdiction.

WHO CONDUCTS

The deposition may be conducted by someone who is either (CCP §§2025.320, 2026.010(d)):

- a. Authorized to administer oaths by the laws of United States or those of the place where deposition is held and is:
 - (1) *Not* financially interested in the action; and
 - (2) *Not* a relative or employee of any attorney of any of the parties, or of any party; or
- b. Appointed by court to administer oaths and take testimony.

HOW CONDUCTED

The deposition must be conducted in accordance with CCP §§2025.310-2025.340, CCP §2026.010(a); *International Ins. Co. v Montrose Chem. Corp.* (1991) 231 CA3d 1367, 1371, 282 CR 783 (defendant ordered to produce documents it supplied to refresh recollection of nonparty witness, deposed out of state). See also steps 15-18, 29, and 32-37, below.

PARTY WITNESS

WHO IS A PARTY WITNESS

A party witness is (CCP §§2025.010, 2026.010(a)-(b)):

- a. A party; or
- b. An officer, director, managing agent, or employee of a party.

WHERE TO DEPOSE

The party must be deposed within (CCP §2026.010(b)):

- a. Both the state or territory; and
- b. **75 miles** of deponent's residence or business office.

HOW TO COMPEL

Serve deposition notice to (CCP §2026.010(b)):

- a. Compel *party witness* to attend and testify; and
- b. Produce any document or tangible thing for inspection and copying.

JUDGE'S PERSPECTIVE

If you must seek a motion to compel attendance or answers to questions at deposition, the *party witness* is under jurisdiction of the *California court*, and you should move to compel in California.

NONPARTY WITNESS

HOW TO COMPEL

Obtain Commission

If a party requests, clerk of court where action is pending must issue a commission authorizing deposition in another state or place; a noticed motion is not necessary. CCP §2026.010(f).

NOTE

A commission to take a deposition is a warrant or order issued under seal by clerk of court where action is pending, providing official evidence to courts of another jurisdiction that an action is pending in the issuing court. A commission gives out-of-state court a foundation to issue a subpoena to compel a nonparty witness to attend the deposition.

Determine Out-of-State Requirements

The commission may contain terms such as are required by the foreign jurisdiction. If the out-of-state court requires a court order for a commission, the requesting party may obtain the order by ex parte application. CCP §2026.010(c), (f).

JUDGE'S PERSPECTIVE

Because California courts do not have jurisdiction over *the person* of a nonparty witness, if it becomes necessary to compel attendance or answers at a deposition, you must bring a motion to compel in the foreign jurisdiction in which the nonparty resides.

NOTE

California law, however, governs *the taking of the deposition*; e.g., a request for documents is made under California law, not the law of the state in which the deposition is taken. See *International Ins. Co. v Montrose Chem. Corp.*, *supra* (plaintiff's request for documents did not have to be made in Connecticut court, because California law governed taking of deposition, especially when documents belonged to party insurer who had shown them to nonparty witness).

Further Research: See CCP §§2025.010-2026.010; California Civil Discovery Practice, chap 12 (4th ed Cal CEB 2006).

Source: Civil Litigation/Handling Depositions (Action Guide)/If Deposition of Party or Nonparty Lay Witness (Without Motion to Compel)/STEP 12. REVIEW HOW TO TAKE DEPOSITION IN FOREIGN NATION

STEP 12. REVIEW HOW TO TAKE DEPOSITION IN FOREIGN NATION

WHEN AVAILABLE

You or any other party may take an oral deposition in a foreign nation of (CCP §2027.010(a)):

- a. A party; or
- b. A nonparty.

WHO CONDUCTS DEPOSITION

The deposition may be conducted by (CCP §§2025.320, 2027.010(d)):

- a. A person who is authorized to administer oaths by laws of United States or of foreign nation and is *not*:
 - (1) Financially interested in the action; and
 - (2) A relative or an employee of any attorney of any party;
- b. A person or officer appointed by commission or under letters rogatory; or
- c. Anyone agreed on by all parties.

HOW CONDUCTED

The deposition must be conducted in accordance with CCP §§2025.310-2025.340, 2027.010(a). See also steps 15-18, 29, and 32-37, below.

HOW TO COMPEL

Party Witness

Serve party witness with deposition notice to compel deponent to (CCP §2027.010(b); see also step 11, above):

- a. Appear and testify; and
- b. Produce any document or tangible thing for inspection or copying.

Nonparty

Use any process and procedures required and available in the foreign nation to compel nonparty deponent to appear and testify, as well as to produce documents or tangible things for inspection or copying. CCP §2027.010(c).

Further Research: See CCP §§2025.310-2025.340, 2027.010; California Civil Discovery Practice, chap 13 (4th ed Cal CEB 2006).

Source: Civil Litigation/Handling Depositions (Action Guide)/If Deposition of Party or Nonparty Lay Witness (Without Motion to Compel)/STEP 13. REVIEW HOW TO COMPEL SIMULTANEOUS AUDIO OR VIDEO RECORDING OF DEPOSITION

STEP 13. REVIEW HOW TO COMPEL SIMULTANEOUS AUDIO OR VIDEO RECORDING OF DEPOSITION

REQUEST IN DEPOSITION NOTICE

If you represent the party noticing deposition, state in *deposition notice* that you intend to record testimony by (CCP §2025.330; see step 15, below):

a. Either:

- (1) Audio recording; or
- (2) Video recording; and

b. Stenographically, unless:

- (1) Court orders otherwise; or
- (2) All parties agree otherwise.

NOTE

If you intend to use the deposition at trial, you will need a written transcript of the deposition. See step 39, below.

REQUEST IN SEPARATE NOTICE

If deposition has already been noticed by another party and you wish to have it audio or video recorded:

When to Serve

Serve written notice of your intention (CCP §2025.330(c)):

- a. "Promptly"; and
- b. At least **3 calendar days** before scheduled deposition date.

Whom to Notify

a. Serve written notice on (CCP §2025.330(c)):

- (1) Noticing party's attorney (or party, if not represented); and
- (2) All attorneys for other parties (or parties, if unrepresented) who received notice of deposition.

b. Give notice to any deponent who is a nonparty witness under CCP §§2020.210-2020.240. CCP §2025.330(c).

How to Serve

*If you serve notice only **3 calendar days** before deposition, personally serve everyone.* CCP §2025.330(c).

WHO BEARS EXPENSE

Party that requests audio or video recording bears the expense. CCP §2025.330(c).

IF YOU WANT TO USE RECORDING AT TRIAL

a. If you intend to use the recorded deposition at trial:

- (1) Follow the notice procedures (see step 15, below); and

(2) Allow sufficient time for objections *after* deposition and before trial (see step 39, below and CCP §2025.340); and

b. If deposition is of an *expert* (see step 14, below), *also* state in deposition notice that you reserve the right to use video-recorded deposition at trial (see step 15, below, and CCP §2025.620(d)).

WHEN SCHEDULING DEPOSITION

If you give notice of your intent to use deposition at trial:

a. Opposing party may want to postpone deposition if that party has not had adequate time to prepare for, or develop, cross-examination, *e.g.*, of treating or consulting physician or expert witness; and

b. Opposing party may seek a:

(1) Stipulation to reschedule deposition; or

(2) Protective order obtained under CCP §2025.420.

WHEN TO FILE NOTICE

Do not file notice of intent with court unless (Cal Rules of Ct 3.250(a)):

a. It is relevant to an issue in a law and motion proceeding or other hearing; or

b. Court orders it filed for good cause.

FOLLOW AUDIO- OR VIDEO-RECORDING REQUIREMENTS

See step 5, above, steps 15, 32, 39, below, and Appendix D for additional procedures if you video record the deposition.

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Source: Civil Litigation/Handling Depositions (Action Guide)/If Deposition of Expert Witness/STEP 14. REVIEW HOW TO OBTAIN DEPOSITION OF DISCLOSED EXPERT WITNESS

If Deposition of Expert Witness

STEP 14. REVIEW HOW TO OBTAIN DEPOSITION OF DISCLOSED EXPERT WITNESS

WHEN APPROPRIATE

Deposition of disclosed expert witness is appropriate if, in response to demand for exchange of expert witness information (see Handling Expert Witnesses in California Courts, steps 12-13 (Cal CEB Action Guide May 2006)):

- a. A party lists experts who are expected to testify about their opinions at trial (CCP §2034.260(b)); and
- b. You or any other party wants to take experts' depositions.

NOTE

If you follow proper procedures (see step 13, above, and steps 15, 32, and 39, below), you can use a *video recording* of an expert's deposition at trial, *even if* that expert is available for trial. CCP §2025.620(d).

TRY TO STIPULATE

Try to enter into written stipulation with counsel for all parties on (CCP §2016.030):

- a. Date;
- b. Time;
- c. Location of deposition;
- d. Whether the expert will produce reports or *entire* file (including billing); and
- e. Amount and method of paying expert witness fees. For discussion of paying these fees, see below.

JUDGE'S PERSPECTIVE

The court does not have the power to alter the date of demand for exchange of information concerning experts (see County of Los Angeles v Superior Court (1990) 224 CA3d 1446, 1456, 274 CR 712), but CCP §2034.250(b)(2) permits the court to narrow and expand time to exchange information.

To facilitate settlement, many courts use case management techniques to persuade counsel to agree to an earlier demand date.

DEPOSITION DEADLINES

You normally will have no more than **25 calendar days** after exchanging expert witness lists to serve notice of deposition of a disclosed expert witness (see CCP §2034.220), because:

- a. Date of exchange under CCP §2034.230(b) is *later of*:
 - (1) **50 calendar days** before initial trial date; or
 - (2) **20 calendar days** after demand to exchange lists; and
- b. You must (CCP §2024.030):
 - (1) Complete discovery, *i.e.*, start deposition, by **15th day** before *initial* trial date; and
 - (2) Have any motions on discovery heard by **10th day** before that *initial* trial date, unless court alters time limit or parties agree otherwise; and

c. You must give **10 days'** notice of expert's deposition under CCP §2025.270(a) unless court reduces time, so the result is:

- (1) **50 days** before trial (exchange lists);
- (2) Minus **15 days** before trial (finish discovery); and
- (3) Minus an additional **10 days** before trial (give notice before deposition);
- (4) Equals **25 days** before trial that you must serve notice of deposition (assuming that you personally serve notice).

NOTE

If you depose expert within **20 days** after the exchange, give yourself sufficient time to schedule a hearing on any motion to compel answers or production at least **10 days** before initial trial date and to prepare, personally serve, and file moving papers **16 court days** before hearing date. CCP §1005(b); Cal Rules of Ct 3.1025; California Civil Discovery Practice §§6.117-6.118 (4th ed Cal CEB 2006).

PLACE OF DEPOSITION

When deponent is an "employed," "retained," or "party" expert (see CCP §2034.210(b); see also definitions, below), take deposition at location within **75 miles** of the *courthouse* where the action is pending *unless* (CCP §2034.420):

- a. Party designating expert moves for protective order and shows "exceptional hardship"; and
- b. Court orders that deposition be taken at a more distant location.

JUDGE'S PERSPECTIVE

Consider advantages of deposing expert in his or her office, if feasible:

- Expert will not have excuse of having left a portion of the file or other records at the office;
- You can see expert's library and what books expert considers reliable authority for cross-examination purposes at trial (Evid C §721(b)(3); see step 36, below); and
- You can observe how expert maintains his or her office.

"Employed Expert" Defined

An "employed expert" is an employee of party designating him or her as an expert in expert witness exchange. CCP §2034.210(b).

"Retained Expert" Defined

An expert is designated by a party as an expert in expert witness exchange and retained by that party in order to form and express opinion (CCP §2034.210(b)) in:

- a. Anticipation of litigation; or
- b. Preparation for trial.

"Party Expert" Defined

A party who will offer evidence in the form of an expert opinion during trial (CCP §2034.210(b)) is:

- a. Subject, like any other designated expert, to appearing at opposing party's deposition; and
- b. Not entitled to expert witness fees (see CCP §2034.430).

"Expert Percipient Witness" Defined

A percipient witness, *i.e.*, a witness who is asked to recount something that he or she perceived, includes an expert who was *not* retained by a party to form an opinion in the case.

Example: A police officer who investigates or reconstructs a traffic accident that results in a civil lawsuit is an expert percipient

witness whose testimony may include both observations and opinions, as long as the opinions are not formed in anticipation of litigation or in preparation for trial. See CCP §§2034.210, 2034.260. See also Civil Discovery §11.4.

NOTE

A treating physician is not a retained expert, but is an expert percipient witness who must be listed under CCP §2034.210 and who may testify without submission of an expert witness declaration under CCP §2034.260. Schreiber v Estate of Kiser (1999) 22 C4th 31, 91 CR2d 293 (treating physician's testimony may include both fact and opinion on diagnosis, prognosis, causation, and standard of care).

SERVE NOTICE AND DEPOSITION SUBPOENA

If you cannot reach agreement with opposing counsel on details of deposition:

Notice

Serve a CCP §2025.220 notice on all parties to compel expert's attendance and testimony (CCP §2034.410; see steps 15, 17, below); but

Subpoena

- a. To ensure that expert brings his or her *entire* file (including billing), serve on expert, with copies on all parties, deposition subpoena for personal appearance and production of documents and things (see CCP §2020.510); and
- b. Specify in subpoena the discoverable materials you want produced, *e.g.*, expert's entire file (including billing). For discussion of securing evidence from expert, see step 16, below.

NOTE

See step 16, below, on how to prepare deposition subpoena.

JUDGE'S PERSPECTIVE

Make sure you ask for *all* files as they exist in expert's office and expert's bills for all time spent on the case. For instance, file jacket often has notations that can be useful for examination of expert.

PAY EXPERT'S FEES

When You Must Pay

As deposing party, you must pay for the following experts whose opinions you will solicit during deposition:

- a. Experts "retained" by a party (but not experts who are parties or employees of a party) (CCP §2034.430(a)(1));
- b. Treating physicians and surgeons or other treating health care practitioners who will be asked during the deposition to express an opinion (*e.g.*, opinions regarding past or present diagnosis or prognosis and the reasons for particular treatment decisions) (CCP §2034.430(a)(2)); and
- c. Architects, professional engineers, or licensed land surveyors who were "involved with the original project design or survey for which that person is asked to express an opinion within the person's expertise and relevant to the action or proceeding" (CCP §2034.430(a)(3)).

Amount You Must Pay

- a. You must pay expert's "reasonable and customary" hourly or daily fee for time spent at the deposition. CCP §2034.430(b).
- b. Because exchange of expert witness information requires disclosure of expert's hourly and daily fee for providing deposition testimony (see CCP §2034.260(c)(5)), multiply that fee by anticipated length of deposition.
- c. If deposition takes longer than anticipated, pay balance within **5 days** of receipt of expert's itemized statement. CCP §2034.450(c).

NOTE

Experts may charge more for depositions and court appearances than for ordinary services. Rancho Bernardo Dev. Co. v Superior Court (1992) 2 CA4th 358, 362, 2 CR2d 878.

JUDGE'S PERSPECTIVE

Before moving for an order setting expert's fee, you must attempt to resolve matters informally. Expert must provide opposing side with:

- Proof of ordinary fee actually charged and received by expert for similar services provided outside the subject litigation;
- Number of times expert has charged and received the presently demanded fee; and
- Frequency and regularity with which presently demanded fee has been charged and received by expert within the past 2 years.

In addition, the judge may consider customary fees of similar experts for similar services in setting a reasonable fee. CCP §2034.470(c).

How to Pay by Arrangement

Arrange with opposing counsel the sum and manner of payments to avoid problems associated with expert witness fees, *e.g.*, if:

- a. Expert's fees seem exorbitant (\$400/hour for a mechanic);
- b. Expert charges an unreasonable daily fee and deposition will take only 1 hour (\$2000 daily minimum); or
- c. You are truly unable to estimate length of the deposition.

NOTE

Make sure opposing counsel obtains expert's agreement to these arrangements.

How to Pay by Statute

To pay in accord with statute (CCP §2034.450(a)):

- a. Accompany service of deposition notice on opposing counsel with tender of fee based on anticipated length of deposition; or
- b. Tender fee:
 - (1) When deposition begins; and
 - (2) If deposition takes longer than anticipated, pay balance of fee within **5 days** after receiving expert's itemized statement.

JUDGE'S PERSPECTIVE

You have the option to tender an expert witness fee at the beginning of deposition under CCP §2034.450(a), and if opposing counsel refuses to produce expert because fee was not tendered earlier, expert can be precluded from testifying at trial. True v Shank (2000) 81 CA4th 1250, 97 CR2d 462.

WITNESS FEES

If you subpoena expert's business records or files *before deposition* for copying only, pay:

- a. \$15 witness fee (Evid C §1563(b)(6)) at the time you serve deposition subpoena, regardless of whether fees are demanded (CCP §2020.230);
- b. Costs incurred by expert in preparing and providing business records at the time the copies are produced, including (Evid C §1563(b)(1)):
 - (1) Standard reproduction copies—\$.10 per page;
 - (2) Clerical costs for locating and making records available—\$24 per hour per person; and

(3) Retrieval costs of third persons, including retrieval of offsite records.

OPPOSING PARTY PAYS PREPARATION COSTS

Opposing party, not you, is responsible for paying own expert's (CCP §2034.440):

- a. Preparation time;
- b. Travel time; and
- c. Expenses.

DEPOSE EXPERT

On how to proceed to depose expert witnesses, see Handling Expert Witnesses, steps 21-29, below.

Further Research: See CCP §2034.430-2034.450. See also California Expert Witness Guide, chap 10 (2d ed Cal CEB 1991).

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Source: Civil Litigation/Handling Depositions (Action Guide)/When Noticing Deposition/STEP 15. PREPARE DEPOSITION NOTICE

When Noticing Deposition

STEP 15. PREPARE DEPOSITION NOTICE

INCLUDE IN NOTICE

Prepare written deposition notice to include:

Time and Place

- a. Address where deposition will be taken (CCP §2025.220(a)(1)); and
- b. Date and time of deposition (CCP §2025.220(a)(2)).

Identification Information

Include (CCP §2025.220(a)(3)):

- a. Name of *each* deponent, *or* if you do not know the identity of the nonparty, identify the person or class by general description; and
- b. Address and telephone number (if known) of any nonparty deponent.

Organization Deponent

If deponent is not a natural person, describe with reasonable particularity the matters on which examination is requested. CCP §2025.230.

Materials to Be Produced

Specify with reasonable particularity any materials or category of materials to be produced by deponent. CCP §2025.220(a)(4).

Intent to Audio or Video Record Deposition

State your intention to audio or video record the testimony, in addition to official stenographic recording. CCP §2025.220(a)(5).

NOTE

Be sure to state this intention in the notice. If you do not, you will need to try to enter into a stipulation with other parties to audio or video record deposition. CCP §2025.330(c).

Intent to Use Video Recording at Trial

State that you reserve the right to use video recording of deposition at trial (CCP §2025.220(a)(6)) *if* deponent is:

- a. A treating or consulting physician; or
- b. An expert witness.

NOTE

If you give notice of your intent to use deposition, opposing party may want to postpone deposition. See step 13, above.

Intent to Use Instant Visual Display

If you state intention to record testimony by stenographic method through instant visual display of testimony (CCP §2025.220(a)(5)):

- a. You must give copy of deposition notice to deposition officer;
- b. Deposition officer must offer the same service to all parties appearing at deposition; and
- c. Any party or attorney requesting instant visual display or rough draft transcripts must:
 - (1) Pay reasonable cost for those services; and
 - (2) Be charged no more than costs charged to any other party or attorney.

NOTE

For instant visual display of deposition questions and answers, both deposition officer and participating attorneys must have appropriate software. Deposition officer typically provides cables to connect stenographic machine to attorneys' laptop computers at deposition, but service is also available to remote participants through appropriate Internet connection.

Intent to Take Deposition by Telephone

State your intention to take deposition by telephone, video conference, or other remote electronic means. CCP §2025.310; Cal Rules of Ct 3.1010(a).

NOTE

Even if you intend to examine deponent by telephone, any other party may appear in person at deposition without prior notice. See step 5, above.

Parties on Whom Served

List in deposition notice or accompanying proof of service all parties and attorneys you serve. CCP §2025.240(a).

Form

For sample prepared deposition notice, see Appendix G.

Further Research: See steps 4-5, 13, above, steps 32, 39, below, and Appendix D for additional procedures if you video record deposition.

Source: Civil Litigation/Handling Depositions (Action Guide)/When Noticing Deposition/STEP 16. OBTAIN AND PREPARE PROPER SUBPOENA FOR DEPOSITION OF NONPARTY

STEP 16. OBTAIN AND PREPARE PROPER SUBPOENA FOR DEPOSITION OF NONPARTY

DETERMINE WHETHER YOU NEED SUBPOENA

Generally, you need a subpoena to take the deposition of a *nonparty* witness. See [step 10](#), above.

CHOOSE APPROPRIATE DEPOSITION SUBPOENA FORM

Depending on deposition procedure you choose, select appropriate Judicial Council form:

- a. For personal appearance *only* ([CCP §2020.310](#); use Judicial Council Form 982(a)(15.3));
- b. For personal appearance *and* production of documents and things ([CCP §2020.510](#); use Judicial Council Form 982(a)(15.4));
or
- c. For business records *only* ([CCP §2020.410](#); use Judicial Council Form 982(a)(15.2)).

ISSUE SUBPOENA

As attorney of record, you can:

- a. Issue subpoena, *i.e.*, sign it, for any deposition, even that of police and other government officers ([CCP §1985\(c\)](#); [Govt C §68097.2](#)); or
- b. Have the county clerk issue the subpoena.

If You Issue

- a. Obtain blank mandatory Judicial Council form for deposition subpoena appropriate for your deposition from:
 - (1) Your local court;
 - (2) The California Judicial Council Forms Manual (Cal CEB 1981); or
 - (3) The California Courts website at www.courtinfo.ca.gov/forms; and
- b. Complete subpoena form and sign, *i.e.*, "issue" it.

If County Clerk Issues

Obtain signed and sealed *but otherwise blank* Judicial Council form deposition subpoena from clerk of court where action is pending. See [CCP §§1986\(a\), 2020.210\(a\)](#).

NOTE

Because some police departments still improperly insist that the clerk issue the subpoena, you may wish to have clerk issue subpoena for an officer. Ask police department court liaison officer for local practice.

Further Research: See [CCP §§1985-1986, 2020.210](#).

COMPLETE SUBPOENA TO COMPEL APPEARANCE

If you want to compel deponent's *appearance only*, include in deposition subpoena (Judicial Council Form 982(a)(15.3)) ([CCP §2020.310](#)):

Item 1 on Subpoena Form

- a. Date and time of deposition; and

- b. Address where deposition will take place.

Method of Recording

State whether deposition will be recorded:

- a. Stenographically through instant visual display of testimony; or
- b. By audio or video recording; and
- c. If video recorded, whether recording is intended for possible use at trial under CCP §2025.620(d).

Intent to Take Deposition by Telephone

You must serve notice of your intent to take oral deposition by telephone, video conference, or other remote electronic means, with the subpoena. CCP §2025.310; Cal Rules of Ct 3.1010(a).

NOTE

The preprinted Judicial Council forms of deposition subpoena do not take into account the notice requirement of Cal Rules of Ct 3.1010(a). If you intend to take deposition by telephone, video conference, or other remote electronic means, you may add notice of your intent to subpoena form itself or serve a separate document giving such notice with subpoena. See step 5, above.

If Deponent Is an Organization

If the deponent is an organization, the subpoena must (CCP §2020.310(e)):

- a. Describe with reasonable particularity the matters on which examination is requested; and
- b. Advise organization of its duty to designate employees or agents who are most qualified to testify on organization's behalf to extent of information known or reasonably available to deponent.

Form: For deposition subpoena to compel personal appearance only, see Appendix H.

COMPLETE SUBPOENA TO COMPEL APPEARANCE AND PRODUCTION

If you want *both* personal appearance *and* production of documents and things, include in the deposition subpoena (Judicial Council Form 982(a)(15.4)) (CCP §2020.510):

Generally

The same information used to complete the subpoena to compel personal appearance, above, to indicate:

- a. Time and place of deposition;
- b. Method of recording;
- c. Any intent to take deposition by telephone or video conference; or
- d. Other remote electronic means; and
- e. If deponent is an organization; *and*

Item 3 on Subpoena Form

Description of documents and things to be produced, specifically describing (CCP §2020.510(a)(2)-(3)):

- a. Each individual item;
- b. Each category of item; and/or
- c. Any testing or sampling sought.

Form: For deposition subpoena to compel appearance and production of documents and things, see Appendix I.

COMPLETE SUBPOENA TO OBTAIN BUSINESS RECORDS

Generally

If you want *only* business records for inspection and copying, include in the deposition subpoena (Judicial Council Form 982(a)(15.2)) (CCP §2020.410):

- a. Time and place of deposition;
- b. Instructions on how to produce documents requested; and
- c. Name or title of custodian of those records or another person qualified to certify records.

Describe Documents

- a. Do not attach an affidavit or declaration showing good cause;
- b. *Do* designate business records to be produced by either:
 - (1) Specifically describing each individual item; or
 - (2) Reasonably particularizing each category of item.

Form: For deposition subpoena to compel production of business records only, see Appendix J.

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Source: Civil Litigation/Handling Depositions (Action Guide)/When Noticing Deposition/STEP 17. SERVE DEPOSITION NOTICE AND, IF REQUIRED, SERVE DEPOSITION SUBPOENA

STEP 17. SERVE DEPOSITION NOTICE AND, IF REQUIRED, SERVE DEPOSITION SUBPOENA

WHAT TO SERVE ON PARTIES

Notice

Serve deposition notice if deposition of a *party*. CCP §2025.220.

Notice and Subpoena

If deposition is of a *nonparty*, serve (CCP §2025.240):

- a. Deposition notice; and
- b. A copy of deposition subpoena.

Subpoena Only

If deposition is to obtain from nonparty copies of business records only, serve a copy of deposition subpoena instead of notice. CCP §2025.220(b).

If Requesting Consumer or Employment Records

If you are requesting consumer or employment records, see steps 19-26, below, for what to serve and when to serve it.

HOW TO SERVE PARTIES

Personally

If you serve notice personally, deposition can be scheduled **10 days** after service. CCP §2025.270(a).

By Mail

If you serve notice by mail, deposition can be scheduled (CCP §§1013, 2016.050, 2025.270(a)):

- a. **15 days** after you serve notice by mail to a California address;
- b. **20 days** after you mail to an out-of-state address;
- c. **30 days** after you mail to a foreign address.

Fax, Express Mail, or Other Overnight Delivery Method

If you serve notice by fax (stipulation required), express mail, or other method of overnight delivery, deposition can be scheduled **10 days plus 2 court days** after service. CCP §§1013, 2016.050, 2025.270(a).

HOW TO SERVE NONPARTIES

Personally serve deposition subpoena on nonparty witness (CCP §2020.220(b)-(c)):

- a. If a private person, serve the person;
- b. If an organization, serve:
 - (1) Officer;
 - (2) Director;
 - (3) Custodian of records; or

(4) Any agent or employee authorized by organization to accept service of a subpoena.

RETAIN ORIGINAL

Retain original notice and proof of service until **6 months** after final disposition of case, unless court, on motion of any party and a showing of good cause, orders them preserved for a longer time. Cal Rules of Ct 3.250(b).

Further Research: See Appendix F for checklist of dates and deadlines when handling depositions.

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Source: Civil Litigation/Handling Depositions (Action Guide)/When Noticing Deposition/STEP 18. PAY WITNESS FEES AND COSTS FOR NONPARTY LAY WITNESS DEPOSITION

STEP 18. PAY WITNESS FEES AND COSTS FOR NONPARTY LAY WITNESS DEPOSITION

WITNESS FEES FOR PERSONAL ATTENDANCE

For personal attendance at the deposition, pay *whether or not demanded* (CCP §2020.230):

- a. \$35-per-day witness fee (Govt C §68093);
- b. \$.20 per mile to and from site (Govt C §68093); and
- c. If applicable, reasonable costs incurred in producing the records (see Evid C §1563(b)-(c); for discussion of costs for business records, see below).

For expert witness fees, see step 14, above.

When to Pay

Pay witness *either* (CCP §2020.230(a)):

- a. When you serve the deposition subpoena; or
- b. At the deposition.

NOTE

Because you have the option of when to pay fees, consider waiting until deposition if you are not sure that witness will attend.

WITNESS FEES FOR BUSINESS RECORDS

For business records *only*, if records are delivered to attorney or attorney's representative (Evid C §1563(b)(6)), pay:

Witness Fees

\$15 (Evid C §1563(b)(6));

When to Pay

When deposition subpoena served, *whether or not demanded* by deponent. CCP §2020.230(b).

COSTS FOR BUSINESS RECORDS

Pay costs witness incurred (CCP §2020.230(b)) in preparing and providing business records (Evid C §1563(b)(1)), including:

- a. Standard reproduction copies: \$.10 per page;
- b. Reasonable clerical costs for locating and making records available: maximum \$24 per hour per person; and
- c. Retrieval costs of third persons, including retrieval from microfilm.

When to Pay

Pay costs when witness delivers (Evid C §1563(b)(2)-(3)):

- a. Copies of business records; and
- b. Itemized statement listing production and clerical costs.

NOTE

Petition court to recover costs paid or reduce costs charged if they are excessive. Evid C §1563(b)(4).

JUDGE'S PERSPECTIVE

Courts generally consider costs excessive if they exceed statutory rate of \$.10 per page and \$24 per hour. If you demonstrate that excessive costs were charged in bad faith, you are also entitled to attorney fees incurred in obtaining relief. Evid C §1563(b)(4).

WITNESS FEES FOR PUBLIC EMPLOYEES

Give employing public agency (Govt C §68096.1(b) (employees of local agencies), Govt C §68097.2(b) (peace officers, firefighters, and state and county employees)):

- a. \$150 for each day you require public employee to attend; and
- b. The subpoena.

You Must Pay Actual Cost to Agency of Employee's Attendance

a. You must reimburse employing agency for (Govt C §§68096.1(b), 68097.2(b)):

- (1) The full cost of employee's salary; and
- (2) Travel expenses.

b. Proof of witness fee deposit is not a prerequisite to issuing a subpoena *except* for highway patrol officers. Govt C §§68097.2(b), 68097.4.

Obtain Fee Refund, If Applicable

If actual expenses are less than what you paid, seek refund. Govt C §68096.1(c).

Pay Additional Fees, If Necessary

You must pay additional sums if the agency's expenses were greater than your deposit. Govt C §§68096.1(d), 68097.2(d).

Further Research: See CCP §1986.5; Evid C §1563; Govt C §§68093, 68096.1, 68097.4; California Civil Discovery Practice §§5.70-5.71, 5.103-5.107 (4th ed Cal CEB 2006). See also Appendix F for checklist of dates and deadlines when handling depositions.

When Requesting Production of Consumer Records

STEP 19. DETERMINE WHETHER YOU WANT CONSUMER RECORDS

PERSONAL CONSUMER RECORDS DEFINED

Consumer records are originals or copies of any books, documents, other writings, or electronic data (CCP §1985.3(a)(1)):

- a. Pertaining to "consumer" (see below); and
- b. Maintained by "witness" (see below).

Consumer

Consumer (CCP §1985.3(a)(2)):

- a. May be any:
 - (1) Individual;
 - (2) Partnership of five or fewer persons;
 - (3) Association; or
 - (4) Trust;
- b. That has:
 - (1) Transacted business with witness;
 - (2) Used the services of witness; or
 - (3) For whom witness has acted as agent or fiduciary.

Witness

Witness is (CCP §1985.3(a)(1)):

- a. One who has had a business or fiduciary relationship with consumer;
- b. One who maintains consumer's records (Sasson v Katash (1983) 146 CA3d 119, 124, 194 CR 46); and
- c. Is one of the following individuals or groups:
 - (1) Physician, dentist, ophthalmologist, optometrist, chiropractor, physical therapist, acupuncturist, podiatrist, pharmacist, pharmacy, hospital, medical center, clinic, radiology or MRI center, clinical or diagnostic laboratory, or psychotherapist (Evid C §1010), including psychologists, psychiatric/mental health nurses, and social workers;
 - (2) Veterinarian, veterinary hospital, or veterinary clinic;
 - (3) State or national bank, state or federal credit union, or state or federal association as defined in Fin C §5102;
 - (4) Trust company or security brokerage firm;
 - (5) Insurance company, title insurance company, or underwritten title company;
 - (6) Attorney;

- (7) Accountant;
- (8) Institution of Farm Credit System (12 USC §2002);
- (9) Telephone corporation that is a public utility (Pub Util C §216);
- (10) Private or public preschool, elementary school, secondary school, or postsecondary school as described in Ed C §76244;
- (11) Anyone authorized by state to make or arrange loans that are secured by real property; or
- (12) Escrow agent, licensed or exempt from licensing under Fin C §§17000, 17006.

Further Research: See CCP §1985.3(a)(1). See, e.g., *Sasson v Katash, supra* (lease was "personal record" held on behalf of landlord (consumer) by subpoenaed bank (witness)). See Appendix F for checklist of dates and deadlines when handling depositions.

Source: Civil Litigation/Handling Depositions (Action Guide)/When Requesting Production of Consumer Records/STEP 20. PREPARE SUBPOENA AND NOTICE FOR CONSUMER RECORDS

STEP 20. PREPARE SUBPOENA AND NOTICE FOR CONSUMER RECORDS

COMPLETE APPROPRIATE SUBPOENA

- a. Complete appropriate subpoena (see [step 16](#), above);
- b. Make sure that compliance date for a witness commanded to produce personal records at an oral deposition is at least **20 days** after date subpoena is issued ([CCP §2025.270\(a\)](#)); and
- c. If subpoena is for *production of personal records for copying only*, make sure that it commands compliance no earlier than ([CCP §§1985.3\(d\)](#), [2020.410\(c\)](#)):
 - (1) **20 days** after issuance; or
 - (2) **15 days** after service, whichever is later.

PREPARE NOTICE

Prepare notice to consumer, indicating that ([CCP §1985.3\(e\)](#)):

- a. Consumer's records are being sought from witness named in subpoena;
- b. Consumer has a right to file a motion to quash subpoena (if a party) or to serve a written objection (if a nonparty) before date specified in subpoena (see [step 21](#), below); and
- c. If the party requesting the personal records will not agree *in writing* to cancel or limit the subpoena, consumer should consult attorney about protecting his or her privacy.

Form: For notice to consumer, see [Appendix K](#); [California Civil Discovery Practice §5.227 \(4th ed Cal CEB 2006\)](#).

Further Research: See [Appendix F](#) for checklist of dates and deadlines when handling depositions.

Source: Civil Litigation/Handling Depositions (Action Guide)/When Requesting Production of Consumer Records/STEP 21. SERVE CONSUMER WITH SUBPOENA AND NOTICE FOR CONSUMER RECORDS

STEP 21. SERVE CONSUMER WITH SUBPOENA AND NOTICE FOR CONSUMER RECORDS

WHAT TO SERVE

Serve on consumer (CCP §1985.3(b)):

- a. Copy of deposition subpoena (see step 20, above); and
- b. Notice to consumer required by CCP §1985.3(e) (see step 20, above).

NOTE

For a civil subpoena (duces tecum) for personal appearance and production of documents and things at trial or hearing, not discussed in this Action Guide, also serve a copy of declaration or affidavit describing documents.

WHEN TO SERVE

Subpoena for Attendance With Records

Serve consumer at least (CCP §1985.3(b)(2)):

- a. **10 days** before the date of production, if personally served (CCP §1985.3(b)(2)); and
- b. **5 days** before serving witness, if consumer is personally served (CCP §1985.3(b)(3)). See step 22, below.

NOTE

CCP §1013 extends the time if service is other than personal. CCP §1985.3(b)(2)-(3).

Subpoena for Production of Business Records for Copying Only

Serve consumer, if personally served, at least **20 days** before production date because:

- a. CCP §2020.410(c) requires that you serve *witness* at least **15 days** before the production date; and
- b. CCP §1985.3 requires that you serve *consumer* at least **5 days** before serving witness (15 + 5 = 20). See step 22, below.

HOW TO SERVE

Party Consumer

Serve (CCP §1985.3(b)):

- a. Party or attorney of record personally, by mail, or by fax (stipulation required) (CCP §§1011, 1013, 1015);
- b. Clerk or judge if party is not a resident and not represented by counsel (CCP §1015).

Nonparty Consumer

Serve nonparty (CCP §1985.3(b)):

- a. Personally at last known address;
- b. By first-class mail (CCP §§1012-1013);
- c. By telegram (CCP §1017); or
- d. By registered mail (CCP §1020).

Minor Nonparty Consumer

If minor nonparty consumer, serve (CCP §1985.3(b)(1)):

- a. Parent;
- b. Guardian;
- c. Conservator or similar fiduciary; or
- d. If you cannot locate parent, guardian, or conservator/fiduciary with reasonable diligence, then serve any person:
 - (1) Having the care or control of the minor;
 - (2) With whom minor resides; or
 - (3) By whom minor is employed; and
- e. Also serve minor, if he or she is at least 12 years of age.

IF CONSUMER OBJECTS

Party Consumer

A party consumer who objects to subpoena must (CCP §1985.3(g)):

- a. File a motion under CCP §1987.1 to quash or modify subpoena before date for production; and
- b. Give notice of motion to witness and to deposition officer at least **5 days** before production.

Nonparty Consumer

A nonparty consumer who objects to subpoena need only (CCP §1985.3(g)):

- a. Serve a written objection on subpoenaing party, witness, and deposition officer before production date; and
- b. Include in written objection specific grounds on which production of personal records should be prohibited.

SUBPOENAING PARTY'S RESPONSE

The party requesting the records (CCP §1985.3(g)):

- a. May bring a motion under CCP §1987.1 to enforce subpoena within **20 days** after service of written objection; and
- b. Must include a declaration showing that a reasonable, good faith attempt was made at informal resolution of dispute between party requesting consumer records and consumer or consumer's attorney.

Further Research: See Appendix F for checklist of dates and deadlines when handling depositions.

Source: Civil Litigation/Handling Depositions (Action Guide)/When Requesting Production of Consumer Records/STEP 22. SERVE WITNESS WITH SUBPOENA AND OTHER REQUIRED DOCUMENTS

STEP 22. SERVE WITNESS WITH SUBPOENA AND OTHER REQUIRED DOCUMENTS

WHAT TO SERVE

- a. Serve subpoena *and* either (CCP §§1985.3(c), 2020.410(d)):
 - (1) Proof of service of notice to consumer (CCP §1985.3(e); see step 21, above); or
 - (2) Consumer's written authorization to release personal records (CCP §1985.3(c)(2)).
- b. Serve a telephone corporation that is a public utility (Pub Util C §216) with (CCP §1985.3(f)):
 - (1) Subpoena; and
 - (2) Consent to release signed by consumer (Pub Util C §2891).

JUDGE'S PERSPECTIVE

Keep in mind that:

- Psychiatric and substance abuse records in hospital records may be confidential under Welf & I C §5328; and
- Most institutions require a consent from the patient or a court order before they will release records.

Many lending institutions, *e.g.*, banks, also require a court order or the party's consent, because of concerns about:

- Privacy; and
- Potential litigation for disclosing confidential information.

WHEN TO SERVE

Subpoena for Attendance With Records

When you want witness to appear and bring consumer records:

- a. Schedule deposition date at least **20 days** after issuance of subpoena (CCP §2025.270(a));
- b. Allow sufficient time to provide witness reasonable time to travel to place of deposition (CCP §2020.220(a)); and
- c. Serve deposition subpoena in accordance with time frame in CCP §2020.410(c), *i.e.*, at least **15 days** before date specified for appearance and production in subpoena, as long as this is at least **20 days** after subpoena was issued (CCP §§1985.3(d), 2020.410(c)).

NOTE

Remember to serve consumer at least **5 days** before you serve witness (**10 days** if service is by mail within California). CCP §1985.3(b)(3). See step 21, above.

Subpoena for Production of Business Records for Copying Only

If records will be produced for copying only, serve witness "in sufficient time to allow the witness a reasonable time" to locate and produce records or copies as provided in CCP §2020.410(c), *i.e.*, at least **15 days** before date specified for production in deposition subpoena, as long as this is at least **20 days** after subpoena was issued. CCP §1985.3(d).

NOTE

CCP §1013 extends time if service is other than personal. CCP §1985.3(b)(2)-(3).

PROOF OF SERVICE

Keep original subpoena and proof of service for filing with court later if it becomes necessary to bring a motion to obtain witness's compliance. See Cal Rules of Ct 3.250.

Further Research: See CCP §§1985.3, 2020.410; see Appendix F for checklist of dates and deadlines for depositions.

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When Requesting Production of Employment Records

STEP 23. DETERMINE WHETHER YOU WANT EMPLOYMENT RECORDS

"EMPLOYMENT RECORDS" DEFINED

Employment records are originals or copies of records ([CCP §1985.6\(a\)\(3\)](#)):

- a. Pertaining to employment of any "employee" (see below); and
- b. Maintained by a current or former employer of employee.

"Employee" Defined

"Employee" means anyone who is or has been employed by a witness subject to a subpoena duces tecum, or anyone who is or has been represented by a labor organization that is subject to a subpoena duces tecum. [CCP §1985.6\(a\)\(2\)](#).

Further Research: See [CCP §1985.6\(a\)](#). See [Appendix F](#) for checklist of dates and deadlines when handling depositions.

Source: Civil Litigation/Handling Depositions (Action Guide)/When Requesting Production of Employment Records/STEP 24. PREPARE SUBPOENA AND NOTICE FOR EMPLOYMENT RECORDS

STEP 24. PREPARE SUBPOENA AND NOTICE FOR EMPLOYMENT RECORDS

COMPLETE APPROPRIATE SUBPOENA

- a. Complete appropriate subpoena (see [step 16](#), above);
- b. Although timing is not specified for a witness commanded to produce employee records at an oral deposition, it is a good idea to follow the parallel consumer records procedures to ensure that compliance date is at least **20 days** after date subpoena was issued (see [CCP §2025.270\(a\)](#)); and
- c. If the subpoena is for *production of employee records for copying only*, make sure that it commands compliance no earlier than ([CCP §§1985.6\(d\)](#), [2020.410\(c\)](#)):
 - (1) **20 days** after issuance; or
 - (2) **15 days** after service, whichever is later.

PREPARE NOTICE

Prepare notice to employee, indicating that ([CCP §1985.6\(e\)](#)):

- a. Employee's employment records are being sought from witness named in subpoena;
- b. Employment records may be protected by a right of privacy;
- c. If the employee objects to the production of the records, the employee can bring a motion under [CCP §1987.1](#) to quash or modify subpoena before production date (see [step 25](#), below); and
- d. If the party seeking records will not agree *in writing* to cancel or limit the subpoena, employee should consult an attorney about protecting his or her privacy.

Form: For notice to employee, see [Appendix K; California Civil Discovery Practice §5.227 \(4th ed Cal CEB 2006\)](#).

Further Research: See [Appendix F](#) for checklist of dates and deadlines when handling depositions.

Source: Civil Litigation/Handling Depositions (Action Guide)/When Requesting Production of Employment Records/STEP 25. SERVE EMPLOYEE WITH SUBPOENA AND NOTICE FOR EMPLOYMENT RECORDS

STEP 25. SERVE EMPLOYEE WITH SUBPOENA AND NOTICE FOR EMPLOYMENT RECORDS

WHAT TO SERVE

Serve on employee (CCP §1985.6(b)):

- a. Copy of subpoena (see step 24, above);
- b. Affidavit supporting issuance of the subpoena (if any);
- c. Notice to employee required by CCP §1985.6(e) (see step 24, above); and
- d. Proof of service on employee.

NOTE

For a civil subpoena (duces tecum) for personal appearance and production of documents and things at trial or hearing, not discussed in this Action Guide, also serve copy of declaration or affidavit describing documents.

WHEN TO SERVE

Subpoena for Attendance With Records

- a. Serve employee at least (CCP §1985.6(b)(2)):
 - (1) **10 days** before date of production, if personally served (CCP §1985.6(b)(2)); and
 - (2) **5 days** before serving witness, if employee is personally served (CCP §1985.6(b)(3)). See step 26, below.
- b. CCP §1013 extends time if service is other than personal. CCP §1985.3(b)(2)-(3).

Subpoena for Production of Business Records for Copying Only

Serve employee, if personally served, at least **20 days** before production date, because:

- a. CCP §2020.410(c) requires that you serve subpoena on *witness, i.e.,* custodian of records, at least **15 days** before production date; and
- b. CCP §1985.6(b)(3) requires that you serve *employee* at least **5 days** before serving witness (15 + 5 = 20). See step 26, below.

HOW TO SERVE

Party Employee

Serve (CCP §1985.6(b)):

- a. Party or attorney of record personally, by mail, or by fax (stipulation required) (CCP §§1011, 1013, 1015);
- b. Clerk or judge if party is not a resident and not represented by counsel (CCP §1015).

Nonparty Employee

Serve nonparty (CCP §1985.6(b)):

- a. Personally at last known address;
- b. By first-class mail (CCP §§1012-1013);
- c. By telegram (CCP §1017); or

d. By registered mail (CCP §1020).

Minor Nonparty Employee

If nonparty minor, serve (CCP §1985.6(b)(1)):

- a. Parent;
- b. Guardian;
- c. Conservator or similar fiduciary; or
- d. If you cannot locate parent, guardian, or conservator/fiduciary with reasonable diligence, then serve any person:
 - (1) Having the care or control of the minor;
 - (2) With whom minor resides; or
 - (3) By whom minor is employed; and
- e. Also serve minor, if he or she is at least 12 years of age.

IF EMPLOYEE OBJECTS

Any Employee

Any employee who objects to subpoena (CCP §1985.6(f)):

- a. May file a motion under CCP §1987.1 to quash or modify subpoena before production date; and
- b. Must give notice of motion to witness and to deposition officer at least **5 days** before production date.

Nonparty Employee

A nonparty employee who objects to subpoena may (CCP §1985.6(f)):

- a. Serve written objection on subpoenaing party, witness, and deposition officer before production date; and
- b. Include in written objection specific grounds on which production of employment records should be prohibited.

SUBPOENAING PARTY'S RESPONSE

The party requesting records (CCP §1985.6(f)):

- a. May bring a motion under CCP §1987(c) to enforce subpoena within **20 days** after service of written objection; and
- b. Must include declaration showing that a reasonable, good faith attempt was made at informal resolution of dispute between party requesting employment records and employee or employee's attorney.

Further Research: See Appendix F for checklist of dates and deadlines when handling depositions.

Source: Civil Litigation/Handling Depositions (Action Guide)/When Requesting Production of Employment Records/STEP 26. SERVE WITNESS WITH EMPLOYMENT RECORDS

STEP 26. SERVE WITNESS WITH EMPLOYMENT RECORDS

WHAT TO SERVE

Serve subpoena *and* either (CCP §§1985.6(c), 2020.410(d)):

- a. Proof of service of the subpoena, any affidavit, and the notice to employee (CCP §1985.6(e); see step 25, above); or
- b. Employee's written authorization to release employment records (CCP §1985.6(c)(2)).

WHEN TO SERVE

Subpoena for Attendance With Records

When you want witness to appear and bring employment records:

- a. Allow sufficient time to give witness a reasonable time to travel to place of deposition (CCP §2020.220(a)); and
- b. Serve deposition subpoena in accordance with time frame in CCP §2020.410, *i.e.*, at least **15 days** before date specified for appearance and production in subpoena, as long as this is at least **20 days** after subpoena was issued (CCP §§1985.6(d), 2020.410).

NOTE

Remember to serve employee at least **5 days** before you serve witness (**10 days** if service is by mail within California). CCP §1985.3(b)(3). See step 25, above.

Subpoena for Production of Business Records for Copying Only

- a. If records will be produced for copying only, serve witness "in sufficient time to allow the witness a reasonable time" to locate and produce records or copies as provided in §2020.410(c), *i.e.*, at least **15 days** before date specified for production in deposition subpoena, as long as this is at least **20 days** after subpoena was issued. CCP §1985.6(d).
- b. CCP §1013 extends time if service is other than personal. CCP §1985.6(b)(2)-(3).

PROOF OF SERVICE

Keep original subpoena and proof of service for filing with court later if it becomes necessary to bring a motion to obtain witness's compliance. See Cal Rules of Ct 3.250.

Further Research: See CCP §§1985.6, 2020.410; see Appendix F for checklist of dates and deadlines when handling depositions.

Source: Civil Litigation/Handling Depositions (Action Guide)/When Motion Needed to Obtain Deposition/STEP 27.
MOVE TO COMPEL DEPOSITION OF PARTY AT LOCATION OUTSIDE STATUTORY DISTANCE LIMITS

When Motion Needed to Obtain Deposition

STEP 27. MOVE TO COMPEL DEPOSITION OF PARTY AT LOCATION OUTSIDE STATUTORY DISTANCE LIMITS

WHEN APPROPRIATE

In ruling on motion to compel party's deposition outside statutory distance limits, court must consider any factor tending to show whether interests of justice will be served by requiring deponent's attendance at that more distant place. See CCP §2025.260(b); step 9, above.

Show That "Interests of Justice" Served

State in your or your client's declaration any factors tending to show that the interests of justice will be served if deposition is taken at a more distant location, *e.g.* (CCP §2025.260(b)(1)-(7)):

- a. Deponent chose forum, *i.e.*, deponent is plaintiff or an officer, director, managing agent, or employee of plaintiff;
- b. It will not inconvenience deponent to travel to deposition location;
- c. Discovery by deposition is required, because, *e.g.*, case:
 - (1) Is complex; or
 - (2) Depends on deponent's credibility;
- d. It would be *more* expensive to travel to deponent's residence than to have deponent travel to location you propose for deposition; or
- e. Deponent's whereabouts at time of deposition make attendance at a place admittedly distant from his or her residence reasonable, *e.g.*, deponent might be present there anyway.

NOTE

Court may order you to make advance payment of reasonable travel costs and expenses to deponent as a condition of its order. CCP §2025.260(c).

Example: Nonresident deponent is officer of *plaintiff organization* and is often in forum county on business, the lawsuit is complex, credibility is a factor, and it is less expensive to take deposition in California. See *Glaws v Superior Court* (1988) 204 CA3d 1048, 1053, 251 CR 690 (court held that motion should be granted).

DEADLINE FOR MOTION

The motion must be heard on or before the **15th day** before the initial trial date, unless (CCP §2024.020(a)):

- a. Court orders otherwise (CCP §2024.050); or
- b. Parties agree in writing (CCP §2024.060).

NOTE

After a mistrial, order granting a new trial, or remand for a new trial, discovery is reopened, and the last date for completing discovery is **15 days** before date initially set for new trial of the action. *Fairmont Inv. Co. v Superior Court* (2000) 22 C4th 245, 92 CR2d 70.

HOW TO PROCEED

Try to Stipulate

Meet and confer *first* (CCP §2016.030):

- a. Try to reach an agreement for taking deposition; and

b. Keep in mind interests of justice that court will consider. On showing "interests of justice" served, see above.

Notice Motion

If no agreement is reached, file:

a. Notice of motion and memorandum of points and authorities seeking court order permitting deposition to be held outside statutory mileage limitations (CCP §2025.260); and

b. Declaration setting forth:

(1) Good faith effort to meet and confer (CCP §2016.040); and

(2) Facts showing why deposition should be allowed outside statutory limits (see CCP §2025.260(b)). On showing "interests of justice" served, see above.

IF MOTION OR OPPOSITION UNSUCCESSFUL

Court *will* impose monetary sanctions against any party, person, or attorney who *unsuccessfully* makes or opposes motion without (CCP §2025.260(d)):

a. Substantial justification; or

b. Other circumstances that make imposition of monetary sanctions unjust.

NOTE

Court will probably not award sanctions if your motion or opposition to the motion has a good faith basis. There are no reported cases that define "other circumstances that make imposition of monetary sanctions unjust."

JUDGE'S PERSPECTIVE

Relief for a perceived mistaken trial court order regarding a deposition dispute can be sought by a petition for a writ in the court of appeal. However, courts of appeal rarely intervene in discovery disputes.

FORMAT

For format requirements of motion and supporting papers, see Handling Motions to Compel and Other Discovery Motions, steps 11-15 (Cal CEB Action Guide March 2007).

Further Research: See California Civil Discovery Practice §§5.25, 5.142-5.144 (4th ed Cal CEB 2006).

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Source: Civil Litigation/Handling Depositions (Action Guide)/When Motion Needed to Obtain Deposition/STEP 28.
MOVE TO SERVE EARLIER DEPOSITION NOTICE OR SHORTEN NOTICE PERIOD

STEP 28. MOVE TO SERVE EARLIER DEPOSITION NOTICE OR SHORTEN NOTICE PERIOD

EARLIEST STATUTORY DATE FOR DEPOSITIONS

The earliest date a party may serve deposition notice is:

a. *Plaintiff:* May serve deposition notice without leave of court **20 days** after (CCP §2025.210(b)):

- (1) Serving summons on defendant; or
- (2) Defendant appears.

b. *Defendant:* May serve notice without leave of court any time after *earlier* date that defendant (CCP §2025.210(a)):

- (1) Was served with summons; or
- (2) Appeared in the action.

BEFORE ACTION FILED

WHEN APPROPRIATE

You can show that a deposition is needed, even though no action has yet been filed:

a. To perpetuate testimony or to preserve evidence for use if an action is filed (CCP §2035.010); and

b. You have a present inability to either (CCP §2035.030):

- (1) Bring the action; or
- (2) Cause it to be brought.

NOTE

As a practical matter, these depositions are not common and are prompted by *very* unusual circumstances, *e.g.*, when an injured minor who might not bring suit for years refuses to provide evidence of his or her medical condition. See *Block v Superior Court* (1963) 219 CA2d 469, 477, 33 CR 205.

HOW TO PROCEED

To serve deposition notice before an action is filed:

- a. File a petition in court of county of residence of any expected adverse party; and
- b. Serve each expected adverse party.

Further Research: See California Civil Discovery Practice §§5.147-5.155, 5.230-5.232 (4th ed Cal CEB 2006).

IMMEDIATELY AFTER FILING COMPLAINT

PLAINTIFF'S OPTION

Plaintiff has the option to serve deposition notice immediately after filing complaint:

a. On motion with or without notice, court may allow service of deposition notice before defendant has been served with complaint, *if* plaintiff can show good cause (CCP §2025.210(b)); however

b. It would probably be more practical to wait **20 days** after serving defendant and then serve deposition notice. CCP §2025.210(b).

HOW TO PROCEED

If plaintiff believes that it is important to serve deposition notice earlier than date allowed by statute:

- a. File ex parte application seeking leave to serve deposition notice early (CCP §2025.210(b); Cal Rules of Ct 3.1201); and
- b. Include in declaration:
 - (1) Facts showing good cause to serve deposition notice at earlier date (CCP §2025.210(b); Cal Rules of Ct 3.1201(2), 3.1202(c)); and
 - (2) Facts regarding notice, *i.e.* (Cal Rules of Ct 3.1204(b)(1)-(3)):
 - (a) The notice given, including date, time, manner, and name of party informed, the relief sought, any response, and whether opposition is expected;
 - (b) If notice was not given to all parties, the good faith efforts made to inform parties of ex parte application; or
 - (c) Reasons why applicant should not be required to provide parties with notice of ex parte application.

NOTE

A party seeking an ex parte order must give notice to all parties no later than 10 a.m. on the court day before the ex parte appearance, absent a showing of exceptional circumstances. Cal Rules of Ct 3.1203(a).

Further Research: See Civil Discovery §§5.45-5.48.

SHORTEN NOTICE PERIOD

WHEN APPROPRIATE

You can show good cause for scheduling deposition within **10 days** after you serve deposition notice (CCP §2025.270(c)) if, *e.g.*:

- a. Testimony is needed at imminent hearing; or
- b. Deponent is leaving jurisdiction or is very ill.

HOW TO PROCEED

File ex parte application (see Cal Rules of Ct 3.1200-3.1207) and include in declaration:

- a. Facts showing good cause for relief requested (CCP §2025.270(c); Cal Rules of Ct 3.1201(2), 3.1202(c)); and
- b. Facts regarding notice, *i.e.* (Cal Rules of Ct 3.1204(b)(1)-(3)):
 - (1) The notice given, including date, time, manner, and name of party informed, the relief sought, any response, and whether opposition is expected;
 - (2) If notice was not given to all parties, the good faith efforts made to inform parties of ex parte application; or
 - (3) Reasons why applicant should not be required to provide parties with notice of ex parte application.

NOTE

A party seeking an ex parte order must give notice to all parties no later than 10 a.m. on the court day before the ex parte appearance, absent a showing of exceptional circumstances. Cal Rules of Ct 3.1203(a).

Sample Form: For sample form, see Civil Discovery §5.219.

Further Research: See Civil Discovery §§5.18, 5.120.

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Source: Civil Litigation/Handling Depositions (Action Guide)/Before Deposition/STEP 29. PREPARE TO TAKE DEPOSITION

Before Deposition

STEP 29. PREPARE TO TAKE DEPOSITION

REVIEW SCOPE OF DEPOSITION

The scope of your questions may be broader than might be admissible at trial; you may examine deponent on any issue that (CCP §2017.010):

- a. Is not privileged;
- b. Is relevant to the subject matter of the action or to determination of any motion to be made, *e.g.*, for summary judgment; and
- c. *Either*:
 - (1) Is admissible in evidence; or
 - (2) Appears reasonably calculated to lead to discovery of admissible evidence.

DEVELOP CHRONOLOGY

To help you understand the case and prepare for the deposition, develop chronology of case, using:

- a. Pleadings;
- b. Other important documents;
- c. Informal interview notes;
- d. Investigators' reports; and
- e. Consulting experts' reports.

NOTE

For discussion of reviewing case documents, consulting with expert witnesses, and adding informally discovered information, see below.

PREPARE CHECKLIST

Prepare deposition checklist that covers all important topics relating to your deposition goals (see step 2, above) based on:

- a. Chronology (see above); and
- b. Research. For discussion of performing relevant research, see below.

ORGANIZE YOUR PREPARATION

Organize chronology, relevant documents, and checklist in a manner that will be most helpful for you to:

- a. Develop questions or topic areas *before* deposition; and
- b. Find and use documents, questions, or topic areas *during* deposition.

Example 1: Distill your checklist until you have only one page of topics to use during deposition, so that you will not have numerous papers to shuffle; or

Example 2: Create checklists for each major topic that you wish to cover in deposition; place each checklist with relevant documents in a notebook separated by tabs for easy reference.

REVIEW PLEADINGS AND OTHER DOCUMENTS

Review pleadings and other documents relevant to deposition goals as you prepare deposition chronology and checklist, *e.g.*:

- a. If deposing plaintiff or cross-complainant, examine complaint or cross-complaint for major allegations, particularly vague or generalized allegations;
- b. Compare documents you have obtained through formal discovery requests with allegations and defenses; *e.g.*, review:
 - (1) Escrow file you previously subpoenaed from escrow holder to determine what information was provided or known about a transaction; or
 - (2) Deeds, contracts, or hospital records; and
- c. Review all discovery responses, *e.g.*, answers to interrogatories or response to request to produce.

ADD INFORMALLY DISCOVERED INFORMATION

Add to chronology and checklist information received from thorough pursuit of informal discovery, *e.g.*, from:

- a. Interviewing client and other witnesses;
- b. Consulting experts;
- c. Inspecting site; or
- d. Hiring an investigator.

PERFORM RELEVANT RESEARCH

Research applicable law and evidentiary rules, *e.g.*:

Evidentiary Rules

Authentication and exceptions to hearsay rule if taking document deposition;

Deponent's Possible Objections

Privacy and trade secret protections if probing sensitive area, *e.g.*, sexual harassment allegations;

Elements of Case

Jury instructions for concise statement of legal elements applicable to your case; *e.g.*, review damage instructions if you are defense counsel to help formulate questions for plaintiff.

CONSULT WITH EXPERT WITNESS

If case involves technical elements or deponent is expert witness:

Provide Material

- a. Provide your consulting expert with material you have obtained:
 - (1) Through discovery;
 - (2) That is of public record; or
 - (3) That is available to opposing party.
- b. Do *not* give consulting expert any of your notes (even in margins of other documents), summaries, or other work product, because they may be discovered if (see CCP §§2025.280(a), 2034.210-2034.270):

- (1) These are included in consultant's file; and
- (2) Opposing party subpoenas expert's entire file.

NOTE

Be prepared to argue that your notes are protected by work product privilege, even if you do disclose them to your expert. See *Handling Expert Witnesses in California Courts*, step 8 (Cal CEB Action Guide May 2006); California Expert Witness Guide, chap 8 (2d ed Cal CEB 1991).

Ask Consultant to Assist

Ask consultant to assist you by:

- a. Reviewing material you provide.
- b. Discussing orally his or her:
 - (1) Opinions on strengths and weaknesses of case; and
 - (2) Independent findings, *e.g.*, consultant's ideas, strategies, or issues to help your client's case.

NOTE

If you consult an expert, you may prefer an oral report, because opposing party might discover written report if you later designate that expert as an expert witness for trial. See *Handling Expert Witnesses*, step 10.

- c. Familiarizing you with technical aspects of case.
- d. Assisting you in preparing deposition examination, *e.g.*, questions to test expert deponent's opinions and conclusions.
- e. Helping you to prepare *in writing* sound hypotheticals for questioning deponent expert.

DESIGNATE PHYSICAL EVIDENCE

Organize documents and other evidence before deposition by:

- a. Identifying each document or physical object you expect to introduce at deposition, and assigning a letter or number to it.

NOTE

Consider a successive marking system that allows you to assign the next highest letter or number to exhibits you plan to use in succeeding depositions, *e.g.*, 1-10 in first deposition, 11-25 in second. Keep an updated exhibit index.

- b. Retaining one *unmarked* original set of documents.
- c. Making copies of exhibits for deponent and all opposing counsel.

JUDGE'S PERSPECTIVE

At trial it will be easier for the court and jury to understand the documents if you use the *same* numbering system for exhibits at deposition and trial, *e.g.*, assign numbers, not letters, to the exhibits, and if possible use the same number for the same exhibit at all depositions and at trial.

COORDINATE CHECKLIST WITH EXHIBITS

Review all exhibits, and:

- a. Coordinate checklist with exhibits so you can easily refer to them at deposition; and
- b. Consider marking on your copy of documents the topic or parts you wish to ask about to facilitate examination of deponent.

PREPARE DEPOSITION QUESTIONS OR TOPICS

Prepare separate outline of questions or topics designed to develop deposition testimony to use at trial (Evid C §§1270-1272), *e.g.*,

to:

- a. Authenticate documents; or
- b. Establish a foundation for their introduction under business records exception to hearsay rule.

JUDGE'S PERSPECTIVE

It is important to lay the proper business record foundation for the admissibility of records under Evid C §1271 for use at trial. A declaration from the custodian of records in response to a subpoena duces tecum under Evid C §1560 needs to satisfy the technical requirements of Evid C §1271. See, e.g., Taggart v Super Seer Corp. (1995) 33 CA4th 1697, 1705, 40 CR2d 56 (subpoena on District Attorney invalid because business records sought were not the District Attorney's records, but records of other entities).

Further Research: See California Civil Discovery Practice §§5.31-5.35 (4th ed Cal CEB 2006); California Expert Witness Guide, chap 8 (2d ed Cal CEB 1991); Effective Direct & Cross-Examination §9.14 (Cal CEB 1986). See also Appendixes A-D.

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Source: Civil Litigation/Handling Depositions (Action Guide)/Before Deposition/STEP 30. OPPOSING COUNSEL:
REVIEW NOTICE AND PREPARE DEFENSE TO DEPOSITION

STEP 30. *OPPOSING COUNSEL*: REVIEW NOTICE AND PREPARE DEFENSE TO DEPOSITION

WHEN YOU RECEIVE NOTICE OF DEPOSITION

Review notice for defects (see [step 15](#), above):

If Defects in Notice

a. If you, as opposing counsel, believe that notice was defective, serve *written* objections on noticing attorney or unrepresented party, and any others on whom notice was served promptly, *i.e.*, as soon as you receive notice:

- (1) Within **3 calendar days** before deposition ([CCP §2025.410\(a\)](#)); and
- (2) Personally serve noticing attorney if only **3 calendar days** remain before deposition;

b. Specify the error or irregularity of the notice; and

c. Move to quash notice and stay deposition or for protective order ([CCP §§2025.410\(c\)](#), [2025.420\(a\)](#)) if noticing attorney will not cancel deposition. For how to proceed, see [Handling Motions to Compel and Other Discovery Motions, step 27 \(Cal CEB Action Guide March 2007\)](#).

If PMK Notice

If you represent an organization served with a deposition notice under [CCP §2025.230](#), to designate "persons most knowledgeable" (PMK), you should inform your client that it is required to diligently:

- a. Search for and identify the officers, directors, managing agents, employees, or agents who are most knowledgeable to testify on matters specified in deposition notice;
- b. Locate all available documents (if deposition notice also includes a notice to produce) that are responsive to the areas described in deposition notice; and
- c. Require deponent(s) to review those documents in order to answer questions asked during deposition to the full extent of information known or reasonably available to the organization.

Further Research: See [Maldonado v Superior Court \(2002\) 94 CA4th 1390, 1395, 115 CR2d 137](#).

May Appear by Telephone at Any Deposition

a. In appropriate cases, consider appearing and participating in deposition by telephone, video conference, or other remote electronic means. [CCP §2025.310](#); [Cal Rules of Ct 3.1010\(b\)](#).

Example: Nonparty witness's deposition is scheduled out of state; witness's testimony is not controversial and will not affect your client's position.

- b. If you decide to appear by telephone, video conference, or other remote electronic means ([Cal Rules of Ct 3.1010\(b\)](#)):
 - (1) Serve written notice of such appearance by personal delivery or facsimile at least **3 court days** before deposition; and
 - (2) Make all arrangements, including payment of all expenses incurred for your appearance and participation.

If Notice of Deposition by Telephone or Video Conference

If deposition notice states that oral deposition will be taken by telephone, video conference, or other electronic means, decide whether you wish to participate in person or by electronic means. [CCP §2025.310](#); [Cal Rules of Ct 3.1010\(a\)](#). See [step 5](#), above.

If Instant Visual Display

If deponent's testimony will be recorded by stenographic method through instant visual display of testimony, decide whether to participate in this service, or request rough draft transcripts, as provided by deposition officer. CCP §2025.220(a)(5). See step 15, above.

Scheduling Conflict

a. If you or your client has a scheduling conflict:

- (1) Contact the noticing attorney and try to reschedule;
- (2) Confirm in writing:
 - (a) Agreement on new date and time; or
 - (b) Why you were unable to resolve conflict.

b. If you have made a good faith effort to be available to reschedule the deposition, attorney noticing the deposition has two options:

- (1) To accommodate you; or
- (2) To bring a motion to compel.

NOTIFY CLIENT

If notice is unobjectionable, as opposing counsel, you should:

- a. Forward copy of deposition notice to client or other individual, *e.g.*, nonmanagement employee; and
- b. Send letter:
 - (1) Explaining notice; and
 - (2) Setting date for deposition preparation session.

RESPOND TO NOTICE OF RECORDED DEPOSITION

If deposition notice includes intent to record deposition by audio or video technology (CCP §2025.220(a)(5)) or to reserve right to use the recorded deposition of an expert at trial (CCP §2025.220(a)(6)):

- a. Seek stipulation that you can depose witness before recorded deposition so that you can:
 - (1) Discuss testimony with consultants; and
 - (2) Prepare cross-examination recorded deposition; or
- b. If you cannot informally resolve matter, seek protective order to stay recorded deposition until after unrecorded deposition or other discovery (see CCP §2025.420(b)(3)).

NOTE

The court may order a "predeposition" deposition when attorney noticing the video-recorded deposition intends to use the recorded testimony at trial. See CCP §2025.420(b)(3) (deposition of treating or consulting physician or any expert witness intended for use at trial under CCP §2025.620(d)).

WEIGH PRIVACY CONCERNS

Stipulate

If you want to protect privacy interests (*e.g.*, trade secret, financial matters, or sexual activity), seek stipulation with noticing attorney to, *e.g.*:

- a. Exclude anyone from deposition who is *not*:

- (1) A party;
 - (2) A related witness; or
 - (3) Their counsel; and
- b. If warranted, seal transcript to protect it from use for detrimental purpose, *e.g.*, publicity.

Protective Order

If unable to stipulate, move for protective order to ensure that, *e.g.*:

- a. Persons that you designate be excluded (CCP §2025.420(b)(12));
- b. Certain matters not be inquired into (CCP §2025.420(b)(9));
- c. Trade secret or other confidential research not be disclosed, or be disclosed only to specified persons (CCP §2025.420(b)(13)); or
- d. Deposition be sealed (CCP §2025.420(b)(15)).

Claim Privilege

Anticipate need to claim privilege.

Surrender Claim

Consider whether client wishes to surrender claim rather than answer sensitive questions.

Example: Client claiming loss of consortium might choose to waive damages for loss of sexual relations rather than answer questions about sexual relationship.

NOTE

If client asserts a privilege and refuses to answer a question, client will ordinarily be precluded from changing positions and answering the question for the first time at trial. See *Xebec Dev. Partners, Ltd. v National Union Fire Ins. Co.* (1993) 12 CA4th 501, 569, 15 CR2d 726.

JUDGE'S PERSPECTIVE

If information may be of a sensitive or proprietary nature, court is likely to grant a protective order to limit use of depositions, *e.g.*, that deposition not be disclosed to the public.

PREPARE DEFENSE

In preparing to defend deposition:

- a. Determine likely reason that noticing attorney is taking this deposition by:
 - (1) Reviewing file, including documents; and
 - (2) Researching applicable law and evidentiary issues.
- b. Prepare as you would for trial if deposition *may* be used at trial (see step 40, below), *e.g.*:
 - (1) Be ready for *complete* cross-examination of witness; and
 - (2) If your expert's deposition is being recorded, review when you can use that deposition at trial (see step 40, below) and be prepared to ask a complete set of *trial* questions. See Effective Direct & Cross-Examination §§7.2-7.8, 9.19 (Cal CEB 1986).

Further Research: See California Civil Discovery Practice §5.132-5.136 (4th ed Cal CEB 2006).

Source: Civil Litigation/Handling Depositions (Action Guide)/Before Deposition/STEP 31. OPPOSING COUNSEL:
PREPARE CLIENT FOR DEPOSITION

STEP 31. *OPPOSING COUNSEL*: PREPARE CLIENT FOR DEPOSITION

REVIEW EVIDENTIARY RULES

Determine whether privileges or rules will protect communications made or documents reviewed at deposition preparation session, or whether disclosure to opposing counsel will be required, *e.g.*:

Attorney-Client Privilege

Attorney-client privilege is held by *client* (Evid C §954), not *nonparty* deponent, *e.g.*, former employee of client who either was a percipient witness or made a nonprivileged communication is not protected by *Chadbourne* rule (*D. I. Chadbourne, Inc. v Superior Court* (1964) 60 C2d 723, 737, 36 CR 468). See Appendix C.

Work Product Rule

Work product rule (CCP §2018.030) protects attorney's impressions, conclusions, opinions, legal research, or theories, and is held by attorney, not client. See *Trade Ctr. Props. v Superior Court* (1960) 185 CA2d 409, 411, 8 CR 345. See also Appendix C.

Rule Requiring Production of Documents Used to Refresh Recollection

Documents used by witness to refresh recollection must be produced, if requested (Evid C §771):

a. Opposing attorney *may* be entitled to receive copies of documents used to refresh recollection *even* if they are otherwise privileged, *e.g.*:

Example 1: The employee of defendant prepared reports for defendant's attorney (*i.e.*, attorney-client privilege/work product rule); but because the employee used reports to refresh recollection *at deposition*, the reports were held discoverable. *Kerns Constr. Co. v Superior Court* (1968) 266 CA2d 405, 410, 72 CR 74 (both attorney-client privilege and work product rule waived).

Example 2: Before client's deposition, client reviewed transcript of her initial interview with attorney to refresh her recollection; transcript was *not* discoverable. *Sullivan v Superior Court* (1972) 29 CA3d 64, 68, 105 CR 241 (attorney-client privilege not waived).

b. You face the hard choice between:

(1) Having witness testify without reviewing documents; and

(2) Providing key documents for witness to review, knowing that opposing counsel may learn which documents you consider critical.

Example: At deposition, witness could not recall which of the documents he had reviewed had actually refreshed his recollection. The court held that if deponent cannot recall which of the documents refreshed his recollection, then *all* documents that deponent reviewed must be produced. *International Ins. Co. v Montrose Chem. Corp.* (1991) 231 CA3d 1367, 1372, 282 CR 783.

NOTE

Some attorneys have deponent review scores of documents, pointing out during deposition preparation those that are significant. If witness testifies that he or she refreshed recollection from documents, attorney produces the voluminous "chaff" as well as the "wheat."

DETERMINE WHO WILL ATTEND SESSION

If a third party, *e.g.*, former employee of your client, might attend the deposition preparation session, consider:

a. That attorney-client privilege might be waived; and

b. Whether preparation will be adversely affected if you exclude nonparties to whom privileges will not attach.

HANDLE DOCUMENTS CAREFULLY

Consider transmitting relevant documents to deponent for review *before* deposition preparation meeting, but:

- a. Noticing attorney may properly demand copies of documents used to refresh recollection. See Evid C §§250, 771; for discussion of reviewing evidentiary rules, see above.
- b. Instead, you may elect to:
 - (1) Review documents yourself; and
 - (2) Ask deponent questions to help refresh recollection and avoid risk of having to produce documents.

CONDUCT DEPOSITION PREPARATION SESSION

Allow Sufficient Time

Schedule meeting with client:

- a. To conduct preparation session without time pressure; and
- b. For witness to reflect on subject matter and on instructions you give during preparation, *i.e.*, several days before deposition.

NOTE

The disadvantage of conducting the preparation session too early is that your client may forget warnings about opposing counsel's examination and your instructions on how to act at deposition.

Review Procedures

Review deposition procedures with deponent, *e.g.*:

- a. Roles of attendees;
- b. Court reporter's function;
- c. Roles of examining and defending counsel, *e.g.*, examining attorney's broad authority to examine all issues relevant to subject matter of action, including issues inadmissible at trial (CCP §2017.010); and
- d. Deponent's opportunity to review transcript and correct errors (CCP §2025.520(a)).

NOTE

Advise deponent to be as accurate as possible at deposition because deponent may be asked at trial to justify corrections to transcript. See step 34, below, on advice to deponent *during* deposition.

Give General Advice

- a. Provide general advice about (see Appendix A):
 - (1) Appearance;
 - (2) Demeanor; and
 - (3) Responses at deposition.

NOTE

You *may* give this advice in writing if deponent is client or an officer, director, managing agent, or employee of client, and it will probably be protected by attorney-client privilege.

- b. Explain procedures for counsel's objecting and instructing client not to answer.

Review Material

Review relevant material from file, *e.g.*:

- a. If deponent is defendant, review answer, responses to interrogatories and requests for admissions, and physical evidence that noticing attorney will probably use at deposition.
- b. If deponent is an expert witness, review with expert:
 - (1) All relevant reports already obtained;
 - (2) Testimony on expert's qualifications;
 - (3) Expert's findings and opinions in detail; and
 - (4) Effect of these findings and opinions on parties' contentions.

Discuss Privacy Concerns

If warranted, discuss privacy concerns with deponent. For discussion of weighing privacy concerns, see [step 30](#), above.

Simulate Deposition

Use simulated deposition with question-and-answer format to:

- a. Familiarize deponent with examination techniques, and, if you are familiar with noticing attorney's examination technique, describe it, *e.g.*, whether friendly, hostile, or pounds the table;
- b. Prepare witness for hostile questions;
- c. Familiarize witness with questions on the most difficult issues, *e.g.*, personal relationship with plaintiff deponent's brother who is a defendant or loss of intimate relations with spouse; and
- d. Test witness's understanding of instructions, *e.g.*, if witness answers from personal knowledge.

JUDGE'S PERSPECTIVE

Remember that:

- Opposing counsel's assessment of client's jury appeal is a significant factor in settling a case; and
- The deposition is your opportunity to observe your client under cross-examination and to assess his or her jury appeal.

If the case merits the cost, consider a video-recorded session to enable the client to see and improve his or her demeanor and manner of answering questions, *e.g.*, if your client has unusual, distracting mannerisms.

NOTE

In how to prepare deponent for video-recorded deposition, see [Appendix D](#).

IF MEETING WITH NONCLIENT DEPONENT

Use extreme caution in deciding to meet with a *nonparty* witness before deposition:

- a. If you judge the witness to be friendly, you may wish to discuss some of the subject areas and types of questions to anticipate from opposing counsel; but
- b. *Do not*:
 - (1) Suggest which answers will be helpful; or
 - (2) Discuss trial strategy or tactics.
- c. Alert nonparty that you may only *advise* (not instruct) deponent not to answer.

NOTE

Assume that every word you say to nonparty witness will be repeated at deposition, and take steps to preserve work product protection. Counsel should avoid creating a situation in which he or she may become a witness in the case by virtue of the third party communication. See California Civil Discovery Practice §5.134 (4th ed Cal CEB 2006).

JUDGE'S PERSPECTIVE

There is *no* privilege between a nonparty witness and counsel. At deposition and at trial, opposing counsel may ask the nonparty witness about *everything* the preparing attorney *said* to the witness or suggested to the witness, including questions about documents or photographs shown to the witness.

Further Research: See CCP §§2017.010, 2025.010-2025.620; Evid C §§916-917, 950-955. See also Civil Discovery §§3.4-3.68, 6.91-6.109; Effective Direct & Cross-Examination §§9.17, 9.20 (Cal CEB 1986); California Trial Objections §§34.1-34.7, 35.1-35.8 (Cal CEB Annual).

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Source: Civil Litigation/Handling Depositions (Action Guide)/At Deposition/STEP 32. IF APPLICABLE, FOLLOW PROCEDURES FOR AUDIO OR VIDEO RECORDING

At Deposition

STEP 32. IF APPLICABLE, FOLLOW PROCEDURES FOR AUDIO OR VIDEO RECORDING

ARRANGE FOR STENOGRAPHIC RECORDING

Even if deposition is recorded by audio or video technology, it must *also* be stenographically recorded (CCP §2025.330(b)), *unless*:

- a. Parties have stipulated; or
- b. Court has ordered otherwise.

NOTE

If you intend to use an audio or video recording of deposition testimony at trial, you must provide a transcript (CCP §2025.340(m); Cal Rules of Ct 2.1040(a)); also, if you use a reporter, there will be no confusion about what witness said.

WHERE TO AUDIO OR VIDEO RECORD

Area for recording oral testimony must be (CCP §2025.340(a)):

- a. Suitably large;
- b. Adequately lighted; and
- c. Reasonably quiet.

Further Research: For additional factors in selecting location, see Appendix D.

SELECT PROPER OPERATOR

Competence

Operator must be competent to:

- a. Set up, operate, and monitor equipment properly; and
- b. Edit recording for trial, if necessary.

Proper Equipment

Operator must not use camera or sound recording techniques that distort participants' demeanor or appearance. CCP §2025.340(g).

Employee

You *may* use your own employee to record deposition *if* (CCP §2025.340(c)):

- a. You have a different deposition officer (*e.g.*, court reporter is the deposition officer); and
- b. You do *not* expect to use the recording *at trial*. Otherwise, unless all parties agree, the operator must be a "disinterested person" (see below).

Disinterested Person

If you or *any party* expects to use a recording of deposition testimony *at trial* (see step 39, below), the operator must be a person

who is (CCP §2025.340(c)):

a. Authorized to administer an oath; and

b. *Either*:

(1) *A disinterested person, i.e.:*

(a) *Not* financially interested in the action; and

(b) *Not* your relative or employee, or the relative or employee of any attorney of any of the other parties; or

(2) *A person about whom the parties agree*: All parties attending deposition stipulate on the record to waive these qualifications and restrictions.

Further Research: For additional factors in selecting operator, see Appendix D.

DECIDE ON RECORDING PROCEDURES

As the attorney noticing a video-recorded deposition, discuss with operator and other counsel how you want the session recorded, *e.g.*, whether you want the camera to:

a. Focus only on deponent's face during questions and answers (the usual method); or

b. Shift focus during questions and answers.

JUDGE'S PERSPECTIVE

Decide whether you want only deponent to appear on the recording during questioning (most common procedure), or whether you want deponent *and* the questioning attorney to appear.

It might help the court and jury to see the:

- Environment in which deposition was taken; and
- Expressions and mannerisms of the questioning attorney as well as the witness. However, the court in *Green v GTE Cal., Inc.* (1994) 29 CA4th 407, 410, 34 CR2d 517, questioned whether CCP §2025.330 allows video recording of opposing counsel in the absence of a court order. See California Civil Discovery Practice §5.78 (4th ed Cal CEB 2006).

AGREE ON GROUND RULES

Try to reach an agreement with opposing counsel on ground rules for the recorded deposition so that there are fewer interruptions and a clearer video presentation. See Appendix D.

a. You will usually want to minimize the operator's control over what is recorded; *e.g.*:

(1) If the operator is busy fading and shifting positions, the camera may miss *deponent's* reactions and responses, which are what *you* want to capture; but

(2) The jury (if you plan to use deposition at trial) may be bored by 2 hours of seeing only deponent's face.

b. *You* should decide the camera position *before* the deposition begins.

NOTE

Avoid camera bias that can occur, *e.g.*, when camera focuses in on deponent during a particular question, thus emphasizing it.

Further Research: For additional factors in selecting recording procedure, see Appendix D.

BEGIN RECORDED DEPOSITION

At start of audio or video recording:

a. Begin deposition with oral or written statement that includes (CCP §2025.340(h)):

- (1) Operator's name and business address;
- (2) Operator's employer's name and business address;
- (3) Date, time, and place of deposition;
- (4) Caption of case;
- (5) Deponent's name;
- (6) Name of party taking deposition; and
- (7) Any stipulations by parties.

NOTE

If you decide to use a written statement, you can have deposition operator either photograph the statement as part of the video or mark the statement as an exhibit to deposition.

- b. Have counsel identify themselves. CCP §2025.340(i).
- c. Show deposition officer administering oath to deponent. CCP §2025.340(j).

DURING DEPOSITION

If deposition requires more than one unit of tape or electronic storage, announce (CCP §2025.340(k)):

- a. End of each unit, *e.g.*, "This is the end of Tape 1"; and
- b. Beginning of each succeeding unit, *e.g.*, "This is the beginning of Disk 2."

AT DEPOSITION'S CONCLUSION

- a. State that deposition has ended (CCP §2025.340(l)); and
- b. Set forth any stipulations concerning:
 - (1) Custody of recording and exhibits; and
 - (2) Any other pertinent matters.

Further Research: See Civil Discovery §§5.75-5.84; see steps 4, 13, 15, above, step 39, below, and Appendix D for additional procedures if you video record the deposition.

Source: Civil Litigation/Handling Depositions (Action Guide)/At Deposition/STEP 33. COMPLETE PRELIMINARY DEPOSITION PROCEDURES

STEP 33. COMPLETE PRELIMINARY DEPOSITION PROCEDURES

WHO MAY ATTEND

PARTIES AND THEIR COUNSEL

Parties and their officers and counsel *cannot* be excluded from deposition, and have the right to attend. See CCP §2025.420(b)(12).

OTHER PERSONS

Others may attend, unless excluded by protective order. CCP §2025.420(b)(12).

NOTE

As a general rule, the only persons present are you (the examiner), deponent, deponent's counsel, other parties' counsel, and the court reporter. If you are surprised by an unwelcome person who insists on being present, consider suspending the deposition and applying to court for order to exclude that person.

Further Research: See California Civil Discovery Practice §6.18 (4th ed Cal CEB 2006).

IDENTIFY PARTIES NOTIFIED

ATTACH NOTICE

It is a good idea to attach deposition notice, with proof of service, as an exhibit to deposition transcript to show all parties you served with notice.

STATE ON RECORD

It is a good idea to state *on the record* the identity of parties properly served with notice who are not attending, *e.g.*, counsel who telephoned that he or she was not attending or who merely failed to show up.

NOTE

You may use deposition testimony at trial against those properly noticed and served. CCP §2025.620.

ENTER INTO APPROPRIATE STIPULATIONS

STIPULATE WHEN BENEFICIAL TO CASE

Determine the stipulations that facilitate your discovery and trial preparation goals and enter into them *on the record*.

"USUAL" STIPULATIONS

Avoid offering or agreeing to enter into the "usual" stipulations, which vary by locale, *unless* you:

- a. Ask what they are; and
- b. Agree that they are necessary.

NOTE

Most situations that the "usual" stipulations are meant to deal with are already covered by CCP §§2025.310-2025.620, and you thus need to stipulate only if you wish to alter these statutory provisions.

IF INSTRUCTED NOT TO ANSWER

Sample Stipulation

A sample stipulation regarding an instruction not to answer is: "If counsel instructs deponent not to answer, this is considered refusal to answer without the deposition officer having to read the question and formally ask if deponent refuses to answer."

Unnecessary

Because a motion to compel may be brought for mere *failure* to answer, and "refusal" to answer is not required, stipulation is unnecessary. See CCP §2025.480(a).

Advantage

The advantage of a stipulation is that it protects the record and helps your case for sanctions, if you do move to compel.

Sample Form: For sample stipulations, see Civil Discovery §§6.35-6.44.

RESERVED OBJECTIONS

Sample Stipulation

A sample stipulation regarding reserved objections is: "All objections *except* as to form of question or answer are reserved until trial."

Advantage

The advantage of this stipulation is that it avoids the risk that you will waive objection to substance of question or response when basis for objection could have been obviated or removed if interposed at deposition.

Disadvantages

A disadvantage is that your conduct of deposition can actually be *helped* by objections that can be obviated or removed if interposed at deposition, but if you stipulate, such objections might not be made.

Further Research: See CCP §2025.460; Appendixes B-C.

SIGNING OF DEPOSITION

Sample Stipulation 1

A sample stipulation regarding signing of deposition is: "Deposition need not be signed before officer before whom deposition was taken." See CCP §2025.520.

Advantage

This stipulation gives deponent the option to:

- a. Personally review and sign transcript at officer's office;
- b. Correct, approve, or reject it by letter that is treated as if personally signed (see CCP §2025.520(c)); or
- c. Personally sign transcript at the office of *any* notary public.

Sample Stipulation 2

Another sample stipulation for signing of deposition is: "Reading, correcting, and signing deposition waived; deposition may be used with same force and effect as if signed." See CCP §2025.520.

Advantage

For expert deposed within **30 days** of trial, this stipulation obviates problem of insufficient time to comply with 30-day notice requirement of CCP §2025.520(b).

Disadvantage

A disadvantage is that deponent gives up right to correct transcript; defending counsel loses opportunity to cross-examine deponent about changes to testimony.

Further Research: See CCP §2025.520; see also step 38, below.

RETAINING ORIGINAL DEPOSITION

Sample Stipulation

A sample stipulation regarding retaining original deposition is that you, as examining party, "will retain signed original deposition."

Unnecessary

Stipulation is unnecessary because you are *required* to retain original for **6 months** after final disposition of action. CCP §2025.550.

RETAINING RECORDED DEPOSITION

Sample Stipulation

A sample stipulation for retaining recording deposition is that you, as examining party, "will retain recorded version of deposition, rather than operator, as provided in CCP §2025.560."

Advantage

The advantage of using this stipulation is that it is more convenient and accessible, especially in a multiparty case.

Further Research: See CCP §2025.010-2025.620. See also Civil Discovery §§6.35-6.44; California Trial Practice: Civil Procedure During Trial §§12.2-12.3, 12.8-12.13, 12.16-12.17 (3d ed Cal CEB 1995); Effective Direct & Cross-Examination §9.15 (Cal CEB 1986).

Source: Civil Litigation/Handling Depositions (Action Guide)/At Deposition/STEP 34. ADMONISH DEPONENT ON DEPOSITION PROCEDURES

STEP 34. ADMONISH DEPONENT ON DEPOSITION PROCEDURES

OBJECTIVE

Provide information *on the record* to deponent so that you will have a foundation for introducing transcript:

- a. At trial; or
- b. In a summary judgment or summary adjudication motion.

EXPLAIN OATH

Tell deponent that oath administered by court reporter (CCP §2025.330(a)) requires deponent to testify as truthfully and accurately as if in court.

JUDGE'S PERSPECTIVE

A deponent who willfully gives false testimony is subject to prosecution for perjury. Penal Code §118 defines perjury as it applies to false testimony in a deposition.

Ask If Deponent Understands

- a. Ask deponent "Do you understand?" in order to avoid the risk that, when you later try to use transcript, *e.g.*, to impeach deponent, deponent claims to have been unaware of or not to have understood oath when deposed.
- b. If deponent states at deposition that he or she understands the oath, deponent will make a poor impression on jury if ignorance or misunderstanding is claimed at trial.

EXPLAIN RECORD OF DEPOSITION

Review Deposition

Tell deponent that deposition will be recorded and transcribed, and deponent will have opportunity to review and correct testimony (CCP §2025.520-2025.540; see step 38, below).

If Changes Testimony

Explain that if deponent changes or corrects testimony (see step 38, below), at a subsequent hearing or trial, you may:

- a. Ask deponent the reasons for changes (see CCP §2025.620(a)-(b));
- b. Comment on corrections during argument; and
- c. Ask jury to draw adverse or unfavorable inference from fact that testimony was different at deposition.

Further Research: See California Civil Discovery Practice §§6.127-6.130 (4th ed Cal CEB 2006); California Trial Practice: Civil Procedure During Trial §§11.118-11.124, 12.63-12.66 (3d ed Cal CEB 1995).

If Audio or Video Recording Deposition

Point out that reporter is also transcribing testimony and that written transcript will be official record. CCP §2025.510(g).

Ask If Deponent Understands

Again ask deponent: "Do you understand?"

ADMONISH CONCERNING TESTIMONY

Tell deponent:

Answers

- a. Not to answer unless question is fully understood; and
- b. To inform you if question is not understandable, to allow you to rephrase it;

Corrections

To correct errors or misstatements at any time *during* deposition by asking you for opportunity to do so;

If Unsure of Answer

Not to guess, but either:

- a. Give best recollection; or
- b. Say "I do not know," if that is most accurate statement;

Effect of Answer

To be aware that, when deponent answers a question on record, judge and jury will assume that deponent:

- a. Understood question; and
- b. Gave accurate and truthful response; and

If Understands Precautions

To acknowledge understanding these precautions, which will avoid deponent's claiming at hearing or trial:

- a. Not to have understood questions, procedures, or what something meant; or
- b. That deponent's testimony was mistaken.

EXPLAIN CONCERNING COURT REPORTER

Audible Answer Needed

Tell deponent that audible answers are necessary for counsel's understanding and for court reporter's transcription, *i.e.*, deponent should not answer with gestures.

Avoid Interruptions

Ask deponent not to interrupt when someone else speaks, so that reporter can accurately record testimony.

DETERMINE DEPONENT'S COMPETENCY

Because deponent's understanding and health must be adequate to permit deposition to proceed, ask:

- a. Whether deponent understands all preliminary admonitions; and
- b. If appropriate, whether deponent feels competent at this time to testify.

NOTE

Ask on the record whether poor health, other conditions or events, or medications taken before deposition might affect accuracy of deponent's testimony. This question will avoid risk of deponent's recanting or contradicting testimony later because of mental or physical impairment during deposition.

Further Research: See CCP §2025.010-2025.620; see also Civil Discovery §§6.46-6.47; Effective Direct & Cross-Examination §9.15 (Cal CEB 1986).

Source: Civil Litigation/Handling Depositions (Action Guide)/At Deposition/STEP 35. CONDUCT EXAMINATION TO SATISFY YOUR DEPOSITION GOALS

STEP 35. CONDUCT EXAMINATION TO SATISFY YOUR DEPOSITION GOALS

HOW TO MEET GOALS

Accomplish goals you set when preparing for the deposition (see [step 2](#), above) by:

- a. Your conduct toward deponent; and
- b. Scope of your questions.

Further Research: See [Creating Your Discovery Plan, steps 7, 10, & 15 \(Cal CEB Action Guide February 2007\)](#).

IF GOAL IS TO GATHER INFORMATION

From a witness you expect will be *available at trial*:

Your Conduct

- a. Use a relaxed, informal, and hospitable examination to gather information;
- b. Be cordial to all attendees at deposition and during recesses.

Your Questions

- a. Ask broad questions, *e.g.*, to uncover weaknesses in your case;
- b. Use "how" and "why" questions that do not suggest answers; and
- c. Allow nonresponsive, rambling, self-serving, or narrative answers, which may reveal more information than you are entitled to receive.

JUDGE'S PERSPECTIVE

Listen to deponent's answer as if you were a juror. If the response is unclear, ask the witness for clarification.

Follow-Up

- a. Follow up with specific questions:
 - (1) Pin down witness on important points; and
 - (2) Insist on responsive answers so that, if testimony is read to a jury, the jury can easily follow answers.
- b. Try to ascertain whether deponent has revealed all he or she knows about subject, *e.g.*, end line of questioning with:
 - (1) "Is that all?"; or
 - (2) "What else was said?"; or
 - (3) "Are those all the documents with which you are familiar?"
- c. If it is possible that you may introduce some of the testimony at trial, make sure the questions and answers are in a properly admissible form, *e.g.*, create a summary on the record by asking whether x, y, and z were deponent's testimony.

JUDGE'S PERSPECTIVE

Elicit details from witness carefully to ensure that answers will be understandable to the jury.

- Clear up the answer; do not leave it sandwiched between qualifying remarks so that it loses its impact at trial.

- If you believe that an answer can be used to impeach the witness on the stand, make certain that the answer contradicts the testimony you want to impeach.

IF GOAL IS TO PRESERVE TESTIMONY

From a *potentially unavailable* witness, *e.g.*, nonparty employee or former employee:

Your Conduct

Be friendly, but, to preserve testimony, examine as if at trial. For example, avoid questions that will be subject to objection at trial. If the witness is unavailable, the deposition transcript will be all you will have from that witness.

Your Questions

Ask clear, precise questions to produce admissible responses.

Follow-Up

- a. You may not want to follow up on some questions if you are unsure of deponent's response, although you risk missing information that could help you evaluate the merits of your case.
- b. Summarize deponent's testimony and ask if summary fairly represents deponent's responses, *e.g.*, "You testified to x, y, and z— is that correct?"
- c. If you expect to use deposition, instead of witness's appearance, at trial (see [step 40](#), below), establish *on the record*:
 - (1) Reasons for deponent's unavailability; and
 - (2) Your intention to introduce deposition at trial.

NOTE

Having reasons for deponent's unavailability on the record aids judge in determining "unavailability" ([Evid C §240](#)) and ensures that opposing counsel had reasonable opportunity at deposition to cross-examine witness.

IF GOAL IS TO PROMOTE SETTLEMENT

If deponent is a party that you think might settle, friendly but vigorous questioning may persuade opposing party and counsel that you are a strong adversary who may prevail at trial. See [Creating Plan, step 10](#).

JUDGE'S PERSPECTIVE

If your main purpose is to promote settlement, develop information at deposition to educate opposing side about weaknesses in its case, particularly those in deponent's testimony.

Further Research: See [California Civil Discovery Practice §§5.31-5.35](#) (4th ed Cal CEB 2006).

Source: Civil Litigation/Handling Depositions (Action Guide)/At Deposition/STEP 36. CONDUCT SPECIFIC DEPOSITION EXAMINATION

STEP 36. CONDUCT SPECIFIC DEPOSITION EXAMINATION

CONCERNING ANY RECORDS

INTRODUCE FOR THE RECORD

Before examining deponent about any records:

- a. Adequately describe each document for record;
- b. Designate document with exhibit number (for discussion of designating physical evidence, see [step 29](#), below);
- c. Instruct court reporter to mark document for identification as an exhibit;
- d. Refer to document by number during questioning.

JUDGE'S PERSPECTIVE

You should be thoroughly familiar with the exhibits *before* the deposition; when you refer to the exhibit on the record, use the *document title* and exhibit number so the trier of fact at trial will know exactly to what you refer.

CONCERNING BUSINESS RECORDS

QUESTION DEPONENT

After introducing documents for the record, consider carefully questioning a deponent who is custodian of records or other qualified witness about *record-keeping methods* to reveal foundational problems (see [Evid C §§1270-1271, 1400-1421](#)), so that you may:

- a. Object if the opposing party tries to introduce records into evidence at trial; or
- b. Cure problem before trial if *you* wish to introduce the records.

JUDGE'S PERSPECTIVE

Computer records may pose foundational problems, but you do not need the testimony of everyone who participated in each step of creation of computer records to establish the business records exception to the hearsay rule. See [People v Lugashbi \(1988\) 205 CA3d 632, 638, 252 CR 434](#).

- Find out the means used to ascertain that documents produced represent all described in deposition notice;
- Consider having deponent describe search involved in locating documents and identify those who conducted it; and
- Ask for identity of others who may know about these and other documents.

REQUESTING DEPONENT TO MARK EXHIBIT

There is no requirement that a deponent mark on a diagram or exhibit at a deposition, but if deponent should mark on an exhibit, *e.g.*, location of persons at scene of an incident:

- a. Make certain markings are clear for trial purposes; and
- b. Explain on the record what the marks signify, *e.g.*, "P-1 is the mark you have made showing where Joe Smith was standing, on the southwest corner of Main and Market on the diagram marked Exhibit 1."

CONCERNING CONSUMER OR EMPLOYMENT RECORDS

QUESTION DEPONENT

After introducing documents for the record (for discussion concerning any records, see above):

- a. Determine whether deponent has sufficient personal knowledge to establish adequate foundation, *e.g.*, ask deponent to identify document and who prepared it;
- b. If deponent does not have sufficient knowledge, ask identity of other witnesses with that knowledge; and
- c. Refer to available documents to help deponent refresh recollection.

CONCERNING CONVERSATION OR INCIDENT

QUESTION DEPONENT

If questioning deponent about particular conversation or incident:

Generally

Ask for:

- a. Time, date, and place of all meetings or events;
- b. Identities of those present; and
- c. General subject matters of discussions.

Specifically

Follow up with questions about specific details of conversation or incident that you conclude are important.

Regarding Documents

Ask whether written notes or memoranda were made of discussion or incident and by whom.

Follow-Up

Finish by asking whether witness has told you all about conversations or incidents.

JUDGE'S PERSPECTIVE

Note that you cannot ask witness to state facts, list witnesses, or identify documents that support particular contentions. *Rifkind v Superior Court* (1994) 22 CA4th 1255, 1256, 27 CR2d 822.

- You can accomplish the same goal by asking the witness to state what your client did, or failed to do, that caused damage or injury.
- You can require deponent to perform a physical reenactment of an event during a video-recorded deposition. *Emerson Elec. Co. v Superior Court* (1997) 16 CA4th 1101, 68 CR2d 883.

NOTE

Although you want to ascertain deponent's specific recollection, settle for general recollection if deponent lacks specific recall.

CONCERNING DEPONENT'S PREPARATION

QUESTION DEPONENT

Question deponent on whether there are any other documents you have not seen or any other preparation by deponent for this examination.

Documents Related to Deposition

Ask whether deponent has reviewed or been shown any documents in preparation for deposition, *e.g.*:

- a. "Were documents shown to you before this deposition?";
- b. "By whom?";
- c. "In the presence of your attorney?";
- d. "Was anyone else there?"; and
- e. "What was said about those documents?"

Earlier Review of Documents

Ask whether deponent has reviewed or been shown at *any* time any other documents in connection with *this case*.

NOTE

You may be entitled to receive copies of these documents used to refresh the witness's recollection (Evid C §771) even if they are otherwise privileged. For discussion of reviewing evidentiary rules, see step 31, above.

Diaries, Notes

Ask about any personal diary or notes made by deponent.

Discussions

Ask about preparation *not* based on documents, *e.g.*, if deponent talked to attorney or any other person about deposition:

- a. Contents of discussion between client and attorney would be privileged (Evid C §952); but
- b. You may discover content of discussions between:
 - (1) Nonclient and attorney; and
 - (2) Witness and a third person, *e.g.*, friend or another witness.

CONCERNING BASES FOR EXPERT'S OPINIONS

OBJECTIVE

The objective is to learn what expert:

- a. Thinks about case;
- b. Has done so far; and
- c. Plans to do in connection with the case.

QUESTION DEPONENT

Generally

Question expert about:

- a. Qualifications, *e.g.*, formal education, other training, job experience, and professional affiliations, activities, and honors;

- b. Prior experience as litigation expert;
- c. Percentage of time spent as litigation expert;
- d. Whether expert is used mostly by plaintiffs or defendants;
- e. Names and case numbers of cases in which expert has testified in court; and
- f. Whether certain treatises are considered authoritative.

JUDGE'S PERSPECTIVE

Because of privacy rights, you cannot compel an expert to review office records to reveal income derived from expert work or to ascertain the precise number of cases for plaintiffs or the defense, but you can and should ask expert to give his or her best estimate of income derived from expert consultation and an estimate of number of previous plaintiff- or defense-related cases. *Stonybrook I Homeowner's Ass'n v Superior Court* (2000) 84 CA4th 691, 101 CR2d 6Z.

AUTHORITY OF PUBLICATION

a. Under Evid C §721(b)(3), you may cross-examine any expert witness about a publication that has been established as a reliable authority by:

- (1) The testimony or admission of the witness;
- (2) Other expert testimony; or
- (3) Judicial notice.

b. Although cross-examination may take place at deposition, most experienced practitioners simply obtain expert's testimony that a certain publication is authoritative and save cross-examination about the publication for trial.

Employment in This Case

Find out about expert's:

- a. Date of hire; and
- b. Fee arrangements for each phase of case.

Preparation for This Case

Ask the expert about:

- a. What materials expert has read or considered to prepare or to form any opinions for case;
- b. All opinions expert has formed on case to date;
- c. All facts on which expert has based those opinions;
- d. Any information expert has found that is inconsistent with opinions; and
- e. Any other information or opinion expert can provide, *e.g.*:
 - (1) "Are you aware of any other record or information concerning the subject matter of this case?"; and
 - (2) "Have you formed any other opinions in connection with this case?"

JUDGE'S PERSPECTIVE

An expert should be prepared to testify as fully at deposition as he or she would at trial. Most trial judges will not allow an expert to give an opinion at trial that is based on work or research undertaken after deposition and before trial. See *Jones v Moore* (2000) 80 CA4th 557, 95 CR2d 216.

Your Expert

Explore deponent's knowledge of *your* expert's reputation, qualifications, and opinions, *e.g.*:

- a. "Have you heard of Dr. X?"; and
- b. "What is his reputation in the medical community?"

NOTE

Be prepared to have *your* expert establish that a particular treatise is authoritative regarding the specific issue in question so that you can cross-examine opponent's expert on learned treatise even if opponent's expert declines to vouch for treatise (which is likely).

concerning possible REEXAMInation

WHEN APPROPRIATE

If opposing counsel also examines witness, perhaps in order to preserve testimony for trial, consider reexamining witness when you are not sure earlier questions and responses are in admissible form.

NOTE

Be prepared to raise any objections, on the record, to opposing counsel's questions, and anticipate objections on your reexamination. See [step 37](#), below; [Appendixes B-C](#).

Further Research: See [CCP §§2017.010, 2025.010-2025.620](#); [Evid C §§760-774](#). See also [California Civil Discovery Practice §6.65](#) (4th ed Cal CEB 2006); [Expert Witness, chap 11](#); [Effective Direct & Cross-Examination §§7.1-7.14, 9.16](#) (Cal CEB 1986).

Source: Civil Litigation/Handling Depositions (Action Guide)/At Deposition/STEP 37. RESPOND TO OBJECTIONS OR NONRESPONSIVE ANSWERS

STEP 37. RESPOND TO OBJECTIONS OR NONRESPONSIVE ANSWERS

OBJECTIONS BASED ON PRIVILEGE OR WORK PRODUCT

ANTICIPATE OBJECTION

Unless opposing counsel objects to any question on the ground that it seeks information protected by attorney work product or other privilege, the information is discoverable. See CCP §§2018.030-2018.040. See also International Ins. Co. v Montrose Chem. Corp. (1991) 231 CA3d 1367, 1373 n4, 282 CR 783.

NOTE

Because CCP §2025.460(a) states only that failure to object waives protection of information "from discovery," it is not clear that failure to object at deposition waives objection *at trial*.

HOW TO RESPOND

For discussion of appropriate privacy objection and for discussion of objection and instruction not to answer, see below.

OBJECTIONS BASED ON CURABLE ERRORS

ANTICIPATE OBJECTION

Opposing counsel must object to any error or irregularity that might be cured if promptly brought to your attention; otherwise, opposing party will waive an objection to, *e.g.* (CCP §2025.460(b)):

- a. Manner of taking the deposition;
- b. Oath or affirmation administered;
- c. Conduct of any party, attorney, deponent, or deposition officer; or
- d. Form of the question or answer.

Further Research: See Appendixes B-C.

JUDGE'S PERSPECTIVE

If these objections are not interposed at the deposition, they will be waived.

- All other objections are *unnecessary* and may be made at trial. See CCP §2025.460(c).
- Most trial judges will liberally allow you to make objections at trial, even if you failed to make the objection at the deposition.

Before trial:

- Tell the court you intend to use a deposition;
- Ask the court to review deposition transcript and to allow you to object to answers that may be, *e.g.*, nonresponsive or incompetent. See step 41, below.

HOW TO RESPOND

- a. Attempt to cure error or irregularity, *e.g.*, rephrase question to overcome objections to form of question.

b. If counsel claims that question is ambiguous, consider:

- (1) Asking what deponent understands by your question; or
- (2) Using what deponent says to rephrase your question and get the desired answer.

c. If objection is to missing or misstated element in hypothetical question you asked deponent expert:

- (1) Supply that element, if possible; or
- (2) Ask deponent's counsel to state missing elements. Parlier Fruit Co. v Fireman's Fund Ins. Co. (1957) 151 CA2d 6, 15, 311 P2d 62.

NOTE

Better practice is to develop *written* hypotheticals when preparing for expert's deposition and have consultant review them for foundational accuracy. For discussion of consulting with expert witness, see step 29, below.

IF PURPOSE OF OBJECTION IS TO COACH

If it seems that opposing counsel's purpose in objecting is to coach witness, *e.g.*, opposing counsel is using objection to suggest how deponent should answer:

- a. Better practice is to avoid arguing about it because "coaching" is difficult to prove (opposing counsel's objection and its result are already on the record); but
- b. If obvious, repeated "coaching" occurs, consider (CCP §2025.470):
 - (1) Suspending deposition; and
 - (2) Seeking protective order.

Sample Forms: For sample forms, see California Civil Discovery Practice §§6.142-6.144 (4th ed Cal CEB 2006).

Further Research: See CCP §§2017.010-2017.320, 2025.010-2025.620. See also Civil Discovery §§6.83-6.85; Los Angeles Ct R 7.12(e)(8) (while question pending, counsel should not coach deponent, or suggest answers, through objections or otherwise).

OBJECTING PARTY'S OPTIONS

- a. If you do not cure the error or irregularity, opposing party may demand that deposition be suspended to permit a motion for protective order under CCP §2025.420; or
- b. Opposing counsel may allow deposition to proceed subject to the objection. CCP §2025.460(d).

| |
|---|
| INAPPROPRIATE OBJECTIONS ON SUBSTANCE OF QUESTION |
|---|

REVIEW WHICH OBJECTIONS ARE INAPPROPRIATE

Why Inappropriate

Some objections are inappropriate because they are:

- a. *Unnecessary* at deposition; and
- b. *Not waived* even if opposing party fails to object during deposition.

Examples

Inappropriate objections include those about:

- a. Deponent's competency;

b. Testimony or material that is:

(1) Irrelevant (see Davies v Superior Court (1984) 36 C3d 291, 305 n3, 204 CR 154; for discussion of recognizing when relevancy objection appropriate, see below); or

(2) Inadmissible at trial. Colonial Life e³ Acc. Ins. Co. v Superior Court (1982) 31 C3d 785, 790, 183 CR 810.

Further Research: See CCP §§2017.010-2017.020, 2025.420, 2025.460. See also Civil Discovery §6.86; Effective Direct & Cross-Examination §§9.4-9.14 (Cal CEB 1986); Appendixes B-C.

JUDGE'S PERSPECTIVE

It is not appropriate to object that a deposition question is cumulative to other evidence of the same fact that the deposing party already has. TBG Ins. Servs. Corp. v Superior Court (2002) 96 CA4th 443, 448, 17 CR 2d 155.

GENERALLY, HOW TO RESPOND

State *on the record* that:

a. The objection is inappropriate at deposition, *e.g.*, "A hearsay objection is not appropriate at a deposition because":

(1) "It goes to whether the testimony will be admitted at trial; and

(2) "The scope of discovery is much broader than the test of admissibility at trial";

b. Counsel's objection is on the record and will be decided by a trial judge at the appropriate time; or

c. Counsel, having made the record, should allow witness to answer the question.

HOW TO RESPOND TO HEARSAY OBJECTION

If your purpose is to preserve testimony for trial, although a hearsay objection is inappropriate at deposition:

a. Phrase your questions to avoid this objection; or

b. Establish on record an appropriate exception to the hearsay rule.

JUDGES PERSPECTIVE

On a showing of good cause under CCP §2025.510(b), the court may order a non-noticing party to bear a part of the cost of the deposition due to improper conduct such as needless argument on the record or unreasonably prolonged cross-examination of deponent. San Diego Unified Port Dist. v Douglas E. Barnhart, Inc. (2002) 95 CA4th 1400, 1405 n3, 116 CR2d 65.

APPROPRIATE PRIVACY OBJECTION

RECOGNIZE WHEN RELEVANCY OBJECTION APPROPRIATE

Although generally relevancy is *not* an appropriate objection, objection that question would lead to invasion of deponent's *privacy* may be appropriate. CCP §2017.020; see, *e.g.*, Britt v Superior Court (1978) 20 C3d 844, 864, 143 CR 695; Tylo v Superior Court (1997) 55 CA4th 1379, 64 CR2d 731.

RESPOND TO RELEVANCY/PRIVACY OBJECTION

When information is relevant but privacy objection appears to be valid, offer to agree to protective order to facilitate discovery of unprotected information.

OBJECTING PARTY'S OPTIONS

Anticipate that deponent's counsel may:

Agree

Objecting counsel: Agree to protective order on record, *e.g.*, "I agree to provide this information to you under seal and on the condition that this information will not be disclosed to anyone other than attorneys representing party X."

Offer Alternative Source

- a. *Objecting counsel:* Offer to provide the information by another method, *e.g.*, interrogatories or document request; if so
- b. *Your response:* Accept, subject to redeposition of witness on information provided.

Refuse to Agree

- a. *Objecting counsel:* Refuse offer on ground that protective order is inadequate to protect privacy; if so
- b. *Your response:* Inquire on the record what other provisions in protective order could be included that would adequately address these concerns.

OBJECTION AND INSTRUCTION NOT TO ANSWER

WHEN ARISES

Party Deponent

Deponent's counsel can object and *instruct* a client not to answer examiner's question.

Nonparty Deponent

Opposing counsel can object and *advise nonclient*, *e.g.*, expert witness, not to answer examiner's question.

GROUNDINGS

a. Instructing your client not to answer a deposition question continues to be a controversial topic in state court. *Stewart v Colonial W. Agency, Inc.* (2001) 87 CA4th 1006, 1014, 105 CR2d 115, states that counsel should instruct client not to answer deposition question only when:

- (1) Information called for in the answer would invade a privilege, and/or
- (2) Examiner's conduct has become so abusive that stopping deposition to seek protective order is necessary.

b. Federal courts and many California practitioners are of the opinion that an instruction not to answer is proper only when protecting a privilege.

c. Other practitioners, including the author, believe that privilege is not the only ground, and that there are other situations in which an instruction not to answer is proper, even in the absence of privilege.

NOTE

The *Stewart* court's comments are dicta because the precise holding was that the objected-to questions were "relevant to the subject matter" and therefore discoverable. 87 CA4th at 1013.

Example 1: A sexual harassment plaintiff may not be required to disclose sexual conduct with persons other than the alleged perpetrator. CCP §2017.220(a). Although this information is technically not privileged, it is nonetheless an appropriate area for an instruction not to answer.

Example 2: It is improper to ask a deponent, even if the deponent is an attorney, to "state all facts that support [your allegation]." *Rifkind v Superior Court* (1994) 22 CA4th 1255, 1263, 27 CR2d 822. Although such a question does not call for privileged information, deponent's counsel may legitimately instruct the client not to answer.

Example 3: Questions, such as "What religion are you?," "Did you file income tax returns in each of the past five years?," "How much would you take to settle this case?," or "Why did you file this case?" are not privileged under the Evidence Code (although they may be "privileged" under the constitutional right of privacy), and, if asked in isolation, may not trigger the need to suspend the deposition to seek a protective order. Nonetheless, such questions should be met with an instruction not to answer.

NOTE

Counsel should give careful consideration before instructing a client not to answer. But these examples, in the author's view, suggest that a formulistic approach is not appropriate.

HOW TO RESPOND

If you are the examiner asking the question, you may:

- a. If deponent fails to answer, ask opposing counsel to state on record why he or she instructed or advised deponent not to answer (see Appendixes B-C);
- b. Try to compromise, if possible, on the record, and offer to rephrase the question or limit the scope of inquiry, if this might eliminate opposing counsel's objection;
- c. Instead of adjourning the deposition, complete the examination on other matters, which will not waive your right to move for an order compelling the answer under CCP §2025.480 at a later time. CCP §2025.460(d); and
- d. If objection is based on claim of privilege, elicit factual basis for claim through subsequent questions.

NOTE

Depending on the facts and circumstances, counsels' attempts to discuss a disagreement during deposition may satisfy the requirement to meet and confer before moving to compel the answer under CCP §2025.480. Stewart v Colonial W. Agency, Inc. (2001) 87 CA4th 1006, 105 CR2d 115. However, counsels' "bickering" during deposition will not meet this requirement. Townsend v Superior Court (1998) 61 CA4th 1431, 1439, 72 CR2d 333. The test is probably the tone of the discussions, not the venue.

JUDGE'S PERSPECTIVE

Instruct your client witness not to answer when a question seeks information that is protected by a statutory privilege or a constitutional right, such as the right of privacy.

Further Research: See CCP §§2017.010-2018.080, 2025.620; Civil Discovery §§6.75, 6.102-6.105; California Trial Objections, chaps 33-51 (Cal CEB Annual); Direct & Cross §9.4; Los Angeles Ct R 7.12(e)(9) (counsel should not direct deponent not to answer unless question seeks privileged information, is manifestly irrelevant, or is calculated to harass).

NOTE

When a document contains privileged information, a deponent cannot claim a privilege as to the existence of the document, but rather must identify and generally describe it. The privilege protects only the information in the document. Hernandez v Superior Court (2003) 112 CA4th 285, 293, 4 CR3d 883.

NONRESPONSIVE OR DEFECTIVE ANSWER

RECOGNIZE NONRESPONSIVE ANSWER

Recognize nonresponsive answers:

Example 1: Q: "How old are you?" A: "The light was red."

Example 2: Q: "Did you see defendant run into plaintiff?" A: "I was there."

RESPOND TO NONRESPONSIVE ANSWER

Object and Move to Strike

You *must* object to preserve your objection and motion to strike at trial *if* the answer:

- a. Is otherwise admissible; or
- b. Has defects that could be cured at deposition.

Example: You ask: "How old are you?" Deponent answers: "The light was red." You fail to object. If deponent is unavailable at trial, opposing party may be able to introduce deponent's answer, even though it was nonresponsive.

When Not to Object

If the answer is not otherwise admissible, you do not need to object. See CCP §2025.460(c).

Ask Again

In addition to, or instead of, objecting:

- a. Explain that you need a response to your question;
- b. Refocus deponent's attention by asking him or her to listen to the question; and
- c. Rephrase the question to try to secure an answer.

Example: You explain: "Mr. D, your response did not answer my question; please listen carefully to the question: How old are you?," "In what year were you born?," or "When is your birthday?"

Move to Compel

If unsuccessful in eliciting a responsive answer, consider either:

- a. Proceeding and later moving to compel (CCP §§2025.460(d), 2025.480); or
- b. Adjourning and moving to compel, if you need the answer to continue examination. State on the record, *e.g.*, "The deposition is adjourned to bring a motion to compel, and it is not completed on other matters," to avoid any dispute over which areas of inquiry you may go into when deposition resumes.

Further Research: On how to move to compel, see CCP §2025.480; Handling Motions to Compel and Other Discovery Motions (Cal CEB Action Guide March 2007).

RECOGNIZE DEFECTIVE ANSWER

Recognize defective answers:

Example 1: Speculation: Q: "How fast was he going?" A: "He must have been going 70."

Example 2: Hearsay/No personal knowledge: Q: "Was the stoplight red?" A: "She said it was red."

RESPOND TO DEFECTIVE ANSWER

- a. Establish a further factual basis for your objection, *e.g.*:
 - (1) "Did you *see* the color of the stoplight?"; or
 - (2) "You have no personal knowledge of your last answer, is that correct?"
- b. Object to defects in form of answer, *e.g.*, "Deponent is not testifying based on personal knowledge"; then
- c. Rephrase question or otherwise try to obtain proper answer.

JUDGE'S PERSPECTIVE

If you are involved in a deposition with obstreperous, obstructionist opposing counsel, you can seek appointment of a discovery referee (usually a retired judge) who can make rulings during deposition itself. The presence of a referee has a tendency to change an atmosphere of confrontation to one of evidence gathering.

Further Research: See CCP §§2017.010-2018.080, 2025.620; see also Civil Discovery §§6.75-6.82.

Source: Civil Litigation/Handling Depositions (Action Guide)/After Deposition/STEP 38. ANTICIPATE PREPARATION AND REVIEW OF TRANSCRIPT

After Deposition

STEP 38. ANTICIPATE PREPARATION AND REVIEW OF TRANSCRIPT

COURT REPORTER PREPARES TRANSCRIPT

Unless parties agree otherwise, the court reporter must transcribe testimony of any deposition that was recorded stenographically. CCP §2025.510(a).

DETERMINE WHETHER YOU WANT DEPOSITION TRANSCRIBED

If you do not want or need to have the deposition transcribed, *e.g.*, the case is settled during a break in the deposition:

Stipulate

Seek a stipulation with other counsel *not* to have deposition transcribed, and if they agree, so state on the record; or

Make Motion

Move for an order, on good cause shown, that the party who insisted on transcription shall bear the cost.

COST OF DEPOSITION

- a. You, as the party noticing deposition, bear costs of transcription unless court orders otherwise (CCP §2025.510(b)); and
- b. Any other party, or deponent, may obtain a copy of the transcript at its own expense (CCP §2025.510(c)).

PROVIDE OPPORTUNITY TO HEAR AND SEE RECORDING

At *any* party's request, if you recorded deposition by audio or video technology, "promptly" provide that party (CCP §2025.510(f)):

- a. An opportunity to see and hear the recording; and
- b. A copy of the recording, if the party gives you the reasonable cost of making it.

COURT REPORTER NOTIFIES ABOUT TRANSCRIPT

If deposition is stenographically recorded:

Notice Required

For each session of deposition, court reporter *must* send written notice to deponent and all parties attending deposition that original transcript of testimony for that session is available for (CCP §2025.520(a)):

- a. Reading;
- b. Correcting; and
- c. Signing.

Notice Not Required

Court reporter need not send notice if deponent and all parties attending deposition (CCP §2025.520(a)):

- a. Agreed on the record to waive reading, correcting, and signing of transcript; or

- b. When transcript is for only one of multiple deposition sessions, agreed that reading, correcting, and signing will take place after entire deposition has been concluded or at some other specified time.

JUDGE'S PERSPECTIVE

You may want to send a letter of instruction to your client deponent explaining how to make deposition corrections and asking that they be sent first to you for review.

COURT REPORTER NOTIFIES ABOUT AUDIO OR VIDEO RECORDING

If deposition is audio or video recorded and not stenographically recorded:

Notice Required

Court reporter must send written notice to deponent and all parties attending deposition that recording is available for review. CCP §2025.530(a).

Notice Not Required

Court reporter need not send notice if deponent and all parties attending deposition agreed on record to waive hearing or viewing the recording. CCP §2025.530(a).

DEPONENT MAY CORRECT DEPOSITION

For **30 days** after notice from court reporter, unless attending parties and deponent agree on the record or otherwise in writing to a longer or shorter time period, deponent may:

- a. Change the form *or* substance of the answer to any question; and
- b. Either:
 - (1) Approve the transcript by signing it; or
 - (2) Disapprove the transcript by refusing to sign it.

Method of Correction

Deponent may:

- a. Review deposition at the office of deposition officer and note corrections on original transcript; or
- b. Send (use this method if deposition is video recorded without a stenographic transcript (CCP §2025.530)):
 - (1) A letter signed by *deponent* (CCP §§2025.520(c), 2025.530(b)) to deposition officer by certified or registered mail, return receipt requested; and
 - (2) A copy of the letter, by first class mail, to all parties attending the deposition.

Deposition Officer Indicates

Deposition officer notes:

- a. On original of the transcript (CCP §2025.520(e)):
 - (1) Any action taken by deponent; and
 - (2) Deponent's approval of, or failure or refusal to approve, the transcript; or
- b. In writing to accompany the audio or video recording (CCP §2025.530(c)):
 - (1) The changes made by deponent; and
 - (2) That deponent either identified deposition as his or her own or refused to do so.

EFFECT OF FAILURE TO APPROVE

If deponent fails or refuses to approve transcript within the **30 days**, deposition is given the same effect as though it had been approved, subject to any changes made by deponent. CCP §§2025.520(f), 2025.530(d).

DEPOSITION OFFICER CERTIFIES TRANSCRIPT

Deposition officer certifies on transcript or writing accompanying the recording of deposition that (CCP §2025.540(a)):

- a. Deponent was duly sworn; and
- b. Transcript is a true record of:
 - (1) Testimony given; and
 - (2) Any changes deponent made.

KEEP ORIGINAL TRANSCRIPT

- a. Deposition officer will transmit original certified transcript to you, as the party who noticed deposition.
- b. You must keep the original (CCP §2025.550):
 - (1) In conditions that will protect it against loss, destruction, or tampering;
 - (2) Until **6 months** after final disposition of the action.

Further Research: See California Civil Discovery Practice §6.126-6.132 (4th ed Cal CEB 2006).

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Source: Civil Litigation/Handling Depositions (Action Guide)/Before Trial/STEP 39. IF PLANNING TO USE AUDIO- OR VIDEO-RECORDED DEPOSITION TESTIMONY AT TRIAL, COMPLY WITH PROCEDURAL REQUIREMENTS

Before Trial

STEP 39. IF PLANNING TO USE AUDIO- OR VIDEO-RECORDED DEPOSITION TESTIMONY AT TRIAL, COMPLY WITH PROCEDURAL REQUIREMENTS

NOTIFY COURT, OTHER PARTIES

If you intend to introduce all or part of deposition testimony at trial, notify court and all parties *in writing* in "sufficient" time for (CCP §2025.340(m)):

- a. Trial judge to hear and rule on written objections of opposing parties; and
- b. You to edit the audio or video recording if ordered by court.

ANTICIPATE OBJECTIONS

Anticipate receiving *written* objections to all or part of the deposition testimony. CCP §2025.340(m).

RESPOND TO OBJECTIONS

It is a good idea to respond to objections *in writing*, although Code of Civil Procedure does not discuss the form of your response. See CCP §2025.340(m).

RECEIVE COURT DIRECTIONS

Court can (CCP §2025.340(m)):

- a. Rule on objections;
- b. Allow parties to further designate testimony to be offered;
- c. Allow further objections that court decides justice may require; or
- d. If you or another party designate *only* a portion of the recorded testimony for use at trial, may order you (or other party also designating a portion) to:
 - (1) *Suppress* nondesignated portions; or
 - (2) Prepare an *edited* version of the recording.

JUDGE'S PERSPECTIVE

The trial judge will encourage you and other counsel to enter into stipulations about disputed portions of the recording. In the absence of agreement, court will use stenographer's transcript to rule on objections.

NOTE

Expect the trial judge to ask you and other counsel to agree and to edit the recording to include only admissible material; do *not* expect the judge to play the recording and determine which portions to edit, except in limited areas of specific disagreement.

PRESERVE ORIGINAL RECORDING

If court orders suppression or editing of a portion of the recording, *make sure* that the original is preserved *unaltered*. CCP §2025.340(m).

PREPARE STENOGRAPHIC RECORD

If recorded deposition was not also stenographically recorded (CCP §2025.340(m)):

- a. Have court reporter prepare a stenographic transcript from the recording; and
- b. Offer transcript into evidence at trial when recording testimony is offered. See step 41, below.

JUDGE'S PERSPECTIVE

You *must* provide a transcript:

- To the court; and
- For use by opposing counsel. See Cal Rules of Ct 2.1040(a).

NOTE

Do not assume that opposing counsel's failure to object to deponent's testimony means that you can necessarily use that testimony at trial. If you are taking the deposition of a witness who will be unavailable at trial and fail to lay the proper foundation for an opinion or a percipient observation, opposing counsel can object at trial and potentially preclude that testimony on the basis of lack of foundation.

Further Research: See California Trial Practice: Civil Procedure During Trial §§12.16-12.31 (3d ed Cal CEB 1995). See also steps 4, 13, 15, 32, 38, above, and Appendix D for additional procedures if you video recorded the deposition.

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Source: Civil Litigation/Handling Depositions (Action Guide)/At Trial/STEP 40. REVIEW WHEN YOU CAN USE DEPOSITION AT TRIAL

At Trial

STEP 40. REVIEW WHEN YOU CAN USE DEPOSITION AT TRIAL

DEPOSITION OF ADVERSE PARTY FOR ANY PURPOSE

a. You may use the deposition *for any purpose, e.g.*, to impeach or to prove substance of case, without first giving witness the opportunity to explain his or her deposition testimony if deponent is (CCP §2025.620(b)):

(1) Adverse party; or

(2) Officer, director, managing agent, employee, or agent of adverse party. See California Trial Practice: Civil Procedure During Trial §12.54 (3d ed Cal CEB 1995).

Further Research: For sample methods of introducing transcript, see Civ Proc During Trial §§12.56-12.57, 12.62-12.69.

DEPOSITION OF NONPARTY OR PARTY FOR ANY PURPOSE

Deponent Lives More Than 150 Miles Away

You may use deposition *for any purpose* if deponent lives more than **150 miles** from the place of trial. CCP §2025.620(c)(1).

Deponent Unavailable

You may use deposition *for any purpose* if deponent is (CCP §2025.620(c)(2)):

- a. Exempted or precluded from testifying on ground of privilege, *e.g.*, witness will not testify based on Fifth Amendment;
- b. Disqualified from testifying, *e.g.*, witness has been declared incompetent;
- c. Dead;
- d. Unable to attend or testify because of existing physical or mental illness or infirmity;
- e. Not subject to court process, *e.g.*, witness lives in another state; or
- f. Not served with subpoena because you were unable to serve witness after diligent attempts.

Further Research: See CCP §§1989, 2025.620(c); Evid C §240; Civ Proc During Trial §§12.58-12.61. See also Laying a Foundation to Introduce Evidence (Preparing and Using Evidence at Trial), step 27 (Cal CEB Action Guide April 2006), on how to introduce deposition of an unavailable witness.

JUDGE'S PERSPECTIVE

When laying a foundation for introducing testimony of a witness you are unable to serve, provide the court and opposing counsel with a declaration from the investigator or process server detailing *all* attempts to serve the witness.

Exceptional Circumstances

You may use deposition *for any purpose* in exceptional circumstances. CCP §2025.620(c)(3); Jordan v Warnke (1962) 205 CA2d 621, 630, 23 CR 300 (decided under former CCP §2016(d)(3)(v), renumbered CCP §2025.620(c)).

Includes Deposition of Your Client

Client may use *own* deposition instead of live testimony if requirements of CCP §2025.620(c) are met. See Civ Proc During Trial §12.69.

Use Client's Live Testimony, Not Deposition

Whenever possible, use client's live testimony, not deposition, because:

- a. Client's deposition was probably taken by opposing counsel, who will have elicited different testimony from that which you could elicit at trial, *e.g.*, in deposition preparation, you may have told client to keep answers short and not to volunteer information;
- b. Much of deposition testimony may be unusable because of presence of, *e.g.*, hearsay questions or responses;
- c. Unlike direct testimony, you cannot control flow and chronology of questions; and
- d. Reading a long deposition will bore the jury.

JUDGE'S PERSPECTIVE

As a rule, the trier of fact wants to see *live* litigants in order to assess their credibility. See CACI 107 (formerly BAJI 2.20).

DEPOSITION OF NONPARTY TO IMPEACH OR REFRESH

You may also use deposition of a nonparty to:

Impeach

Impeach or contradict trial testimony. Evid C §§770, 1235; CCP §2025.620(a).

NOTE

You will need to lay a foundation to introduce this deposition. See step 41, below. See also Laying a Foundation, steps 26-27, and Appendix G to that Action Guide.

Refresh Recollection

Refresh recollection, if witness does not recall matters. Evid C §771; see Laying a Foundation, step 30.

Further Research: For examples of ways of introducing transcript, see Laying a Foundation, steps 26, 30; Civ Proc During Trial §§12.62, 12.63-12.66.

TESTIMONY OF EXPERT WITNESS

You can introduce video-recorded deposition of treating or consulting physician or other expert witness *even if witness is available to testify at trial* if you:

- a. Stated that intention in deposition notice (see step 15, above; CCP §§2025.220(a)(5), 2025.330(c), 2025.620(d)); and
- b. Notified court and all parties in writing of:
 - (1) Your intent; and
 - (2) Portions of deposition you intended to offer.

For discussion of complying with procedural requirements, see step 39, above; CCP §2025.340(m).

Further Research: See CCP §2025.620; California Civil Discovery Practice §§6.136-6.139 (4th ed Cal CEB 2006); Effective Direct & Cross-Examination §12.9 (Cal CEB 1986); Civ Proc During Trial §§12.32-12.97.

Source: Civil Litigation/Handling Depositions (Action Guide)/At Trial/STEP 41. INTRODUCE DEPOSITION TESTIMONY AT TRIAL

STEP 41. INTRODUCE DEPOSITION TESTIMONY AT TRIAL

FOLLOW COURT PROCEDURES

If you are unfamiliar with local procedure for introducing deposition testimony, ascertain which method court prefers. See, *e.g.*, Los Angeles Ct R 8.70.

JUDGE'S PERSPECTIVE

Tell the court as soon as possible that you plan on using a deposition at trial, *e.g.*, at the pretrial conference or during motions in limine:

- This allows you and opposing counsel to object to all or portions of the deposition; and
- The court will then have time to read the deposition and consider the objections.

PRODUCE ORIGINAL TRANSCRIPT

Produce or arrange for custodial attorney or court reporter to file original deposition transcript with court. See CCP §§2025.550-2025.560.

JUDGE'S PERSPECTIVE

The trial judge will require that the original deposition be lodged with the clerk at the *beginning* of the case. The first time you use a deposition at trial, ask the trial judge to explain a deposition to the jury using, *e.g.*, CACI 208 (formerly BAJI 2.06), thus adding significance and impact to deposition.

CONSIDER RULE OF COMPLETENESS

- a. If you offer into evidence selected portions of deposition, any other party may introduce any other part relevant to the part you introduce. CCP §2025.620(e).
- b. Review deposition transcript and weigh risks of introducing only portions that support your case.

JUDGE'S PERSPECTIVE

The other party may introduce *only* the parts of the deposition that are relevant to the parts you have introduced. Trial judges generally consider "relevant" under CCP §2025.620(e) to share the same rationale as Evid C §356.

DESIGNATE PORTIONS TO BE READ

- a. Tell opposing counsel and court which portions of deposition you intend to read.
- b. It is a good idea to designate in writing portions of deposition to be read.

JUDGE'S PERSPECTIVE

When using the deposition during the trial, *before* reading testimony into the record:

- Refer to the date of the deposition and page and line numbers; and
- Give opposing counsel an opportunity to state objections to your reading that portion of the deposition.

READ TRANSCRIPT

Read designated portion into the record, or have someone else help you by reading "Answers" after you read "Questions" of deposition. See Laying a Foundation to Introduce Evidence (Preparing and Using Evidence at Trial), step 26 (Cal CEB Action Guide April 2006).

OFFER INTO EVIDENCE

When using deposition as substantive evidence, read it into evidence with court's permission. The deposition transcript itself is not received as evidence. See California Trial Practice: Civil Procedure During Trial §12.47 (3d ed Cal CEB 1995).

IMPEACH THE WITNESS

LAY FOUNDATION FOR DEPOSITION

When using deposition to impeach, ask witness/deponent foundational questions establishing that:

- a. Deposition was taken;
- b. You advised deponent that any inconsistencies in testimony could be brought to jury's attention (see step 34, above); and
- c. Witness had opportunity to read and correct transcript.

NOTE

Use common sense when asking foundational questions; *e.g.*, if you or another attorney use the same deposition more than once, you do not need to bore the jury by repeating the same foundational questions.

ASK COURT'S PERMISSION TO READ

Inform court which portions you intend to read and ask court for permission to do so.

JUDGE'S PERSPECTIVE

Be certain that testimony is material and fairly impeaches the witness:

- Counsel frequently makes the mistake of using statements that only marginally impeach or are inconsistent on an immaterial point.
- Do not take statement out of context.
- Opposing counsel has the right on redirect to read the passages in context and other portions of the deposition that clarify the answer. See CCP §2025.620(e).

READ TRANSCRIPT

Read designated portion carefully into record.

DO NOT OFFER INTO EVIDENCE

It is generally unnecessary to offer transcript into evidence. See Laying a Foundation, step 26.

JUDGE'S PERSPECTIVE

Although the original deposition itself is not received into evidence, you can have enlargements made of the crucial portion of the deposition testimony you have read into the record, and use that enlargement during your closing argument.

If you have enlargements made of trial testimony as well, juxtapose the contradictory statements during argument for a persuasive effect on the trier of fact.

Further Research: See Civ Proc During Trial, chap 13.

Source: Civil Litigation/Handling Depositions (Action Guide)/APPENDIX A Checklist of Instructions for Preparing Client for Deposition

APPENDIX A

Checklist of Instructions for Preparing Client for Deposition

General Instructions

- 1. Explain deposition process and purpose to your client, including:
 - a. Persons expected to attend; and
 - b. Usual explanation offered at deposition by examining attorney. See [step 30](#), above.
- 2. Instruct deponent to address those attending deposition by formal names, and otherwise behave as if in courtroom.
- 3. Stress importance of remaining calm and businesslike, regardless of examining counsel's behavior. Say that you will object to any improper behavior.
- 4. Point out that examining counsel may interrupt an answer and that deponent should not lose control if interrupted. Explain that you will then ask counsel to try not to interrupt deponent.
- 5. Remind deponent not to use his or her hands or otherwise "draw pictures" that cannot be accurately reflected in transcript.
- 6. Instruct deponent not to use technical slang or imprecise terminology, which could be misunderstood when transcript is used at trial months or years after deposition took place.
- 7. Emphasize importance of telling the truth at the deposition.
- 8. Explain that deponent must have personal knowledge of matters to which testifying and that it is not acceptable to "guess" at an answer, but that an "estimate" or a range based on what deponent saw is appropriate; *e.g.*, the red car was 40 to 60 feet from the intersection.
- 9. Advise deponent of papers or other items to bring to deposition.
- 10. Tell deponent that you or another attorney at deposition may object to a question. Ask deponent to delay his or her answer to allow time for objections and any instruction not to answer.
- 11. Explain that deponent can ask to take a break at any time.
- 12. Advise deponent to tell you privately during breaks if he or she wants to enlarge or correct answer.
- 13. If deposition will be video recorded, work with deponent to correct any mannerisms or habits that could mar his or her performance. Engage in mock video deposition with deponent as aid to correct problems.

How to Respond, in General

- 1. Explain that deponent needs to:
 - a. Listen carefully to question;
 - b. Wait until question is completed; and
 - c. Answer question carefully, *if* it is understood; if it is confusing, ask the examiner to rephrase the question.
- 2. Encourage deponent to:
 - a. Give shortest possible answer, *e.g.*, "yes," "no," or "I don't know," if they are fair and accurate answers;
 - b. Not to volunteer any information, but to give explanation if question requires one; and
 - c. Speak as though dictating to the court reporter.

- 3. Point out that if deponent does not know the answer, deponent should say so. Tell deponent that no one is required to answer a question unless he or she has personal knowledge of the facts and can provide an accurate answer.
- 4. Advise deponent to answer based on his or her knowledge of the facts and not to offer estimates or opinions unless there is good reason.
- 5. Call deponent's attention to the fact that sometimes examining counsel's questions may really be statements or arguments. Instruct deponent not to respond in that situation, but to wait for deponent's counsel's objection.
- 6. Explain that if the question contains mistakes or incorrect premises, deponent should say so politely.
- 7. Tell deponent that if a question cannot be answered without qualifications, deponent should begin answer by saying so and wait for examining counsel to qualify question.

How to Respond When Deponent *Should* Rely on Documents

- 1. Stress that deponent's best recollection is all that is required and that guessing or speculating is unwise.
- 2. Explain that to refresh recollection, deponent:
 - a. Can ask to look at document or other item available at the deposition if question refers to it; but
 - b. Should read entire document carefully to have a good understanding of context in which statement was made and to frame answer (or allow deponent's counsel to frame objection).
- 3. Explain difference between:
 - a. *Past recollection recorded*: Insufficient present recollection, but past recollection has been recorded and it is shown to deponent to verify (see Evid C §1237); and
 - b. *Present recollection refreshed*: Present recollection, but memory needs stimulation by showing deponent a document or other evidentiary item. Evid C §771.
- 4. Point out that:
 - a. If deponent's answer is based on document or other item used before deposition to prepare deponent or refresh recollection, opposing counsel is entitled to inspect and copy it.
 - b. Suggest that deponent try to prepare without reviewing evidence.
- 5. Advise deponent to refer to documents or other items by exhibit number or other identification, to review this evidence before answering questions, and to relate it to answers.
- 6. Stress to deponent not to volunteer information about documents or other items if not certain they are being mentioned or called for by examining counsel.

Further Research: See CCP §§2017.010, 2025.010; California Civil Discovery Practice §§6.11-6.17 (4th ed Cal CEB 2006); Effective Direct & Cross-Examination §9.20 (Cal CEB 1986).

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Source: Civil Litigation/Handling Depositions (Action Guide)/APPENDIX B Objections Appropriate at Deposition

APPENDIX B

Objections Appropriate at Deposition

WHETHER TO OBJECT

Not all objections available at trial should be raised at a deposition. Whether you object depends on the nature of the question and the purpose of the testimony:

- If you expect deponent to testify at trial and be asked the same question, an *inappropriate* objection to the *substance* of the question risks educating examining counsel without adding to your record or otherwise aiding your discovery goals. See *Inappropriate Objections to Substance of Question*, below.
- If you intend to preserve the deposition testimony for trial and do not object at the deposition to the form of a question or answer or other curable error, but instruct the witness not to answer, you risk waiver of a valid objection and having your later objection (at trial) properly overruled by the trial court.

OBJECTIONS TO FORM OF QUESTION OR ANSWER

- Objections to form of question or answer are waived at trial if not timely raised at the deposition (presumably the error can be cured; CCP §2025.460(b)).
- Try to cure error, except when your purpose is to gather broad information, *e.g.*, by asking question that calls for narrative answer. In that situation, note objection on record and direct deponent to answer question.

Appropriate Objections to Form of *Question*:

| Objection | Statutory Authority | Other Authority |
|---|----------------------------|---|
| 1. AMBIGUOUS OR UNINTELLIGIBLE | <u>Evid C §765</u> | See <u>California Trial Objections, chap 7 (Cal CEB Annual)</u> . |
| 2. COMPOUND | <u>Evid C §765</u> | <u>Wiese v Rainville (1959) 173 CA2d 496, 506, 343 P2d 643</u> . See <u>Trial Objections, chap 8</u> . |
| 3. TOO GENERAL | <u>Evid C §765</u> | See <u>Trial Objections, chap 9</u> . |
| 4. CALLS FOR NARRATIVE ANSWER | <u>Evid C §765</u> | See <u>Trial Objections, chap 10</u> . |
| 5. ASKED AND ANSWERED | <u>Evid C §765</u> | See <u>Trial Objections, chap 11</u> . |
| 6. MISQUOTES WITNESS | <u>Evid C §765</u> | See <u>Trial Objections, chap 12</u> . |
| 7. ARGUMENTATIVE, <i>e.g.</i> , designed to persuade witness or to be contentious, rather than to elicit independent answer | <u>Evid C §765</u> | <u>Estate of Loucks (1911) 160 C 551, 557, 117 P 673</u> . See <u>Trial Objections, chap 14</u> . |
| 8. ASSUMES FACTS IN DISPUTE OR NOT IN EVIDENCE | <u>Evid C §765</u> | See <u>Trial Objections, chap 15</u> . |
| | | <ul style="list-style-type: none">• This may not be an entirely appropriate objection at a deposition because until trial no testimony or item will have been ordered "in evidence."• If you raise this objection, expect experienced counsel to frame the same question carefully as a hypothetical to allow each element to be established at trial. |
| 9. CALLS FOR SPECULATION | | |
| Not in witness's personal knowledge | <u>Evid C §702</u> | |
| Calls for improper <i>lay</i> conclusion | <u>Evid C §800</u> | |
| Calls for improper <i>expert</i> conclusion | <u>Evid C §801</u> | See <u>Trial Objections, chap 16</u> . |
| 10. LEADING | <u>Evid C §§764, 767</u> | See <u>Trial Objections, chap 13</u> . |
| Generally objection appropriate when deponent is <i>not</i> an adverse party or identified with an adverse party, <i>i.e.</i> , a related witness (<u>Evid C §776</u>). | | |

Inappropriate Objection to Form of *Question*:

| Objection | Statutory Authority | Other Authority |
|------------------|----------------------------|--|
| LEADING | <u>Evid C §§764, 767</u> | See <u>Trial Objections, chap 13</u> . |

When question is:

- Designed to establish preliminary matters;
- To refresh recollection;
- Intended to aid witness requiring help in testifying, *e.g.*, child, infirm;
- Directed to an expert witness;
- Related solely to identifying exhibits.

Appropriate Objection to Form of Answer:

| Objection | Statutory Authority | Other Authority |
|---------------------------|---------------------|---|
| NONRESPONSIVE ANSWER | None | See <i>In re Rosoto</i> (1974) 10 C3d 939, 949, 112 CR 641. |
| Object and move to strike | | |

OBJECTIONS TO SUBSTANCE OF QUESTION

- Generally considered *not* waived at trial if not raised at the deposition. CCP §2025.460(c).
- When your goal is to preserve testimony, not objecting at the deposition risks your valid objection being overruled at a trial or hearing on a motion for summary judgment or summary adjudication.
- When your goal is to gather information, objecting risks educating opposing counsel.

Appropriate Objections to Substance:

| Objection | Statutory Authority | Other Authority |
|-------------------------|---|---------------------------------------|
| 1. INCOMPETENT WITNESS | <u>Evid C §§701(a)-(b), 704(b)</u> | See <u>Trial Objections, chap 18.</u> |
| 2. INADMISSIBLE OPINION | <u>Evid C §§800-802.</u> See also <u>Evid C §720(a)</u> | See <u>Trial Objections, chap 20.</u> |

Lay witness may not be asked at deposition to recall, from all the facts known to him or her, those that support a given legal conclusion, *e.g.*, "state all facts known to you that support your contention that defendant was negligent." See *Pember v Superior Court* (1967) 66 C2d 601, 604, 58 CR 567 (dictum).

| | | |
|--|-------------------------------|---|
| 3. INSUFFICIENT FOUNDATION | <u>Evid C §§403, 405</u> | See <u>Trial Objections, chap 21.</u> |
| | | <ul style="list-style-type: none">• If deponent is a lay witness, objection may be unnecessary because other testimony may supply foundation.• If you are examining deponent expert and expert's counsel interposes this objection, state on record that counsel is not allowing inquiry into this area.• If this objection is raised to hypothetical question you posed to deponent expert, demand statement of missing elements from counsel if not included in objection. <i>Parlier Fruit Co. v Fireman's Fund Ins. Co.</i> (1957) 151 CA2d 6, 15, 311 P2d 62. See <u>step 32</u>, above.• Object and <i>advise</i> expert not to answer if question relates to materials he or she did not actually consult, consider, or rely on in forming opinion. <u>Evid C §721(b)</u> |
| 4. IMPROPER IMPEACHMENT | <u>Evid C §§780, 785</u> | See <u>Trial Objections, chap 22.</u> |
| 5. IMPROPER REHABILITATION | <u>Evid C §§780, 785</u> | See <u>Trial Objections, chap 23.</u> |
| 6. INADMISSIBLE SECONDARY EVIDENCE | <u>Evid C §§1521-1523</u> | See <u>Jefferson, California Evidence Benchbook, chap 31 (3d ed Cal CEB 1997).</u> |
| 7. INADMISSIBLE PAROL EVIDENCE | <u>CCP §1856; Com C §2202</u> | See <u>Trial Objections, chap 25.</u> |
| 8. CROSS-EXAMINATION EXCEEDS SCOPE OF DIRECT | <u>Evid C §§761, 773</u> | See <u>Trial Objections, chap 26.</u> |
| 9. PRIVILEGES | See <u>Appendix C</u> | |

Inappropriate Objections to Substance (*appropriate at trial, not at deposition*):

| Objection | Statutory Authority | Other Authority |
|--|----------------------------|---|
| 1. IRRELEVANT (see <u>step 36</u> , above) | | See <u>Trial Objections, chap 17</u> . |
| Inappropriate objections on substance | | |
| 2. HEARSAY (see <u>step 36</u> , above) | | See <u>Trial Objections, chap 19</u> . |
| Inappropriate objections on substance | | |
| 3. OFFER TO COMPROMISE | | See <u>Trial Objections §32.2</u> . |
| 4. COMPROMISE PAYMENT | | See <u>Trial Objections §32.3</u> . |
| 5. SUBSEQUENT SAFETY MEASURES | | See <u><i>Ault v International Harvester Co.</i> (1974) 13 C3d 113, 117, 117 CR 812; <i>Bank of the Orient v Superior Court</i> (1977) 67 CA3d 588, 599, 136 CR 741; <u>Trial Objections §32.5</u>.</u> |
| 6. LIABILITY INSURANCE | | See <u><i>Laddon v Superior Court</i> (1959) 167 CA2d 391, 395, 334 P2d 638; <u>Trial Objections §32.6</u>.</u> |
| 7. SIMILAR ACTS OR OCCURRENCES | <u>Evid C §1101(b)</u> | See <u>Trial Objections §32.7</u> . |

Source: Civil Litigation/Handling Depositions (Action Guide)/APPENDIX C Claims of Privilege

APPENDIX C
Claims of Privilege

Many experienced practitioners believe that the claim of privilege is the only appropriate objection to a deposition question's substance (for apparent agreement with this view, see Davies v Superior Court (1984) 36 C3d 291, 305 n3, 204 CR 154; Smith v Superior Court (1961) 189 CA2d 6, 12, 11 CR 165), and raising any other objection risks educating examining counsel.

Note that a question such as "Did you discuss x with your attorney?" apparently seeks foundational information but may also require disclosure of a privileged communication. Also, if the only source of a witness's knowledge is a communication from an attorney, answering a question that calls for the information will invade the attorney-client privilege. Here, a thorough discussion between deponent and counsel before the deposition should allow for the recognition of such questions and timely objection.

In general, if a question violates a privilege, you should *either*:

- Object and *instruct* deponent not to answer:
- If deponent is your client;
- If deponent is an employee of your client, has a connection with the litigation other than as a percipient witness, and the "dominant purpose" of the communication in question is privileged (D. I. Chadbourne, Inc. v Superior Court (1964) 60 C2d 723, 737, 36 CR 468; Alpha Beta Co. v Superior Court (1984) 157 CA3d 818, 827, 203 CR 752);
- If deponent is member of unincorporated organization, *e.g.*, labor union, social club, or fraternal society that consulted or retained you as counsel (Benge v Superior Court (1982) 131 CA3d 336, 345, 182 CR 275).

NOTE: Be prepared to provide examining counsel with preliminary facts establishing when, where, and to whom communication is made. See Evid C §400; Coy v Superior Court (1962) 58 C2d 210, 219, 23 CR 393.

- Object and *advise* deponent not to answer:
- If deponent is not your client or an employee of your client to whom the privilege attaches (see step 1, above);
- If deponent is a former employee, the question relates to a privileged matter, and deponent indicates a willingness to answer; adjourn deposition and seek protective order under CCP §2025.420.

| Privilege | Statutory Authority | Other Authority |
|--|---------------------------------|---|
| 1. LAWYER-CLIENT | <u>Evid C §§950-962</u> | See <u>California Civil Discovery Practice §§3.4-3.51</u> (4th ed Cal CEB 2006); <u>California Trial Objections, chap 34</u> (Cal CEB Annual). |
| 2. WORK PRODUCT RULE | <u>CCP §§2018.010-2018.080</u> | See, <i>e.g.</i> , <u>Trade Ctr. Props. v Superior Court</u> (1960) 185 CA2d 409, 411, 8 CR 345. See <u>Civil Discovery §§3.52-3.68</u> ; <u>Trial Objections, chap 35</u> ; <u>Jefferson, California Evidence Benchbook §§41.1-41.7A</u> (3d ed Cal CEB 1997). |
| 3. PHYSICIAN-PATIENT | <u>Evid C §§990-1007</u> | See <u>Trial Objections, chap 36</u> . |
| 4. PSYCHOTHERAPIST-PATIENT | <u>Evid C §§1010-1027</u> | See <u>Trial Objections, chap 37</u> . |
| 5. SEXUAL ASSAULT VICTIM-COUNSELOR | <u>Evid C §§1035-1036.2</u> | See <u>Trial Objections, chap 38</u> . |
| 6. CONFIDENTIAL MARITAL COMMUNICATIONS | <u>Evid C §980</u> | See <u>Trial Objections, chap 40</u> . |
| 7. NOT TO TESTIFY AGAINST SPOUSE | <u>Evid C §§970-973</u> | See <u>Trial Objections, chap 41</u> . |
| 8. OFFICIAL INFORMATION | <u>Evid C §§1040, 1042-1045</u> | See <u>Trial Objections, chap 43</u> . |
| 9. TRADE SECRETS | <u>Evid C §§1060-1063</u> | See <u>Trial Objections, chap 45</u> . |

After you object, be prepared to state on record why claiming privilege will not "tend to conceal fraud or

otherwise work injustice." Evid C §1060; see *Willson v Superior Court* (1924) 66 CA 275, 278, 225 P 881.

| | | |
|--|---------------------------|---|
| 10. AGAINST SELF-INCRIMINATION | <u>Evid C §§404, 940</u> | US Const amends V, XIV; Cal Const art I, §15; see <u>Trial Objections, chap 46</u> . |
| 11. VOTER | <u>Evid C §1050</u> | See <u>Trial Objections, chap 49</u> . |
| 12. PENITENT-CLERGY | <u>Evid C §§1030-1034</u> | See <u>Trial Objections, chaps 50-51</u> . |
| 13. DISCLOSURE OF FEDERAL AND STATE INCOME TAX RETURNS | | See, e.g., <i>Schnabel v Superior Court</i> (1993) 5 C4th 704, 21 CR2d 200; see <u>Trial Objections §§43.7, 43.12</u> . |
| 14. INVASION OF PRIVACY (generally relates to claimed invasion of financial or sexual privacy) | | See, e.g., <i>Schnabel v Superior Court</i> (1993) 5 C4th 704, 21 CR2d 200; <i>Britt v Superior Court</i> (1978) 20 C3d 844, 864, 143 CR 695. |

APPENDIX D

Checklist for Video Recording Deposition

This checklist is designed for the video deposition of an important witness whose recorded testimony you intend to use at trial.

Consider conducting a *sample recording session* to prepare witness *and* to enable you to evaluate witness's demeanor, and see whether he or she appears credible on video. Consider arguments that sample recording is discoverable (it should be protected work product).

1. Review video-recording requirements of CCP §§2025.010-2025.620, especially CCP §§2025.330-2025.340 (see steps 3, 13, 15, 32, and 39-40, above) and inform court reporter that deposition will be recorded by video technology.

2. Select qualified videographer.

- a. Obtain referrals from other lawyers.
- b. Check references, experience, and whether operator is authorized to administer oath.
- c. Review sample video deposition and sample edited recording.
- d. Verify quality of equipment, *e.g.*:
 - (1) Separate microphones with audio mixer for each attorney and witness;
 - (2) Time-date generator that times deposition to the second so that you can locate objectionable portions;
 - (3) Ability to supply extra lighting; and
 - (4) Color monitors.

3. Consider location of deposition. The environment and decor of the deposition location should duplicate that of the courtroom, as far as possible.

- a. Is location "suitably large, adequately lighted, and reasonably quiet," as required by CCP §2025.340(a)?
- b. Will special lighting be needed?
- c. Is it reasonably private?
- d. Are there sufficient power outlets, circuit breakers, and fuse boxes?
- e. Is it away from street noise, fans, vents, and office noises or conversations?
- f. Look through the camera lens. Is the background cluttered? Consider impact on jury of, *e.g.*, pictures, diplomas, that may be displayed.
- g. Are there uncovered windows that will cause glare?
- h. Clear away from table white Styrofoam cups or objects that may cause glare.

4. Prepare yourself for the deposition.

- a. Draft questions as though you were preparing for trial, so that you can proceed quickly and smoothly. Even 20 seconds of dead time on recording can seem an eternity to viewers.
- b. Prepare exhibits:
 - (1) Avoid small sketches and photos. Consider using an easel to which you can clip the exhibit for a good image.
 - (2) Mark exhibits before the deposition to avoid dead time.

5. Prepare the witness for the deposition.

- a. A conservative approach to the appearance of the witness is best, *e.g.*:
 - (1) Advise witness to avoid extremes in color and style of clothing. If possible, stay within medium earth tones (beige, tan, blues, lavender). Avoid white or yellow.
 - (2) Avoid flashy jewelry.
 - (3) Remember, the view of witness will be tabletop to top of head. Jurors will be alert to attempts to influence them by, *e.g.*, a doctor's white coat or a uniform.
- b. Witness should speak in natural tone, with same demeanor as though testifying in court, *e.g.*, witness should not smoke or chew gum, and, if possible, should avoid distracting mannerisms.
- c. To avoid shuffling papers, you may want to ask expert witness to be prepared to testify about standard matters, *e.g.*, education and number of hours spent on the case, without having to consult notes or papers.
- d. If deposition takes more than a day, consider advising deponent to wear same clothing each day (and sit in same spot) to avoid having to explain at trial why witness appears in different clothing on edited recording.

6. Talk with the operator and conduct the deposition.

- a. Find out when operator will arrive to set up equipment (usually an hour or so before time deposition will begin) and make room available.
- b. Take time before the deposition to talk with the operator. Discuss:
 - (1) Placement of witness, counsel, and reporter. Witness usually sits at end of table, facing you, the questioner. Camera is usually behind you, somewhat to your right.
 - (2) Opening identification procedure.
 - (3) How picture should be framed. Usual procedure is a medium shot (a standard news shot) of the witness. Operator will not zoom in for close-up, because to do so would emphasize a response and introduce camera bias. The operator's goal is to use neutral shots.
 - (4) How objections will be handled. You may wish to stipulate with counsel to reserve, until trial, objections other than those about form of question or responsiveness, so that flow of testimony is unbroken. Usual practice is to keep recording running during objections, unless discussion is off the record. If stenographer is recording, camera is usually running.
 - (5) Procedure for going off the record.
 - (6) How you can briefly consult with co-counsel or others during deposition without being heard or going off the record; *e.g.*, operator may, at your signal, turn down microphone.
 - (7) How operator will signal when camera is on and when recording will end; be aware if fade time used.
 - (8) How exhibits will be video recorded, *e.g.*, where they will be placed, whether camera will zoom in on exhibits such as X-rays.
 - (9) Use of microphones.
 - (10) Additional monitor for counsel's viewing (optional); multiple cameras (still rare).
 - (11) How operator will alert counsel to audio/video problems.
 - (12) Custody and duplication of master video recordings. Operator keeps the master and usually gives the duplicate original to counsel within a few days. If you wish, at additional cost, operator may be able to run dual masters and give you a recording every day. If desired, ask if you can review the recording immediately after the deposition concludes for the day.
- c. If you have any questions about ground rules for video recording, ask the operator. You will then be able to present to the witness and opposing counsel how the recording will be conducted.

- d. Instruct staff to reroute calls or visits from area where deposition is being video recorded to avoid distractions and interruptions.
- e. Remain silent at the end of the deposition until the operator tells you that the camera is off (to avoid recording, *e.g.*, informal conversation, laughing).

7. After deposition.

- a. Review the recording. Does your witness appear credible?
- b. When the transcript is ready, mark the sections (page numbers and lines) that you intend to use and give to opposing counsel. Correlate to time as shown on the screen.
- c. Counsel may object to certain portions and/or designate sections for opposing party's use.
- d. Agree with counsel about which segments will be used. If some segments are still in dispute, the court will rule on any disagreements before the recording is shown to the jury. Be sure to leave plenty of time before trial to have objections ruled on and any edited version of recording prepared. See CCP §2025.340(m).
- e. Give the transcript to the operator in sufficient time to create an edited master, *i.e.*, a rerecording of the original master without the objectionable or unusable portions. The original remains with the operator.
- f. Review the recording. Editing the recording may produce an effect that is different from playing the original. Jurors may be suspicious of obvious editing.

8. Playback in court.

- a. Although editing the recording is the usual way to eliminate objectionable material, the operator may also turn off the audio so that the jury cannot hear the objectionable material, or may fast forward through the deleted segment.
- b. In determining number and placement of monitors for playback, consider the size of the courtroom and number of jurors and attorneys who will be present.
- c. Consider making a small monitor available for the judge.

Source: Civil Litigation/Handling Depositions (Action Guide)/APPENDIX E Checklist for Deposition by Written Questions

APPENDIX E

Checklist for Deposition by Written Questions

Except as modified by CCP §§2028.010-2028.080, provisions of CCP §§2025.010-2027.010 govern deposition by written questions. CCP §2028.010. For discussion of how to conduct deposition by written questions, see California Civil Discovery Practice §§5.160-5.199 (4th ed Cal CEB 2006).

1. Prepare for deposition.

- a. Draft direct questions. See Civil Discovery §5.168.
- b. Draft brief deposition admonitions to deponent about nature of deposition under oath. See Civil Discovery §§5.168, 6.46-6.47.
- c. Select the deposition officer. See Civil Discovery §5.169.
- d. Prepare notice of deposition for party deponent (CCP §2028.020; see Civil Discovery §5.170):
 - (1) Include the name or descriptive title and address of the deposition officer.
 - (2) You need *not* include the time, date, and place of the deposition; deposition officer will determine these later.
- e. Prepare deposition subpoena for nonparty deponent. See step 16, above.

2. Serve notice and direct questions on parties.

- a. Serve notice of deposition *and* direct questions on all other parties who have appeared in the action. CCP §§2025.220-2025.240, 2028.020-2028.030.
- b. Include intention to audio or video record deposition and any materials to be produced. CCP §2025.220(a)(5). See Civil Discovery §§5.75-5.84, 5.193.

3. Exchange objections and cross-questions.

- a. Expect objections within **15 days**. CCP §§2028.040-2028.050. See Civil Discovery §5.176.
- b. Consider possibility of motion for protective order, including an order that the deposition proceed orally, or by both oral and written examination. CCP §2028.070. See CCP §2025.420; Civil Discovery §§5.179-5.182.
- c. Expect cross-questions within **30 days**. CCP §2028.030(b).
- d. Object to cross-questions within **15 days**. CCP §§2028.040-2028.050.
- e. Serve redirect questions within **15 days**. CCP §2028.030(c).
- f. Expect motion to sustain objection or move to overrule objection. CCP §2028.050. See Civil Discovery §§5.177-5.178.

4. Serve notice on deposition officer and subpoena on nonparty deponent.

- a. Serve notice and complete set of all questions, including cross, redirect, and recross, on deposition officer after exchange of all questions and cross-questions. CCP §2028.080. See Civil Discovery §5.187.
- b. Serve subpoena on nonparty witness:
 - (1) Serve after deposition officer has received copy of all questions and determined date, time, and place of deposition. CCP §§2028.080, 2020.010-2020.030, 2020.210, 2025.220.
 - (2) Serve in sufficient time to give witness reasonable opportunity to locate documents to be produced and travel to the place of the deposition. CCP §2020.220(a).
 - (3) Include intention to audio or video record deposition and materials to be produced. CCP §2020.510.

- (4) Pay witness fee, or wait until witness attends deposition. CCP §2020.230. See Civil Discovery §5.171.
- c. Serve *direct* questions on witness, if desired, but do *not* serve cross, redirect, or recross question. See Civil Discovery §5.172.

5. At deposition.

- a. Expect counsel for deponent to make objections, if present; but if deponent is a party, such objections should probably already have been made. CCP §§2025.460, 2028.030-2028.040. See Civil Discovery §5.190.
- b. Deposition officer puts deponent under oath, asks each question, records testimony, and handles transcript as though for an oral deposition.

6. After deposition.

- a. Review the transcript to be sure that your questions were answered.
- b. Within **60 days** after transcription, move for an order to compel. CCP §2025.480(b).
- c. Anticipate possible motion to sustain objections to deposition. CCP §2028.050.
- d. If desired, use deposition in trial as though it were an oral deposition. CCP §2025.620.

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Source: Civil Litigation/Handling Depositions (Action Guide)/APPENDIX F Checklist and Calendar of Dates and Deadlines When Handling Depositions

APPENDIX F

Checklist and Calendar of Dates and Deadlines When Handling Depositions

| WHAT TO SERVE | DEADLINE | SEE (references are to steps of this Action Guide) | YOUR CLIENT'S DEADLINE |
|--|---|---|---------------------------|
| For attendance and/or production of documents of party: | | | |
| Notice of deposition. | <i>Plaintiff</i> may serve no earlier than 20 days after service of summons, or appearance by any defendant, whichever occurs first, <i>unless</i> obtaining court order (<u>CCP §2025.210(b)</u>), or stipulation (<u>CCP §2016.030</u>). | <u>Step 8</u> | _____ |
| | <i>Defendant</i> may serve any time after being served with summons and complaint or after appearing in action, whichever comes first. <u>CCP §2025.210(a)</u> . | <u>Step 8</u> | _____ |
| | Serve notice at least 10 days before deposition, plus extra days if served by mail, fax, or overnight delivery, on all parties who have appeared in action. <u>CCP §§1013, 2016.050, 2025.270(a)</u> . | <u>Steps 8, 17</u> | _____ |
| | Serve no later than 40th day before initial trial date, plus extra days if served by mail, fax, or overnight delivery. <u>CCP §§1013, 2024.010-2024.020, 2025.270(a)</u> . (Deposition must begin at least 30 days before initial trial date, and you must give 10 days' notice.) | <u>Step 8</u> | _____ |
| For attendance and/or production of documents of nonparty: | | | |
| Serve deposition subpoena for appearance or for appearance <i>and</i> production of documents, things. | Within sufficient time to allow witness "reasonable opportunity" to locate and produce documents and to travel to place of deposition. <u>CCP §§1013, 2020.220(a)</u> . | <u>Steps 8, 17</u> | _____ |
| Serve deposition subpoena for production of business records for copying only. | At least 15 days before production date, as long as this is at least 20 days after issuance of subpoena, plus extra days if served by mail. <u>CCP §§1013, 2020.410(c)</u> . | <u>Step 8</u> | _____ |
| For consumer's records and attendance of witness at deposition: | | | |
| Serve <i>consumer</i> with deposition subpoena and notice to consumer. <u>CCP §1985.3(b)</u> . | At least 20 days before production date specified in subpoena, if personally served (you must serve subpoena on witness at least 15 days before production, <i>and</i> you must serve consumer at least 5 days before serving witness, so serve consumer 20 days before production, plus extra days if served by mail). <u>CCP §§1013, 1985.3(b)(2)-(3), 2020.410</u> . | <u>Step 21</u> | _____ |

| | | | |
|---|--|----------------|-------|
| Serve <i>witness</i> with deposition subpoena plus <i>either</i> proof of service of notice to consumer <i>or</i> consumer's written authorization to release records. <u>CCP §§1985.3(c), 2020(d)(2), (e).</u> | At least 15 days before production date specified in subpoena, plus extra days if served by mail, as long as date is at least 20 days after subpoena issued, <i>and</i> in sufficient time to provide witness reasonable time to travel to place of deposition. <u>CCP §§1013, 1985.3(d), 2020.410, 2020.220-2020.230, 2025.270.</u> | <u>Step 22</u> | _____ |
|---|--|----------------|-------|

| | | | |
|--|---|---------------|-------|
| Serve <i>all parties</i> with notice of deposition. <u>CCP §2025(f).</u> | At least 10 days before deposition, plus extra days if served by mail, and set deposition date at least 20 days after subpoena issued. <u>CCP §§1013, 2025.270.</u> | <u>Step 8</u> | _____ |
|--|---|---------------|-------|

For consumer's records that are business records for copying only:

| | | | |
|---|---|----------------|-------|
| Serve <i>consumer</i> with deposition subpoena and notice to consumer. <u>CCP §1985.3(b).</u> | At least 20 days before production date, if personally served (you must serve subpoena on witness at least 15 days before production, and you must serve consumer at least 5 days before serving witness, so serve consumer 20 days before production, plus extra days if served by mail). <u>CCP §§1013, 1985.3(b)(3), 2020.410.</u> | <u>Step 21</u> | _____ |
|---|---|----------------|-------|

| | | | |
|---|---|----------------|-------|
| Serve <i>witness</i> with subpoena plus <i>either</i> proof of service of notice to consumer <i>or</i> consumer's written release. <u>CCP §§1985.3(c), 2020(d)(2), (e).</u> | In sufficient time to allow witness reasonable time to locate and produce records or copies as provided in <u>CCP §2020.410</u> , <i>i.e.</i> , at least 15 days before date specified for production, as long as this is 20 days after issuance, plus extra days if served by mail. <u>CCP §1013, 1985.3(d).</u> | <u>Step 22</u> | _____ |
|---|---|----------------|-------|

| | | | |
|---|---|----------------|-------|
| Serve all parties with copy of subpoena, instead of notice of deposition. | At least 10 days before production date, plus extra days if served by mail. <u>CCP §§1013, 2025.220, 2025.240, 2025.270.</u> | <u>Step 17</u> | _____ |
|---|---|----------------|-------|

For employee's records and attendance of witness at deposition:

| | | | |
|--|--|----------------|-------|
| Serve <i>employee</i> with deposition subpoena, affidavit (if any), notice to employee, and proof of service. <u>CCP §1985.6(b).</u> | At least 20 days before production date specified in subpoena, if personally served (you must serve subpoena on witness at least 15 days before production, and you must serve consumer at least 5 days before serving witness, so serve consumer 20 days before production, plus extra days if serving by mail). <u>CCP §§1013, 1985.6(b)(2)-(3), 2020.410.</u> | <u>Step 25</u> | _____ |
|--|--|----------------|-------|

| | | | |
|--|---|----------------|-------|
| Serve <i>witness</i> with deposition subpoena plus <i>either</i> proof of service of subpoena, affidavit (if any), and notice to employee, <i>or</i> employee's written authorization to release records. <u>CCP §§1985.6(c), 2020(d)(2), (e).</u> | At least 15 days before production date specified in subpoena, plus extra days if served by mail, as long as date is at least 20 days after subpoena issued, <i>and</i> in sufficient time to provide witness reasonable time to travel to place of deposition. <u>CCP §§1013, 1985.6(d), 2020.410-2020.430, 2020.220-2020.230.</u> | <u>Step 26</u> | _____ |
|--|---|----------------|-------|

| | | | |
|--|---|---------------|-------|
| Serve <i>all parties</i> with notice of deposition. <u>CCP §2025(f).</u> | At least 10 days before deposition, plus extra days if served by mail. <u>CCP §1013, 2025.270.</u> | <u>Step 8</u> | _____ |
|--|---|---------------|-------|

For employee's records that are business records for copying only:

Serve *employee* with deposition subpoena, affidavit (if any), notice to employee, and proof of service. CCP §1985.6(b). At least **20 days** before production date, if personally served (you must serve subpoena on witness at least **15 days** before production; you must serve consumer at least **5 days** before serving witness, so serve consumer **20 days** before production). CCP §§1013, 1985.6(b)(3), 2020.410. Step 25

Serve *witness* with subpoena plus *either* proof of service of subpoena, affidavit (if any), and notice to consumer, *or* consumer's written release. CCP §§1985.6(c), 2020.410, 2020.510. In sufficient time to allow witness reasonable time to locate and produce records as provided in CCP §2020.410, *i.e.*, at least **15 days** before date specified for production, as long as this is at least **20 days** after subpoena issued, plus extra days if served by mail. CCP §§1013, 1985.6(d). Step 26

Serve all parties with copy of subpoena, instead of notice of deposition. At least **10 days** before production date, plus extra days if served by mail. CCP §§1013, 2025.240-2025.270. Step 17

Source: Civil Litigation/Handling Depositions (Action Guide)/APPENDIX G Sample Deposition Notice

APPENDIX G
Sample Deposition Notice

Charles Wilson

State Bar No. 53210

458 Fifth Street

Fillmore, CA 94899

(415) 654-0098

Attorney for Plaintiff Mary Johnston

SUPERIOR COURT OF CALIFORNIA
COUNTY OF PROVINCE

Mary Johnston,

)

No. 392085

)

Plaintiff

)

NOTICE OF DEPOSITION AND
PRODUCTION OF DOCUMENTS
(CCP §§2025.220-2025.230)

)

vs.

)

)

John Switzer,

)

)

Defendant

)

)

NOTICE IS HEREBY GIVEN that on February 27, 2007, at 10:00 a.m., at 458 Fifth Street, Fillmore, CA, plaintiff Mary Johnston will take the deposition of Harry Winston, 3392 Seventh Avenue, Fillmore, CA (415) 889-0832.

The deponent is required to bring to the deposition the following materials: All documents relating to the loan agreement between the deponent and John Switzer dated September 14, 2006, including, but not limited to, the agreement itself; canceled checks, receipts, or other documentary evidence of payments made; records kept of payments made; and correspondence regarding the agreement.

Date: February 1, 2007

__[Signature]__

CHARLES WILSON

Attorney for Plaintiff

Mary Johnston

APPENDIX H
Deposition Subpoena for Personal Appearance



SUBP-015

| | |
|--|--|
| ATTORNEY OR PARTY WITHOUT ATTORNEY (<i>Name, State Bar number, and address</i>) TELEPHONE NO.: _____ FAX NO. (<i>Optional</i>): _____ E-MAIL ADDRESS (<i>Optional</i>): _____ ATTORNEY FOR (<i>Name</i>): _____ | FOR COURT USE ONLY CASE NUMBER: _____ |
| SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME: | |
| PLAINTIFF/ PETITIONER: DEFENDANT/ RESPONDENT: | |
| DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE | |

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (*name, address, and telephone number of deponent, if known*):

1. YOU ARE ORDERED TO APPEAR IN PERSON TO TESTIFY AS A WITNESS in this action at the following date, time, and place:

| | | |
|-------|-------|----------|
| Date: | Time: | Address: |
|-------|-------|----------|

- a. As a deponent who is not a natural person, you are ordered to designate one or more persons to testify on your behalf as to the matters described in item 2. (Code Civ. Proc., § 2025.230.)
 - b. This deposition will be recorded stenographically through the instant visual display of testimony and by audiotape videotape.
 - c. This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025.620(d).
2. If the witness is a representative of a business or other entity, the matters upon which the witness is to be examined are as follows:

3. *At the deposition, you will be asked questions under oath. Questions and answers are recorded stenographically at the deposition; later they are transcribed for possible use at trial. You may read the written record and change any incorrect answers before you sign the deposition. You are entitled to receive witness fees and mileage actually traveled both ways. The money must be paid, at the option of the party giving notice of the deposition, either with service of this subpoena or at the time of the deposition. Unless the court orders or you agree otherwise, if you are being deposed as an individual, the deposition must take place within 75 miles of your residence or within 150 miles of your residence if the deposition will be taken within the county of the court where the action is pending. The location of the deposition for all deponents is governed by Code of Civil Procedure section 2025.250.*

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF \$500 AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued:

_____ (TYPE OR PRINT NAME)

_____ (SIGNATURE OF PERSON ISSUING SUBPOENA)

_____ (TITLE)

(Proof of service on reverse)

Page 1 of 2

| | |
|-----------------------|--------------|
| PLAINTIFF/PETITIONER: | CASE NUMBER: |
| DEFENDANT/RESPONDENT: | |

PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE

1. I served this Deposition Subpoena for Personal Appearance by personally delivering a copy to the person served as follows:

- a. Person served (name):
- b. Address where served:
- c. Date of delivery:
- d. Time of delivery:
- e. Witness fees and mileage both ways (check one):
 - (1) were paid. Amount: \$ _____
 - (2) were not paid.
 - (3) were tendered to the witness's public entity employer as required by Government Code section 68097.2. The amount tendered was (specify): \$ _____
- f. Fee for service: \$ _____

2. I received this subpoena for service on (date):

- 3. Person serving:
 - a. Not a registered California process server
 - b. California sheriff or marshal
 - c. Registered California process server
 - d. Employee or independent contractor of a registered California process server
 - e. Exempt from registration under Business and Professions Code section 22350(b)
 - f. Registered professional photocopier
 - g. Exempt from registration under Business and Professions Code section 22451
 - h. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

(For California sheriff or marshal use only) I certify that the foregoing is true and correct.

Date:

Date:

(SIGNATURE)

(SIGNATURE)

Source: Civil Litigation/Handling Depositions (Action Guide)/APPENDIX I Deposition Subpoena for Personal Appearance and Production of Documents and Things

APPENDIX I
Deposition Subpoena for Personal Appearance and Production of Documents and Things



SUBP-020

| | |
|---|---|
| ATTORNEY OR PARTY WITHOUT ATTORNEY (<i>Name, State Bar number, and address</i>): TELEPHONE NO.: _____ FAX NO. (<i>Optional</i>): _____ E-MAIL ADDRESS (<i>Optional</i>): _____ ATTORNEY FOR (<i>Name</i>): _____ | FOR COURT USE ONLY CASE NUMBER: _____ |
| SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME: | |
| PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: | |
| DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS | |

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (*name, address, and telephone number of deponent, if known*):

1. YOU ARE ORDERED TO APPEAR IN PERSON TO TESTIFY AS A WITNESS in this action at the following date, time, and place:

| | | |
|-------|-------|----------|
| Date: | Time: | Address: |
|-------|-------|----------|

- a. As a deponent who is not a natural person, you are ordered to designate one or more persons to testify on your behalf as to the matters described in item 4. (Code Civ. Proc., § 2025.230.)
 - b. You are ordered to produce the documents and things described in item 3.
 - c. This deposition will be recorded stenographically through the instant visual display of testimony and by audiotape videotape.
 - d. This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025.620(d).
2. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized by Evidence Code sections 1560(b), 1561, and 1562 will not be deemed sufficient compliance with this subpoena.
3. The documents and things to be produced and any testing or sampling being sought are described as follows:

Continued on Attachment 3.

4. If the witness is a representative of a business or other entity, the matters upon which the witness is to be examined are described as follows:

Continued on Attachment 4.

5. **IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.**

6. *At the deposition, you will be asked questions under oath. Questions and answers are recorded stenographically at the deposition; later they are transcribed for possible use at trial. You may read the written record and change any incorrect answers before you sign the deposition. You are entitled to receive witness fees and mileage actually traveled both ways. The money must be paid, at the option of the party giving notice of the deposition, either with service of this subpoena or at the time of the deposition. Unless the court orders or you agree otherwise, if you are being deposed as an individual, the deposition must take place within 75 miles of your residence or within 150 miles of your residence if the deposition will be taken within the county of the court where the action is pending. The location of the deposition for all deponents is governed by Code of Civil Procedure section 2025.250.*

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF \$500 AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued: _____

 (SIGNATURE OF PERSON ISSUING SUBPOENA)



| | |
|-----------------------|--------------|
| PLAINTIFF/PETITIONER: | CASE NUMBER: |
| DEFENDANT/RESPONDENT: | |

PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS

1. I served this *Deposition Subpoena for Personal Appearance and Production of Documents and Things* by personally delivering a copy to the person served as follows:

- a. Person served (*name*):
- b. Address where served:
- c. Date of delivery:
- d. Time of delivery:
- e. Witness fees and mileage both ways (*check one*):
 - (1) were paid. Amount \$ _____
 - (2) were not paid.
 - (3) were tendered to the witness's public entity employer as required by Government Code section 68097.2. The amount tendered was (*specify*): \$ _____
- f. Fee for service: \$ _____

2. I received this subpoena for service on (*date*):

- 3. Person serving:
 - a. Not a registered California process server
 - b. California sheriff or marshal
 - c. Registered California process server
 - d. Employee or independent contractor of a registered California process server
 - e. Exempt from registration under Business and Professions Code section 22350(b)
 - f. Registered professional photocopier
 - g. Exempt from registration under Business and Professions Code section 22451
 - h. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

(For California sheriff or marshal use only)
I certify that the foregoing is true and correct.

Date:

Date:

(SIGNATURE)

(SIGNATURE)

APPENDIX J
Deposition Subpoena for Production of Business Records



SUBP-010

| | |
|---|--|
| ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): TELEPHONE NO.: _____ FAX NO. (Optional): _____ E-MAIL ADDRESS (Optional): _____ ATTORNEY FOR (Name): _____ | FOR COURT USE ONLY CASE NUMBER: _____ |
| SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____ STREET ADDRESS: _____ MAILING ADDRESS: _____ CITY AND ZIP CODE: _____ BRANCH NAME: _____ | |
| PLAINTIFF/PETITIONER: _____ DEFENDANT/RESPONDENT: _____ | |
| DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS | |

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name, address, and telephone number of deponent, if known):

1. YOU ARE ORDERED TO PRODUCE THE BUSINESS RECORDS described in item 3, as follows:

| | |
|---|------------------|
| To (name of deposition officer): _____ | |
| On (date): _____ | At (time): _____ |
| Location (address): _____ | |
| Do not release the requested records to the deposition officer prior to the date and time stated above. | |

- a. by delivering a true, legible, and durable copy of the business records described in item 3, enclosed in a sealed inner wrapper with the title and number of the action, name of witness, and date of subpoena clearly written on it. The inner wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and mailed to the deposition officer at the address in item 1.
 - b. by delivering a true, legible, and durable copy of the business records described in item 3 to the deposition officer at the witness's address, on receipt of payment in cash or by check of the reasonable costs of preparing the copy, as determined under Evidence Code section 1563(b).
 - c. by making the original business records described in item 3 available for inspection at your business address by the attorney's representative and permitting copying at your business address under reasonable conditions during normal business hours.
2. The records are to be produced by the date and time shown in item 1 (but not sooner than 20 days after the issuance of the deposition subpoena, or 15 days after service, whichever date is later). Reasonable costs of locating records, making them available or copying them, and postage, if any, are recoverable as set forth in Evidence Code section 1563(b). The records shall be accompanied by an affidavit of the custodian or other qualified witness pursuant to Evidence Code section 1561.
3. The records to be produced are described as follows:

Continued on Attachment 3.

4. IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued: _____

(TYPE OR PRINT NAME)



(SIGNATURE OF PERSON ISSUING SUBPOENA)

(Proof of service on reverse)

(TITLE)

Page 1 of 2

| | |
|-----------------------|--------------|
| PLAINTIFF/PETITIONER: | CASE NUMBER: |
| DEFENDANT/RESPONDENT: | |

PROOF OF SERVICE OF DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS

1. I served this *Deposition Subpoena for Production of Business Records* by personally delivering a copy to the person served as follows:

a. Person served (*name*):

b. Address where served:

c. Date of delivery:

d. Time of delivery:

e. (1) Witness fees were paid.

Amount: \$ _____

(2) Copying fees were paid.

Amount: \$ _____

f. Fee for service: \$ _____

2. I received this subpoena for service on (*date*):

3. Person serving:

- a. Not a registered California process server.
- b. California sheriff or marshal.
- c. Registered California process server.
- d. Employee or independent contractor of a registered California process server.
- e. Exempt from registration under Business and Professions Code section 22350(b).
- f. Registered professional photocopier.
- g. Exempt from registration under Business and Professions Code section 22451.
- h. Name, address, telephone number, and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(SIGNATURE)

(For California sheriff or marshal use only)
I certify that the foregoing is true and correct.

Date:

(SIGNATURE)

APPENDIX K
Notice to Consumer or Employee and Objection



SUBP-025

Form with fields for: ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address); TELEPHONE NO.; FAX NO. (Optional); E-MAIL ADDRESS (Optional); ATTORNEY FOR (Name); SUPERIOR COURT OF CALIFORNIA, COUNTY OF; STREET ADDRESS; MAILING ADDRESS; CITY AND ZIP CODE; BRANCH NAME; PLAINTIFF/ PETITIONER; DEFENDANT/ RESPONDENT; CASE NUMBER; NOTICE TO CONSUMER OR EMPLOYEE AND OBJECTION (Code Civ. Proc., §§ 1985.3,1985.6)

NOTICE TO CONSUMER OR EMPLOYEE

TO (name):

- 1. PLEASE TAKE NOTICE THAT REQUESTING PARTY (name): SEEKS YOUR RECORDS FOR EXAMINATION by the parties to this action on (specify date): The records are described in the subpoena directed to witness (specify name and address of person or entity from whom records are sought): A copy of the subpoena is attached.
2. IF YOU OBJECT to the production of these records, YOU MUST DO ONE OF THE FOLLOWING BEFORE THE DATE SPECIFIED. IN ITEM a. OR b. BELOW:
a. If you are a party to the above-entitled action, you must file a motion pursuant to Code of Civil Procedure section 1987.1 to quash or modify the subpoena and give notice of that motion to the witness and the deposition officer named in the subpoena at least five days before the date set for production of the records.
b. If you are not a party to this action, you must serve on the requesting party and on the witness, before the date set for production of the records, a written objection that states the specific grounds on which production of such records should be prohibited. You may use the form below to object and state the grounds for your objection. You must complete the Proof of Service on the reverse side indicating whether you personally served or mailed the objection. The objection should not be filed with the court. WARNING: IF YOUR OBJECTION IS NOT RECEIVED BEFORE THE DATE SPECIFIED IN ITEM 1, YOUR RECORDS MAY BE PRODUCED AND MAY BE AVAILABLE TO ALL PARTIES.
3. YOU OR YOUR ATTORNEY MAY CONTACT THE UNDERSIGNED to determine whether an agreement can be reached in writing to cancel or limit the scope of the subpoena. If no such agreement is reached, and if you are not otherwise represented by an attorney in this action, YOU SHOULD CONSULT AN ATTORNEY TO ADVISE YOU OF YOUR RIGHTS OF PRIVACY.

Date:

(TYPE OR PRINT NAME) (SIGNATURE OF [] REQUESTING PARTY [] ATTORNEY)

OBJECTION BY NON-PARTY TO PRODUCTION OF RECORDS

- 1. [] I object to the production of all of my records specified in the subpoena.
2. [] I object only to the production of the following specified records:

3. The specific grounds for my objection are as follows:

Date:

(TYPE OR PRINT NAME) (SIGNATURE)

(Proof of service on reverse)



Source: Civil Litigation/Handling Depositions (Action Guide)/TABLE OF STATUTES, REGULATIONS, AND RULES

TABLE OF STATUTES, REGULATIONS, AND RULES

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