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FIVE OF THE MOST ANNOYING OBJECTIONS BY OPPOSING COUNSEL AND THE RULINGS THAT ARE SURE TO FOLLOW

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YOU are a rational person. YOU conduct yourself in a professional manner as an attorney. YOU have a passing familiarity with the California Code of Civil Procedure, Rules of Court, and local Rules of the San Mateo County Consolidated Courts. YOU don't think a "good time" consists of appearing to argue motions to compel or resisting discovery or having opposing counsel in your ear demanding to have it "his way".

Unfortunately, you have run into a lawyer very unlike yourself. Maybe she's a local lawyer, maybe he's from out of the County. In any event, this person is over the top demanding discovery in one or more ways. What's a pro like you to do in order to (a) assert or defend your client's rights in discovery, (b) reconfirm your reputation as a professional, and (c) demonstrate to the offending attorney that "We just don't comport ourselves in that fashion in San Mateo County"?

The following problems are actual events that have occurred in our professional careers and the resulting outcome:

Problem #1: Opposing Counsel refuses to produce his client for deposition because he "Called Dibs First"

The basic rule is that there is no priority of discovery in California state courts. **CCP §2019(c)** The only exception to this rule is that a plaintiff cannot serve a deposition notice until 20-days after the summons and complaint has been served. **CCP §2025(b)(2)** However, upon the showing of good cause, the court may establish the sequence and timing of discovery for the convenience of the parties, witnesses and in the interests of justice. **CCP §2019(c)**

Set opposing counsel straight: If you really want it first, be first -- notice your discovery for the first available date. If it's a deposition, call opposing counsel and tell her: "I'd like to

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take you client's deposition, and the first date available to me for that purpose is August 20. Is that date acceptable to you and your client", or "Can you tell me the first date after that available for you and your client?" By making this inquiry, you've satisfied the meet and confer requirements of the Code of Civil Procedure and the guidelines of professional responsibility (which many counties including Santa Clara highly suggest) which recommend that dates for proceedings such as depositions and hearings be cleared in advance with opposing counsel wherever possible.

In all likelihood the court/commissioner/referee will rule in favor of the attorney who was most reasonable and accommodating. Therefore, make sure that those meet and confer letters pass the Miss Manners test!!

Problem #2: The usual written discovery objections "Vague, ambiguous, overbroad, burdensome, oppressive, not likely to lead to admissible evidence, and I don't like Green Eggs and Ham." (a.k.a. "the junkyard objection" or, for the lawyers with State Bar numbers lower than 60,000: Incompetentirrelevantandimmaterial.")

When addressing objections you must respond to each of them as if they are all valid objections for written discovery.

"Vague and Ambiguous"-- The standard is set forth in ***Deyo v. Kilbourne*** **(1978) 78 CA3d 771, 783**. However, if the interrogatory, request for admission or request for production of documents is found to be vague and/or ambiguous, many courts require that the interrogatory or request be rephrased. See ***Cembrook v. Superior Court*** **(1961) 56 C2d 423, 430** The best way to handle this is to state your objection and then rewrite the interrogatory or request yourself. Such as "Objection on the grounds that the request is vague and ambiguous. Assuming that the requesting party defines "_____" as "_____" then the response is _____"

"Overbroad" -- This is not a valid objection. It is only valid if the interrogatory or request imposes an undue burden or is relevant to the subject matter. See **CCP §2017(a); *Perkins v. Superior Court* (1981) 118 CA3d 761, 764-765; and Durst v. Superior Court (1963) 218 CA2d 460**

"Burdensome and Oppressive" -- The showing required to sustain this objection is that the intent of the party was to create an unreasonable burden, or that burden created does not

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weigh equally with what requesting party is trying to obtain from it.

In situations where opposing counsel has served a slew of discovery such as Form Interrogatories, Special Interrogatories, Requests for Admissions and Requests for Production of Documents, all due at the same time, the answering party's best remedy is to bring a motion for a protective order. In most cases, the court will limit the discovery and/or extend the time for service of the responses.

If a party chooses to rely on just the objection in its response, realize that the standard is set forth in ***Mead Reinsurance Co. v. Superior Court* (1986) CA3d 313**. In that case the objecting party showed that it would take 5 claims adjusters working full time a total of 6 weeks to sort and evaluate 13,000 claim files. Can you meet that burden????

"Not likely to lead to admissible evidence" Irrelevance to the issues of the case is not a valid objection. Irrelevance to the subject matter is a valid objection. See **CCP §2017(a)** If you can think of an item of information if obtained could lead to an item of information that could be admissible then you are there. Now you can't be out in left field, but you can take a fishing trip. ***Greyhound v. Superior Court* (1961) 56C2d 355, 383-385.** Just keep in mind what you are fishing for. ***Calcor Space Facility, Inc. v Superior Court* (1997) 53 CA 4th 216, 224-225**

"I don't like Green Eggs and Ham" -- This objection will always be overruled!!! There is something inherently wrong with counsel if they are not a Dr. Suess fan. Request Judicial Notice.

Problem #3: The Deposition "Objection--Vague, Ambiguous, Lack of Foundation, Assumes Facts not in Evidence, Incomplete Hypothetical and my client needs to talk to me."

Objections-- Objections to the form of a question or privileged information must be stated at the time of the deposition or they are waived. Many objections that are proper for trial are not proper at a deposition. The following are proper and improper objections:

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Proper Objections

a) Ambiguous
See ***Deyo v. Kilbourne*** **(1978) 84 CA3d 771**

b) Calls for contention
See ***Rifkind v. Superior Court*** **(1994) 22 CA4th 1255**

c) Irrelevant to subject matter
See **CCP §2017**

d) Calls for Legal Reasoning
See ***Sav-On Drugs v. Sup. Ct.*** **(1975) 15 C3d 1**

e) Privileged--but must state privilege

f) Invasion of privacy
See **California Constitution Article I, Section 1**

g) Trade Secret
See **CCP §2017**

h) Work Product
See **CCP §2018**

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Improper Objections

a) Answer is known to propounding party
See ***Alpine Mut. Water Co. v. Sup. Ct.*** **(1968) 259 CA2d 45, 54**

b) Argumentative
See **CCP §2017(a)**

c) Asked and answered
See ***Coy v. Sup. Ct.*** **(1962) 58 C2d 210, 218**

d) Assumes facts not in evidence
See ***West Pico Furniture v. Sup. Ct.***
(1961) 56 C2d 407,421

e) Calls for conclusion
See **CCP §2017(a)**

f) Insufficient foundation
See **CCP §2017(a)**

g) Hearsay
See **CCP §2017(a)**

h) Irrelevant to the issues
See **CCP §2017(a)**

I) Calls for a narrative

See **CCP §2017(a)**

j) Calls for an opinion
See **CCP §2017(a)**

k) Oppressive
See ***Coy v. Sup. Ct., Supra at 218***

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When an objection is made, carefully consider the form of the question. Though the deponent may answer the question, the objection may be sustained at trial and you never get the deponents answer before the jury. Another favorite objection by lawyers is "I don't understand the question, therefore, I am instructing the witness not to answer". Judges, court commissioners and discovery referees have mixed rulings on this issue. Some Judges rule that it is only the deponent who needs to understand the question. However, an argument can be made that counsel for the deponent can not properly represent his client if he doesn't understand the question. Since discovery is fact finding, we would suggest that you state your objection, then ask counsel to rephrase the question.

Coaching-- Constant interruption, coaching and non-professional behavior is getting more prevalent. Some lawyers want to break your train of thought, some don't know the applicable rules, some think they need to show their clients that they're awake, and some really would rather not have their clients answer any question without a whole lotta coaching. Whatever the reason, it's wrong!!!

If an attorney defending a deposition engages in objectionable conduct, make a record of it and ask him to "cease and desist." Use the deposition transcript as your meet and confer and remember the "Miss Manners" test as the court is sure to see the transcript. Set opposing counsel straight. If he continues in that manner adjourn the deposition and immediately Seek a protective order (make sure you"ve got a good record).

Your best piece of ammunition is a copy of ***Hall v. Clifton Precision*, 150 F.R.D.525 (E.D.Pa. 1993)**. In this case, beloved by many litigators, the federal district court made several trenchant observations about deposition discovery, and the role of counseling defending a deposition. For example:

"The underlying purpose of a deposition is to find out what a witness saw, heard, or did--what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, [footnote omitted] and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness--not the lawyer--who is the witness."

However, coaching is not prohibited by California statute or case law. Many judges, commissioners and referees will allow a deponent to meet and confer privately with his counsel

as long as it is not excessive or a pattern emerges regarding a certain issue. The deponent should be apprised that he or she will not be given the same opportunity at trial. Usually a deponent will try and proceed without meet and conferring with his counsel as a test run for the real thing.

If any of the tactics above are seen as abusive, a law and motion judge may appoint a discovery referee to sit in on the depositions and rule on the objections. See **CCP §639(e)**.

Problem #4--"My expert has to go last because he won¢t know what to say until he knows what your expert is going to say."

According to CCP Section 2034 (f)(2) the expert declaration requires counsel to state that each expert listed is familiar with the case and is ready to be deposed. This statute was an attempt to guarantee that, when an expert's deposition is taken, the expert is prepared to testify as fully as he or she would be at trial. The way the statute reads, the expert should be ready to testify as to his trial testimony on the day the expert disclosure is served. However, that is not how it happens in real life. Many experts are retained just days and sometimes hours before the disclosure is served and are fed information up to the day of their deposition. If the case is going to become a battle of the experts, and it is important which expert testifies first (or last) then file your motion for protective order to get a deposition schedule. In most cases, the court or a court appointed referee will do the scheduling of the depositions of the experts taking into consideration, counsels' schedule, the experts' schedule, the trial date and the importance of the experts testimony. A common solution is to schedule the experts deposition at the same time or back to back with no break in between and banning each expert from the other's deposition.

Problem #5 --"You can't see mine until I see yours"

As mentioned above, there is no priority in discovery. CCP §2019(c). There also is no statute or case law that lets counsel grant his own protective order because he didn't get his. The Discovery Act was intended to be self executing. That's why there are those pesky rules about response time. Counsel's remedy is to bring a motion to compel and to seek sanctions. Counsel can bring a motion for a protective order and try the argument "he can't get mine until I get his." If counsel really wants want to make this argument, I can only make one suggestion--DUCK!! No judge is going to stay one side's obligations to discovery just because the other side failed to abide by the Code of Civil Procedure, except when it involves experts.

It is really important to look like you have been a good boy or girl and served all your discovery responses in a timely manner. Issue, Evidence and Terminating sanctions are usually granted only when the side requesting the sanction hasn't been playing discovery games.

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