

Unethical Coaching of Non-Party Witnesses: What is Your Recourse?

Jessica Heppenstall, Esq.

A zealous advocate has an ethical duty to prepare their client for deposition. But, how do you handle opposing counsel crossing the line and coaching unrepresented non-party witnesses to refuse to answer questions based on the deponent's right to privacy? The right to privacy is not absolute and must be balanced against other important interests. *Johnson v. Superior Court* (2000) 80 Cal. App. 4th 1050, 1068.

Scenario One:

You notice the deposition of a non-party witness to an automobile accident involving a fatality. You ask the general background questions, "Did you speak with anyone in preparation of your deposition today?" The non-party witness usually responds "no" or "only to schedule the deposition." However, through the course of questioning on the deponent's background, the deponent has witnessed another fatal accident. Upon further questioning, opposing counsel objects on right to privacy and the deponent refuses to answer the questions.

Clearly, this is an indication opposing counsel had somewhat of a substantive conversation with the deponent and neither are fessing up.

Scenario Two:

In the same fatal auto accident, you notice the deposition of a character witness. The deponent again denies substantive conversations with opposing counsel prior to the deposition. Questioning leads into discussions and meetings the deponent had with plaintiff after the accident and before the deposition. Unsurprisingly, the deponent refuses to answer questions over opposing counsel's objections based on right to privacy.

Response:

Generally, witnesses are not permitted to decline to participate in civil discovery, even when the information sought from them is personal or private. *Puerto v. Superior Court* (2008) 158 Cal. App. 4th 1242, 1256-57. As stated above, the right to privacy must be balanced against other important interests. *Johnson v. Superior Court* (2000) 80 Cal. App. 4th 1050, 1068. Those interests include the general public interest in facilitating the ascertainment of truth and obtaining just results in litigation. *Puerto v. Superior Court* (2008) 158 Cal. App. 4th 1242, 1256.

First, consider the information you seek. In scenario one, the deponent has witnessed another fatal auto accident and it is important to know if their testimony is biased or clouded by the prior experience. A line of questioning regarding generalities of the other accident should suffice and still maintain the deponent's privacy. Such as, if there are similarities between the accidents that has affected the deponent's ability to testify regarding the subject accident. With a percipient witness, the most important information is what the deponent witnessed and their credibility in providing the account.

In the second scenario, it is important to know if the plaintiff discussed the accident or the lawsuit as these discussions are not privileged. It certainly raises suspicion the deponent is refusing to respond to seemingly benign questions. Again, ask general questions regarding if the accident or lawsuit was discussed during any conversations or meetings with plaintiff. If the deponent denies the accident or lawsuit was discussed but appears to be lying and holding steadfast to their lies, at a minimum, you gain insight into the deponent's credibility.

Second, ask the deponent why they are refusing to respond. Advise the deponent why the information is relevant. Caution the deponent that refusal to

respond can subject the deponent to a motion to compel, including sanctions.

Third, follow up with direct questions on any communications the deponent had with opposing counsel. The communications are not privileged. Be direct and go through each detail painstakingly. Inquire about the date, time and location of any and all communications.

Finally, give the deponent one last opportunity to respond. Make a clear record asking the deponent the questions again and if they are willing to respond. If not, suspend the deposition and advise the deponent you will seek an order from the court compelling their responses and seeking sanctions.

Takeaway:

Attorneys are not in the business of harassing non-party witnesses, but we have a duty to obtain information necessary to the prosecution or defense of our client's case. If opposing counsel is obstructing the process, the only way to the information is through the witness. Here is a recap of our recommendations for responding to improper coaching of non-party witnesses:

1. Consider the information sought from the witness, including its importance and relevance to your case.
2. Be direct with the deponent and inquire why they are refusing to respond.

3. Advise the deponent of the consequences in failing to respond.
4. Make a clear record should a motion to compel be necessary.
5. Do not let opposing counsel interfere with your ability to effectively represent your client and obtain necessary information.

ABOUT THE AUTHOR

Jessica Heppenstall graduated from California Western School of Law in 2008. Ms. Heppenstall's focus is on general liability and personal injury. Contact her at 858.263.4120 or jheppenstall@tysonmendes.com.