

L.A. COUNTY BAR ASSOCIATION PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

FORMAL ETHICS OPINION NO. 497

MARCH 8, 1999

CONSULTING WITH A CLIENT DURING A DEPOSITION

SUMMARY

In a deposition of a client, an attorney has an ethical duty to assert appropriate objections and to consult with the client during the course of the deposition if such consultation is necessary to fulfill the attorney's duties to competently represent the client. In doing so, the attorney must reconcile the duty to represent the client competently with the duties to act in a manner consistent with the truth, to refrain from suppressing evidence or suborning perjury, and to comply with court orders that limit counsel's conduct in a deposition.

AUTHORITIES CITED

Local Rules 7.12(e), 7.13, Rules for the Superior Court for Los Angeles County
Rule 3-110(A), Rule 3-110(C), Rule 5-200(A)-(B), Rule 5-220, California Rules of Professional Conduct
Business and Professions Code §§ 6067, 6068(a), 6068(d), 6068(o)(3), 6086.7(c), 6088, 6103 and 6106
Code of Civil Procedure § 2025(l)(1)
Penal Code §§127, 132, 134, 135, 182(5)
Allen Jacobs v. The State Bar (1977) 20 Cal. 3d 191, 198
Barnum v. State Bar (1990) 52 Cal. 3d 104 n.5
Annex British Cars, Inc. (Berkhous & Williams) v. Parker-Rhodes (1988) 198 Cal. App.3d 788, 791.
Beverly Union Co. v. Superior Court (1988) 206 Cal. App.3d 40, 43
California Correctional Peace Officers Assn. V. State Personnel Bd. (1995) 10 Cal.4th 1133,1145
Cole v. Antelope Valley Union High School District (1996) 47 Cal. App.4th 1505, 1511-13
Garcia v. McCutchen (1997) 16 Cal. 4th 469, 475-77
Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976)
Hall v. Clifton, 150 F.R.D. 525 (E.D. Penn. 1993)
In re Jones (1971) 5 Cal. 3d 390, 400
Laborers' Intern. Union North America v. El Dorado Landscape Co. (1989) 208 Cal. App. 3d 993, 1008
Pacific Trends Lamp & Lighting Products v. J. White, Inc. (1998) 65 Cal. App. 4th 1131, 1135-36
People v. Johnson (1998) 62 Cal. App.4th 608, 621
Potashnik v. Port City Const. Co., 609 F.2d 1101, 1117-1119 (5th Cir. 1980)
Spitze v. Zolin (1996) 48 Cal. App.4th 1920, 1926-27
Trans-Action Commer. Investors, LTD. v. Firmaterr, Inc. (1997) 60 Cal. App.4th 352, 372.
1 Witkin California Procedure (4th Ed. 1996), *Attorneys*, §§535, 540-541
David H. Taylor, *Rambo as Potted Plan: Local Rulemaking's Preemptive Strike Against Witness-Coaching During Depositions*, 40 Vil. Law. Rev. 1057 (1995)

FACTS AND ISSUES PRESENTED

The Committee has been asked its opinion of the ethical duties of counsel during the deposition of his or her client if: (1) counsel asserts an objection to a question in a manner which directly or indirectly suggests the answer to the question; (2) counsel objects to a question on the grounds that counsel does not understand the question prior to the client indicating a similar lack of understanding; (3) counsel interrupts the deposition while a question is pending to privately consult with the client, and (4) counsel consults privately with the client during breaks or recesses in the deposition. In each case, the inquirer's concern is that counsel is engaging in improper coaching of the client.

Because the inquiry does not recite the specific facts or questions that prompted the inquiry, the Committee's ability to respond directly to each question is likewise limited. In this opinion, therefore, the Committee can only provide general guidelines based on an analysis of attorneys' ethical duties. Similarly, while in some circumstances the questioned conduct may be viewed as rude or uncivil,¹ the scope of this opinion is limited to an analysis of conduct which rises to the level of ethical misconduct.

DISCUSSION

The inquiry is inspired, in part, from the holding of Hall vs. Clifton 150 F.R.D. 525 (E.D. Penn. 1993) in which the Court issued a blanket order prohibiting counsel from privately conferring with their client during breaks or recesses in the client's deposition and further ordered that if such conferences did occur, the opposing counsel could question the client during the deposition regarding the content of those private discussions with counsel. The Committee also notes that a growing number of jurisdictions have adopted rules which limit or prohibit counsel from privately consulting with their client during breaks or recesses in a client's deposition.² These authorities, however, are not controlling in California and do not address the ethical implications of such "no-consultation" rules. Moreover, the Committee generally does not opine on questions of discovery procedure or the application of substantive, rather than ethical, law.³ The Committee, therefore, limits its analysis of the inquiry to the application of ethical duties of California attorneys during a client's deposition.

The California Rules of Professional Conduct do not specifically address the conduct of counsel during a deposition. Nor has any California Appellate opinion been published that specifically addresses the inquirer's questions. Because no specific state rules exist which govern the ethical duties of attorneys in depositions, the inquirer's question must be analyzed in light of the general ethical duties.

California Business & Professions Code, Section 6067 recites the attorney's oath "to faithfully discharge the duties of an attorney at law to the best of his knowledge and ability." Rule 3-110(A) of the California Rules of Professional Conduct provides that a California lawyer shall not intentionally, recklessly or repeatedly fail to perform legal services with competence. The duty of competence requires that when representing a client, a lawyer must act with the "diligence, learning and skill, and mental, emotional and physical ability reasonably necessary for the performance of such service." Rule 3-110(C), Cal. Rules of Prof. Conduct.

The duty to competently advocate a client's interests, however, does have limits. An attorney may not suppress any evidence that the attorney or the attorney's client has a legal obligation to reveal or produce. Rule 5-220, Cal. Rules of Prof. Conduct. Similarly, an attorney has a duty "To employ, for purposes of maintaining the causes confided to him or her, such means as only are consistent with the truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." Bus. & Prof. Code §6068(d); Rule 5-200(A)-(B), Cal. Rules of Prof. Conduct. Likewise, acts involving moral turpitude, dishonesty or corruption and the willful disobedience or violations of a court order all are grounds for disbarment or suspension from the practice of law. Bus. & Prof. Code §§ 6103, 6106. Specifically, offering

false evidence or suborning perjury constitute moral turpitude in violation of an attorney's ethical duties. In re Jones (1971) 5 Cal.3d 390, 400; See also, 1 Witkin California Procedure (4th Ed. 1996), Attorneys, §535 at p. 634. Moreover, an attorney has an obligation not only to protect the client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice. Kirsch v. Duryea (1978) 21 Cal. 3d 303, 309.

In the context of a client's deposition, therefore, the Committee concludes that an attorney has an ethical duty to ensure that the client's interests are protected by asserting appropriate objections, provided those objections are asserted in a manner that is consistent with the truth. On the other hand, ethical duties are violated if counsel's objection to a deposition question is made in a manner that directly or indirectly attempts to conceal, distort, or misrepresent the facts that are required to be disclosed. Bus. & Prof. Code §6068(d); Rule 5-220, Cal. Rules of Prof. Conduct.

Similarly, there is nothing inherently improper with counsel's assertion of an objection that a question is vague when counsel does not understand the question or reasonably believes the client may not understand the question. The duty of competence permits an attorney to seek clarification of a deposition question if the attorney does not understand it. If the attorney does not understand the question, the attorney cannot advise the client with the necessary knowledge to provide effective representation. The assertion of an objection that the question is vague, therefore, is consistent with the attorney's ethical duties even if the client does not express a similar lack of understanding.

Finally, there is no ethical duty to refrain from interrupting a deposition to consult with the client or to consult with a client during breaks or recesses in the client's deposition. Indeed, in some circumstances, an attorney may have an ethical duty to interrupt the deposition to privately consult with the client. For example, if the client is testifying in a manner that the attorney knows is intentionally misleading or false, the attorney has an ethical duty to interrupt the deposition to consult with the client to address the truthfulness of the client's testimony, admonish the client to tell the truth, and explain the adverse consequences of perjury. See, People v. Johnson (1998) 62 Cal. App.4th 608 (When faced with a client who indicates he will commit perjury, an attorney must first try to persuade the client to testify truthfully.) Similarly, if a deposition question calls for the disclosure of privileged information, it may be necessary for the attorney to interrupt the deposition to consult with the client to determine the scope of the privileged testimony and clarify what answer, if any, can be given that would protect the privileged information from inadvertent disclosure. Finally, the attorney's duty to advocate for the best interests of the client may require an attorney to interrupt a deposition to consult with the client if the client is confused or otherwise unable to provide complete and accurate responses to the deposition questions. Such consultation during the deposition allows inaccurate or misleading testimony to be avoided, or at least corrected during the course of the deposition.⁴ Absent such consultation, the client could become the victim of the unscrupulous attorney who asks unfair, inappropriate or "trick" questions that are themselves designed to harass the witness or to obtain distorted and conflicting testimony.

The Committee is cognizant of the concern of those who believe the truth can be concealed, distorted or obstructed by unscrupulous counsel who abuse the right to consult with their client during a deposition. One rationale for an absolute prohibition of private consultations with the client during the course of a deposition is the assumption that counsel will improperly cause the client to change his or her testimony from what it would have been absent counsel's "coaching." The fallacy of that view, however, is the assumption that given the opportunity, every attorney will act unethically and advise the client to lie, distort the truth, or withhold information that should be disclosed. The Committee does not adopt such a cynical view. Indeed, the Committee sees no basis to assume that consultation with a client *before* the deposition commences is always ethical, but that consultation with a client *during* the course of a deposition is always unethical. The ethical duties that are implicated do not depend on when the consultation occurs; but rather, depend on whether the purpose or content of the consultation crosses the line between proper advocacy and suborning perjury or obstructing justice. The Committee notes that there is ample authority that prohibits an attorney from telling a client to lie or to withhold information that should properly be disclosed.⁵

An attorney has an ethical duty "to support the Constitution and laws of the United States and of this state." Bus. & Prof. Code § 6068(a). Similarly, an attorney has an ethical duty to comply with "an order of the court requiring him to do or forbear an act connected with or in the course of his profession." Bus. & Prof. Code § 6103. In the context of this inquiry, therefore, statutory rules of discovery procedure and court orders could create ethical duties that limit an attorney's conduct in a deposition.

Code of Civil Procedure Section 2025(l)(1) provides that "examination and cross-examination of the deponent shall proceed as permitted at trial under the provisions of the Evidence Code." The Evidence Code, however, does not specifically address the conduct that is questioned in the inquiry. The Committee notes that there are "local rules" in Los Angeles County that do address the conduct of counsel in depositions. Specifically, Local Rule 7.12(e) states:

"(7) Counsel defending a deposition should limit objections to those that are well-founded and necessary for the protection of a client's interest. Counsel should bear in mind that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought.

(8) While a question is pending, counsel should not, through objections or otherwise, coach the deponent or suggest answers.

(9) Counsel should not direct a deponent to refuse to answer questions unless they seek privileged information or are manifestly irrelevant or calculated to harass.

(10) Counsel for all parties should refrain from self-serving speeches during depositions.

(11) Counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer."

These rules were originally adopted by the LACBA Litigation Section as "Litigation Guidelines."⁶ After they were published, the Los Angeles Superior Court, by court order, incorporated them into the Superior Court Rules. California courts have recognized that an attorney has a "professional responsibility to be aware of duly adopted local court rules." Laborers' Intern. Union North America v. El Dorado Landscape Co. (1989) 208 Cal. App.3d 993, 1008; Beverly Union Co. v. Superior Court (1988) 206 Cal. App.3d 40, 43; Annex British Cars, Inc. (Berkhus & Williams) v. Parker-Rhodes (1988) 198 Cal. App.3d 788, 791.

While these rules have been adopted as a local court rule, they remain phrased as "guidelines" for deposition conduct. All of the guidelines state that counsel "should" or "should not," rather than "shall" or "must not" engage in various conduct. Whether the words "shall" or "should" in a statute are to be construed as mandatory or directory "depends upon ascertainment of the probable legislative intent." Allen Jacobs v. The State Bar (1977) 20 Cal. 3d 191, 198; Cole v. Antelope Valley Union High School District (1996) 47 Cal. App.4th 1505, 1511-13. The use of words such as "should" or "should not" rather than "shall" or "shall not" are generally interpreted to be directory, not mandatory, where the statute does not provide for a sanction or remedy for a failure to comply with its provision. See, e.g., Bus. & Prof. Code §19; California Correctional Peace Officers Assn. V. State Personnel Bd. (1995) 10 Cal.4th 1133, 1145; Spitze v. Zolin (1996) 48 Cal. App.4th 1920, 1926-27.

The Committee recognizes that there is authority that a court may impose sanctions against an attorney who fails to comply with certain local rules. See, Local Rule 7.12, Preamble and Local Rule 7.13, Los Angeles County Superior Court Rules; see also, Garcia v. McCutchen (1997) 16 Cal. 4th 469, 475-77; but see, Pacific Trends Lamp & Lighting Products v. J. White, Inc. (1998) 65 Cal. App.4th 1131, 1135-36. However, there is nothing in the local rules, or the statutes authorizing the adoption and enforcement of those rules, that suggests that an attorney's failure to follow local rule guidelines for conduct in a deposition was intended by the Legislature or the Court to be a violation of an attorney's ethical duty to "support the law" under

Business & Professions Code, Section 6068(a). In the Committee's view, to the extent the guidelines for deposition conduct contained in the local rules regulate the ethical conduct of attorneys, those guidelines are directory, not mandatory. The failure to follow the guidelines of the local rules regarding the conduct of counsel in a deposition, by itself, will not necessarily be a violation of an attorney's ethical duty to "support the law" under Business & Professions Code, Section 6068(a).

Similarly, although the local rules were adopted by a "court order," in the Committee's view, these local rules are not an "order of the court," the willful violation of which would be an ethical violation under Business & Professions Code, Section 6103. Attorneys disciplined under Section 6103 were found to have violated specific court orders relating to case specific conduct and not general local court rules. See, e.g., Barnum v. State Bar (1990) 52 Cal. 3d 104 n.5; Trans-Action Commer. Investors, LTD. v. Firmaterr, Inc. (1997) 60 Cal. App.4th 352, 372. However, when a Court does issue a specific order that limits counsel's conduct in a deposition, including counsel's ability to consult with a client during the course of a deposition, an attorney is ethically required to comply with that order. Bus. & Prof. Code § 6103.

This opinion is advisory only. The Committee acts only on specific questions *ex parte*, and opinions are based on facts set forth and the questions presented.

¹ The Committee recognizes that Business & Professions Code § 6068(f) states that it is the duty of every attorney to "abstain from all offensive personality." That subsection, however, has been held to be unconstitutionally vague. United States v. Wunsch, 84 F.3d 1110, 1120 (9th Cir. 1996). The Committee, therefore, declines to apply Section 6068(f) to this inquiry.

² See, Local Rule 30.1C, U.S.D.C., Dist. of Colo.; Local Rule 30.1, U.S.D.C., So. Dist. of Ind.; Local Rule 13, U.S.D.C., So. & Eastern Dists. of N.Y.; Local Rule 204(b), U.S.D.C., Mid. Dist. of N.C.; Local Rule 230-5, U.S.D.C., Dist. of Ore.; Local Rule 30, U.S.D.C., Dist. of Wyo.

³ The Committee notes that so-called "no-consultation" rules may impair a client's Constitutional right to the assistance of counsel. See, Geders v. U.S., 425 U.S. 80, 47 L.Ed.2d 592, 96 S.Ct.1330, Potashnik v. Port City Construction Co., 609 F.2d 1101, 1117-1119 (5th Cir. 1980).

⁴ Hall v. Clifton, *supra*, 150 F.R.D. at 527-528. For a comprehensive discussion of "no-consultation" rules see David H. Taylor, *Rambo as a Potted Plant: Local Rule Makings Preemptive Strike Against Witness - Coaching During Depositions*, 40 Vil. Law. Rev. 1057 (1995).

⁵ Rule 5-220, Rules of Professional Conduct (suppression of evidence); Business & Professions Code §§6106 (moral turpitude), 6068(d) (member's oath to act consistent with the truth); Penal Code §§127 (subordination of perjury), 132 (offering forged or altered documents), 134-135 (falsifying, destroying or concealing evidence), 182(5) (conspiracy to obstruct justice); See also 1 Witkin, California Procedure, (4th Ed. 1997), Attorneys, §535, 540-541.

⁶ The United States District Court, Central District of California, has published similar guidelines. Those guidelines, however, were not incorporated into the District Court's local rules and expressly shall not be used as a basis for litigation or for sanctions or penalties.