Depositions

Business/commercial litigation.

1) VIP client is being deposed tomorrow in Texas. Because he is a VIP, two attorneys will be accompanying him. Is it okay for both attorneys to object? While it may not be common, is there any rule or rationale to prohibit it?

2) I've heard of things like opposing counsel proposing to stipulate to the "usual" stipulations or agreements. Any conventional wisdom here? What does that usually include in Texas? Any thoughts? Fine to agree or better not to?

All thoughts welcome. Thanks.

If I was your opposing counsel I would object to having more than one attorney object. At trials/hearings, Judges usually don't permit it.

Samuel Katz, New York

I have never heard anyone say anything like that. But, the court reporter will usually ask is this depo pursuant to the rules? •I always clarify state or federal rules and say yes.

I am sure OC will object to more than one lawyer lodging objections. Depositions should occur as they would at trial. A trial judge would never allow more than one lawyer to make objections.

Tom Crane, Texas

I presume that the depo is taken pursuant to TRCP?

It is not common for two attorneys representing the same witness to make objections. You can sit next to your partner, and he/she can poke you in the leg if he/she thinks you need to object. Under TRCP, you can object only to the form of the question and non-responsiveness of the answer, so there is not much more you can say other "objection, form" (when you are defending) and "objection, non-responsive" (when you are asking the questions).

I would not agree to the "usual stipulations" unless you know what they are. If opposing counsel asks for the first time during the depo, I would ask him/her to define them on the record, as different ppl may have different ideas on what is "usual." I am not sure what "usual stipulations" are under TRCP. With that said, I have agreed to stipulations before, e.g. in a multiple-defendant case (e.g. mass tort case), I have stipulated that

an objection by one defendant is good for all defendants. Otherwise, I
don't agree to any stipulation/agreement on the record unless it was
discussed and agreed to beforehand.

Tracia Y. Lee, Texas

Right. And FRCP 30 says "The examination and cross-examination of a
deponent proceed as they would at trial under the Federal Rules of
Evidence, except Rules 103 and 615." If you can't do it at trial, you
can't do it during a deposition. But they might get around this in a
multiple-party case by stating, for instance, that one lawyer
represents the company and the other is there on behalf of the
witness.

As for your second question, others here have noted that you should
not just blindly agree to the "usual" stipulations. You should ask
what they are. Better yet, just say no.

Tony LaCroix, Missouri

I recently saw an article in a magazine for California lawyers (I don’t now remember which one, but you might be able to find it if you search) on the issue of the "usual stipulations. •

In essence, the article said that agreeing to the usual stipulations • is ambigu
may differ from what you consider usual), so the parties should specifically spell out what they are stipulating to.

The article also noted that, in California, the practices of court reporters in northern parts of the state are different from those in the southern parts. I have no idea if that type of geographic differentiation might be the case in Texas, but it might be worth knowing that before you stipulate to anything.

Brian H. Cole, California

Usual stipulations in Mass: (1) all objections and motions to strike, except as to form, are reserved for trial; (2) the witness has 30 days to read and sign the deposition transcript before it is deemed accurate; (3) waive notarization of witness' signature on the transcript.

Irrespective as to what is usual, the attorney taking the deposition should describe what those stipulations are for the record at the commencement of the deposition.

Brian J. Hughes, Massachusetts

Interesting to read the discussion about this. In Vermont we have a rule of civil procedure that expressly provides that "[a] witness shall not be examined by more than one attorney on a side; nor shall more than one attorney on a side be heard on questions of evidence. Attorneys shall stand when examining witnesses or addressing the court." V.R.C.P. 43(g).

L. Maxwell Taylor, Vermont

You received some good answers on question 1, but I thought it worthwhile to elaborate a little.

As has been said, most lawyers would agree having 2 lawyers for the same party objecting to testimony is improper; most judges wouldn't allow it at a trial. So you certainly can object to the practice if it happens.

But you can't really stop it if they insist. They'll continue to state their objections, and the reporter will continue to write them down. I suppose you could say that you are only going to acknowledge lawyer 1, and not pay attention to anything lawyer 2 says, but how likely is it that the judge, if there ever is a dispute about the propriety of a particular question, is going to agree with you? Can you afford, in questioning, not to pay attention to what lawyer 2 says, or will you have to give some thought to his objections in the event the judge does later on?

If the deposition proceeds with minimal interruptions, who really cares who is objecting?

The main point of a deposition is to get the information and evidence you need. Getting as close as you can to that goal most efficiently is what you want to do. If fighting about a particular rule gets you closer to the goal, then fight. If it doesn't, then forget about it, or state an objection on the record and move on. If you feel that it is necessary to engage in a "who's tougher" or "who's smarter" kind of argument at the outset (sometimes it is), then fight the fight, but make sure you end up being the tougher/smarter one, or else you've probably killed your chance of doing much at the deposition. And if it's a VIP, you might never get another chance.

Patrick W. Begos, Connecticut

I am with Patrick on this one. Practicality goes a very long way into making things work. Fighting for your rights does not always mean that a judge will uphold you, or even if the judge does say you are right that the judge will not think that you were a pain for bringing it up in the first place. Since judges seem to have memories, I really try to work these things out with my own common sense first.

Many years ago I was approached by OC on a case to ask if I would allow her to let her new associate take the lead in defending her client's deposition, however she wanted to be sure she could still object even if the associate did not. Since she asked, and did not just assume she could do it, I had no problem allowing this. I even made the offer that she could allow the associate to conduct the deposition of my client, if she wanted to do so, and I would not object if she threw in some of her own questions. Teaching and training are something that we should encourage; I believe it helps cut down on the Rambo tactics that such an associate might try on their own thinking that was the way to do things.

Good luck,

Frank J. Kautz, II, Massachusetts

Texas Rule of Civil Procedure No. 199.5(e) limits objections to objection, leading objection, form • or objection, non responsive. o, If you state you objections should be pretty simple. In my depose, they are usually pretty basic.

Tom Crane

Thanks, and well said, Frank.

2 reasonable lawyers can get a lot accomplished with much less effort and aggravation than 2 sticklers for rules.
Of course, knowing when to draw the line on reasonableness is part of the trick

Patrick W. Begos

Do attorneys stand during the depositions then?

Phil A. Taylor, Massachusetts

Thanks, Thomas. I forgot to mention the leading objection, since it is rarely used. But, yes, it is available under TRCP. So, Arshil, you can make only three types of objections. Make your objection and then stop. Don't explain your objection. If OC asks what your objection is, you need to tell him/her. Otherwise, just make your objection and stop. If you explain without any "challenge" from OC, you may waive your objection.

Tracia Y. Lee

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1. Unlikely that more than one lawyer can object. Court would not allow and deposing lawyer does not have to put up with it. Assign roles for the deposition.

2. Never agree to stipulations where uncertainty exists on scope. I will agree to take depositions by the rules of civil procedure only.

Darrell G. Stewart, Texas

#2 Most attorneys agree to "usual stipulations" to avoid looking like they
don't know what they are doing.

There are two easy ways you can avoid this without looking
"unknowledgable". When the court reporter asks, "Usual stipulations?" look
at opposing counsel and say, "Is that okay with you?" If they say. "Yes,"
then ask OC, "What are the 'usual stipulations'?" Then you can agree or
disagree to each stipulation.
Or, you can just say to the court reporter to put the the "usual
stipulations" on the record and then concur or not with each one.

Because I like my clients to "read and sign", I usually mention that and
then ask, "What are the other 'usual stipulations'?" This puts everyone on
equal footing.

Kindly,
Jimmy Mac
James M. McMullan, Alabama

Some years ago I had this with a newbie lawyer. It was his depo, so he asked if the usual stips were OK.
When I asked what they were. He starts naming them off, and when got to waive objections until time of
trial I stopped him. "Counsel, this is a post-judgment depo." Kinda stopped him right there.
Tom Simchak, Texas

My preference is to always give opposing counsel the impression that I
do not know what I'm doing. It provides the benefit of always being
underestimated. It also provides the benefit of not having to worry
about how you look, which is quite liberating.

Tony LaCroix