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Person-Most-Qualified depositions

TAKING THE PMQ DEPOSITION AND USING IT EFFECTIVELY AT TRIAL

In nearly every instance where your client is suing an entity, you are going to have to take the deposition of the entity's representative. These depositions are useful, not just for the information you develop, but also because you are taking the deposition of the entity itself, as if it were an individual. Thus, the deposition will be admissible at trial as to the entity, just as the deposition of an individual would be admissible. These are commonly known as Person-Most-Knowledgeable "PMK" depositions.

These depositions generally come into play whenever your client is suing a corporate defendant, a partnership, governmental agency, etc. As plaintiffs' attorneys, however, it is important to note that the Legislature has designed this procedure somewhat to the benefit of entity defendants. This is because the Code of Civil Procedure does not actually use the word, "knowledgeable."

Code of Civil Procedure section 2025.230 states:

> If the deponent named is not a natural person, the deposition notice shall describe with reasonable particularity the matters on which examination is requested. In that event, *the deponent shall designate and produce at the deposition those of its officers, directors, managing agents, employees, or agents who are* most qualified *to testify on its behalf as to those matters to the extent of any information known or reasonably available to the deponent.*

In other words, the Code of Civil Procedure permits an entity defendant to designate an individual of its choice and "qualify" (i.e., educate them if necessary) that individual as to whatever the particular subject matter is at issue; even if there is another individual at the entity who may technically have more "knowledge" about the particular subject.

Therefore, when conducting a Person-Most-Qualified or "PMQ" deposition, one of the most important things to establish at the deposition is whether the person the entity defendant is presenting has been "qualified" as to the particular subject matter, or whether there is any other person (or multiple persons) at the entity whose primary responsibility is to deal with the particular area of inquiry, and who may actually have more personal knowledge.

Fortunately, if you discover that the corporation has hidden the individual who has the most knowledge of a particular subject matter (e.g., because the individual doesn't present well, has provided conflicting testimony in past litigation, etc.), you are not precluded from taking that other individual's deposition as well. Indeed, this is often helpful because in any instance where you can obtain conflicting deposition testimony from multiple corporate defendants, it can prove invaluable at trial.

Procedure

Taking a corporate defendant PMQ deposition is subject to the same general rules that apply to all depositions in California, (e.g., at the outset of litigation, the plaintiff must wait 20 days to serve a deposition notice, measured from the date of the service of the summons, or the appearance of *any* defendant in the action [Code Civ. Proc., § 2025.210]).

Furthermore, the same general rules concerning formatting of the deposition notice, statement of address, methods of service, notice and use of videotaped deposition testimony at trial all apply. Additionally, as with individuals, if the entity is not a party to the action, a subpoena will need to be issued to the entity itself (as opposed to the individual person who will be presented for the deposition). However, unlike typical deposition notices of individuals, the deposition notice (or in the case of a non-party, the subpoena) also must describe "with *reasonable particularity* the matters on which examination is requested." (Code Civ. Proc., § 2025.230, emphasis added.)

Forgetting to identify the topics of the PMQ deposition in the notice or subpoena obviates any duty on the part of the entity to produce the most "qualified" individual for the deposition. However, assuming the correct procedure is followed and the topics are described with "reasonable particularity," the entity has a legal duty to designate and produce the officers, directors, managing agents or employees who are "most qualified" to testify on its behalf. (Code Civ. Proc., § 2025.230.)

Further, the individual(s) designated by the entity must testify "to the extent of any information known *or reasonably available* to the [entity/deponent]." (Code Civ. Proc., § 2025.230, emphasis added.) That means that even if the deponent presented by the entity doesn't have personal knowledge of the subject matter of the deposition, he or she has an affirmative duty to take reasonable efforts to discover the information. [Practice Pointer: When deposing an entity representative who claims not to know certain information on a topic that he or she has been designated on, ask the deponent to describe in detail all efforts undertaken by the deponent to ascertain the information. Inadequate effort by the deponent may subject the entity to sanctions.]

Just as with individuals, documents may also be requested as part of a PMQ deposition notice (and often this is one of the most important features of a PMQ deposition). When such a request for documents is made, the witness or someone in authority "is expected to make an inquiry of everyone who might be holding responsive documents or everyone who knows where such documents might be held." (*Maldonado v. Superior Court (ICG Telecom Group., Inc.)* (2002) 94 Cal.App.4th 1390, 1396.) (Again, when taking the deposition of an entity PMQ where a request for documents has been made, a detailed inquiry of the deponent as to what he or she did to identify and locate documents

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responsive to the production request must be made as to each category of documents.)

The reason a PMQ deponent is required to make such an inquiry with regard to the location and/or possession of documents is to eliminate the problem of trying to find out who in the entity hierarchy has the information the examiner is seeking. (*LAOSD Asbestos Cases* (2023) 87 Cal.App.5th 939, 948.) Under former law, the entity was required only to designate "one or more" officers or employees to testify on its behalf. This permitted considerable "buck-passing" and "I don't know" answers at deposition. (*Maldonado*, *supra* at 1395.)

The ultimate result is that if the subject matter of the questioning is clearly stated, the burden is on the entity, not the examiner, to produce the right witnesses. And if the particular officer or employee designated lacks personal knowledge of all the information sought, he or she must find out from those who do. (*LAOSD*, *supra* at 185-186.)

Trial strategies

Remember, depositions are not just about finding out information. Depositions allow you to evaluate the witnesses and pin down their stories; but when you are taking a deposition, you should always be thinking how you might use it at trial.

Two areas where I often see attorneys overplay their hand are with the use of soundbites, and when the attorney is in possession of evidence that can prove a witness is lying.

What I mean by soundbites, is that when you get a good statement that really helps your case, move on. So often when a defendant says something that is very damning to the defense or is great for your case, attorneys will get excited, realizing that they have just obtained a great admission or statement for use at trial. This happened to me when I was deposing a well-known defense doctor regarding my client's pre-existing wrist injury that had healed with a scaphoid nonunion. The defense doctor said, "It was a good thing that your client was evaluated." To which I replied, "So doctor, just to clarify, your testimony is that this car accident was a good thing for my client?" To which the doctor said, "Yes, absolutely."

In situations like these, there is often a strong temptation to follow up. Resist the urge. If you get a great statement, that you know will play great at trial, leave it alone. Don't beat a dead horse, because more often than not, the witness will realize what they said and then backtrack. Don't give them the opportunity. With regard to the statement above, I played it over and over during the trial, and the jurors told me after the trial how disgusted they were by the doctor.

The other situation I often see is where an attorney knows a witness is lying, and they can prove it (usually with some sort of document). While it is true that sometimes you just want to settle a case, so you want the other side to know how strong your hand is – you may run the risk of losing valuable ammunition if you end up in trial. When I depose witnesses and I know they're lying and that I have concrete evidence to prove it, I let them dig their own grave. There is nothing better than having a defense witness lie at deposition, having the witness repeat the lie at trial, and then bringing out a document or other evidence that establishes the deceit in front of the jury. You get to point out that they lied under oath, not once, but twice.

These principles also apply in the PMQ deposition setting. As mentioned earlier, taking the PMQ deposition of an entity (e.g., a corporation) is putting a face to the name of the corporation (i.e., you are personifying the corporation). [Practice Pointer: Before questioning any defendant at trial, but especially a corporate representative, ask the Court to allow you to question the witness pursuant to Evidence Code section 776 (Hostile Witness), which permits you to do your direct as if you were on cross-examination, with leading questions.]

In that last trial that I did, as soon as I got the corporate PMQ on the witness stand, I said, "Mr. [X] you were designated as the person most qualified for [Corporation,] right? So, you are [Corporation] as you sit here today, correct?"

Try to have the defendant PMQ admit that if their employees did (insert act or omission), that it would constitute a violation of their own policies and procedures. Make the PMQ take positions on safety, known hazards, steps to mitigate risk, etc.; and reach out to your fellow CAALA members to see if they have other PMQ deposition transcripts for the same entity. It is terrific when you can exploit different PMQs for the same entity testifying inconsistently in different cases.

Lastly, do not forget to serve a Code of Civil Procedure section 1987 notice to appear at trial for the defendant's PMQ. [Practice Pointer: You can include a request for documents, so always include a request for sub rosa – this is a great way to get surveillance footage that was conducted *after* the discovery cut-off.] Do not make it generic, include the individual's name who was produced as the PMQ. Follow these steps, and you will be sure to get the most out of the defendant entity's PMQ depositions.

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