

Breaks During Deposition Before Answering Pending Question (California)

Sezzers,

How do you guys and gals deal with a situation in a deposition where the deponent's lawyer asks for a break before a pending question is answered?

I suspect opposing counsel is coaching his client during the break so that the deponent can answer the pending question a certain way.

My jurisdiction is in California, there doesn't seem to be much case law (that I can quickly find) that touches on this subject.

Thanks,

It is not allowed in our jurisdiction. breaks are between answers and if it would happen you would 1st object and if it happened again, I would have the judge on the phone issuing a protective order against it.

Erin M. Schmidt, Ohio

I note it on the record but I don't think there is much more you can do about it. You could break, move for an order appointing a discovery referee or such, but I don't think you will get very far with that.

Roger Rosen, California

You ask the deponent if he/she discussed the question with counsel during the break.

Walter D. James III, Texas

Such actions are prohibited in Maryland, but very difficult to enforce. I give the instruction against at the start.

However, if you suspect it is a problem, there is nothing that prohibits you from going back to the question later and testing deponent's memory. Coached answers usually only last in the memory for a short time. Ask the question again, and if OC asks for a break again before the answer is given, you will have a pretty good circumstantial case that coaching is taking place.

Matthew S. Johnston, Maryland

Keep the camera rolling during the break, tell the reporter not to go off the record, then announce the time both at the start of the break and the end of the break. That whole break thing won't play well to a jury.

Eugene Lee, California

Yeah, and that's not necessarily a bad technique in general. I know it's a lot easier to go in with your prepared depo questions; you know you got your 10 areas you're asking about and each area has 30 questions or whatever, and you go thru them sequentially, you ask about subject A first, exhaust that, B, exhaust that, etc. But sometimes when deponent is slippery it can be useful to jump around, ask half the questions of subject A, move to subject B, ask a couple more about A, move to C, ask a couple more about A; and then maybe a couple more about B, then a few more about C; it is very disconcerting for the deponent. It really throws them off their stride, particularly if they're trying to keep their story straight.

Ronald Jones, Florida

You lay out in the ground rules that a pending question will be answered before a break is taken. If they break anyway, I always ask the witness what the lawyer told him. That which is said during the break is not covered by attorney/client privilege

Robert "Robby" W. Hughes, Jr., Georgia

The instruction I lay out at the beginning is we can take a break whenever you want except that if a question is pending you need to answer the question before break. Then if the witness changes his/her answer, after the break you can ask why etc and have fun probing...

It won't work so well if you have aggressive Rambo on the other side, in which case, there are two options i have used, one is to suspend the depo pending a ruling from the court to establish the ground rule as a discovery order, or if your jurisdiction allows you to call the chambers of the presiding judge, duty judge or magistrate to explain the problem and get a discovery ruling right then and there.

Eugene W. Policastri, Maryland

What's the difference between a "break" and discussing with your lawyer?

Paul Gieri

How is it that what the witness said to his lawyer during the break is not protected by the attorney-client privilege????????????????

Roger Rosen

I was wondering the same thing.

Tina Willis, Florida

I always tell the deponent that if at any time s/he wants to take a break, just let me know, but that if there is a question pending, that s/he will answer the question on the table before taking the break. The deponent has always told me that the request is fair and she will abide by it. The lawyer is not involved in agreeing to the request.

Robert "Robby" W. Hughes, Jr.

It is much akin to sequestered. Once the witness takes the witness stand (begins answering questions in a deposition), the time for coaching is over. You are free to find out what was said to a sequestered witness, and by whom, if the sequestration rule is violated. I have done in several trials when opposing counsel, during a break, spoke to upcoming witnesses about the testimony being given in the courtroom.

Robert "Robby" W. Hughes, Jr.

I tell opposing counsel "you cannot do that at trial when your client is on the stand so what makes you think you are allowed to do that in deposition?" Though I rarely have had to litigate such conduct, maybe twice in my 36 + year career, in my experience the judges are of the same view as mine. If the coaching persists and especially if there is a lot of obvious story-changing after coaching going on I make a clear record and the stop and start times, ask the witness what was discussed and why the witness could not provide that response before the break, etc.

PS if you can afford to video the deposition that usually helps a lot with such conduct by opposing counsel and with a resistant or sarcastic witness. But it costs around \$1500 per day to \$2000, here in CA, to have a videographer

Michael L. Boli, California

I'm not so sure. This article discusses the issue, including sequestration, and other possible rules that might prohibit a lawyer from communicating with their client during deposition or trial testimony. The upshot is that judges can control this behavior, but must issue an order, and there is no specific rule prohibiting the conduct.

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Tina Willis

