

Legislation Report

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

REPORT NO. 47

May 21, 2001

S. 3536-A

By: Senator Volker
Senate Committee: Codes
Effective Date: First day of January next
succeeding the date on
which it shall have become
a law

AN ACT to amend the civil practice law and rules, in relation to conduct of depositions

LAW AND SECTIONS REFERRED TO: CPLR 3113 and 3115

REPORT PREPARED BY THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES (#16)

THIS BILL IS APPROVED

This bill would revise rules 3113 and 3115 of the Civil Practice Law and Rules in order to correct the practice of some opposing counsel who interfere with the taking of deposition testimony by, *inter alia*, "speaking objections" (designed to coach the witness how to answer a question), inappropriate directions to the witness not to answer questions (especially when the question is pertinent), unnecessary evidentiary objections (which had been waived by stipulation), and mid-deposition conferences with the witness. The bill has been proposed by the OCA Advisory Committee on Civil Practice Law and Rules. Because the bill is carefully balanced and strikes at practices which all too often enable an attorney (who is "defending" the deposition) to obstruct the proceedings and prevent the examining party from obtaining useful information, the committee recommends the measure.

CPLR 3113 and 3115, as now written, offer little guidance with respect to the conduct of a deposition. CPLR 3113(b) provides that the deposition shall be taken continuously and without unreasonable interruption; CPLR 3113(c) directs that depositions "shall proceed as permitted in the trial of actions in open court," except that cross-examination "need not be limited to subject matter of the examination in chief." CPLR 3115(b) instructs that "errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form

of the questions or answers, in the oath or affirmation, or in the conduct of persons, and errors of any kind which might be obviated or removed if objection were promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition." CPLR 3115(a) instructs that any other objections are preserved until the time of trial, and most attorneys explicitly stipulate that all objections except as to form are preserved as to the time of trial. Notwithstanding this, many non-form objections are raised during depositions and often opposing counsel direct witnesses not to answer a question, even though nothing in the CPLR explicitly authorizes these tactics; nor does the CPLR provide any remedy for such, although at one time, the examining party had the right to adjourn the deposition and seek a court order; a provision that was eliminated with the 1993 revision of CPLR 3124 (See Laws of 1993 Ch. 98 10).

The bill would create a deposition practice that is closer to the federal rules (see Fed. R. Civ. 30[d][1]) and the law of neighboring states (see e.g. N.J. Court Rule 4:14-3), and would make the taking of depositions proceed much more like the taking of trial testimony. [Although, curiously, the bill deletes from CPLR 3113 the language, "examination and cross-examination of deponents shall proceed as permitted in the trial of actions in open court," it appears that the elimination is simply to spell out the procedures in more detail, which is accomplished, under the bill, in CPLR 3115.]

Under proposed CPLR 3115, other than as expressly permitted, "persons in attendance shall not make statements or comments that interfere with the questioning "[CPLR 3115 (a)]. From this broad proscription, limited exceptions are carved out. The new rule would bar objections, statements and comments during the course of a deposition, except where the objection would be waived and is one of the circumstances set forth in subdivisions (b)-(d) of the Rule, namely, with respect to errors that can be obviated if immediately made known (such as form objections), an objection to the qualification of the person taking the deposition (usually the reporter), or to competency. The proposed rule requires objections to be "stated succinctly and framed so as not to suggest an answer to the deponent." Only when requested by the examining attorney would the objecting attorney be required to state the alleged defect in the question. Otherwise, comments and elucidation would be improper.

Also, despite the objection, the amendment requires the witness to answer, if possible, unless a refusal to answer is warranted under the limited grounds found in proposed CPLR 3115(e). By so requiring the witness to answer over an objection on the grounds of form, error or irregularity, the examining attorney must take care that the transcript does not contain inaccurate or misleading testimony which, unless corrected during the deposition or through some other discovery tool, will be unusable for any purpose.

CPLR 3115(e) would control when a witness could refuse to answer and codifies the attorney's right to direct a witness not to answer a question, and, by implication (although not expressly stated), provides additional grounds for objection. A witness may refuse to answer only when refusal is necessary to preserve a privilege or a right of confidentiality [(e)(I)], to

enforce a limitation set forth by the court [(e)(II)] or "when the question is plainly improper and would, if answered, cause significant prejudice to any person" [(e)(III)]. Although CPLR 3115(e)(III) is somewhat ambiguous, it presumably allows attorneys enough flexibility to protect against embarrassing questions that are not pertinent to the suit and questions that are so poorly framed (or craftily worded) to be patently unfair to the witness, as well as other abusive tactics directed at witnesses or other persons subject to the ability of the witness or directing attorney to persuade the court that the question is "plainly improper" and would cause "significant prejudice" if answered. Note that the phrasing here is broad enough to interdict prejudice "to any *person*," which would include the witness, a party to the suit, or even a non-party. Presumably, the provision will be construed in accordance with the CPLR 3103 standard for a protective order which is designed "to prevent unreasonably annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

The new rule would greatly reduce attorney-witness consultations during the deposition and is one of most pointed changes in practice. Subdivision (f) would bar such consultation, except where the parties consent or their communication concerns a claim of privilege, a right of confidentiality, or a limitation imposed by a court order. The reason for such communication would then have to be stated on the record. The proposed rule does not bar communications during breaks and appears to address only the time when the witness is present before the examining attorney. Such a provision is well-measured and gives the participants some pragmatic flexibility, more so than New Jersey's Rule on this subject, which bars all communications (even during breaks) once the deposition has started. See N.J. Court Rule 4:14-3(f)

As revised, CPLR 3113(c) would permit any other party attending a deposition to examine the witness on any matters in issue, notwithstanding such party's failure to "cross-notice" the deposition. Once the witness has been subpoenaed to the deposition, he or she may become the witness of any other party attending. Further, the proposal deletes the "cross-examination" nomenclature and retains original language which sustains the right of any party to elicit deposition testimony on matters outside the scope of any other party's examination.

One significant difference between state and federal practice is the availability under federal practice of a telephonic ruling during a deposition by either the judge or a magistrate. The legislation does not, regrettably, encourage such rulings, which, if available, would eliminate much of the abuse on both sides. New Jersey, for example, explicitly authorizes telephonic applications to the Court. See N.J. Court Rule 4:14-4.

The legislation is also lacking in measures to eliminate abuse by the examining party, which often occurs in state practice: for example, such tactics as ambiguous and confusing questions designed to elicit an answer that can be twisted out of context; long and extended examination into matters that are completely collateral to the litigation; by prolix depositions that continue for days and days and are calculated to wear down witnesses; and by the frequent last minute adjournment of depositions by the party seeking to take them. Indeed, some on the

committee believe that the proposal goes too far in favor of the questioner, leaves the deponent and counsel almost at the mercy of the adversary, and would make it very difficult to deal with lengthy and over-extended depositions. They believe that the bill should include better protections for the deponent.

On balance, however, the proposal should improve current deposition practice and reduce some of the gamesmanship that often takes place during depositions.

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