

new!

Solving deposition problems

- **Verbal and non-verbal coaching of the witness**
- **Colloquies and stipulations among counsel**
- **Instructing the witness not to answer**
- **Disruptive or inappropriate objections**
- **Production of privileged or confidential documents**

Perhaps because depositions are as close to a trial as many cases will get, deposition disputes have grown more heated and difficult to resolve.

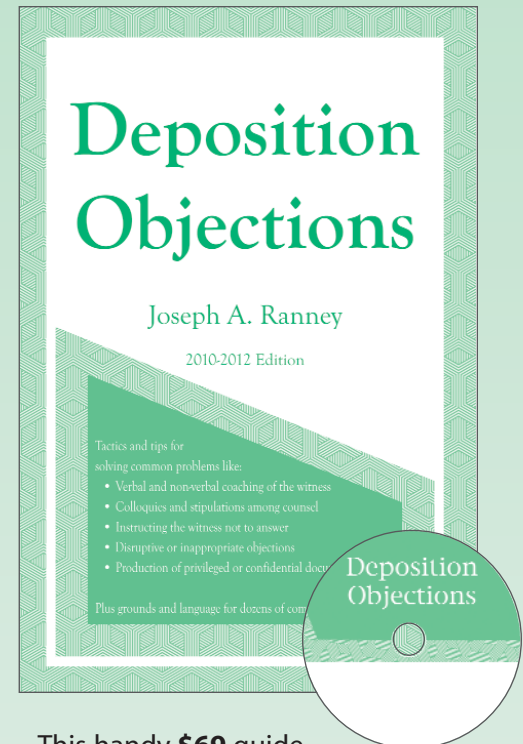
Here is a portable and affordable volume that provides practical guidance for resolving many of the more contentious disputes. Joseph A. Ranney's *Deposition Objections* offers help with these issues and objections:

Procedural issues

- 13 examples of when it is and when it is not appropriate to ask the court for a supervisory ruling. §15:03
- When to adjourn and move for a protective order. §15:04
- How to lay the groundwork for a supervisory ruling. §15:05
- When is it okay to instruct a witness not to answer? §16:01 et seq
- Techniques for stopping bad attorney behavior at depositions. §16:03
- Checklist of steps to take before adjourning a deposition. Form 16-2
- When are you on safe ground when making a speaking objection? §17:27
- Guidelines for responding to a speaking objection. §17:40
- Sample language for putting stipulations on the record. Form 18-2

Grounds for objecting

- The limits of the attorney-client privilege, §4:01-05, with checklist of when it does and does not apply, Form 4-1
- What are the limits of work-product immunity? §§5:01-04
- How to resolve work-product disputes during a deposition. §5:25
- Issues in formulating protective orders and common solutions. §6:10
- Quick-reference chart showing the confines of professional privilege. Form 9-1
- What is the scope of the privacy privilege? §§10:01-03
- Making the balancing calculation in legal process privilege objections, with examples, §11:44. Summary checklist, Form 11-1
- The 5 situations when a relevance objection is proper. §12:02
- Methods for resolving relevance disputes. §§12:20-21
- Handling attorneys and witnesses who play the dictionary game. §13:05
- How many times should you allow a question to be asked? §13:11
- Preparing witnesses for loaded questions. §13:23
- Should you instruct the witness not to answer a legal theory disclosure question? §14:11
- Are evidence identification questions allowed? What to consider when making the judgment call. §§14:30-31
- The line between permissible and impermissible position disclosure questions. §14:40



This handy **\$69** guide provides the grounds and language for these objections:

Privilege and confidentiality

- Attorney-client privilege
- Attorney work-product privilege
- Proprietary and confidential information
- Witness self-incrimination
- Family communications privileges
- Privileges for communications with professionals
- Privacy privilege
- Legal process privilege

Other grounds

- Relevance: overbroad and burdensome questions
- Vagueness, ambiguity, repetition, and lack of foundation
- Legal conclusions

§17:40 What Should You Do When Another Attorney Makes a Speaking Objection?

If you are the deposing attorney, there is no simple rule for how to respond to a speaking objection. Your response will depend on such factors as: (1) whether the objection is made in order to clean up a problem with your question or to suggest an answer to the witness; (2) whether the objection is an isolated one or part of a continuing series of speaking objections; and (3) whether the question at issue is peripheral or central to resolution of the issues in the case.

The following guidelines will help you formulate your response:

Purpose of the objection. If you are satisfied that the witness's counsel has made a speaking objection in good faith for some reason other than suggesting an answer to the witness, then either let the objection pass without comment or simply caution the witness's counsel. This is usually the appropriate response to "explanation" objections and "understanding" objections.

Example: In the auto accident case involving Dinah Storm, Adams' attorney asks:

Q How far were you from the intersection when you first saw the red light ahead of you?

STORM'S ATTORNEY: Objection. Lack of foundation. Your question assumes that Ms. Storm had a red light. It could have been green or yellow or flashing red or yellow, not just red. The witness may answer the question subject to the objection.

YOU: Counsel, I understand your point, but that's a speaking objection which is not permitted in this jurisdiction. In the future, if you have a problem with the way I'm putting my questions, please keep your objection short. If you need to say more, then let me know and we'll excuse the witness while you put your statement on the record.

If the speaking objection is egregious - for example, if the attorney testifies directly for the witness or blatantly signals what the answer to the question should be - then you should object to the speaking objection on the record but if the objection is an isolated one there is little else you can do. Phrase your

Instructions and examples.
Clear-cut suggestions on how to
handle this common problem.

Supervisory rulings. How to obtain one, and what to say.

Form 15-1 Checklist: How to Handle a Telephone Hearing on an Objection to a Deposition Question

NOTE: This checklist can be copied or printed from the CD for use at depositions and during deposition preparation.

Situation: In an auto accident case, deposing counsel has asked your client what the client told you about the accident. You have objected based on the attorney-client privilege, but deposing counsel insists on an answer and is threatening to ask the court for sanctions if your client does not answer the question now.

- Explain on the record that the question calls for privileged communications. Point out that the attorney can ask the witness about his knowledge of the accident without involving you. Give deposing counsel a chance to withdraw the objectionable question.
- If counsel refuses to withdraw the question, state on the record that you wish to call the court to have the objection resolved now.
- Call the court. Conduct the call by speaker phone so that opposing counsel and the reporter can hear the conversation. Ask the reporter to record the conversation.
- Explain the situation to the court and ask if the judge can make a ruling:

Hello, this is Attorney Jane Doe. I am involved in the case of Smith v. Jones which is before Judge Rosenberry. This is case number 08-C-123-FDR. Mr. Jones's deposition is being taken, and Mr. Smith's counsel has asked a question that I believe calls for privileged information and should not be answered. We would like to get a ruling from the judge on the question now if that is possible. I think we can explain the situation to the judge quickly and not take up too much of her time. Is she available or is someone else available who could help us?"

- When the judge comes on the line, explain the situation and ask the judge to rule in your favor:

Abbreviated Contents

I. BEFORE THE DEPOSITION

1. Objecting to Deposition Notices and Subpoenas:

Procedure, Objections to Technical Defects, Objections to Time and Place of Deposition, Objections to Depositions of Particular Witnesses, Objections to Continuation of Depositions, Second Depositions, and Excessive Number of Depositions, Privileged and Confidential Documents

2. Motions to Quash or Limit Deposition Subpoenas: Basic Points, Preparation of Motion Papers, How to Handle a Motion Hearing

3. Preparing Witnesses for Deposition Objections: Basic Points, Explain the Deposition Process, Review Specific Objections, Review Possible Questions

II. GROUNDS FOR OBJECTING TO DEPOSITION QUESTIONS

A. Objections Based on Privilege and Confidentiality

4. Attorney-Client Privilege: Application to Communications with Corporate Clients and Company Employees, Derivative Attorney-Client Privilege, Exceptions to and Waiver of Attorney-Client Privilege, Asserting the Privilege

5. Attorney Work Product Privilege: Application, Exception to and Waiver of Work Product Privilege, Asserting the Work Product Privilege

6. Proprietary and Confidential Information: Asserting Confidentiality Objections at a Deposition, Protective Orders, In Camera Inspections

7. Witness Self-Incrimination: Legal Principles, Asserting the Privilege and Resolving Disputes

8. Family Communications Privileges: General Guidelines for Determining the Scope of a Privilege, Spousal Communications, Common Exceptions, Parent-Child Communications, Asserting Family Communication Privileges

9. Privileges for Communications with Professionals: Communications with Health Care Providers, Clergy, Journalists, Accountants, Asserting Professional Privileges

10. Privacy Privilege: Scope, Asserting the Privacy Privilege

(continued on next page)

Form 16-1 Checklist: Factors to Consider In Deciding Whether to Instruct the Witness Not to Answer

16. Instructing the Witness

Factors weighing in favor of instructing a witness not to answer:

- The question calls for disclosure of privileged information. (An instruction not to answer should almost always be given as to this type of question.)
- The question calls for disclosure of confidential information or other information protected by court order. (An instruction not to answer should almost always be given as to this type of question.)
- The question calls for highly personal and clearly irrelevant information.
- The question is distressing the witness and making it difficult for her to function effectively.
- Answering the question may result in needless embarrassment or damage to the witness or to others.
- Deposing counsel has repeatedly asked irrelevant and harassing questions during the course of the deposition.
- Deposing counsel has refused to stop asking irrelevant and harassing questions despite being asked to do so.

Factors weighing against instructing a witness not to answer:

- Deposing counsel has not engaged in a pattern of asking objectionable, irrelevant, or harassing questions.
- Even though the question is objectionable, allowing the witness to answer will not embarrass the witness, damage the case, or result in a waiver of privilege.

PRACTICE TIP:

Explain on the record, in as much detail as possible, the reasons for your instruction not to answer. Because instructions not to answer are not favored, it is important to make a record that shows the instruction is justified in case deposing counsel moves to compel the witness to answer. In some cases, an explanation may also cause deposing counsel to rethink her behavior.

Step-by-step checklists.
What to do when you receive a subpoena that is objectionable.

FORM 2-1 CHECKLIST OF STEPS TO TAKE IN PREPARATION FOR OBJECTING TO A SUBPOENA OR MOVING TO QUASH

2. Motions to Quash or Limit

NOTE: This checklist can be copied or printed from the CD for use at depositions and during deposition preparation.

<i>Make a list of objections</i>	Make a list of the parts of the subpoena that you believe are objectionable. Identify any portions of the subpoena that ask for irrelevant or privileged information (e.g., attorney-client communications, attorney work product, and confidential business information).
<i>Discuss the objections with your opponent</i>	Contact counsel for the deposing party and see if she is willing voluntarily to limit the scope of the deposition and recede from objectionable requests for information. See if other issues, such as improper service, disputes over time and place of deposition, and failure to tender witness fees can be resolved informally.
<i>If objection can't be resolved: is it necessary or cost-effective to pursue the objection?</i>	If an objection can't be resolved, ask yourself: Is it worth pursuing? • If privileged or confidential information is sought, you may have no choice but to pursue the objection. • In other cases, consider whether pursuing the objection is cost effective.
<i>Privileged and confidential documents: prepare a privilege log</i>	If counsel is not willing to recede from her request for privileged and confidential documents, make a formal objection and produce a privilege log. In some cases, the privilege log may be sufficient to satisfy deposing party that it is not entitled to the documents withheld.
<i>Confidential documents: are a protective order</i>	If trade secrets and confidential business information are at issue, determine whether a protective order has been entered in the case. • If so, and if the protective order is adequate for your purposes, produce the documents subject to the order. • If not, seek a protective order before the documents are produced.
<i>If objection can't be resolved: determine whether deposition should be postponed until the court makes a decision</i>	If the objection can't be resolved at the deposition and if it must be pressed, consult with counsel as to whether the deposition should be delayed until after a motion is brought and decided.

Evaluation checklist.

Factors pro and con on instructing the witness not to answer.

(continued from previous page)

11. Legal Process Privileges: Law Enforcement Records, The Deliberative Process, Settlement Discussions, Asserting the Legal Process Privilege

B. Objection Based on Other Grounds

12. Relevance: Overbroad and Burdensome Questions: Legal Principles, Asserting Relevance Objections, Methods for Resolving Relevancy Disputes

13. Vagueness, Ambiguity, Repetition, and Lack of Foundation: Vague or Ambiguous Questions, Repetitive Questions, Questions That Lack Foundation

14. Legal Conclusions: Theory Disclosure Questions, Theory Sifting Questions, Evidence Identification Questions, Position Disclosure Questions, Preparing Witnesses to Handle Legal Conclusion Objections

III. PROCEDURAL ISSUES DURING THE DEPOSITION

15. Court Rulings and Supervision During a Deposition: How to Find Out Your Court's Policy, How Bad Does the Situation Have to Get, Supervisory Ruling vs. Protective Order, Procedures, When Will the Court Supervise a Deposition

16. Instructing the Witness Not to Answer a Question: Legal Principles, Protecting a Privilege, Preserving Court-Ordered Limitations, Irrelevant or Burdensome, Lack of Foundation, Unfamiliar Documents or Events

17. Coaching and Communications with the Witness During Breaks: Before the Deposition, Speaking Objections, Witness-Coaching Disputes, Communication During Breaks

18. Colloquies and Stipulations Among Counsel: Discussions Among Counsel On and Off the Record, Stipulations

19. Motions to Strike and Clarification of Testimony: Situations in Which Counsel May Move, What to Do After You Object, Clarifying Your Client's Testimony

IV. SPECIAL SITUATIONS

20. Objections at Expert Witness Depositions: Discoverability of Communications with Experts, Objections to Discovery of Information Supplied by Attorney and Materials Generated by Expert, Objections to Expert Testimony, Objections to Methodology and Qualifications

(continued on next page)

§2:21 How to Write a Brief Supporting a Motion to Quash or Limit a Subpoena

A description of the art of brief writing could fill an entire treatise by itself. Some of the most important rules of brief writing are:

- *Make the brief as short and concise as possible.* Many judges have heavy caseloads and are inundated with paperwork. Judges appreciate lawyers who make their points concisely and they tend to read short, well-written briefs more carefully than long and poorly written briefs.
- *First impressions are important.* Start your brief with a short introduction (no longer than 1-2 pages) that presents the key points of your argument in distilled form. Often, judges form their initial opinions after reading the first couple of pages of a brief.
- *Organize your arguments carefully.* Present your arguments in a logical order that the judge can follow. Often a motion to compel discovery will cover a large number of issues. For example, a motion might address ten different document requests involving several different claims of privilege or confidentiality. In some cases, it may be best to discuss each document individually; in others, it may be best to discuss in the same section of the brief all documents involving a particular privilege, or all documents referring to a particular subject. You must decide this on a case-by-case basis.
- *Use headings freely.* Headings and sub-headings make it easy for the judge to see at a glance how your brief is organized and to find relevant portions of your brief as she considers her decision on each point.
- *Use underlining and bold type.* If the brief is lengthy, underlining or bolding key passages in the text may help the judge quickly see the main points of your argument. Be careful, however: some judges find excessive underlining and bolding to be irritating. This technique is most useful when you know that the judge is extremely busy and will have little time to review the motion papers.
- *Limit the number of citations.* Some attorneys believe that citing a large number of cases and statutes for each point makes their arguments more powerful. Usually, that is not the case. If a legal standard is clear (for example, because it is set forth in a statute or it is well established in the case law), cite only the supporting statute and one or two supporting cases. If the standard is less clear because there is conflicting authority or no authority directly on point, cite one or two of your best cases.

Briefing tips.

12 concise suggestions for improving the readability and persuasiveness of your briefs.

About the Book and CD

Joseph Ranney's *Deposition Objections* contains 600 pages in a 6 x 9 softcover designed to easily travel with you to your next deposition. Most of the pages are devoted to providing ways to handle areas of contention that commonly arise in depositions, including:

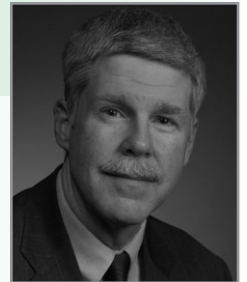
- Speaking objections and other coaching
- Instructing a witness not to answer
- Obtaining supervisory rulings
- Resolving work-product disputes

Included at no extra charge is an intuitive, full-text CD which requires no installation before use. It may be searched by key word, case name, topic, or form. The CD's forms and chapters are also provided in Word in case you do not want to work with the CD's database.

\$69 buys the book and CD. New editions are published every other year, and may be returned if not to your liking. The update service may be cancelled at any time.

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About the Author

Joseph A. Ranney has a wide-ranging litigation practice that has included commercial, insurance, personal injury, and

intellectual property disputes. He has litigated cases in the Wisconsin and Colorado state courts and in federal courts throughout the United States.

Mr. Ranney is a partner in the Madison Wisconsin law firm DeWitt Ross & Stevens (www.dewittross.com) and an adjunct professor at Marquette Law School.

Martindale-Hubbell has given him their AV rating, and he is named in the 2010 edition of *The Best Lawyers in America* in the specialty of Commercial Litigation. In 2003 he was presented with the President's Award for Meritorious Service by the State Bar of Wisconsin. He served in the U.S. Army from 1972 to 1975, and is a 1978 graduate of Yale Law School. He has written two books and numerous articles and has lectured extensively on civil procedure, constitutional law, legal history and other legal subjects.

(continued from previous page)

21. Objections to Testimony of Witnesses You Do Not Represent:

Can You Object, Litigation Relationship, Representing a Non-Party Witness, Objecting to Questions Put to Unrepresented Witnesses

22. Objections to Videotape Depositions:

Differences, Improper Notice, Quality, Distortion, Improper Remarks, Witness' Behavior

23. Objections at Depositions of Non-English Speaking Witnesses:

Use and Qualifications, Conduct, Foreign Language Documents

24. Objections to Attendance of Unauthorized Persons:

Legal Principles, Parties, Other Witnesses, Expert Witnesses, Refusal to Identify, Parties' Representatives

V. AFTER THE DEPOSITION**25. Making and Opposing Motions to Compel Deposition Testimony:**

Deciding Whether to Move, Resolving Disputes Informally, Time for Making, How to Make, Minimize Your Risk

26. Reviewing and Correcting the Deposition Transcript:

"Read and Sign" Rules, How to Review and Correct, Types of Corrections Allowed, How to Handle Excessive or Improper Changes

82 Forms

Before the Deposition

Checklist for Deposition Subpoenas, Notice of Deposition, Deposition Subpoena, Rule 30(b)(6) Deposition Subpoena, Letter Confirming a Deposition, Privilege Log, Protective Order

Checklist of Steps to Take in Preparation for Objecting to a Subpoena or Moving to Quash, Motion to Modify a Subpoena, Motion to Quash a Subpoena, Brief in Support, Affidavit in Support, Declaration in Support, Order Granting

Explaining the Nature of a Deposition, Checklist of Common Objections and Responses

Grounds for Objecting

Checklist: When the Attorney-Client Privilege Does and Does Not Apply, Letter Confirming Joint Defense Agreement, Motion to Compel, Brief in Support, Order Granting, Motion for a Protective Order, 2 Briefs in Support, Letter Confirming Verbal Confidentiality Agreement

Checklist for Privilege Against Self-Incrimination, Motion to Compel Discovery, Brief in Support, Checklist: Do Federal or State Rules of Evidence Apply Re Privileges in Your Case, Checklist of Family Communication Privileges, E-Mail Regarding Resolution of Dispute, Checklist for Making Objections Based on Professional Privileges, Stipulation and Order for Limited Disclosure of Information, Checklist for Preparing to Assert Privacy Objections, Motion for Protective Order, Checklist for Legal Process Objections

Letter to Counsel as to Scope of Deposition Questioning, Motion for Bifurcation of Discovery, Brief in Support, Order Granting

Procedural Issues During the Deposition

Checklist for How to Handle a Telephone Hearing on an Objection to a Deposition Question, Notes as to Dispute Positions, Notice of Motion and Motion on Court Supervision of Depositions

Checklist on Whether to Instruct the Witness Not to Answer, Checklist on Steps to Be Taken Before Adjourning a Deposition, Checklist of Steps to Be Taken in Adjourning the Deposition and Moving for a Protective Order, Motion

for a Protective Order, 2 Briefs in Support, 2 Declarations in Support, Order Denying

Checklist on How to Handle Speaking Objections and Witness Coaching, Stipulated Order Prohibiting Coaching, Checklist on Whether You Should Talk to a Witness During a Deposition Break

Checklist on Rules for Deposition Conversations, Checklist of Language for Putting Stipulations on the Record, Letter Confirming Agreement that Each Side Will Bear Its Own Experts' Deposition Costs, Letter Confirming Central Depository for Original Transcripts and Exhibits, Motion to Preclude Use of Unresponsive Answers to Deposition Questions

Special Situations

Checklist for Laying the Groundwork for the Expert's Deposition, Checklist Explaining the Objection Process to an Expert Witness, Letter Confirming Agreement that Draft Reports Will Not Be Discoverable, Letter Confirming Agreement as to Payment of Expert Witnesses' Fees

Checklist on Objecting to Testimony of Witnesses You Do Not Represent, Checklist on Preparing for a Videotape Deposition

Checklist on Preparing to Monitor and Object to the Primary Interpreter's Conduct, Checklist of Questions to Ask Interpreters or EFL Witnesses About Their Pre-Deposition Communications with Each Other, Checklist on Preparing for Objections to the Translation Process, Checklist of Issues to Be Addressed in Preparing a Protocol for Use of Interpreters at Depositions, Order Governing Use of Interpreters

Scheduling Order with Provisions for Attendance of Non-Parties at Depositions, Checklist on What to Do When an Unauthorized Person Appears at a Deposition, Letter Notifying Opposing Counsel that a Non-Party Witness Will Be Present at a Deposition, Motion to Preclude Non-Party Witness from Attending Depositions

After the Deposition

2 Motions to Compel Deposition Testimony, Brief Opposing Motion to Compel, Affidavit in Support of Motion, Correction Sheet, Motion to Strike Changes, Brief Opposing Motion to Strike Changes

Send me one copy of Joseph Ranney's **Deposition Objections** and its CD with an invoice for \$69 plus \$5.98 shipping. If not satisfied, I may return the book and CD within 30 days. Send the new editions (published every other year) on the same 30-day review basis. I may cancel the new editions at any time.

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Making and Meeting Deposition Objections

Here is a quick-draw armory of dozens of objections and tactics to help you protect your witness and your case, including:

- Attorney-client privilege
 - Attorney work-product
 - Proprietary and confidential information
 - Witness self-incrimination
 - Family communications
 - Communications with professionals
 - Privacy
 - Legal process privileges
 - Relevance
 - Vagueness, ambiguity, repetition, and lack of foundation
 - Legal conclusions
- Offers help with common deposition issues**
- Coaching and communications with the witness during breaks
 - Colloquies and stipulations among counsel
 - Instructing the witness not to answer a question

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Details inside...