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Chasing the white rabbit

DEALING WITH DIFFICULT AND DISSOCIAL DEPONENTS

You ask the question. The deponent eyes you thoughtfully… opposing counsel smiles and nods their head in consent. The deponent answers your question truthfully and completely, and you find yourself satisfied with the response. Birds chirp outside your office window. You lean back in your office chair in a state of gentle bliss.

This is not going to be one of those depositions. Instead, opposing counsel, who has been obnoxious at every opportunity, is going to do everything they think they can get away with to ensure that you get as little usable testimony as possible. Perhaps rescheduled numerous times – perhaps compelled pursuant to court order – even with the patience of Solomon, this is going to be a difficult deposition.

This article will deal with two aspects to successfully obtaining usable testimony from difficult deponents. First, we will explore the pathologies of the most difficult types of deponents and learn to exploit the very maladaptive behaviors and thought processes that render the deponent a "problem" witness (the "theory"). Second, we will get into the nuts-and-bolts of obtaining deposition testimony involuntarily, i.e., by means of a motion to compel (the "practice").

The taxonomy of the dissocial deponent

Difficult deponents come in many stripes, but today we will be focusing on a subset that often appear at depositions with the unmistakable intent of being as uncooperative as possible. One does not need to be a licensed psychiatrist to observe that these most difficult deponents exhibit behavioral traits that are consistent with the DSM-V description for *antisocial personality disorder*. The WHO's *International Statistical Classification of Diseases and Related Health Problems* (10th Edition) describes *dissocial personality disorder* as being characterized with three of the following traits:

- Callous unconcern for the feelings of others.
- Gross and persistent attitude of irresponsibility and disregard for social norms, rules, and obligations.
- Incapacity to maintain enduring relationships, though having no difficulty in establishing them.
- Very low tolerance to frustration and a low threshold for discharge of aggression, including violence.
- Incapacity to experience guilt or to profit from experience, particularly punishment.
- Marked readiness to blame others or to offer plausible rationalizations for the behavior that has brought the person into conflict with society.

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Sound like someone you may have deposed? Well, they're likely an adverse party because their antisocial personality has caused harm to a person who has had to sue them, thus having "brought the person into conflict with society." It is this sixth behavioral trait that we will be briefly exploring: blaming others and offering plausible rationalizations, as it offers a pathway to obtain information from an antisocial deponent which would otherwise be unavailable from more traditional forms of deposition interaction.

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Now, caution, there are two ways to proceed with such a deposition. The first, and perhaps the most prudent, is to proceed according to outline, marking each question not fully answered, and if there is an instruction not to answer, ensuring that the deponent is taking their attorney's advice and refusing to answer the question. This is the safest way, but likely will yield little to zero useful or novel testimony.

The second way requires a detour down the rabbit hole, requiring a wholesale suspension of disbelief for the sole purpose of adopting the dissocial deponent's version of the truth in order to obtain testimony that would otherwise never be voluntarily offered up in a traditional and adverse deposition interaction. It is this pathological worldview that serves as a *white rabbit*, and it is because of the very pathology of the dissocial deponent that they will want to *tell you all about it*.

The most common outcome in a deposition interaction between a plaintiff's lawyer and a dissocial deponent resembles the following: The deponent feigns ignorance of any fact or transaction that is harmful to their narrative, but possesses immaculate recollection of any facts or transactions that bolster their narrative of the case. It is this feigned ignorance that results in a near total lack of novel testimony under these conditions, and under this most common behavioral framework, the deponent will speak freely about their version of events and provide the most possibly guarded responses to areas of inquiry that threaten their narrative, or by extension, their *ego*.

It is this compulsion to preserve the *ego* that can be weaponized against the dissocial deponent to increase the amount of factual data points at play, as the more provably factual data, the more difficult it remains to maintain a deceit. Getting the deponent to provide you with as much information as possible is the objective, and then it is the advocate's job to utilize each of these factual opportunities to deconstruct the defendant's fraudulent version of events.

And how are you the victim?

In the avoidance of doubt, all you must do is ask the deponent to tell you about how they have been victimized, and they will be overcome with the compulsion to *tell you all about it*. Going back to the WHO's sixth *dissocial personality disorder trait*, the dissocial deponent is characterized by the "[m]arked readiness to blame others or to offer plausible rationalizations..." While taking a more traditional approach will lead to monosyllabic responses to dangerous lines of inquiry, asking the dissocial deponent to regale you with all the ways they feel that they have been wronged will result in an overflowing cornucopia of actionable information. The underlying illness is characterized by a total lack of remorse and inability to take responsibility for harmful actions against others, and any attempt to hold the dissocial individual responsible for their bad acts will be viewed not only as an ego threat, but an unfair "witch hunt" that they will want to tell you *all about*.

This entire approach presupposes that the dissocial deponent will never give you directly self-impeaching testimony, but rather the goal is to facilitate the deponent's spinning of a tangled factual web that will inevitably not withstand reasonably objective scrutiny from a third-party finder of fact. In layman's terms: the longer they talk, the more outlandish the lies… the easier to catch them red-handed. And of course, a total lack of self-awareness will cause them to dig in deeper and create an additional layer of lies to serve as "plausible rationalizations." At this stage, the whoppers can grow to an immense scale where – the hope is – the entire fabrication will implode under its own weight.

This sounds almost too simple to work. This is true. None of what you have read thus far should work on most rational human beings, especially those with any sense of self-awareness, or should we say, *shame*. It is the author's position that the pathology of the dissocial personality renders the subject deponent unable to pass up any opportunity to discuss how it is *they* who have been victimized, or to engage in what amounts to a maladaptive (and usually destructive to others) reinforcement of the *ego*. Simply, they can't help themselves.

Get them talking

While the dissocial deponent will invariably enter the deposition with an air of intellectual and moral superiority, it is the susceptibility to loss of narrative control with respect to the moral justification that will invariably lead to an abdication of the tight-lipped approach that is concomitant with the position of ostensible intellectual superiority. The solitary goal is to get the deponent talking, and there is one topic of conversation that dissocials prefer to all others: themselves.

By making the deposition about the dissocial deponent, there is a false sense by the deponent that the dynamics of the social hierarchy inherent to the deposition have shifted, and the dissocial is now in the position of both unreliable narrator and – more importantly to them – the center of attention.

"How did being falsely accused of this bad act make you feel?" "Was the plaintiff a bad employee? Why don't you tell me about that?" "What else do you feel that the plaintiff lied about?" These

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are all excellent threshold *white rabbit* questions. These are *not* questions that will result in a monosyllabic response from a dissocial deponent. These are questions that call for, and will result in, a cavalcade of lies and pathological rationalizations. The bolder the lies, the better. Try not to interrupt what will be an extended train of thought from your dissocial deponent. Continue until you feel that there is no more useful information that can be elicited by these means. Certainly, do not do anything but play the role of the sympathetic listener and engage in gentle social cues such as head nodding and reasonable verbal affirmations (e.g., "UH-HMM," "OK," etc.).

Now that you've gotten all the useful testimony possible given the circumstances, it is time to weaponize the information provided. Hopefully, the novel testimony has provided enough new data points to begin an effective cross-examination as to every aspect of the deposition testimony that is factually suspect or otherwise subject to challenge.

The kind and receptive approach utilized to glean the information should give way to a more stern and intentional methodology intended to prove that the deponent has committed perjury. Parts of the testimony that don't make sense or are internally inconsistent should be addressed methodically and individually. The point of this entire exercise was to adduce as much actionable information as possible from a deponent who would otherwise be loath to engage with a meaningful oral examination. The culmination of this exercise is to effectively call out the dissocial deponent on every single lie that they have told you on the record, to dramatic effect.

If executed deftly, this approach has the potential to increase the volume of novel and actionable testimony that can be later used to impeach the deponent versus a traditionally antagonistic deposition of a party opponent or party opponent-affiliated witness.

Compelling the deposition responses

The practical outcome of taking a difficult deposition from an adverse witness who is likely to meaningfully perjure themselves is that certain responses will not be forthcoming and opposing counsel may instruct the witness to not respond on an improper basis, e.g., a basis other than statutory privilege or gross irrelevancy.

In one recent difficult deposition that the author officiated over, a deponent received 37 instructions not to answer – almost consecutively – by their attorney, including to such inquiries as whether the deponent recognized a photo of his truck.

Unfortunately, this case was the exception, and not the rule, as the judge presiding over the case demonstrated "callous unconcern" for the rights of the plaintiff in the action and refused to order the deponent to answer even basic biographical questions. However, under normal circumstances, there exists a robust mechanism to enforce the plaintiff's right to broadly obtain discovery in a California state civil action.

The basics of compelling a response to a question which the deponent either has refused to answer, or has provided an incomplete response to, are twofold. First, if there is an instruction not to answer, confirm with the deponent that they are following their attorney's advice to not answer the question. If the response is incomplete or otherwise noncompliant, the deponent should be advised of such and be given the opportunity to supplement or amend their response. Second, logistically the deposing attorney should ask the court reporter to "mark the question." Marking the question will generally result in the court reporter preparing an index of "marked" questions, facilitating easy reference for purposes of later moving for a motion to compel a response to the question(s) so marked.

If the deposing attorney asks a question that seeks the disclosure of statutorily privileged information, the defending attorney must affirmatively act to preserve the privilege by objecting on the record and instructing the deponent not to respond based upon the assertion of the same statutory privilege, as the failure to so object constitutes a waiver of the privilege. (Code Civ. Proc., § 2015.460, subd. (a).) A question that a deponent refuses to answer on the basis of privilege requires that the deponent prove that facts exist which provide the foundation for the assertion of a relevant and statutory privilege. (*San Diego Professional Ass'n v. Sup.Ct. (Paderewski, Mitchell, Dean & Assocs.)* (1962) 58 Cal.2d 194, 199.)

As referenced above, an instruction not to answer upon any basis other than statutory privilege, privacy, trade secrets or gross irrelevancy is generally improper. (*Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006, 1013-15.) Remember, the deponent's attorney must contemporaneously object to questions that are defective as to form pursuant to Code of Civil Procedure section 2025.460, subdivision (b), but there exists a requirement that the deponent meaningfully respond to the inquiry despite and over the objection.

Of course, relevance is not a pretrial objection, as the inquiry need only be reasonably calculated to lead to the discovery of admissible evidence: "[r]elevance objections should be held in abeyance until an attempt is made to use the testimony at trial." (*Id.* at 1015.) "[I]rrelevance alone is an insufficient ground to justify preventing a witness from answering a question posted at deposition." (*Id*. at 1014.) *Stewart* memorialized the concept that the attorney defending the deposition is not to assume the role of the judge and decide which questions should and should not be answered absent the risk of invasion into the purview of a statutory privilege. If the deponent steadfastly refuses to answer questions, or produce documents properly requested to be produced at the deposition, the deposing attorney can elect to complete the

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deposition as best they can given the circumstances, or adjourn the deposition. (Code Civ. Proc., §§ 2025.460, subd. (e) & 2025.480, subd. (a).)

The clock is ticking

In the avoidance of doubt, you have exactly *60 days* to bring your motion to compel responses or production of documents at a deposition, with the time being calculated from the date of the "completion of the record of the deposition." (Code Civ. Proc., § 2025.480, subd. (b).) The notice of motion and all supporting papers, to include the memorandum, separate statement, and declaration in support of the motion, must all be served within this timeframe. (*Weinstein v. Blumberg* (2018) 25 Cal.App.5th 316, 321.)

Since there exists an ambiguity in the law as to whether the "completion of the record of the deposition" is triggered upon the reporter giving notice that the deposition transcript has been completed or after the time for the deponent to correct and sign the transcript, one would be best served by using the earlier of those two dates and begin counting the 60 days upon notice from the reporter that the transcript has been completed and is ready for review.

Provided that the motion date has been reserved with the court, the "deposition officer" may provide oral notice of the motion to compel responses to the deponent. (Code Civ. Proc., § 2025.480(c); see also *Parker v. Wolters Kluwer U.S., Inc.* (2007) 149 Cal.App.4th 285, 296.)

While oral notice of the motion to compel during the deposition is permitted pursuant to Code of Civil Procedure section 2025.480, subdivision (c), California Rules of Court, rule 3.1346 mandates *personal service* of the motion to compel upon any nonparty deponent, "unless the nonparty deponent agrees to accept service by mail or electronic service at an address or electronic service address specified on the deposition record." Further, written notice of the motion to compel must be served on all other parties to the action. (Code Civ. Proc., § 2025.480, subd. (c).) Nonparty deponents have consented to the court's jurisdiction in compelling further responses and awarding sanctions by appearing at the deposition pursuant to notice. (*Marriage of Lemen* (1980) 113 Cal.App.3d 769, 780.)

While Code of Civil Procedure section 2025.480, subdivision (h) requires that a certified copy of the portions of the deposition transcript underpinning the motion to compel responses be lodged with the court at least five days prior to the hearing on the motion, most trial courts do not require strict compliance with this rule, so be sure to check with the department clerk. If compliance is required, be sure to arrange the logistics of a safe return of the certified deposition transcript, either by placing an order with your attorney service or providing a prepaid return envelope.

Perhaps most importantly, any motion to compel responses (or further responses) at deposition must be accompanied by a *separate statement* which sets forth verbatim the contended questions and responses, or lack thereof, in addition to legal authorities compelling the responses sought. (Cal. Rules of Court, rule 3.1345(a) & (c).)

Another indispensable component of any motion to compel responses at deposition is a declaration which, at a minimum, must evidence "a reasonable and good faith attempt at informal resolution of *each issue* presented by the motion." (Code Civ. Proc., § 2016.040 [emphasis added].) This affirmative obligation incumbent upon the moving party requires that the attorney seeking additional responses has made an "attempt to talk the matter over, compare their views, consult and deliberate." (*Townsend v. Sup.Ct. (EMC Mortg. Co.)* (1998) 61 Cal.App.4th 1431, 1433.)

This requirement suggests something other than – and in addition to – counsel "bickering" at the deposition proper. (*Id*. at 1439.) However, there is no requirement that the attempt to meet-and-confer regarding each of the individual bases underlying the motion to compel further responses take place after the conclusion of the deposition: "[w]e leave it to the parties to determine the proper time, manner and place for such discussion." (*Id.* at 1438; see also *Obregon v. Sup.Ct.* (*Cimm's, Inc.*) (1998) 67 Cal.App.4th 424, 431, fn. 8; *Stewart, supra*, 87 Cal.App.4th at 1016 [suggesting that a good-faith meet-and-confer off the record may be sufficient in some cases, e.g., where the issue at dispute was simple and there was an imminent discovery cut-off.].)

If either party to a motion to compel responses at deposition requests monetary sanctions, mandatory language requires that the court "shall" impose such upon the losing party absent a finding that the losing party "acted with substantial justification" or other circumstances which would make imposition of the sanction "unjust." (Code Civ. Proc., §§ 2025.450, subd. (g)(1) & 2025.480, subd. (j).)

These sanctions can include reasonable court reporter costs and attorney's fees incurred in bringing or opposing the motion. (Code Civ. Proc., § 2023.030, subd. (a).) In granting a motion to compel responses, the subject deponent may be subject to further sanctions for disobeying the order to respond, for example issue, evidence, or terminating sanctions against a party or party-affiliated witness, in addition to monetary sanctions. (Code Civ. Proc. § 2023.030, subds. (a)-(d).) Finally, any disobedient deponent can also be punished by being held in contempt of court pursuant to Code of Civil Procedure sections 2025.480, subdivision (k) and/or 2023.030, subdivision (e).

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