

Practice Tips...

Instructing a Witness Not to Answer

It can be frustrating when, during a discovery deposition, defense counsel instructs a witness not to answer. However, there are ways to deal with that tactic.

When is it Proper to Instruct a Witness not to Answer?

You may properly instruct a witness not to answer a question if it involves privilege or work product. In addition, if the question is asked "in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party" then you may instruct the witness not to answer, if you are prepared to seek a protective order. CR 30 (d). The burden of proof is on the person seeking the protective order.

If counsel instructs a witness not to answer on the ground that the question is in bad faith or is intended to annoy, embarrass, or oppress, and counsel is not prepared to seek a protective order, then only an objection to the question has been made. The deposition should continue. According to CR 30(c) "Evidence objected to shall be taken subject to the objections."

There are a number of statutes that make certain evidence privileged or confidential. Some of these privileges are: attorney/client, RCW 5.60.060(2); alcohol and drug treatment records, RCW 70.96A.150 and 21 U.S.C.A. 1175; community mental health records, RCW 71.05.390; crime victim's compensation records, RCW 7.68.140 and .145; criminal history, RCW 10.97.010 et seq.; crimes and offenses, RCW 43.43.710; juvenile court records, RCW 13.50.050 and .100; nurses, RCW 5.62.020; optometrists, RCW 18.53.200; psychologists, RCW 18.83.110; therapists, RCW 18.19.180; husband/wife, RCW 5.60.060(1); priest/penitent, RCW 5.60.060(3); and sexually transmitted disease records, RCW 70.24.105. There are other federal and state privileges.

How to Instruct a Witness not to Answer

Counsel who instruct a witness not to answer should be prepared to state the basis for their action on the record. Failure to state a proper basis for instructing a witness not to answer may be interpreted as a tactic meriting sanctions. CR 37.

What to do When a Witness is Instructed not to Answer

If you believe that a witness has been instructed not to answer when there is no proper basis, then you must build a record. At a minimum, make sure the attorney's instruction not to answer is on the record. Ask the attorney to state a basis for the instruction not to answer.

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Next, you might ask the witness if he is refusing to answer the question. I have had attorneys instruct a witness not to answer a question only to find that the witness was more than willing to answer, and did answer the question, when directly asked.

Next, you might lay the foundation for seeking an order to compel the witness to answer the question. Ask if the witness is able to answer the question but for his attorney instructing him not to answer. Then lay the foundation to challenge the instruction not to answer. The foundation will vary depending on what basis counsel gives for instructing the witness not to answer. If the basis for instructing the witness not to answer is the attorney/client privilege, you might ask the date, time, and place of the communication. Who was present? Who made the communication and did it occur in an attorney/client context? Was the witness sent a bill for the meeting? What was the purpose of having an attorney present and did the witness believe he was getting legal advice? Has the witness disclosed the legal advice to anyone? And so on.

If the instruction not to answer is based on work product then you might whom was it given and who reviewed it? Are there other sources of this same information? Can the information be obtained from other sources without substantial hardship? And so on.

After laying the foundation you need to decide whether to continue or terminate the deposition and seek an order compelling answers to your questions. If possible, you should continue the deposition and build a record for each question that the witness refused to answer.

Once the deposition is over you may move to compel answers to the deposition questions. CR 37. If the instruction not to answer was an obstructionist tactic, then sanctions may be appropriate under CR 37. Another thing to consider is a motion to preclude the witness from testifying, or from testifying about the matter upon which he refused to answer questions during his deposition. CR 37(b)(2)(B).

The Civil Rules permit broad discovery so you can prepare your case for settlement or trial. Don't permit defense counsel to prevent legitimate discovery by an improper instruction to a witness not to answer your questions. If you lay a proper foundation you may convince the attorney to permit the witness to answer. If not, at least you will be ready to go to Court for an order compelling answers to your questions.

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