

INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/ALL OFFICES/CLIENTS

FROM: JOE TRUCE

DATE: February 27, 2002

RE: DEPOSITIONS - INSTRUCTING WITNESSES NOT TO ANSWER

In a recent case entitled Stewart v. Colonial Western Agency, Inc. (2001) 87 Cal. App. 4th 1006 the Court of Appeal has issued a caution to all lawyers who routinely instruct witnesses not to answer questions at depositions based on the fact that the question either does not call for relevant information or is not calculated to obtain information that may lead to the discovery of relevant information.

This case involved litigation between one Mary Martha Stewart against Colonial Western Agency, Inc.

In connection with this litigation, the plaintiff's attorney took the deposition of an employee of Colonial Western Agency, one Douglas Wiskow, and at the direction of the attorney representing Colonial Western Agency, refused to answer numerous questions "...on the ground they were not calculated to lead to the discovery of admissible evidence..."

At the subsequent hearing on plaintiff's motion to compel further answers on deposition, the Superior Court Judge remarked to the attorney for Colonial Western as follows:

"So you're the Mr. Wolfe that sat in the deposition and instructed the witness not to answer questions because you didn't think they were relevant. Well that's not your role. You are ordered not to instruct the witness not to answer a question during any deposition in this case unless the matter is privileged. The proper procedure is to adjourn the deposition and move for protective order. You don't assume the role of judge and instruct the witness not to answer a question in deposition. That is a huge no-no."

The court then awarded sanctions in the amount of \$2,400.

On appeal the court of Appeal discussed the general purpose of discovery as follows:

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**"For discovery purposes, information is relevant if it 'might reasonably assist a party in evaluating the case, preparing for Trial, or facilitating settlement...'
Admissibility is not the test and information unless privileged, is discoverable if it might reasonably lead to admissible evidence...These rules are applied liberally in favor of discovery..., and (contrary to popular belief) fishing expeditions are permissible in some cases."**

The court then stated: **"Code of Civil Procedure Section 2025, Subdivision (n)(2) applies to questions containing errors or irregularities that might be cured if promptly brought to counsel's attention, such as errors in the form of question. Objection to these type of mis-steps is 'waived unless a specific objection to them is timely made during the deposition.'
Subdivision (m)(2) makes clear that counsel should not instruct the deponent not to answer such objectionable questions, expressly stating that 'unless the objecting party demands the taking of the deposition be suspended to permit a motion for a protective order under subdivision (n) the deponent shall proceed subject to the objection."**

Although all procedure is not controlled by the Code of Civil Procedure in workers' compensation, Labor Code §5710 (deposition of witnesses) would indicate that a deposition is to be conducted **"in the manner prescribed by law for like depositions and civil actions in the Superior Courts of this state..."**

~~WIT:dab~~

cc list attached