Avoiding Unfair Deposition Questions And the Rule of *Rifkind*

By Howard A. Kapp

Probably the single most important California deposition case is the Second District's decision in *Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255 [27 Cal.Rptr.2d 822]. *Rifkind* is an absolute must-know case for any litigator who defends depositions, that is, all of us. It is also, sometimes, a grossly underestimated case as aggressive counsel may seek to limit that case to its facts, despite its very clear, and broader, reasoning and support.[1]

Rifkind involved a money dispute between two experienced lawyers. The deponent himself was one of the attorney-parties. The deponent was very explicitly asked in separate questions to list all of the facts, witnesses and documents supporting his affirmative defenses. Unquestionably, such questions would be proper in an interrogatory, as is explained in the published opinion.

Rifkind plainly holds that, while contention interrogatories are perfectly proper, such questions at deposition are not permitted. (*Id.*) While no one would contend that, after *Rifkind*, contention-type questions at a deposition are proper, a number of deposing attorneys refuse to acknowledge the true import, and scope, of *Rifkind*.

The Non-Contention Contention Question

The first common method that attorneys use in an attempt to evade *Rifkind* is to replace the word "contend" with another, similar, word. This might appear in a number of reformulations, for example:

1. "Why is that so?"
2. "Why do you claim/allege/assert _that?"
3. "What information do you know supports that?"
4. "Why do you believe that is so?"
5. "What did So-and-So tell you that caused you to believe that?"
6. "Do you claim _____? Why?"
7. "How did this affect your relationship with your wife?"
8. "How much money, total, did you lose from this [wage loss, out of pocket, etc.]?"

Each of these questions, and many more like it, are really mere semantic replacements for the prohibited use of "contend" or "contention." All should be treated as functional equivalents and objected to by the attorney defending the deposition. Rather than parsing *Rifkind* into its various components to derive some discrete, otherwise established objections – and thereby risk the possibility of asserting the "wrong objection" – the objection should simply cite *Rifkind* directly, i.e., "Objection. Violates *Rifkind v. Superior Court.*" (In *Rifkind*, at 1258, we learn that "Mr. Rifkind's attorney objected to these questions as calling for legal conclusions.")

The Give-Me-A-List-On-The-Spot Question

The *Rifkind* court did not merely cite a list of prior authorities on the narrow question of the evils of contention questions during deposition, but explained, in a rather expansive way, its reasoning why the contention questions posed at a deposition are improper. Indeed, this reasoning, it is clear, was intended to explain that its ruling was not strictly limited to "contention" questions, but that "contention" questions were merely a common form of a larger abuse, the impossible-to-answer Give-Me-A-List-Now Question. Consider the following key explanation from *Rifkind*:

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> Even if such questions may be characterized as not calling for a legal opinion, or as presenting a mixed question of law and fact, their basic vice when used at a deposition is that they are unfair. They call upon the deponent to sort out the factual material in the case according to specific legal contentions, and to do this by memory and on the spot. There is no legitimate reason to put the deponent to that exercise. If the deposing party wants to know facts, it can ask for facts; if it wants to know what the adverse party is contending, or how it rationalizes the facts as supporting a contention, it may ask that question in an interrogatory. The party answering the interrogatory may then, with aid of counsel, apply the legal reasoning involved in marshaling the facts relied upon for each of its contentions. That, we believe, is a principal basis of the Supreme Court's dicta in [a 1967 California Supreme Court case] and of the federal authorities. It is a major reason why, as Professor Hogan puts it, "[t]aking the oral deposition of the adverse party is neither a satisfactory nor a proper way to satisfy" the interrogating party's desire to learn which facts a party thinks support its specific contentions. "[T]he most suitable tool" for obtaining this kind of information is the written interrogatory, because "[t]his discovery device

provides time for reflection as well as the assistance of counsel in formulating a reply. The interrogatory method of discovery takes on an added dimension when employed for this purpose. It is not confined, as is an oral deposition, to learning what a party has done, seen, heard, or been told. So used, the interrogatory becomes an instrument for forcing one's opponent (or, more realistically, the opponent's attorney) to engage in a rather sophisticated process of legal reasoning. This process will require the responding party to sort through the mass of available factual data and arrange it in terms of the particular contentions that are being made." As the United States District Court put it ... "[t]his is what lawyers are for." (*Rifkind*, *supra*, at 826-827, citations and internal quote marks omitted.)

If the "basic vice when used at a deposition *is that they are unfair*" because these questions "call upon the deponent to sort out the factual material in the case according to specific legal contentions, and to do this by memory and on the spot," and "*[e]ven if such questions may be characterized as not calling for a legal opinion*, or as presenting a mixed question of law and fact," then the true import of the court's decision becomes clear. Certain types of "unfair" depositions questions – i.e., those seeking a list – are prohibited even though such questions are totally appropriate in interrogatories. Indeed, the *Rifkind* court expressly instructs that deposition testimony is limited to "learning what a party has done, seen, heard, or been told." (*Id.*, at 827.)

This rule was not only well established elsewhere, but essentially required by common experience. Every layperson knows that the oath requires the disclosure of "the whole truth": witnesses who are seen as providing half-truths, or omitting information, appear to lack credibility. The omission of some requested information may imply deceit or fraud. However, witnesses are human beings with imperfect memories and lack the computer-like ability to spit out perfect strings of information – lists of information – in compliance with this universally-perceived standard of required truthfulness. The *Rifkind* court merely acknowledges human nature and, from a litigator's standpoint, avoids a

situation where an honest witness cannot help but appear to "lie" simply because the question posed is unfair.

Thus, questions which call for a witness "to sort out the factual material in the case according to specific legal contentions, and to do this by memory and on the spot" are prohibited.

This form of question can be seen in any question which:

1. is open-ended; and/or
2. *calls for the witness to provide a list.*

Indeed, the listing-type question is *intended* to be unfair: it is a very old "lawyer's trick," i.e., a trap for the wary as well as unwary. It is also an excuse for lazy lawyering, that is, forcing the witness to do all of the work. The fact is that very few human beings can, on the spot, provide a list of things. (Obviously, there are exceptions to this, such as a list of one's own children or siblings. These lists, presumably, are virtually hard-wired in any competent human being.)

The all-time defense favorite is "How did this change your life?" and its evil twin, "Tell me everything you haven't been able to do since the accident." These questions, in proper form, may be appropriate in interrogatories, but are deliberately unfair and essentially impossible to "truthfully" (fully) answer in deposition consistent with the common oath to provide the "whole truth." A full answer to these types of questions, even in the most ordinary injury case, would inherently involve the obvious (loss of work, loss of recreation, long-standing exercise, etc.) to the more subtle (difficulty in toilet needs, assisting in home maintenance). In any event, such questioning should be objected to.[2]

Finally, it is important that the witness's counsel not acquiesce in such questioning because the deposing lawyer claims that it would be useful and/or "discoverable" information. *Rifkind* has nothing to do with the scope of discovery, but only the mechanism used to discover the information. As stated in *Rifkind*, "'[t]aking the oral deposition of the adverse party is neither a satisfactory nor a proper way to satisfy' the interrogating party's desire to learn which facts a party thinks support its specific contentions."

There Is Nothing Obstructionist About Using the *Rifkind* Objection at the Time of Deposition

In our world of liberal discovery, it is sometimes easy to forget that we have different discovery vehicles and that each exists for a reason. It is common for lawyers to be of the view that the scope of a deposition is as broad or more broad than written discovery requests. However, that is not the case. A deposition is "confined ... to learning what a party has done, seen, heard, or been told." In expert depositions, the object is to uncover opinions. Asserting that one's opponent has exceeded the procedural bounds of a discovery device is not obstructionism: it is part of representing a client within the defined rules. At the same time, deposing counsel is not without a proper device:

> "If the deposing party wants to know facts, it can ask for facts; if it wants to know what the adverse party is contending, or how it rationalizes the facts as supporting a contention, it may ask that question in an interrogatory." (*Id.*, at 1262.)

There are many examples of the intended limitations of the various discovery vehicles. Defense medical exams are the defense's opportunity to "physically examine" the claimant's body; they are not another opportunity to depose the plaintiff under the guise of a "medical history" or to obtain non-interrogatory written responses to the defense "doctor's questionnaire." (See, e.g., Kapp, "Prohibiting Medical Histories During Defense Medical Exams and Other Fancy Stuff," CAOC *Forum*, March 2002, p. 27.) Record subpoenas are for obtaining records, not to question the provider. Interrogatories serve a number of roles, including the compiling of information which is not known to the party, including contentions, but one cannot use an interrogatory to compel the production of a described document. (*Associated Brewers, etc. v. Superior Court* (1967) 65 Cal.2d 583 [55 Cal.Rptr. 772].)

Each of these discovery devices has a defined role. It is an attorney's job, when defending a deposition, to insure that the questioning is done within the guidelines as set forth by *Rifkind*. ■

Throughout this article, I will refer to *Rifkind* as if it were sui generis: it is not. I do not imply that *Rifkind* announced some startling or new rule of law: it merely clarifies rules, for California, that previously had not been the subject of such definitive law. It cites a number of prior authorities, including some old California cases. Nonetheless, this article is not intended to explain the historical basis for the case but rather to explain its use in real life litigation.

[2] In close cases, one should always consider the individual abilities of the witness. There is certainly a gray area of listing-type questions where a very capable witness would be able to respond truthfully but a less capable witness would not. If you are concerned about the state of the record and want to completely foreclose a threatened motion, it may be prudent to ask your own witness a few questions to set forth an objective basis for erring on the side of caution (e.g., demonstrate the witness's lack of education or intellectual achievement).