

Rifkind v. Superior Court
22 Cal. App.4th 1255

A court may not require a deponent to answer “legal contention” questions at his or her deposition, for example, to state all facts, list all witnesses, and identify all documents that support or pertain to a particular contention in the deponent’s pleadings. These questions, while entirely appropriate for written interrogatories, are not proper at a party’s deposition.

FACTS

The petitioner on appeal, an attorney, Robert Rifkind, was sued by another attorney, Ned Good, for improperly withdrawing money held in a joint account pending resolution of a fee dispute between them. The petitioner, then represented by counsel, was deposed and, at the deposition, was asked "legal contention" questions, calling upon him to state all facts, list all witnesses, and identify all documents that supported the affirmative defenses he had asserted in his answer to the lawsuit. Rifkind’s counsel objected and explained that it was unfair to ask a witness at a deposition to determine on his own which facts support a particular affirmative defense. But counsel expressly invited respondent’s attorney to ask the same questions by way of interrogatories. The offer was declined, and the motion to compel followed. The trial court issued an order to compel petitioner to answer legal contention questions and ordered sanctions against petitioner when he refused to answer those questions in the deposition.

DISCUSSION

The Court of Appeal concluded that the questions were improper in that context, and that the trial court erred in granting respondent’s motion to compel petitioner to answer them.

The questions at issue included: (1) State all facts that support the affirmative defense; (2) State the identity of each witness who has knowledge of any facts supporting the affirmative defense; (3) Identify any documents that pertain to the facts or witnesses.

The court stressed that the problem with legal contention questions had nothing to do with the discoverability of the information sought. The information was clearly discoverable by written interrogatory.

The Court of Appeal reasoned that asking legal contentions at a deposition was inherently “unfair” because the deponent was asked to sort out the factual material in the case according to specific legal contentions, and to do this by memory and on the spot. Even though Rifkind was a lawyer, the court pointed out that any lawyer who was sued or who was suing someone else, and who placed his or her cause in the hands of an attorney, was no less entitled to have that attorney attend to the legal aspects of the case than was a layperson.

However, the Court of Appeal gave guidance as to what was not included in the ruling. Specifically, the court stated that it was appropriate to ask a party being deposed “about the basis for, or information about, a factual conclusion or assertion.” The Court distinguished this line of inquiry as factual as opposed to seeking the basis for a legal conclusion. The court concluded that contention questions of the kind at issue in this case, while entirely appropriate for interrogatories, were not proper in the deposition of a party who was represented by counsel.