

Effective Use of the PMQ Deposition



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I. Introduction

The person most qualified (“PMQ”) deposition is a powerful discovery tool that should be used for all size cases in order to force the defendant to commit to a position and provide dependable discovery. As the “voice” of the defendant, testimony of the PMQ has many uses and can make a significant impact on a case if used correctly.

II. Legal Authority and Effect

California Code of Civil Procedure § 2025.230 provides that upon a notice that “describe[s] with reasonable particularity the matters on which examination is requested...the deponent shall designate and produce at the deposition those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to those matters to the extent of any information known or reasonably available to the deponent.” Keep in mind that here, as with any other notice when a request for documents is made the witness is “expected to make an inquiry of everyone who might be holding responsive documents or everyone who knows where such documents might be held.” *Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390, 1396. The testimony of the chosen PMQ is then the “voice” of the deponent, in that his or her testimony effectively binds the deponent. The legal ramifications of this concept are far reaching.

The PMQ that is produced may be an officer or an office worker, but it is the responsibility of the noticed party to designate the correct person. The noticing party has no say as to whom the PMQ is and in fact one may learn about organizational structure of a defendant

corporation or public entity through these depositions. Be aware of a party who requests you to choose among different persons to satisfy the noticed category and refuse to be part of that process. Multiple persons may be produced per topic and we have seen retired or ex-employees produced in some cases.

The PMQ has a duty to testify as to any information “reasonably available to the deponent.” This is a powerful requirement because, taken in context, the PMQ is the person selected to represent the deponent’s best knowledge about a certain topic and is therefore in the best position to obtain all relevant information. This duty to gather reasonably available information becomes an issue, all too often, when the deponent does not satisfy the duty. Different ways to deal with this situation are listed below.

Note that the “deponent” does not have to be party to the litigation and a PMQ deposition can be noticed via subpoena. Consider taking this deposition if you are considering substituting a party for a Doe defendant to determine if there is sufficient information to pursue them. As most PMQs will be of defendants, they will be referred to as such for the remainder of this article.

III. Notice

Thought must be put into the PMQ categories you notice and because there is no real limit (aside from relevance and harassment) both general and surgically crafted categories are useful. Technically, we generally notice a specific date and time for each category (rather than a list of categories to be produced on a specific date.) In a product liability case, notice the designer of the product overall and the

designer of the specific part/feature that you claim is defective. In an elder abuse case, notice the person most qualified to discuss the policies and procedures in general and then the person who can discuss specific employee training.

Often a defendant will “mistakenly” provide a person that is not responsive to the request. For example, recently a public entity in a dangerous road case produced the city worker that had physically striped an intersection in response to a work order from the traffic department. When we pointed out the notice had requested the PMQ regarding “the decision to stripe the intersection,” the deposition was continued until the proper engineer was provided. In that same case the PMQ regarding the design of the intersection was noticed and that single category resulted in the production of separate deponents for striping, construction, engineering, and signing. Last, always attach a document request to this notice for, at a minimum, all documents related to each category of PMQ noticed.

Do not forget that you can always re-depose the PMQ in a personal capacity if you are prevented from delving into areas that lie outside the noticed PMQ categories. It may also provide a strategic advantage to see who the defendant will produce and then, after further discovery, call that person individually for a second deposition. Often defense counsel will produce a person as a PMQ whom you have also noticed individually

and produce the deponent in both capacities at the same time. Beware “whose” testimony you are getting, as questions asked of the deponent in a personal capacity may not effectively bind the defendant. One way to protect yourself is to first take the PMQ deposition and then “switch gears” to personal capacity at a discrete time announced on the record.

IV. Uses

A. To Solidify the Defendant's Position

1. It is Essential to Lay a Proper Foundation Regarding the PMQ's Preparation for the Deposition

For each PMQ deposition category, we routinely read the PMQ category into the record and ask the deponent the following introductory questions:

1. When did they become aware they were going to be the PMQ in this category?
2. Did they review any documents in preparation for the deposition, and if so, what were they, where were they located, how were they procured (i.e. were the documents provided in their ordinary course of business or through counsel), and did they bring them to the deposition or could they be easily produced if requested?
3. Did they talk to anyone other than counsel in preparation, and if so, what was the content of those conversations?

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4. Aside from those items already discussed, what else did you do to ensure you would be adequately prepared to be the PMQ?

5. Was there any information that they sought in preparation for their deposition that they could not obtain for any reason?

6. Do they think there is any other employee or person more knowledgeable than they about this subject?

7. Then go through the relevant document requests and see what, if anything, they brought that was responsive.

This line of questioning has a couple of different uses but most importantly, it provides foundation for any future motions regarding the adequacy of the preparation or those for preclusion of evidence.

2. Forces the Defendant To Do Work

PMQ deposition notices put the defense counsel to work. They must work with their client to ensure that the proper person is produced and that forces the client to also be involved in the discovery process and potentially provides them a view into the litigation not provided by their counsel. We have also found that the PMQ often provides a previously unproduced document that had been requested because counsel and their client had neglected to ask all the correct people when responding to previous discovery. Occasionally you will get the conscientious deponent that will bring a treasure trove of documents

that you have been requesting for months (or years).

3. Common Results

a. "That Person Doesn't Exist"

Many times a noticed party will claim that there is no one that exists that can satisfy the requested category. Unfortunately, in this situation you cannot rely upon opposing counsel's word, no matter how trustworthy. If this happens, require either a declaration or testimony by a knowledgeable person designated by the defendant about these facts, that a reasonable inquiry and diligent search were performed, and that no one can address these issues. This evidence can then be used at trial as party testimony to show the jury that the party did not even have a person, for example, that is supposed to review warranty claims to see if design changes in a product would make it safer.

b. The Unprepared Deponent

All too often, the PMQ comes to the deposition without looking at any documents, speaking to anyone aside from counsel, and otherwise performed no investigation at all. This clearly is grounds for a motion to compel, but consider not always following that course of action. Take the deposition, ask all the appropriate questions, leave it unconcluded as to any potential motion to compel, and then closely review the transcript to analyze the effect of informed answers on your case. Claims



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alleging corporate malfeasance or “profits over people” may be made better by indifferent testimony of the person that should know these facts!

B. PMQ Testimony Uses At Trial

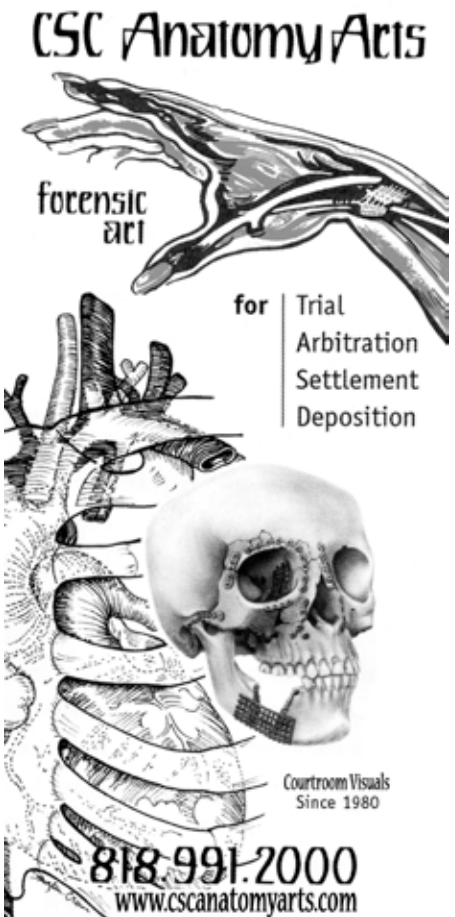
As PMQ testimony is the “voice” of the defendant, you may read that testimony at any time and for any reason pursuant to Evidence Code §1220. This may be particularly useful during the opening statement or during inconsistent testimony of other witnesses. For larger cases, videotape these depositions so the defendant’s own people (often those who will be produced as witnesses at that same trial) can speak to the jury in their own words. This is costly, but has been extremely effective in those situations where the deponent was under prepared, ignorant, or indignant.

Motions in limine are effective to preclude evidence either not provided at the appropriate PMQ deposition or contrary to their testimony. Ask for an order binding the company to the

answers given in deposition because the PMQ spoke on behalf of the company. Most effective are the “I don’t know” responses to pointed questions on the subject at issue.

V. Conclusion

Please use the PMQ deposition to cut the fat from written discovery responses and to bind the corporation to theories and contentions. Under The Discovery Act, the PMQ deposition is one of the most efficient tools for getting the defendant’s (and defense counsel’s) attention while providing the information you need to effectively prosecute your case. **TL**



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