

The Person Most Qualified Deposition – Tools and Tips

By Casey Kaufman and Brian Malloy

I. INTRODUCTION

The person most qualified (“PMQ”) deposition is one of the most effective discovery devices because the deponent binds a corporate entity defendant and, unlike written discovery, there is no defense attorney sanitizing each response. 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 BACKDROP FOR THE PMQ DEPOSITION

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 the testimony effectively binds the deponent corporation. The legal ramifications of this concept are far reaching.

The person produced as the PMQ 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 you may learn about the 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; 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 entity’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. PROCEDURAL COMMENTS REGARDING THE PMQ NOTICE

Person Most Qualified deposition notices are written as categories which describe



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the subject matter that the plaintiff requests a deponent to discuss.

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 whole product as well as 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. In a public entity case, notice the person with knowledge of accident history as well as the mechanism for the public entity to track accidents in any particular area.

Often a defendant will “mistakenly” provide a person that is not responsive to the request. In response to a notice which requested the PMQ regarding “the *decision* to stripe the intersection,” the public entity instead produced the employee that physically striped an intersection in response to a work order from the traffic department. The deposition had to be continued until the proper engineer was produced.

Do not forget that you can always re-depose the person produced as 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.

Last, it is my practice to attach a document request that exactly tracks the categories of PMQ testimony requested in the notice. Certainly, you can build from that base of document requests, but these should be included at a minimum.

IV. THE DEPOSITION

A. Lay the Foundation to Reduce Later Ambiguity

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?
4. Aside from those items already discussed, what else did they do to ensure they 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.

B. Defendant Must Prepare Its Witness

Section 2025.230 requires that the PMQ deponent must testify “to the extent of any information known or reasonably available.” This is one of the most often ignored phrases when a defendant produces a PMQ deponent. Defense counsel is supposed to 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

it a view into the litigation not provided by their counsel. Sometimes, the PMQ deponent may provide 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).

C. Responses to PMQ Notice

1. Claims that no one exists to testify on a particular subject

Often a party will claim that no one exists who can satisfy the requested category. Unfortunately, in this situation you cannot rely upon opposing counsel's word, no matter how trustworthy. Simply 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.

2. Ignorant deponents

Very often, the PMQ deponent comes to the deposition without looking at any documents, without speaking to anyone aside from counsel, and without otherwise performing any investigation at all. This clearly is grounds for a motion to compel, but think about not following that course of action in some circumstances. 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 alleging corporate malfeasance or "profits over people" may be made better by indifferent testimony of the person that should know these facts.

3. Lawyers as PMQ – a different flavor of ignorant deponent

Recently, we have seen several lawyers produced as the PMQ deponents. Most often, these lawyers are within the general counsel office at a very low level. I don't have a sense as to why this tactic is chosen, but the result is always the same. The lawyer knows nothing. It seems that the Discovery Act's requirement for a PMQ deponent to educate themselves would be more important here, when the deponent is an officer of the court. However, every time a lawyer shows up it is a contentious deposition with little or nothing learned.

D. Use at Trial

Since PMQ testimony is considered to be the testimony of an entity 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. Videotaping can be extremely effective in those situations where the deponent was insufficiently-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. Once the entity states they don't know, they cannot fairly come to trial with a different story.

V. CONCLUSION

The PMQ deposition is a highly effective tool that I have been using more and more in my practice because it allows you to avoid some written discovery battles that so many firms enjoy. This testimony binds the corporation to theories and contentions and often gets an entity's attention in a new way while providing the information you need to effectively represent your client. ■

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