

When Self-Help is a Hindrance: SANCTIONS FOR FAILING TO APPEAR AT DEPOSITION

BY JONATHAN W. FOUNTAIN, ESQ.

Rule 30 of the Federal Rules of Civil Procedure contains a straightforward procedure for initiating a deposition—the party wishing to take the deposition serves a notice on the deponent’s counsel that states the date, time and place of the deposition. See Fed. R. Civ. P. 30(b)(1) (“A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent’s name and address.”).

As written, the rule allows the party noticing the deposition to *unilaterally* determine the date, time and place of the deposition irrespective of the schedules of the deponent and his or her counsel. Problems with unilaterally noticed depositions invariably arise; the deponent has a doctor’s appointment scheduled for the date set in the deposition notice, the deponent’s counsel is scheduled to be at a hearing in another state, or the deponent cannot arrange for child care on the noticed date. The list goes on and on. Many of the reasons why parties and their counsel may be unavailable for a deposition on a given date are perfectly legitimate. It is for this reason that most lawyers cooperate *in advance* with opposing counsel in determining convenient dates to schedule depositions, so that when depositions are noticed, they are noticed to occur on a date, at a time and at a location the parties and their counsel have already agreed upon.

But sometimes parties and their counsel cannot agree on a convenient date, time and location for a deposition, and sometimes parties and their counsel simply refuse to cooperate in scheduling depositions because they are unprepared, want to make their opponent’s task more difficult and expensive or because they simply do not want the deposition to go

forward. In these circumstances, opposing parties can meet-and-confer about deposition scheduling and ideally reach a resolution without the court’s intervention, but it is often the case that one party resorts to unilaterally noticing the recalcitrant party’s deposition pursuant to Fed. R. Civ. P. 30(b)(1).

Faced with a looming deposition that a party does not want to proceed with, sometimes parties resort to self-help; they tell opposing counsel who noticed the deposition that, despite the fact that a valid deposition notice was served providing a reasonable amount of advance notice, they simply will not be appearing for the deposition for one reason or another. Unfortunately, this response often occurs just a few days or weeks before the deposition date, such that a motion to compel the deponent to appear at the deposition could not be fully briefed, heard and decided by the court in the ordinary course. For example, in the U.S. District Court for the District of Nevada, a party has 14 days to file and serve an opposition to motion to compel and the movant then has seven days to file and serve a reply. *See* D. Nev. LR 7-2(b).¹ Given that depositions are usually noticed only two to three weeks in advance, this timeframe typically does not allow the noticing party sufficient time to obtain an order compelling the deponent to appear prior to the noticed deposition date. The reluctant deponent who decides not to appear effectively engages in “self-help.” He or she has unilaterally opted out of the deposition, and the noticing party cannot obtain an order compelling the party’s appearance before the noticed date becomes



moot. Prior to engaging in self-help, the deposition-dodging party may or may not have filed a motion seeking a protective order to require that the deposition occur at another time, another place, etc.

For the party who engages in “self-help,” fails to appear for a properly noticed deposition and who does *not* first file a motion seeking a protective order, a very hard road lies ahead. Federal Rule of Civil Procedure 37(d) allows the

noticing party to file a motion seeking sanctions against the deposition-dodger.² The rule states the following, “The court where the action is pending may, on motion, order sanctions if:

(i) a party ... fails, after being served with proper notice, to appear for that person’s deposition ...” Fed. R. Civ. P. 37(d)(1)(A)(i). A meet-and-confer is not required prior to filing a motion seeking sanctions. *See Nationstar Mortg., LLC v. Flamingo Trails No. 7 Landscape Maintenance Ass’n*, 316 F.R.D. 327, 335 (D. Nev. 2016).

In addition, because the deposition-dodger failed to file a motion seeking a protective order prior to skipping out on the deposition, he or she cannot attempt to justify their non-appearance by arguing that the discovery sought through his or her testimony is objectionable. *See* Fed. R. Civ. P. 37(d)(2) (“A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for protective order under Rule 26(c).”). In other words, in opposing the motion for sanctions, the party who engaged in self-help cannot argue that his or her non-appearance was substantially justified because the testimony would have resulted in evidence that is, for example, irrelevant, cumulative or privileged.³

For the party who engages in “self-help” but who first files a motion seeking a protective order prior to skipping out

on the deposition, a similarly hard road lies ahead. Contrary to the belief of many lawyers in the Ninth Circuit, the mere filing of a motion seeking a protective order before a noticed deposition does *not* justify or otherwise excuse a party’s non-appearance at the deposition. *See Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964). In *Pioche Mines*, the Ninth Circuit stated the following:

Counsel’s view seems to be that a party need not appear if a motion [seeking a protective order] ... is on file, even though it has not been acted upon. Any such rule would be an intolerable clog upon the discovery process. [The Rules] place the burden on the proposed deponent to get an order, not just to make a motion. And if there is not time to have his motion heard, the least that he can be expected to do is to get an order postponing the time of the deposition until his motion can be heard. He might also appear and seek to adjourn the deposition until an order can be obtained. But unless he has obtained a court order that postpones or dispenses with his duty to appear, that duty remains. Otherwise, as this case shows, a proposed deponent, by merely filing motions ... could evade giving his deposition indefinitely. Under the Rules, it is for the court, not the deponent or his counsel, to relieve him of the duty to appear.

Id. (internal citations omitted) (alterations added). Thus, simply filing a motion seeking a protective order does not excuse a party’s non-appearance at a property noticed deposition. Rather, a party seeking to reschedule or otherwise

avoid a deposition is *required to appear* at the deposition at the date and time noticed unless he or she has *first* obtained an order from the court staying, rescheduling or vacating the deposition.

Irrespective of whether a party first files a motion seeking a protective order before failing to appear for a noticed deposition, the party who fails to appear may indeed face sanctions. This was thoroughly explained by Magistrate Judge Nancy Koppe in *Nationstar*, *supra*. In that case, the plaintiff, Nationstar Mortgage, LLC (Nationstar), filed a quiet title action seeking to determine whether its rights in real property were extinguished following a foreclosure sale to the defendant, SFR Investment Pool 1, LLC (SFR). *Nationstar*, 316 F.R.D. at 331. On February 22, 2016,

Nationstar served (by hand delivery and mail) a deposition notice seeking to depose SFR’s manager, Hardin, on March 7, 2016. *Id.* at 331. On March 5, 2016, just two days before the deposition, SFR filed a motion seeking a protective order “that the deposition

not take place.” *Id.* Nationstar’s counsel appeared for the deposition, but Hardin and SFR’s counsel did not. *Id.* Nationstar filed a motion seeking to compel Hardin’s deposition testimony and sanctions for his non-appearance in the form of an award of its attorneys’ fees and costs. *Id.* at 331, 335.

SFR argued, among other things, that it was immune from sanctions because it filed a motion seeking a protective order on March 5, 2016, prior to its non-appearance at the scheduled March 7, 2016, deposition. Nationstar argued that SFR’s position was premised on a “fundamental misunderstanding of Rule 37.” The court agreed with Nationstar. Magistrate Judge Koppe began her analysis by noting that it was

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a “settled and universally recognized proposition” that “a party is not empowered to grant itself, de facto, the relief it seeks from the Court by delaying in filing a motion to such an extent that it cannot be resolved prior to the scheduled event.” *Id.* at 336. Judge Koppe continued, quoting *Pioche Mines*, and noting that:

The mere filing of a motion for protective order does not relieve a deponent of his duty to appear at a deposition; instead, that duty is relieved only by obtaining either a protective order or an order staying the deposition pending resolution of the motion for protective order. Any other rule would allow litigants to engage in gamesmanship and “would be an intolerable clog upon the discovery process.”

Id. at 336-337 (internal citations omitted).

SFR argued that it could not be sanctioned because it had filed a motion seeking a protective order prior to its non-appearance at the deposition. It argued that Rule 37(d)(2), “provides that the failure to appear for a deposition is excused if the party had a pending motion for protective order.” *Id.* at 337. Magistrate Judge Koppe disagreed, explaining that:

Rule 37(d)(2) ... provides that the failure to appear for a deposition “is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).” Fed. R. Civ. P. 37(d)(2). *This provision operates to bar a party who has not moved for a protective order from arguing that sanctions are improper given the objectionable nature of the disputed discovery. Hence, Rule 37(d)(2) dictates that a pending motion for protective order is a necessary, but not sufficient, condition to be excused for failing to attend a deposition.* Quite simply, SFR has fallen victim to the classic logical fallacy of conflating what is necessary with what is sufficient; the fact that the filing of a motion for protective order is necessary to excuse a non-appearance at a deposition does not mean that the filing of a motion for protective order is sufficient to excuse that non-appearance.

Id. (internal citations omitted) (emphasis added). Magistrate Judge Koppe also noted that “[t]his reading of Rule 37(d) is ... supported by the policy considerations that animated the Ninth Circuit’s holding in *Pioche Mines*. Adopting the position advanced by SFR would enable litigants to avoid their discovery obligations by filing last-minute and unmeritorious motions for protective order[s] without any fear of sanctions, a loophole that would cripple the discovery process.” *Id.*

SFR also argued that it should not be sanctioned because Nationstar’s counsel “knew that SFR objected to the Notice.” *Id.*, n. 8. Magistrate Judge Koppe dismissed that argument, stating that, “[c]onveying to opposing counsel objections to a deposition notice and an intent not to appear is insufficient to avoid sanctions for a subsequent non-appearance. *Id.* (citing *Toys “R” Us-Delaware, Inc. Fair & Accurate Credit Transactions Act (FACTA) Litig.*, No. ML 08-1980 MMM (FMOx), 2010 WL 4942645,

at *3 (C.D. Cal. July 29, 2010) (advising opposing counsel of intended non-appearance does not excuse failure to appear); see also *Peyman v. Rayan*, No. 2:09-cv-01384-KJD-LRL, 2011 WL 976925, at *1 (D. Nev. Mar. 18, 2011) (“courts have held that parties may not escape sanctions simply by notifying the attorney who noticed the deposition that they will not appear”).

In the end, despite the fact that it had filed a motion for a protective order prior to the deposition, Magistrate Judge Koppe granted Nationstar’s motion for sanctions, holding as follows:

In this case, SFR filed its motion for protective order during the weekend before a Monday deposition, nearly two weeks after service of the deposition notice. While that motion for protective order may have remained pending as of the date of the deposition, that circumstance flowed from SFR filing it at such a late date that it could not have been argued and decided before the scheduled deposition. This is exactly the scenario that *Pioche Mines* sought to prevent: SFR sought to avoid having Mr. Hardin depose through its filing of a motion for protective order, it filed an unmeritorious motion for protective order on the eve of that deposition, and now it seeks to be free of any repercussions from his non-appearance by arguing that it was permitted to avoid and delay its discovery obligations without any court order allowing it to do so. Given these circumstances, the imposition of sanctions is appropriate for the failure of Mr. Hardin to appear at his deposition and the motion for sanctions will be granted.

Nationstar, 316 F.R.D. at 337-338.

Nationstar provides important lessons for counsel about the propriety of self-help in the context of depositions; parties cannot excuse themselves from properly noticed depositions by failing to appear, and the fact that they may have filed a motion seeking a protective order prior to their non-appearance does not justify their non-appearance and is insufficient to prevent an award of sanctions if the failure to appear was not otherwise substantially justified.

1. While a party can file an “emergency” motion pursuant to D. Nev. LR 7-4, emergency motions are not favored and are only appropriate in rare and meritorious circumstances. “Emergency motions ‘are not intended to save the day for parties who have failed to present requests when they should have.’” *Cardoza v. Bloomin’ Brands, Inc.*, 141 F. Supp. 3d 1137, 1143 (D. Nev. 2015) (quoting *In re Intermagnetics Am., Inc.*, 101 B.R. 191, 193-94 (C.D. Cal. 1989)). Emergency motions will be denied when the movant has created the exigent circumstances by delaying in bringing the request. *Id.* “When an attorney knows of the existence of a dispute and unreasonably delays in bringing that dispute to the Court’s attention until the eleventh hour, the attorney has created the emergency situation and the request for relief may be denied outright.” *Id.*; see also *Allstate Ins. Co. v. Nassiri*, No. 2:08-cv-00369-JCM-GWF, 2011 WL 4905639, at *1 (D. Nev. Oct. 14, 2011) (overruling objections to magistrate judge order finding an emergency motion to quash subpoena was untimely when three-weeks’ notice was provided for a deposition but the motion to quash was filed only three business days before the deposition).
2. Sanctions that may be imposed include (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) striking pleadings in whole or in part; (iv) staying further proceedings until the order is obeyed; (v) dismissing the action or proceeding in whole or in part; or (vi) rendering a default judgment against the disobedient party. See Fed. R. Civ. P. 37(b)(2)(A)(i)-(vi). Sanctions may also include an award of reasonable expenses, including attorneys’ fees, unless the failure to appear was substantially justified or other circumstances make an award of expenses unjust. See Fed. R. Civ. P. 37(b)(2)(C).
3. For the party who filed a motion seeking a protective order prior to skipping out on the deposition, the party may argue against the imposition of sanctions by arguing that the testimony being sought was objectionable—provided, of course, that the party asserted his or her objections to the testimony in the motion.

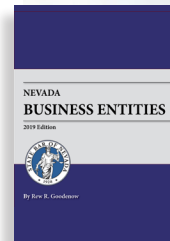
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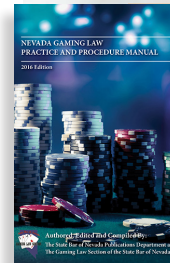
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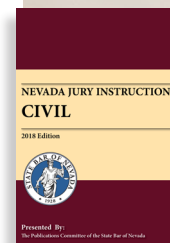
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