

A plaintiff brought a diversity action against a defendant in federal court. During discovery, the plaintiff orally deposed the defendant. Upon completion of that deposition, the plaintiff sought to depose the defendant again, which would be the tenth deposition taken by the plaintiff in the case.

The plaintiff served the defendant with written notice stating the time and place of the deposition. Upon receipt of the notice, the defendant's attorney called the plaintiff's attorney to tell him that the defendant would not appear at the deposition. The plaintiff's attorney demanded that the defendant appear as noticed. Neither the defendant nor the defendant's attorney appeared at the deposition. The plaintiff's attorney has moved for sanctions.

Is the court likely to impose sanctions?

- A. No, because the defendant had already been deposed in the action.
- B. No, because the plaintiff failed to serve a subpoena to compel the defendant's attendance.
- C. Yes, because the defendant received written notice of the deposition.
- D. Yes, because the plaintiff is entitled to take up to 10 depositions.

Explanation:

Leave of court for oral or written deposition

Court's leave* or parties' stipulation required to conduct deposition when:

- deposition exceeds 10-deposition limit
- deposition sought before parties' initial planning conference *or*
- deponent already deposed in action

*Leave of court is always required when deponent is in prison.

An **oral deposition** is a [method of discovery](#) in which the deposing party conducts an oral examination of another party or nonparty (deponent) under oath and outside of court. To compel the attendance and testimony of a party deponent, the deposing party must provide the party deponent with written [notice](#). If the party deponent [fails to attend](#), the federal court may impose sanctions.

Notice may be provided and the deposition conducted **without the court's leave** (ie, permission) or the **parties' stipulation unless**:

- the deposition **exceeds the 10-deposition limit** (which includes both oral and written depositions)
- the deposition is **sought before** the parties' initial planning conference* *or*
- the **deponent was already deposed** in the action.

Here, the plaintiff sought to conduct an oral deposition of the defendant after the defendant had already been deposed in the action. Since the plaintiff failed to obtain the court's leave and the parties did not stipulate to the second deposition, the plaintiff's written notice to the defendant was improper **(Choice C)**. As a result, the defendant was *not* required to attend the deposition, and the court is unlikely to impose sanctions.

*Leave of court or the parties' stipulation is not required for an oral deposition conducted before the initial planning conference if the deposing party certifies (and provides supporting facts) in the notice that the deponent is expected to leave the U.S and be unavailable for examination.

(Choice B) A subpoena is required to compel a *nonparty* deponent's attendance at an oral deposition. But a *party* deponent can be compelled to attend through written notice.

(Choice D) Although the plaintiff was entitled to take up to 10 depositions, leave of court or a stipulation between the parties was required before the plaintiff could depose the defendant a second time.

Educational objective:

A party may provide notice of and conduct an oral deposition without the court's leave or the parties' stipulation *unless* (1) the deposition exceeds the 10-deposition limit, (2) the deposition is sought before the initial planning conference, or (3) the deponent was already deposed in the case.

References

- Fed. R. Civ. P. 30(a) (when court's leave or parties' stipulation required for oral deposition).

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