

ITEM 5.02 | DEPOSITIONS

This issue most commonly arises in connection with a scheduled or court ordered deposition. A motion for protective order does not automatically stay a pending deposition.¹ The movant must file the motion as soon as the need for protection arises, schedule the motion for hearing sufficiently in advance of the pending proceeding, and show good cause why discovery should not go forward. A party who seeks a protective order to prevent discovery must make every reasonable effort to have a motion heard before a scheduled deposition or other discovery is to occur. The movant bears the burden of showing good cause and obtaining a court order related to the pending proceeding before discovery is to be had. The failure to file a timely motion for a protective order or to limit discovery may result in a waiver. However it does not bar a party from asserting privilege or exemption from matters outside the scope of permissible discovery.²

As always, lawyers should cooperate with each other concerning the scheduling of both, discovery, and a hearing on a motion for a protective order. Except where the taking of a deposition is an urgent matter or where the cancellation of a scheduled deposition would be prejudicial to a party, it is generally in the best interest of both parties to have the court rule on objections to depositions prior to the time that the deposition is conducted in order to avoid the necessity for a second deposition of a witness after are later resolved. Faced with a decision as to whether to attend a deposition while a motion for protective order is pending (and for which a prior hearing is unavailable), a lawyer often must make the difficult decision of whether to waive the objection by appearing at the deposition or risking sanctions by the court for not appearing. While the filing of a motion for protective order does not act as a stay until such time as an order is procured from the court, the courts have the authority to grant or withhold sanctions for failing to appear based upon the factors enumerated in the case law, including the diligence and good faith of counsel.³

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Footnotes

¹ *Rahman Momenah v. Ammache*, 616 So. 2d 121 (Fla. 2d DCA 1993); citing: *Stables and CNA Ins. Co. v. Rivers*, 559 So. 2d 440 (Fla. 1st DCA 1990). See also: *Don Mott Agency, Inc. v. Pullum*, 352 So. 2d 107 (Fla. 2d DCA 1977).

² *Liberty Mutual Insurance Co. v. Lease America, Inc.*, 735 So. 2d 560 (Fla. 4th DCA 1999); *Insurance Company of North America v. Noya*, 398 So. 2d 836 (Fla. 5th DCA 1981). See also: *Berman, Florida Civil Procedure §280.4[1][b]* (2005 Edition).

³ See: *Canella v. Bryant*, 235 So. 2d 328 (Fla. 4th DCA 1970); and *Rahman Momenah*, *supra*.

