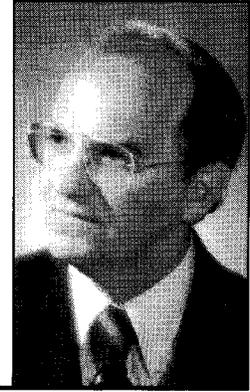


# Depositions v. Trials: Did You Miss Any of That?



Judge Jerry Buchmeyer

## By Judge Jerry Buchmeyer

I have this feeling that our answer may be Drawing Nigh. Surely, next month — after more than a year of examples<sup>1</sup> — we should be able to Determine For All Time which is worse: the dangers of *Depositions* or the risk of facing the witnesses at *Trial*.

### Did I Really Hear That? — Chap. I

From Robert A. Markowitz of Houston (Brochstein & Slobin), this excerpt<sup>2</sup> from a Harris County deposition:

Q: Did Mr. Garrett receive any of the proceeds of that \$189,000 promissory note you referred to?

A: No, I don't believe so.

Q: Why is that?

A: *I'm not sure of the mechanism, you would have to check with the lawyer who handled the transaction.*

Q: *What was the name of the lawyer that handled that?*

A: *Jim Cornish.*

Q: *Where is Mr. Cornish located?*

A: *I'm not sure which cemetery he's buried in.*

Q: *When was he deceased?*

A: *I'm not sure of the actual date, I believe it was two years ago, but I'm not sure.*

### Did I Really Hear That? — Chap. II

From Judge Frank J. Douthitt of Henrietta, formerly of the 97th District Court; Archer, Clay & Montague Counties (now State Bar general counsel), this testimony from a "45-minute hearing" that drug on past 7 p.m. The issue was whether or not substituted service on the defendant, Mr. Smith — who testified he lived in a mobile home near Crystal City, and "before that on an oil lease near Springtown, OK" — was proper (i.e., was he served at the correct residence). Lonny Morrison of Wichita Falls is questioning Smith for an attempt to set aside the default judgment:

Q: How long have you had your trailer?

A: Oh, I bought that trailer when I was opening up my Oklahoma operation.

Q: And you lived in that trailer up in Oklahoma?

A: I stayed in it when I was up there.

Q: How long did the job go in Oklahoma?

A: I don't know

Q: Well, when did you arrive in Oklahoma?

A: Oh, I started opening that operation, I guess around October of '81.

Q: October of '81 to May. What is that, about six or seven months?

A: Oh, I don't know; about that.

Q: *Well, how long was your trailer up there?*

A: *Thirty-three foot.*

*Judge Douthitt adds: Fortunately, the case was later settled and I did not have to determine whether the length of the trailer was material to the issue at hand.*

### Did I Really Say That? — Chap. I

Judge Robert Lee Eschenburg, II of Floresville (218th District Court) notes that "you rarely write about a judge's goof" — and contributes one of his own to help fill the void:

I have just finished a criminal trial. During the final argument by one of the attorneys, the other attorney raised an objection. I quickly responded "*overstained*." Just let the 4th Court of Appeals in San Antonio reverse me on that!

Judge Eschenburg thinks that, at the very least, the "overstained" ruling should cut my reversals in half.<sup>3</sup>

### Did I Really Say That? — Chap. II

This deposition excerpt comes from E. L. Caraway, III of Austin (Camp, Jones). It is from a slip and fall case, in which Frank Scarborough (Abilene) is deposing one of the employees of the retail store where the accident occurred.

Q: Okay. Now, what conversation, if any, did you have with the gentlemen, or did you overhear him talking to any of the other store personnel there while he was in the store and before he left the premises?

A: Well, I did see the gentleman get up and go over to a bread man and ask him, or told him, "you saw me fall," and the bread man told him, "No, I did not see you fall." I saw that, and *I did hear that with my own two eyes.*

*E. L. Caraway could not resist adding: "Perhaps this excerpt is something that attorneys would enjoy reading [in your column] with their 'own two ears.'"<sup>4</sup>*

### Some Kinda Guy — Chaps. I & II

From Constance A. Luedicke of Corpus Christi, "another offering for you 'deposition derby.'" This excerpt is from an

automobile accident/personal injury case, and the questioning is about any mechanical problems the car may have had.

Q: How soon before the accident [was the car repaired], and what were the problems?

A: See —

WITNESS: I know there was something wrong but what do I tell him —

MR. WOLTER: Something wrong with the car before the accident?

WITNESS: Yes, sir, but, see, I don't know like — I don't know what was really wrong with it.

MR. WOLTER: Then that's your answer.

Q: (By Mr. Steiner) *What do you believe was wrong with it?*

A: *I don't have no belief. I just know what my husband tells me.*

Q: What did he tell you?

A: He said it's the thing — it wasn't breathing good.

Q: It wasn't breathing too well?

A: The exhaust thing needed air or whatever.

From **Jessica Stettler** of Dallas (Office of the City Attorney), this deposition in a personal injury case. Jessica explains: "The deponent [being cross-examined] is a biker who drove "Blue," his Harley Davidson, into a city curb on a Saturday night and injured himself and the girl bartender on the back of the bike. They have mostly recovered, but I believe Old Blue is still in a coma. The case is set for trial.

Q: But as far as my original question, you don't know of any medical reason or any reason why your memory got worse the longer you stayed in the hospital?

A: I don't know unless it was something the hospital was feeding me.

Q: Are you currently taking any medication?

A: Yes, I am.

Q: What are you taking?

A: I have never had nor will I ever have an epileptic attack, *but part of my brain is missing* so the doctor for insurance purposes gives me Dilantin because the back side of my brain is missing. *Einstein only used eight percent of his brain. What do I care if a fourth of it is missing?*

Q: Did you really lose a fourth of your brain?

A: Yes.

### Let's Be Particularly Careful — Chaps. I & II

From **Robert F. Alexander** of Houston, this testimony from a cocaine possession trial before a jury and **Judge Miron Love** (177th District Court, Harris County). The cocaine (?) was allegedly found by the jail officer/witness during a "routine inventory search"; on cross, Robert is trying to establish that this "client was quite sober during his search."

Q: So my question once again is, with regard to whether or not he had been drinking, do you have an opinion as to whether he was heavily intoxicated, mildly intoxicated or stone sober?

A: I don't have an opinion on that, sir.

Q: Do you think if he had been falling down drunk, you would have noticed?

A: I'm sure I would have.

Q: And do you think if he had a strong odor of alcohol about his breath, you would have noticed?

A: No. I can't smell.

Q: (With Disbelief) You can't smell?

A: No, sir.

Q: No kidding?

A: No kidding.

[PAUSE — then question from defense counsel, now with genuine concern and empathy.]

Q: Is that for like all the time?

A: *Well, it has to be a very, very, very strong odor for me to be able to smell.*

Q: I'm sorry to hear that.

A: *Working in the jail, sometimes it's an advantage.*

From **Judge Stephen B. Ables** of Kerrville (216th District Court), this excerpt from an arraignment held in June 1989. The defendant, who was charged with manufacturing methamphetamine, asked for an appointed attorney — and Judge Ables began the "routine" inquiry concerning the indigent status of the defendant.

Q: (By the Court) Mr. Jones, how long have you been in custody?

A: A month and a half.

Q: *What did you do before you were incarcerated?*

A: *I manufactured methamphetamine.*

[At this point the district attorney almost incurred a hernia trying to suppress a guffaw.]

Q: Mr. Jones, besides that what did you do?

A: *I cooked.*

Q: *You did what?*

A: *I cooked at McDonald's.*

COURT: Thank you Mr. Jones. [Aside to the court reporter] You didn't miss any of that did you?

COURT REPORTER: *Absolutely not.*

SCORE AT THE END OF 11 WINNINGS:  
DEPOSITIONS 52, TRIALS 55

### Footnotes Galore

1. Our epic Quest began in January 1989 with such deposition examples as "No, sir, *but I had my girdle on,*" and "He gave me *artificial insemination*" — and such trial examples as "Well, *she's as dead as she's ever gonna be*" and "If he shot twice, *by the second I was already home.*"
2. **Robert Markowitz** touted this excerpt as "classic 'Buchmeyer' deposition material" for the *et cetera* column.
3. Federal **Judge David Hittner** of Houston would not be so confident. He swears that a Fifth Circuit opinion in one of his cases began: "The trial judge in this case was the Hon. David Hittner (S.D. Tex). *The other reasons for reversal as discussed below.*"
4. **Travis Vanderpool** of Dallas (Worsham, Forsythe) was faced with an unusual prayer in a personal injury case several years ago. Instead of the typical "Wherefore, Plaintiffs Pray That Defendants Be Cited to Appear," it read — probably because of an inexperienced secretary trying to make sense out of nonsense" when she faced her first "litigation legalese" — "Wherefore, Let Us Pray The Defendants Decide To Appear . . ."

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