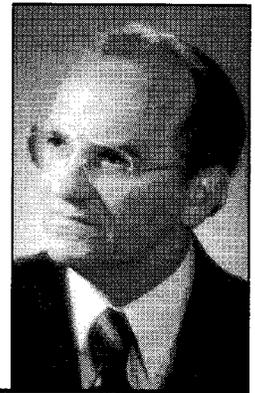


Depositions v. Trials: The Compassion Business



Judge Jerry Buchmeyer

By Judge Jerry Buchmeyer

Of course it's not over! You knew that. Our Epic Quest will continue¹—as we seek an answer to The Burning Question: "Which is worse? The risks of taking a DEPOSITION? Or the Dangers of facing those witnesses at TRIAL?"

After all, there are more examples of both of these Unspeakable Horrors—so many more(!)—that must be covered before we can rest.

Is This Column Part of the Problem?

From James H. Bjorum of Corpus Christi (Cox & Bjorum) comes this excerpt from a deposition in a Longshore Harbor workers' compensation case:

- Q. Are you taking medication today?
- A. No. I don't have any—you're not—
- Q. Did you take any pain pills today?
- A. No, but I'd taken one yesterday, if you're speaking of pain pills. That's all I have.
- Q. Right.
- A. *I haven't taken any today, but I'm quite sure sitting here, seeing as how you are going on and on, I'll have to take one because I—*
- MR. BJORUM: *I want an extra copy of that page. I've got to send it in to the State Bar.*
- MR. PIERSON: *There is nothing like being honest.*

Did I Really Hear That?

This excerpt from a sentencing hearing comes from District Judge Henry Braswell of Paris (6th Judicial District):

- JUDGE: Mr. [Defendant], you are hereby sentenced to five years in the Texas Department of Corrections. . .
- DEFENDANT: Yes, sir.
- JUDGE: And to pay a fine of \$5,000.00. . .
- DEFENDANT: Yes, sir.
- JUDGE: And to pay costs of court.
- DEFENDANT: *Court costs? Court costs? Why do I have to pay court costs? Your Honor, I didn't even want this trial.*

* * * * *

From H. Bryan Hicks of Marble Falls (Jones & Associates), this excerpt from a deposition he took of a client represented by

Ross Lavin of Burnet (Shell & Decuir):

- A. I am not sure. I know I saw it in his—Whether he even gave me a copy or not, I don't know.
- MR. LAVIN: *Can we take a five second break, just for one second.*
- MR. HICKS: Okay. We'll go off the record.

Bryan notes that Ross Lavin "apparently was unsure of how much time he would need to confer with his client; or perhaps he has just mastered the art of trial management."

* * * * *

And, from Donald W. Rogers, Jr. of Houston, this excerpt from the sentencing of a defendant he was appointed to represent:

- Q. So, then, Mr. [Defendant] in all honesty the place where you belong is in the penitentiary for a long time?
- A. I never denied that. I told them not to let me out in the first place. I never asked to get out.
- Q. Is it true you want to go back to the penitentiary?
- A. Yes.
- Q. For a long time?
- A. Yes, forever.
- Q. *We can only send you for 20 years. Is that acceptable?*
- A. *I don't care.*
- MR. GLAESER: I pass the witness.

A Few Quick Shots

Michael P. O'Reilly of Corpus Christi sends this excerpt from a recent deposition which was taken by Mike and Mark Giles:

- Q. Well, when you say "family" are you limiting it to his brother?
- A. The rest of them won't have anything to do with me. They act like that I got *the bluebonnet plague*.
- Mike suggests that this "strain of plague" may be one that "only infects Texans. . . during the time of the year that Spring Fever is contagious."

* * * * *

With the sage observation that "what begins badly usually ends badly," Charles R. Watson, Jr. of Amarillo (Culton, Morgan, etc.), submits "the first and the last questions asked by a young assistant district attorney in a recent Amarillo murder trial":

Voir Dire: First Question

- PROSECUTOR: Ladies and gentlemen, *have any of you ever been the victim of a homicide?*
- A. (No response was received from the jury panel.)

Trial: Last Question

PROSECUTOR: What do you recall exactly occurring that night that stands out in your mind?

- A. *Well, first of all y'all got the wrong man on trial. My brother's not the one that shot him. I did. That's all I'm gonna plead now, I'm going to plead the Fifth Amendment. Anything I say might and can – will be used against me in a court of law.*

PROSECUTOR: I object. Nonresponsive to the question. I would ask that, if we could, have a recess and the jury be removed at this time, Your Honor.

Charles adds: It was fortunate that "the first question on voir dire elicited no response from the jury. The last question asked of the prosecution's star witness resulted in an indefinite postponement of the proceedings."^{2,3}

Is That Really A Reasonable Fee?

This is from a hearing before the Texas Railroad Commission. It comes from Jack Balagia, Jr. of Austin (McGinnis, Lochridge, etc); he explains that An Unnamed Austin Lawyer is testifying in support of the reasonableness of the hourly rates being charged by his firm – which were to be passed through to the customers by the gas utility his firm was representing:

- Q. [T]he client is charged for those fees (of the law firm in this Commission proceeding)?
- A. That's correct.
- Q. And he is also paying for those fees rather than the ratepayers. Is that not true?
- A. That is correct.
- Q. All right, I notice here Mr. [Name Partner] only charges \$130 an hour. In fact, you are the only one I see that is charging \$500 an hour.
- A. Well, Mr. [Name Partner] – that's all that I see here that Mr. [Name Partner] charged on that, but that is not his hourly rate, and I don't know how that happened to be that low because that is not –
- Q. Do you think he took compassion on the ratepayers?
- A. I have no idea how it happened. Normally in my business – I'm not involved in the compassion business. We charge by the hour. . .

1. However, I am tired of keeping score. You will either have to do that for yourself – or call **Ginger Banks** at the *Bar Journal*, who will be our Designated Scorekeeper and who is currently finishing the project she suggested on page 911 of the September 1989 *Journal*: renumbering all footnotes in all past "et cetera" columns *consecutively* since this would make those tiny footnote numbers (now "well in three digits") much easier to see – and would permit "easy reference to a particular footnote" without having "to refer to the particular month and footnote number. . . as we so often [have to] do. . . during otherwise casual conversation."
2. Obviously, we are dealing with vintage Perry Mason stuff, right here in Amarillo. And, it reminds me of the Very Best Excuse I ever heard a lawyer give in defense of his long losing streak in criminal cases: **James H. Miller** of Dallas explained: "Why don't I win any cases? Well, you know those guys who stand up in court at the end of each Perry Mason episode and say 'I did it. I committed the murder.' *Well, I'm the one who is appointed to represent all those people.*"³
3. However, it was not **Jim Miller** – but **Roger Neil Moss** of Lufkin – who was appointed to represent a defendant in Houston "in the early '70s." When Roger checked the "rap sheet," it revealed that his client ("Stewart") had been arrested on Oct. 11, 1950 for a Very Unusual Offense:

"10-11-50: STEWART: 1625½ Jameson Arr #30633 at 1400 Hill [arrested] by Germany, Parker.

MO: With Selmer Goodwin hanging around and talking big.
DISP: Rlsd 10-12-50"

Roger immediately recognized that this appeared to be "a threshold First Amendment question." However, he also thought that – since his client had been released after only one day – the Houston Police Department may have concluded that there was insufficient evidence to convict the defendant of the offense of "Hanging Around and Talking Big":

"[Perhaps] there [was] no indication how 'big' he was talking while 'hanging around' with his co-defendant. Also, I guess it is possible that my client [could have claimed that he was] only listening to 'big talk' and 'hanging around,' was released."

Roger, intrigued with these possibilities, concludes: "I asked [my client] about it, and he said he didn't recall the situation."

Jerry Buchmeyer is a federal district judge, Northern District of Texas, in Dallas.

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