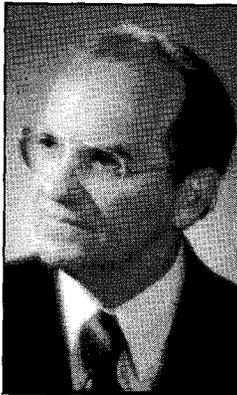


DEPOSITIONS VERSUS TRIALS: OK, VERBATIM IT IS³

By Judge Jerry Buchmeyer



Still no shortage of examples. . .

Is That Objectionable?

From **Lance E. Houghtling** of Tulsa (Richardson, Meier), this excerpt from the deposition of a forensic pathologist:

Q. I guess what I'm asking . . . is that, as a medical examiner, you have a report here stating from your investigator "apparent homicide." I guess my question is: Is it normal for a medical examiner, based on the autopsy such as was done here in this case, to go ahead and rule suicide in view of the fact that her medical examiner that was on the scene had put "apparent homicide" in her report without talking to that investigator?

DEFENSE ATTORNEY: I'm going to object to the form of the question to the extent it's seeking to establish Dr. Norton as an expert medical examiner. I don't think that's the capacity in which she's being tendered in this case.

MR. RICHARDSON: Okay.

THE WITNESS: You mean I'm not being tendered as an expert medical investigator?

DEFENSE ATTORNEY: Or as an expert medical examiner. **It's my understanding you've been tendered as an expert in forensic pathology.**

THE WITNESS: **What do you think medical examiner is?**

DEFENSE ATTORNEY: (**Undaunted**) I'm sorry, that's my objection. But you go ahead.

MR. RICHARDSON: Answer the question.

A. Okay. That's an interesting objection. And I've forgotten the question now.

He Has The Veracity

From **James M. Benson, Jr.** of Houston (VP & general counsel of WNS) this excerpt from a deposition in which the witness is being questioned about "her former employer who was a plaintiff in an arbitration proceeding." **Jimmy R. Sledge** (of Baker, Botts) is representing WNS; **A. Branton Kotch** (of Crain, Caton, etc.) is representing the plaintiff; and Mr. Kotch begins:

Q. Have you had—have you had a chance over those 10 years to hear about his reputation in this community?

A. Very much so.

Q. His reputation for truth and commitment?

A. Uh-huh. Yes. Art has a reputation as being, well, a workaholic, an overachiever.

Q. Is his reputation in this community for truth and veracity good?

A. **He definitely has the veracity.** I've never heard a word against him as far as truthfulness. I know he runs all the stores that he owns in a fair way to his employees. I would say very much so. I wouldn't go to work for anyone with less than an excellent reputation. I don't need to be in that atmosphere.

MR. KOTCH: I'll pass the witness.

MR. SLEDGE: That means I get another shot at you. It won't take long.

QUESTIONS BY MR. SLEDGE:

Q. I don't know big words like Mr. Kotch. **What does veracity mean?**

A. Well, I've got my definition. You want to tell him yours?

Q. Well, I'd like to hear your definition.

A. **Like go-getum, love for life and getting what he wants out of life.** Is that—

* * *

Q. If that's your answer, I'm through with you. You can go home as far as I'm concerned.

A. Okay.

Did I Really Hear That?

From **Frank Douglass** of Austin (Scott, Douglass, etc.), these excerpts from the deposition "given by a Ph.D. in accounting" in an arbitration proceeding. The dispute concerned this paragraph in the contract between the parties:

"13. **Operating Overhead.** To compensate X for overhead costs incurred in the operation of the Plant, X shall charge the Plant Account an amount equal to 15 percent of the total operation and maintenance expense of the plant, including insurance, taxes, plant shrinkage costs, which compensation shall be in lieu of the salaries and expense of X's principal business office, division offices and district offices.

On direct examination, the "expert" testified that the intent of the parties was "fuzzy." On cross, Frank asked the witness "point out the fuzzy words"—and, with Frank's help, new dimensions of fuzziness were established.

A. Okay, "operating overhead," "overhead" is fuzzy; "to compensate" . . .

I don't quite know what that means. "Incurred in the operation of the plant" is not clear.

Q. You skipped a few there. "To compensate X for the overhead costs." . . . The second overhead is fuzzy, too?

A. "Overhead," wherever it occurs. . .

Q. How about "operating," that is okay?

A. "Operating" is all right. . . And the two of them together ("operating" and "overhead") are less fuzzy than "overhead" by itself.

Q. **That improved the fuzziness** of "overhead," to put "operating" in front of it?

A. **It would make it less fuzzy,** yes, sir.

[The witness then testifies that "to compensate," "overhead costs" and "incurred in the operation of the plant" are all fuzzy.]

Q. All right. [Any] fuzzy words in [the next phrase]? . . .

A. **Medium fuzzy,** but not nearly like the others that we have talked about.

Q. The whole phrase is medium fuzzy?

A. Yes. But I'd put it on the lower—that one is **reasonably concrete** to me.

* * *

Q. All right. Continue . . .

A. And the final phrase, "of X's principal business office, division offices and district offices," is, for me, somewhat open to interpretation.

Q. **Semi fuzzy?**

A. **Semi fuzzy.**

- Q. Let me ask you about the [next phrase]. "Rates" fuzzy? "In practice" is fuzzy?
- A. Oh, yes, very definitely.
- Q. Maximum fuzz?
- A. Maximum fuzzy, yes, sir.

I'm Glad We Cleared That Up

John E. Kirby of Dallas (an assistant city attorney) sent me this excerpt from a deposition taken by Dallas attorney Randy Taylor—but, of course, John was not able to resist saying that "this excerpt appears Taylor-made for the I'm glad we cleared that up" department of your column."

- Q. Why would you be living in the east part of Dallas and be going to Sunset in Oak Cliff?
- A. Because I couldn't attend Skyline High School anymore, which is where I was going.
- Q. Why not?
- A. Because I had been late a few times and—
- Q. You had been laid?
- A. Been late for school.
- Q. Oh, boy, am I glad you cleared that up.
- A. Been late to school, and I had had some problems there, you know, with my grades, and they just said I wouldn't be able to attend there if I kept it up.

Are There Any Notes About What Happened?

Patricia D. Chamblin of Beaumont (Mehaffy, Weber, etc.) represented a hospital in a malpractice case; John Seale of Jasper represented the plaintiff, who was suing for the alleged wrongful death of her husband. Patricia sets the stage for this deposition excerpt by describing the plaintiff: She was "an extremely righteous and straitlaced lady who was about 70 years old; she wore her long gray hair in a bun; she had on a long cotton dress and black pumps; she seemed to be very religious and was, in fact, the wife of a fundamentalist preacher."

- Q. Do you know anyone who [kept any notes about what happened in the hospital]?
- A. No. We have got notes that my husband wrote.
- Q. Why did you husband write notes?
- A. He couldn't talk.
- Q. How many pages of notes do you have?
- A. I really don't know. I have got two or three, and my daughter has got one or two, and we threw some of them away down there in the hospital.
- * * *
- Q. But you all decided to keep some of them?
- A. Yes, we did.
- Q. Why did you decide to keep some of them? Was there some special meaning to them?

- A. Yes.
- Q. What kinds of things did you keep notes about?
- A. One I have he told us on Sunday before he passed away the next Sunday, he wrote, "The King is coming. You all stay in church," and naturally, that meant something, and I kept it.
- Q. Did any of them have to do with any criticism that he had of the care he was getting or anything like that?
- A. Yes.
- Q. Tell me about that.
- A. Well, one of them, he couldn't make us understand. He kept trying to tell us something, and he wrote, "Want the doctor," and finally, he wrote on there, "ass hole."
- Q. Who would you take that to be referring to?
- A. (Very indignantly) It was his rectum, and that's what he was wanting to see the doctor for.

Patricia ends: "Without being present to observe the plaintiff's indignant tone of voice and shocked expression, the testimony loses much in the translation, but I thought you would enjoy another "Did I really hear that?" or more appropriately, "Did I really ask that?"

Did I Really Hear That?

From G. R. (Randy) Akin of Longview (Akin, Steele & Bush), this excerpt from the deposition in a "car-truck" accident case. (Randy) explains that the plaintiff was from Viet Nam; that he "was a member of Local 195 Pipefitters Union and obviously learned what little English he could speak from his "fellow union members; and that, after having some difficulty explaining why he should recover damages, the plaintiff "finally blurted out, in layman's terms—much to the dismay of his wife, who was present at the deposition—the consortium problems that he was having."

- Q. Have you gotten any better since the accident?
- A. What? I don't understand.
- Q. Have you gotten worse? Are you feeling worse or better, or the same since the accident?
- A. No. I don't feel good, when after accident to now, too.
- Q. Okay.
- A. Let me tell you truth, I don't lie to you, but I tell you truth. Before, with my wife, you know, I can do that four or five times a week. Now I can't do.
- Q. What can you not do?
- A. I'm sorry about it, but, I don't know what to tell you, you know. I can [redacted] you know, I'm sorry about it, you know. One day a week. I got my back hurt. I'm sorry about it, you know, but I

don't know how we tell you, you know.

MR. JACOBELLIS: Wendell, can we clean that up?

Q. No. It's verbatim. It's verbatim.

(Footnotes 1 and 2 were in the June column.)

3. Similar to the Vaudeville I routine sent to me by Al Ellis of Dallas (see footnotes 1 and 2 in our last episode), Frances Willless of Austin (a legal secretary for Elvis G. Schulze) sent me this Vaudeville II excerpt from an old book she found at the Goodwill Store: "Pieces That Have Won Prizes (Also Many Encore Pieces), compiled by Frank McHale (Noble & Noble 1917). This routine is, of course, entitled "The Witness."
- Q. Do you know the prisoner well?
- A. Never knew him sick.
- Q. (Sternly) No levity. Now, sir, do you ever see the prisoner at the bar?
- A. Took many a drink with him at the bar.
- Q. (Angrily) Answer my question, sir. How long have you known him?
- A. From two feet up to five feet 10 inches.
- Q. Will the Court make the—
- A. I have, Judge. I have answered the question. I knowed the prisoner when he was a boy two feet long, and a man five feet 10.
- Q. Your Honor—
- A. It's a fact, Judge, I'm under oath.
- Q. (Arising and standing in front of the witness) Will you tell the court what you know about this case?
- A. That ain't his name!
- Q. What ain't his name?
- A. Case.
- Q. Who said it was?
- A. You did. You wanted to know what I knew about case. His name's Smith.
- Q. Your Honor—will you make this man answer?
- THE JUDGE: Witness, you must answer the questions put to you.
- A. Land o'Goshen, Judge, hain't I been doing it? Let the blamed cuss fire away, I'm all ready.
- Q. Then, don't beat about the bush any more. You and the prisoner have been friends?
- A. Never!
- Q. What? Wasn't you summoned here as a friend?
- A. No, sir. I was summoned here as a Presbyterian. Nary a one of us was ever Friends. He's an old line Baptist, without a drop of Quaker in him.
- Q. (Yelling) Stand down!
- A. Hey?
- Q. Stand down!
- A. Can't do it. I'll sit down or stand up—
- Q. Sheriff, remove this man from the box.
- A. (Muttering) Well, if he ain't the thick headedest cuss I ever—
- (ANON)

4. Frances says this book ("Pieces That Have Won Prizes") was originally in the Elgin High School Library, and this typed note (and advice that is still good, even today) was in it:

Do not hop, skip, and jump from one key to the other. Relax on the home keys after each motion. Keep up your interest in making each motion more quickly than ever. . . . Take plenty of time for each thing you do and emphasize the right way of doing it.