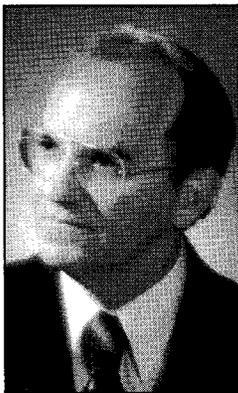


## DEPOSITIONS VERSUS TRIALS: WALKING A LINE

By Judge Jerry Buchmeyer



The examples continue. . .

### Yogi Berra Meets Groucho Marx<sup>1</sup>

This deposition excerpt comes from **Terry L. Jacobson** of Corsicana (Dawson & Sodd), who correctly observes that the attorney taking the deposition "was apparently inhabited by the ghost of Yogi Berra" — because "clearly, if Yogi had entered the practice of law, this is how he would have asked questions."

Q. Now, during these first two minutes that [the plaintiff] was able to walk without any discomfort . . . *he was walking at what speed?*

A. *1.7 miles per hour.*

Q. If a person casually walks into a courtroom, or walks into an office such as this one, is he roughly walking at 1.7 miles per hour?

[After objection.]

A. Depends on which person is walking in the courtroom, I guess.

Q. Let me rephrase the question, doctor. What I'm trying to get at is can you describe for this jury, in whatever means that you can best *describe it, how fast a person is walking at 1.7 miles per hour.*

A. They're — ordinarily they'd be walking at — ordinarily just walking down the sidewalk, you know. Casual implies a little bit less to me. It certainly is not a brisk walk.

Q. Could you walk it in this room for us?

A. I could.

Q. Would you mind doing that?  
ATTORNEY: You think you could pick it up?

WITNESS: Uh-huh.

Q. Why don't you start over here. Start here at the wall and walk over to the other side when everyone is ready. Are the video people ready?

[WITNESS COMPLIES.]

Q: Thank you doctor. That's your best estimate, isn't it, doctor?

Terry continues: "The collective legal minds assembled at the deposition were so stunned at this wonderful

'straight line' that we could think of no objection to make to the question (object to the form of the question because it recites facts which are self evident or which are true under all circumstances?). You should also note that the doctor *answered* the question. This fact supports two alternative hypothesis; specifically, that (1) lawyers are smarter than doctors, or (2) that doctors are smarter than lawyers. The court reporter declined to record the snide, witty and clever comments (remember, we could not think of any objections) made by the assembled lawyers after the question was asked. This of course proves the one thing we all know; specifically, that court reporters are smarter than both lawyers and doctors.<sup>2</sup>

### Did I Really Hear That?

From **Jon Kevin Barton** of Bedford (Auld, Stephenson, etc.), this deposition excerpt in a suit on a sworn account — "which, when properly read, will probably come as close as business litigation ever gets to 'sexy.'"

Q: Who is Patricia?

A: She is in our credit department.

Q: If she described her job to me earlier [in her deposition] as assistant credit manager, would you agree with that description?

A: Yes, that's correct.

Q: Does she report to you?

A: Not now, no. She reports to the credit manager . . .

Q: Would you have any better knowledge of these corporate records that Patricia and I just went through in a very laborious way than she has?

A: Probably not.

Q: So you would have no personal knowledge of how this particular account and dispute in this lawsuit was solicited or serviced?

A: Only to a minor degree?

Q: What would that be? What do you mean?

A: At the time that this situation arose, *I was directly over Pat, and there was no one in between us.*

This comes from *The Law Is An Ass*, by Gyles Brandreth (Pan Books Ltd. 1984). It is testimony from a divorce trial in Canada.

A: I believe she had sexual relations with Mr. [REDACTED].  
 Q: Who is he?  
 A: She was once engaged to him.  
 Q: What did he do?  
 A: He worked for his father in their family corporation.  
 Q: I take it that's the same Mr. [REDACTED] that you testified about earlier?  
 A: Yes.  
 Q: Well, what was his position at the time of this alleged sexual intercourse?

### Just How Fantastic Was He Doing?

These two trial excerpts from a medical malpractice case come from **John R. Halliburton** of Shreveport (Assistant U.S. Attorney, W.D. LA). John explains that the plaintiff was a widow; that her husband was hospitalized three times in a two-month period; and that he died during the third hospitalization when he suffered a stroke after surgery.<sup>3</sup>

First, from John's cross-examination of the widow; he has just read parts of her deposition testimony — that she was asleep and did not talk to one of the doctors who called on Sept. 18, 1987, when her husband died — and asked the plaintiff if she remembered that deposition testimony (which apparently was taken under the Most Unusual Conditions):

A: Not in that way, no, sir, because she said that she told [the doctor], said mother is going to want to talk to you. But I talked to [one doctor] and I talked to [a second doctor]. But she woke me up on both of them. It was rather early in the morning.  
 Q: So just what I read from your deposition there, that's not what you testified to May 27, 1988, then?  
 A: May 27?  
 Q: 1988, yes. You saying you didn't tell me that?  
 A: May 27 is not when he passed away. He passed away on September.  
 Q: Yes, Ma'am, I'm just asking you.  
 THE COURT: *Do you remember when he took your deposition in May, the following May, do you remember that?*  
 THE WITNESS: *Yes, Sir, But I thought he took it in August.*  
 THE COURT: Well.

MR. HALLIBURTON: For the record, it was May 27, 1988?

A: It was.  
 Q: Yes, but.  
 A: *I remember being in the bathtub at that time, and I thought it was August.*

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Next from John's cross-examination of the stepdaughter — with some help from the Court about the use (and meaning) of the word "fantastic."

Q: And the last time you talked to your mother prior to the date of [your stepfather's] demise would have been Sunday, Sept. 16, 1987, by phone, wouldn't it?

A: Yes, sir.  
 Q: You were informed by your mother *that he was fantastic?*  
 A: *That he was doing fine*, that he was going to get to go to a nursing home.

Q: The word in describing that was fantastic, wasn't it?

A: I mean he couldn't get up and do cartwheels, no, sir.

THE COURT: No, the question, I'm sorry. If you will listen carefully to the question that counsel asks and try to answer it, please, ma'am. *Was the word you used "fantastic"*

THE WITNESS: I'm sorry. I don't know.

Q: Do you remember the deposition that I took of you on June 16, 1988?

A: Yes, sir.  
 [John reads a portion from deposition where the witness testified that her mother called and said that her stepfather "was doing absolutely fantastic."]

Q: You remember testifying to that to me, don't you?

A: Yes, sir.  
 Q: So you did use the word fantastic?

A: If that's on the piece of paper I'm sure I did.

Q: You don't take issue with that now, do you?

A: I really don't understand what you mean.

THE COURT: *Do you agree?*

THE WITNESS: *That he was doing fantastic?*

THE COURT: *Yes.*

A: *No, I don't agree. He couldn't have been doing too fantastic to have died just two days later.*

1. **Terry Jacobson** also sent this excerpt from a protective order that, "strangely enough, [was] drafted by [the Yogi Berra-attorney] who also asked the questions in the depositions:

"1. The [witness] will be identified to the Court, in camera by a representative of [the defendant] in a sealed envelope."

Terry adds: "You may have noted a similarity in the grammatical patterns. You will also note that the lawyer appears to have been possessed by the ghost of Groucho Marx (*"This morning I shot an elephant in my pajamas. How he got in my pajamas I will never know."*) When I received a draft copy of the order for review and comment, my chief concern was to make sure that holes were punched in the top of the envelope (presumably a rather large envelope) so that the representative of the defendant would have enough air to breathe. The Judge's reaction to the representative popping out of the envelope was not recorded, since the event occurred *in camera* and God only knows what happens *in there*."

2. As Terry suggests: The observant reader will note that there is at least one alternative explanation for the source of this question, i.e., the lawyer who asked the question was inhabited by the ghost of a game show contestant ("I'll take tautologies for \$20").

3. Actually, **John Halliburton's** explanation was this: The plaintiff's "husband had been hospitalized on two earlier occasions, both in June of the year he died, having been admitted in a semicomatose state with a high fever and a cough producing purulent sputum. He was treated for Diabetes Mellitus, coronary artery disease, left ventricular failure, and chronic anemia. He was further diagnosed as having bilateral pneumonia, pulmonary fibrosis, gastritis with gastrointestinal hemorrhage, atherosclerotic and heart disease. During his third hospitalization in the following month, he underwent a transphenoidal surgical procedure and a craniotomy, and suffered a stroke. *His physicians did not present a favorable prognosis.* He later developed Diabetes Insipidus, a pseudomonas organism, and candida."

### More Et Cetera

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