

Depositions v. Trials: Farmers & Potatoes

By Judge Jerry Buchmeyer



And still more of the saga...
Did I Really Hear That?

From **Richard Virnig** of Houston (Hirsch, Glover, etc.), this excerpt from a deposition he took of the plaintiff in a "minor auto accident case." Richard explains that "the plaintiff had been driving his father-in-law's car at the time of the accident, and his father-in-law, a local attorney, was present at the deposition":

- Q: You don't have any current complaints of pain or injury that you relate to this accident, do you?
A: Related to this accident?
Q: Yeah.
A: No.

* * *

- Q: There's nothing you can't do today that you could do before this accident?
A: (Pointing to his father-in-law) *I can't borrow his car.*

* * *

From **J. Michael Weston** of Dallas (Alexander & Weston), this "objection, ruling and aftermath" from a case tried before **Judge David Brooks** (191st District Court):

- Q: Mr. Tafacory, on that morning, did you see cars pull into the parking lot at the premises?
A: Yes, sir.
Q: Did those cars slow down and then drive through without stopping?
PLTF'S ATTNY: Objection. He's leading.

THE COURT: I will overrule it.
DEF. ATTNY: You may answer the question.
PLTF'S ATTNY: *I didn't hear the question. I'm sorry. I was busy objecting.*

Doing Voir Dire

Robert Myers of San Antonio (Willis, Hickey, etc.) not only believes "that the risks of trial far outweighed the risks of depositions," he is convinced "that certain aspects of trial (*most notably voir dire examination*) are more dangerous still." Robert illustrates his point with two examples from a case tried before **Judge Carolyn Spears** (224th District Court), in which **Bill Kilgarlin**, formerly on the Texas Supreme Court, was co-counsel with Robert Myers.

In the first example, Juror No. 36 "wanted to graphically demonstrate to the Court that he would require attorneys and witnesses to be succinct or they would lose his attention":

JUROR NO. 36: "I have been called on this problem many a time. When someone starts talking too long, things like when he was describing against or with...let me get to the point. That's already going through my mind because I don't know if I am absorbing something, or I've got the answer I want to do. Then I want to get to the point of what they are trying to say. And I get called by my kids, like; "Well, listen to what I am saying." You know, in other words, they make it longer than what it is. If they take 30 words to say something I can understand. But in 10, I am lost, or waiting to get to the end."

THE COURT: "OK."
JUROR NO. 36: "And it takes a lot for me to sit down and listen, you know. But I have already got the answer of what they are trying to say, with the other 20 words that they are going to say. I don't know if you understand what I am trying to say."

THE COURT: "*I do understand exactly what you are saying.*"
MR. MYERS: "*I bet you do.*"
JUROR NO. 36: "In other words, I've already lost part of it...getting the other words."

THE COURT: "I appreciate you telling us...you can go to lunch and come back at 1:30."
(Juror No. 36 left the Courtroom)
MR. KILGARLIN: "*I didn't hear. He said that strong or...*"

THE COURT: "*He didn't say anything...*"

* * *

In the second Myers excerpt, Juror No. 19 (**Frank Kalani Laa**) wished to approach the bench to ask a question; Judge Spears, being understandably unfamiliar with the pronunciation of Mr. Kalani Laa's last name, sought assistance:

THE COURT: "Number 19, would you step forward please."
THE COURT: "How do you pronounce your name?"
JUROR LAA: "**Frank.**"

* * *

From **Michael Charlton** of Houston, this voir dire excerpt from a criminal case tried before **Judge Mary Bacon** (338th District Court):

Prosecutor: Who else (on the panel has ever had your car broken into or stolen)? On the second row. State your name.
JURY PANELIST: Karl.
PROSECUTOR: Okay. You — Karl, I want to know — Sakocius?
JURY PANELIST: Sakocius.
PROSECUTOR: *What kind of name is that?*
JURY PANELIST: *My last name.*
PROSECUTOR: Karl, you're not supposed to make me look stupid here.
JURY PANELIST: It's Lithuanian.
PROSECUTOR: That was really not nice.
JURY PANELIST: You said it was quiet in here.

* * *

From **Fred Head** of Athens, this portion of the voir dire by the defendant's attorney in a case in which Fred was the plaintiff:

DEF. ATTNY: May it please the Court. Your Honor. This Mr. Fred Head is trying to make me look like a bad guy. But there's two sides to every question, and every coin you've got has got a back and front to it . . . Now, what the lawyer said, what I'm telling you right now and what he told you right now, you don't believe. You don't have to believe. It's lawyer's talk, so to speak.

And every special issue is going to, that the Court submits to you, is going to be prefaced ordinarily by, "Do you find from a preponderance of the evidence." The Court, I think, will give you a definition of a preponderance of the evidence. I think it's called *the greater weight of incredible testimony. Incredible evidence.* Now, just that Mr. Head says it's true doesn't mean it is.

I'm Glad We Cleared That Up

From **H. Harmen Camp** of McAllen (Selman & Camp). This deposition ex-

change between Harmen's client and the opposing counsel:

Q: Let me just clarify something. You said you had come to know Horacio Saenz and his wife —

A: Yes.

Q: —through a sister-in-law?

A: Of his, his sister-in-law. And through a brother of the wife of the husband of that lady.

Q: A husband of which lady?

A: Of the lady I just told you about, which is then their sister-in-law.

Q: Well, you mean Mr. Horacio's wife?

A: No. Horacio is the brother of the husband of that wife that I told you I don't remember that name.

Tales From Beyond The Crypt

Also from **H. Harmen Camp** (of McAllen), two somewhat eerie deposition excerpts. The first is from the deposition which Harmen took of a man suing the "county for violation of his civil rights":

Q: Earlier, you mentioned a Doctor Rodriguez. Where is his office; do you know?

A: *He's in Hell*

(Lawyer talk)

Q: The doctor is in Inferno?

A: *I don't know where Hell is.*

Q: Why is the doctor...

A: *When I go there, I'll write back and tell you where it is.*¹

* * *

The second excerpt is from the deposition of a jailer:

Q: Have you received knowledge that there have been people that have died in there in the cells under questionable conditions.

ATTNY: Objection. The witness can't answer unless you clarify that question.

Q: OK. *People have claimed that they have been killed (in the jail.) Was it true or not?*

Is That With One "N" or Two?

From **Alyson Couch Dover** of Dallas (Baker, Glast & Middleton), this excerpt from a deposition taken by **Mark J. Zimmermann** (with two "n's"),² with this explanation to Set The Scene: the suit "involved allegations by Plaintiffs, two lady ranchers from Abilene, that the Big Bad Bank caused their ranch to go broke. The "expert testimony" of F.O. "Buster" Welch centered around the fact that he was the Plaintiffs' neighbor, he didn't go broke and they did, therefore the Big Bad Bank ran the Plaintiffs' ranch into the ground. As the deposition went on, Zimmermann (with two "n's") attempted to establish the proposition that one needed to be able to read and understand a bank statement in order

to be successful in the ranching business. Just when Zimmermann (with two "n's") thought it was safe, the enclosed exchange occurred. No one in attendance at the deposition understood what Buster said. Neither has anyone who has read the transcript."

Q. All right. So, you need to be able to read your bank statement, for example, if you are going to be successful at this business?

A. Well, no, I tell you what, I have seen people that could not read a financial statement or bank statement that was the best ranchers there ever was. I knew two old men out there that wound up multi-millionaires out there in West Texas...and neither one of them had an education, and they split up when they got old, and they asked them, "How did you-all ever figure that out? How did you ever arrive at how to split that?" The other one didn't talk much and the one that did said, "Well, *it was easy. He didn't wear socks and I smoked.*"³

Q. Notwithstanding your story, however, I don't take your statement to be an advocacy of ignorance.

A. No. They had the art and that is more important than the ability to read any kind of financial statement. I can show you people that can read all kinds of financial statements, that can read Wall Street and they can't ranch. I can show you people that can hardly sign their name that can make money ranching. *There is a saying in our business, the dumber the farmer the bigger the potato.* And it is an art, it is a gift.

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1. **Harmen Camp** adds this note: The plaintiff in this civil rights-jail case "also didn't like the four hours he spent in the county lock-up. He complained that his left arm was broken, his right arm was hurt, his nerves were ruptured, his back, head, and spinal cord were hurt, all of his teeth hurt, he became deaf, he became partially blind, his knee joints began to squeak, all of the strength left his thighs and calves, his feet turned purple *and he acquired a stuffy nose.* It's no wonder the doctor couldn't help him."
2. Alyson Couch Dover explains that Mark Zimmermann (with two "n's") is "very sensitive about two things: his name and his height. I can't do anything about the latter, but I did promise to emphasize the proper spelling of his name."
3. Alyson footnotes, too, that to his credit Zimmermann (with two "n's") was able to formulate an appropriate follow-up. "My immediate response was 'Huh?'"