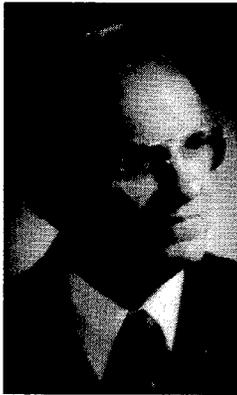


Depositions v. Trials Hung Juror Halts Trial

By Judge Jerry Buchmeyer



This month's "Which is Worse" contributions come from Austin (Mark Levbarg), Corpus Christi (Mark Giles), Dallas (Tom Mills), Galveston (John Buckley), Houston (Tom Rowatt), San Antonio (Robert Rapp), and Wichita Falls (Judge Robert Brotherton and Judge Temple Driver).

Death and/or Taxes

Death:

From Tom Mills of Dallas (Mills & Presby), this excerpt from a recent trial before Judge Sue Lykes of Dallas, (303rd Family District Court):

- Q. Did you go over to their home?
A. Yes.
Q. Did you tell them you were there to see Steve?
A. I said, "I'm going upstairs to see Steve." They said, "Fine."
Q. What did you observe upstairs?
A. The nurse was in the room folding some clothes. I said to her, "He doesn't look well at all to me, Mary."
Q. What did she say?
A. "Well, he's dead!"

Taxes(?):

From Tom Rowatt of Houston (Tucker, Hendryx & Gascoyne), this excerpt from a deposition taken by Randy Fairless of the same firm — of the plaintiff in a personal injury/auto accident case. Tom explains that the plaintiff, a naturalized U.S. citizen from Syria, had a few problems with his answers because "English was not his native tongue."

- Q. Now, we know you worked in 1990 up until May 7th, right?
A. Yes.
Q. Why didn't you file your tax return [for that year]?
A. There is reason for it.
Q. I figured there probably is, and that's what I'm asking you. What is the reason?
A. I did not receive my 10W-40.
Q. Excuse me?
A. I did not receive 10W-40.
Plaintiff's attorney: Excuse me one moment. Did you mean 10W-40, or did you mean the W-2?
The witness: W-2.¹

The Honest Witness

From Judge Robert Brotherton of Wichita Falls (30th District Court), this excerpt from a motion to suppress identification hearing in an aggravated robbery case involving Assistant District Attorney Scott Stephenson and Assistant Public Defender Sonya Kapp ("both very able attorneys"). Judge Brotherton sets the scene: "The victim had picked the defendant, whom he happened to have known for years, from a police photo lineup. The lineup and the victim's I.D. were hotly contested...[But during Ms. Kapp's cross-examination, the victim] was probably the most honest person who has ever testified in my court."

- Q. Can you tell us why you picked Jeffrey Poole [out of the lineup]?
A. Well, at that time, when he brought me the lineup, he showed me, it was six to eight pictures, and he showed me, you know, these little pictures of the guys. And he asked me which one fit the description of the robber. And of those six guys, he was the only one that fit the description.
Q. He didn't ask you, "Are any of these the suspect in the case?"
A. No. He just asked me did any of them fit the description.
Q. Were you picking out Jeffrey Poole because you thought he was the one that did it?
A. I was picking out Jeffrey Poole because he fit the description.

Shortly after this hearing, the case was dismissed. And Judge Brotherton adds: "This is the funniest courtroom Q. & A. since U.S. District Judge Mary Lou Robinson accidentally arraigned me instead of my client about five or six years ago."²

I'm Glad We Cleared That Up!

From Mark Z. Levbarg of Austin, these excerpts from a deposition he took in a case against Southwestern Bell:

- Q. During the 26 years that you were married to Ludim Solis, how many children did you have?
A. We had five children.
Q. Five children?
A. Uh-huh.
Q. Can you tell me the names?
A. Eliseo. [Spelled E-L-I-S-E-O.] And Elizabeth.
Q. Okay. That's two.
A. Dianne, Mary Alice and Margaret.
Q. Any others?
A. And Danny.
Q. Yes.
A. You got all five? How many you got?
Q. I have six.
A. Well, I have eight.
Q. Okay. Who are the other two?
A. Hold on just a minute. Mary Alice, Dianne, Margaret, Annie Ruth and Elizabeth and Albert and Danny.

Then, 39 pages later in the same deposition:

- Q. Mr. Campos, maybe we're having an arithmetic problem. Can you tell me how many years ago 1961 was? How many years ago was that?
A. 1961? To now? You want me to answer that question?
Q. If you can. If you can't, just say, "I don't know."
A. Well, I can start think back and tell you. Be all right with you?
Q. Surely, take your time.
A. You got me without my coffee this morning...I'm used to getting up in the morning and getting coffee before I even say one word to my wife.
Q. Do you want to take a break and have some coffee?
A. Be a good idea.
Q. Let's go off the record, and you have some coffee.

Then, following the coffee break and 11 more deposition pages:

- Q. Let's go back to the question we left off with. Let's see if we can get our arithmetic down. How many years ago was 1961?

A. How many years ago is 1961?

Q. Yes, to today.

A. Okay. Just a minute. This morning has not been good for me, believe me. *What? 15 years, is it?*

Q. *Well, I count 26 years, and that's why we're having a problem with the years that you say you worked at various places. It's because we're not coming up with the same arithmetic.*

Finally, after 32 more deposition questions:

Q. Let's go on to something else. How many brothers do you have?

A. I have eight — brothers? [No,] I have nine altogether.

Q. *Nine brothers?*

A. *[Yes, counting both] girls and boys.*

Did He/She Really Mean That?

From **Mark H. Giles** of Corpus Christi, this excerpt from the statement of the defendant in "a suit to establish the parent-child relationship (paternity):"

A. I feel like she cheated me because she said she couldn't get pregnant because she had an operation for cancer of the uterine or *astigmatism* or something like that.

Mark adds: "It is obvious that a distortion of judgment is not a very good contraceptive."

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Mark Giles also sent me a paragraph from a temporary order in a divorce case — in which "*the parties took strong positions as to their parrot, Herme*" — with the note that the order (drafted by the opposing counsel, of course) "uses words that could have a double meaning," explaining "some of her client's disgust at the parrot arrangement."

Temporary Custodial Orders for Pet

IT IS ORDERED AND DECREED that as to the parrot, HERME, each party shall have the exclusive possession of HERME for alternating two-week periods, with Respondent having the first two-week period...Respondent is ordered to deliver the parrot at the end of such period to Petitioner...Petitioner is ordered to deliver the bird to Respondent at her residence by 6 p.m. at the end of his two-week period.

From **Robert A. Rapp** of San Antonio (McCamish, Martin & Loeffler), this excerpt from the deposition of one of the female plaintiffs in a class action discrimination suit:

Q. [Did you complain to your supervisor about not being permitted to drive trucks on interstate shipments?]

A. Yes, I asked him why I couldn't go interstate, and he told me he couldn't risk somebody's marriage [by] putting them with me. And do you really want to hear what we said during that conversation?

Q. Yes, ma'am, I do.

A. You know, I'm not a real *Donna Reese*. So I will just say what I said. I said, "██████████."

According to Robert, the witness prefaced her X-rated remarks with the statement that she "was no *Donna Reed*," but the court reporter "mistakenly transcribed this as *Donna Reese* because she was too young to remember *Donna Reed*."

Simple Questions, Simple Answers

From **John A. Buckley, Jr.** of Galveston (Greer, Herz & Adams), these excerpts from a deposition taken by **Andrew Mytelka** of the same firm; John explains that they represented a couple "who were attempting to purchase a piece of property from the La Porte State Bank" — but the deponent-intervenor "was claiming that he had a right of first refusal which the bank had not given him the opportunity to exercise."

Q. Please state your name for the record.

A. Mat Wiggins.

Q. And your address, please?

A. 707 Bay, in Kemah.

Q. Did you pay any monetary consideration for them to give you the right of first refusal?

A. I don't recall. I'm sure I probably did, knowing the bank.

Q. [And do you have any records anywhere] of what you paid the bank for that right of first refusal?

A. If there were any records, they probably existed, but they probably burned down at the house last year.

Q. Where was this house located?

A. In Kemah. At 707 Bay.

Q. At the beginning of this deposition, you told me that you reside at 707 Bay...did you rebuild this house?

A. Not yet. [Well], I don't actually reside there...[I'm staying] at the Airport Inn right at this second.

Q. Okay. *Where do you physically reside?*

A. *It depends on what night.*

Q. *Where do you physically reside on Monday nights?*

A. *It depends on how I feel.*

Hung Juror Halts Trial

From **Judge Temple Driver** of Wichita Falls (89th District Court), this marvelous story from one of his criminal jury trials: "After waiting for a missing juror to return to court at the end of a recess, I sent my bailiff looking for him. When the bailiff returned, he approached the bench and whispered: "Judge Driver, we have a problem. I found the missing juror in the restroom, and he has a hung zipper."

According to Judge Driver, "the problem was solved after we found a repairman with the proper equipment." However, the next day, a story about this amusing incident (written by **Lois Luecke**, the courthouse reporter) appeared on the front page of the *Wichita Falls Times*, with this headline: "Hung Juror Halts Trial."

1. Later in this same deposition, **Randy Fairless** asks the plaintiff if he knows the location of a co-worker who was test-driving a car with the plaintiff that was involved in a prior accident. The witness answers:

To be honest with you, I don't know. Only thing is, I'm not sure even — let's see; only thing is you got the name right. *If you check with Harris County, I think about 90 percent maybe find him down there. He commit murder or something.*

2. In his letter, **Judge Brotherton** also made this very candid admission: "I have attempted not to take myself too seriously, I enjoy your column and find it to be a refreshing retreat from the sometimes deadly serious practice of law. *As an attorney, many of the humorous exchanges I witnessed were caused by me, and since I have never been one to intentionally subject myself to ridicule, I've kept quiet.* Now, however, as a member of the judiciary, I have finally found a silly exchange that I didn't cause, and I couldn't wait to share it."