

Depositions v. Trials:

And a Recess Was Taken By All

The contributions this month are from Austin (**William Ibbotson**), Dallas (**Coyt Randal Johnston**, **Braden Sparks**, **Terry Lynn Thornton**, **Ira Tobolowsky**), Houston (**D'Anne Haydel**), San Antonio (**Michael Black**), and Shreveport, LA (**John Halliburton**).

Life Can Be So Complicated

From **Terry Lynn Thornton** of Dallas (Prager & Benson), this excerpt from the deposition of the plaintiff in "a real estate deceptive trade practice suit — in which **George White** of Irving represented the plaintiff":

Q. Was this your first or your second husband?

A. Third.

Q. It was your third? All right.

A. It was fourth.

Q. Your fourth marriage. All right. Why don't we start with your first marriage. Who was that to?

(*Sotto voce* discussion between witness and counsel.)

Mr. White: If it was annulled, you weren't married.

Witness: Well, that's what I'm asking, 'cause I was married.

Mr. White: No, you weren't. If it's annulled, you're not married. It doesn't exist.

Witness: Okay.

Mr. White: So then subtract one, four minus one is three.

Witness: Okay.

Mr. White: Okay. So only those marriages that ended up in a divorce decree.

Witness: Okay.

Mr. White (wisely): *Well ... life can be complicated at times.*

Demand Letters ... and Replies

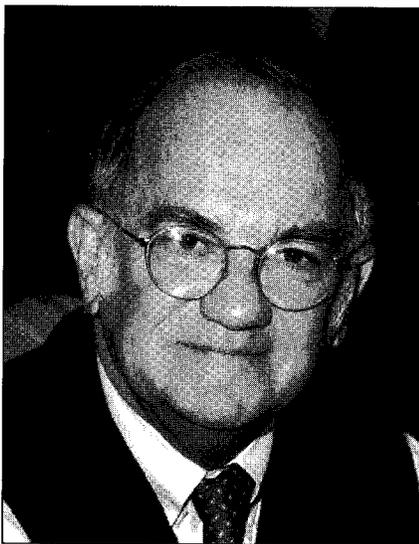
From **D'Anne Haydel** of Houston (**Clements, O'Neill & Pierce**)¹ this excerpt from a demand letter by another Houston lawyer — which demonstrates another hazard in practicing law, the use of form letters.

Dear General Electric:

This is to provide you with notice pursuant to the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA)....

As a result of these acts, omissions and

By Jerry Buchmeyer



breaches of warranties, *Geraldine Prickett, deceased*, has suffered and will continue to suffer from a progressive and irreversible disease. Her earning capacity will in the future be diminished, if not completely eliminated.... Moreover, *Geraldine Prickett, deceased*, has incurred and will likely continue to incur medical expenses for the rest of her life in the treatment of her disease....

Pursuant to the DTPA, you have 30 days in which to respond to this demand of *Geraldine Prickett, deceased*, with an offer of settlement.

From **Ira E. Tobolowsky** of Dallas (Tobolowsky & Associates), this excerpt from a reply to a demand letter "between a couple of the Bar's distinguished members, which [he] happened upon while reviewing a massive file":

Dear ____:

This letter is sent in response to your correspondence wherein you have objected to the monthly payments to your client's ex-wife. Your position on this issue reconfirms the fact that you and your client have really gone off the deep end in this case. I would go so far as to say that you have no human decency but then you and your client would probably consider that a compliment, so I will not

give you that credit. Since ____ has no income on which to live, I will be filing a motion to reinstate payments.

Did He/She Really Say That?

From **Michael J. Black** of San Antonio (Burns & O'Gorman), this excerpt from a personal injury deposition taken by **Sam Houston Knutson** of Mike's firm:

A. We just really discussed the tests.

Q. Okay. And what did Dr. Castillo tell you about the test results?

A. I'm pretty normal. I'm not suicidal or anything.

Q. We're not going to find you up on the roof with a magnum or anything like that?

A. No. *I'm scared of heights, so, no, I don't think so.*

From **John R. Halliburton**, an assistant U.S. attorney in Shreveport, LA — John has been a regular "et cetera" contributor for years — this excerpt from the deposition of the plaintiff who claimed the Air Force failed to timely diagnose and treat his medical condition:

Q. Do you know what a *regular discharge* from the hospital means? Do you know what that is?

A. Now, I know what an *irregular discharge* is. Regular duty hospital, it is when you have served your country well, and to the best of your ability, I guess.

Q. I am not talking about discharge from the military ... Do you know what an irregular discharge from a hospital is? Do you know what that means?

A. I suppose you go up and sign out. I suppose.

Q. Do you know what leaving a hospital against medical advice means?

A. Yeah, I understand what that means.

Q. Well, tell me what does that mean to you?

A. Well, it means a number of things. You could either leave one because you are hacked off at the physician, or your patient care ... and you get tired of the hassle, and you leave under those conditions. There is any number of things you can leave a hospital for. I got up and left one once ... because they

wouldn't clean it. It was so filthy that I wouldn't stay in it. I couldn't get them to wash the commodes, and I couldn't get them to mop the floor. Yeah, I know what it means in regards to what your question was.

Something Entirely Different

From **William H. Ibbotson** of Austin (assistant federal public defender), an excerpt from a civil deposition — which was preceded by the return of a subpoena duces tecum stating:

Served on residence of *Patricia Denny* ... at home address as stated by former employer. In driveway was *mid-'80s Cadillac Seville*. Sounds heard inside home but no one would answer door — after 20 minutes *subpoena left in flower pot outside/beside front door about 7:56 a.m. (1-14-92).*

Then, in the resulting civil deposition of Patricia Denny, several mysteries are quickly explained.

Q. Ms. Denny, I believe you have had an opportunity to review what has been marked as Denny Exhibit Nos. one, two, and three. Would you briefly, for the record, state what those three documents are?

A. Okay. This is the deposition subpoena — it's number one — *that was delivered to my rose bush.*

Def. Attorney: Delivered to your rose bush?

A. To my rose bush. It states here that there was a Cadillac outside. That's true. It doesn't work. *The only ones home were two cats.*

It Ain't Gonna Work for You

From **Coyt Randal Johnston** of Dallas (Johnston & Budner), *two* excerpts from a six-week products liability trial involving the sleeping pill, Halcion. Randal and Mike Mosher represented the plaintiffs, and Randal's opening statement "made a big point that no witnesses would testify they had ever seen [Randal's plaintiff] use illegal drugs" — thus setting the stage for this exchange during Randal's direct examination of the former wife of his client:

Q. Did you ever know Bill to break drug laws of this country?

A. No.

Q. Did you and he ever have occasion to break the drug laws of this country together in any fashion?

A. Well, we did smoke a marijuana cigarette together.

Q. When was that?

A. In the early '70s. I suppose that was breaking the law, so I have to say yes we did.

(... a very long pause, while Randal — not expecting this answer — stares at counsel table. Then ...)

Q. *Well, did you inhale?*

Randal adds: "This trial started ... weeks before the presidential campaign when President Clinton gave this same explanation for his prior use of marijuana.

Randal also sets the stage for the second excerpt by explaining that the Upjohn attorneys had successfully objected to the introduction of many FDA documents by concluding their objections with the statement that Randal's response was "*a 'bootstrap' argument*, which they would then explain to the court in a manner that I seldom understood." Randal was beginning "to believe that there must be some magic in this 'bootstrap' response" — which led to this exchange during the cross-examination of the plaintiffs' expert:

Q. As I estimate it, would it be correct that you will be paid about, oh, \$12,000, \$13,000 approximately for your testimony, sir?

A. I hope it is more than that, because I sure have done a lot more work than that.

Q. Could be \$15,000?

Mr. Johnston: Your Honor, *objection; boot-*

strap. I don't know what it means, but it worked for them.

The Court: *Well it isn't gonna work for you.*

Overruled.

Q. Is that about right?

A. That's correct.

And a Recess Was Taken By All

From **Braden W. Sparks** of Dallas, this transcription — by court reporter **Don Hardy** — of a Marvelous Event during a sanity hearing before **Judge Jim Zimmerman**, involving a defendant represented by **Tom Mills**:

The Court: Let the record reflect that the jury has been examined, impaneled, and sworn and has not yet heard any testimony. Before they are presented any testimony, let me ask if either side has any objections or exceptions to the examination, impaneling, and swearing of the jury?

Mr. Loving: The State does not, your honor.

Mr. Mills: The defense does not.

The Court: Let the record so reflect. Bring

the jury in, Sheriff.

Whereupon, the jury was brought into open court and the following proceedings were held in the presence and hearing of the jury:

The Court: Who do you have first?

Mr. Ormesher: We will call Bill Slack, please.

Whereupon, the defendant, while seated at the counsel table and in the presence of the jury, produced from a hidden location on his person a small wooden sulphur-headed incendiary device, to-wit: a kitchen match, setting on fire several sheets of paper, which burning sheets were then placed on top of the defendant's head, which in turn resulted in the immediate ignition of the defendant's hair.

The defendant thereupon left his chair amidst exclamations from his counsel, admonitions from the court, the pervasive aroma of burning protein, and moved toward the bench in a manner suggesting his intention to ascend thereto.

Whereupon, the defendant was thereupon sat upon by various court officials (whom the court relied upon) and was immediately (1) subdued (2) given warnings as to his constitutional and legal rights, which warnings complied in all respects with the Constitution and laws of this state and the United States, and (3) extinguished, following which a recess was taken and enjoyed by all.

1. Oops! In the March 1994 "et cetera," I failed to reflect **D'Anne Haydel's** new firm affiliation — so her demand for equal column time for **Clements, O'Neill & Pierce** is GRANTED!

Jerry Buchmeyer is a federal district judge for the Northern District of Texas.

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