

Presented:

Winning at Deposition: Skills and Strategy

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Deposition Misconduct and Recesses

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I.

Introduction

The deposition table often serves as the battleground for plaintiff and defendant's counsel to ask and object to tough questioning. In some instances, professionalism may be relegated to the background. To counter this scenario, federal and state procedural rules are implemented to regulate both witness and attorney conduct during depositions and throughout discovery. On the federal level, the Federal Rules of Civil Procedure allow the court to sanction attorneys for their misconduct. Within Texas, the Texas Rules of Civil Procedure spell out the rules for both attorney and witness conduct during depositions. Part II of this memo compiles some example cases in which counsel is sanctioned for deposition misconduct. Part III then provides an overview of Texas's law regarding witness consultations during deposition recesses or breaks.

II.

State and Federal Deposition Misconduct Cases

Under Texas state rules, counsel for each side is expected to "cooperate with and be courteous to each other and to the witness" during a deposition. Tex. R. Civ. P. 199.5(d). Additionally, the witness himself or herself should not be evasive and should not unnecessarily delay or prolong the examination. *Id.* Sanctions can be imposed for abuse of the discovery process, which encompasses attorney misconduct during depositions. Tex. R. Civ. P. 215.3. Specifically, the court can impose any appropriate sanctions if a party is "abusing the discovery process in seeking, making or resisting discovery." *Id.*

Under the federal rules, a court can sanction an attorney for advising a deponent such that he or she fails to answer a question or gives "evasive or incomplete" answers at a deposition. Fed. R. Civ. P. 37(a)(3)(B)(i), (a)(4), (a)(5)(A). In addition, attorneys may be sanctioned for his or her own conduct that "impedes, delays, or frustrates the fair examination of the deponent." Fed. R. Civ. P. 30(d)(2). These sanctions can include the moving party's reasonable expenses, including attorney's fees. *Id.* Moreover, 28 U.S.C.

§ 1927 imposes liability for excess costs on counsel for bad faith conduct. 28 U.S.C. § 1927. Accordingly, any attorney “who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the Court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” *Id.*

The following cases demonstrate instances in which an attorney is sanctioned either under state or federal law for deposition misconduct, including threatening behavior, personal or discriminatory comments, frequent interruptions, and witness coaching.

A. Vulgar Language and Threatening Behavior

1. *Paramount Commc’ns Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994)

In *Paramount Commc’ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 52 (Del. 1994), the court added an addendum to its shareholder litigation opinion solely to address the conduct of Joe Jamail during a deposition. Mr. Jamail represented one of Paramount’s directors, even though Mr. Jamail had not been admitted *pro hac vice* to the litigation. *Id.* at 52-53. In addition to improperly instructing the witness not to answer, Mr. Jamail also was exceedingly rude to opposing counsel. *Id.* at 53. For instance, Mr. Jamail called opposing counsel an “asshole” and then continued, “You could gag a maggot off a meat wagon.” *Id.* at 54. The court found this behavior to be “outrageous and unacceptable” but only stated it would “welcome” a voluntary appearance by Mr. Jamail to show cause why his conduct should not bar future appearances in the Delaware court. *Id.* at 55-56. The court also reprimanded Mr. Thomas (representing Paramount) for passively allowing Mr. Jamail to proceed with his tactics. *Id.* at 56.

2. *Carroll v. Jaques Admiralty Law Firm, P.C.*, 110 F.3d 290 (5th Cir. 1997)

Practicing attorney, Leonard Jaques, appealed the Eastern District of Texas court’s order imposing sanctions for his deposition conduct. *Carroll v. Jaques Admiralty Law Firm, P.C.*, 110 F.3d 290, 291 (5th Cir. 1997). Plaintiff Dermot Carroll had filed suit against Mr. Jaques and his law firm for previous negligent representation. *Id.* After failing to appear for several scheduled depositions, Mr. Jaques further threatened and cursed at plaintiff’s counsel during his show cause hearing. *Id.* As revealed through an excerpt from the deposition transcript, Mr. Jaques made the following profane and threatening comments to plaintiff’s counsel: (1) “[Plaintiff’s counsel] ought to be punched in the g--damn nose,” (2) “Get off my back, you slimy son-of-a-bitch,” and (3) “F--- you, you son-of-a-bitch.” *Id.* at 292. The district court found that Mr. Jaques’ behavior constituted bad faith and imposed monetary sanctions against him. *Id.* The 5th Circuit court then affirmed the district court’s holding and upheld the \$7,000 sanction. *Id.* at 291.

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