

PRESENTED AT

2015 Winning at Deposition: Skills and Strategy

October 22, 2015
Houston, Texas

Putting Combative Lawyers in Their Place

Michael T. Gallagher

Putting Combative Lawyers in Their Place

1. Dondi Properties Corp. v. Commerce Savings & Loan Association, 121 F.R.D. 284 (N.D. Tex. 1988)
2. Texas Lawyer's Creed
3. Federal Rules of Civil Procedure, Rule 30
4. Texas Rules of Civil Procedure, Rule 199.5
5. Paramount Communications Inc. v. QVC Network Inc., 637 2d 34, 53-54 (Del. 1994)
6. Principe v. Assay Partners, 586 N.Y.S. 2d 182, 184 (Sup. Ct. 1992)

121 F.R.D. 284
United States District Court,
N.D. Texas,
Dallas Division.

DONDI PROPERTIES CORPORATION and the
Federal Savings and Loan Insurance Corporation
as Receiver for Vernon Savings and Loan
Association, FSA, Plaintiffs,

v.

COMMERCE SAVINGS AND LOAN
ASSOCIATION, et al., Defendants.
Jean Rinard KNIGHT, Plaintiff,

v.

PROTECTIVE LIFE INSURANCE COMPANY,
Defendant.

Civ. A. Nos. CA3-87-1725-H, CA3-87-2692-D. |
July 14, 1988.

At request of one its members, the United States District Court for the Northern District of Texas convened en banc for purpose of establishing standards of litigation conduct to be observed in civil actions in district. The District Court held that standards of litigation conduct would be adopted.

Ordered accordingly.

Attorneys and Law Firms

*284 Don T. O'Bannon of Arter, Hadden & Witts, Dallas, Tex., and Jerome A. Hochberg and Douglas M. Mangel of Arter & *285 Hadden, Washington, D.C., for Dondi Properties Corp., et al.

Ernest E. Figari, Alan S. Loewinsohn, and James A. Jones of Figari & Davenport, Dallas, Tex., for Gerald Stool, et al.

Gordon M. Shapiro, Michael L. Knappek, and Patricia J. Kendall of Jackson & Walker, Dallas, Tex., for Commerce Sav. Assn.

Paul E. Coggins and Weston C. Loegering of Davis, Meadows, Owens, Collier & Zachry, Dallas, Tex., for W. Deryl Comer.

Randall L. Freedman, Dallas, Tex., for Jack Franks.

Christopher M. Weil and Amy Brook Ganci of Weil &

Renneker, P.C., Dallas, Tex., for R.H. Westmoreland.

Mark T. Davenport of Figari & Davenport, Dallas, Tex., for Jean Rinard Knight.

David M. Kendall of Thompson & Knight, Austin, Tex., for Protective Life Ins. Co.

Before PORTER, Chief Judge, SANDERS, Acting Chief Judge, and WOODWARD, MAHON, BELEW, ROBINSON, BUCHMEYER, FISH, MALONEY, FITZWATER, and CUMMINGS, District Judges.

Opinion

PER CURIAM:

We sit en banc to adopt standards of litigation conduct for attorneys appearing in civil actions in the Northern District of Texas.

I.

Dondi Properties is a suit for recovery based upon civil RICO, common law and statutory fraud, the Texas Fraudulent Transfer Act, federal regulations prohibiting affiliate transactions, civil conspiracy, negligent misrepresentation, and usury, arising in connection with activities related to the failed Vernon Savings and Loan Association. *Knight* is an action for violations of the Texas Insurance Code and Texas Deceptive Trade Practices—Consumer Protection Act, and for breach of duty of good faith and breach of contract, arising from defendant's refusal to pay plaintiff the proceeds of a life insurance policy.

In *Dondi Properties*, the following motions have been referred to the magistrate pursuant to 28 U.S.C. § 636(b) and N.D.Tex.Misc.Order No. 6, Rule 2(c): the Stool defendants'¹ third motion for sanctions or, in the alternative, to compel (and supplement to the motion); the third motion for sanctions of defendant, Commerce Savings Association (and supplement to the motion); defendant, W. Deryl Comer's, first motion for sanctions or, in the alternative, motion to compel (and supplement to the motion); the Stool defendants' motion for sanctions against plaintiffs' attorney; defendant, Jack Franks', first motion for sanctions or, in the alternative, motion to compel; defendant, R.H. Westmoreland's, motion for sanctions and, in the alternative, to compel; and various

submissions containing additional authorities in support of the motions and briefs already filed. Plaintiffs have responded to the motions, and the Stool defendants have filed a motion for leave to file reply to plaintiffs' response.

The sanction motions complain of plaintiffs' failure to answer interrogatories, failure to comply with prior orders of the court pertaining to discovery, misrepresenting facts to the court, and improperly withholding documents. The magistrate had previously entered orders on March 29, 1988 and April 28, 1988 and defendants contend plaintiffs' conduct with respect to prior orders of the magistrate warrants dismissing their action or awarding other relief to movants.

In *Knight*, there is pending before a judge of this court plaintiff's motion to strike a reply brief that defendant filed without leave of court. On April 8, 1988, defendant filed four motions, including motions for separate trials and to join another *286 party.² On April 27, 1988, plaintiff filed her response to the motions. Thereafter, without leave of court, defendant, on May 26, 1988, filed a reply to plaintiff's response. On June 3, 1988, plaintiff filed a motion to strike the reply, to which motion defendant has filed a response.

Plaintiff contends the reply brief should be stricken because defendant did not, as required by Local Rule 5.1(f), obtain leave to file a reply, because defendant failed to seek permission immediately upon receipt of plaintiff's response, and, alternatively, because defendant's reply was filed in excess of 20 days after plaintiff filed her response. In the event the court does not strike the reply, plaintiff requests leave to file an additional response.

At the request of a member of the court, we convened the en banc court³ for the purpose of establishing standards of litigation conduct to be observed in civil actions litigated in the Northern District of Texas. In section II of the opinion we establish such standards. In section III the magistrate decides the *Dondi Properties* motions, and in section IV a judge of the court decides the *Knight* motion, in accordance with the standards we adopt.⁴

II.

^[1] The judicial branch of the United States government is charged with responsibility for deciding cases and controversies and for administering justice. We attempt to carry out our responsibilities in the most prompt and

efficient manner, recognizing that justice delayed, and justice obtained at excessive cost, is often justice denied.⁵

We address today a problem that, though of relatively recent origin, is so pernicious that it threatens to delay the administration of justice and to place litigation beyond the financial reach of litigants. With alarming frequency, we find that valuable judicial and attorney time is consumed in resolving unnecessary contention and sharp practices between lawyers. Judges and magistrates of this court are required to devote substantial attention to refereeing abusive litigation tactics that range from benign incivility to outright obstruction. Our system of justice can ill-afford to devote scarce resources to supervising matters that do not advance the resolution of the merits of a case; nor can justice long remain available to deserving litigants if the costs of litigation are fueled unnecessarily to the point of being prohibitive.

As judges and former practitioners from varied backgrounds and levels of experience, we judicially know that litigation is conducted today in a manner far different from years past. Whether the increased size of the bar has decreased collegiality, or the legal profession has become only a business, or experienced lawyers have ceased to teach new lawyers the standards to be observed, or because of other factors not readily categorized, we observe patterns of behavior that forebode ill for our system of justice.⁶ We now adopt standards designed to end such conduct.

A.

We begin by recognizing our power to adopt standards for attorney conduct in *287 civil actions and by determining, as a matter of prudence, that we, rather than the circuit court, should adopt such standards in the first instance.

By means of the Rules Enabling Act of 1934, now codified as 28 U.S.C. § 2072, Congress has authorized the Supreme Court to adopt rules of civil procedure. The Court has promulgated rules that empower district courts to manage all aspects of a civil action, including pretrial scheduling and planning (Rule 16) and discovery (Rule 26(f)). We are authorized to protect attorneys and litigants from practices that may increase their expenses and burdens (Rules 26(b)(1) and 26(c)) or may cause them annoyance, embarrassment, or oppression (Rule 26(c)), and to impose sanctions upon parties or attorneys who violate the rules and orders of the court (Rules 16(f) and 37). We likewise have the power by statute to tax costs, expenses, and attorney's fees to attorneys who

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