UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

WINNING AT DEPOSITION: SKILLS AND STRATEGY

August 24, 2017
Austin, TX

Dealing with Combative and Unscrupulous Lawyers

Michael L. Slack

Author Contact Information:
Michael L. Slack
Slack & Davis, LLP
Austin, TX
mslack@slackdavis.com
512.795.8686

Dealing with Combative and Unscrupulous Lawyers

By
Michael L. Slack
Slack & Davis, LLP

Scope of Article

This paper addresses issues that often arise during depositions when lawyers engage in bullying, intimidation or abusive conduct which is outside the bounds of civility. The paper examines cases dealing with abusive conduct in depositions, why such conduct occurs and discusses practical methods for anticipating, preparing for and dealing with abusive deposition conduct.

Background

Combative and unscrupulous attorney conduct in pretrial practice is not a new or novel problem to Texas lawyers and judges. *Dondi Properties Corporation v. Commerce Savings and Loan Association*, 121 F.R.D. 284 (N.D. Tex. 1988). *Dondi Properties* resulted from extensive acrimonious motion practice in two different cases pending in the Northern District of Texas. The district judges of the Northern District convened en banc to review the litigation conduct at issue in the two cases*, Dondi Properties* and *Knight v. Protective Life Ins. Co*. After establishing standards of litigation conduct, the en banc court decided the pending motions in the underlying *Dondi Properties* and *Knight* cases, applying their articulated standards of conduct. *Dondi Properties* has since been cited extensively in numerous state and federal jurisdictions as establishing guiding standards for civility in litigation even though the standards were initially promulgated for applicability only within the Northern District of Texas.

At the outset, the panel observed:

> 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.

Id. at 286.

Referencing the recently promulgated "Guidelines of Professional Courtesy" and "Lawyer's Creed," the panel adopted standards of litigation conduct which incorporated, among others, the following features:

a) A duty of courtesy to and cooperation with opposing counsel;
b) A duty of personal and professional integrity;
c) A duty to reject client demands for abusive or offensive conduct;
d) Prohibition for using discovery for harassment;
e) A mandate to cooperate in scheduling of case matters

Id. at 287-88.

The Texas Legislature entered the arena of regulating attorney conduct in personal injury, wrongful death and property damage cases shortly before *Dondi Properties*, in 1987, when it enacted Chapter 9 of the Tex. Civ. Prac. & Rem. Code entitled "Frivolous Pleadings and Claims." Later, the Legislature broadened its purview to embrace questionable filings in all civil proceedings when it enacted Chapter 10 of the Tex. Civ. P. & Rem. Code entitled "Sanctions for Frivolous Pleadings and Motions" in 1995. Most recently in 2015, the 84th Texas Legislature passed, and Governor Abbott signed into law, Senate Bill 534 which modifies the lawyer's oath to require that an attorney act with integrity and civility.

The Texas Rules of Civil Procedure which addressed abusive pleadings (Rule 13) and discovery practices (Rule 215) were significantly amended in the post-*Dondi* era with changes to Rule 13 in 1990 and to Rule 215 in 1990 and 1999.

Post-*Dondi Properties* Incivility in Depositions

While *Dondi Properties* sharply illuminated the lack of civility rampant within the ranks of litigators, it did not, as it proposed to do, end abusive attorney practices. It did provide judges with a new standard of conduct and sense of authority to more effectively police and deter offensive attorney behavior within their jurisdictions.

Egregious Attorney Misconduct. The case of *Carroll v. The Jaques Admiralty Law Firm, P.C.*, 110 F.3d 290 (5th Cir. 1997), offers the unique circumstance of a lawyer-witness, rather than the questioning lawyer, being sanctioned for abusive conduct. In this case the witness was an attorney, Leonard Jaques of Michigan, who was being sued for fraud by a former client. Jaques was being deposed pursuant to court order since he failed to appear at an earlier scheduled deposition. Once sworn, witness Jaques became a fountain of profanity and abusive language and did not stop until the lawyer questioning him halted the deposition and referred the matter to the district court. The district court sanctioned Jaques $7,000 for his behavior which was affirmed by the Fifth Circuit: "We find entirely appropriate the court's expectations of a heightened standard of conduct by a litigant who is also an attorney." *Id*. at 294; (citing *Coane v. Ferrar Pan Candy Co*., 898 F.2d 1030, 1033 (5th Cir. 1990)).

Clark v. Bres, 217 S.W.3d 501(Tex. App.—Houston [14th] 2006, pet. denied) involved sanctions levied against attorney Clark by the trial court which were affirmed. Attorney Clark represented homebuilder Clark, d/b/a Celtic Constructors, Inc., in a breach of contract action against the homeowners, Bres. Bres counterclaimed on multiple grounds including fraud and theft. During discovery, attorney Clark deposed Ms. Bres while her husband was present. Clark asked a series of questions, laced with profanity, that suggested infidelity on the part of Ms. Bres.[1] Before trial, the court issued a show-cause order asking

[1] The question asked is not repeated here. It is unclear why the Fourteenth Court of Appeals felt the need to repeat the offensive question verbatim in its opinion, especially given the abundance of evidence of abusive conduct

UT LAW CLE THE UNIVERSITY OF TEXAS TEXASLAW

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the UT Law CLE eLibrary (utcle.org/elibrary)

Title search: Dealing with Combative and Unscrupulous Lawyers

Also available as part of the eCourse
Answer Bar: Taking Your Car Crash Case to Trial

First appeared as part of the conference materials for the
2017 Winning at Deposition: Skills and Strategy session
"Dealing with Combative and Unscrupulous Lawyers"