DEALING WITH OBSTREPEROUS WITNESSES OR COUNSEL

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University of Houston Law Foundation

October 27, 2005 – Cityplace Conference Center, Dallas, Texas
November 3, 2005 – Sheraton Suites Hotel, Houston, Texas

TABLE OF CONTENTS

I. INTRODUCTION

Every lawyer taking a deposition will from time to time encounter the obstreperous lawyer or witness whose apparent goal is to obstruct the discovery process and prevent you from obtaining necessary information. When faced with such a dilemma, the lawyer must carefully consider the legal and tactical alternatives and approaches for dealing with such conduct. This outline will attempt to address some of the legal and tactical alternatives available to an attorney dealing with a difficult opposing counsel or witness.

II. LAWYER CONDUCT

A. Background

Some attorneys approach depositions with an aim towards obstructing the other attorney's ability to obtain meaningful information at any and all costs. Frankly, some attorneys believe their main purpose in a deposition is to obstruct the discovery process as much as possible. Several reasons exist for this conduct. The attorney may be unprepared to defend the deposition and acts out of desperation or ignorance. The inexperienced lawyer may also engage in misbehavior because he or she lacks the confidence to allow the facts to come out and may be weary of the opinions of supervising attorneys. Finally, some attorneys simply do not accept the premise of the Texas Rules of Civil Procedure, especially the 1999 amendments to the rules, which attempt to minimize the lawyer's role in depositions. While the obstructionist attorney is more likely to prey upon the young or apparently inexperienced counsel, who he believes he can intimidate, he may try these tactics on any attorney during a deposition.

B. 1999 New Discovery Rules

The term "Rambo litigation" was coined as a result of the conduct of attorneys in Texas leading up to the new Texas discovery rule revisions in 1999. The practice of Rambo litigation manifested itself in long-speaking objections and colloquy resulting in efforts to coach witnesses during depositions and obstruct the deposition process. In 1998 the Supreme Court Advisory Committee recommended a drastic set of changes to our discovery rules, including limitations on deposition objections, witness conferences and other aspects of deposition conduct, aimed at curtailing the Rambo litigation tactics and minimizing obstructionist behavior during depositions. The result of the Supreme Court Advisory Committee's recommendations were new rules enacted in 1999 allowing only specific form objections and containing other provisions curtailing the obstructionist behavior. The new rules proposal created great controversy because of fear that the rules went too far and would eliminate the ability of lawyers defending depositions to adequately represent their clients. A commentary published in the *Texas Lawyer* even deemed the new rules the "potted plant rule," suggesting that the limits reduce the role of a lawyer defending a deposition to a "potted plant." Nevertheless, the Supreme Court accepted the committee's recommendations and concluded that strict limits were necessary in order to curtail the out-of-control abusive conduct prevalent in depositions in Texas. The Court did, however, address some of the concerns and attempted to achieve a balance between the deposing and defending lawyers, as well as witnesses. Every lawyer engaging in deposition practice in Texas should be familiar with the rules as they provide great guidance on ways to curtail or control the obstructionist lawyer.

Rule 199.5(d-h) are the rules that generally govern the conduct of counsel and witnesses

during depositions. The following rules have greatly changed deposition practice in Texas since 1999.

1. Guidelines [Rule 199.5 (d)]

(a) The deposition must be conducted as though the testimony were being received in a courtroom during trial. This rule generally provides that counsel should cooperate with each other and be courteous and polite to each other, as well as witnesses.

(b) An attorney must not object to a question at an oral deposition, instruct the witness not to answer a question, or suspend the deposition unless there is a good faith factual and legal basis for doing so at the time. [Rule 199.5 (h)]

This general rule is aimed at controlling the conduct of lawyers at depositions. The rule specifically provides that if a lawyer violates these limitations, the Court has discretion to allow in evidence at trial of statements, objections, discussions, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony. This rule gives the Court power to admit evidence of the conduct of an obstructionist lawyer during the course of a deposition and can and should be used to attempt to control the conduct of the obstructionist attorney.

2. Conferences [Rule 199.5(d)]

One of the main tactics of the obstructionist attorney was to engage in repeated and continual private conferences with witnesses. Sometimes attorneys would hold private conferences during the actual pendency of a question, often whispering in the ear of the witness. Rule 199.5(d) imposes limitations on conferences between witnesses and the witnesses' attorney during the actual taking of the deposition. The rule specifically states that private conferences between witnesses and the witnesses' attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege applies. The rule also states that private conferences may be held during agreed recesses and adjournments. Under the rules, a lawyer is not allowed to take a break while a question is pending to discuss the matter with the witness. The deposing attorney is allowed to require that the question be answered and that a private conference can only be held during agreed-upon recesses and adjournments. If you, as a deposing lawyer, do not agree to go off the record, the opposing counsel will be in violation of the rules in conducting such a private conference.

3. Objections [Rule 199.5(e)]

Rule 199.5(e) sets forth the rules for objecting in depositions. While the obstructionist attorney typically utilizes the ability to object as a means to obstruct the deposition and/or coach his or her witness, the rules specifically limit objections to "leading" and "form." Comment 4 to Rule 199 elaborates on the definition of a "form" objection as including objections that the question calls for speculation, calls for a narrative answer, is vague, is confusing, or is ambiguous. Ordinarily, a witness must answer a question at a deposition subject to the objection. Objections to the testimony during the oral deposition are limited to objection, nonresponsive. The 1999 rule revisions are an effort to eliminate the obstructionist conduct that had become routine in Texas involving long-speaking objections and coaching of witnesses. The rule contains some very strict waiver provisions if the obstructionist lawyer does not conform to these new rules. The rule states that objections are

waived if not stated as phrased during the oral deposition. It further states that argumentative or subjective objections waive the objection and may be grounds for terminating the oral deposition or assessing costs or other sanctions. The rule further continues the prior practice that an attorney need not make objections other than "form" or "leading" during a deposition in order to raise such objections later during trial.

The rule further states that if a deposing party asks for an explanation of the objection, the objecting party must give a clear and concise explanation of the objection if requested. This rule specifically prohibits the objecting lawyer from giving an argumentative or suggestive explanation if asked. The lawyer must be concise and clear in stating the grounds for the objection, giving the deposing lawyer an opportunity to cure the objection if necessary.

Remember that you will often get what you have asked for. If you ask for an explanation of an objection, many times you will get a response much beyond the clear concise response permitted by the Texas Rules of Civil Procedure. Many lawyers will use this as an opportunity to engage in old school typical witness coaching. You may ask for an explanation on an objection if you are really concerned that the objection is valid and want an attempt to cure the objection. If you are going to ask for an explanation, do it after the witness has already answered the question. Let the witness answer the question so that you will get an answer without the lawyer's explanation and then go back and ask for the explanation and reask the question, if necessary, to cure the objection.

4. Instructions Not To Answer [Rule 199.5(f)]

In an effort to address lawyers' concerns to the "potted plant" moniker, the 1999 rule revisions provided the tendering lawyer with some ammunition in the form of the rule permitting the lawyer to instruct a witness not to answer. Rule 199.5(f) contains provisions setting forth the parameters for such an instruction. This rule is the main rule which provides ammunition for the obstructionist attorney and has been an area of continuing difficulty with some lawyers. The rule authorizes an attorney to instruction a witness not to answer only if necessary to (1) preserve a privilege; (2) comply with a court order or the rules; (3) protect a witness from an abusive question or one for which any answer would be misleading; or (4) secure a ruling concerning the termination of a deposition.

The procedure permitting instructions not to answer an abusive question or one for which an answer would be misleading was specifically included to respond to complaints that lawyers defending depositions would otherwise be powerless to protect a witness from any abuse. Comment 4 to Rule 199 elaborates making it clear that witnesses need not answer the "when did you stop beating your wife" types of questions or other questions inquiring into matters clearly beyond the scope of discovery or that are argumentative, repetitious, or harassing. The somewhat vague language contained in this rule and the commentary is ripe for abuse by the obstructionist attorney. Whether a question is repetitious, argumentative, harassing, or necessarily requires a misleading answer can be a very subjective interpretation. My experience has been that some lawyers will interpret this provision broadly and will utilize the instruction not to answer rule as the main means of obstructing a deposition. The only way to combat this is to simply ask for an explanation and attempt to cure the question. Again, if the lawyer gives a suggestive or argumentative explanation of the reason he or she instructed the witness not to answer, the instruction will be waived and the witness will be required to answer the question.

5. Hearing [Rule 199.6]

Rule 199.6 specifically provides that a party at any reasonable time may request a hearing on an objection or privilege asserted by an instruction not to answer or suspension of the deposition. The rule also provides, however, that the failure of a party to obtain a ruling prior to trial does not waive any objection or privilege.

Although the 1999 rule revisions were a valiant effort to curtail the obstructionist behavior, some lawyers will simply engage in obstructionist behavior despite the consequences. My experience has been the deposition practice in Texas improved dramatically with the enactment of the 1999 rule revisions. Nevertheless, you may still be faced with an obstructionist attorney regardless of the rules or the consequences.

III. ETHICAL RULES

In addition to the 1999 Texas Rules of Civil Procedure, several ethical rules and provisions arguably apply to the obstructionist lawyer. In dealing with an obstructionist attorney, you may either file a motion with the Court seeking sanctions or cite the ethical rules. You may also consider filing a grievance against a lawyer who continually engages in such conduct, particularly if the trial court has refused to take any action against the obstructionist attorney.

The preamble to the Texas Disciplinary Rules of Professional Conduct specifically states that:

> "A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials."

The preamble to the Disciplinary Rules of Professional Conduct attempts to inject a sense of professionalism into lawyers' conduct. Any abusive effort by a lawyer to obstruct the discovery process violates the overall tenor of the Texas Rules of Disciplinary Procedure.

The Texas Lawyers Creed, which was a mandate for professionalism adopted in November of 1989, also contains language applicable to the obstructionist lawyer. Specifically, the Texas Lawyers Creed states that a lawyer "will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process." It further states that the lawyer will "encourage witnesses to respond to all questions which are reasonably understandable" and states the lawyer will not "encourage nor permit a witness to quibble about words where their meaning is reasonably clear." Clearly, the tenor of the Texas Lawyers Creed and preamble to the disciplinary rules is that obstructionist behavior is not favored and should be discouraged. These ethical provisions can be used by the deposing lawyer as threats to the obstructionist attorney or in hearings as persuasive authority when seeking assistance from the trial court.

Specific disciplinary rules contained within the Texas Disciplinary Rules of Professional Conduct also apply to the lawyer's conduct and the obstructionist lawyer may be violating these rules and be subject to discipline by the Commission for Lawyer Discipline. Specifically, Rules3.02 and 3.04 of the Texas Rules of Professional Conduct may apply to the obstructionist attorney.

Rule 3.02 states that "a lawyer shall not take a position that unreasonably increases the cost or other burdens of the case or that unreasonably delays resolution of the matter." Clearly, engaging in repetitive obstructionist conduct in a deposition unreasonably increases the cost of litigation and is a violation of Rule 3.02.

Rule 3.04 states that a lawyer shall not "unlawfully obstruct another party's access to evidence or habitually violate an established rule of procedure or of evidence or engage in conduct intended to disrupt the proceedings." Again, the obstructionist lawyer will many times violate Rule 3.04 of the Texas Disciplinary Rules of Professional Conduct. These rules can be used by the deposing party in hearings before the trial court as persuasive authority or in a grievance procedure. Trial courts are often very reluctant to take action against any attorney in the form of sanctions. The grievance process may be an alternative to the trial court in attempting to control the conduct of the obstructionist attorney and should be considered as an option in extreme cases..

IV. CASE LAW

I found only one reported Texas case dealing with the 1999 rules. The case *In re Harvest Communities of Houston, Inc.*, 88 S.W.3d 343 (Tex. App. -- San Antonio 2002, no writ), dealt with an attorney who engaged in some old school typical obstructionist behavior. The obstructionist counsel repeatedly interrupted the deposing lawyer with argumentative objections and did not limit his objections as required by Rule 199.5(e). The obstructionist lawyer made continual speeches and was obviously attempting to intimate the deposing lawyer. He also was abusive towards the lawyer and ridiculed him calling his questions "nonsense," "preposterous," and "absurd." The trial court struck the testimony of the expert witness being tendered during the course of the deposition. While the appellate court found that this type of "death penalty sanction" was excessive and unduly punished the client and not the lawyer, the trial court made it clear and specifically stated that this type of conduct is sanctionable and should be sanctioned by the trial court. This case illustrates the appellate court's view towards the obstructionist lawyer and can be utilized in hearings with courts in dealing with this type of conduct.

V. TACTICAL CONSIDERATIONS

Despite the tenor of the ethical rules governing Texas lawyers and the 1999 Rules of Civil Procedure governing deposition practice, some lawyers will continue to engage in obstructionist behavior. While some lawyers are naturally "jerks" and intend to obstruct the process, others may be engaging in legitimate conduct in objecting to questions and instructing witnesses not to answer. Remember, some objections are made because they are valid and legitimate. When deciding how to respond to the seemingly obstreperous or obstructionist counsel, you should always remember that responding with nuclear weapons to a polite request for clarification or a polite instruction not to answer is guaranteed to turn the deposition into an unpleasant experience for all involved. It is also likely to interfere with your ability to obtain the maximum amount of information from the witness. As the deposing lawyer, you should always keep your goals in mind; that is to obtain useful

information and better prepare your case for trial. You must decide whether the conduct of the obstreperous lawyer is actually obstructing your ability to gain information or is simply irritating. The following are some possible ways to react and deal with the obstreperous counsel.

A. Ignore the Lawyer.

The goal of the obstructionist counsel is to prevent you from obtaining information and to interrupt the flow of your deposition. If you continually respond to objections and get into long debates with counsel, you are playing into the hand of the obstructionist lawyer. You subconsciously switch your form of questions and your focus from the witness to the lawyer. One tactic you should consider is to simply ignore him and do not even look at the lawyer or respond to him in any way when he makes ridiculous objections or instructions not to answer. Keep reasking the question and attempt to cure the objection. Many times, lawyers will understand and get the point that you are going to continue indefinitely until you obtain the information you need. Sometimes this will discourage the obstructionist counsel and you may obtain more profitable information during the course of the deposition. This approach does, however, require discipline and patience.

B. Escalating Your Response.

While the approach of ignoring counsel is effective if you are ultimately obtaining useful information, this tactic does not work with the obstructionist attorney who is actually preventing you from obtaining necessary information. Ignoring counsel when he is effectively obstructing your deposition or effectively coaching the witness, simply rewards improper behavior. One way to combat this behavior is to make the lawyer understand that you are aware of the tactics and you are keeping track of these matters for a motion with the court. If your low grade statements do not work, the next approach is to escalate the response and draw a line and threaten to seek assistance with the Court. You may consider taking a break with opposing counsel off the record and ultimately display anger. Sometimes, particularly with young lawyers, displaying anger and/or "throwing a fit" will somewhat control the obstructionist counsel. If the other lawyer knows that his tactics are going to provoke a very unpleasant and aggressive response from you, sometimes this will control the behavior because most people actually want to avoid being in such an unpleasant environment. Use this tactic with caution, however, because you may provoke the opposite response depending upon counsel.

C. Ask Good Questions.

Sometimes what you perceive as obstructionist behavior is merely the result of you not asking good and precise questions. If you know you are going to be dealing with an obstreperous counsel, you need to give a lot more thought to your deposition preparation and be prepared to ask very clear and precise questions that minimize the ability of an obstreperous lawyer to object to your questions or instruct the witness not to answer. For example, if the lawyer is not allowing a witness to answer compound questions because he claims they are abusive, be prepared to break the questions down and ask precise, clear questions.

D. Seek Court Intervention.

Sometimes, you simply cannot control the obstructionist lawyer without seeking court intervention. If this is necessary, do not stop the deposition until you obtain all the information that you can obtain. You never know how the Court is going to rule and if you stop the deposition without obtaining all of the information you could have obtained, the Court may not allow you to resume the deposition. One suggestion for controlling obstructionist counsel is to ask the Court to allow you to put a video camera on both attorneys. This is particularly useful when you suspect that the opposing counsel is making facial gestures to the witness or perhaps even nudging and/or kicking a witness under the table.

E. Use a Videotape Deposition.

When dealing with an obstructionist counsel, consider videotaping all depositions. My experience has been that lawyers will tend to behave themselves more during a videotape deposition because they know that the audiotape is available for you to use at a hearing in front of the judge and their conduct will be easier for you to demonstrate to the judge.

F. Don't Go Off The Record.

Some attorneys will try and get you off the record to intimidate you and get you off your game. They know that it is difficult for you to prove anything that happens off the record. You may consider simply refusing to go off the record to speak with the opposing attorney. The rules allow you to refuse to go off the record unless everyone agrees.

G. Don't Depose Late.

I have found that obstructionist behavior tends to escalate after 5:00 p.m. When lawyers and/or witnesses get tired, conduct tends to deteriorate. Therefore, I suggest as a general rule to not prolong a deposition much past 5:00 p.m., particularly if you have been going all day. I will also refuse to start a deposition at a point in time in the afternoon where I know the deposition is likely to go well past 5:00 p.m. This occurs frequently when dealing with physicians, who many times like to start their depositions after 5:00 p.m. when their normal workday is done. I universally refuse this request because I have found that unproductive behavior between lawyers and witnesses increases late in the evening when everyone is tired and cranky.

H. Be Lighthearted.

Sometimes being lighthearted and almost making a joke of the matter will cause the opposing counsel to lighten up and decrease the obstructionist behavior. By appealing to the good-natured side of the lawyer, you can sometimes get the opposing lawyer's guard down and inject a friendlier attitude that can be conducive to decreasing obstructionist behavior.

In short, there is no one single approach for dealing with the obstructionist counsel. Every situation is different and unique and the deposing attorney must be prepared to deal with all possible strategies.

VI. WITNESS CONDUCT

Dealing with the obstreperous counsel has been addressed by the 1999 rules and the disciplinary rules. Rules governing the conduct of actual witnesses, however, are few and far between. Sometimes witnesses will simply not cooperate and will not answer questions. Since witnesses are not governed by our ethical rules and there are not many other rules to control the conduct of witnesses in the deposition context, a lawyer's skill and tactical considerations play an even greater role in dealing with the obstreperous witness.

A. Discovery Rules.

Rule 199.5 does contain some rules that govern the conduct of witnesses during depositions. Rule 199.5(d) specifically states that witnesses should not be evasive and should not unduly delay the examination. The rule also states that a witness' conduct can be sufficient to permit a trial court to allow evidence in trial of the objections, discussions, and other evidence of the witness' conduct.

B. Tactical Considerations.

Dealing with an obstreperous witness is extremely frustrating because of the limited resources available to the deposing lawyer to combat this problem. Many times the obstreperous witness is a skillful expert witness who is very politely refusing to answer your question with long, wordy and suggestive answers to your simple cross-examination questions. The following are a list of some possible tactics that can be used to deal with this type witness.

1. Reask the Question Indefinitely.

Dealing with a long-winded, wordy, and skillful witness can be extremely frustrating and tricky. One of the best approaches to this witness is to simply reask the question as many times as necessary in an effort to obtain an answer to your question. Many times a witness will learn that his long-winded answers are not going to shake you off the trail and that you will reask the question as many times as necessary. The witness may decide that he does not want to subject himself to an all-day deposition and will become more responsive as the deposition continues as your approach becomes evident.

2. Have Witness Repeat the Question.

Sometimes after a witness gives a long-winded nonresponsive answer to your question, it is useful to ask the witness, on the record, to tell you what the pending question was. Many times a witness will be unable to tell you what the question was after having given a long-winded five-minute, nonresponsive answer. This can make the witness feel silly and can sometimes have the effect of controlling the overly wordy witness.

3. Defining Words and Terminology.

One trick of the obstreperous witness is to play word games with you and quibble over your use of words. A useful tactic to combat this problem is to be very precise and careful in defining all words that the witness has a problem with. Many times you can simply use the witness' own definitions of words in order to provoke a meaningful response to a question. When a witness

complains that your use of words or question is vague, simply ask the witness what was vague about it. Make the witness explain to you what the problem with your question is. You can then respond to the question in accordance with the complaints of the witness, which will be more likely to provoke a meaningful response to your question.

4. Intimidation.

A lawyer must make a tactical decision during the course of deposing a difficult witness as to whether or not you want to use the carrot or the stick. Sometimes being extremely polite and nice can provoke more useful information and more meaningful responses, whereas some witnesses will respond more to intimidation and aggressive behavior. Again, some witnesses will not want to be exposed to an unpleasant experience and will respond more favorably to subtle, and sometimes not so subtle, intimidation tactics in which you aggressively let the witness know that his conduct is improper and that you will bring him before the court if necessary.

5. Court Intervention.

Sometimes nothing works and you simply have to bring a witness down before a Court and seek court intervention to obtain useful information from the witness. You may even have to consider asking the Court to appoint a master to essentially referee depositions, although this can be extremely time consuming and costly.