ETHICAL CHALLENGES IN ZEALOUSLY REPRESENTING YOUR CLIENT

FRANK D. WEEDON, Longview
Mayfield Weedon

ANDREW Z. SCHRECK, Sugarland
Downs Stanford

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CHAPTER 1
FRANK WEEDON

Frank Weedon was born on November 21, 1967 in Austin, Texas. He graduated from Longview High School in 1986, University of Texas at Arlington in 1993, and South Texas College of Law in 1998.

Frank is an attorney, board certified in workers’ compensation law. He is an adjuster, licensed in Texas, Oklahoma, and Arizona.

Frank began working in the insurance claims industry for a third party administrator in January 1991. He adjusted claims during the day, and attended undergraduate and law school at night. As an attorney for the defense, Frank represented most of the workers’ compensation insurers writing policies in Texas, and provided risk management services to his employer clients. As a continuing education provider authorized by the Texas Department of Insurance, Frank lectured to hundreds of insurance adjusters across the state on issues such as insurance bad faith, investigation and administration of claims. Today, Frank practices in his hometown of Longview, Texas, where he represents injured workers in administrative claims and civil litigation. He frequently speaks regarding Texas insurance and workers compensation claims handling procedures. He is an expert witness testifying over seventy times regarding Texas, Oklahoma, and Arizona workers’ compensation matters. He provides testifying and consulting services for plaintiffs and defendants. He holds an OSHA General Industry safety certification and SafeLand drilling certification from the Petroleum Education Council.

He and his wife spend their spare time chasing their three teenage daughters around North East Texas.

Mayfield Weedon, LLP
P.O. Box 3959
208 North Green Street, Suite 200
Longview, Texas 75606
(903)757-9600
www.mayfieldweedon.com
Andrew Z. Schreck

Mr. Schreck is a shareholder and the managing attorney in the Firm’s Houston-area office. He handles a wide variety of civil litigation matters including personal injury, premises liability and wrongful death defense, business and commercial litigation, and employment law. He also defends clients from claims arising under Texas’ workers’ compensation laws, the Federal Employer Liability Act, the Jones Act, the Longshore Act (and its extensions), and other land transportation and maritime personal injury claims. Mr. Schreck also handles litigation against employers involving non-subscriber claims. He has almost 20 years of experience handling a variety of personal injury and commercial claims in the energy industry both onshore and offshore, heavy industries including manufacturing, petrochemical, construction and related businesses, and claims arising from marine and land transportation industries.

Bar Admissions
- State of Texas (1990)
- US Court of Appeals, Fifth Circuit
- United States District Court--Northern, Southern, Eastern, and Western Districts of Texas

Professional Affiliations
- State Bar of Texas
- Houston Bar Association
- Fort Bend Bar Association

Education
- Baylor University, BA, 1986
- University of Houston, JD, 1990

Lectures
- 1997, 1998 and 2007- Speaker, Loyola University (New Orleans), Annual Longshore Conference
- “Update on Texas Indemnity Law”
- “Texas Workers’ Compensation Law for Beginners”
- “Handling Texas and Maritime Employer Liability Claims”
- “Ethical Claims Handling”
- “Premises Liability Update”

Board Certifications
- Board Certified, Workers’ Compensation Law, Texas Board of Legal Specialization
- AV Rated, Martindale Hubbell
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Sometimes it is difficult to be a zealous advocate. As practitioners in workers’ compensation claims litigation, we handle matters that are generally routine. As the saying goes, “if you’ve seen one, you’ve seen them all.” Let’s face it, most of the cases we deal with fall into a cookie cutter type pattern, with common theories of prosecution and defense. These “routine” cases confirm one fact: there is no greater pleasure than having an interesting legal or factual issue cross your desk.

Fortunately, every now and then a unique case will come our way. We have the infrequent distraction of a novel legal or factual issue. Most of you could tell a humorous story about this case or that. Often these cases take over, and consume our thoughts, resources, and energy. We find ourselves working on it harder, and talking about it with our colleagues to gain fresh perspective. These cases make us work extra hard to put the best foot forward before the hearing officer, judge or jury. These cases are enjoyable. Win or lose, they recharge our vigor and zeal. Sometimes we are even reminded that the law is an honorable calling, and it brings closer to home the requirement that we treat all cases equally, with zeal and concern, even those less interesting or profitable.

That being said, the authors debated about the best method to tackle this topic. No doubt, most attorneys in our practice area are so good that they have this down to a science. How many times have we heard that the causation opinion meets the necessary legal requirements while the other side says it does not? How many different ways can a Claimant’s attorney present a common back-injury fact pattern? How many different ways can a defense attorney argue that this particular Claimant is not credible, or the evidence does not meet the causation standard? Our jobs as attorneys, no matter how romanticized (or criticized) by the public, deal generally with routine fact patterns, and repeated doctrines of law and defenses. This makes the idea of zealous advocacy difficult to deal with, and honestly barely entertaining.

To begin our journey, we should look at the Texas Disciplinary Rules of Professional Conduct. The preamble sums it up well. A lawyer plays three roles. She is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice. These juxtaposed roles require us “to maintain the highest standard of ethical conduct.” The preamble notes that as an advocate, we must “zealously assert the client’s position under the rules of the adversary system.” The preamble goes on to say, to that end, we must only use the law for legitimate purposes, and not for harassment or intimidation. It calls for us to use our own conscience, to obtain the highest level of ethical conduct, so that the society served by attorneys will uphold the respect and confidence due the most noble profession. The greatness and strength of our vocation depends upon the confidence of the public at large - the same public that views Denny Crain and the nameless prosecutor or defense lawyer on CSI as the sole example of a practicing lawyer. Therefore, we must uphold the rules of conduct regarding the law, “its greatness and its strength, which permit of no compromise.”

Therefore, giving consideration to making this the best Advanced Workers’ Compensation Seminar ever, and with an eye to the fact that we are the first presenters of the seminar at a very early hour, we thought we would use an
example found in the public domain to discuss “Ethical Challenges in Zealously Representing Your Client.”

We are constantly amazed at the videos one may find on the world wide web. Within that public domain, found on several different web sites, is the video of a deposition, commonly referred to as the “Texas Deposition.” Type these words into any search engine, and you will enter the world of Texas lawyering at its finest - hard working, hard playing litigators, probably nearing the onset of trial in a hotly contested dispute. One word of caution. We would note that attorneys sometimes swear, and call each other mean names. In the interest of full disclosure, if “damn” or “SOB” or “***hole” are offensive to you, do not press play on the version found on the internet. Fortunately, we have prepared an edited version of the video for presentation at the seminar.

We will take a look at the video, then discuss some of the things happening therein. You may follow along with the unedited version of the transcript beginning on the next page. It is our desire to examine this video, to discuss the issue of zealous advocacy. We will then analyze some of the issues, and offer our thoughts and opinions. We would remind you that our opinions are ours. They do not reflect the opinions of our firms, our partners, or the Texas State Bar.

So lets begin.
Cause No.: Unknown

Plaintiff Unknown §

v. §

§

The Great State of Texas §

Defendant Unknown, et al §

Transcript of the Deposition of someone, probably Mr. Garrett

Date: Unknown

State: Texas, of course

This is an unofficial transcript, taken from the public domain, made by the over-worked legal assistants at Mayfield Weedon, L.L.P., not pursuant to the Rules of Texas Procedure, unedited, unauthenticated, and unreliable. Enjoy!

Witness, Having been duly sworn, testified as follows:

1. Joe Jamail: Did you talk to this man (referring to Ed Carstarphen) sitting next to you before this deposition started?
2. Witness: Yesterday, but he had nothing to do with any word I’m saying.
3. Joe Jamail: I didn’t ask you that, did you talk to him?
4. Witness: I said it though didn’t I
5. Joe Jamail: Did you talk to him? Sir... What did you say?
6. Witness: I said nothing.... I said you have a case of incipient verbal diarrhea
7. Joe Jamail: Well sir were gonna see about that. Did you talk to him yesterday?
8. Witness: Yes
10. Witness: mmm about three hours.
11. Joe Jamail: Talk about this case?
12. Witness: Yes
13. Joe Jamail: Did you tell him the other companies you consulted for?
14. Expert Witness: No, I did not
16. Witness: I did not
17. Joe Jamail: We’ll see about it

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18. Joe Jamail: When you were at Monsanto, what was your title?
19. Witness: At Monsanto, what do you mean?
21. Witness: Research Chemist
22. Joe Jamail: and was that your title your entire stay at Texas City?
24. Ed Carstarphen: Don’t talk over each other
26. Joe Jamail: After you left Texas City
27. Tucker: Wait, let me ask a question here? Do you represent this guy or not?
28. Ed Carstarphen: Who are you?
29. Tucker: My name is Tucker, and I represent Ayrshire and I just wanna know do you represent the guy or not, I’m getting... you know. If you don’t represent him, you don’t have any right to be making any objection. If you do represent him, tell us so.
30. Ed Carstarphen: Why don’t you just keep your mouth shut, I’ll do what I want.
31. Tucker: No your not gonna do what you want
33. Ed Carstarphen: I’m gonna do what I want
34. Joe Jamail: No your not
35. Ed Carstarphen: Yeah I am
36. Joe Jamail: That’s bullshit
37. Ed Carstarphen: I’ll give whatever objections I wanna give and I’ll make em as loud as I wanna make em. Now you can just shut your mouth and keep the record straight.
38. Tucker: Don’t tell me to shut my mouth boy. You may be big but you wanna see how bad you are come on.
39. Joe Jamail: And I wouldn’t try that Ed
40. Witness: Are you threatening to fight?
41. Ed Carstarphen: Hold on just a second
42. Witness: I wanna know who’s side were on.
43. Unknown: We need to start this over...
44. Witness: Were gonna be out numbered Ed
45. Ed Carstarphen: Hold on Just a second
46. Joe Jamail: Now you got a big mouth, Yeah you do.. Now either you represent the man or not, I’m not gonna tolerate ...
47. Ed Carstarphen: I represent Monsanto and I made an objection on the record
48. Joe Jamail: Then your not entitled to be his lawyer then, ok
49. Ed Carstarphen: I’m not representing the man, I’m making an objection on the record
50. Joe Jamail: Well your trying to be, and another thing
51. Ed Carstarphen: Don’t tell me what to do
52. Joe Jamail: Yeah Im gonna tell you something else, you don’t run this deposition you understand
53. Ed Carstarphen: Neither do you Joe
54. Joe Jamail: You watch and see... You watch and see who does ... Big Boy
55. Ed Carstarphen: I’m telling you Joe
56. Joe Jamail: You ain’t telling me a goddamn thing
57. Ed Carstarphen: I’ll give whatever objections I want to make.... You can talk as loud as you want
58. Joe Jamail: You can make your objections and then keep you keep quite see...
59. and don’t tell another lawyer to shut-up that ain’t your goddamn job fat boy
60. Unknown: That ain’t your job
61. Ed Carstarphen: Mr. Hairpiece
62. Joe Jamail: Now you got something to say?
74. **Witness:** As I told you before you have an incipient case of verbal diarrhea
75. **Joe Jamail:** What are you gonna do about it asshole?
76. **Ed Carstarphen:** Hold on just a second
77. **Witness:** I’d like to knock you on your ass but I’m not gonna do that.
78. **Joe Jamail:** Well try it..Come over here and try it you dumb son of a bitch
79. **Unknown:** Wait just a second
80. **Unknown:** Come over here
81. **Unknown:** Hold on
82. **Unknown:** hey wait a minute
83. **Unknown:** No way

Inaudible commotion

84. **Joe Jamail:** The associate is taking Mr. Garrett out in to the hall to lecture him
85. I suppose. They’re doing this over our objections. We started this
86. deposition, unable to get an answer from this man
So we would like to use this deposition video to begin a discussion concerning Zealous Advocacy.

General rules related to professional conduct is where we will start.\(^1\) We find the Rule 3.04(c) of the Texas Disciplinary Rules of Professional Conduct to be on point. It holds that, with regards to a matter before a tribunal, an attorney may not state or allude to any matter the lawyer does not believe is relevant to a proceeding, will not be supported by admissible evidence, or assert personal knowledge of facts in issue, section 3.04(c)(2). A lawyer may not state a personal opinion as to the justness of a cause, the credibility of a witness, or the culpability of a litigant. She may only argue her analysis of the evidence using other permissible considerations, section 3.04(c)(3). The lawyer may not ask any question to degrade a witness, except where the lawyer reasonably believes that the question will lead to admissible evidence, section 3.04(c)(4). Last, the lawyer may not engage in conduct intended to disrupt proceedings, section 3.04(c)(5).

Particularly regarding conduct at an oral deposition, one should review Texas Rules of Civil Procedure 199.5(d). It holds that the deposition must be conducted in the same manner as if the testimony were being obtained in court during trial, which implicates the general rules of conduct noted above. Counsel should cooperate and be courteous to each other, and to the witness. The witness should not be evasive and should not unduly delay the examination. If these rules are not followed, the court may allow in evidence at trial statements, objections, discussion, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony.

\[^1\] The Texas Disciplinary Rules of Professional Conduct: http://www.texasbar.com/AM/Template.cfm?Section=Grievance_Info_and_Ethics_Helpline&Template=/CM/ContentDisplay.cfm&ContentFileID=96

Rule 199.5 deals with objections during oral depositions. Though this rule was not in effect at the time of the Texas Deposition, objections are now limited to “Objection leading” and “Objection form.” Argumentative or suggestive objections waive the objection and may be grounds for terminating the deposition, assessing costs or other sanctions.

Rule 199.5(g) deals with suspending the deposition. A deposition may be suspended if it is being conducted or defended in violation of these rules, so that a ruling may be obtained from the court.

Last, our rules have a general obligation of Good Faith. According to Rule 199.5(h), an attorney may not ask a question at an oral deposition solely to harass or mislead a witness, or for any other improper purpose.

So, with the rules being stated, lets take a look at some of the comments made in this deposition.

Let’s start with the general issue giving rise to the problems. As best we can tell, it appears Castarphen represented Monsanto, presumably a party. He was presenting for deposition a former Monsanto employee, who we will call Mr. Garrett. Mr. Garrett was apparently unrepresented, but spent over three hours preparing for the deposition with Castarphen, an attorney who is not his lawyer. This therefore makes all of the conversation between Castarphen and Mr. Garrett discoverable, as no privilege attached to the communications.

When Mr. Jamail, examining Mr. Garrett asked how many hours they spoke, Mr. Garrett states that they spoke about three hours. He conceded they spoke about the case at issue, but he declined to admit that Garrett told Carstarphen what other companies he consulted. Apparently this was an important issue in the case. As we all know, three hours
is a long conversation. A lot can be said during that time. The conversation was ripe for picking by Jamail.

As things got rolling, Carstarphen instructed the witness not to talk over Jamail. This brought Mr. Tucker into the fold. At line 27, Tucker jumped in:

Tucker: “Wait, let me ask a question here? Do you represent this guy or not?”

Carstarphen: “Who are you.”

To which Tucker responded:

Tucker: “My name is Tucker, and I represent Ayrshire and I just wanna know do you represent the guy or not, I’m getting... you know. If you don’t represent him, you don’t have any right to be making any objection. If you do represent him, tell us so.”

At this point we do not know whether Carstarphen had clearly stated whether he represented the witness or not. Nevertheless, Tucker’s statement that Carstarphen may not object if he does not represent the witness is untrue. To the contrary, anyone who represented a party may lodge an objection at a deposition, as long as it is limited to form or leading objections. So, right off the bat, Tucker has misstated the law. But this easily happens in the heat of the battle.

But, Carstarphen took a jab at Tucker, line 33.

Ed Carstarphen: Why don’t you just keep your mouth shut, I’ll do what I want.

This statement began a heated discourse concerning whether an attorney can, “do what he wants,” which garnered replies of “no way” and “bullshit.” Again, Carstarphen added fuel to the fire by stating, “now you just shut your mouth and keep the record straight.” This is where the deposition began to fall apart.

At this point, counsel have clearly left the realm of zealous advocacy. Remember conduct by attorneys at a deposition must be consistent with that which is before the judge. TRCP 195.(d) is being violated here, as counsel are no longer cooperative and courteous to each other.

The discourse deteriorated, at line 43:

Tucker: Don’t tell me to shut my mouth boy. You may be big but you wanna see how bad you are, come on.

Joe Jamail: And I wouldn’t try that Ed

This is clearly a challenge to physical confrontation, causing the witness to respond:

Witness: Are you threatening to fight?

The witness makes the best point of the day when he says:

Witness: I wanna know who’s side were on.

And lamented that...

Witness: Were gonna be out numbered Ed

This is where the name-calling began, and the deposition violated the rules of conduct and the rules of procedure. The attorneys here were engaged in humiliation or intimidation, and the exchange was not likely to lead to admissible evidence.

The harsh words and intimidation continued at line 60. Jamail reminded everyone that he was running the deposition. Carstarphen disagreed, and Jamail said: you watch and see “Big Boy.”

Jamail then instructed Carstarphen that he should not tell another lawyer to “shut up” which is probably good advice. But, again Jamail reminded Carstarphen that he was obese. Carstarphen was forced to retaliate by
calling Jamail “Mr. Hairpiece.”

This apparently amused the witness, who glared at Jamail, prompting Jamail to ask him if he had something to say. At line 74, the witness, for the second time, tried to be smart and accused Jamail of having an “incipient case of verbal diarrhea.” Jamail responded, “what are you going to do about it Asshole?” The witness jumped out of his chair as if to attack. Jamail challenged the witness to “come over here and try it you dumb son of a bitch.” Chaos ensued.

So lets try to summarize some points that are relevant to this deposition.

1. Zealously represent your client, but maintain the highest standard of ethical conduct;

2. Use the forum for legitimate purposes, not for harassment or intimidation;

3. Do no allude to matters that are not relevant to a proceeding;

4. Short of oral argument, do not state a personal opinion as to the justness of a cause or the credibility of a witness;

5. Do not ask questions to degrade a witness, which will not reasonably lead to discoverable evidence;

6. Do not engage in conduct to disrupt proceedings;

7. Be cooperative and courteous to co-counsel and witnesses.

Being an attorney is not an easy job. We deal with difficult circumstances, within an adversarial process. In addition, our conduct is scrutinized by the general public, fueled by its fascination with lawyers and the legal system. We must therefore remember that in all we do, we must maintain the highest levels of professionalism. Likewise, we must refrain from all conduct that reflects negatively upon our profession.

Paragraph nine of the preamble to our Texas Disciplinary Rules of Professional Conduct states:

“The desire for the respect and confidence of the members of the profession and of the society which it serves provides the lawyer the incentive to attain the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.”