

OADC

OKLAHOMA ASSOCIATION OF DEFENSE COUNSEL

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March 2, 2009

John Morris Williams
Executive Director
Oklahoma Bar Association
PO Box 53036
Oklahoma City, OK 73152-3036

Re: New Rule Proposed for Rules of the District Courts
Rule 31. Conduct During Depositions

Mr. Williams,

The Oklahoma Association of Defense Counsel (OADC) is an organization comprised of almost 400 attorneys who specialize in civil defense litigation. The Officers and Directors of OADC, on behalf of the OADC membership, submits this comment regarding the new rule proposed for Rules For District Courts, Rule 31. Conduct During depositions.

Depositions may be the single most important aspect of litigation. A deposition is a legal proceeding very much like a court hearing, held primarily in an informal setting. Deposition testimony is sworn testimony that carries the same force and effect as if it were given before a judge and jury. Quite simply, depositions can make or break a case.

The Oklahoma Discovery Code is explicit in how objections are to be made during a deposition. 12 O.S. § 3230 (E)(1) clearly states:

“Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, or work product protection, to enforce a limitation on evidence directed by the court....”

Rule 31, as proposed, unjustly restricts deponent's counsel's ability to defend his or her client against abusive, harassing, and overreaching tactics by examining counsel. On occasion depositions veer off course and rather than remain a search for factual information and truth, they become an attempt to manipulate non-expert witnesses to testify in a manner that will improve a party's position in litigation that may be contrary to the truth. Questions may contain misstated facts. Questions can become argumentative and harassing. Questions are asked over and over again. Previous testimony is manipulated and mischaracterized. Witnesses are requested and required to speculate. Improper hypothetical questions are used.

Deponent's counsel, regardless of which party he or she may represent, must be allowed to represent his or her client in a deposition against such abuses of process. Deponent's counsel must be allowed to defend his or her client against abusive, harassing, and overreaching tactics by examining counsel. Deponent's counsel must be allowed to establish a record of examining counsel's inappropriate conduct and attempts to rectify the conduct before stopping a deposition to seek court intervention with a protective order pursuant to 12 O.S. § 3226.

Other states have recognized that the deposition examiner is often abusive, repetitious, misleading, etc. The State of Florida recognizes that examining counsel must not be given *carte blanche* to abuse the deposition process. The Florida Bar's *Guidelines for Professional Conduct* addresses examining counsel's behavior:

Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment. Counsel should not conduct questioning in a manner intended to harass the witness, such as by repeating questions after they have been answered, by raising the questioner's voice, or by appearing angry at the witness. *Florida Bar Guideline (7)*.

Proposed Rule 31 only seeks to curtail potentially inappropriate behavior of the non-interrogating attorney. Proposed Rule 31 ignores inappropriate behavior of the interrogating attorney who manipulates a witness with abusive, repetitious and misleading questions. As a result, Proposed Rule 31 will foster further abuses by the interrogating attorney who will have statutory permission to continue and even escalate their behavior. Proposed Rule 31 renders the deponent's counsel helpless to respond to such abuses by interrogating counsel.

Beyond the problems expressed concerning potential abuses by the examining attorney, proposed Rule 31 is also overbroad and inconsistent with particular provisions of the Oklahoma Discovery Code under which attorneys in Oklahoma must currently represent and advocate for their clients. Section 3232(B) and (D)(3)(a) and (b) of the Oklahoma Discovery Code specifically require attorneys to make objections beyond the proposed limitations of "Objection, leading" or "Objection, form" to any question relating to the competency of a witness or to the competency, relevancy or materiality of testimony or other irregularity if "the ground of the objection is one which might have been obviated or removed if presented" during the deposition. For example, if a witness has not been properly credentialed through prior questioning in the deposition or the proper factual or legal

foundation has not been laid, and this problem or ground for objection could have been repaired by the interrogator during his or her questioning in the deposition, the non-interrogating attorney will waive these objections if they are not contemporaneously raised.

The Supreme Court of the State of Oklahoma has made it clear that “there is no difference in law between ‘discovery’ and ‘trial’ depositions.” *Herman v. Robertson*, 145 P.3d 1039. In today’s protracted litigation environment, every deposition is potentially “trial” testimony because the testimony in deposition may, pursuant to Section 3232(A)(3), be used “for any purpose” if the witness does not reside in the county where the action is pending, if the party offering the deposition has been unable to procure the attendance of the witness by subpoena, if the witness is an expert witness, or is dead. Proposed Rule 31 prevents attorneys from raising these valid objections during the deposition while Section 3232(D)(3) holds that the failure to assert them during the deposition deems them to be waived.

It is the position of the Officers and Directors of OADC and, on behalf of our membership, that the Rule 31 as proposed will not allow counsel defending a deponent at a deposition to properly and fully represent their client’s interests. Rule 31 will have a practical effect of preventing a deponent’s right to counsel. The Oklahoma Discovery Code properly governs the deposition process and those rules should be left in place without further restriction. We respectfully request that Rule 31 as proposed be rejected.

Sincerely,

Michael J. Heron
OADC President-2009