



DEPOSITION ETHICS


U.S. District Court
District of Rhode Island
October 27, 2016



The Dos and Don'ts of Being a Potted Plant

Overview


- State – *Kelvey v. Coughlin*
- Federal – Fed. R. Civ. P. 30 (c) and (d)



Kelvey v. Coughlin

FACTS

- **Medical negligence case; involving allegations of negligent treatment of Ms. Kelvey's newborn son, Benjamin**
- **Deposition of Defendant ObGyn, Dr. John Coughlin;**
- **Defendant's counsel:**
 - **offered gratuitous comments,**
 - **directed the deponent's answers through suggestive objections,**
 - **instructed the deponent not to answer certain non-privileged questions.**



Kelvey v. Coughlin, **625 A.2d 775 (R.I. 1993)**


- **Came to the R.I. Supreme Court by way of Writ of Certiorari after a ruling by the Motion Calendar trial court**
- **Trial court had granted Plaintiff's motion under Rule 37(a) and ordered:**
 - ***the deponent to be redeposed under certain conditions***

Defendant's argument

If a deponent refuses to answer any question propounded at a deposition, the deposition should be completed on other matters and the deponent should be required to seek a court order to compel the answers

RI Supreme Court Ruling

- **Affirmed the discretion of the trial justice to impose appropriate sanctions for discovery abuse pursuant to Rule 37(a)**
- **Rules 26 and 30 are so clear and direct that there should be no question about their meaning**
- **Issued 5 conditions for depositions in RI**



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RULE #1

Counsel for the deponent shall refrain from gratuitous comments and directing the deponent in regard to times, dates, documents, testimony, and the like.

NOT ALLOWED

- Gratuitous remarks: *“If you know . . .”*
- Directing the deponent:
 - *“He’s asking you about the 25th, not the 26th.”*
 - *“Look at the documents in front of you.”*
 - *“I can’t imagine how he would know that”*

- 1 A They were full, full privileges in obstetrics and
2 gynecology.
- 3 Q Are you also a gynecological surgeon?
- 4 A Yes, sir.
- 5 Q So you do not only obstetrics, but also surgery in
6 gynecology?
- 7 A Yes, sir.
- 8 Q Do you remember Joyce Kelvey?
- 9 A No, sir.
- 10 Q You have no recollection of what she looked like, or
11 anything of that sort?
- 12 A No, sir.
- 13 Q Prior to coming here, did you read the deposition given
14 of Dr. McGoldrick?
- 15 A I have not read Dr. McGoldrick's deposition, I don't
16 think.
- 17 (Mr. Carroll shakes head in the negative)
- 18 Q Have you had any portions of the deposition read to
19 you?
- 20 A No.
- 21 Q Have you reviewed any documents before coming here?
- 22 A I reviewed the hospital record of Joyce Kelvey.
- 23 Q Did you review your answers to interrogatories?
- 24 A Not today, but I have looked at them in the past.
- 25 Q And have you looked at the answers to interrogatories

1 Q It does not say how it was reported to you. Maybe we
2 should go to those records, that part of the record
3 first.

4 MR. CARROLL: The nurse's notes at
5 one o'clock, Doctor.

6 A Right.

7 Q Do you have any recollection of any status being
8 reported to you at that time?

9 A I do not.

10 Q Would it have been likely that you were in the hospital
11 at that time?

12 A It would have been likely. Probably not.

13 Q So that, most probably, then, this status would have
14 been reported to you at home by telephone?

15 A Yes, sir.

16 Q The next mention of you in the record, Doctor, the
17 nurse's record, that is, at 4:50 a.m., when you are
18 again notified of something?

19 A Yes.

20 Q And apparently you ordered medication at that time?

21 A Yes, sir.

22 Q Would that have been most probably by telephone?

23 A Most probably.

24 Q And then the record indicates that you conducted a
25 vaginal examination at 8:45 a.m. on the morning of

January 10th?

MR. CARROLL: No. There's a 7:30 contact,
7:30 a.m.

Q Okay. 7:30 a.m., Doctor, do your records indicate what
you might have done in relation to Joyce Kelvey?

MR. CARROLL: Go to the delivery record,
Doctor.

A Delivery, labor. At 1/10 at 7:30 a.m. I examined
Joyce Kelvey.

Q You did a vaginal examination?

A Yes, sir.

Q Did you do another one at 8:45?

MR. CARROLL: Look at the nurse's notes for
8:45, Doctor, please.

A Yes. The nurse's notes stated I did.

Q And were the findings at all different?


MR. CARROLL: I'm going to object to the
question. Go ahead, Doctor.

Q Well, I'm looking at the vaginal examination of the
nurse's -- in the nurse's notes, which indicates five
centimeters plus one station.

A Mmm.

Q Was that the result of your 7:30 examination, also?

A 7:30 examination there was five centimeters one plus
station. 8:45 exam says again five centimeters zero



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RULE #2

Counsel shall refrain from cueing the deponent by objecting in any manner other than stating an objection for the record followed by a word or two describing the legal basis for the objection.

ALLOWED

- *“Objection, to the form of the question.”*
- *“Objection, compound question.”*
- *“Objection, misstates the facts.”*

NOT ALLOWED

- *“Objection, the question asks her to talk about a meeting she did not attend.”*
- *“Objection, you have misstated the standard of care.”*
- *“Objection, the light was red when the defendant went through the intersection, not green.”*

1 A Milliunits.

2 Q Milliunits?

3 MR. CARROLL: I'm sorry.

4 A See it right here?

5 MR. CARROLL: Okay. That's at 7:33 note?

6 THE DEPONENT: Mmm.

7 MR. CARROLL: Okay. Go ahead.

8 Q And that's less of a dosage than she was receiving
9 earlier, is that correct?

10 A Yes, sir.

11 Q She had been receiving 60 milliunits earlier?

12 A Yes, sir.

13 Q Do you know why you restarted at 20 milliunits and not
14 at 60 milliunits?

15 A I do not recall my thought process at that time.

16 Q When did you next see Joyce Kelvey?

17 MR. CARROLL: The 8:55 nurse's note.

18 A 8:55? At 8:55 the nurse's notes state: Dr. Coughlin
19 in, report given.

20 Q Was there any communication that you were aware of
21 between the nursing staff and/or the resident staff and
22 yourself between seven o'clock and 8:55?

23 MR. CARROLL: Check the nurse's notes.

24 A Yes. The nurse's notes state that -- where is it here?
25 -- report of patient's progress given to Dr. Coughlin

1 at 8:30 p.m.

2 Q That was at 8:30; that's now an hour and a half after
3 you've left, is that correct?

4 MR. CARROLL: Objection.

5 A I don't --

6 Q Well, would it -- let me ask you this, Doctor. Could
7 you have been there during that period of time?

8 A Yes, I could have been.

9 Q You could have been in the hospital?

10 A Yes, sir.

11 Q And you could have been in the labor room?

12 A I could have been around the labor room.

13 Q Or around the labor room?

14 A In the hospital.


15 Q The nurse's notes indicate that it's at 7:33, after the
16 Pitocin was restarted at 20 milliunits that there were
17 late decelerations, very subtle with a lowering of the
18 fetal heart rate to ten to fifteen beats per minute?

19 MR. CARROLL: Objection.

20 MR. GIDLEY: Objection.

21 MR. CARROLL: It's not to ten to fifteen
22 beats per minute. It's a lowering to decrease of about
23 ten to fifteen beats per minute.


24 Q Of about ten to fifteen beats per minute. Do you have
25 any recollection as to whether that was reported to



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RULE #3

Counsel shall refrain from directing the deponent not to answer any question submitted unless the question calls for privileged information.



Kelvey, 625 A.2d at 776

“The only instance, we repeat, the only instance in which an attorney is justified in instructing a deponent not to answer is when the question calls for information that is privileged.”

1 There is a note on the chart at that -- I felt a
2 C section should be done. However, there is no time
3 next to that note.

4 Q And is it your normal practice to order an
5 adominal preparation and the cross-matching when you
6 have made that decision?

7 A When you're thinking of it. Not necessarily have made
8 it.

9 Q So that, you could have made this decision at any time
10 between 8:30 and ten o'clock, is that fair?

11 MR. CARROLL: Objection as to form. Don't
12 bother answering it, Doctor.

13 THE DEPONENT: Let me see something, anyway.

14 MR. GRIMM: Why?

15 MR. CARROLL: I think it's speculation. I
16 think you're asking the doctor to speculate as to when
17 he made it.

18 MR. GRIMM: A decision was made between
19 8:30 and 10:00, and the doctor's agreed it would have
20 been his decision.

21 MR. CARROLL: Right.

22 MR. GRIMM: And he's also stated he doesn't
23 remember when he made the decision.

24 MR. CARROLL: Right.

25 MR. GRIMM: My question was, would you have

EXHIBIT C
4-8-75
D



Post-*Kelvey* Rulings

- ***Cunningham v. Heard (1995)***: Deponent asked to draw a diagram and was instructed not to draw. RI Supreme Court ruled: improper.
- ***Menard v. Blazar (1996)***: Defendant doctor deponent was asked about the “standard of care” and was instructed not to answer. RI Supreme Court ruled: improper.
- ***Irvine v. Inn at Castle Hill (1996)***: Deponent asked about what he said to the defendant’s insurance carrier investigator and was instructed not to answer on a work product objection. RI Supreme Court ruled: improper.

Plante v. Stack


109 A.3d 846 (Feb. 6, 2015)

- Auto collision case – defense att’y asked injured Pltf’s mother the reason for her divorce – Pltf counsel instructed her not to answer
- RI Supreme Ct: “Although plaintiff’s counsel did not comply with our holding in *Kelvey*, we nevertheless conclude that the hearing justice did not err in denying defendant’s motion to reopen discovery.”

Plante v. Stack

109 A.3d 846 (Feb. 6, 2015)

- “Although we do not retreat from our holding in *Kelvey*, we are not convinced that the hearing justice erred in her denial of the motion to compel, especially in light of the length of both depositions, and the point at which they concluded. We find the grounds for the hearing justice’s denial of the motion to compel to be reasonable given the extent of the deposition, and we affirm that portion of the ruling.”



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RULE #4

Counsel shall refrain from dialogue on the record during the course of the deposition.

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RULE #5

If counsel for any party or person given notice of the deposition believes that these conditions are not being adhered to, that counsel may call for suspension of the deposition and then immediately apply to the court in which the case is pending, or the court in which the case will be brought, for an immediate ruling and remedy. Where appropriate, sanctions should be considered.

Unanswered Question

What if the questioner engages in harassment or oppressive questioning of the deponent?

- Rule 30(d)(3): At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

Federal Rules of Civil Procedure

Rule 30 (c) and (d)

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(2) *Objections.* An objection at the time of the examination--whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition--must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(d) Duration; Sanction; Motion to Terminate or Limit.

(2) *Sanction.* The court may impose an appropriate sanction--including the reasonable expenses and attorney's fees incurred by any party--on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) *Motion to Terminate or Limit.*

(A) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order.* The court may order that the deposition be terminated or may limit its scope and manner as provided in [Rule 26\(c\)](#). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) *Award of Expenses.* [Rule 37\(a\)\(5\)](#) applies to the award of expenses.

Rule 30(c) (2)

- An objection must be stated concisely in a nonargumentative and nonsuggestive manner.
- A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)

Rule 30(d) (3)

(3) Motion to Terminate or Limit.

(A) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.