

DEPOSITION ETHICS

Chief Judge John J. McConnell, Jr. Nicole J. Benjamin, Adler, Pollock & Sheehan

> United State District Court Litigation Academy May 17, 2023



Overview



• <u>State</u> – Kelvey v. Coughlin

• Federal – Fed. R. Civ. P. 30 (c) and (d)



Kelvey v. Coughlin FACTS



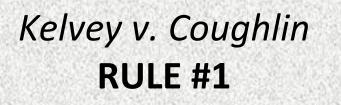
- Medical negligence case; involving allegations of negligent treatment of Ms. Kelvey's newborn son, Benjamin
- Deposition of Defendant ObGyn, Dr. John Coughlin;
- Defendant's counsel:
 - offered gratuitous comments,
 - directed the deponent's answers through suggestive objections,
 - instructed the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





- 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





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

-	10
A	They were full, full privileges in obstetrics and
	gynecology.
0	Are you also a gynecological surgeon?
	yes, sir.
0	So you do not only obstetrics, but also surgery in
A.	gynecology?
A	Yes, sir.
0	Do you remember Joyce Kelvey?
A	No, sir.
Q	You have no recollection of what she looked like, or
	anything of that sort?
A	No, sir.
0	Prior to coming here, did you read the deposition give
	of Dr. McGoldrick?
A	I have not read Dr. McGoldrick's deposition, I don't
	think.
	(Mr. Carroll shakes head in the negative)
	Have you had any portions of the deposition read to
	you?
1	No.
	Bave you reviewed any documents before coming here?
	I reviewed the hospital record of Joyce Kelvey.
	Did you review your answers to interrogatories?
	Not today, but I have looked at them in the past.
	And have you looked at the answers to interrogatories



16
It does not say how it was reported to you. Maybe we
should go to those records, that part of the record
first.
MR. CARROLL: The nurse's notes at .
one o'clock, Doctor.
Right.
Do you have any recollection of any status being
reported to you at that time?
I do not.
Would it have been likely that you were in the hospital
at that time?
It would have been likely. Probably not.
So that, most probably, then, this status would have
been reported to you at home by telephone?
Yes, sir.
The next mention of you in the record, Doctor, the
nurse's record, that is, at 4:50 a.m., when you are
again notified of something?
Yes.
And apparently you ordered medication at that time?
Yes, sir.
Would that have been most probably by telephone?
Most probably.
And then the record indicates that you conducted a
vaginal examination at 8:45 a.m. on the morning of



17 January 10th? MR. CARROLL: No. There's a 7:30 contact, 7:30 a.m. 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, .poctor. Delivery, labor. At 1/10 at 7:30 a.m. I examined Joyce Kelvey. You did a vaginal examination? 10 Yes, sir. 3A Q Did you do another one at 8:457 . MR. CARROLL: Look at the nurse's notes for 8:45, Doctor, please. Yes. The nurse's notes stated I did. A And were the findings at all different? 2 MR, CARROLL: I'm going to object to the question. Go Ahead, Doctor. ALE. Well, I'm looking at the vaginal examination of the 2119 0 nurse's -- in the nurse's notes, which indicates five 20 centimeters plus one station. 21 22 A Mann. Was that the result of your 7:30 examination, also? 23 0 7:30 examination there was five centimeters one plus 24 A station. 8:45 exam says again five centimeters zero 25



Kelvey v. Coughlin 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.

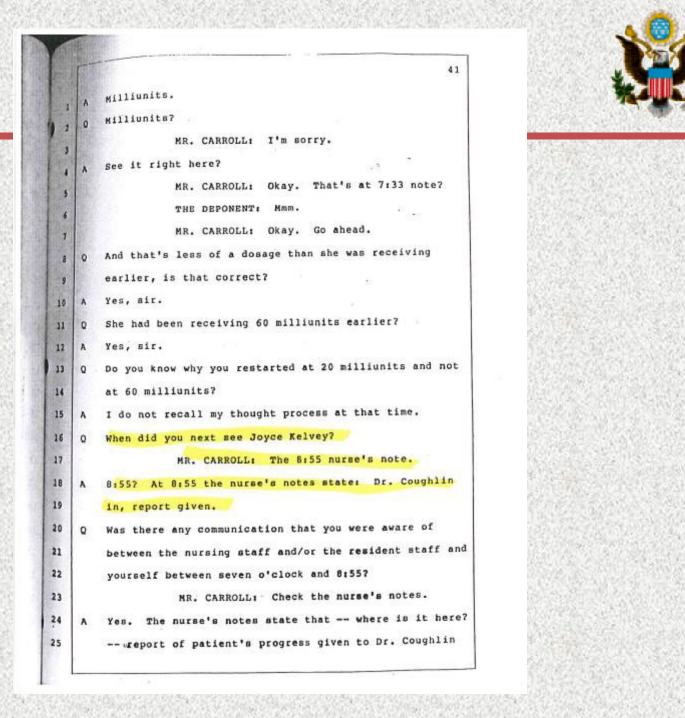


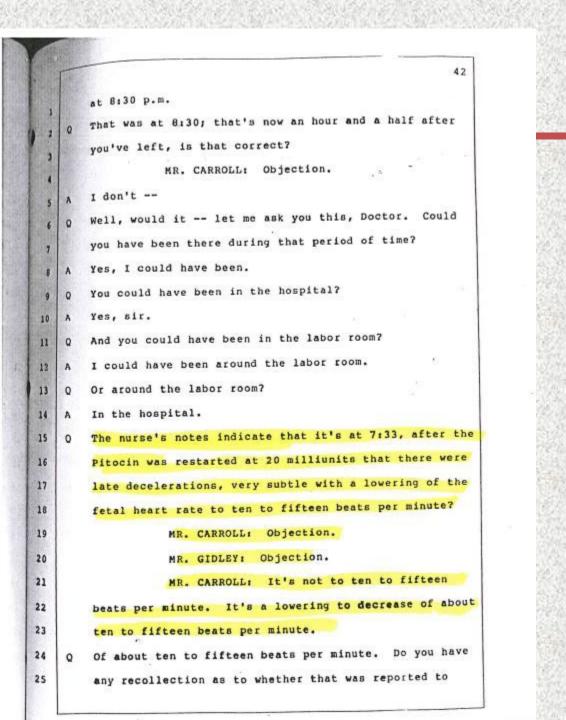
ALLOWED

- "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."







Kelvey v. Coughlin RULE #3

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



"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."

IA DAY:	
Profil.	
1	
2	C section should be done. However, there is no time
3	and he block and
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	0 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



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C



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.
- Soares v. Prospect CharterCare (2018): Judge McConnell adopted Kelvey for practice before him in USDC



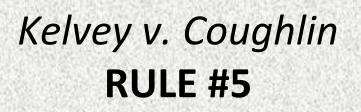


- Auto collision case defense att'y asked injured Pltf's mother the reason for her divorce – Pltf counsel instructed her not to answer
- RI Supreme Ct: "Although plaintiff's counsel did not comply with our holding in *Kelvey*, we nevertheless conclude that the hearing justice did not err in denying defendant'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





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





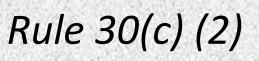
If counsel for any party or person given notice of the deposition believes that these conditions are not being adhered to, that counsel may call for suspension of the deposition and then immediately apply to the court in which the case is pending, or the court in which the case is pending, or the court 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 <u>conducted in bad
faith</u> or <u>in a manner that unreasonably annoys, embarrasses, or oppresses the
deponent or party</u>. 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.





- 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 <u>conducted in bad faith</u> or <u>in a manner that unreasonably annoys</u>, <u>embarrasses</u>, 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.



ETHICALLY PREPARING WITNESSES TO TESTIFY AT DEPOSITION



- Restatement (Third) of the Law Governing Lawyers § 116
 - "A lawyer may interview a witness for the purpose of preparing the witness to testify."
 - "A prospective witness is generally under no obligation to submit to such an interview."



- Restatement (Third) of the Law Governing Lawyers § 116
 - Preparation may include:
 - discussing the witness's role and effective courtroom demeanor;

Permissible: Advising the witness to remain calm. **Impermissible**: Advising the witness to fake cry.

discussing the witness's recollection and probable testimony;

Permissible: Advising the witness to state if he/she does not recall. **Impermissible**: Advising the witness who recalls facts that are unfavorable to state that he/she does not recall.



- Restatement (Third) of the Law Governing Lawyers § 116
 - Preparation may include:
 - revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light;

Permissible: Refreshing the witness's recollection in an effort to have a witness recall events more favorably to the attorney's client. **Impermissible**: Creating a new set of memories on which the witness relies in testifying.



• Restatement (Third) of the Law Governing Lawyers § 116

Preparation may include:

discussing the applicability of law to the events in issue;

Permissible: Explaining the law. **Impermissible**: Explaining the law in a suggestive way to alter or shape the witness's testimony.



- Restatement (Third) of the Law Governing Lawyers § 116
 - Preparation may include:
 - reviewing the factual context into which the witness's observations or opinions will fit;
 - reviewing documents or other physical evidence that may be introduced;
 - discussing probable lines of hostile cross-examination that the witness should be prepared to meet; and
 - rehearsal of testimony.



- Restatement (Third) of the Law Governing Lawyers § 116
 - **Permissible**: A lawyer may suggest choice of words that might be employed to make the witness's meaning clear.
 - *Impermissible:* A lawyer <u>may not</u> assist the witness to testify falsely as to a material fact.



COMPENSATING FACT WITNESSES TO TESTIFY



- Restatement (Third) of the Law Governing Lawyers § 117
- A lawyer may not offer or pay to a witness any consideration:
 - in excess of the reasonable expenses of the witness incurred and the reasonable value of the witness's time spent in providing evidence, except that an expert witness may be offered and paid a noncontingent fee;
 - (2) contingent on the content of the witness's testimony or the outcome of the litigation; or
 - (3) otherwise prohibited by law.



- Rule 3.4. Fairness to opposing counsel. A lawyer shall not:
 - (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
 - R.I. R. Prof. Resp. 3.4(b)(emphasis added).



- ABA Comm. On Ethics and Prof'l Responsibility, Formal Opinion 96-402 (Aug. 2, 1996):
- "A lawyer, acting on her client's behalf, may compensate a non-expert witness for time spent in attending a deposition or trial or in meeting with the lawyer preparatory to such testimony, provided that the payment is not conditioned on the content of the testimony and provided further that the payment does not violate the law of the jurisdiction."



- Reasonableness: "The amount of such compensation must be reasonable, so as to avoid affecting, even unintentionally, the content of the witness's testimony."
- Direct Loss of Income: When the witness suffers a direct loss of income because of his time away from work, compensation in that amount is reasonable.
- No Direct Loss of Income: When the witness has not suffered a direct loss of income (retired or unemployed) the lawyer must determine the reasonable value of the witness's time based on all relevant circumstances.



- United States v. Davis, 261 F.3d 1, 39 n.33 (1st Cir. 2001):
- Payments made to fact witnesses as "actual expenses" as permitted by law will not be disturbed or set aside.
- Court distinguished between the situation of a lawyer paying a fact witness for actual expenses and a circumstance where a lawyer paid one witness over \$400,000 and another over \$100,000 to influence their testimony.



SPECIAL ISSUES RELATED TO REMOTE DEPOSITIONS

Treatment of Exhibits



- Options
 - Screen share
 - Mail hard copies in sealed envelope and open during deposition
 - Comply with protocol set by the Court (if there is one)

Treatment of Exhibits



- State v. Purdue Pharma L.P., et al., No. PC-2018-4555 (Aug. 20, 2020).
 - Established protocol for remote depositions.
 - Hard copies of exhibits should be provided to other deponents and other participants 48 hours before the start of the deposition.
 - "Given the difficulties with using documents during a remote deposition additional time to prepare and review exhibits is beneficial to all parties."

Where Does a Remote Deposition Take Place?



- Fed. R. Civ. P. 30(b)(4): "The parties may stipulate—or the court may on motion order—that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions."
- Court reporter must be licensed where the deponent is answering the questions.

Communications with Clients During Remote Depositions



- State v. Purdue Pharma L.P., et al., No. PC-2018-4555 (Aug. 20, 2020).
 - "While the deposition is on the record, attorneys are prohibited from communicating with the deponent in any way other than through the videoconference or remote technology that may be heard by all Participants to the deposition. This prohibition includes private messages of any kind, including instant messages and text messages."
 - "Such prohibition shall not affect the right of the deponent and her/his lawyer(s) to communicate in private off the record to the extent otherwise permitted under the applicable rules."

Communications with Clients During Remote Depositions



- State v. Purdue Pharma L.P., et al., No. PC-2018-4555 (Aug. 20, 2020).
 - "In instances where counsel for the deponent is in the same room with the deponent but the questioning attorney is not, the noticing party may provide for a second video camera to record the actions of the ponent's attorney and/or any other Participants present in the same room as the deponent during times that the deponent is on the record."



- Salazar v. City of Phoenix, No. CV-19-01188, 2021 U.S. Dist. LEXIS 98100 (D. Ariz. 2021).
 - Deponent: Christopher Doran
 - Represented by: James Cool
 - Opposing counsel: Lori Berke



Attorney Cool

1 p.m.

Lori Berke's a [derogatory name]. The only reason I asked her for the authority to support her objections is to embarrass her. At a minimum, it will ruin her lunch.

2:06 p.m.

3:56 p.m.

Derogatory text about Lori Berke

Derogatory text about Lori Berke

4:08 p.m.

Derogatory text about Lori Berke

Deponent Doran

Ha, ha

Text messages are representative (based on publicly available information) and not exact quotes as actual messages are filed under seal.



and the second second	
11	Q. Did you have any other conversations with
12	Mr. Rundall or Mr. Cool during the deposition or during
13	any break?
14	A. Mr. Cool sent me a text message during the
15	deposition as well.
16	Q. Was it while you were testifying?
17	A. No, ma'am.
18	Q. It was during a break?
19	A. I don't know. I haven't really been looking at
20	my phone while I've been testifying, so I can't tell you
21	exactly like what the timing of it was.
22	Q. What does the what does the text message say?
23	A. Would you like me to get my phone?
24	Q. Yes.



and the second second	
11	Q. Did you have any other conversations with
12	Mr. Rundall or Mr. Cool during the deposition or during
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22	Q. What does the what does the text message say?
23	A. Would you like me to get my phone?
24	Q. Yes.



Sent Via Email Only

Lori Berke Berke Law Firm, P.C. Lori@berkelawfirm.com

Dear Ms. Berke:

I have been informed that text messages I sent to Chris Doran on Tuesday were made part of the deposition record. I apologize for my coarse language and my commentary about you. I regret my intemperate behavior and the embarrassment it has caused my colleagues. Please know that my partner, Ben, was not aware of my messages and does not support my actions. I understand he also expressed his disapproval of my conduct during the deposition. My behavior was inconsistent with the values and standards of Honor Law Group. It also does not reflect my personal values and standards of conduct.

Out of respect for you and the others involved, I will step away from day-to-day involvement in the Salazar case going forward.

Sincerely. lames M. Cool



- Mr. Cool's text messages to Mr. Doran constitute bad faith conduct that warrants imposition of monetary sanctions.
- Sanctions included:
 - (1) Defendants' attorneys' fees incurred as a result of the legal research Attorney Berke and her colleague performed during the lunch break and
 - (2) Defendants' attorneys' fees incurred as a result of bringing the Motion for Sanctions.



- "[A] witness being deposed may not confer with his counsel during a deposition unless the conference is for the purpose of determining whether an applicable privilege should be asserted."
- "The same basic standards of civility and decency that govern in-person depositions apply to remote video depositions."
- "A deposition is a judicial proceeding that should be conducted with the solemnity and decorum befitting its importance.... When lawyers behave otherwise, it reflects poorly on the entire judicial process."

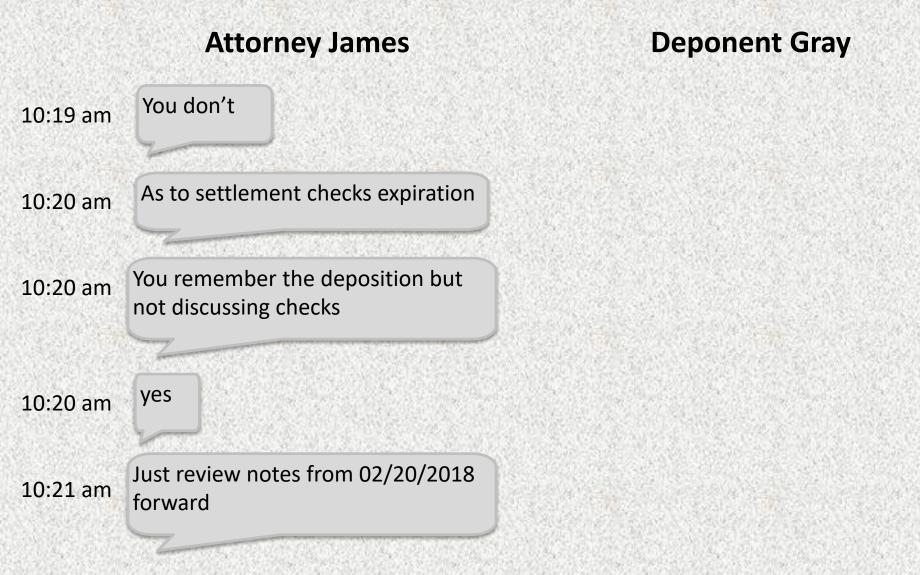


"Counsel should never forget that even though the deposition may be taking place far from a real courtroom, with no black-robed overseer peering down upon them, as long as the deposition is conducted under the caption of this court and proceeding under the authority of the rules of this court, counsel are operating as officers of this court. They should comport themselves accordingly."

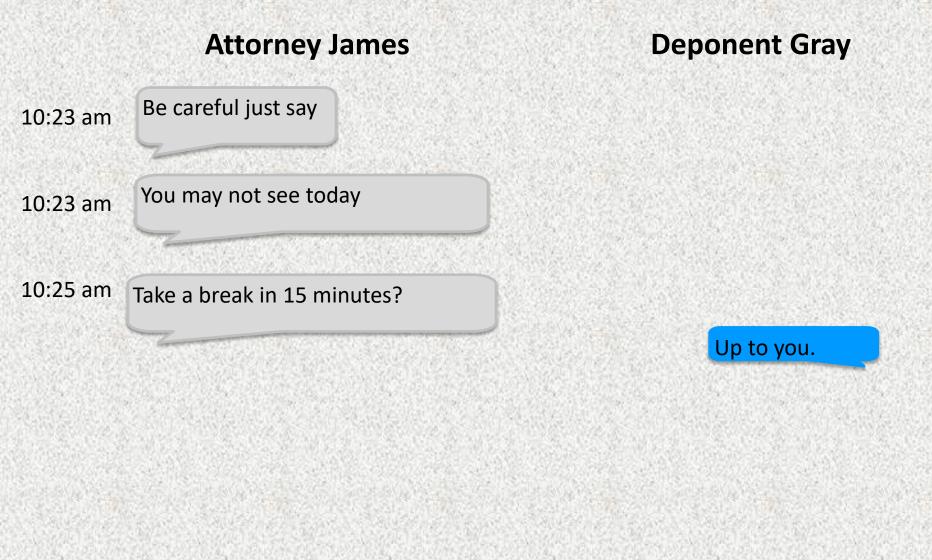


- Fla. Bar v. James, 329 So.3d 108 (Fla. 2021):
- Derek James represented the employer in a worker's compensation case.
- Renee Gray, the adjuster who worked for the employer, was deposed.
- Toni Villaverde took the deposition.
- The deposition was conducted by telephone, not video.





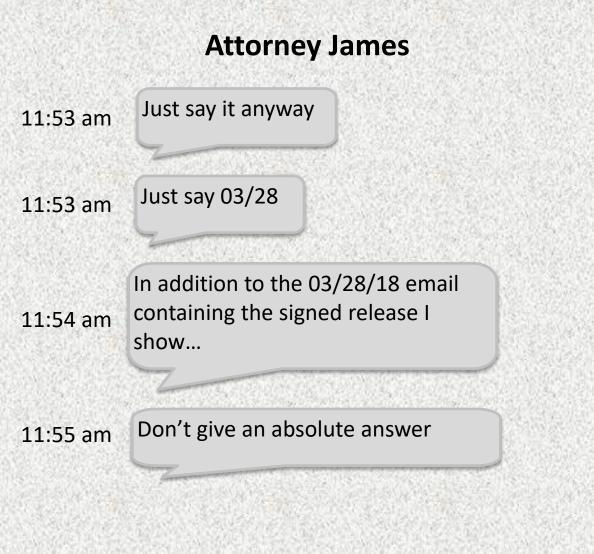






- Opposing counsel could hear typing and asked Gray and James whether they were texting. James denied texting Gray and said he was only receiving a text from his daughter.
- James represented to opposing counsel that he had concluded texting.
- However, he not only proceeded to text, he inadvertently sent the texts intended for the deponent to opposing counsel.





Attorney Villaverde



Attorney James

11:55 am

All I can see at this time but I cannot rule out existence

國際保留

11:55 am

11:56 am

It's a trap

Then say that is my best answer at

this time.

Attorney Villaverde



 Derek James's license was suspended for 90 days for having coached a witness via text message during a remote deposition.



THE VERACITY OF OTHER WITNESSES

Questioning a Witness on Whether Another Witness Lied Under Oath



- United States v. Pereira, 848 F.3d 17 (1st Cir. 2017).
 Impermissible: Counsel may not ask one witness to comment on the veracity of the testimony of another witness.
- United States v. DeSimone, 699 F.3d 113 (1st Cir. 2012).
 Permissible: "It is not improper to ask one witness whether another was 'wrong' or 'mistaken,' since such questions do not force a witness to choose between conceding the point or branding another witness as a liar. There is no error in simply asking a witness if he agreed with or disputed another witness's testimony.""



USE OF FALSE FACTS

Questioning a Witness Using False Facts

- In re Cossen, 880 N.E.2d 352 (Mass. 2008):
- An attorney cannot question a witness using false facts.
- Attorney who conspicuously displayed and suggestively labeled audio tape recordings in order to mislead the deponent to believe that the tape recordings contained conversations that could impeach and personally embarrass the witness violated the Rules.



ERRATA SHEETS



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- Pina v. Children's Place, 740 F.3d 785 (1st Cir. 2014)
- "Rule 30(e) does not limit a party to the correction of stenographic errors; it permits changes 'in form or substance.'"
- "When witnesses make substantive changes to their deposition testimony, the district court certainly has the discretion to order the depositions reopened so that the revised answers may be followed up on and the reasons for the corrections explored."
- See also Bennett v. Kent Cty. Mem'l Hosp., No. 07-163ML, 2009 U.S. Dist LEXIS 2683 (D.R.I. Jan. 14, 2009).



- TP Plastics Trading Co. v. Toray Plastics (America), Inc., No. 09-336M, 2013 U.S. Dist. LEXIS 10930 (D.R.I. Jan. 28, 2013):
- Concluding that although witness's errata sheet sought to contradict or substantially revise some of the witness's original responses, there was no basis to conclude that the changes were made in bad faith or otherwise in violation of Rule 30(e).