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WHO'S ON FIRST?

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In many lawsuits, the question often arises as to which party should be allowed to depose the opponent first. This issue is usually resolved amicably by agreement between counsel. However, in some instances both sides want their respective client to hear what the other side might have to say about the underlying case facts before committing themselves to sworn testimony.

A review of the Texas Rules of Civil Procedure and its case law reveal that there is no published Texas rule or case law specifically on the question of the order of party depositions. Accordingly, when disputed the issue must be resolved by the trial court.

Generally, the order of discovery is within the sound discretion of the trial court. *See, e.g.,* Tex. R. Evid. 611(a), Tex. R. Civ. Proc. 192.2, 192.6(b); *Dillard Dep't Stores, Inc. v. Hall,* 909 S.W.2d 491, 492 (Tex. 1995); *Lindley v. Flores,* 672 S.W.2d 612, 614 (Tex.App.-Corpus Christi 1984, no writ). However, such discretion must be applied reasonably, so as to achieve a fair, timely, and orderly result. *In re CSX Corp.,* 124 S.W.3d 149, 152 (Tex. 2003); *Able Supply Co. v. Moye,* 898 S.W.2d 766, 773 (Tex. 1995).

> *"All litigants, even those with the burden of proof, are constitutionally entitled to equal treatment under the law. Able Supply Co., 898 S.W.2d at 773 ("Both the plaintiffs and the defendants are entitled to full, fair discovery....").*

There are two general schools of thought on the "usual" order of depositions of parties which the court might apply. Defense lawyers typically advocate that the plaintiff should be deposed first because the plaintiff has the burden of proof. Plaintiffs' counsel contrarily usually contend that whoever asks for the deposition first should get to take the first opposing party deposition.

The first school, that the party with the burden of proof should provide his or her factual testimony first, has some facial appeal. However, when examined more closely, it is completely lacking any legal or logical foundation.

The placement of the burden of proof has no reasonable relationship to the order of discovery. In fact, if direction is taken from the analogous situation of the order of proceeding at trial, the general rule is that the party with the burden of proof has the right to both open and close the evidence. Tex. R. Civ. Proc. 265. There is nothing preventing the plaintiff's counsel from calling the defense witnesses as his first witnesses in his case-in-chief. Accordingly, it is difficult to square a "rule" that the party with the burden of proof for some reason should have to wait for the opponent to complete discovery before the plaintiff can get started.

While there also is no specific supportive case law as to the second rule either (he who asks first goes first), this logical rule nonetheless has a sound legal basis. Texas law provides that litigants can take the depositions of other parties as a matter of right. Tex. R. Civ. Proc. 199.1(a). All litigants, even those with the burden of proof, are constitutionally entitled to equal treatment under the law. *Able Supply Co.,* 898 S.W.2d at 773 ("Both the plaintiffs and the defendants are entitled to full, fair discovery....").

There rarely is any compelling reason provided by defense counsel for refusing to present their clients for deposition before the opponent is deposed. Defense counsel usually only desire to secure an advantage of knowing what plaintiffs will say about the conduct and words of the defendants before giving their own sworn testimony to the same facts.

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While gaining an advantage is consistent with the lawyers' duties to their defense clients, from the court's perspective providing advantage to one party is not a legitimate basis to determine the order in which discovery should occur. *Able Supply Co.*, 898 S.W.2d at 773. This is true because the right of discovery is not only bilateral, it is fundamental to the search for truth and justice. *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984). Applying a "blanket rule" of requiring the plaintiff to give his deposition before being allowed to exercise his right to depose the defendants would effectively be imposing a precondition on the plaintiff pursuing his right of discovery.

The legislature has imposed some preconditions on a plaintiff pursuing some or all of his discovery in a few limited instances. *See, e.g.*, Tex. Civ. Prac. & Rem. Code § 74.351(s) (restricting much discovery by the plaintiff until expert reports are filed in health care liability suits). However, there is nothing in the statutes, the Texas Rules of Civil Procedure, or case law that would similarly authorize a court to impose a precondition on a plaintiff pursuing discovery until she has given her own deposition. Thus, imposing such a pre-condition is lacking a legal basis and is therefore impermissibly arbitrary. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985), *cert. denied*, 476 U.S. 1159 (1986). It is an abuse of discretion for the trial court to enter an arbitrary order without reference to guiding law. *Id.*

It is the burden of the party resisting discovery to provide a specific and compelling reason it should not be ordered to comply with a discovery request, and the resisting party must produce evidence to support the claim. *In re Frank A. Smith Sales, Inc.*, 32 S.W.3d 871, 874 (Tex.App.-Corpus Christi 2000, orig. proc.). Thus, the lesson to legal assistants working the defense side of the docket when this issue arises is that there had better be a compelling and supportable reason advanced as to why the plaintiff should be deposed first, beyond the claim that it is "customary." The take for legal assistants working on the plaintiff's side is that there is a solid legal basis to resist the imposition of an extralegal precondition on a plaintiff pursuing his discovery.

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