

# The Fight for Information With the Obstructionist Lawyer

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## Abstract

*A litigator who has been in practice for any length of time has likely encountered the type of combative lawyer discussed in this Article. Approaching these lawyers and dealing with their tactics constructively helps both your client and the overall tone of professionalism for the bar. Here, Professor Flynn outlines several ethical rules and tactical approaches designed to address this problem.*

## I. Introduction

Over the past few decades,<sup>1</sup> many seminars, conferences, articles and books have addressed issues concerning the “S.O.B.,”<sup>2</sup> “Rambo,”<sup>3</sup> and

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<sup>1</sup> See generally Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 953 (1995) (stating litigation demands civility as it is “an essential element of the fair administration of justice”); Warren E. Burger, *The Decline of Professionalism*, 61 TENN. L. REV. 1, 3 (1993) (remarking that “the standing of the legal profession is at its lowest ebb in the history of our country due to the misconduct of . . . all too many lawyers in and out of the courtroom”); Warren E. Burger, Chief Justice, United States Supreme Court, Opening Remarks at the 1971 American Law Institute Proceeding (noting lawyers have voiced concerns over the decline in professionalism and unchecked ill behaviors of the practicing bar) (May 18, 1971).

<sup>2</sup> See generally *Dealing With the S.O.B. Litigator: An ABA Satellite Seminar*, American Bar Association (May 11, 1989); Michael B. Hyman, *A Guide to Curbing “S.O.B.” Discovery Tactics With Protective Orders*.

<sup>3</sup> “Rambo Lawyer” is defined as follows: “*Slang*. A lawyer, especially a litigator, who uses aggressive, unethical, or illegal tactics in representing a client who lacks courtesy and professionalism in dealing with other lawyers. Often shortened to Rambo.” BLACK’S LAW DICTIONARY 1373 (9th ed. 2009). This term originates with the fictional character, John Rambo, who was a United States Green Beret war veteran, trained assassin and heroic, albeit infamous, silver screen legend. See *FIRST BLOOD* (Orion 1982); *RAMBO: FIRST BLOOD PART II* (Tristar 1985); *RAMBO III* (Tristar 1988); see also Robert N. Saylor, *Rambo Litigation: Why Hardball Tactics Don’t Work*, 74 A.B.A. J. 78 (1988). A Rambo litigator is characterized by

even the “Asshole”<sup>4</sup> litigator. The majority of the relevant instruction includes comments and tips about how to deal with this kind of lawyer in a deposition, focusing primarily on how to deal with the obstructionist lawyer defending the deponent.<sup>5</sup> The premise of this Article is that despite educational efforts,<sup>6</sup> decreased tolerance among lawyers for this

A mindset that litigation is war and that describes trial practice in military terms.

A conviction that it is invariably in your interest to make life miserable for your opponent.

A disdain for common courtesy and civility, assuming that they illbefit the true warrior.

A wondrous facility for manipulating facts and engaging in revisionist history.

A hair-trigger willingness to fire off unnecessary motions and to use discovery for intimidation rather than fact-finding.

*Id.* at 79.

<sup>4</sup> See generally Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 *FORDHAM L. REV.* 773, 775 (1998). Sociologist Robert Nelson conducted a candid survey of discovery abuse and corporate litigation ethics. His essay revealed the following observations from practicing attorneys: “Midway through the first weekend conference one of the lawyer-informants referred to obnoxious, obstructive litigators as ‘assholes.’ The label stuck.” *Id.*; see also ROBERT I. SUTTON, *THE NO ASSHOLE RULE: BUILDING A CIVILIZED WORKPLACE AND SURVIVING ONE THAT ISN’T* (2007).

<sup>5</sup> See generally Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 *HOFSTRA L. REV.* 561 (1996); Partha P. Chatteraj et al., *Ethical Considerations for Effective Deposition Defense in New York*, 798 *PLI/Lit* 389, 390 (2009); Sandra F. Gavin, *Playing by the Rules: Strategies for Defending Depositions*, 1999 *L. REV. MICH. ST. U. DET. C. L.* 645; Janeen Kerper & Gary L. Stuart, *Rambo Bites the Dust: Current Trends in Deposition Ethics*, 22 *J. LEGAL PROF.* 103 (1998); Sarah Diane McShea, *Taking and Defending Depositions: Special Ethics Issues*, H0-0071 *PRAC. LAW INST.* 52 (2000); Alyson Nelson, *Deposition Conduct: Texas’s New Discovery Rules End Up Taking Another Jab at the Rambos of Litigation*, 30 *TEX. TECH. L. REV.* 1471 (1999).

<sup>6</sup> See generally Georgia Professionalism Project. In 1990, the Georgia Supreme Court was the first in the country to require a mandatory CLE program on professionalism. Professionalism CLE Guidelines, available at [http://www.gabar.org/related\\_organizations/chief\\_justices\\_commission\\_on\\_professionalism/professionalism\\_cle\\_guidelines/](http://www.gabar.org/related_organizations/chief_justices_commission_on_professionalism/professionalism_cle_guidelines/) (last visited May 14, 2010); see also La. Sup. Ct. R. 30(b)-(c), available at <http://www.lasc.org/rules/supreme/RuleXXXRule3.asp> (last visited May 14, 2010).

(b) Any newly admitted active Member shall . . . attend twelve and one half (12.5) hours of approved CLE and not less than eight (8) of such hours shall concern legal ethics, professionalism . . .

(c) Of the twelve and one half (12.5) hours of CLE required annually, not less than one (1) of such hours shall concern legal ethics, and not less than one (1) of such hours shall concern professionalism.

behavior, the proliferation of bar association professionalism initiatives,<sup>7</sup>

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Legal ethics concerns the standard of professional conduct and responsibility required of a lawyer.

*Id.*

<sup>7</sup> As of this writing, the American Bar Association's Center for Professional Responsibility provides the following list of Organizations with Professionalism Codes: Alabama State Bar, Mobile Bar, United States District Court for the Middle District of Alabama; State Bar of Arizona; Pulaski County Bar (Arkansas); Alameda County Bar Association, Beverly Hills Bar, Contra Costa County Bar Association, Marin County Bar Association, Orange County Bar, Riverside County Bar, San Diego Association of Business Trial Lawyers, San Diego County Bar, Santa Clara County Bar, State Bar of California, State Bar of California Litigation Section, Ventura County Bar; Boulder County Bar, Colorado Bar, Denver Bar; Connecticut Bar, Waterbury Bar; Delaware State Bar/Delaware Supreme Court, Delaware Supreme Court; District of Columbia Bar; The Florida Bar, Florida Bar Trial Lawyers Section, Hillsborough County Bar, Hillsborough County Family Law Division, Jacksonville Bar, Orange County Bar, Palm Beach County Bar, Second Judicial Circuit, Sixth Judicial Circuit, St. Petersburg Bar, Tallahassee Bar; Chief Justice's Commission on Professionalism (Georgia); Family Court of the First Circuit, Hawaii State Bar, Supreme Court of the State of Hawaii; United States District Court District of Idaho and the Courts of the State of Idaho; Illinois State Bar, Kane County Bar; Evansville Bar, Indianapolis Bar; Iowa State Bar, Iowa Supreme Court; Johnson County Bar, Kansas Bar, Wichita Bar; Kentucky Court of Justice, Kentucky Bar, Louisville Bar; Baton Rouge Bar, Louisiana Trial Lawyers, Louisiana State Bar, Shreveport Bar, Supreme Court of Louisiana; Baltimore Young Lawyers, Bar of Baltimore City, Maryland State Bar, Montgomery County Bar, Prince George's County Bar; Massachusetts Bar, Boston Bar; Genessee County Bar, Grand Rapids Bar, United States District Court Eastern District of Michigan, United States District Court Western District of Michigan; Hennepin County Bar, Minnesota State Bar, Minnesota Supreme Court, Minnesota Trial Lawyers Ass'n/Minnesota Defense Lawyers Association; Hinds County Bar, La Fayette County Bar, Mississippi State Bar; Kansas City Metro Bar, Missouri Bar, Bar of Metro St. Louis; State Bar of Montana; Nebraska State Bar; Nevada State Bar; New Hampshire Bar Association; Burlington County Bar, Camden County Bar, Middlesex County Bar, New Jersey Commission on Professionalism in the Law; State Bar of New Mexico; Brooklyn Bar, Monroe County Bar, New York County Lawyer's Association, New York State Bar, Suffolk County Bar Association, New York State Unified Court System; North Carolina Bar, Wake County/Tenth Judicial District Bar; Akron Bar, Cleveland Bar, Columbus Bar, Supreme Court of Ohio; Oklahoma County Bar, Oklahoma Bar Association; Multnomah Bar, Oregon State Bar; Bucks County Bar, Montgomery Bar, Northampton County Bar, Pennsylvania Bar, Pennsylvania Supreme Court, Philadelphia Bar; Rhode Island Bar; South Carolina Bar, South Carolina Supreme Court; Memphis Bar, Nashville Bar, Tennessee Bar; Dallas Bar, Houston Bar, San Antonio Bar, Supreme Court of Texas and Court of Criminal Appeals, Texas Trial Lawyers/Texas Association of Defense Counsel, Travis County Bar; Utah Supreme Court; Vermont Bar; Virginia Bar, Virginia Bar Litigation Section, Fairfax County Bar, Bar of the City of Richmond; King County Bar, Spokane County Bar, Tacoma-Pierce County Bar, Washington State Bar, Washington State Trial Lawyers Association/Washington Defense Trial Lawyers, United States District Court

and the ever-present deterrent of the ethical rules<sup>8</sup> and their subsequent disciplinary process,<sup>9</sup> a “hole” still exists. This gap permits the misbehaving lawyer to crawl through to the detriment of the opposing lawyer and the opposing lawyer’s client.<sup>10</sup>

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for the Eastern District of Washington; West Virginia State Bar; Wisconsin Supreme Court; U.S. District Court for the District of Wyoming. ABA Center for Professional Responsibilities, Professionalism Codes, *available at* <http://www.abanet.org/cpr/professionalism/profcodes.html> (last visited May 14, 2010).

<sup>8</sup> The terms “ethics” and “professionalism” are often used interchangeably when speaking of the expectations within the legal community. However, the line of demarcation between the two is wrought with debate, one commentator noting, “[i]n contrast to ‘legal ethics’—which is concerned with what lawyers ‘shall’ and ‘shall not’ do—‘professionalism’ is concerned with the ‘shoulds’ and the ‘should not.’” Dane S. Ciolino, *Redefining Professionalism as Seeking*, 49 LOY. L. REV. 229, 233 (2003) (quoting the Georgia Supreme Court as stating “ethics is that which is required and professionalism is that which is expected.” *Evanoff v. Evanoff*, 418 S.E.2d 62, 63 (Ga. 1992) (Benham, J., concurring)).

<sup>9</sup> A court’s jurisdiction to impose sanctions and the wide range of sanctions available are derived from a multitude of authorities. *See generally* 28 U.S.C. § 1927 (2000).

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney’s fees reasonably incurred because of such conduct.

*Id.*; FED. R. CIV. P. 11(c)(1) (sanctions imposed upon the finding of an improper representation to the court); FED. R. CIV. P. 16(f)(1)(A)-(C) (sanctions imposed for failing to appear for pretrial conferences, being unprepared to participate, or failing to obey related order); FED. R. CIV. P. 26(g)(3) (sanctions imposed for improper certification without substantial justification); FED. R. CIV. P. 30(d)(2) (permitting sanctions against an attorney who impedes, delays, or otherwise frustrates the fair examination of a witness); FED. R. CIV. P. 37 (the “inherent authority” of the judiciary to regulate and discipline attorney conduct established by the United States Supreme Court (*In re Snyder*, 472 U.S. 634, 643 (1985))).

<sup>10</sup> Depositions remain one of the most valuable of all the discovery tools. “The purpose of discovery is the pursuit of truth.” Mark A. Kosieradzki, *Advocacy Track: The Art of Questioning: Deposition and Examination Techniques*, 2000 ATLA-CLE 103 (Summer 2000). “The goal of discovery should be the expeditious discovery of relevant facts.” *Id.* (citing *R.E. Linder Steel Erection Co. v. U.S. Fire Ins. Co.*, 102 F.R.D. 39, 40 (D. Md. 1983)). “The purpose of a deposition is to find out what a witness saw, heard or did—what a witness thinks. A deposition is meant to be a question and answer conversation between the deposing lawyer and the witness.” *Id.* (citing *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993)). Obstructionist tactics not only undermine the effectiveness of depositions, but they distort the overall integrity and administration of justice of the discovery process.

Consider this scenario:

*Pete is the lawyer for the deponent. Scheduling conflicts have prevented Pete from meeting with his client-deponent except for a few minutes before the deposition begins. Pete is not confident, and neither is the deponent, about the ability of the deponent to accurately and effectively present testimony at the deposition.<sup>11</sup> This deponent is one of Pete's most valued paying clients. The litigation is very important to the client and is worth a substantial amount of money. The client has made it known to Pete that he is relying on him to make sure this litigation produces a favorable outcome.*

*From the outset, the deposition is going poorly for the deponent. The deposing lawyer is well prepared and respectful, but skillful and relentless in asking questions. When the questioning begins to focus on what Pete considers to be the most crucial factual and legal issue in the litigation, Pete slows the deposition down by injecting repeated objections to the form of the questions. Some of the questions are objectionable, some are not.<sup>12</sup> Pete becomes more intrusive by not only objecting to questions, but by commenting on the substance of questions, and in the process, suggesting to the deponent what the answer to the question should be.<sup>13</sup>*

*At one point, Pete requests a break in the deposition while a particularly important question is pending without an answer.<sup>14</sup> The deponent*

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<sup>11</sup> Pete's predicament can be avoided by properly and thoroughly preparing the witness prior to the scheduled deposition date. See Gavin, *supra* note 5, at 665 ("Comprehensive witness preparation is mandated by the nature of the deposition process itself.").

<sup>12</sup> In general, lawyers should object only to preserve the record, to assert a valid privilege, or to protect the witness from unfair, ambiguous, or abusive questioning. See AM. COLL. OF TRIAL LAWYERS, CODE OF PRETRIAL CONDUCT AND CODE OF TRIAL CONDUCT 6 (2002) [hereinafter CODE OF PRETRIAL AND TRIAL CONDUCT], available at [http://www.actl.com/AM/Template.cfm?Section=All\\_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=59](http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=59).

<sup>13</sup> Under the Federal Rules of Civil Procedure, "[a]n objection must be stated concisely in a nonargumentative and nonsuggestive manner." FED. R. CIV. P. 30(c)(2).

<sup>14</sup> See *Hrometz v. Local 550 Int'l Ass'n of Bridge, Constr. & Ornamental Iron Workers*, 135 Fed. App'x. 787, 789 n.1 (6th Cir. 2005) (explaining that the local rule explicitly prohibits an attorney from conferring with her client when a question is pending during a deposition); *Calzaturificio S.C.A.R.P.A. S.P.A. v. Fabiano Shoe Co.*, 201 F.R.D. 33, 40 (D. Mass. 2001) (concluding that counsel who conferred with the deponent while questions were pending was "not entitled to engage" in such behavior).

*seconds the request for a break, and upon returning from the break, the deponent expertly spins the question and answer.*<sup>15</sup>

*It is important to note that the deposing lawyer first simply ignored Pete's objections and continued to politely press the deponent for answers to the questions. Second, the deposing lawyer advised Pete, on the record, that Pete should refrain from misbehaving during the deposition and, in particular, noted that Pete and the deponent took a break while an important question was pending. Third, the deposing lawyer advised Pete that he was prepared to call upon a judge to schedule a telephone hearing concerning Pete's misbehavior unless it stopped.*<sup>16</sup>

*After several minutes of misbehavior, the deposing lawyer focuses the questions on the most damaging substantive problems with the deponent's position in the lawsuit. Pete injects an objection each time a question of this type is propounded and instructs the deponent not to answer without offering a proper basis for such an instruction.*<sup>17</sup> *The deposing lawyer makes sure the record is clear as to Pete's instructions not to answer and then recesses the deposition to contact the court. The judge, who is in the courthouse but on a break from other proceedings, schedules a hearing on the matter for the next morning.*

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<sup>15</sup> See generally Kosieradzki, *supra* note 10 ("Any witness coaching is strictly prohibited. Federal Rule of Civil Procedure 37(c) directs that depositions are to be taken with the same testimony of rules as trials. At trial, a witness's attorney does not sit beside him or her in the witness stand, telling him or her what to say or refrain from saying.").

<sup>16</sup> The United States District Court for the Eastern District of Arkansas mandated, through its case law, that

[a] discovery motion should not be filed until aggrieved counsel attempts to place a conference call to the Court (calls may be made during a deposition). Such calls will be given priority. Counsel is directed to first use all good faith and reasonable efforts to resolve discovery disputes before calling the Court.

Harp v. City, 161 F.R.D. 398, 401-02 (E.D. Ark. 1995).

<sup>17</sup> Under the Federal Rules of Civil Procedure, "[i]nstructions to a deponent not to answer certain questions are generally inappropriate." *Armstrong v. Hussmann Corp.*, 163 F.R.D. 299, 302 (E.D. Mo. 1995). There are only three exceptions to this proposition: "[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) [Motion to Terminate or Limit]." FED. R. CIV. P. 30(c)(2).

*At the hearing the next morning, the judge chastised and sanctioned Pete for his misbehavior. The sanctions included payment of the cost of the deposition and the deposing lawyer's attorney fees, which amounted to over \$1000. The judge also ordered that Pete pay for the cost of a videotape deposition of his client and that the deposition reconvene in five days.<sup>18</sup> The judge further ordered Pete not to misbehave in the reconvened deposition or be subject to a contempt of court sanction.*

*Pete informs his client of the judge's order and the monetary sanction. The client thanks Pete for the great job he did in protecting his interests during the deposition and tells Pete to just add the amount of the sanction to his bill.<sup>19</sup> The client also agrees to meet with Pete over the next three days to adequately prepare for the reconvened deposition.*

*The reconvened deposition does not go well for the deposing lawyer. The deponent is so well prepared that despite skillful questions by the deposing lawyer and his persistence in probing what the deponent knows, the deponent handles the questions flawlessly. From the deposing lawyer's perspective, the deposition in which Pete does not misbehave is not very useful.<sup>20</sup>*

The purpose of this Article is to address this anecdote, specifically the opportunity loss of the deposing lawyer due to misbehavior by the deponent's lawyer during the deposition. The Article has been divided into four sections. The first section chronicles, with references to transcript excerpts, some of the most common obstructionist tactics used by lawyers. The second section summarizes the procedural rules, ethical rules, and guidelines of professional conduct applicable to lawyers. The

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<sup>18</sup> Florida rules specifically permit videotape depositions. "Any deposition may be recorded by videotape without leave of the court or stipulation of the parties, provided the deposition is taken in accordance with this subdivision." FLA. R. CIV. P. 1.310(b)(4).

<sup>19</sup> See generally Interim Report of the Comm. on Civility of the Seventh Fed. Judicial Circuit, 143 F.R.D. 371, 382 (1992) (noting when it appears that "Rambo" style attorneys are successful, clients encourage their attorneys to participate in such tactics).

<sup>20</sup> Although sanctions were imposed in this scenario, the unfortunate reality is that the imposition of a sanction on an offending attorney does not make the offended client whole. There was a grave loss of opportunity to gather valuable information, and in actuality that loss will go without compensation. See generally Deborah L. Rhode, *Opening Remarks: Professionalism*, 52 S.C. L. REV. 458, 469-70 (2001) (observing it is rare that a sanction would require a reimbursement sufficient enough to make up for what a client truly has lost).

third section sets out a progression of tactics that can be used to combat the misbehaving lawyer. Finally, this Article concludes with a four-pronged proposal to close the “hole” that may be used by misbehaving lawyers.

## II. Common Obstructionist Tactics

Some of the most common obstructionist tactics used during depositions are improperly instructing a witness not to answer a question,<sup>21</sup> clarifying questions unnecessarily,<sup>22</sup> speaking objections,<sup>23</sup> interrupting the witness while in the process of answering questions,<sup>24</sup> lengthy colloquies,<sup>25</sup> inappropriate recessing<sup>26</sup> and private consultations while a

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<sup>21</sup> FED. R. CIV. P. 30(c)(2) (“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) [Motion to Terminate or Limit].”); *see, e.g.*, N.Y. C.P.L.R. 3115 (McKinney 2004); N.Y. COMP. CODES R. & REGS. tit. 22, § 221.2 (Supp. 2009) (New York state and federal rules of procedure, prohibiting instructions not to answer barring protecting privilege, complying with court order, or to protect against harassment); *GMAC Bank v. HFTC Corp.*, 252 F.R.D. 253, 257-58 (E.D. Pa. 2008) (sanctions imposed for improper instructions not to answer, in accordance with Pennsylvania Rules of Professional Conduct).

<sup>22</sup> *See* Chatteraj et al., *supra* note 5, at 406.

[S]eeking to “clarify” the record or “help” opposing counsel formulate a clear and proper question is a tactic fraught with potential abuse and peril. Although counsel are free to clarify matters for the record (*e.g.*, “Let the record reflect that the witness is pointing at Exhibit X”), counsel are not permitted to provide substantive testimony or seek to modify the effect of the witness’s testimony with their own “clarifications”. If “clarification” is needed, counsel should prompt the witness to state such clarifications on the record by examination, permissible conferences with the witness, or correction to the transcript.

*Id.*

<sup>23</sup> *See generally* Peter M. Panken & Mirande Valbrune, *Enforcing the Prohibitions Against Coaching Deposition Witnesses*, PRAC. LITIGATOR, Sept. 2006, at 15 (stating most courts prohibit “witness coaching,” where an attorney attempts to guide a witness by suggesting answers to the questions presented), *available at* [http://files.ali-aba.org/thumbs/datastorage/lacidoirep/articles/PLIT\\_PLIT0609-PANKEN\\_thumb.pdf](http://files.ali-aba.org/thumbs/datastorage/lacidoirep/articles/PLIT_PLIT0609-PANKEN_thumb.pdf).

<sup>24</sup> *See* *Morales v. Zondo, Inc.*, 204 F.R.D. 50, 53-55 (S.D.N.Y. 2001) (finding counsel’s interruptions pervasive and frustrating to a fair examination of the deponent).

<sup>25</sup> *See generally* *Martinez v. Univ. of Ill. at Chi.*, No. 98-C-5043, 1999 WL 592106, at \*1 (N.D. Ill. 1999) (Senior J. Shadur, writing the Memorandum Opinion and Order for the Court, notes the “increased concerns about the loss of civility and about the growth of the ‘give no quarter’ litigation tactics within the profession”).



question is still pending before a witness,<sup>27</sup> unsavory use of blatant rudeness,<sup>28</sup> profanity,<sup>29</sup> ad hominem attacks,<sup>30</sup> and the use of either vulgar gestures or threats of physical violence.<sup>31</sup> These tactics are used indiscriminately against either opposing counsel or witnesses.

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Just to choose one example, there was no legitimate reason for too many of the constant objections that were injected by . . . counsel during the . . . deposition. Thus all too often questions that were perfectly understandable to an ordinary listener were made the subject of hypertechnical interruptions that professed to find the questions either vague or without foundation or as misstating the witness' prior testimony or what have you, only to be followed by answers that showed that the witness (if not the objecting lawyer) had comprehended the question full well and had no difficulty in responding. One might well ask, "To what end?" Because the . . . deposition must be renewed for a second day, this Court trusts that a less obstructionist and more civilized approach will enable the deposition to be completed more constructively and with greater expedition.

*Id.* at \*1 n.1.

<sup>26</sup> See generally *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993) (An attorney defending a deposition has a duty to refrain from unnecessary conferences with the witness during the deposition, barring the exception to assert privilege.).

<sup>27</sup> FED. R. CIV. P. 30(c)(1) (requiring deposition testimony to be taken under the same constraints as testimony at trial); see *Kosieradzki*, *supra* note 10 (reminding that a witness's attorney does not provide assistance in answering questions at trial).

<sup>28</sup> See, e.g., *In re First City Bancorp. of Tex., Inc.*, 282 F.3d 864, 865-66 (5th Cir. 2002) (per curiam). The court of appeals affirmed monetary sanctions against an attorney whose obnoxious behavior was made part of the record. *Id.* at 865. The offending attorney characterized other attorneys as "stooge," a "puppet," a "weak pussyfooting deadhead who has been dead mentally for ten years," "various incompetents," "inept," "clunks," "a bunch of starving slobs," and "an underling who graduated from a 29th tier law school." *Id.* at 866.

<sup>29</sup> See, e.g., *Carroll v. Jaques Admiralty Law Firm*, 110 F.3d 290, 294 (5th Cir. 1997) (defending attorney pollutes deposition transcript with profane language).

<sup>30</sup> "Ad hominem" is defined as "[a]ppealing to personal prejudices rather than to reason; attacking an opponent's character rather than the opponent's assertions." BLACK'S LAW DICTIONARY 46 (9th ed. 2009); see, e.g., *In re Williams*, 414 N.W.2d 394 (Minn. 1988) (deposition adjourned while counsel sought judicial intervention after being called a "sheeny Hebrew"); *Principe v. Assay Partners*, 586 N.Y.S.2d 182, 184 (App. Div. 1992) (finding remarks made to opposing counsel were "a paradigm of rudeness, and condescend, disparage, and degrade a colleague upon the basis that she is female").

<sup>31</sup> See *Office of Disciplinary Counsel v. Levin*, 517 N.E.2d 892, 893-94 (Ohio 1988) (per curiam) (involving a disciplinary hearing based on counsel's threats of physical violence during a deposition when counsel threatened to take the mustache off his questioner's face, told opposing counsel he would give him the beating of his life, slap him across his face, and break his head).

The Supreme Court of Delaware made it apparent in *Paramount Communications Inc. v. QVC Network Inc.*<sup>32</sup> that the lawyer representing the deponent abused the privilege of representing a witness because he “(a) improperly directed the witness not to answer certain questions; (b) was extraordinarily rude, uncivil, and vulgar; and (c) obstructed the ability of the questioner to elicit testimony to assist the Court in this matter.”<sup>33</sup> The following exchange is an example of the misconduct:

[Deponent]: . . . I vaguely recall [Mr. Oresman’s letter]. . . . I think I did read it, probably.

. . . .

[Deposing Attorney]: Okay. Do you have any idea why Mr. Oresman was calling that material to your attention?

[Deponent’s Lawyer]: Don’t answer that. How would he know what was going on in Mr. Oresman’s mind? Don’t answer it. Go on to your next question.

[Deposing Attorney]: No, Joe –

[Deponent’s Lawyer]: He’s not going to answer that. Certify it. I’m going to shut it down if you don’t go to your next question.

[Deposing Attorney]: No. Joe, Joe –

[Deponent’s Lawyer]: Don’t “Joe” me, asshole. You can ask some questions, but get off of that. I’m tired of you. You could gag a maggot off a meat wagon. Now, we’ve helped you every way we can.

[Deposing Attorney]: Let’s just take it easy.

[Deponent’s Lawyer]: No, we’re not going to take it easy. Get done with this.

[Deposing Attorney]: We will go on to the next question.

[Deponent’s Lawyer]: Do it now.

[Deposing Attorney]: We will go on to the next question. We’re not trying to excite anyone.

[Deponent’s Lawyer]: Come on. Quit talking. Ask the question. Nobody wants to socialize with you.

[Deposing Attorney]: I’m not trying to socialize. We’ll go on to another question. We’re continuing the deposition.

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<sup>32</sup> 637 A.2d 34 (Del. 1994). In reviewing the deposition transcripts at trial, the court in *Paramount* addressed the issue of the deponent’s lawyer’s conduct *sua sponte*. *Paramount*, 637 A.2d at 52 n.23. Because the attorney was not a member of the Delaware Bar, the court was limited in the sanctions it could impose. *Id.* It did however, preclude him from future *pro hac vice* appearances in the state of Delaware. *Id.* at 56 n.38.

<sup>33</sup> *Paramount*, 637 A.2d at 53.

[Deponent's Lawyer]: Well, go on and shut up.

[Deposing Attorney]: Are you finished?

[Deponent's Lawyer]: Yeah, you –

.....  
[Deponent's Lawyer]: . . . . Now, I've tolerated you for three hours. If you've got another question, get on with it. This is going to stop one hour from now, period. Go.

[Deposing Attorney]: Are you finished?

.....  
[Deponent's Lawyer]: You fee makers think you can come here and sit in somebody's office, get your meter running, get your full day's fee by asking stupid questions. Let's go with it.<sup>34</sup>

In *Armstrong v. Hussmann Corp.*, the district court found frequent interruptions by the deponents' attorneys warranted sanctions.<sup>35</sup> These interruptions included frequent improper instructions not to answer, objections to questions which were then adopted into the deponent's answers, restated questions for clarification purposes, and "whispered . . . pointed out portions of documents to" the deponent.<sup>36</sup> A simple example of the deponent's attorney impermissibly making a suggestive objection during a deposition is found in the court's opinion:

[Deponent's Attorney]: Objection, I believe his testimony has been that he never did refuse to take off the T-shirt, he merely questioned it. His prior testimony was that before he had a chance to react one way or the other, that security was called and he was ordered to be walked out of the doors. So that's a mischaracterization of his testimony.

[Question was then reread to the deponent]

[Deponent]: I never refused.<sup>37</sup>

In *Howell v. Standard Motor Products, Inc.*,<sup>38</sup> the plaintiff-deponent filed a lawsuit under the federal Family and Medical Leave Act

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<sup>34</sup> *Id.* at 53-54; see "Texas Style Deposition" *infra* note 105 (involving the deponent's lawyer, Joseph Jamail, who displayed other unsavory behaviors in a video deposition conducted during the Pennzoil-Texaco litigation).

<sup>35</sup> 163 F.R.D. 299, 303-04 (E.D. Mo. 1995).

<sup>36</sup> *Armstrong*, 163 F.R.D. at 301.

<sup>37</sup> *Id.* at 302.

<sup>38</sup> No. 4:99-CV-987-E, 2001 U.S. Dist. LEXIS 5295, at \*1 (N.D. Tex. Apr. 27, 2001).

(FMLA).<sup>39</sup> After the deposing attorney established that the plaintiff was alleging retaliation based on requesting FMLA leave, the deposing attorney posed the following question:

[Deposing Attorney]: Okay. Then we need to talk about it if you're alleging that. . . . What acts of retaliation were taken against you because you sought FMLA benefits?

[Deponent's Attorney]: Objection. Asking for legal conclusions is not an appropriate deposition question, and you're just wasting everybody's time. . . . Just ask him questions—a factual question.

[Deposing Attorney]: I have asked him a question, and I'm going to stick by that question. Could you please read that question back to him, please?

[Last question read back.]

[Deponent's Attorney]: I'm going to suspend the deposition at this point and just request a hearing . . . .<sup>40</sup>

The court stated that the response by the deponent's attorney was "indefensible."<sup>41</sup> In regards to the deposing lawyer's motion to compel, the district court was unable to have the parties reconvene and require the deponent to answer the aforesaid question because the deponent passed away before the deposition could be scheduled.<sup>42</sup> As a result, the district court ordered that evidence establishing a claim of retaliation be precluded at trial.<sup>43</sup>

In *Hagbourne v. Campbell*, the parties stipulated at the outset of the deposition that they would "waive until trial all objections except as to the form of the question."<sup>44</sup> Notwithstanding this stipulation, the defense counsel objected and interrupted the deposition numerous times.<sup>45</sup> The deponent's attorney interrupted the deponent with "[w]ait, wait, wait"

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<sup>39</sup> The Family & Medical Leave Act can be found in 29 U.S.C. § 261 (2008).

<sup>40</sup> *Howell*, 2001 U.S. Dist. LEXIS 5295, at \*4.

<sup>41</sup> *Id.* at \*8.

<sup>42</sup> *Id.* at \*10.

<sup>43</sup> *Id.* (holding "[the plaintiff] will be prohibited from introducing any evidence at trial regarding a claim for retaliation under the provisions of FMLA, which was the subject matter of the questions Howell did not answer at his deposition").

<sup>44</sup> CV 960132593, 1997 Conn. Super. LEXIS 3282, at \*1 (Conn. Super. Ct. Dec. 12, 1997).

<sup>45</sup> *Hagbourne*, 1997 Conn. Super. LEXIS 3282, at \*1.

while the deponent was attempting to answer.<sup>46</sup> The court noted that the deponent's counsel also "improperly expounded on the objection," and responded in a "quarrelsome fashion."<sup>47</sup> Pertinent excerpts from the deposition transcript include:

[Deposing Attorney]: No. Let me finish the question, please. Does your office keep track of billing that you would have done for that particular day?

[Deponent's Attorney]: Objection to the form. They are not like lawyers. They don't have time sheets.<sup>48</sup>

....

[Deposing Attorney]: As this standard was in effect on January 31st of 1994, was it—was it your goal as a practicing anesthesiologist to abide by it?

[Deponent's Attorney]: Objection.

[Deponent]: I got to read the thing first.

[Deponent's Attorney]: Well, did you in the operating room as you were there, did you say to yourself, I need to abide by the standards for basic anesthetic monitoring as approved by the house of delegates on October 21, 1986?

[Deposing Attorney]: That wasn't the question.

[Deponent's Attorney]: Well, that's my question.

[Deposing Attorney]: You are not asking the questions, I am. Do I need to get a judge to tell you that?

[Deponent's Attorney]: You know, you keep threatening that [as] if that's something I have a fear of and I assure you I do not. I feel very confident if [was] anyone reading this transcript, they'd see it more towards my way of thinking than yours.

[Deposing Attorney]: I'm not saying it as a threat. I'm saying it because you are constantly interrupting what would be the short, normal and orderly flow of this deposition with speaking objections.<sup>49</sup>

The court concluded that the deponent's attorney exhibited "frequent interruptions [which] were improper, argumentative and time-consuming, with the result that the [deposing attorney] did not have a proper and orderly deposition" of the deponent.<sup>50</sup> The court sanctioned the deponent's attorney, requiring her to "pay attorneys fees to the plaintiff,"

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<sup>46</sup> *Id.* at \*2.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at \*3.

<sup>49</sup> *Id.* at \*4-5.

<sup>50</sup> *Id.* at \*6.

which consisted of the deposing attorney's time attributable to defense counsel's misconduct during the deposition, her preparation of the motion for sanctions, as well as the court appearance for argument of the motion.<sup>51</sup>

In *Frazier v. Southeastern Pennsylvania Transportation Authority*, the district court held that the deponent's attorney's conduct amounted to a patent violation of the Federal Rules of Civil Procedure because he "repeatedly interrupted the deposition, suggesting answers to the witness, cutting short the witness's responses to questioning, and instructing the witness, without basis, not to answer certain questions."<sup>52</sup> The following is a portion of the deposition transcript:

[Deposing Attorney]: Let me ask it this way, when you went to see Dr. Saul for the first time, do you remember the route you took to get there, how you got there?

[Deponent]: Uh-uh.

[Deponent's Attorney]: What is the answer?

[Deposing Attorney]: You have to say yes or no.

[Deponent]: I'm trying to think if that was the time I was assaulted on SEPTA because I was in route to the place then.

[Deponent's Attorney]: The question is do you remember how you got to see Dr. Saul the first time you went there? Do you remember the route? That's the question. Do you know the answer?

[Deponent]: (Witness nods.)

[Deponent's Attorney]: You shook your head no. Does that mean no?

[Deponent]: No, I don't know.

[Deponent's Attorney]: Fine. That's the answer. Now let him ask another question.

[Deponent]: I don't know the answer to that, but I do know that—

[Deponent's Attorney]: That's the answer to the question.

[Deposing Attorney]: No, she hasn't answered the question. You've been answering for her. She has not answered the question.

[Deponent's Attorney]: That's the answer to the question. Let him ask another question.<sup>53</sup>

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<sup>51</sup> *Id.* at \*7-8; *see also* *Van Pilsum v. Iowa State Univ. of Science & Tech.*, 152 F.R.D. 179 (S.D. Iowa 1993) (imposing sanctions when attorney's speaking objections were blatant instructions to witness); *Am. Directory Serv. Agency, Inc. v. Beam*, 131 F.R.D. 15 (D.D.C. 1990) (imposing sanctions against attorney whose speaking objections were so outrageous as to hamper all relevant information gathering and caused unnecessary increase in cost of going forward).

<sup>52</sup> 161 F.R.D. 309, 316 (E.D. Pa. 1995).

<sup>53</sup> *Frazier*, 161 F.R.D. at 315.

The deponent's attorney in *Frazier* was ordered by the court to compensate the "moving party the reasonable expenses incurred in making the motion, including attorney's fees."<sup>54</sup> Additionally, the district court ordered a re-deposition of the deponent.<sup>55</sup>

The court in *Morales v. Zondo, Inc.*, ruled that, during the deposition, the defendant's lawyer took part in "detailed objections, private consultations with the witness, instructions not to answer, instructions how to answer, colloquies, interruptions, and ad hominem attacks [which] disrupted . . . and protracted the length of the deposition."<sup>56</sup> The following evidences such misconduct during the deposition:

[Deposing Attorney]: So you don't know what policies were in effect for Zondo, Inc.'s New York employees in 1998, is that your testimony?

[Deponent's Attorney]: He didn't say that he didn't know any of them. He said that he didn't commit—

[Deposing Attorney]: If you would not coach my witness; I would like his answers as best he can to my questions.

[Deponent's Attorney]: Okay. I object to the characterization that I was trying to coach my client. If I'm going to coach him, I would only do what the rules of procedure permit. I'm not coaching him. I'm still trying to clarify your question. You ask a question, you get an answer, then you ask a question as if that prior question had never been asked and answered. Try to listen to the witness's answers and it will help, so that you don't ask a question that makes no sense to the prior one.

....

[Deposing Attorney]: Okay. From your recollection, what employee policies were in effect at Zondo Inc.'s New York offices in 1998?

[Deponent's Attorney]: Same objection as I objected to a question—two or three questions ago, which amounted to that very same question. Are you asking the witness to tell you every policy he recalls on whatever subject?

[Deposing Attorney]: Yes.

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<sup>54</sup> *Id.* at 317 (citing FED. R. CIV. P. 37(a)(4)(A)).

<sup>55</sup> *Frazier*, 161 F.R.D. at 317. The court cautioned the sanctioned attorney as to the future re-deposition: "[W]e will expect [him] to conduct himself in a manner consistent with this Memorandum and Order, the requirements of the Federal Rules, the guidelines we set forth in [this court's previous decision in] *Hall*, and the high standard of professionalism and personal decorum expected of an attorney and officer of the Court." *Id.* at 317 n.9.

<sup>56</sup> 204 F.R.D. 50, 54 (S.D.N.Y. 2001).

[Deponent's Attorney]: Okay. Tell him what you recall and take as long as you need.

[Deponent]: I believe there were policies referring to office decorum, tardiness, paid time off, and also vacation.

....

[Deposing Attorney]: Let me show you what was previously marked Plaintiff's Exhibits 16, 17, and 18, and ask if you are—

[Deponent's Attorney]: What happened to Exhibits 4 through 15?

....

[Deposing Attorney]: Are you familiar with those exhibits or documents? (Handling.)

[Deponent's Attorney]: Familiar how?

[Deposing Attorney]: In any way.

[Deponent]: (Reviewing document.) I am unclear as to your definition of "familiar."

[Deposing Attorney]: Well, have you seen anything like that issued on behalf of your company to any of its employees?

[Deponent]: Can you define "like that"?

[Deponent's Attorney]: By the way, for the clarity of the record, 16 seems to relate to a pay period running from 7/23/98 to 7/28/98. Exhibit 17 appears to run—to be reflective of 6/25/98 to 7/1/98. And God forbid we should be in chronological order, 18 is from 7/9/98 to 7/15/98.

....

[Deposing Attorney]: What was your policy regarding giving employee performance evaluations to new employees?

[Deponent's Attorney]: When? What facility, which employees?

[Deposing Attorney]: Let's start with the general as to whether you have any general policy regarding performance evaluations of employees?

[Deponent's Attorney]: You showed him Exhibit 2 earlier today—

....

[Deposing Attorney]: Do you have a secretary?

[Deponent's Attorney]: Today? He said "do you," so assume the present.

[Deponent]: I do not presently have an employee with the title of secretary.

....

[Deposing Attorney]: When did you learn that Ms. Morales was pregnant?

[Deponent]: I don't recall.

[Deponent's Attorney]: Can we note that it's 5 o'clock and we're finally getting to a question that's relevant to the claim pending in the case?

....

[Deposing Attorney]: During the time that you had these dinner meetings with Ms. Morales, would you describe or characterize your relationship with her as a cordial one?

[Deponent's Attorney]: You mean did he have to drag her to dinner by her hair?



[Deponent]: Yes.

....

[Deposing Attorney]: Well, do you prepare documents related to Zondo, Inc.'s business at your home?

[Deponent]: I have—

[Deponent's Attorney]: Do you mean does he have a practice of doing so or has it ever happened?

[Deposing Attorney]: Has it ever happened?

[Deponent's Attorney]: Do you ever work at home?

[Deponent]: Yes.

[Deposing Attorney]: Do you prepare Zondo, Inc.'s correspondence at home?

[Deponent's Attorney]: All of it, some of it, any of it? . . .<sup>57</sup>

The court ordered the deponent's attorney to pay the cost of the transcript of this deposition, compensate the deposing attorney's time during this deposition, and pay \$1500 to the Clerk of the Court.<sup>58</sup>

These examples just scratch the surface of obstructionist conduct exhibited by lawyers in depositions. In each of these instances, the court reacted with sanctions against the attorneys.<sup>59</sup> Yet, even with the assessment of sanctions, the court did not prevent the opportunity lost by the deposing lawyer to gather information at the particular deposition.<sup>60</sup>

<sup>57</sup> *Id.* at 55-57. Technically, the corporation was the defendant in this case. The deponent in this case was a principal of that corporation.

<sup>58</sup> *Id.* at 58.

<sup>59</sup> Aside from disciplinary actions that may be taken against an offending attorney, the Federal Rules of Civil Procedure outline specific sanctions that affect parties to the litigation itself:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

FED. R. CIV. P. 37(b)(2)(A)(i-vii).

<sup>60</sup> See John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 551 (2000).

### III. Procedural Rules, Ethical Rules, and Professional Guidelines

The federal and state court rules of civil procedure, various state rules of professional conduct, and professionalism guidelines anticipate that lawyers, like Pete, will be tempted to misbehave. These codes set out rules of conduct for lawyers to observe in a deposition setting.

Federal Rule of Civil Procedure 30(c)(2) states, in part, that any objection during the examination of a deponent

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 non-argumentative 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) [a motion for a protective order].<sup>61</sup>

Furthermore, Federal Rule of Civil Procedure 30(d)(3)(A) provides, in part, that 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. . . . If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.<sup>62</sup>

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[T]he incentive structure inherent in the Federal Rules fails to provide sufficient incentives to cooperate, except in low-stakes cases where the amount at issue does not justify the costs of litigating a discovery motion with its risk of sanctions. The risk of having to pay one's adversary's attorney's fees incurred in litigating a motion to compel discovery or motion for protective order in addition to one's own fees, however, pales into insignificance as the stakes in the litigation increase. . . . In high-stakes cases . . . the quantum of sanctions that the rules prescribe for losers of discovery motions is grossly inadequate. The incentive structure envisaged by the Federal Rules is ill-designed to deter overreaching discovery by proponents and incomplete, evasive and dilatory responses to discovery by respondents.

*Id.* at 551-52.

<sup>61</sup> FED. R. CIV. P. 30(c)(2); *see also* Delta Fin. Corp. v. Morrison, 829 N.Y.S.2d 877, 884 (N.Y. Sup. Ct. 2007) (determining whether work product and materials used preparing for trial constitute discovery protections).

<sup>62</sup> FED. R. CIV. P. 30(d)(3)(A).

This rule prohibits a defending lawyer from using an objection to coach or otherwise inappropriately disrupt deposition questioning.<sup>63</sup> This rule also includes an enforcement mechanism if the defending lawyer displays bad faith in defending the deponent.<sup>64</sup>

Many federal district courts publish local civil procedure rules that go even further in proscribing what constitutes abusive deposition conduct and the sanctions for such abuse.<sup>65</sup> For example, the Federal District Court for the Southern District of Florida local rules, similar to local rules adopted in many courts, prohibit the following specific kinds of behavior during a deposition:

1. Objections or statements which have the effect of coaching the witness, instructing the witness concerning the way in which he or she should frame a response, or suggesting an answer to the witness.
2. Interrupting examination for an off-the-record conference between counsel and the witness, except for the purpose of determining whether to assert a privilege.
3. Instructing a deponent not to answer a question except when to preserve a privilege, to enforce a limitation on evidence directed by the Court, or to present a motion [for a protective order].<sup>66</sup>

These local rules also contain enforcement mechanisms including the appointment of a special master to sit at future depositions, the requirement that future depositions be conducted at the federal courthouse so that disputes can be immediately heard by the court, and sanctioning of attorney fees and costs.<sup>67</sup>

There appears to be no question that the federal courts are serious about not only trying to pre-empt obstructionist behavior, but also sanctioning lawyers who do misbehave during a deposition. Certainly, Pete's conduct in the deposition violates both referenced federal and state

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<sup>63</sup> FED. R. CIV. P. 30(c)(2).

<sup>64</sup> "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." FED. R. CIV. P. 30(d)(2).

<sup>65</sup> *See generally* The Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (2006) (permitting adoption of local rules not inconsistent with federal rules).

<sup>66</sup> S.D. Fla. R. 30.1(A).

<sup>67</sup> S.D. Fla. R. 30.1(B)-(D).

procedural rules. Further, Pete's conduct resulted in sanctions consistent with the provisions of these rules. Yet, all of the pre-emptive and enforcement mechanisms still resulted in the deposing lawyer losing the opportunity to question a deponent after proper scheduling of the deposition. The Federal Rules of Civil Procedure do not prevent this opportunity loss.

What about state court civil procedure rules? Many states model their civil procedure rules after the Federal Rules of Civil Procedure.<sup>68</sup> It is not surprising, then, that many state civil procedure rules mirror the federal rules concerning the conduct of lawyers at depositions. For example, Florida Rule of Civil Procedure 1.310(d), not unlike the rules in many states, is identical to the portion of Federal Rule of Civil Procedure 30(c)(2) which admonishes a defending lawyer to not propound argumentative or suggestive objections.<sup>69</sup> Therefore, state courts also appear to be serious about curbing misconduct by lawyers, like Pete, during a deposition, yet seem to have no answer for the opportunity loss revealed in the opening scenario to this Article.

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<sup>68</sup> See generally Kosieradzki, *supra* note 10 (quoting Standing Orders of the Court for the Eastern District of New York, 102 F.R.D. 339, 351 (E.D.N.Y. 1984) (prohibitions against directions not to answer, suggestive objections and conferences between deponent and defending attorney)) (quoting Local Rules for the United States District Court for the District of Colorado, D. Colo. R. 30.1C (prohibitions against abusive deposition conduct including coaching the witness, off the record conferences, instructions not to answer)), (quoting Standing Orders of the District of South Carolina, 5 JUNE S.C.L. 42 (1994) (advising that witnesses ask opposing counsel for question clarifications, all objections except those asserting privilege are to be preserved at deposition, attorneys may not direct a witness not to answer, may not coach a witness, may not hold private conferences)). See also 22 N.Y.C.R.R. § 221.2 (New York state and federal law prohibiting a deponent's attorney from instructing a witness not to answer barring privilege, compliance with court order or protection against harassment).

<sup>69</sup> FLA. R. CIV. P. 1.310(d).

At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, or that objection and instruction to a deponent not to answer are being made in violation of rule 1.310(c), the court in which the action is pending or the circuit court where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition or may limit the scope and manner of the taking of the deposition under rule 1.2809(c).

*Id.*

The American Bar Association (ABA) Rules of Professional Conduct also address attorney behavior during a deposition.<sup>70</sup> Paragraph 2 of the Preamble to these rules states that a lawyer should zealously advocate a client's position.<sup>71</sup> Accordingly, the boundaries of a lawyer's zealous representation of a client are set by the ABA rules.<sup>72</sup>

With this Preamble in mind, the ABA rules go on in Paragraph 9 of the Preamble to note:

Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.<sup>73</sup>

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<sup>70</sup> MODEL RULES OF PROF'L CONDUCT R. 3.5 cmt. (2009) ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."). Comment [5] was added in 2002 "to clarify that the prohibition against disruptive conduct is intended to apply to . . . depositions." American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005*, 476 (2006).

<sup>71</sup> MODEL RULES OF PROF'L CONDUCT Preamble (2) (2009); see Gavin, *supra* note 5, at 659 ("[Z]eal is the talisman traditionally offered by practicing Rambos to justify [their] toxic behavior."); see also Kerper & Stuart, *supra* note 5, at 121.

[T]he overwhelming trend in the law suggests that attorneys who attempt to invoke . . . zealous advocacy to justify overly aggressive deposition behavior may be in for a rude shock. . . . Zealous advocacy is the buzz word which is squeezing decency and civility out of the law profession. Zealous advocacy is the doctrine which excuses, without apology, outrageous and unconscionable conduct so long as it is done ostensibly for a client, and, of course, for a price. Zealous advocacy is the modern day plague which infects and weakens the truth-finding process and which makes a mockery of the lawyer's claim to officer-of-the-court status.

*Id.* at 122 (citing Kathleen P. Browne, Comment, *A Critique of the Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751, 767 (1996)).

<sup>72</sup> It is worth noting that some organizations are removing the words "zeal" and "zealous advocacy" and replacing them with "diligence" and "competence." This is in an effort to shorten the leash of the aggressive litigator who pushes those boundaries to the extreme. See, e.g., N.Y. RULES OF PROF'L CONDUCT (2009).

<sup>73</sup> MODEL RULES OF PROF'L CONDUCT Preamble (9) (2009).

This quoted portion describes the conflict and dilemma faced by Lawyer Pete in defending his client in the deposition.<sup>74</sup> The ABA Rules offer some guidance to Pete.

ABA Rule 3.1, Meritorious Claims and Contentions, prohibits a lawyer from asserting a frivolous claim or defense.<sup>75</sup> Comment 1 to this rule explains that a lawyer has a duty to use legal procedure to the fullest benefit of a client's cause, but also has a duty not to abuse legal procedure.<sup>76</sup> This Comment concludes that even though the law is not always clear and never static, procedural law establishes the limits within which an advocating lawyer may proceed.<sup>77</sup> When applied to lawyer Pete's behavior during the deposition, Pete's speaking objections, frivolous objections, and instructions not to answer fall within the broad prohibitions of this ABA Rule.

ABA Rule 3.2, Expediting Litigation, requires a lawyer to expedite litigation consistent with the interests of her client.<sup>78</sup> The Comment to this rule speaks to Lawyer Pete's tactics in the deposition. The Comment explains that, although recognizing that postponements and other delays may be appropriate, delays or other tactics employed for the purpose of frustrating an opposing party's attempt to rightfully pursue a cause are not justified.<sup>79</sup> It further states that "[r]ealizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client."<sup>80</sup>

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<sup>74</sup> See Pierre M. Gentin & Peter J. Kozlowski, *Legal and Ethical Issues Arising in Discovery*, 654 PLI/LIT 231, 233 (2001) (citing THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY 175 (3d ed. 1992)).

[A]n attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. . . . Therefore, a lawyer's duty to represent a client competently and effectively does not allow a lawyer to harass another person . . . or to use means which serve no substantial purpose but to embarrass, delay or burden.

*Id.*

<sup>75</sup> MODEL RULES OF PROF'L CONDUCT R. 3.1 (2009).

<sup>76</sup> *Id.* R. 3.1 cmt.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* R. 3.2.

<sup>79</sup> *Id.* R. 3.2 cmt.

<sup>80</sup> *Id.*

Applying this Rule to Lawyer Pete, it was the client's financial interests that in part motivated Pete to misbehave during the deposition, frustrating and delaying the opposing lawyer's attempt to pursue the opposing client's claim. This kind of misconduct also violates the ABA Rules. ABA Rule 3.4, Fairness to Opposing Party and Counsel, provides in part:

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or
- (b) unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (c) knowingly disobey an obligation under the rules of a tribunal. . .
- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party . . . .<sup>81</sup>

Comment 1 to this ABA Rule specifically prohibits concealment of evidence, improperly influencing witnesses, and obstructive tactics in discovery procedure.<sup>82</sup> Lawyer Pete's conduct during the deposition arguably fits each one of these prohibitions. This Comment notes that fair competition in the adversary system of justice is founded on these prohibitions.<sup>83</sup> Therefore, Pete's misconduct can be viewed as an attempt to corrupt the legal system.<sup>84</sup>

Finally, ABA Rule 8.4, Misconduct, declares that it is professional misconduct for a lawyer to violate the ABA Rules and to "(b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer; (c) engage in conduct that is prejudicial to the administration of justice."<sup>85</sup> Section (a) of this rule states that this Rule prohibits a lawyer to knowingly assist

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<sup>81</sup> *Id.* R. 3.4.

<sup>82</sup> *Id.* R. 3.4 cmt.

<sup>83</sup> *Id.*

<sup>84</sup> See Beckerman, *supra* note 60, at 573 n.273 (suggesting attorneys who use obstructionist tactics to thwart a deposition should be considered to have committed tortious interference, and be subjected accordingly to the laws of that jurisdiction).

<sup>85</sup> MODEL RULES OF PROF'L CONDUCT R. 8.4 (2009).

or induce another to violate the ABA Rules or to violate the ABA Rules through the acts of another person.<sup>86</sup> Lawyer Pete's misbehavior during the deposition assisted and induced his client to violate the ABA Rules.

Lawyer Pete's actions constituted misconduct,<sup>87</sup> but his violations of the cited ABA Rules may not be used as the basis of a legal malpractice action.<sup>88</sup> Although Lawyer Pete's violations of the foregoing ABA Rules may not be used as the basis of a legal malpractice action, his obstructionist behavior during the deposition hampers the fair prosecution and defense of the opposing party's claim.

In addition to the civil procedure rules and the state bar association disciplinary rules, various lawyer organizations<sup>89</sup> and bar associations

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<sup>86</sup> *Id.*

<sup>87</sup> See generally Vanessa A. Lantin & Alissa York, *Professionalism: Dealing with Unprofessional Conduct in Bankruptcy*, 36 U. MEM. L. REV. 575 (2006).

An attorney should be ever mindful of . . . her broader professional duty to the judicial system and should demonstrate concern for public perceptions of the legal profession and its members. . . . [A]ttorneys should not be overly contentious, combative, or bellicose. Courtesy, cooperation, and respect for the court . . . clients, opposing counsel, and witnesses are, in reality, professional strengths and virtues—not weaknesses. Personal dignity and professional integrity are vital to the legal profession, to the judicial process, and to public confidence.

*Id.* at 629.

<sup>88</sup> MODEL RULES OF PROF'L CONDUCT, Scope (20) (2009).

Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

*Id.*

<sup>89</sup> The American Inns of Court was formally established in 1985 to "foster excellence in professionalism, ethics, civility, and legal skills." Their Profession Creed reads, in part:



have published professionalism codes and guidelines that deal with deposition conduct. For example, the American College of Trial Lawyers adopted a Code of Pretrial Conduct.<sup>90</sup> This Code addresses the conduct of lawyers in a deposition.<sup>91</sup> Specifically, section 5(e)(5) under the heading “Discovery Practice” declares that during a deposition, “[o]bjections should not be used to obstruct questioning, to improperly communicate with the witness, or to disrupt the search for facts or evidence germane to the case.”<sup>92</sup>

Aside from national organizations such as the American College of Trial Lawyers, state and local trial lawyer groups have also published codes or guidelines for lawyers in a deposition proceeding. Perhaps one unique example of such a publication is the *Handbook of Discovery Practice* developed by the Joint Committee of the Trial Lawyers Section of The Florida Bar and the Conference of Circuit and County Court Judges.<sup>93</sup> The fact that both trial lawyers and judges worked together to produce a discovery handbook adds more credence to the publication. In particular, Chapter 4 of the Handbook titled “‘Speaking Objections’ and Inflammatory Statements at a Deposition” condemns the practice and provides civil procedure rules and case law citations which support this position.<sup>94</sup> Further, Chapter 5 of the Handbook titled “Instructing a

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I will treat the practice of law as a learned profession and will uphold the standards of the profession with dignity, civility and courtesy. I will value my integrity above all. My word is my bond. I will develop my practice with dignity and will be mindful in my communications with the public that what is constitutionally permissible may not be professionally appropriate. I will serve as an officer of the court, encouraging respect for the law in all that I do and avoiding abuse or misuse of the law, its procedures, its participants and its process. I will represent the interests of my client with vigor and will seek the most expeditious and least costly solutions to problems, resolving disputes through negotiation whenever possible. . . .

American Inns of Court, General Information, Professional Creed, <http://www.innsofcourt.org/Content/Default.aspx?Id=141> (last visited May 14, 2010).

<sup>90</sup> CODE OF PRETRIAL AND TRIAL CONDUCT, *supra* note 12.

<sup>91</sup> *Id.* at 6.

<sup>92</sup> *Id.*

<sup>93</sup> JOINT COMM. OF THE TRIAL LAWYERS SECTION OF THE FLA. BAR AND CONFERENCES OF CIRCUIT AND COUNTY COURT JUDGES, 2007 HANDBOOK ON DISCOVERY PRACTICE (Sept. 2007) [hereinafter 2007 HANDBOOK], available at <http://www.ninthcircuit.org/research/downloads/Handbook-Discovery&Practice-2007.pdf>.

<sup>94</sup> *Id.* at 41.

Witness Not to Answer Questions at a Deposition,” citing civil procedure rules and case law, explains that an instruction not to answer is only appropriate to claim a privilege or to enforce a court ordered limitation in discovery.<sup>95</sup> Lawyer Pete’s conduct in the deposition was contra to the prohibitions and mandates of these professionalism guidelines.

#### IV. Combating the Misbehaving Lawyer

The next question becomes, what can an opposing lawyer do when faced with Lawyer Pete’s misconduct? Deposition literature and skills training programs offer many suggestions for handling the obstructionist lawyer.<sup>96</sup> The following is a “Top Eight” list of tactics for dealing with the misbehaving lawyer. These tactics are listed in chronological order, beginning with pre-deposition tactics, followed by tactics that can be used during the deposition.

Number 1: If a deposing lawyer, through experience or investigation, has a reasonable basis to suspect misconduct by an opposing lawyer, then seeking a pre-deposition protective order may be effective in stopping the misbehavior before it starts.<sup>97</sup> Such protective orders should set out the parameters within which the deposition will be conducted.<sup>98</sup> The

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<sup>95</sup> *Id.* at 47.

<sup>96</sup> This entire section of the Article draws extensively from the materials produced and used in The National Institute for Trial Advocacy (NITA) Deposition Training Programs. The author has worked as a Program Director for the NITA Florida Deposition Program along with Professor Michael Dale for many years. One of the best sources for learning about deposition tactics is DAVID M. MALONE ET AL., *THE EFFECTIVE DEPOSITION* (3d ed. 2007). *See, e.g.*, AM. COLL. OF TRIAL LAWYERS, *ANNOTATED CODE OF TRIAL CONDUCT* (2005) (a manual for trial practitioners and for use as a teaching aid); AM. COLL. OF TRIAL LAWYERS, *TRIAL ETHICS TEACHING PROGRAM* (2004); DENNIS SUPLEE & DIANA DONALDSON, *THE DEPOSITION HANDBOOK* (1988); Zachary D. Fasman, *Taking the Plaintiff’s Deposition—The Defense Viewpoint*, 712 PLI/Lit 513 (2004); John F. Romano, *Making the Deposition Count in Auto and Premises Cases*, 2 Ann. 2006 ATLA-CLE 2153 (Summer 2006).

<sup>97</sup> *See* FED. R. CIV. P. 16, 26(c), 26(f) & 30(d)(3); *see also* Gavin, *supra* note 5, at 663 (“[T]he best defense [is] a good offense . . . an astute practitioner can . . . predict the deposition at which . . . the witness is likely to be tested, if not outright abused.”).

<sup>98</sup> Such deposition parameters include forbidding disclosure or discovery, establishing date and location, limiting scope of disclosures, limiting persons permitted to attend the deposition, and granting motions to seal transcripts including maintaining secrecy of sensitive information. FED. R. CIV. P. 26(c). However, be mindful that not

deposing lawyer should first attempt to get the opposing lawyer to agree in writing to abide by and refrain from certain conduct during the deposition.<sup>99</sup> Such an agreement might reference state or local deposition conduct guidelines and rules, and may be enough to permit a court to sanction a breach of the agreement.<sup>100</sup> However, court approval of such an agreement is an extra precaution that sets up, upon violation of the order, compelling proof of contempt of court.<sup>101</sup> In some courts, a standing discovery order renders the need for a protective order covering deposition conduct moot.<sup>102</sup>

Number 2: If a deposing lawyer anticipates misconduct by an opposing lawyer, then videotaping the deposition may thwart the misbehavior.<sup>103</sup> In most instances, the presence of the camera seems to have a leveling influence and encourage proper behavior by not only opposing lawyers, but by deposing lawyers and deponents as well.<sup>104</sup> Of

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all courts welcome the idea of limiting the gathering of information when all the issues of the case have not yet been brought to light. See Cary, *supra* note 5, at 585.

<sup>99</sup> Federal Rule of Civil Procedure 26(c)(1) states in pertinent part: "The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." FED. R. CIV. P. 26(c)(1).

<sup>100</sup> See generally A. Darby Dickerson, *The Law and Ethics of Civil Deposition*, 57 MD. L. REV. 273, 327 (1998).

<sup>101</sup> FED. R. CIV. P. 37(b)(1) (providing for sanctions against a deponent for failure to comply with court order to compel discovery); FED. R. CIV. P. 37(b)(2) (providing for sanctions against a party or a party's officer, director, or managing agent, or organization, for failure to obey an order to provide or permit discovery).

<sup>102</sup> Dickerson, *supra* note 100, at 284.

<sup>103</sup> FED. R. CIV. P. 30(b)(3)(A) ("Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means.").

<sup>104</sup> Michael J. Henke & Craig D. Margolis, *The Taking and Use of Video Depositions: An Update*, 17 REV. LITIG. 1, 20 (1998).

[T]he attorney's own style of questioning may become subject to scrutiny at a video deposition. Conduct that a stenographic transcript could not adequately convey—such as aggressive examination, abusive treatment of opposing counsel or the witness, and witness coaching—may be preserved in full detail on video. Therefore, the video deposition is a powerful means of curbing discovery abuse. Even a defending attorney should consider having a stenographic deposition also recorded by video if obstructionist conduct is expected from opposing counsel.

*Id.*

course, this is not always true.<sup>105</sup> The tactic of videotaping a deposition is a popular option to curb deposition misconduct because videotaping is convenient and relatively inexpensive.<sup>106</sup> Further, the camera does not lie, giving a reviewing court solid evidence of potentially sanctionable misconduct.<sup>107</sup>

Number 3: Some deposing lawyers have requested that, prior to the beginning of a deposition, the opposing lawyers and the deponent agree that all objections to questions be made with the deponent outside of the deposition room.<sup>108</sup> The lawyers and the deponent would have to agree to this procedure for it to be binding, as there is no evidence that any court has entered an order embracing it. Certainly, such an agreement would limit the ability of a deponent's lawyer to coach a witness while a question is pending through a speaking objection. However, this kind of process begs for an opposing lawyer to object as often as necessary to disrupt the flow of deposition questioning, resulting in a disjointed and ineffective deposition.<sup>109</sup> Therefore, before proposing such a procedure, the deposing lawyer would have to gauge the pluses and minuses of taking a deposition in this manner with a particular deponent and opposing lawyer.<sup>110</sup>

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<sup>105</sup> See Miriam Rozen, *Hairpiece v. Fat Boy*, AM. LAW., Oct. 1992, at 82. This article contains the transcript of a video of the infamous Joseph Jamail in action during a deposition of a witness in the Pennzoil-Texaco case. Fortunately for Jamail's client, they won a multimillion dollar judgment, in spite of his offensive behaviors.

<sup>106</sup> Gavin, *supra* note 5, at 669.

<sup>107</sup> A defending attorney who elects a videotaped deposition should be mindful of his own conduct during the deposition, especially when facing the combative behaviors of aggressive litigators. If one is planning on presenting evidence of improper conduct to the court for sanctions, it is imperative that the defending attorney maintain a respectable level of dignity and decorum. See generally Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637 (1990) (acknowledging that courts are more likely to grant sought after relief when the moving attorney's conduct is unblemished).

<sup>108</sup> FED. R. CIV. P. 16 (requiring pre-trial conferencing). This is an ideal opportunity to establish the limitations and scope of deposition discovery. See Dickerson, *supra* note 100, at 353 ("stipulate at the beginning of the deposition to reserve all objections until trial"); Gavin, *supra* note 5, at 669 ("To avoid . . . speaking objections, the deposition defender should ask the witness to leave the room while making the record.").

<sup>109</sup> See generally Dickerson, *supra* note 100, at 313, 354.

<sup>110</sup> See *id.* at 353-54.

Number 4: One of the conventional rules of deposition questioning is: Friendly and informal first.<sup>111</sup> This axiom may not only apply to the deposing lawyer's behavior towards a deponent, but also to the deposing lawyer's approach to opposing counsel. Many times, a friendly and solicitous approach to a deponent's lawyer can set the tone for proper behavior during a deposition. For the most part, this kind of approach cannot hurt.<sup>112</sup> A deposing lawyer who is considerate and cooperative towards both a deponent and a deponent's lawyer may diffuse existing or perceived animosity and the temptation of an opposing lawyer to be inconsiderate and uncooperative.<sup>113</sup> A tangential benefit may be that even if only the deponent buys into the approach offered by the deposing lawyer and the deponent's lawyer does not, or vice-versa, this can create a rift between the deponent and the deponent's lawyer.<sup>114</sup> In either case, such a rift can benefit the deposing lawyer when the deponent or the deponent's lawyer chooses to behave appropriately despite the other's attempt to engage in inappropriate behavior.<sup>115</sup> From the deposing lawyer's perspective, the creation of cognitive dissonance can, with patience, produce the desired results of an incident-free and productive information gathering deposition.

Number 5: To combat lawyer misconduct once the deposition begins, the deposing lawyer's first option should be to ignore the obstructive behavior, look directly at the deponent and ask for an answer to a

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<sup>111</sup> See generally Robert N. Sayler, *Rambo Litigation: Why Hardball Tactics Don't Work*, 74 A.B.A. J. 78 (1988); Andrea Kupfer Schneider, *Shattering Negotiations Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002).

<sup>112</sup> Cf. Sayler, *supra* note 111 (attorneys who play "hardball" are generally less successful and less respected than their civilized and professional colleagues). See generally Schneider, *supra* note 111 (identifying empirical study results showing overall effectiveness of problem solving tactics, benefiting clients with decreased costs of litigation and satisfaction of outcome).

<sup>113</sup> See generally MALONE ET AL., *supra* note 96, at 164 (noting that pleasant and courteous responses may engender similar behavior from opposing counsel).

<sup>114</sup> *Id.* at 168. A solid tactic to practice is relating to the witness. "[D]eposing counsel may well be able to develop a relationship with [the witness] that helps when . . . [opposing] counsel becomes obnoxious and unreasonable." *Id.*

<sup>115</sup> *Id.* at 169 (explaining that making a positive connection with a witness may help the witness to overcome the obstacle that is their own counsel, who may have offended their intelligence, attempt to illicit them to lie, drag the deposition on longer than necessary, and ultimately waste their time).

question.<sup>116</sup> The rationale for this tactic is multi-faceted. First, assuming the deposing lawyer at the beginning of the deposition has discussed and obtained the agreement of the deponent to answer the questions posed, the deposing lawyer insisting on an answer from the deponent is in effect insisting that the deponent live up to the agreement to answer questions.<sup>117</sup> Second, since under most civil procedure rules, an objection or other comment regarding a question does not permit a deponent to refuse to answer a question absent a claim of privilege or perhaps undue harassment, the deposing lawyer is entitled to an answer to the question.<sup>118</sup> Furthermore, by ignoring the deponent's lawyer, perhaps the defending lawyer will tire of misbehaving.<sup>119</sup> The key to this tactic is to avoid responding, arguing, or otherwise discussing an objection or other comment made by the deponent's lawyer<sup>120</sup> with the deponent's lawyer. Brendan Sullivan, the lawyer for Oliver North, bemoaned this tactic by stating on the record that he was not a "potted plant."<sup>121</sup> However, from

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<sup>116</sup> Dickerson, *supra* note 100, at 375.

When the improper conduct first occurs, the defending attorney might try ignoring it. Some attorneys will stop if their conduct does not draw the desired reaction. Another technique is to employ a flexible questioning format. If opposing counsel objects to a question, consider moving to another area and returning to the contested area later, with a slightly different question.

*Id.*

<sup>117</sup> See generally Romano, *supra* note 96.

<sup>118</sup> FED. R. CIV. P. 30(c)(2) ("testimony is taken subject to any objection").

<sup>119</sup> See Dickerson, *supra* note 100, at 375.

<sup>120</sup> See Gavin, *supra* note 5, at 661-62.

[J]udges and magistrates do not generally relish discovery disputes and may disregard the dispute altogether if the misconduct appears mutual. . . . In instances where both the interrogator and the defender at a deposition have acted improperly, courts have refused to sanction conduct. . . . Any advocate seeking court protection from abuse must take care to conduct themselves at all times within the spirit of the rules.

*Id.*

<sup>121</sup> *Joint Hearings Before the Senate Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Comm. to Investigate Covert Arms Transactions with Iran*, 100th Cong. 1262, at 263 (1987). After having objected to a question posed by Special Prosecutor Arthur Liman, to which a congressman stated the committee has been "as fair as" possible, Sullivan responded, "I'm not a potted plant. I'm here as a lawyer. That's my job." *Id.*

the perspective of the deposing lawyer, a misbehaving lawyer is a potted plant and initially should be ignored to see if the misbehavior stops.

Although not a fool-proof tactic, ignoring the deponent lawyer's misconduct first, and then insisting the deponent answer a question may work and allow the deposing lawyer to gather information. To be most effective, this tactic requires the deposing lawyer to be patient and even-tempered. Regardless, a deposition transcript that reveals this tactic is a solid first step in making the record against a misbehaving lawyer.

Number 6: If ignoring the defending lawyer's misbehavior does not work, then the deposing lawyer must make a reasoned decision to do something more.<sup>122</sup> This decision should be based on the fact that the defending lawyer's misbehavior has escalated to the point that the deposing lawyer cannot gather information from the deponent, or the testimony proffered by the deponent is not the deponent's testimony but rather the testimony of the deponent's lawyer.<sup>123</sup>

The first option may be to speak to the deponent's lawyer politely and request that the lawyer refrain from the misbehavior.<sup>124</sup> The deposing lawyer has the option of having this conversation on or off the record. This is a judgment call. Having the conversation off the record may not be enough to impress upon the defending lawyer that the misbehavior must stop. However, having the conversation on the record may just entice the defending lawyer to engage the deposing lawyer and further delay the deposition. In either instance, a conversation that is hostile, confrontational or anything other than professional will most likely not be effective.

Number 7: If a polite and courteous conversation does not work, then the next step in the progression of tactics is to make a record.<sup>125</sup> Frankly, the deposing lawyer should always be record conscious from the moment

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<sup>122</sup> See MALONE ET AL., *supra* note 96, at 170 (noting the time to take action is when obstructionist tactics move beyond annoying antics and halt the flow of information).

<sup>123</sup> *Id.* (providing a "series of escalating responses" to more serious obstructionist actions).

<sup>124</sup> See generally Cary, *supra* note 5, at 600 ("Rambo" opponents will likely temper poor conduct when advised of their misbehaviors and the local judiciaries' implementation of sanctions.).

<sup>125</sup> See MALONE ET AL., *supra* note 96, at 169 ("The start of the escalation can be as simple as alerting opposing counsel that their actions, objections, instructions not to answer, etc., are being noted 'for the record.'").

a defending lawyer begins to misbehave.<sup>126</sup> However, at this point in the progression of tactics, the deposing lawyer becomes more assertive and consciously decides to escalate tactics by making the record.

The key to making a useable record is at least three-fold. First, the deposing lawyer must choose to make a record of an incident of misconduct that is truly misconduct.<sup>127</sup> When in doubt, avoid making a mistake and either ignore the potential misconduct or pause to evaluate the potential misconduct more fully. Second, pick a good incident. The deposing lawyer must evaluate whether the misbehavior is clear enough in context to be worthy of note.<sup>128</sup> Petty or other kinds of silly misbehavior should not be the focus of making a record unless there are a substantial number of these instances that prevent the gathering of information. Third, the deposing lawyer must be able to describe accurately, without inflammatory comment, what happened.<sup>129</sup> There is no margin for exaggeration or misspeak.

When making a record, it is the factual description of the incident that means the most. However, in addition, it may also be helpful for the deposing lawyer to make reference to the civil procedure rules or other ethical or professionalism rules and guidelines that apply and prohibit such misconduct.<sup>130</sup> Finally, in this record the deposing lawyer may chose to remind the defending lawyer of her obligation to refrain from such misbehavior. The danger in this last part of making the record is

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<sup>126</sup> See Gavin, *supra* note 5, at 669.

<sup>127</sup> *Id.* (“If the interrogator is intent on abusing the spirit of the rules, the defender must object and make a record in anticipation of seeking court intervention.”).

<sup>128</sup> *Id.* at 669-70 (“Courts take a quantitative approach when reviewing the record. . . . [T]he deposition defender must wait . . . and establish a pattern of abuse before . . . seeking intervention by the court.”).

<sup>129</sup> See *Advocacy Track: Discovery-Attacking Evasion Tactics and Getting What You Are Entitled To*, 2005 ATLA-CLE 83 (Winter 2005).

All untoward conduct must be placed on the record. If the conduct is nonverbal, ask the court reporter to note it—for example, “Counsel is pounding the desk and turning red, and yelling like he always does.” It may also be effective to ask the (appropriately prepped) witness, “Do you feel intimidated or offended or badgered?” An affirmative answer should give you sufficient ammunition to stop the deposition and seek appropriate relief in light of your opponent’s conduct.

*Id.*

<sup>130</sup> See MALONE ET AL., *supra* note 96, at 171 (advising opposing counsel of the improper conduct prohibited by the rules of procedure may constrain their behaviors).



that such a reminder may just trigger the deponent's lawyer to instigate an argument or continue with more commentary.

The making of a record is especially important when dealing with an inappropriate instruction not to answer. Aside from the foregoing admonitions about making a record, the first step for the deposing lawyer is to confirm on the record that the defending lawyer is instructing the deponent not to answer a question.<sup>131</sup> Second, despite this instruction, the deposing lawyer should look to the deponent and ask the deponent to answer the question.<sup>132</sup> Sometimes this works and the deponent goes ahead and answers the question contra to the defending lawyer's instruction.<sup>133</sup> Assuming the deponent follows the defending lawyer's instruction, the next step in making a record is for the deposing lawyer to request the defending lawyer to state with specificity the legal and factual basis for instructing the deponent not to answer a question.<sup>134</sup> By obtaining this information, the deposing lawyer can evaluate whether the instruction not to answer is really inappropriate and, if not, how to rephrase a question in an attempt to avoid this objection.

<sup>131</sup> See generally *Harp v. Citty*, 161 F.R.D. 398, 400 (E.D. Ark. 1995).

[Deposing attorney]: [A]re you instructing this witness . . . who was subpoenaed here for this video deposition, not to answer my questions about hypothetical questions?

[Deponent's attorney]: Yes, I am.

[Deposing attorney]: Just so our record's clear. . . . And so that our record is perfectly clear, [to deponent], let me ask you these questions and observe Mr. Beard's testimony and don't answer the questions. And Mr. Beard, if I ask her a question that you don't have an objection to during this next full period, please let me know so that [the deponent] can answer those.

[Deponent's attorney]: Fine.

*Id.* The deposition continued in the same manner, as did a deposition of another witness the following day, during which the deposition was interrupted and a conference call was placed to the court. *Id.* at 401. During imposition of sanctions against the obstructionist attorney, the Court stated: "Instructions not to answer tend to thwart legitimate discovery, and are looked upon with disfavor . . ." *Id.* at 405.

<sup>132</sup> See generally *Dickerson*, *supra* note 100, at 351-52.

<sup>133</sup> *Id.*

<sup>134</sup> FED. R. CIV. P. 30(c)(2) ("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 [to terminate or limit]."); see *Castillo v. St. Paul Fire & Marine Ins. Co.*, 938 F.2d 776 (7th Cir. 1991) (dismissing the plaintiff's case with prejudice and awarding the defendant attorney's fees, when the plaintiff-deponent steadfastly refused to answer opposing counsel's questions in deposition and after court order to compel).

Again, making a useable record takes patience and thought. One tool that is helpful in making a record is the ability to look at a real time transcript provided by the court reporter.<sup>135</sup> Although expensive, an instantaneous review of a transcript can be helpful to not only making the decision to make a record, but to also review the deposing lawyer's attempt to make that record.

The foregoing suggestions for making a record of lawyer misconduct detail the ideal circumstances. In fact, misbehaving lawyers often do not cooperate and present the ideal record for description or court review. However, with some reflection and thought, a deposing lawyer can make an effective record—even if not the ideal record.

Number 8: If after exhausting patience and the aforementioned tactics the obstructionist behavior of the defending lawyer still does not stop, the next step is to recess the deposition and proceed to seek court intervention.<sup>136</sup> The deposing lawyer should not adjourn the deposition at this point, but merely recess the deposition to set up immediate court intervention.<sup>137</sup> This means that the deposing lawyer must have planned ahead enough to know that a judge or magistrate will be available and willing to intervene in a deposition incident. An empty threat of court intervention will most likely not be effective.<sup>138</sup>

Presenting deposition misconduct to the court for review requires that an accurate transcript be produced and delivered to the court.<sup>139</sup> Here,

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<sup>135</sup> “Real-time” court reporting is a form of computer-assisted transcription that allows for an almost instantaneous review of a transcript. It is widely used throughout federal courtrooms and is growing in popularity. *Realtime Court Reporting Grows in Popularity*, THE THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), Dec. 2005, available at <http://www.uscourts.gov/ttb/dec05ttb/realtime/index.html>.

<sup>136</sup> See Gavin, *supra* note 5, at 664 (“One of the most effective means for moving along a deposition and putting your adversary on the straight and narrow is to pick up the telephone during the deposition and call the judge’s chambers when an issue reaches a head . . .”).

<sup>137</sup> *Id.*

<sup>138</sup> Dickerson, *supra* note 100, at 376 (advising that when giving opposing counsel an ultimatum, follow through or risk escalation of poor behaviors).

<sup>139</sup> See MALONE ET AL., *supra* note 96, at 312. This involves the careful selection of the court reporter and videographer. It is important, not only in selecting the format of the deposition, but in selecting a sufficiently trained operator to accurately record the events as they transpire. This is especially critical when a deposition will be used for more than mere discovery, such as evidence in trial or for impeachment purposes. *Id.*

the capability of the court reporter is crucial. The ability to electronically or otherwise promptly transmit an accurate transcript to a judge is best. The deposing lawyer must be selective to include the cleanest instances of lawyer misconduct in the portion of the deposition transcript delivered to the court. Make the court's job of reviewing the transcript as easy as possible. Further, the deposing lawyer should not go to the court for intervention unless there is more than one instance of lawyer misconduct. The exception to this rule may be if the single instance of misconduct covers a lynchpin issue in a lawsuit. The real point here is that judges and magistrates do not like to referee discovery disputes.<sup>140</sup> However, the court is more likely to be receptive when a deposing lawyer can present a series or pattern of clear lawyer misconduct.<sup>141</sup>

## V. Conclusion

There is no question that in recent years local, state, and federal bar associations as well as other lawyer groups, committees and conferences of judges and lawyers have intensified their efforts to raise the standard of professionalism among lawyers.<sup>142</sup> Deposition proceedings have been one of their targets.<sup>143</sup> Yet as the vignette opening this Article demon-

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<sup>140</sup> See *Van Pilsum v. Iowa State Univ. of Sci. & Tech.*, 152 F.R.D. 179, 181 (S.D. Iowa 1993) (discussing the rare appointment of a discovery master was warranted as "day care" when court stated both attorneys were behaving "like small children" and suggested they were unable to play nicely with others).

<sup>141</sup> See *MALONE ET AL.*, *supra* note 96, at 253. The court should be contacted only as a last resort. Local procedures will usually require both attorneys to make full faith efforts to comply with the discovery process prior to seeking judicial intervention. The deposing attorney, when seeking a protective order, should be able to show to the court that the behaviors of opposing counsel interfered with the information gathering and that all alternative actions were taken to curtail this misbehavior prior to contacting the court. *Id.*

<sup>142</sup> See *Kerper & Stuart*, *supra* note 5, at 112 (noting the coming together of legislation, rule-making, judicial actions, and legal leadership to redefine and enforce appropriate depositional behavior).

<sup>143</sup> Some courts have begun imposing rather creative sanctions outside what is generally expected. See *Avista Mgmt., Inc., v. Wausau Underwriters Ins. Co.*, No. 6:05-CV14300RL31JGG, 2006 WL 1562246, at \*1 (M.D. Fla. 2006) (ordering both attorneys to meet on the steps of the courthouse to play a game of "rock, paper, scissors" after parties were unable to agree on time and location for depositions); *Curran v. Price*, 150 F.R.D. 85, 87 (D. Md. 1993) (attorney was ordered to hand write

strates and the excerpts from deposition transcripts reveal,<sup>144</sup> many lawyers continue to manipulate deposition proceedings to obstruct the appropriate gathering of information. One judge, when commenting about the prohibition of unfair trade practices, remarked that there “is no limit to human inventiveness.”<sup>145</sup> This statement seems to apply to lawyers designed to obstruct a deposition proceeding.

In this Article’s opening vignette, the deposing lawyer did try to salvage the original deposition and still make a record, and the court did impose sanctions. Yet it is the deposing attorney’s lost opportunity that cannot be undone. Pete, the obstructionist lawyer in the scenario, was successful in disrupting the deposition. He profited from his misbehavior by delaying the deposition until his client could be properly prepared. Ultimately, it is the deposing lawyer who is penalized because of the loss of the opportunity to question the un-coached deponent. This kind of result sends the wrong message to lawyers, clients, and witnesses and undermines the integrity of the deposition process.<sup>146</sup>

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a copy of civil procedure manual); *Schmidt v. Ford Motor Co.*, 112 F.R.D. 216, 220 (D. Colo. 1986) (disqualifying an attorney from taking further action in the case); *Blank v. Ronson*, 97 F.R.D. 744, 745 (S.D.N.Y. 1983) (disregarding abusive discovery and ordering an attorney to redo it); *Cholfin v. Gordon*, No. CA943623, 1995 WL 809916, at \*9 (Mass. Super. Ct. Mar. 22, 1995) (barring an attorney from taking future depositions unless chaperoned by another attorney speaking on her behalf); *Braden v. Downey*, 811 S.W.2d 922, 930 (Tex. 1991) (imposing community service hours upon an attorney for discovery abuse).

<sup>144</sup> E.g., *Saldana v. K-Mart Corp.*, 260 F.3d 228 (3d Cir. 2001) (overturning a lower court imposition of sanctions on appeal, stating four uses of the word “fuck” did not justify sanctions because the deposition was not thwarted); see also Thomas E. Richard, *Professionalism: What Rules Do We Play By?*, 30 S. U. L. REV. 15, 20 n.25 (2002) (“When comparing the score between the Third and Fifth Circuits, four ‘fucks’ and one ‘Nazi’ do not beat ‘four idiots,’ three ‘slimy sons of bitches,’ and a parting ‘Fuck you, you son of a bitch.’”). Compare *Carroll v. Jaques Admiralty Law Firm*, 110 F.3d 290, 292 (5th Cir. 1997), with *Saldana*, 260 F.3d 288.

<sup>145</sup> *Fed. Trade Comm’n v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 312 n.2 (1934) (quoting H.R. REP. NO. 1142, at 19 (1914)).

<sup>146</sup> See Dane S. Ciolino, *Redefining Professionalism as Seeking*, 49 LOY. L. REV. 229, 238 (2003).

[I]f the Rambo litigator were as unsuccessful and unpopular as his demonizers say he is, economic natural selection would have dragged him to the bottom of the legal-services tar pit long ago. Justice O’Connor may be right that “[g]reater civility can only enhance the effectiveness of our justice system, improve the public’s perception of lawyers, and increase lawyers’ professional satisfaction.” But she may be wrong. Clients want Rambo, not Bambi.

Is there a solution? If you believe the previously quoted remarks of the judge, there just may not be a lasting solution to lawyer misconduct. However, that is not a good enough reason to decline to try to find a solution.

First, all of the efforts of local, state, and federal bar associations to publicly denounce lawyer misconduct and to continue to fashion guidelines for the professional practice of law should be commended and enhanced. State bar association disciplinary boards, when given the chance, should act to convey a zero tolerance policy towards lawyer misconduct in a deposition proceeding by sanctioning misbehaving lawyers with mandatory re-education programs during license suspension or revocation.<sup>147</sup> For these organizations to be effective, aggrieved lawyers must not hesitate to step forward and report such behavior to the bar associations. If an offended lawyer files a grievance, it will force the misbehaving lawyer to respond and permit the bar associations to act. A grievance procedure is not a pleasant experience for a misbehaving lawyer.<sup>148</sup> In addition, it will send a message to the misbehaving lawyer that the deposing lawyer is not to be trifled with in the future. This kind of action can have a deterrent effect.<sup>149</sup>

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*Id.* See generally Elizabeth A. Alston, *The Ten Commandments of Professionalism: A Misguided Effort*, 13 PROF. LAW. 24 (2002) (noting clients prefer violent animosity than professional congeniality).

<sup>147</sup> Both the ABA Model Rules of Professional Conduct and the Federal Rules of Civil Procedure have extended the expectation of professional conduct beyond courtroom demeanor. The rules of evidence and procedure followed at trial are the same as those anticipated in a deposition. It follows then, that the sanctions available for violations of courtroom conduct should be the same as those for misbehaviors in depositions. One of the sanctions available is mandatory Continuing Legal Education (CLE) programs for ethical rule violations. For example, Washington State Court Rules, Rules for Enforcement of Lawyer Conduct, ELC 13.1(c)(4) requires that lawyers attend CLE courses for ethical violations. State bar associations have suggested this very idea as a means of improving professionalism. See Doug Buffalo & Don Hollingsworth, *Results from "Professionalism" Section of the Membership Survey*, 34 ARK. LAW. 16 (1999); Ellen Godbey Carson, *Work for Justice . . . for a Better Hawaii*, 1996 HAW. B.J. 4 (1996) (offering suggestions for improving disciplinary functions by requiring, among others, CLE programs as a means of disciplinary violations).

<sup>148</sup> See *In re Schiff*, 599 N.Y.S.2d. 242 (App. Div. 1993) (During a deposition, attorney Schiff was vulgar, obscene and sexist towards his female opposing counsel. The Departmental Disciplinary Committee sanctioned his actions with public censure and monetary sanctions.); McShea, *supra* note 5, at 58.

<sup>149</sup> See *Advocacy Track*, *supra* note 129, at 83.

Second, trial and appellate court judges, collectively and individually, should act to effectively sanction lawyers who misbehave during a deposition.<sup>150</sup> State and federal rules of civil procedure provide an ample array of case dispositive sanctions that can be imposed.<sup>151</sup> Although judges are traditionally hesitant to impose harsh sanctions on lawyers for misconduct because such sanctions harm clients,<sup>152</sup> judges must find the will to impose such sanctions and let the misbehaving lawyer bear the responsibility for the client's harm.<sup>153</sup> In modern civil litigation, because of the increasing infrequency of trial proceedings, deposition proceedings take on an increasingly important role in the resolution of lawsuits.<sup>154</sup> Consequently, judicial control over the conduct of misbehaving lawyers is required to be consistent with local and state bar association professionalism efforts and essential to the integrity of the adversary system of

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As a U.S. district court judge has said, "If the only sanction for failing to comply with the discovery rules is having to comply with the discovery rules if you are caught, the diligent are punished and the less than diligent [are] rewarded." This is why discovery sanctions must be applied consistently, not only to penalize those whose conduct may be deemed to warrant a sanction, but also to deter those who otherwise might be tempted to engage in misconduct.

*Id.*

<sup>150</sup> PEGGY E. BRUGGMAN, PUB. LAW RESEARCH INST., REDUCING THE COSTS OF CIVIL LITIGATION: DISCOVERY REFORM (Fall 1995) (Often, the judiciary "plays a role in facilitating discovery abuse through its failure to enforce the rules and impose sanctions."); *see also* Beckerman, *supra* note 60, at 574 (noting "judicial responses to serious discovery violations are often manifestly inadequate . . . despite generations of critics who have emphasized that in order for discovery to succeed, courts must not shrink from using the sanctions provided by the rules"); Mark Kosieradzki & Kara Rahimi, *Keep Discovery Civil: When Opposing Counsel Obstructs or Deflects Your Access to Evidence, Look to the Rules and Long-Settled Case Law for Relief—Both Are on Your Side*, 44 TRIAL 30 (2008) (acknowledging the ABA has noted an increase in Rambo tactics because attorneys anticipate courts will refuse to address discovery disputes and enforce sanctions for such violations).

<sup>151</sup> *See, e.g.*, FED. R. CIV. P. 37(b)(2)(A)(i-vii).

<sup>152</sup> *See generally* Beckerman, *supra* note 60, at 568 (noting that courts are generally hesitant to enforce sanctions for discovery violations when the consequence and burden on the parties are virtually unknown).

<sup>153</sup> *See generally In re Snyder*, 472 U.S. 634, 643 (1985) (stating that "[c]ourts have long recognized an inherent authority to suspend or disbar lawyers").

<sup>154</sup> *See generally* Peter M. Appleton, *Is Winning Everything? 'Professionalism' Doesn't Have to Mean 'Doormat'*, 62 OR. ST. BAR BUL. 21, 22 (2002) (There may be a correlation between the increase of obstructionist tactics and an ever increasing bar. "The principal ally of Rambo is anonymity.").

justice.<sup>155</sup> Bad behavior is not only an embarrassment to the misbehaving lawyer, but also to the profession. Little wonder the public's perception of lawyers is often that of disgust.<sup>156</sup>

The future of civility in the practice of law rests in part in the law schools. Every obstructionist lawyer was once a rising law student and today's young lawyer could very well be tomorrow's next Rambo.<sup>157</sup> Law professors<sup>158</sup> would well serve not only law students, but also the legal profession by incorporating ethics and professionalism questions routinely in all substantive and skills training courses.<sup>159</sup> It is also incumbent upon seasoned attorneys to continue to offer and expand mentoring to other younger and not so young lawyers.<sup>160</sup> Every lawyer

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<sup>155</sup> See Beckerman, *supra* note 60, at 511 (noting while having authority in their jurisdictions to do so, many courts opt not to impose harsh sanctions for discovery violations which may be dispositive and therefore may harm the reputation and livelihoods of the attorneys).

<sup>156</sup> See generally Panel 3: *Lawyers in the Hot Seat: The State of Ethics & Professionalism*, 6 DEPAUL BUS. & COM. L.J. 557 (2008) (discussing low public approval of lawyers and the legal profession, referring to surveys conducted by Harris and Gallup polls in 2007); Gallup Poll, *Honesty/Ethics in Professions* (2009), available at <http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx> (last visited May 14, 2010); Richard, *supra* note 144, at 15 (writing on public perception of lawyers and the "professionalism" movement).

<sup>157</sup> See generally Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618, 1639 (1996).

Younger lawyers, convinced that their future careers may hinge on how tough they seem while conducting discovery, may conclude that it is more important to look and sound ferocious than to act cooperatively, even if all that huffing and puffing does not help (and sometimes harms) their cases. While unpleasant at first, nastiness, like chewing tobacco, becomes a habit. . . . Without guidance as to appropriate conduct from their elders, either at the firm or on the bench, it is easy for young lawyers not only to stay mired in contumacious, morally immature conduct, but to actually enjoy it.

*Id.*

<sup>158</sup> See generally Jean M. Cary, *Teaching Ethics and Professionalism in Litigation: Some Thoughts*, 28 STETSON L. REV. 305, 309 (1998) (arguing that ethics and civility in litigation can and must be taught in law school).

<sup>159</sup> See generally Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10 GEO. J. LEGAL ETHICS 367 (1998).

<sup>160</sup> See Gavin, *supra* note 5, at 659 ("Long before new lawyers take their first ethics course in law school, these future lawyers are schooled in the L.A. Law [Law and Order] concept of advocacy where posturing and theatrics win the day.").

who enters the legal profession both as a career and a calling must be willing to protect and preserve the future of the legal profession.

Finally, perhaps the only true long term solution to the problem of lawyer misconduct, whether it occur in a deposition setting or otherwise, rests with the commitment by both deposing and defending lawyers to not misuse the deposition process. In essence, this commitment requires lawyers to act in good faith and with respect for the deposition process. This may not be a very comforting or satisfying solution.