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THE LAW AND ETHICS OF CIVIL DEPOSITIONS

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INTRODUCTION

Lawyers hold a unique position in American society, because they must simultaneously serve two demanding masters—their client and the court.[1] Like double-agents, lawyers must keep both masters

1. *See* MODEL RULES OF PROFESSIONAL CONDUCT pmbl. ¶ 1 (1994) ("A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice."); *id.* ¶ 8 ("In the nature of law practice, . . . conflicting responsibilities are encountered. 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 upright person while earning a satisfactory living."); *cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY pmbl. ¶ 3 (1982) ("In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks."). *Compare* Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1546 (11th Cir. 1993) ("All attorneys, as 'officers of the court,' owe duties of complete candor and primary loyalty to the court before which they practice. An attorney's duty to a client

happy, while trying to convince each that their loyalties are undivided. This task is difficult, because the rules governing lawyers' conduct do not always clearly indicate whether duties to clients outweigh those owed to the court.[2] Moreover, some rules seemingly conflict and leave lawyers in a Catch-22: One master cannot be served without betraying the other.

This tension between duties to client and court is nowhere more obvious than in the deposition setting.[3] Civil discovery, including depositions, occurs largely outside of the judge's supervision.[4] Thus, lawyers are expected to self-regulate their conduct.[5] However, self-regulation can be difficult in a system that expects lawyers to represent their clients' interests zealously while serving as quasi-official judicial officers.[6] Moreover, often neither the *Model Rules of Professional Conduct*, the *Model Code of Professional Responsibility*, nor the Federal

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can never outweigh his or her responsibility to see that our system of justice functions smoothly.") *with* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-3 ("While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law.") *and* L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 909 (1980) ("'An advocate . . . knows . . . but one person in the world, that client and none other. To save that client at all expedient means—to protect that client at all hazards and costs to all others, and among others to himself—is the highest and most unquestioned of his duties . . . .'" (quoting Lord Brougham)). *See generally* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989) (discussing lawyers' obligations to court and client).

Lawyers also have a third duty: the duty of fairness to others. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104 ("Communicating with One of Adverse Interest"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 ("Fairness to Opposing Party and Counsel"); *id.* Rule 4.4 ("Respect for Rights of Third Persons").

2. *See* William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 714 (1989) ("[Ethical] rules impose on lawyers a heavy burden of having to accommodate conflicting expectations of the litigation process."). *See generally* Patterson, *supra* note 1 (tracing the historical shifts in attitudes and rules concerning lawyers' duties to clients and to the court).

3. *See* W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895, 896 (1996) ("Discovery practice provides the setting in which these conflicting roles are drawn into the most severe conflict for litigators.").

4. *See* Kramer v. Boeing Co., 126 F.R.D. 690, 692 (D. Minn. 1989) (explaining that the spirit of the Federal Rules "is that discovery [should] be self-effectuating, without need to resort to the court").

5. *See* MODEL RULES OF PROFESSIONAL CONDUCT pmbl. ¶ 9 ("The legal profession is largely self-governing."); MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 2 (1990) ("With the exception of occasional statutes that deal with specific issues, the rules that govern lawyers' professional conduct have been drafted into comprehensive codes by a private organization, the American Bar Association, and these codifications ordinarily have been adopted by state courts rather than by legislatures.").

6. One practitioner observed:

> I share my clients' general amazement at how lawyers can be perfectly congenial over drinks and then absolutely rude and vicious once they work themselves into the role of "advocate." Nowhere is this Jekyll-Hyde transformation so apparent as

Rules of Civil Procedure provide clear guidance for lawyers faced with the ethical dilemmas associated with taking a civil deposition.

For instance, Model Rule 3.4(d) provides that "[a lawyer shall not] in pretrial procedure . . . fail to make [a] reasonably diligent effort to comply with a legally proper discovery request by an opposing party."[7] On the other hand, Model Rule 1.3 imposes on an attorney the general duty to represent his or her client with "reasonable diligence" or zeal.[8] Thus, the tension between a lawyer's duty as an officer of the court and as a client representative is replicated in the Model Rules.[9]

Moreover, the Federal Rules of Civil Procedure frequently complicate, not ease, the problem. They do not provide ethical guidance, and they tend to refer only to "good faith" efforts to comply with discovery requests.[10] Although some individual courts have adopted local rules that address deposition conduct, they, too, typically omit instructions about how to reconcile attorneys' conflicting duties.[11] Also thrown into the equation are attorney civility or courtesy codes, which frequently do address discovery, including deposition conduct. These codes, however, are usually aspirational and contain no enforcement mechanisms.[12]

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at a deposition, where the presence of neither a stern judge nor a scrutinizing jury assures lawyers will stay within the bounds of civility.

Larry G. Johnson, *The 10 Deadly Deposition Sins*, A.B.A. J., Sept. 1984, at 62, 63.

7. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(d).

8. *Id.* Rule 1.3. Professor David Luban observed:

[T]he law is inherently double-edged: any rule imposed to limit zealous advocacy . . . may be used by an adversary as an offensive weapon. . . . The rules of discovery, for example, initiated to enable one side to find out crucial facts from the other, are used nowadays to delay trial or impose added expense on the other side . . . .

David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER 83, 88 (David Luban ed., 1983).

9. Wendel, *supra* note 3, at 919. *But see* MODEL RULES OF PROFESSIONAL CONDUCT pmbl. ¶ 8 (explaining that "the Rules of Professional Conduct prescribe terms for resolving . . . conflicts" between "a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living").

10. *See, e.g.*, FED. R. CIV. P. 26(c) ("Upon motion . . . accompanied by 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, . . . the court . . . may make any order which justice requires to protect a party or person . . . ." (emphasis added)).

11. *See infra* Part I.A.1.b.

12. *See infra* Part I.C. However, some courts have announced that they will enforce local aspirational creeds by sanctioning offending attorneys. *See, e.g.*, Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 287 (N.D. Tex. 1988) (en banc) (per curiam) (adopting, in part, the Dallas Bar Association's "sensible and pertinent" guidelines "as standards of practice to be observed by attorneys appearing in civil actions in this district" (footnote omitted)); *see also* M.D. ALA. GUIDELINES CIV. DISCOVERY PRAC. guide.

What, then, are attorneys in depositions to do when faced with a situation that places their obligations to the court at odds with their obligations to their clients? What are their legal and ethical obligations? Where should they look when neither the discovery rules nor the ethical rules provides clear guidance?

This Article will focus on the tension between ethics and advocacy in the deposition setting. It will discuss applicable court rules, case law, ethical rules, and civility codes. The discussion takes place in the context of a hypothetical case concerning Ovar-X, a contraceptive similar to Norplant.[13] Specifically, this Article will analyze different forms of discovery abuse. It will assess scenarios in which the deponent and her attorney hold several private conferences during the deposition; the deponent's attorney continuously objects and instructs the deponent not to answer questions; the questioning attorney asks potentially embarrassing questions that may or may not be relevant; and the attorneys engage in colloquy and hurl personal attacks at each other.[14] When the rules are silent, this Article will propose solutions that might help attorneys and courts deal with these common forms of deposition abuse.

I. THE BALANCING ACT: RULES AFFECTING DEPOSITION CONDUCT

A deposition can be the most powerful and productive device available during discovery.[15] Depositions provide virtually the only op-

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I(A) (incorporating courtesy standards into local rules and informing practitioners that "discovery in this district is normally practiced with a spirit of ordinary civil courtesy and honesty"); E.D. OKLA. L.R. 1.3(B) ("The Court may deal with unprofessional conduct in any manner deemed appropriate that is consistent with the Constitution and laws of the United States.").

13. Available since February 1991, Norplant is a long-term contraceptive that consists of six match-like silicone rods. The rods are surgically inserted into a woman's upper arm, and they release a synthetic hormone to prevent pregnancy. Laura Duncan, *Norplant: The Next Mass Tort: State and Federal Suits Allege Birth Control Device Is Defective*, A.B.A. J., Nov. 1995, at 16, 16. Each implant is designed to last for about five years. Susan Borreson, *Norplant's Fate on Trial in Beaumont*, TEX. LAW., Feb. 24, 1997, at 1, *available in* LEXIS, Legnew Library, Txlawr File; *Group Asks FDA to Take Norplant off Market*, DAILY REC., June 28, 1996, at 1, *available in* LEXIS, Legnew Library, Dlyrec File; American Civil Liberties Union, *ACLU Norplant Fact Sheet: Norplant: A New Contraceptive with the Potential for Abuse* (visited Sept. 5, 1997) <http://www.choice.org/2.norplant.aclu.html>. Currently, thousands of women have cases pending against companies that manufactured and distributed Norplant and against doctors who prescribed the contraceptive. Duncan, *supra*, at 17.

14. This Article is limited to situations in which the deponent is a party to the litigation. Different considerations may apply when the deponent is merely a witness.

15. *See* DAVID M. MALONE & PETER T. HOFFMAN, THE EFFECTIVE DEPOSITION 27 (2d ed. 1996) ("Depositions are the most powerful discovery device available to a litigator."); *see also* Hall v. Clifton Precision, 150 F.R.D. 525, 531 (E.D. Pa. 1993) ("Depositions are the factual battleground where the vast majority of litigation actually takes place."); 7 JAMES

portunity for counsel to speak directly with the opposing party before trial. The deposition format allows the examining attorney to ask questions without having those questions screened in advance by opposing counsel. Consequently, attorneys often obtain more information, and more "honest" information, through deposition questions than through other discovery devices. Depositions also allow the attorney to ask follow-up questions immediately, if the deponent answers in an unexpected or incomplete manner. Further, the questioning attorney can look the deponent in the eye and gauge the deponent's testifying abilities and credibility.[16]

Unfortunately, the effectiveness of depositions can be undermined through abusive antics.[17] Because most depositions are not court-supervised, some attorneys believe they can get away with hardball tactics they would never try in open court.[18] In addition, because depositions involve face-to-face encounters between opposing sides,

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WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 30.02[2], at 30-15 (3d ed. 1997) ("The importance of depositions to modern civil litigation was well (if perhaps cynically) captured by [the *Hall*] court.").

16. MALONE & HOFFMAN, *supra* note 15, at 27-31.

17. For example, in 1989, the United States Court of Appeals for the Seventh Circuit appointed a nine-member Seventh Circuit Committee on Civility, which was chaired by Judge Marvin E. Aspen, a United States District Judge in the Northern District of Illinois. Interim Report of the Committee on Civility of the Seventh Judicial Circuit, 143 F.R.D. 371, 374-76 (1991). As part of its work, the Committee distributed a four-page civility questionnaire to jurists and more than 1500 members of the Seventh Circuit Bar Association. *Id.* at 377. Of the practitioners responding to the survey, 94% indicated that a civility problem existed among attorneys during discovery. *Id.* at 386. According to the report, "Depositions, conducted by lawyers without direct judicial supervision, can be one of the most uncivil phases of trial practice." *Id.* at 388.

In 1990, the Committee on Second Circuit Courts found, after questioning many practitioners, that "the current method of taking and defending depositions is too often an exercise in competitive obstructionism." Federal Bar Council, Committee on Second Circuit Courts, A Report on the Conduct of Depositions, 131 F.R.D. 613, 613 (1990). This Committee called for more specific rules concerning deposition conduct, some of which were incorporated into the 1993 amendments to the Federal Rules of Civil Procedure. *Id.* at 615-22; *cf.* Robert D. Cooter & Daniel L. Rubinfeld, *Reforming the New Discovery Rules*, 84 GEO. L.J. 61, 66-68 (1995) (summarizing several studies concerning attorneys' views about the prevalence of deposition abuse); Susan Keilitz et al., *Attorneys' Views of Civil Discovery*, JUDGES' J., Spring 1993, at 2, 4-6, 32-42 (surveying attorneys' views about discovery in five state-court systems).

18. As one commentator observed, "No experience more clearly demonstrates the decline of civility in the practice of law than viewing attorney conduct at a deposition. In this ring, unfettered by a judicial referee, some lawyers conceive themselves gladiators free to ignore such rules as there are and to bully witnesses and adversaries." Melvyn H. Bergstein, *Dirty Depositions: Soiling a Truth-Finding Process*, N.J. L.J., Jan. 15, 1996, at 11, *available in* LEXIS, Legnew Library, Njlawj File; *accord* Johnson, *supra* note 6, at 63 (categorizing lawyers' confusion between rudeness and advocacy as one of the "[d]eadly [d]eposition [s]ins").

emotions run high.[19] An attorney trying to impede her opponent's progress sometimes interjects countless objections,[20] or instructs the witness not to answer questions propounded by the opposing counsel.[21] An attorney worried that her opponent is about to extract important or damaging information commonly calls recesses to confer with the witness about how best to answer those touchy questions.[22] Attorneys trying to intimidate opposing witnesses sometimes ask inappropriate or baseless questions.[23] Attorneys trying to impress their own clients sometimes engage opposing counsel in shouting matches.[24]

Given the importance of depositions in civil litigation, and given their susceptibility to abuse, it is no surprise that many different sources contain rules that affect depositions. This Part will describe rules that affect deposition conduct. Later, these rules will be applied to depositions taken in the hypothetical case involving Ovar-X.

A. Court Rules and Case Law

1. Federal Courts.—

a. Federal Rules of Civil Procedure.—In 1993, Congress overhauled the Federal Rules of Civil Procedure, including the rules concerning depositions.[25] Rule 30, the rule governing deposition conduct, was significantly altered. Before the 1993 amendments, Rule 30 was silent about how or what type of objections could be made, when a defending attorney could instruct the witness not to answer, and the consequences if one side delayed or impeded the examina-

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19. Bergstein, *supra* note 18.

20. *Id.*

21. MALONE & HOFFMAN, *supra* note 15, at 138.

22. *See* Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993) (considering a deposition dispute in which an attorney called inappropriate conferences and holding that "a lawyer and client do not have an absolute right to confer during the course of the client's deposition").

23. *See* Edward Bart Greene, *The Folklore of Depositions, in* THE LITIGATION MANUAL 211, 217 (John G. Koeltl ed., 2d ed. 1989) (describing a case that evidenced numerous "argumentative and senseless" questions (internal quotation marks omitted)).

24. *See* Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1994) (addressing a situation in which an attorney engaged in abusive conduct while defending his client in a deposition).

25. Seven Federal Rules of Civil Procedure concern depositions. *See* FED. R. CIV. P. 26 ("General Provisions Governing Discovery; Duty of Disclosure"); FED. R. CIV. P. 27 ("Depositions Before Action or Pending Appeal"); FED. R. CIV. P. 28 ("Persons Before Whom Depositions May Be Taken"); FED. R. CIV. P. 30 ("Depositions upon Oral Examination"); FED. R. CIV. P. 31 ("Depositions upon Written Questions"); FED. R. CIV. P. 32 ("Use of Depositions in Court Proceedings"); FED. R. CIV. P. 37 ("Failure to Make or Cooperate in Discovery: Sanctions"). This Article will focus on oral depositions taken under Rule 30.

tion.[26] Instead, the rule provided only that the court could terminate or limit the deposition when a party or deponent showed that the deposition was "being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party."[27]

In 1993, the following language was added to Rule 30(d):

> (1) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3).
> (2) . . . [T]he court . . . shall allow additional time . . . if the deponent or another party impedes or delays the examination. If the court finds such an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.[28]

According to the advisory committee notes accompanying the 1993 amendments, paragraph 1 in Rule 30(d) was added because, in the past, depositions frequently were prolonged and frustrated "by lengthy objections and colloquy, often suggesting how the deponent should respond."[29] The language concerning instructions not to answer was added because "[d]irections to a deponent not to answer a question can be more disruptive than objections."[30] Paragraph 2 was added expressly to authorize courts "to impose the cost resulting from obstructive tactics that unreasonably prolong a deposition on the person engaged in such obstruction."[31]

Although not affected by the 1993 amendments, Rule 32(d)(3) also impacts deposition conduct. This rule indicates what types of objections must and may be raised during a deposition. Under Rule 32(d)(3)(B), objections must be raised during the deposition, or

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26. *See* FED. R. CIV. P. 30(d) (1988).

27. *Id.* This language was retained in the 1993 revision. *See* FED. R. CIV. P. 30(d)(3) (1993).

28. FED. R. CIV. P. 30(d)(1)-(2) (1993).

29. FED. R. CIV. P. 30(d) advisory committee notes on 1993 amendments.

30. *Id.*

31. *Id.*; *accord* Phillips v. Manufacturers Hanover Trust Co., No. 92 Civ. 8527 (KTD), 1994 U.S. Dist. LEXIS 3748, at *11 (S.D.N.Y. Mar. 29, 1994) (considering sanctions under amended Rule 30(d) for obstructionist tactics during a deposition, but denying such sanctions, in part, because of the "newness of the amendment").

otherwise be waived, if they concern errors or irregularities "in the manner of taking the deposition," the form of the questions or answers, "the oath or affirmation," or the parties' conduct.[32] In addition, "errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition."[33] As one commentator observed:

> The rule focuses on the necessity of making the objection at a point in the proceedings at which it will be of some value in curing the alleged error in the deposition. In addition, the rule is intended to render technical objections based on errors and irregularities in depositions unavailable at trial.[34]

In contrast, Rule 32(d)(3)(A) identifies objections that need not be raised during the deposition.[35] Specifically, objections to the competency, relevancy, or materiality of testimony typically are not waived if not raised during the deposition.[36] When followed, this rule permits depositions to be conducted in a more orderly fashion, with fewer interruptions.[37] This rule, however, does not prohibit attorneys from raising these types of objections; it merely indicates that the objections are not waived if not raised during the deposition. Therefore, some counsel will raise objections covered by Rule 32(d)(3)(A) either

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32. FED. R. CIV. P. 32(d)(3)(B); *accord* 7 MOORE ET AL., *supra* note 15, § 32.45, at 32-59 to -60 (discussing when deposition objections should and must be raised).

33. FED. R. CIV. P. 32(d)(3)(B). For further discussion of objections during depositions, see *infra* Part IV.

34. 7 MOORE ET AL., *supra* note 15, § 32.45, at 32-60.

35. *See* FED. R. CIV. P. 32(d)(3)(A); *accord* 7 MOORE ET AL., *supra* note 15, § 32.45 at 32-61 & n.11.

36. Rule 32(d)(3)(A) states:

> Objections [relating] to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

FED. R. CIV. P. 32(d)(3)(A); *accord* United States v. Irvin, 127 F.R.D. 169, 170 n.2 (C.D. Cal. 1989) (indicating that relevancy objections are preserved for trial and need not be raised during the deposition).

37. *See, e.g.*, Hall v. Clifton Precision, 150 F.R.D. 525, 528 n.3 (E.D. Pa. 1993) (suggesting that counsel should not repeatedly interrupt the deposition by raising objections that are preserved for trial under Rule 32(d)(3)(A)); Detective Comics, Inc. v. Fawcett Publications, Inc., 4 F.R.D. 237, 239-40 (S.D.N.Y. 1944) (chastising counsel for raising nonwaivable errors and observing that "[t]he interruptions in the conduct of the examination were entirely unnecessary").

out of fear of waiving them under the "might have been obviated" clause[38] or to disrupt the deposition.[39]

Even after the 1993 amendments, the Federal Rules of Civil Procedure still do not address the propriety of private conferences between a deponent and her attorney, and they have never addressed an attorney's ethical obligations. Therefore, attorneys must search for other rules and standards to fill these gaps.

b. Local Court Rules and Standing Orders.—To supplement the Federal Rules of Civil Procedure, and to help curb unprofessional and abusive conduct at depositions,[40] the following federal district courts adopted local rules to control deposition conduct: Middle District of Alabama,[41] Southern District of Alabama,[42] District of Alaska,[43] District of Colorado,[44] Southern District of

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38. *See infra* notes 407-409 and accompanying text; *cf.* EDWARD J. IMWINKELRIED & THEODORE Y. BLUMOFF, PRETRIAL DISCOVERY: STRATEGY AND TACTICS § 6:21 (1996) (describing situations in which the Rule 32(d)(3)(A) phrase "which might have been obviated or removed if presented at that time" is confusing and ambiguous).

39. *See* discussion *infra* Part IV.D (proposing a rule that would prohibit objections other than those that are waived for lack of timeliness).

40. *See, e.g.*, S.D. FLA. L.R. 30.1 cmt. (stating that the purpose of its "Sanctions for Abusive Deposition Conduct" is "to curb unprofessional conduct at depositions").

41. M.D. ALA. GUIDELINES CIV. DISCOVERY PRAC. guide. II(E)-(G). These guidelines characterize an attorney's instruction to a witness not to answer as a "high-risk practice one should use—if at all—only in extraordinary situations involving privilege, or temporarily in situations in which Rule 30(d) suggests the propriety of a court order to protect from bad faith examination or unreasonable annoyance, embarrassment, or oppression of the deponent or party." *Id.* guide. II(E). The guidelines also state that "[l]awyers should not attempt to prompt answers by [using] suggestive objections," *id.* guide. II(F), and that "[e]xcept during normal breaks and for purposes of determining the existence of privilege or the like, normally at the request of the client, a deponent and his attorney should not normally confer during a deposition," *id.* guide. II(G).

42. The Southern District of Alabama has the following pretrial procedure instructions for the conduct of depositions:

> Any objection made during a deposition must be stated concisely and in [a] non-argumentative and non-suggestive manner. An instruction to a deponent not to answer must not be made unless necessary to preserve a privilege, or enforce a limitation directed by the court, or to present a motion under Fed. R. Civ. P. 30(d)(3).

S.D. ALA. PRETRIAL PRO. INSTRUCTIONS, *Conduct of Depositions.*

43. In depositions taken pursuant to the authority of the District of Alaska, "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial under provisions of the Federal Rules of Evidence." D. ALASKA L.R. 30.1(c).

44. Colorado's rule prohibits the following five categories of abusive deposition conduct:

> 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.

Florida,[45] Southern District of Indiana,[46] District of Maryland,[47]

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. Any off-the-record conference during a recess may be a subject for inquiry by opposing counsel, to the extent it is not privileged.
3. Instructing a deponent not to answer a question except when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under Rule 30(d)(3) of the Federal Rules of Civil Procedure.
4. Filing a motion for protective order or to limit examination without a substantial basis in law.
5. Questioning that unfairly embarrasses, humiliates, intimidates, or harasses the deponent, or invades his or her privacy absent a clear statement on the record explaining how the answers to such questions will constitute, or lead to, competent evidence admissible at trial.

D. COLO. L.R. 30.1C.

45. The Southern District of Florida based its local rules on those promulgated by the United States District Court for the District of Colorado. *See* S.D. FLA. L.R. 30.1 authority.

46. The rule in the Southern District of Indiana provides:

(a) An attorney who instructs a deponent . . . not to answer . . . shall state, on the record, the reasons and legal basis for the instruction . . . .

(b) If a claim of privilege has been asserted . . . the attorney seeking disclosure shall have reasonable latitude . . . to question the deponent to establish . . . the legal appropriateness of the assertion of the privilege . . . .

(c) An attorney for a deponent shall not initiate a private conference with the deponent regarding a pending question except for the purpose of determining whether a claim of privilege should be asserted.

(d) An attorney shall not . . . interpose objections . . . which suggest answers . . . .

S.D. IND. L.R. 30.1.

47. In the United States District Court for the District of Maryland, the following conduct is presumptively improper:

- "[I]ntentionally ask[ing] a witness a question that misstates or mischaracterizes the witness' previous answer." D. MD. DISCOVERY GUIDELINES guide. 5(a).
- Objecting or giving instructions that coach or suggest answers to the deponent. *Id.* guide. 5(b).
- "[R]epeatedly ask[ing] the same or substantially identical question of a deponent if the question already has been asked and fully and responsively answered by the deponent." *Id.* guide. 5(c).
- "[I]nstruct[ing] a witness not to answer . . . unless under the circumstances permitted by [FED. R. CIV. P.] 30(d)(1)." *Id.* guide. 5(d).
- Propounding questions "clearly beyond the scope" permitted by Federal Rule of Civil Procedure 26(b)(1), "particularly of a personal nature" and after an objection that the deposition is being conducted in "bad faith" or in an unreasonably annoying or harassing manner. *Id.*
- Refusing, if asked, to state the basis for an objection. *Id.* guide. 5(e).
- Conducting a private session with the deponent, except to determine whether a privilege should be asserted. *Id.* guide. 5(f).
- Discussing, during breaks in the deposition, "the substance of the prior testimony given by the deponent during the deposition." *Id.* guide. 5(g).

The Maryland guidelines also provide that when a privilege is asserted during a deposition, the person asserting the privilege must first identify the nature of the privilege. *Id.* guide. 6(a)(i). Then, opposing counsel can ask questions designed to determine whether the privilege was properly asserted. *Id.* guide. 6(a)(ii). In addition, the person recording the

Northern District of Ohio,[48] District of South Carolina,[49] and District of Wyoming.[50] In addition, a few courts have issued standing orders or discovery guidelines concerning deposition conduct.[51]

In 1997, the Northern District of Illinois decided not to adopt what would have been the most sweeping and comprehensive local rules on deposition conduct.[52] The proposed Illinois federal rules would have applied to (1) attorneys taking or defending depositions in the district,[53] (2) attorneys representing a party during a deposition in a case pending in the district, "irrespective of where the deposition is taken,"[54] and (3) attorneys taking or defending a deposition under

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deposition must, at the request of an attorney or unrepresented deponent, describe in the record any conduct that violates the guidelines or other applicable procedural rules. *Id.* guide. 7.

48. The rule in the Northern District of Ohio provides that "[w]itnesses, parties, and counsel shall conduct themselves at depositions in a temperate, dignified, and responsible manner." N.D. OHIO L.R. 30.1(a).

49. The South Carolina local rules track the order issued in *Hall v. Clifton Precision*, 150 F.R.D. 525, 531 (E.D. Pa. 1993). *See* D.S.C. L.R. 30.04; *see also infra* Part I.A.1.c (discussing *Hall*).

50. The Wyoming rule addresses several deposition abuses. First, with regard to instructions not to answer, the local rule states that "[r]epeated directions to a witness not to answer questions calling for non-privileged answers are symptomatic that the deposition is not proceeding as it should." D. WYO. L.R. 30(c). It then directs that an instruction not to answer should be "made only on the ground of privilege." *Id.* Next, the rule provides that "[o]bjections in the presence of the witness which are used to suggest an answer to the witness are presumptively improper." *Id.* 30(d). Objections should be concise, and objections based on privilege must be "stated and established." *Id.* The Wyoming rule also prohibits private conferences between a *non-party* deponent and counsel "during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted." *Id.* 30(e). Unlike other local rules, the Wyoming rule also addresses the assertion of privilege or qualified immunity from discovery. *Id.* 30(f), (g). The rule states: "Where a claim of privilege or qualified immunity from discovery is asserted during a deposition, the attorney asserting the privilege or qualified immunity from discovery shall identify . . . the nature of the privilege or qualified immunity from discovery which is being claimed." *Id.* 30(f). The questioning attorney then has "reasonable latitude . . . to question the witness . . . concerning the assertion of the privilege or qualified immunity from discovery . . . ." *Id.* 30(g).

51. *See, e.g.*, Standing Orders of the Court on Effective Discovery in Civil Cases, 102 F.R.D. 339, 351 (E.D.N.Y. 1984) (ordering that "[a]n attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted" and prohibiting "[o]bjections in the presence of the witness which are used to suggest an answer" to the question). The *Manual for Complex Litigation* also contains a proposed standing order concerning deposition guidelines. MANUAL FOR COMPLEX LITIGATION (THIRD) § 41.38 (Matthew Bender 1997).

52. Telephone Interview with the Office of the Clerk, N.D. Ill. (Chicago office) (Dec. 29, 1997).

53. N.D. ILL. L.R. 5.21(A) (proposed May 24, 1995) (rejected Feb. 24, 1997) (on file with author).

54. *Id.* 5.21(B).

the court's subpoena power.[55] The proposed rules repeatedly emphasized that attorneys must follow the restrictions on objections and instructions not to answer added by the 1993 amendments to the Federal Rules of Civil Procedure.[56] They also indicated that judges within the Northern District of Illinois expect attorneys at depositions to treat witnesses and opposing counsel with the same courtesy and respect they would show at trial,[57] and to resolve disputes informally.[58] The proposed rules set time limits for seeking protective orders under Rule 30(d) of the Federal Rules of Civil Procedure[59] and imposed strict limits on when the deponent's counsel can confer privately with her client during a deposition.[60] Although the Northern District of Illinois did not adopt these extensive rules, the rules may provide a guide for districts that seek to provide their practitioners with clear directives about how depositions should be conducted. The proposed rules would have undoubtedly changed the way depositions are con-

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55. *Id.* 5.21(A).

56. *See id.* 5.22(A)-(C). The comment to the proposed rule included a recommendation from the Committee on Deposition Practice that the rules should contain language "that reminds counsel of their obligation[s]" under Rule 30(d)(1) of the Federal Rules of Civil Procedure. *Id.* 5.22 cmt.

57. *Id.* 5.21(C).

58. *Id.* 5.22(E) & cmt.

59. *See id.* 5.22(F) ("If a deposition is suspended because of an objecting counsel's instruction not to answer and stated intention to proceed with a motion under [FED. R. CIV. P.] 30(d)(3), objecting counsel must serve that motion within 10 days of the suspension of the deposition unless some longer or shorter time is agreed upon by the parties . . . .").

60. *Id.* 5.23(B)-(D). The proposed rules sought to limit private communications during depositions:

> In order to prevent counsel for a deponent from improperly suggesting answers or the content of testimony to a witness and to prevent disruption of the deposition, during examination by any party or counsel other than the party offering the deponent as a witness, no party or counsel, including the deponent's counsel, shall communicate with the deponent (other than through on-the-record interrogation) regarding the interrogation, the testimony or the facts of the case. During interrogation by other counsel, counsel for the deponent may confer with the deponent off-the-record only for the purpose of deciding whether to assert a privilege . . . . This prohibition applies, without limitation, to all means of communication and is applicable, without limitation, to all periods of examination of the witness by anyone other than counsel for the party offering the deponent as witness. The prohibition, however, does not apply during ordinary and necessary recesses taken during the deposition session, such as lunch breaks and rest periods. Counsel for a deponent and the deponent shall not initiate breaks or recesses for the purpose of engaging in communications to circumvent the prohibitions of this Rule.

Id. 5.23(B). To determine whether the deponent or her counsel has violated section (B), the examining attorney may ask the deponent with whom she has spoken. *Id.* 5.23(C). After all other counsel have completed their examinations, the deponent and her counsel may privately confer before the deponent's counsel examines the witness. *Id.* 5.23(D).

ducted in the district, but for the better. In the future, hopefully Illinois and other districts will reconsider these or similar conduct rules.

c. Scheduling Orders and Case Law.—In federal cases, all phases of a civil deposition are subject to court control;[61] the court has discretion to issue orders designed to prevent abusive tactics during depositions.[62] Therefore, even when local rules do not address deposition conduct, judges can control depositions through individual standing orders[63] or rulings on discovery motions.[64]

One judge who has greatly impacted this area is Robert S. Gawthrop, III of the United States District Court for the Eastern District of Pennsylvania. In a widely publicized opinion, *Hall v. Clifton Precision*,[65] Judge Gawthrop gained the national spotlight by issuing strict guidelines for deposition conduct.[66]

During his client's deposition, plaintiff's counsel stated that, "at any time if you want to stop and talk to me, all you have to do is

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61. 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 211b, at 121 & n.11 (2d ed. 1994).

62. *Id.*; *see also* Hall v. Clifton Precision, 150 F.R.D. 525, 527 (E.D. Pa. 1993).

63. *See, e.g.*, *In re* Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014, 1995 WL 925664, at *1 (E.D. Pa. Oct. 25, 1995) (order stating, among other things, that (a) defending counsel may object to questions only "in a concise, non-suggestive, non-argumentative manner"; (b) witnesses must answer questions unless their counsel can "in detail and with sufficient clarity, state for the record the grounds under which the witness should not answer as permitted by Rule 30(d)(1)"; and (c) witnesses and their counsel may not conduct private, off-the-record conferences during breaks or recesses, except to decide whether to assert a privilege and only after the witness has specifically described the basis for the consultation); *In re* All Pending & Future Litig. Before Hon. G. Ross Anderson, Jr., No. 6:93mc161 (D.S.C. Dec. 16, 1993), *reprinted in* S.C. Law., May-June 1994, at 42, 42-43 (order establishing deposition conduct guidelines for all cases pending in Judge Anderson's court); *In re* Braniff, Inc., Nos. 89-03325-BKC-6C1, 92-911, 1992 WL 261641, at *13-14 (Bankr. M.D. Fla. Oct. 2, 1992) (order establishing deposition conduct rules for objections, directions not to answer, private consultations between deponents and attorneys, and the number of attorneys permitted to examine deponent); *In re* Domestic Air Transp. Antitrust Litig., No. 1:90-CV-2485-MHS, MDL 861, 1990 WL 358009, at *8-9 (N.D. Ga. Dec. 21, 1990) (order imposing restrictions on objections, instructions not to answer, and private conferences); *In re* San Juan DuPont Plaza Hotel Fire Litig., No. MDL 721, 1989 WL 168401, at *37-39 (D.P.R. Dec. 2, 1988) (order providing detailed rules concerning objections, directions not to answer, private consultations with deponents, and many other problems that may arise during depositions).

64. *See, e.g.*, Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., No. 91 Civ. 4544 (MGC), 1994 U.S. Dist. LEXIS 4024, at *6-9 (S.D.N.Y. Apr. 4, 1994) (mem.) (order attaching procedures and rules for conducting discovery in a case that involved discovery disputes).

65. 150 F.R.D. 525 (E.D. Pa. 1993).

66. *Id.* at 531-32; *see also infra* note 74 and accompanying text (listing cases in courts around the country that have adopted Judge Gawthrop's very words); *infra* note 78 (describing a bench-bar conference that discussed implications of the ruling).

indicate that to me."[67] Later, the deponent asked to confer with his attorney about "the meaning of the word 'document.'"[68] The deposition was recessed, but when questioning resumed, the deponent asked opposing counsel to define "document."[69] Soon thereafter, defense counsel showed the plaintiff-deponent a document and started to ask questions about it.[70] However, before defense counsel completed his question, plaintiff's counsel interjected that "I've got to review it with my client."[71] Defense counsel objected to this tactic, and the attorneys contacted the court, which ordered them to adjourn the deposition and appear for a discovery conference.[72]

At the conference, plaintiff's counsel argued that an attorney has a right to confer with his client at any time.[73] Judge Gawthrop disagreed. In a frequently quoted section of his opinion, Judge Gawthrop stated:

> The underlying purpose of a deposition is to find out what a witness saw, heard, or did—what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness—not the lawyer—who is the witness. . . . Therefore, I hold that a lawyer and client do not have an absolute right to confer during the course of the client's deposition.[74]

Judge Gawthrop also explained that although a lawyer has a right to prepare a client for deposition, once the deposition begins, that

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67. *Hall*, 150 F.R.D. at 526.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 528 (footnote omitted). The same or substantially similar language appears in other cases. *See* Armstrong v. Hussmann Corp., 163 F.R.D. 299, 303 n.15 (E.D. Mo. 1995) (mem.); Frazier v. Southeastern Pa. Transp. Auth., 161 F.R.D. 309, 315 (E.D. Pa. 1995) (mem.); Applied Telematics, Inc. v. Sprint Corp., No. 94-CV-4603, 1995 U.S. Dist. LEXIS 2191, at *7 (E.D. Pa. Feb. 22, 1995) (mem.); Van Pilsum v. Iowa State Univ. of Science & Tech., 152 F.R.D. 179, 180 (S.D. Iowa 1993); Meehan v. Town Lyne House Restaurant, No. 925584C, 1994 WL 902907, at *1 (Mass. Super. Ct. Aug. 29, 1994).

right "is somewhat tempered by the underlying goal of our discovery rules: getting to the truth."[75] Judge Gawthrop recognized that pretrial depositions should be conducted like a trial: "During a civil trial, a witness and his or her lawyer are not permitted to confer at their pleasure during the witness's testimony. Once a witness has been prepared and has taken the stand, that witness is on his or her own."[76] Judge Gawthrop also held that this rule would hold true even if the witness, not the attorney, initiated the conference.[77] In addition, Judge Gawthrop decided that these rules concerning private conferences should apply during breaks agreed to by both counsel, such as coffee breaks, lunch breaks, and evening recesses.[78] He reasoned that once the deposition begins, preparation ends.[79]

Judge Gawthrop, however, did recognize one exception to the no-conference rule. During a deposition, an attorney or witness may request a private recess to discuss whether to assert a privilege. The judge explained that a break to discuss a possible privilege is proper because the attorney-client privilege is an important objection about which a client is entitled to counsel. When a conference occurs for the purpose of discussing privilege, the conferring attorney should state for the record the fact that a conference occurred, the subject of

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75. *Hall*, 150 F.R.D. at 528.

76. *Id.* (footnote omitted). Judge Gawthrop continued:

> The same is true at a deposition. The fact that there is no judge in the room to prevent private conferences does not mean that such conferences should or may occur. The underlying reason for preventing private conferences is still present: they tend, at the very least, to give the appearance of obstructing the truth.

Id.

77. *Id.*

78. *Id.* at 529. At a bench-bar conference held in June 1994, Gawthrop clarified his position on prohibiting conferences. When asked about talking to clients during a lengthy hiatus in the deposition, Gawthrop acknowledged that, in *Hall*, he had not contemplated a break stretching on for weeks or months. In that type of situation, Gawthrop responded that "I'm not going to leave the hapless client floating around without a lawyer." Shannon P. Duffy, *Discovery Ruling Comes Under Fire: Merits of Gawthrop Opinion Debated by Bench-Bar Panel*, LEGAL INTELLIGENCER, June 28, 1994, at 1, *available in* LEXIS, Legnew Library, Lglint File.

79. *Hall*, 150 F.R.D. at 529. Otherwise, stated Judge Gawthrop, "[a] clever lawyer or witness who finds that a deposition is going in an undesired or unanticipated direction could simply insist on a short recess to discuss the unanticipated yet desired answers, thereby circumventing the prohibition on private conferences." *Id.* The judge also noted that to the extent improper conferences did occur during a deposition, the matters discussed between attorney and deponent would not be privileged. *Id.* at 529 n.7. Therefore, opposing counsel could rightly inquire about what was discussed during the conference. *Id.* Specifically, Judge Gawthrop stated: "Therefore, any such conferences are fair game for inquiry by the deposing attorney to ascertain whether there has been any coaching and, if so, what." *Id.*

the conference, and the decision reached about whether to assert a privilege.[80]

Although it was not directly raised in the *Hall* plaintiff's deposition, the judge felt compelled to prohibit "on-the-record witness-coaching through suggestive objections," because "the spirit of the prohibition against private conferences could be flouted by a lawyer's making of lengthy objections which contain information suggestive of an answer to a pending question."[81] Again comparing depositions to trials, he noted that the Federal Rules of Evidence contain no rules that permit a lawyer to make speaking objections during trial.[82]

Along with the opinion, Judge Gawthrop entered a nine-paragraph order requiring the following:

- that the witness be instructed to ask deposing counsel, not the witness's own counsel, for clarification and explanations;
- that objections not be made during the deposition, unless they are expressly permitted under Rule 32(d)(3)(B) of the Federal Rules of Civil Procedure, are necessary to preserve a privilege, or are interjected so counsel can seek a protective order under Rule 30(d)(3);
- that counsel refrain from directing a witness not to answer a question, unless counsel objects to the question on grounds that the answer is privileged or that evidence on that topic has been limited by the court;
- that counsel not make objections that might suggest an answer to the deponent;
- that counsel and their witnesses not engage in private, off-the-record conferences during depositions or breaks in the deposition, except to decide whether to assert a privilege; and
- that deposing counsel provide to the witness's counsel at the deposition a copy of all documents shown to the witness.[83]

Judge Gawthrop has expounded upon his *Hall* decision in two other opinions. In *Heller v. Consolidated Rail Corp.*,[84] he clarified that the deponent's counsel need not remain "utterly mute."[85] Instead, he explained that counsel has a duty "to interrupt to protect his client

80. *Id.* at 529-30.
81. *Id.*
82. *Id.*
83. *See id.* at 531-32.
84. Civil Action No. 95-3935, 1995 U.S. Dist. LEXIS 11615 (E.D. Pa. Aug. 4, 1995).
85. *Id.* at *9 n.2.

from overreaching and abuse by an opponent, provided it is done within the rules."[86] In *Langer v. Presbyterian Medical Center*,[87] Judge Gawthrop sanctioned an attorney who improperly objected, instructed the witness not to answer on grounds other than privilege,[88] held several attorney-client conferences to discuss matters other than whether to assert a privilege,[89] and made many unfounded privilege objections.[90] Even though the *Langer* deposition occurred before *Hall* was decided,[91] Judge Gawthrop believed that sanctions were appropriate for the attorney's egregious deposition conduct.[92] However, on reconsideration, the judge vacated his order imposing sanctions in *Langer*.[93] Although he did not condone the deposition conduct, he agreed with the offending law firm's position that the aggrieved party waited too long to move for sanctions, thus procedurally barring the sanctions motion.[94]

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86. *Id.*

87. Civ. Action Nos. 87-4000, 91-1814, 88-1064, 1995 U.S. Dist. LEXIS 2199 (E.D. Pa. Feb. 17, 1995), *vacated on reconsideration*, 1995 U.S. Dist. LEXIS 9448 (E.D. Pa. June 30, 1995).

88. *Id.* at *23. Judge Gawthrop noted that "[t]he deposition is peppered with objections on the basis of relevance and instructions that the witness refuse to answer on the basis of relevance, form of the question, and 'asked and answered.'" *Id.* Judge Gawthrop reasoned that those objections were preserved for trial under Rule 32(d)(3) of the Federal Rules of Civil Procedure and that counsel should not have raised the objection. If counsel believed that the questions were harassing or oppressive, Gawthrop asserted, he should have applied to the court for a protective order under Rule 30(d). *Id.* at *24.

89. *Id.* at *28-29. Judge Gawthrop believed that the attorney's "frequent conferences with the witness, between question and answer, [led] to the inference, the appearance, of tainted testimony, the parroted product of counsel's coachings, rather than the witness's actual recollection." *Id.* at *29.

90. *Id.* at *30-31. The judge observed that the attorney's "improper invocation of the privilege belies the assertion that he was merely preventing the disclosure of privileged information, as opposed to obstructing discovery of damaging testimony." *Id.* at *30.

91. *See id.* at *29 n.4.

92. *Id.* at *37-39. Judge Gawthrop summarized the offending lawyer's conduct as follows:

> At a deposition, one may neither take the witness nor the law into one's own hands. Here, counsel, figuratively or literally, did both. The deposition is a "question-and-answer conversation between the deposing lawyer and the witness." *Hall*, 150 F.R.D. at 528. [The deponent's attorney] turned this concept on its head, injecting himself as the dominant voice during the examination in order to obstruct the discovery of damaging testimony, impermissibly roadblocking the path to the truth.

Id. at *37.

93. Langer v. Presbyterian Med. Ctr., Nos. 87-4000, 91-1814, 88-1064, 1995 U.S. Dist. LEXIS 9448 (E.D. Pa. June 30, 1995).

94. *Id.* at *4-12. Judge Gawthrop applied a Third Circuit "supervisory rule," based on *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 99-100 (3d Cir. 1988), which held that motions for Rule 11 sanctions must be filed before the entry of a final judgment. *See Langer*, 1995 U.S. Dist. LEXIS 9448, at *4 & n.2. Although the sanctions motion was not filed

Other judges sitting in the Eastern District of Pennsylvania have embraced the rules for deposition conduct Judge Gawthrop articulated in *Hall*.[95] In addition, the *Hall* holding has been adopted, at least in part, by several other courts.[96] Judge Gawthrop's opinion

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under Rule 11 of the Federal Rules of Civil Procedure, Judge Gawthrop interpreted the *Lingle* rule to extend to other types of sanctions motions as well. *Id.* at *5, 9. Because the motion was filed after judgment was entered, the motion was procedurally barred. *Id.* at *11-12.

95. *See, e.g.*, O'Brien v. Amtrak, 163 F.R.D. 232, 236 (E.D. Pa. 1995) (mem.) (Joyner, J.) (noting that the guidelines established in *Hall* are "intended to ensure that a witness's words are placed on the record, not an attorney's"); Applied Telematics, Inc. v. Sprint Corp., No. 94-CV-4603, 1995 U.S. Dist. LEXIS 2191, at *3-4 (E.D. Pa. Feb. 22, 1995) (mem.) (Naythons, J.) (declaring that "[t]his [c]ourt is bound by the decision in *Hall*" and that this court "us[es] its holding not only as guidance, but as controlling directive"); Frazier v. Southeastern Pa. Transp. Auth., 161 F.R.D. 309, 315 (E.D. Pa. 1995) (mem.) (Joyner, J.) (quoting *Hall*'s description of proper deposition procedure); Christy v. Pennsylvania Turnpike Comm'n, 160 F.R.D. 51, 53 (E.D. Pa. 1995) (mem.) (Joyner, J.) (stating that *Hall* "severely restricts the communications that can take place between witnesses and their counsel during a deposition," but distinguishing the case at bar from *Hall* because *Hall* "does not limit in any way communications between witnesses and counsel prior to depositions"); Johnson v. Wayne Manor Apts., 152 F.R.D. 56, 58-59 (E.D. Pa. 1993) (mem.) (Joyner, J.) (relying on *Hall*'s guidelines in determining whether deposition conduct complied with federal discovery rules).

96. *See, e.g.*, *In re* Amezaga, 195 B.R. 221, 227-28 (Bankr. D.P.R. 1996) (noting that "counsel may not instruct deponent not to answer questions posed by opposing counsel except in particular situations"); Damaj v. Farmers Ins. Co., 164 F.R.D. 559, 561 (N.D. Okla. 1995) (explaining that while the court would not implement "the full range of *Hall* restrictions," it would "impose . . . requirements for the conduct of further depositions"); Armstrong v. Hussmann Corp., 163 F.R.D. 299, 303 (E.D. Mo. 1995) (mem.) (citing with favor *Hall*'s restrictions on counsel's conduct at depositions); Bucher v. Richardson Hosp. Auth., 160 F.R.D. 88, 94-95 (N.D. Tex. 1994) (mem.) ("It is improper for an intermediary to interpret questions and help the witness formulate answers."); Chapsky v. Baxter V. Mueller Div., Baxter Healthcare Corp., No. 93 C 6524, 1994 WL 327348, at *1 (N.D. Ill. July 6, 1994) (mem.) (noting that "private conferences during a deposition between a deponent and his or her attorney for any purpose other than to decide whether to assert a privilege are not permitted"); Phillips v. Manufacturers Hanover Trust Co., No. 92 Civ. 8527 (KTD), 1994 U.S. Dist. LEXIS 3748, at *12-13 (S.D.N.Y. Mar. 29, 1994) (quoting *Hall* and explaining that the witness, not the witness's attorney, should "make the determination as to whether a question is clear and answer to the best of his or her ability"); Van Pilsum v. Iowa State Univ. of Science & Tech., 152 F.R.D. 179, 180-81 (S.D. Iowa 1993) (quoting *Hall* and sanctioning attorney for numerous "groundless" objections); *cf.* Ethicon Endo-Surgery v. United States Surgical Corp., 160 F.R.D. 98, 99 (S.D. Ohio 1995) (restricting deposition conduct in a manner similar to *Hall* without citing the case). Some state courts have also embraced the *Hall* rationale. *See, e.g.*, Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 55-56 & nn.34, 36 & 37 (Del. 1994) (employing *Hall*'s reasoning for prohibitions against attorneys' "coaching" deposition witnesses and making superfluous objections); Operator Serv. Co. v. Croteau, No. CL961672AI, order at 2 (Fla. Cir. Ct., 15th Jud. Dist., Palm Beach County Aug. 5, 1996) (Order on Motions to Compel, for Sanctions for Discovery Abuse, and to Appoint a Special Master to Supervise Deposition Proceedings) (indicating that *Hall*'s reasoning was persuasive and ruling that holding "off-record deposition conferences" while questions were pending was "improper") (on file with author); Cholfin v. Gordon, Civ. Action No. CA943623, 1995 WL 809916, at *10

grabbed the attention of judges and practitioners, and it refocused attention on legal and ethical dilemmas that frequently arise during depositions.[97] In *Hall*, Judge Gawthrop made a significant contribution to the case law on deposition conduct. The opinion, however, is controversial due to its strictness, and it is not followed in all jurisdictions.[98]

2. State Courts.—

a. Court Rules.—Although this Article will focus primarily on depositions taken in federal court, it is important not to ignore rules

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(Mass. Super. Ct. Mar. 22, 1995) (mem.) (quoting *Hall*'s aspiration that "[t]here is no proper need for the witness's own lawyer to act as an intermediary" during depositions); Meehan v. Town Lyne House Restaurant, No. 925584C, 1994 WL 902907, at *1 (Mass. Super. Ct. Aug. 29, 1994) (citing *Hall* to indicate that attorney "coaching" during depositions was "wholly inconsistent with the purpose of the discovery process and the obligations imposed on attorneys while the process is going forward"); Corsini v. U-Haul Int'l, Inc., 630 N.Y.S.2d 45, 47 (App. Div. 1995) ("A lawyer's duty to refrain from uncivil and abusive behavior is not diminished because the site of the proceeding is a deposition room, or law office, rather than a courtroom.").

97. *See generally* Duffy, *supra* note 78 (describing a bench-bar conference that discussed implications of the ruling).

98. *See* Odone v. Croda Int'l P.L.C., 170 F.R.D. 66, 68 (D.D.C. 1997) (mem.) (maintaining that this court is not "bound by the litany of deposition restrictions and prohibitions [that *Hall*] outlines" and interpreting *Hall*'s holding as not placing "a blanket prohibition" on attorney-client conferences).

In *Acri v. Golden Triangle Management Acceptance Co.*, 142 PITT. LEGAL J. 225 (Pa. Ct. C.P., Allegheny County 1994), the court chose not to follow the *Hall* guidelines for a number of reasons:

> (1) they prohibit counsel for a party being deposed from raising objections that our discovery rules specifically allow; (2) they provide insufficient protection to the deponent; (3) they can produce results that could not have been intended; (4) they fail to recognize the proper role of counsel; (5) they increase the burden and expense of litigation; and (6) they are not necessary to curb the discovery abuses which are described in the *Hall v. Clifton Precision* opinion.

Id. at 228. The court further expounded:

> It is my experience that more often than not intervention by counsel for the deponent shortens the deposition by requiring the deposing counsel to focus on relevant matters and to allow the witness to fully respond in the witness's own language. Depositions taken by certain attorneys would never end if other counsel could not raise objections that the questions are repetitive or argumentative. . . .
>
> We need not turn the lawyer for the deponent into a fly on the wall in order to protect litigants' rights to obtain information from a witness in a witness's own language through depositions by oral examination. If the misbehavior of the deponent's counsel becomes a recurring and serious problem, counsel for the deposing party can discontinue the deposition and request judicial intervention. As a discovery judge, I will review a transcript of the discontinued deposition and if I agree with counsel for the deposing party that counsel for the deponent was attempting to sabotage proper efforts to obtain discovery, I will tailor an order that will protect the interests of the deposing party.

Id. at 230.

that control state-court depositions. Some states have statutes that track the current version of Rule 30 of the Federal Rules of Civil Procedure;[99] however, most states still track the pre-1993 version of this rule.[100] A few states have deposition conduct rules that are less rigorous than even the pre-1993 federal rules,[101] while a few others have exceeded the federal rules.[102] As in federal court, some state courts also have attempted to regulate deposition conduct through standing orders.[103]

At this point, New Jersey is the state with the most progressive rules. New Jersey Superior, Tax and Surrogate's Courts Rule 4:14-3 limits the type of objections that can be raised to "those addressed to the form of a question or to assert a privilege, a right to confidentiality or a limitation pursuant to a previously entered court order."[104] The rule also directs that an objection concerning the form of the question must include a statement about why the question is defective so

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99. *See, e.g.*, ARK. R. CIV. P. 30; COLO. R. CIV. P. 30; CONN. SUPER. CT. R. § 247; FLA. R. CIV. P. 1.310; KY. R. CIV. P. 30.03, 30.04; MINN. R. CIV. P. 30; R.I. SUPER. CT. R. CIV. P. 30; VT. R. CIV. P. 30; WYO. R. CIV. P. 30.

100. *See, e.g.*, ALA. SUP. CT. R. 30; ALASKA R. CIV. P. 30; ARIZ. R. CIV. P. 30; D.C. SUPER. CT. CIV. P. R. 30; GA. R. CIV. PRAC. 30; HAW. R. CIV. P. 30; IDAHO R. CIV. P. 30; IND. R. TRIAL P. 30; IOWA R. CIV. P. 148; KAN. R. CIV. P. 60-230; LA. STAT. ANN. arts. 1443, 1444 (West 1984 & Supp. 1997); ME. R. CIV. P. 30; MASS. R. CIV. P. 30; MISS. R. CIV. P. 30; MO. SUP. CT. R. CIV. P. 57.03; MONT. R. CIV. P. 30; NEV. CT. R. 30; N.M. DIST. CT. R. CIV. P. 1-030; N.Y. C.P.L.R. 3113; N.C. R. CIV. P. 30; N.D. R. CIV. P. 30; OHIO R. CIV. P. 30; OKLA. STAT. ANN. tit. 12, § 3230 (West Supp. 1998); OR. R. CIV. P. 39; PA. R. CIV. P. 4011, 4016; S.C. R. CIV. P. 30; S.D. CT. R. 15-6-30(c); TENN. R. CIV. P. 30; UTAH R. CIV. P. 30; VA. SUP. CT. R. 4:5; WASH. SUPER. CT. R. 30; W. VA. TRIAL CT. REC. R. CIV. P. 30; WIS. R. CIV. P. 804.05.

101. *See, e.g.*, ILL. SUP. CT. R. 206 (omitting the references to instructions not to answer and to non-suggestive objections); MICH. CT. R. CIV. P. 2.306 (addressing the assertion of privilege, but omitting references to non-suggestive objections and to instructions not to answer); NEB. R. CIV. P. 25-1242 (merely defining "deposition"); N.H. SUPER. CT. R. 37-44 (primarily discussing notice requirements); TEX. DIST. & COUNTY CTS. R. CIV. P. 204 (discussing the waiver and preservation of objections without indicating the nature of proper objections).

102. For example, the Delaware rule provides:

> From the commencement until the conclusion of a deposition, including any recesses or continuances thereof of less than five calendar days, the attorney(s) for the deponent shall not: (A) consult or confer with the deponent regarding the substance of the testimony already given or anticipated to be given, except for the purpose of conferring on whether to assert a privilege against testifying or on how to comply with a court order, or (B) suggest to the deponent the manner in which any questions should be answered.

DEL. SUPER. CT. CIV. R. 30(d).

103. *See, e.g.*, Cascella v. GDV, Inc., Civ. Action No. 5899, 1981 Del. Ch. LEXIS 455 (Del. Ch. Jan. 15, 1981) (confirming the court's earlier ruling that curtailed the scope of attorneys' instructions to deponents not to answer but allowing exceptions in circumstances where the answer would disclose privileged information).

104. N.J. SUPER. T. & SUR. CTS. R. 4:14-3(c).

the questioning attorney can amend the question.[105] However, "[n]o objection shall be expressed in language that suggests an answer to the deponent."[106]

The prohibition on instructions not to answer differs slightly from the federal rule. The New Jersey rule states that an attorney may instruct a client not to answer only if "the basis of the objection is privilege, a right to confidentiality or a limitation pursuant to a previously entered court order."[107] The New Jersey rule also differs from the federal rule by addressing adjournments and private conferences.[108] With regard to adjournments, the rule provides that, except in limited circumstances, a deposition must be taken continuously and without adjournment unless the court orders otherwise or the parties and deponent stipulate.[109] Further, once the deponent has been sworn, the defending attorney cannot communicate with the deponent "during the course of the deposition while testimony is being taken except with regard to the assertion of a claim of privilege, a right to confidentiality or a limitation pursuant to a previously entered court order."[110]

Like the federal rules, state-court rules are not exhaustive. They do not address all serious abuses and do not deal with important ethical concerns. Moreover, among states that have traditionally patterned their rules of civil procedure after the federal rules, some have lagged in adopting revisions that track the 1993 amendments to the Federal Rules of Civil Procedure.[111] This lag has added to the confusion about what constitutes proper deposition conduct. For example, while instructions not to answer have been severely limited in federal court, many state courts have not imposed those same restrictions.[112] Because the 1993 version of the federal rules contains more specific guidance about proper deposition conduct,[113] state legislatures should consider amending their rules either to track or exceed the federal rules as soon as is practicable.

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105. *Id.*

106. *Id.*

107. *Id. Contra* FED. R. CIV. P. 30(d)(1) ("A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under [FED. R. CIV. P. 30(d)(3)].").

108. *See* N.J. SUPER. T. & SUR. CTS. R. 4:14-3(d), (f).

109. *Id.* 4:14-3(d).

110. *Id.* 4:14-3(f).

111. *See supra* notes 100-101 and accompanying text.

112. *See supra* note 101.

113. *See supra* notes 25-31 and accompanying text.

b. Case Law.—State courts have also faced their fair share of cases concerning deposition misconduct. The most extensively publicized case concerning state-court deposition misconduct is *Paramount Communications, Inc. v. QVC Network, Inc.*,[114] in which a Delaware superior court raised, sua sponte, the issue of appropriate deposition behavior.[115]

According to the *Paramount Communications* court, "[o]ne particular instance of misconduct during a deposition in this case demonstrates such an astonishing lack of professionalism and civility that it is worthy of special note here as a lesson for the future—a lesson of conduct not to be tolerated or repeated."[116] During the deposition of a corporate representative, Texas attorney Joseph D. Jamail[117] represented the deponent, a director of Paramount Communications.[118] The court concluded that Jamail's deposition conduct was abusive because he "improperly directed the witness not to answer certain questions,"[119] raised many improper objections that suggested answers to the deponent,[120] engaged in lengthy colloquies,[121] was "extraordinarily rude, uncivil, and vulgar,"[122] and "obstructed the ability of the questioner to elicit testimony to assist the Court in this matter."[123]

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114. 637 A.2d 34 (Del. 1994). The deposition was recounted widely in the legal and nonlegal media. *See, e.g.*, William A. Brewer III & John W. Bickel, *Etiquette of the Advocate?*, TEX. LAW., Mar. 21, 1994, at 20, *available in* LEXIS, Legnew Library, Txlawr File; Debra Cassens Moss & Stephanie B. Goldberg, *No Ordinary Joe*, A.B.A. J., May 1994, at 44; John Ira Pe, *Jamail Not Going to Delaware*, HOUS. POST, Feb. 8, 1994, at C4, *available in* LEXIS, Tex Library, Txnews File; Brenda Sapino, *Jamail Unfazed by Delaware Court's Blast*, TEX. LAW., Feb. 14, 1994, at 11, *available in* LEXIS, Legnew Library, Txlawr File; Jerry Urban, *State Bar to Review Lawyer Rebuked by Delaware Court*, HOUS. CHRON., Feb. 15, 1994, at A15, *available in* LEXIS, News Library, Majpap File; Benjamin Weiser, *Are Too! Am Not! Are Too! Am Not! Judges Try to Impose a Civil Tone as Depositions Get Increasingly Down and Dirty*, WASH. POST, Mar. 10, 1994, at B10, *available in* 1994 WL 2275495.

115. *Paramount Communications*, 637 A.2d at 52 & n.23. No party or attorney complained to the court about the deposition addressed in the opinion. Instead, the deposition transcript was submitted to the court as part of the record on appeal. *Id.* at 52. The court raised the matter "as part of [its] exclusive supervisory responsibility to regulate and enforce appropriate conduct of lawyers appearing in Delaware proceedings." *Id.* at 52 n.23.

116. *Id.* at 52.

117. Joseph D. Jamail is a litigator in Houston, Texas, who won national recognition for his now-famous $10.53 billion verdict when he represented Pennzoil in its suit against Texaco. Miriam Rozen, *Joe Jamail's Life in Litigator Heaven*, AM. LAW., Oct. 1988, at 40, *available in* LEXIS, Legnew Library, Amlawr File. This was not Jamail's only brush with deposition incivility. *See infra* note 484 (describing the Fat Boy/Mr. Hairpiece incident).

118. *Paramount Communications*, 637 A.2d at 52. The court noted that Mr. Jamail did not appear in the Delaware proceeding and was not admitted to practice pro hac vice. *Id.*

119. *Id.* at 53.

120. *Id.* at 56.

121. *Id.*

122. *Id.* at 53.

123. *Id.* The following excerpt illustrates Jamail's deposition demeanor:

Although the court recognized that an attorney has a duty to advocate staunchly for his client, the court also emphasized that "it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client's legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process."[124] The court indicated that had Jamail been admitted to practice in Delaware, it would have at least censured him and imposed heavy sanctions.[125]

Paramount Communications has provided Delaware attorneys with guidelines about how to act during depositions. However, in many states, most discovery disputes never advance to the appellate level, and most state courts do not publish their trial courts' decisions.[126] Consequently, less guidance exists about proper deposition conduct.[127] This lack of published case law should serve as yet another impetus for state legislatures to consider quickly more comprehensive civil procedure rules concerning deposition conduct.

Q. (By Mr. Johnston [Delaware counsel for QVC]) Okay. Do you have any idea why Mr. Oresman was calling that material to your attention?

MR. JAMAIL: 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.

MR. JOHNSTON: No, Joe —

MR. JAMAIL: 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.

MR. JOHNSTON: No. Joe, Joe —

MR. JAMAIL: 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.

Id. at 53-54 (alteration in original).

124. *Id.* at 54.

125. *Id.* at 55. The court also warned Delaware counsel to be careful about sponsoring out-of-state lawyers' pro hac vice motions and cautioned that Delaware attorneys should not passively allow deposition abuse to occur. *Id.* at 55-56.

126. *See* Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 130 (1994).

127. *See* Mark A. Cohen, *Courts Cracking Down on Discovery Abuse by Attorneys: "Irritated" Judges Imposing More Sanctions*, MASS. L. WKLY., Sept. 2, 1996, at 1, *available in* LEXIS, Legnew Library, Malawr File ("Because appellate courts rarely pass on discovery matters, Massachusetts has little precedential authority to guide the discovery conduct of lawyers."); *cf.* Bergstein, *supra* note 18 (describing a "litany" of "dirty" deposition tactics and the problems associated with remedying them).

B. *Ethical Codes*

As one commentator noted, "discovery abuse is a function of professional ethics."[128] Ironically, neither the *Model Code of Professional Responsibility* nor the *Model Rules of Professional Conduct* specifically mentions depositions.[129] This does not mean, however, that these sources do not contain rules that affect deposition conduct.[130]

The American Bar Association adopted the *Model Code of Professional Responsibility* in 1969.[131] The Model Code is divided into three sections: Canons, Ethical Considerations, and Disciplinary Rules.[132] Ethical Considerations (ECs) are "aspirational in character and represent the objectives toward which every member of the profession should strive,"[133] while Disciplinary Rules (DRs) are mandatory and state the outer limits of acceptable behavior.[134] Both the Ethical Considerations and the Disciplinary Rules derive from the Canons, which are "statements of axiomatic norms."[135]

Even though the Model Code does not expressly mention discovery or depositions, its Ethical Considerations and Disciplinary Rules apply when an attorney prepares a witness to give deposition testi-

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128. Robert E. Sarazen, Note, *An Ethical Approach to Discovery Abuse*, 4 GEO. J. LEGAL ETHICS 459, 470 (1990).

129. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1982); MODEL RULES OF PROFESSIONAL CONDUCT (1994).

130. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 (describing a lawyer's obligation of fairness to the opposing party and counsel, including not assisting a witness to testify falsely); *id.* Rule 4.4 (explaining that respecting the right of third persons includes not using means that have no substantial purpose other than to embarrass, delay, or burden).

131. STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 421 (1997). By 1980, almost every state had adopted a code of professional responsibility based on the Model Code. *Id.* Today, however, only a small minority of states still base their professionalism rules on the Model Code. These states include the following: Alaska, Georgia, Massachusetts, Nebraska, New York, Ohio, Oregon, Tennessee, Vermont, and Virginia. *See* 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § AP4:107, at 1269-70 (2d ed. 1994 & Supp. 1997) (listing the states that have adopted the *Model Rules of Professional Conduct*). Additionally, in California, "the rules of discipline follow the format of neither the Code nor the Model Rules, but borrow considerable substance from each." *Id.* § AP4:101, at 1255 n.1. Moreover, North Carolina, Michigan, and Illinois are counted as having adopted the Model Rules, yet these states still retain some of the language of the Model Code. *Id.* § AP4:101, at 1255-56 n.1.

132. MODEL CODE OF PROFESSIONAL RESPONSIBILITY preliminary statement ¶ 1.

133. *Id.* preliminary statement ¶ 4.

134. *See id.* preliminary statement ¶ 5 ("The Disciplinary Rules [DR], unlike the Ethical Considerations [EC], are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.").

135. *Id.* preliminary statement ¶ 3.

mony, defends a witness during a deposition, and questions a witness during the deposition. Specifically, the Model Code provides that an attorney may not prepare or counsel his witness to present false testimony or evidence or to suppress evidence that he or his client has a legal obligation to produce.[136] It also provides that an attorney must protect his client's confidences.[137] Further, the Model Code prohibits an attorney from asking questions or engaging in conduct merely to harass or embarrass.[138] The Model Code also instructs lawyers that they should treat each other, and the tribunal, with courtesy and respect.[139] Most importantly, the Model Code clearly indicates that

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136. For example, one Ethical Consideration states:

> Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal . . . is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers. Unless constrained by his obligation to preserve the confidences and secrets of his client, a lawyer should reveal to appropriate authorities any knowledge he may have of such improper conduct.

Id. EC 8-5; *accord id.* DR 1-102(A)(4) (prohibiting a lawyer from "[e]ngag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation"); *id.* DR 7-102(A)(3) (prohibiting a lawyer from "conceal[ing] or knowingly fail[ing] to disclose that which he is required by law to reveal"); *id.* DR 7-102(A)(7) (prohibiting a lawyer from "[c]ounsel[ing] or assist[ing] his client in conduct that the lawyer knows to be illegal or fraudulent"); *id.* EC 7-26 ("The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline." (footnote omitted)); *id.* EC 7-27 ("Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce.").

137. *See id.* EC 4-1 ("Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him.").

138. One Disciplinary Rule is particularly telling:

> In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
>
> (2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person . . . .
>
> . . . .
>
> (6) Engage in undignified or discourteous conduct which is degrading to a tribunal.
>
> (7) Intentionally or habitually violate any established rule of procedure or of evidence.

Id. DR 7-106(C) (footnotes omitted); *see also id.* DR 7-102(A)(1) ("In his representation of a client, a lawyer shall not . . . [f]ile a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."); *id.* EC 7-25 (directing that "a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing him").

139. Ethical Consideration 7-37 provides:

> In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct,

while attorneys have a duty to represent each client with zeal,[140] this duty is not violated by complying with procedural rules or by treating adversaries with civility.[141] Indeed, the Model Code provides that violating procedural rules may also constitute an ethical violation.[142]

In 1983, the ABA replaced its Model Code with the *Model Rules of Professional Conduct*.[143] Like the Model Code, the Model Rules direct attorneys to "zealously assert[ ] the client's position under the rules of the adversary system."[144] The Model Rules declare that a lawyer "shall act with reasonable diligence and promptness in representing a client"[145] and "shall make reasonable efforts to expedite litigation consistent with the interests of the client."[146]

> attitude, and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

Id. EC 7-37 (footnote omitted).

140. *See id.* DR 7-101(A)(1) ("A lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules . . . . A lawyer does not violate this Disciplinary Rule . . . by . . . avoiding offensive tactics, or by treating [others] with courtesy and consideration." (footnotes omitted)); *id.* EC 7-1 ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations." (footnotes omitted)).

141. *See id.* EC 7-19 ("The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law."); *id.* EC 7-20 ("Not only must there be competent, adverse presentation of evidence and issues, but a tribunal must be aided by rules appropriate to an effective and dignified process."); *id.* EC 7-25 ("[W]hile a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them."); *id.* EC 7-36 ("Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of [judicial] proceedings."); *id.* EC 7-38 ("A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client."); *id.* EC 7-39 ("[P]roper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will preserve the impartiality of the tribunal . . . without impinging upon the obligation of the lawyer to represent his client zealously within the framework of the law.").

142. *See supra* notes 140-141 and accompanying text (citing parts of the Model Code which address the ethical obligations involving procedural rules).

143. 2 HAZARD & HODES, *supra* note 131, § AP4:101, at 1255. Today, at least 38 states and the District of Columbia have adopted all or significant portions of the Model Rules. *See id.* § AP4:107, at 1269-70 (listing states that have adopted the Model Rules); *see also supra* note 131 (explaining that some states have adopted the Model Rules while retaining some language from the Model Code).

144. MODEL RULES OF PROFESSIONAL CONDUCT pmbl. ¶ 2 (1994).

145. *Id.* Rule 1.3.

146. *Id.* Rule 3.2.

However, the Model Rules also require an attorney representing a client to "demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials."[147] Also, as under the Model Code, an attorney may not knowingly offer or assist her client to offer false evidence.[148]

Unlike the Model Code, the Model Rules actually mention pretrial discovery. Model Rule 3.4(d) provides that "[a] lawyer shall not . . . 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."[149] As the comments to this rule explain, "Fair competition in the adversary system is secured by prohibitions against . . . obstructive tactics in discovery procedure."[150] In addition, the Model Rules forbid attorneys to use discovery methods "that have no substantial purpose other than to embarrass, delay, or burden a third person."[151] Finally, an attorney who violates any other ethics rule automatically violates Rule 8.4, which proscribes conduct that violates or attempts to violate the rules of professional conduct, conduct that involves dishonesty, fraud, deceit, or misrepresentation, and conduct prejudicial to the administration of justice.[152]

As noted above, both the Model Rules and Model Code impose conflicting duties on attorneys.[153] Moreover, attorneys conducting or defending depositions cannot fulfill their ethical responsibilities without reference and adherence to court rules and controlling case

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147. *Id.* pmbl. ¶ 4; *see also id.* Rule 8.4(d) ("It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.").

148. Rule 3.4 provides:

> A lawyer shall not:
>
> (a) unlawfully obstruct another party's access to evidence or 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;
>
> (b) . . . counsel or assist a witness to testify falsely . . . ;
>
> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists . . . .

Id. Rule 3.4; *accord id.* Rule 3.3(a)(4) ("A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false.").

149. *Id.* Rule 3.4(d).

150. *Id.* Rule 3.4 cmt.

151. *Id.* Rule 4.4; *see also id.* cmt. (indicating that an attorney's responsibility to a client "does not imply that a lawyer may disregard the rights of third persons").

152. *Id.* Rule 8.4(a), (c), (d); *see also* Robertson's Case, 626 A.2d 397, 400 (N.H. 1993) (declaring that "[t]he violation of Rule 4.4 automatically violates Rule 8.4(a)").

153. *See, e.g., supra* note 1 and accompanying text (explaining the various responsibilities and allegiances of attorneys).

law.[154] In addition, because the mandatory ethical rules are very broad[155] and do not contain specific guidance regarding deposition conduct or other discovery procedures,[156] some bar associations have attempted to provide that guidance in the form of aspirational civility or conduct codes.[157]

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154. *See* MODEL RULES OF PROFESSIONAL CONDUCT pmbl. ¶ 13 ("The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general.").

155. *See id.* ("The Rules simply provide a framework for the ethical practice of law.").

156. *See supra* notes 129-142 and accompanying text (providing examples of Ethical Considerations in the Model Code that can be applied to deposition conduct or other discovery procedures but that do not contain specific guidance regarding the same); *cf. supra* notes 149-151 and accompanying text (providing examples of the broad scope of the Model Rules applying to discovery).

157. Several jurisdictions have adopted some type of aspirational conduct code. *See* ALABAMA STATE BAR, A LAWYER'S CODE OF PROFESSIONALISM (1991); MOBILE BAR ASS'N, A LAWYER'S CODE OF PROFESSIONALISM (Ala. 1986); STATE BAR OF ARIZONA, A LAWYER'S CODE OF PROFESSIONALISM (1989); PULASKI COUNTY BAR ASS'N, CODE OF PROFESSIONAL COURTESY (Ark. 1986); BEVERLY HILLS BAR ASS'N, GUIDELINES FOR PROFESSIONAL COURTESY (Cal. 1989); CONTRA COSTA COUNTY BAR ASS'N, STANDARDS OF PROFESSIONAL COURTESY (Cal. 1993); LOS ANGELES COUNTY BAR ASS'N, LITIGATION GUIDELINES (Cal. 1989); ORANGE COUNTY BAR ASS'N, GOALS OF PROFESSIONAL CONDUCT (Cal. 1990); SACRAMENTO COUNTY BAR ASS'N, STANDARDS OF PROFESSIONAL CONDUCT (Cal. 1994); SAN DIEGO COUNTY BAR ASS'N, CIVIL LITIGATION CODE OF CONDUCT (Cal. 1990); SANTA CLARA COUNTY BAR ASS'N, CODE OF PROFESSIONALISM (Cal. 1992); COLORADO BAR ASS'N, A LAWYER'S PRINCIPLES OF PROFESSIONALISM (1990); BOULDER COUNTY BAR ASS'N, GUIDELINES OF PROFESSIONAL COURTESY (Colo. 1990); DENVER BAR ASS'N, STANDARDS OF PROFESSIONALISM (Colo. 1992); EL PASO COUNTY BAR ASS'N, CODE OF PROFESSIONAL COURTESY (Colo. 1989); CONNECTICUT BAR ASS'N, LAWYERS' PRINCIPLES OF PROFESSIONALISM (1994); DELAWARE STATE BAR ASS'N, STATEMENT OF PRINCIPLES OF LAWYER CONDUCT (1991); DISTRICT OF COLUMBIA BAR, STANDARDS FOR CIVILITY IN PROFESSIONAL CONDUCT (1997); FLORIDA BAR ASS'N, IDEAS AND GOALS OF PROFESSIONALISM (1990); THE FLORIDA BAR TRIAL LAWYERS SECTION, GUIDELINES FOR PROFESSIONAL CONDUCT (1995); HILLSBOROUGH COUNTY BAR ASS'N, STANDARDS OF PROFESSIONAL COURTESY (Fla. 1987); ORANGE COUNTY BAR ASS'N, STANDARDS OF PROFESSIONAL COURTESY (Fla. 1990); PALM BEACH COUNTY BAR ASS'N, STANDARDS OF PROFESSIONAL COURTESY (Fla. 1990); ST. PETERSBURG BAR ASS'N, STANDARDS OF PROFESSIONAL COURTESY (Fla. 1992); TALLAHASSEE BAR ASS'N, CODE OF PROFESSIONAL COURTESY (Fla. 1990); HAWAII STATE BAR FAMILY LAW SECTION, GUIDELINES OF PROFESSIONAL COURTESY AND CIVILITY (1995); EVANSVILLE BAR ASS'N, CODE OF PROFESSIONAL COURTESY (Ind. 1990); INDIANAPOLIS BAR ASS'N, TENETS OF PROFESSIONAL COURTESY (Ind. 1989); IOWA STATE BAR ASS'N, CODE OF PROFESSIONALISM (1991); KANSAS BAR ASS'N, HALLMARKS OF THE PROFESSIONAL (1988); JOHNSON COUNTY BAR ASS'N, CREED OF PROFESSIONAL CONDUCT (Kan. 1989); WICHITA BAR ASS'N, TENETS OF PROFESSIONAL CONDUCT (Kan. 1993); KENTUCKY BAR ASS'N, CODE OF PROFESSIONAL COURTESY (1993); LOUISVILLE BAR ASS'N, CREED OF PROFESSIONALISM (Ky. 1989); LOUISIANA STATE BAR ASS'N, CODE OF PROFESSIONALISM (1991); LOUISIANA TRIAL LAWYERS ASS'N, LAWYER'S CREED (n.d.); BATON ROUGE BAR ASS'N, ATTORNEY'S CREED OF PROFESSIONALISM (La. 1990); SHREVEPORT BAR ASS'N, A LAWYER'S CREED OF PROFESSIONALISM (La. 1988); MARYLAND STATE BAR ASS'N, CODE OF CIVILITY (1997); BAR ASS'N OF MONTGOMERY COUNTY, LAWYERS' CREED OF PROFESSIONALISM (Md. 1992); PRINCE GEORGE'S COUNTY BAR ASS'N, LAWYER'S CREED OF PROFESSIONALISM (Md. 1989); MASSACHUSETTS BAR ASS'N, STATEMENT ON LAWYER PROFESSIONALISM (1989); BOSTON BAR ASS'N, CIVILITY STANDARDS FOR

C. Civility and Courtesy Codes

Many civility or conduct codes were formulated in the 1980s and 1990s,[158] during the era of the "Rambo litigator."[159] Because

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CIVIL LITIGATION (Mass. 1994); GENESEE COUNTY BAR ASS'N, STANDARDS FOR PROFESSIONAL CONDUCT WITHIN MICHIGAN'S SEVENTH JUDICIAL CIRCUIT (Mich. 1994); GRAND RAPIDS BAR ASS'N, MISSION STATEMENT (Mich. 1989); UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, CIVILITY PRINCIPLES (1996); MISSISSIPPI STATE BAR, MISSISSIPPI CODE OF PROFESSIONAL CONDUCT (1990); HINDS COUNTY BAR ASS'N, PLEDGE OF PROFESSIONALISM (Miss. 1988); LAFAYETTE COUNTY BAR ASS'N, CODE OF PROFESSIONAL COURTESY (Miss. n.d.); THE MISSOURI BAR, TENETS OF PROFESSIONAL COURTESY (1987); THE BAR ASS'N OF METROPOLITAN ST. LOUIS, TENETS OF PROFESSIONALISM (Mo. 1990); STATE BAR OF MONTANA, GUIDELINES FOR RELATIONS BETWEEN LAWYERS AND CLIENTS, GUIDELINES FOR RELATIONS BETWEEN AND AMONG LAWYERS (1986); STATE OF NEBRASKA, STANDARDS OF PROFESSIONALISM (1994); CAMDEN COUNTY BAR ASS'N, CODE OF PROFESSIONALISM (N.J. 1991); STATE BAR OF NEW MEXICO, A LAWYER'S CREED OF PROFESSIONALISM (1989); NEW YORK STATE BAR ASS'N, GUIDELINES ON CIVILITY IN LITIGATION (1995); BROOKLYN BAR ASS'N, CODE OF PROFESSIONALISM (N.Y. 1989); MONROE COUNTY BAR ASS'N, STANDARDS OF PROFESSIONAL CONDUCT (N.Y. 1994); NORTH CAROLINA BAR ASS'N, PRINCIPLES OF PROFESSIONAL COURTESY (1989); NORTH CAROLINA WAKE COUNTY/TENTH JUDICIAL DISTRICT BAR, CREED OF PROFESSIONALISM (1977); AKRON BAR ASS'N, A LAWYER'S CREED OF PROFESSIONALISM (Ohio 1988); CLEVELAND BAR ASS'N, A LAWYER'S CREED OF PROFESSIONALISM (Ohio 1988); OKLAHOMA COUNTY BAR ASS'N, GUIDELINES OF PROFESSIONAL COURTESY (Okla. 1996); MULTNOMAH COUNTY BAR ASS'N, PROPOSED STATEMENT ON PROFESSIONALISM IN THE PRACTICE OF LAW (Or. 1988); BUCKS COUNTY BAR ASS'N, RULES OF PROFESSIONALISM (Pa. 1992); THE NORTHAMPTON COUNTY BAR ASS'N, GUIDE TO CONDUCT AND ETIQUETTE AT THE BAR (Pa. 1994); PHILADELPHIA BAR ASS'N, WORKING RULES OF PROFESSIONALISM (Pa. 1990); RHODE ISLAND BAR ASS'N, A LAWYER'S CREED OF PROFESSIONALISM (1989); SOUTH CAROLINA BAR, STANDARDS OF PROFESSIONALISM (1993); TENNESSEE BAR ASS'N, A LAWYER'S CREED OF PROFESSIONALISM (1991); MEMPHIS BAR ASS'N, GUIDELINES FOR PROFESSIONAL COURTESY AND CONDUCT (Tenn. 1989); NASHVILLE BAR ASS'N, STANDARDS OF INTRA-PROFESSIONAL CONDUCT (Tenn. 1987); THE SUPREME COURT OF TEXAS & THE COURT OF CRIMINAL APPEALS, THE TEXAS LAWYER'S CREED: A MANDATE FOR PROFESSIONALISM (1989); THE TEXAS TRIAL LAWYERS ASS'N & TEXAS ASS'N OF DEFENSE COUNSEL, GUIDELINES FOR PROFESSIONAL CONDUCT (1989); DALLAS BAR ASS'N, GUIDELINES OF PROFESSIONAL COURTESY (Tex. 1987); SAN ANTONIO BAR ASS'N, GUIDELINES FOR PROFESSIONAL COURTESY (Tex. 1989); TRAVIS COUNTY BAR ASS'N, TRAVIS COUNTY CUSTOMS AND PRACTICES FOR LAWYERS (Tex. n.d.); VERMONT BAR ASS'N, GUIDELINES OF PROFESSIONAL COURTESY (1989); VIRGINIA BAR, PRINCIPLES OF PROFESSIONAL COURTESY (1988); FAIRFAX COUNTY BAR ASS'N, CREED OF PROFESSIONALISM (Va. 1991); NORFOLK & PORTSMOUTH BAR ASS'N, CODE OF PROFESSIONALISM (Va. 1991); THE BAR ASS'N OF THE CITY OF RICHMOND, PRINCIPLES OF PROFESSIONALISM (Va. 1990); WASHINGTON STATE BAR, COURTROOM DECORUM AND PRACTICE GUIDELINES (1994); SEATTLE-KING COUNTY BAR ASS'N, GUIDELINES OF PROFESSIONAL COURTESY (Wash. 1989); SPOKANE COUNTY BAR ASS'N, CODE OF PROFESSIONAL COURTESY (Wash. 1989); TACOMA-PIERCE COUNTY BAR ASS'N, CODE OF PROFESSIONAL COURTESY (Wash. 1989); WEST VIRGINIA STATE BAR, CODE OF PROFESSIONAL COURTESY (1990) (copies of each code are on file with the author). The author thanks Debi Taylor, Project Coordinator of the ABA Center for Professionalism, for supplying these codes.

158. These codes started to appear about the time jurisdictions began to replace the Model Code with the Model Rules. *See* 2 HAZARD & HODES, *supra* note 131, § AP4:107, at 1269-70 (listing when the *Model Rules of Professional Conduct* were adopted by various states). Because the Model Rules eliminated the aspirational goals articulated in the Model Code, civility codes may have been enacted to fill the void once filled by the Model Code's ethical considerations.

"[d]iscovery is the theater of incivility,"[160] most codes contain detailed aspirational rules concerning deposition conduct.

For example, under the *Texas Lawyer's Creed*,[161] lawyers pledge to "not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process," to "encourage witnesses to respond to all deposition questions which are reasonably understandable," and to "neither encourage nor permit [their] witness[es] to quibble about words where their meaning is reasonably clear."[162] As another example, the Boston Bar Association's *Civility Standards for Civil Litigation*[163] provide several aspirational rules for deposition conduct with which Boston attorneys should comply. These include the following:

- "A lawyer should not inquire into a deponent's personal affairs or question a deponent's integrity where such inquiry is irrelevant to the subject matter of the deposition";[164]
- "A lawyer should not harass a deponent and should refrain from repetitive or argumentative questions";[165]
- "A lawyer . . . should limit objections to those that are well founded and necessary for the protection of a client's interest";[166]

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159. Judge Thomas M. Reavley explained: "Rambo is the last name of a fictional United States Green Beret veteran characterized in a novel by John Morrell and later portrayed by Sylvester Stallone in several recent films. The character is the ultimate military warrior, always willing and able to fight to the death." Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637, 637 n.4 (1990) (citing FIRST BLOOD (Orion 1982); RAMBO: FIRST BLOOD PART II (Orion 1985); RAMBO III (Tristar 1988)). In the legal profession, a "Rambo litigator" is one who engages in "sharp and nasty" practices. Thomas M. Reavley, *Rambo Litigators: Aggressive Tactics Versus Legal Ethics*, TRIAL, May 1991, at 63, 63. One author, in half-jest, indicated that a Rambo litigator "[h]as a tendency to foam at the mouth during depositions," "[p]roudly displays tattoos featuring his favorite objections," and "look[s] for the office building with the scorched earth in front." John G. Browning, *Top 10 Ways to Spot a Rambo Litigator*, 53 TEX. B.J. 1094, 1094 (1990); *accord* Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561 (1996).

160. Cornelia Wallis Honchar, *'Rambo' Litigators Can Be Disarmed with Sanctions*, CHI. DAILY L. BULL., Nov. 4, 1994, at 5, *available in* LEXIS, Regnws Library, Ilnws File.

161. THE SUPREME COURT OF TEXAS & THE COURT OF CRIMINAL APPEALS, THE TEXAS LAWYER'S CREED: A MANDATE FOR PROFESSIONALISM (1989), *reprinted in* W.D. TEX. L.R. app. M (1997).

162. *Id.* pt. III(17).

163. BOSTON BAR ASS'N, CIVILITY STANDARDS FOR CIVIL LITIGATION (Mass. 1994), *reprinted in* BOSTON B.J., Sept.-Oct. 1994, at 11.

164. *Id.* stand. B(5)(e).

165. *Id.* stand. B(5)(f).

166. *Id.* stand. B(5)(g).

- "[A] lawyer should not, through objections or otherwise, coach the deponent or suggest answers";[167]
- "A lawyer should not direct a deponent to refuse to answer questions unless he or she has a good faith basis for claiming privilege or for seeking a protective order";[168]
- "A lawyer should refrain from self-serving speeches";[169] and
- "A lawyer should not engage in any conduct during a deposition that would not be allowed or would be inappropriate in the presence of a judicial officer or a jury."[170]

Other codes contain comparable directions and prohibitions for attorneys taking and defending depositions.[171]

For three primary reasons, civility codes can cause confusion among the judiciary and the practicing bar. First, in certain situations, it may be unclear whether courts should apply the civility codes or other standards of conduct, such as the *Model Code of Professional Responsibility* or the *Model Rules of Professional Conduct.*[172] Second, most civility codes are merely aspirational and have no formal enforcement mechanism.[173] For this reason, some believe they have no real impact

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167. *Id.* stand. B(5)(h).

168. *Id.* stand. B(5)(i).

169. *Id.* stand. B(5)(j).

170. *Id.* stand. B(5)(k).

171. *See, e.g.*, CONTRA COSTA COUNTY BAR ASS'N, STANDARDS OF PROFESSIONAL COURTESY stand. II(D) (Cal. 1993) ("Attorneys should bear in mind that depositions are to be taken as if the testimony was being given in court . . . ."); LOS ANGELES COUNTY BAR ASS'N, LITIGATION GUIDELINES guide. 5 (Cal. 1989) (prohibiting counsel from, among other things, delaying a deposition for dilatory purposes, inquiring into a deponent's personal affairs, making unfounded objections, coaching the deponent, and making self-serving speeches); DENVER BAR ASS'N, STANDARDS OF PROFESSIONALISM stand. C (Colo. 1992) (advising attorneys to minimize argument, to refrain from instructing witnesses through speaking objections, and to refrain from smoking); ST. PETERSBURG BAR ASS'N, STANDARDS OF PROFESSIONAL COURTESY stand. E (Fla. 1992) (cautioning attorneys to avoid inquiring into a deponent's personal affairs, to refrain from repetitive questioning, and to limit objections); WASHINGTON STATE BAR, COURTROOM DECORUM AND PRACTICE GUIDELINES decorum guide. VIII(C) (Wash. 1994) (instructing attorneys to "[m]ake only good faith objections to discovery").

172. *See* Kathleen P. Browe, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751, 780 (1994) ("Overall . . . codes of conduct do not add much to the already existing standards of attorney conduct and, where the new codes do differ from already existing rules, there is a potential for confusion and satellite litigation as attorneys argue over which rules should apply."); *id.* at 779 ("[W]here a code has a slightly different standard than the Model Rules of Professional Conduct, it could result in a great deal of satellite litigation to determine which standard applies.").

173. One reason civility codes are aspirational only is to avoid satellite litigation, like that generated by the 1983 version of Federal Rule of Civil Procedure 11. *See* Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441, 448

on attorney behavior.[174] A few courts, however, have announced a willingness to sanction attorneys who violate the local civility code.[175] Thus, some confusion exists about whether and when courts will enforce codes, which, by their express terms, are aspirational. Third, some civility codes may actually set a lower threshold of acceptable conduct than mandatory ethical rules,[176] while others contain goals that conflict with mandatory ethical rules.[177] Therefore, while civility codes add welcome, specific admonitions about deposition conduct and help to set the parameters for acceptable conduct, they can also add to the confusion and tensions experienced by attorneys who must take and defend depositions on a regular basis.

D. Interaction and Tension

Now that sources concerning deposition conduct have been identified,[178] the next step is to determine how attorneys should apply the

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(1992) (stating in its preamble to the proposed standards for professional conduct that "[v]oluntary adherence is expected" and that the standards "shall not be used as a basis for litigation or for sanctions or penalties"); Browe, *supra* note 172, at 763 ("The purpose in making these [civility] standards nonsanctionable is to avoid satellite litigation and to avoid turning them into another weapon attorneys could use against each other in litigation proceedings."); *cf.* Daniel E. Lazaroff, Foreword, *The Third Annual Fritz B. Burns Lecture on Rule 11 Reform: Progress or Retreat on Attorney Sanctions?*, 28 LOY. L.A. L. REV. 1, 1-2 (1994) (noting that one of the most frequent complaints about the 1983 version of Rule 11 was that it "spawned time-consuming satellite litigation"); Howard A. Cutler, Comment, *A Practitioner's Guide to the 1993 Amendment to Federal Rule of Civil Procedure 11*, 67 TEMP. L. REV. 265, 273-74 (1994) ("Commentators have asserted that Rule 11 has . . . created an abundance of satellite litigation unconnected to the substance of a legal dispute." (footnote omitted)).

174. One commentator asserted:

> The problem with codes of civility . . . is not their intention; there is no doubt that professionalism in the bar is sorely in need of repair. The problem is the appropriateness of means. If the present mandatory rules of professional discipline are not being observed, a new pledge of allegiance is unlikely to improve the level of observance.

Geoffrey C. Hazard, Jr., *Civility Code May Lead to Less Civility*, NAT'L L.J., Feb. 26, 1990, at 13, *available in* LEXIS, Legnew Library, Ntlawj File.

175. *See supra* note 12 (noting that some courts have decided to enforce local civility codes by sanction).

176. *See, e.g.*, Hazard, *supra* note 174 (asserting that as compared to the Model Code and the Model Rules, the *Texas Lawyer's Creed* may lower the standard of conduct in some areas, especially harassment).

177. *See, e.g.*, *Attack on Rambo: Bar Courtesy Codes Spread*, B. LEADER, Nov.-Dec. 1988, at 11, 29 (quoting one bar chair who criticized an aspirational code proposed by the ABA Tort and Insurance Practice Section because "[i]t mixed mandatory rules and those that are aspirational").

178. One other source that might affect deposition conduct includes advisory opinions of ethics committees. The ABA and many state and local bar associations have ethics committees that consider and write opinions concerning legal ethics. Some committees publish their opinions, which can provide guidance to attorneys. Although they are not

rules—and how conflicts among the rules should be resolved—so that attorneys do not breach any legal or ethical duties. In the context of depositions taken in the hypothetical below, this Article will analyze the tensions caused by the interplay of the varied rules affecting deposition conduct—federal and state rules, federal and state case law, mandatory ethical rules, and aspirational civility codes.

II. THE HYPOTHETICAL

In February 1993, PharTech, Inc., a large pharmaceutical manufacturing company, received approval from the Federal Drug Administration to manufacture and commercially market a long-term contraceptive known as Ovar-X.[179] Ovar-X must be administered by a licensed physician because the contraceptive, which is encased in a silicone capsule about the size of a watch battery, must be surgically inserted and removed. When inserted, Ovar-X releases a synthetic hormone to prevent pregnancy; the device is designed to work for approximately three years.

In June 1994, Erin Sawyer, a thirty-two-year-old female who lives in Cincinnati, Ohio, visited Dr. Harriet Foster, an OB/GYN, to discuss birth control options. Ms. Sawyer had been married for two years and previously had been taking birth control pills. At this point in their

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binding, ethics opinions are often cited as persuasive authority. MORTIMER D. SCHWARTZ ET AL., PROBLEMS IN LEGAL ETHICS 41 (3d ed. 1992). In addition, some bar associations are willing to provide quick ethics information by telephone. The attorneys staffing these hotlines typically cite callers to controlling authority but do not give advice. *Id.* at 41-42.

179. Ovar-X is loosely based on the Norplant contraceptive. *See supra* note 13. The hypothetical presented here is based on actual cases. *See In re* Norplant Contraceptive Prods. Liab. Litig., 955 F. Supp. 700 (E.D. Tex. 1997) (mem.); Tamulavage v. American Home Prods. Corp., No. 96 C 7769, 1996 U.S. Dist. LEXIS 19284 (N.D. Ill. Dec. 18, 1996) (mem.); *In re* Norplant Contraceptive Prods. Liab. Litig., 915 F. Supp. 845 (E.D. Tex. 1996) (order); Woods v. Wyeth Labs. Inc., No. 94-1493 (W.D. Pa. filed Sept. 1, 1994); Neideffer v. Wyeth-Ayerst Labs., No. 49D109502-CT0247 (Ind. Super. Ct., Marion County filed Feb. 16, 1995); Avondet v. Blankstein, Nos. 69934, 69935, 1997 WL 64048 (Ohio Ct. App. Feb. 13, 1997); Burton v. Wyeth Labs., No. 910 (Pa. Ct. C.P., Phila. County filed July 25, 1995); *see also Complaint: Doctor Negligent for Removal; Wyeth Liable for Defects*, MEALEY'S LITIG. REP. NORPLANT, Nov. 17, 1994, *available in* LEXIS, Legnew Library, Allnws File; Duncan, *supra* note 13; *Parties Debate Sufficiency of Fraud, Punitive Damage Claims*, MEALEY'S LITIG. REP. NORPLANT, Feb. 2, 1995, *available in* LEXIS, Legnew Library, Allnws File; AVSC International, *Are Norplant Implants the Right Method for Me?* (last modified July 31, 1996) <http://www.avsc.org/nor-text.html>; AVSC International, *Norplant Implants: Answers to Your Questions* (last modified July 31, 1996) <http://www.avsc.org/norplant.html#what>; *Norplant Patient Instruction: Patient Information* (visited Sept. 5, 1997) <http://lib-sh.lsumc. edu/fammed/pted/norppost.html>; Planned Parenthood Federation of America, Inc., *Norplant* (visited Sept. 5, 1997) <http://www.igc.apc.org/ppfa/contraception/choices_norplant_detail.html>; Planned Parenthood Federation of America, Inc., *Planned Parenthood Fact Sheet: Norplant Contraceptive Implant* (visited Sept. 5, 1997) <http://www.igc.apc.org/ppfa/norplant.html>.

busy careers, Ms. Sawyer and her husband, Matt, did not want children. Ms. Sawyer did not like taking birth control pills, because given her hectic schedule, she occasionally forgot to take them. Therefore, she was interested in Ovar-X, the long-term contraceptive that had been receiving so much media attention.

After discussing the matter with Dr. Foster, who explained that the possible side effects of Ovar-X included nausea, irregular menstrual bleeding, migraine headaches, and weight gain, Ms. Sawyer opted to have Ovar-X implanted. Before Ms. Sawyer left the office, Dr. Foster gave her some literature produced by PharTech that also explained these and other possible side effects.

A week later, Dr. Foster performed the surgical implant procedure in her office, using a local anesthetic. The doctor made a small incision on the inside of Ms. Sawyer's left upper arm and inserted the Ovar-X implant. Although Ms. Sawyer's arm was swollen for a few days after the procedure, she did not experience any complications from the surgical procedure.

During the first year, Ms. Sawyer suffered a few mild side effects, including spotting between menstrual periods and slight weight gain. After about six months, these symptoms disappeared. However, in September 1995, Ms. Sawyer began to experience irregular menstrual bleeding, stomach pain, mild dizziness, and additional weight gain; in addition, Dr. Foster discovered an ovarian cyst. Due to these side effects and the fact that she and her husband decided they would like to start a family, Ms. Sawyer decided to stop using Ovar-X. A few weeks later, Dr. Foster removed the Ovar-X device during an in-office surgical procedure. Unfortunately, Dr. Foster had difficulty locating the implant; this complicated the removal process and left Ms. Sawyer with a three-inch scar on her left arm and some nerve damage in the upper-arm area.

After several months of unsuccessfully trying to conceive, Ms. Sawyer visited Dr. Victoria Hernandez, a fertility specialist. After running tests and examining Ms. Sawyer, Dr. Hernandez discovered that Ms. Sawyer suffered from endometriosis, a condition that would severely limit her ability to become pregnant.[180] Distraught over the diagnosis, Ms. Sawyer asked how she had developed the condition.

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180. Endometriosis is "an abnormal condition in which menstrual tissue, instead of escaping from the uterus through the vagina, goes up the fallopian tubes and accumulates in the pelvic cavity." 10 THE ENCYCLOPEDIA AMERICANA 340 (int'l ed. 1996). Women with endometriosis frequently are unable to conceive. *Id.*; *see also Endometriosis: This "Career Woman's Disease" Is a Major Cause of Infertility*, MAYO CLINIC HEALTH LETTER, Mar. 1987, at 3, 3.

Dr. Hernandez replied that the endometriosis could have been linked to the Ovar-X implant.

After reading several newspaper accounts about other women who had suffered similar effects from using Ovar-X, and who had sued to recover for their injuries, Ms. Sawyer and her husband contacted attorney Scott Palmer for advice. Mr. Palmer reviewed Ms. Sawyer's medical history, interviewed the Sawyers, and conducted some preliminary legal research. He then recommended that the Sawyers sue PharTech and Dr. Foster; the Sawyers retained Palmer to initiate the suit.

On June 3, 1996, Palmer filed suit for the Sawyers against Dr. Foster and PharTech in the United States District Court for the Southern District of Ohio. The counts directed at Dr. Foster alleged medical malpractice based on her failure to provide complete cautionary instructions for Ovar-X use, negligence in removing the implant, and loss of consortium. The complaint also contained causes of action against PharTech for strict products liability, negligence, breach of express warranty of merchantability, failure to warn, consumer fraud, misrepresentation, and loss of consortium. In addition to seeking compensatory damages for items including medical expenses, lost wages, and pain and suffering, the Sawyers also sought punitive damages against both defendants.

Although they filed separate answers, each defendant denied liability to the Sawyers. In addition, PharTech raised the following affirmative defenses: assumption of the risk, learned intermediary doctrine, failure to mitigate damages, and contributory negligence. Along with her answer, Dr. Foster cross-claimed against PharTech, alleging that the manufacturer failed to warn her about all possible risks associated with Ovar-X and failed to train her properly on how to remove Ovar-X implants.

Two weeks after the answers were filed, Palmer noticed the deposition of Randall Lee, PharTech's national product manager for Ovar-X, to occur on August 12, 1996.[181] Corrine Davis, lead counsel for PharTech, responded by noticing Ms. Sawyer's deposition for August 7, 1996. Counsel for all parties then met and jointly agreed that Dr. Foster and Mr. Sawyer would be deposed in mid-September.

181. *Cf.* S.D. OHIO L.R. 26.5 ("Unless otherwise ordered or agreed by the parties, discovery may begin at any time notwithstanding Rule 26(d), FRCP.").

III. PRIVATE CONFERENCES WITH THE DEPONENT

A serious controversy exists regarding the propriety of a lawyer conferring privately with his witness during a deposition, especially when a question is pending. Some believe that a witness should have complete, unbridled access to counsel during the deposition,[182] while others believe that deposition testimony should be treated exactly like cross-examination at trial, where the deponent cannot confer with her attorney before her testimony is completed.[183] Still others seek a middle ground that would allow the deponent to confer with her attorney, but only under limited circumstances.[184] Although courts typically agree that a lawyer may confer with his client to determine whether to assert a privilege,[185] confusion exists regarding other situations in which a private conference might be proper.[186] Indeed, most jurisdictions do not have rules concerning private conferences.[187] In addition, very few published cases address the propriety of private conferences in the deposition setting.[188] Therefore, attorneys in most jurisdictions have little guidance about when private conferences

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182. *See, e.g.*, 7 MOORE ET AL., *supra* note 15, § 30.43[6], at 30-71 ("As recently as the mid-1980s, many lawyers counseled clients that they had an absolute right to confer at any time during the deposition.").

183. *See, e.g.*, Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993) ("During a civil trial, a witness and his or her lawyer are not permitted to confer at their pleasure during the witness's testimony. Once a witness has been prepared and has taken the stand, that witness is on his or her own. The same is true at a deposition." (footnote omitted)).

184. *See, e.g.*, M.D. ALA. GUIDELINES CIV. DISCOVERY PRAC. guide. II(G) (for language, see *supra* note 41); D. COLO. L.R. 30.1C(A)(2) (for language, see *supra* note 44); S.D. FLA. L.R. 30.1 (tracking the Colorado local rule); S.D. IND. L.R. 30.1 (for language, see *supra* note 46); D. MD. DISCOVERY GUIDELINES guide. 5(c) (for language, see *supra* note 47); D.S.C. L.R. 30.04(E) (for additional information, see *supra* note 49); D. WYO. L.R. 30(e) (for language, see *supra* note 50); DEL. SUPER. CT. CIV. R. 30(c) (for language, see *supra* note 102); N.J. SUPER. T. & SUR. CTS. R. 4:14-3 (for language, see *supra* text accompanying notes 104-110); *see also* Standing Orders of the Court on Effective Discovery in Civil Cases, 102 F.R.D. 339, 351 (E.D.N.Y. 1984) ("An attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted."); MANUAL FOR COMPLEX LITIGATION (THIRD), *supra* note 51, § 41.38, at 518 ("Private conferences between deponents and their attorneys in the course of interrogation are improper except for the purpose of determining whether a privilege should be asserted.").

185. *See infra* text accompanying notes 228-239.

186. *See* IMWINKELRIED & BLUMOFF, *supra* note 38, § 6:27, at 55 ("The law governing the propriety of private conferences between the deponent and the attorney representing the deponent is unsettled.").

187. For example, the Federal Rules of Civil Procedure do not address private conferences. *See* FED. R. CIV. P. 30. For the federal jurisdictions that do have a private conference rule, see *supra* notes 41, 44-47, and 49-51.

188. *See supra* Parts I.A.1.c and I.A.2.b.

should be allowed or how to react when defending counsel confers with the deponent during the deposition.

The legal and ethical issues concerning private conferences between the deponent and her attorney will be illustrated through excerpts from the August 7, 1996 deposition of Erin Sawyer, the plaintiff in *Sawyer v. PharTech, Inc.* The plaintiff is being deposed by Corrine Davis, counsel for PharTech. The deponent's attorney is Scott Palmer. Counsel for Dr. Foster, Curtis Drizolli, is also present.

> **August 7, 1996. Time: 10:37 a.m. (the deposition commenced at 9:00 a.m.)**
>
> MS. DAVIS: Ms. Sawyer, did you contact Dr. Foster as soon as you began experiencing side effects you thought might be associated with the Ovar-X implant?
>
> MS. SAWYER: [Speaking tentatively] Well . . . . Um—I guess . . . .
>
> MR. PALMER: Ms. Davis, I need to confer with my client about this matter.
>
> MS. DAVIS: Mr. Palmer, a question is pending. Your client should answer the question. After she answers, I would be more than amenable to a short recess.
>
> MR. PALMER: No, we're taking a break now.
>
> [Mr. Palmer leaves the room with his client, Ms. Sawyer.]
>
> MS. DAVIS: Mr. Court Reporter, please note the time that Mr. Palmer and his client left and the time they return. Also note on the record my objection to this private conference.
>
> [After about seven minutes, Mr. Palmer and Ms. Sawyer return.]
>
> MS. DAVIS: Ms. Sawyer, please answer my question. Mr. Court Reporter, would you please read back the question?
>
> COURT REPORTER: [Reading back last question before the break.] Ms. Sawyer, did you contact Dr. Foster as soon as you began experiencing side effects you thought might be associated with the Ovar-X implant?
>
> MS. SAWYER: Yes. I tried to contact Dr. Foster's office several times when I began experiencing the irregular periods, but her line was always busy.
>
> MS. DAVIS: Ms. Sawyer, during the break, did you and Mr. Palmer discuss your answer to the question you just answered?
>
> MR. PALMER: I object. What we discussed, if anything, is subject to the attorney-client privilege. Move on, counsel.
>
> * * * *

Time: 11:15 a.m.
MS. DAVIS: Ms. Sawyer, I'm handing you what has been marked as deposition exhibit 5. Please look at the document. [The court reporter hands the document to Ms. Sawyer.] Ms. Sawyer, do you recognize this document?
MS. SAWYER: I need to speak with my attorney before I answer that question.
MS. DAVIS: Ms. Sawyer, I cannot see why you would need to speak with your attorney. You've either seen the document or you haven't. Answer the question.
MR. PALMER: Ms. Sawyer, let's step outside. [Ms. Sawyer and Mr. Palmer leave the room; the pair returns about five minutes later.]
MS. DAVIS: Ms. Sawyer, have you ever seen deposition exhibit 5? If so, please tell me what it is.
MS. SAWYER: I think I might have, but I'm not exactly sure right now. It's published by PharTech and it describes some possible effects of Ovar-X.

* * * *

Time: 12:05 p.m.
MS. DAVIS: When did you first see Dr. Hernandez?
MS. SAWYER: I don't remember the exact date, but it was in early March.
MS. DAVIS: March 1996?
MS. SAWYER: Yes.
MS. DAVIS: Do you have any way to determine the exact date?
MS. SAWYER: Oh yes. I could look in my daytimer.
MS. DAVIS: Well, I see that it's after 12:00. Why don't we break for lunch now? I'm just about ready to start a new topic and I don't want to start it now. Is an hour and fifteen minutes enough time?
MR. PALMER: That's fine. We'll be back here at 1:20.
[Participants take a lunch break. The deposition resumes at 1:25 p.m.]
MS. DAVIS: Did you have lunch with your attorney?
MR. PALMER: Objection, attorney-client privilege.
MS. DAVIS: Oh come on, Scott, I'm just asking whether you ate together. There's nothing privileged about that. Are you instructing her not to answer?
MR. PALMER: I guess not. Ms. Sawyer, you may answer that question.
MS. SAWYER: Yes. In fact, Scott—uh—Mr. Palmer—took me to a very nice Italian restaurant.
MS. DAVIS: Did you discuss any testimony from this morning?

MR. PALMER: I instruct the client not to answer. That question definitely calls for privileged information.
MS. DAVIS: Ms. Sawyer, are you going to follow your attorney's advice and refuse to answer the question?
MS. SAWYER: I'm going to follow my attorney's advice.
MS. DAVIS: Well, I'll move on for now. But I'm going to take this matter to the court in a motion to compel.

* * * *

Time: 3:05 p.m.
MS. DAVIS: Ms. Sawyer, earlier we discussed your first visit to Dr. Hernandez. At the end of that visit, what did Dr. Hernandez tell you, if anything, about the relationship between Ovar-X and endometriosis?
MR. PALMER: Counsel, I need to briefly confer with my client about whether we will raise the doctor-patient privilege. May we go off the record for a few minutes?
MS. DAVIS: I would prefer that the witness answer the question. I don't want you coaching the witness about how to answer the question.
MR. PALMER: Counsel, as I said, I want to discuss whether to assert a privilege. If you'll just give me a few minutes, Ms. Sawyer may very well answer your question.

* * * *

Time: 6:15 p.m.
MR. PALMER: Ms. Davis, it's getting late. My client has been answering your questions since early this morning. Will you please wrap it up?
MS. DAVIS: Well, I still have several important topics to cover. I'm perfectly willing to adjourn for the evening, but I'll need about three more hours to finish. Are you available tomorrow?
MR. PALMER: No. My next available date is August 12, the day I'm scheduled to depose Mr. Lee. As I previously told you, I need more than a day for that depo, so I noticed it for two days. But what if you finish Ms. Sawyer's deposition that morning, and I'll start Mr. Lee's deposition after lunch? I'm pretty sure I can finish in a day and a half.
MS. SAWYER: That's fine with me.
MS. DAVIS: Me too.

* * * *

August 12, 1996. Time: 9:05 a.m.
MS. DAVIS: Good morning, Ms. Sawyer. This is the continuation of your August 7 deposition. Do you realize that you're still under oath?

MS. SAWYER: Yes.
MS. DAVIS: Good. Please tell me whether you have met with your attorney since August 7.
MR. PALMER: I object. You keep asking her about conferences with me. That type of information is privileged. Don't answer that.

* * * *

In many private conference situations, the questioning attorney must decide what steps are appropriate to combat what appears to be witness coaching, as well as decide what relief, if any, to seek.[189] The deponent's lawyer, on the other hand, must grapple with the conflict between protecting his witness and serving as an officer of the court in the context of a proceeding meant to discover the truth.[190]

Here, five breaks occurred during the plaintiff's deposition. Two breaks were initiated by the deponent's counsel, one by the deponent, and two were taken by mutual agreement. How well did the respective counsel handle each break? Did the breaks comport with controlling court rules, ethical rules, and civility codes? Which counsel was correct concerning whether the questioning attorney could inquire about conversations conducted during the breaks?[191] These questions will be answered following a discussion of the applicable legal and ethical rules.

A. Private Conferences During Pending Questions

Each attorney-initiated break in Ms. Sawyer's deposition was called while a question was pending. The first break occurred during the 10:37 a.m. session on August 7, when the deponent's attorney demanded a break immediately after PharTech's attorney posed a question. Although PharTech's attorney indicated she would be willing to break after the witness answered, Ms. Sawyer's counsel refused and left with the deponent. The question asked did not call for the deponent to reveal any privileged information. Instead, Mr. Palmer probably thought Ms. Sawyer's initial hesitation to a relatively easy—but important—question indicated that she was in trouble. In all likeli-

189. *See* MALONE & HOFFMAN, *supra* note 15, at 135-37 (listing possible responses to the "obstructionist" attorney who continues to interrupt the deposition to confer with his witness).

190. *See id.* (discussing the purposes of conferring with a witness and how this right can be abused).

191. Readers should note that the Southern District of Ohio does not have a local rule concerning private conferences during depositions. *See* S.D. OHIO L.R.

hood, therefore, he called the break to ensure that she answered "correctly."

During the 3:05 p.m. session, the deponent's counsel requested a conference when Ms. Davis, the examining attorney, asked about a discussion between the deponent and her treating physician. Mr. Palmer clearly indicated, on the record and before the conference, that he needed to discuss whether to assert the doctor-patient privilege with his client.

Typically, a lawyer has only four reasons to confer with a client during a pending question: (1) to assist the client with the answer;[192] (2) to calm the client;[193] (3) to interrupt the flow of the opposing counsel's examination;[194] or (4) to discuss a possible privilege.[195] Under the first three circumstances, private conferences during a pending question should be presumptively improper.[196]

An attorney should not confer with a client during a pending question if his purpose is to assist the client with the answer. Despite

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192. *See* IMWINKELRIED & BLUMOFF, *supra* note 38, § 5:39, at 81 (observing that some attorneys use the private conference to assist the deponent with the answer).

193. *See* J. Stratton Shartel, *Abuses in Depositions: Litigators Describe Response Strategies*, INSIDE LITIG., July 1994, at 1, 12 (describing the phenomenon of the "paralyzed witness" and advising that, in order to minimize damage, the defending attorney should immediately take a break to talk with the nervous and confused deponent).

194. *See* IMWINKELRIED & BLUMOFF, *supra* note 38, § 5:39, at 80-81 (describing how a deponent's attorney can use private conferences to interfere with the opposing attorney's questioning).

195. *See* MALONE & HOFFMAN, *supra* note 15, at 184 (referring to the use of conferences to prevent disclosure of protected or privileged information). Some might suggest that this list omits a situation in which "clever and unscrupulous examining counsel may attempt to trap the witness into misleading statements that . . . can be used to hurt the witness or parties at trial." 7 MOORE ET AL., *supra* note 15, § 30.43[6], at 30-72. Indeed, one might argue that this list "overlooks [the fact] that witnesses can make honest mistakes, and [that] one of the functions of their counsel is to call those to their attention." *Id.* However, a conference is not the way to remedy such abuses. Instead, deponent's counsel should attempt to rehabilitate the deponent during cross-examination, object to the inappropriate question or behavior, adjourn the deposition to seek a protective order, or speak with the questioning attorney to work out the problem. *Id.*; *see also* FED. R. CIV. P. 30 (describing the proper procedure for the deponent's counsel to terminate or limit the examination).

196. *See* Federal Bar Council, Committee on Second Circuit Courts, A Report on the Conduct of Depositions, 131 F.R.D. 613, 618 (1990) (declaring that a conference initiated by an attorney for any purpose other than to determine whether a privilege should be asserted is "presumptively improper"); Standing Orders of the Court on Effective Discovery in Civil Cases, 102 F.R.D. 339, 382 (E.D.N.Y. 1984) (indicating that private conferences during depositions, not including breaks, are presumptively improper); *see also* MANUAL FOR COMPLEX LITIGATION (THIRD), *supra* note 51, § 41.38, at 518 (suggesting that private conferences are improper, except for the purpose of determining whether a privilege exists).

the practice of some attorneys, testifying is not a team sport.[197] Although an attorney has a legal and ethical duty to prepare a client before the deposition,[198] preparation, by definition, occurs before—not during—the event.[199] If the attorney did not adequately prepare the client before the deposition, then the attorney and the client must suffer the consequences.

In addition, using a conference to suggest an answer is analogous to an attorney making speaking objections to coach the witness's response.[200] Since the 1993 amendments, suggestive objections have been improper in federal court.[201] Because the 1993 amendments to Rule 30 were designed to limit the number of disruptions that occur

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197. *See* Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, 657 F.2d 890, 902 (7th Cir. 1981). This case involved a deponent's attorney who called 127 private conferences, many of which occurred between the question and the answer. The court emphasized, "It is too late once the ball has been snapped for the coach to send in a different play." *Id.*

198. *See, e.g.*, Christy v. Pennsylvania Turnpike Comm'n, 160 F.R.D. 51, 53 (E.D. Pa. 1995) (denying a protective order that would limit the otherwise proper preparation of a witness for deposition); Hall v. Clifton Precision, 150 F.R.D. 525, 528 & n.4 (E.D. Pa. 1993) ("A lawyer . . . has the right, if not the duty, to prepare a client for a deposition." (footnote omitted)); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(2) (1982) ("A lawyer shall not . . . [h]andle a legal matter without preparation adequate in the circumstances."); *id.* EC 7-19 (providing that an advocate should "zealous[ly] prepar[e]"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1994) (requiring "thoroughness and preparation reasonably necessary for the representation"); *see also* ROBERTO ARON & JONATHAN L. ROSNER, HOW TO PREPARE WITNESSES FOR TRIAL 9 (1985) (commenting that "the very essence of the advocate's ethical obligations to the client . . . is adequate preparation at each stage of the process"); *id.* at 309-10 (indicating that 62% of lawyers surveyed believed witness preparation to be a duty).

199. *See* 12 THE OXFORD ENGLISH DICTIONARY 375 (2d ed. 1991) (defining "prepare" as "[t]o put *beforehand* into a suitable condition for some action" (emphasis added)); *see also* James W. McElhaney, *The Pit Bull: Strategies to Keep Depositions on Track*, A.B.A. J., July 1989, at 88, 89 ("Everyone knows that witnesses need to be prepared to testify, but that should be done before the deposition."). However, in *State v. McCormick*, 259 S.E.2d 880 (N.C. 1979), the North Carolina Supreme Court stated:

> It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer, and is to be commended because it promotes a more efficient administration of justice and saves court time.

Id. at 882 (citation omitted).

200. *See Standing Orders*, 102 F.R.D. at 382 ("[S]uch conferences *prima facie* present the appearance of the same evil as the suggestive objection in the presence of the witness but in an even more insidious form since the examining attorney is not privy to the private conference.").

201. *See* FED. R. CIV. P. 30(d)(1) (directing that objections be made "concisely and in a non-argumentative and non-suggestive manner"). For additional information on speaking objections, see *infra* Part IV.A.

during a deposition,[202] the spirit of the Federal Rules prohibits private conferences during a pending question, except to discuss whether a privilege should be asserted.[203]

Further, if the attorney actually suggested that the witness should answer untruthfully, then the attorney would also violate the ethical duty of fairness to opposing counsel[204] and the duties to the client.[205] He would, moreover, abrogate his duties as a court officer by obstructing and delaying the judicial process.[206] Even more seriously, he might be disbarred[207] or subject to criminal prosecution for sub-

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202. *See* FED. R. CIV. P. 30(d) advisory committee notes on 1993 amendments (acknowledging that "[d]epositions frequently have been unduly prolonged . . . by lengthy objections and colloquy" and then explaining how the amendments hope to eradicate this).

203. Federal Rule 30(d)(1) indicates that objections should be non-suggestive and that instructions not to answer are limited to only three circumstances. *See supra* text accompanying note 28 (setting forth the text of Rule 30(d)(1)).

204. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) (1994) (stating that counsel may not assist a witness to testify falsely); *id.* Rule 4.4 (prohibiting a lawyer from using means "that have no substantial purpose other than to embarrass, delay, or burden a third person").

205. *See id.* Rule 1.2 (declaring that a lawyer shall not assist a client in conduct he knows to be fraudulent or criminal). Perjury is a criminal offense. *See, e.g.*, 18 U.S.C. § 1621 (1994) ("Whoever . . . having taken an oath . . . that he will testify . . . that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true . . . is guilty of perjury . . . .").

206. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(5) (1982) ("A lawyer shall not . . . [e]ngage in conduct that is prejudicial to the administration of justice."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."); *id.* Rule 3.2 cmt. ("Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely . . . for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose."); *see also* United States v. Shaffer Equip. Co., 11 F.3d 450, 457 (4th Cir. 1993) ("[L]awyers, who serve as officers of the court, have the first line task of assuring the integrity of the process.").

Some courts have disbarred or suspended attorneys who advised clients to misstate facts. For example, in *Smith v. State*, 523 S.W.2d 1, 5-6 (Tex. Civ. App. 1975, writ ref'd n.r.e.), the court suspended for 32 months an attorney who advised a client to misstate facts. *Id.* at 5-6. The *Smith* court held that the attorney's act constituted professional misconduct "regardless of whether the act or acts in question constituted an offense under the [state penal code]." *Id.* at 6.

207. *See, e.g.*, *In re* McCarthy, 623 N.E.2d 473, 473 (Mass. 1993) (holding that an attorney who elicits false testimony from a client should be suspended from practice); *In re* Kerr, 548 P.2d 297, 301-02 (Wash. 1976) (en banc) (finding that knowingly participating in subornation of perjury warrants disbarment).

orning perjury,[208] obstruction of justice,[209] or conspiracy to obstruct justice.[210]

Interrupting the deposition to assist with an answer also violates Rule 30(c) of the Federal Rules of Civil Procedure, which provides that "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial."[211] No reported case has allowed an attorney to confer privately with a witness while a question was pending at trial.[212] Indeed, in *Perry v. Leeke*,[213] the United States Supreme Court stated:

> [W]hen a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying. He has an absolute right to such consultation before he begins to testify, but neither he nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel's advice.[214]

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208. *See, e.g.*, 18 U.S.C. § 1622 ("Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both."); *see also* Shannon P. Duffy & Kelvyn Anderson, *Client Told to Lie by P.I. Lawyer*, LEGAL INTELLIGENCER, Mar. 9, 1992, at 1, *available in* LEXIS, Legnew Library, Lglint File (indicating that the district attorney was investigating another attorney, who allegedly told his client to lie during a deposition, for suborning perjury); Dan Eggen, *Veteran Lawyer to Hand in License*, DES MOINES REG., Oct. 17, 1996, at 3, *available in* 1996 WL 6259868 (describing a 38-year legal veteran who pleaded guilty to suborning perjury and who surrendered his law license after forging a document and coercing a witness to lie about the forgery).

209. *See, e.g.*, 18 U.S.C. § 1512 (defining the criminality of knowingly persuading another person to influence, delay, or prevent the testimony of that person in an official proceeding).

210. *See, e.g.*, 18 U.S.C. § 1511 (defining the criminality of obstructing state or local law enforcement).

211. FED. R. CIV. P. 30(c); *accord* Ethicon Endo-Surgery v. United States Surgical Corp., 160 F.R.D. 98, 99 (S.D. Ohio 1995) (warning that conduct not permissible in the courtroom is not permissible during a deposition).

212. *See* Sharon E. Grubin, *Calling the Judge for a Ruling During a Deposition, or a View from the Other End of the Line: The Ten Commandments*, *in* TAKING AND DEFENDING DEPOSITIONS IN COMMERCIAL CASES 1994, at 155, 313-14 (PLI Litig. & Admin. Practice Course Handbook Series No. 507, 1994) ("During a civil trial, a witness and his or her lawyer are not permitted to confer at their pleasure during the witness's testimony. Once a witness has been prepared and has taken the stand, that witness is on his or her own.").

213. 488 U.S. 272 (1989).

214. *Id.* at 281. *Perry* was a criminal case whose holding was based on the Sixth Amendment. *See id.* at 272-73. If a criminal defendant has no constitutional right to confer with counsel while testifying, then a civil litigant will be hard-pressed to argue that he has a right to confer with counsel during a pending question. *See* Aiello v. City of Wilmington, 623 F.2d 845, 858-59 (3d Cir. 1980) (concluding that the civil defendant had failed to demonstrate reversible error that resulted from the district court's refusal to allow him to consult with his attorney while on cross-examination).

Under a fair reading of Federal Rule 30(c), the same holds true in the deposition setting.

Similarly, a private conference simply to calm a witness's nerves should be prohibited. Even if no improper coaching occurs, a witness may give different testimony once she has had an opportunity to speak with her attorney about the opposing counsel's question and to regain her poise and composure.[215] Although a deposition can be a traumatic event, an attorney has a duty to prepare the client properly for the psychological dimensions of a deposition.[216] This preparation might include subjecting the client to a mock cross-examination or explaining in detail strategies opposing counsel might employ during the proceeding.[217] If the client appears to be nervous during the deposition, the attorney could—if not done repeatedly or merely to harass or delay—try to calm the witness down while on the record.[218] This technique would avoid subjecting the deponent to suspicions that she had been coached during a private conference.[219]

A private conference called merely to impede opposing counsel's progress is also abusive and would violate both ethical and procedural rules.[220] Rule 1 of the Federal Rules of Civil Procedure states that the federal rules should be construed "to secure the just, speedy, and inexpensive determination of every action."[221] Further, Rule 30(d)(2) permits the court to sanction a deponent or counsel who impedes,

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215. *See Perry*, 488 U.S. at 282 (noting the importance of uninfluenced testimony on cross-examination as a measure of the accuracy and completeness of the story presented by the witness on direct). *But cf. id.* at 292 (Marshall, J., dissenting) (asserting that "a few soothing words from counsel to the agitated or nervous defendant facing the awesome power of the State might *increase* the likelihood that the defendant will state the truth on cross-examination"); Thompson v. State, 507 So. 2d 1074, 1075 (Fla. 1987) (holding that denying the defendant an opportunity to consult with counsel during a trial recess violated the Sixth Amendment because the denial left the criminal defendant "nervous, confused, and may have contributed to his performance on cross-examination").

216. *Cf.* MALONE & HOFFMAN, *supra* note 15, at 155 ("No matter how well you prepare the witness on the substance of his testimony, he will not present clear and persuasive testimony unless he remains calm enough to understand the questions and to respond appropriately and cautiously . . . .").

217. *See generally id.* ch. 13 (discussing effective methods to prepare a client to testify at a deposition).

218. *See id.* at 183 (stating that the attorney and witness can confer quickly during the deposition as many times as necessary, as long as this "right" is not abused).

219. *See infra* text accompanying note 255.

220. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-38 (1982) ("A lawyer should be courteous to opposing counsel . . . ."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1994) ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."); *id.* Rule 3.4(a) (forbidding a lawyer from "unlawfully obstruct[ing] another party's access to evidence"); *see also supra* note 206 and accompanying text.

221. FED. R. CIV. P. 1.

delays, or otherwise frustrates the deposition.[222] A conference of this sort would also be sanctionable under Rule 30(d)(2).[223]

A conference called to interrupt the examination would also violate the spirit of Federal Rule 30.[224] The changes implemented in 1993—specifically, the limits set on objections and instructions not to answer—were included to eliminate improper tactics used to prolong or disrupt depositions.[225] Although private conferences were not addressed in the 1993 amendments, private conferences can be as, if not more, disruptive than objections and instructions not to answer.[226] Accordingly, they too should be prohibited when held for an improper purpose.

Moreover, because this type of conference delays and hinders the deposition, the attorney's conduct would violate Model Rules 3.2, 4.4, and 8.4(d), or, in Model Code states, DRs 1-101(A), 7-101(A)(1), and 7-102(A)(5).[227]

Courts allow one exception to the prohibition against private conferences during pending deposition questions: when the defending attorney needs to discuss with the deponent the possible assertion of a privilege.[228] As many courts have recognized, preserving the attorney-client privilege is crucial to the continued viability of the adversarial system.[229] Moreover, an attorney must assist a client in

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222. FED. R. CIV. P. 30(d)(2).

223. *See id.*

224. *See* FED. R. CIV. P. 30(d) advisory committee notes on 1993 amendments (discussing how depositions are naturally prolonged and frustrating, and explaining the intent behind the 1993 amendments to help ameliorate these problems).

225. *See supra* text accompanying notes 29-31; *infra* Part IV.

226. *See* IMWINKELRIED & BLUMOFF, *supra* note 38, § 5:39, at 81 (describing the proper procedure for initiating a private conference and noting that conferences can become lengthy or abused).

227. These are discussed in *supra* Part I.B.

228. A few courts have issued local rules or standing orders that expressly permit conferences to discuss whether a privilege should be asserted to a pending question. *See supra* notes 41, 44-47, 49, 50, 52; *see also* MANUAL FOR COMPLEX LITIGATION (THIRD), *supra* note 51, § 41.38, at 518 ("Private conferences between deponents and their attorneys . . . are improper except for the purpose of determining whether a privilege should be asserted.").

229. *See* United States v. Zolin, 491 U.S. 554, 562 (1989) (noting the common law tradition of the attorney-client privilege); Upjohn Co. v. United States, 449 U.S. 383, 389, 391 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. . . . 'The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client . . . facilitates the full development of facts essential to proper representation of the client . . . .'" (citations omitted) (quoting the MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1)); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) (explaining that the attorney-client privilege is necessary "'in the interest and administration of justice'" (quoting Hunt v. Blackburn, 128 U.S. 464, 470 (1888))); *cf.* Hall v. Clifton Precision, 150 F.R.D. 525, 529 (E.D. Pa. 1993) ("Since the assertion of a privilege is a proper, and very important,

protecting privileged information.[230] In addition, Rule 30(d)(1) of the Federal Rules of Civil Procedure permits an attorney to instruct his client not to answer a question "when necessary to preserve a privilege."[231] Therefore, a corresponding rule concerning privilege in the context of private conferences is appropriate.[232]

The following suggested procedure should be followed when a question concerns privileged information. First, the defending attorney should note on the record—before conferring with the deponent—that a break is needed to discuss a possible privilege.[233] Second, upon returning from the conference, the defending attorney should state for the record whether a privilege is being asserted.[234] If a privilege is asserted, the basis for the privilege should be clearly stated.[235] For example, if the question calls for information about a communication between a doctor and a patient, the defending attorney should indicate that the conference is to determine whether the doctor-patient privilege should be asserted. If, after the conference,

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objection during a deposition, it makes sense to allow the witness the opportunity to consult with counsel about whether to assert a privilege.").

230. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1982) ("Preservation of Confidences and Secrets of a Client"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1994) ("Confidentiality of Information").

231. FED. R. CIV. P. 30(d)(1).

232. Two commentators explained the appropriateness of such a rule as follows:

> In fact, you cause no added interruption by this conference since the alternative is for you to lodge an objection and direct the witness not to answer, in order to protect her opportunity to find out if a privilege objection must be raised. After that objection and direction, you and the witness would have exactly the same conference.

MALONE & HOFFMAN, *supra* note 15, at 184-85.

233. *See id.* at 184 (discussing the appropriate procedure for requesting a break for the attorney to confer with his witness).

234. *See* FED. R. CIV. P. 26(b)(5) (explaining that a party must state expressly whether and what privilege is being asserted).

235. Rule 26(b)(5) of the Federal Rules of Civil Procedure provides:

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the . . . communications . . . not produced or disclosed in a matter that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

FED. R. CIV. P. 26(b)(5); *accord* D. MD. DISCOVERY GUIDELINES guide. 6(a)(i) (referring to Rule 26(b)(5) as the proper procedure for asserting a privilege); Hall v. Clifton Precision, 150 F.R.D. 525, 529-30 (E.D. Pa. 1993) (explaining that, when objecting to confer with the witness to determine whether to assert a privilege, the attorney should state on the record the subject of the conference); Standing Orders of the Court on Effective Discovery in Civil Cases, 102 F.R.D. 339, 353-54 (E.D.N.Y. 1984) (outlining the proper procedure for claiming a privilege during a deposition and noting that "the attorney asserting the privilege shall identify during the deposition the nature of the privilege . . . which is being claimed").

the attorney and client decide not to assert a privilege, the deponent should answer the pending question.[236]

Third, after the privilege has been asserted and explained, or after the question has been answered, the questioning attorney should be allowed to inquire about discussions held during the private conference.[237] If a privilege is asserted, the questioning attorney should be able to ask questions to test the basis for that privilege.[238] Proper areas of inquiry should include the applicability of the asserted privilege, possible exceptions to the privilege, possible waiver of the privilege, and circumstances that might overcome a claim of privilege.[239] The attorney should also ask if anything other than a privilege was discussed.

If a privilege is not asserted after the conference, the questioning attorney should be able to ask questions that will allow her to determine whether a possible privilege was actually discussed or whether the claim of possible privilege was merely a smokescreen used to hide

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236. In 1996, a Florida state court used a similar procedure:

> Where any attorney defending a deposition in this matter wishes to confer with a witness as to whether privileged matters may be revealed in response to a pending question, that attorney shall specify on the record the reason for any desired conference with the witness, including why privileged material may be revealed. On the occurrence of same, the attorney propounding the question shall have the following options:
>
> 1. Amending the pending question;
> 2. Moving to another line of inquiry with the option of raising the question or line of questioning later; or
> 3. Allowing the witness to decide to take a break in the deposition proceedings to confer with his or her attorney for the sole purpose of determining whether privileged material may be revealed in response to the pending question.

Operator Serv. Co. v. Croteau, No. CL96-1672 AI (Fla. Cir. Ct., 15th Jud. Dist., Palm Beach County Aug. 5, 1996) (Order on Motions to Compel, for Sanctions for Discovery Abuse, and to Appoint a Special Master to Supervise Deposition Proceedings) (on file with author).

237. *See* FED. R. CIV. P. 26(b)(5) (explaining that, when a party withholds information on the grounds that it is privileged, the other party shall be allowed enough information to assess the applicability of the privilege); D. MD. DISCOVERY GUIDELINES guide. 6(a)(ii) (noting that the person seeking disclosure should have "reasonable latitude" to seek relevant information concerning the assertion of a privilege).

238. *See, e.g.*, S.D. IND. L.R. 30.1 (giving the questioning attorney, after a claim of privilege is raised, "reasonable latitude . . . to question the deponent to establish relevant information concerning the legal appropriateness of the assertion of the privilege"); D. MD. DISCOVERY GUIDELINES guide. 6(a)(ii) (same).

239. D. MD. DISCOVERY GUIDELINES guide. 6(a)(ii); *see also* Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., No. 91 Civ. 4544 (MGC), 1994 U.S. Dist. LEXIS 4024, at *7 (S.D.N.Y. Apr. 4, 1994) (mem.) ("If privilege is asserted, the person claiming privilege must answer the predicate questions necessary to establish the applicability of the privilege.").

improper coaching.[240] If the deponent indicates that matters other than whether to assert a privilege were discussed, or if the questioning attorney can determine from the question and answer that a privilege would not reasonably be at issue, then the deponent should—if asked—be required to reveal the substance of discussions held during the conference.[241]

Although this suggestion will disturb some attorneys, permitting the examining attorney to learn the substance of conversations conducted during an improper private conference is akin to—and maybe even a logical extension of—the crime-fraud exception to the attorney-client privilege. This exception acts to "assure that the 'seal of secrecy' does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime."[242] The exception has been applied in circumstances when an attorney encourages a client to give false testimony[243] or otherwise to suppress the truth.[244] Some courts have indicated that other substantial abuses of the attor-

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240. *See, e.g.*, Hall v. Clifton Precision, 150 F.R.D. 525, 532 (E.D. Pa. 1993) ("Any conferences which occur . . . are a proper subject for inquiry by deposing counsel to ascertain whether there has been any witness-coaching and, if so, what.").

241. *See id.* at 529 n.7 (indicating that if prohibited conferences occur, the substance of the conversation is not covered by the attorney-client privilege and that "any such conferences are fair game for inquiry by the deposing attorney").

242. United States v. Zolin, 491 U.S. 554, 563 (1989) (citation omitted) (quoting Clark v. United States, 289 U.S. 1, 15 (1933) and O'Rourke v. Darbishire, [1920] App. Cas. 581, 604 (P.C. 1920)); *accord Clark*, 289 U.S. at 15 ("The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told."); EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 251 (3d ed. 1997) ("Society . . . has no interest in facilitating the commission of contemplated but not yet committed crimes, torts, or frauds. On the contrary, it has every interest in forestalling prohibited conduct."); *cf. In re* Grand Jury Matter No. 91-01386, 969 F.2d 995, 997 (11th Cir. 1992) (instructing that the attorney-client privilege is not all-inclusive and is construed narrowly as a matter of law in order not to exceed the means necessary to support the policy it promotes).

243. *See, e.g.*, White v. American Airlines, Inc., 915 F.2d 1414, 1424 (10th Cir. 1990) (abrogating the attorney-client privilege when an attorney urged a client to commit perjury); United States v. Townsley, 843 F.2d 1070, 1086 (8th Cir.) (stating emphatically that the attorney-client privilege did not apply to a conversation in which the attorney coached witnesses to lie to the grand jury), *modified on other grounds*, 856 F.2d 1189 (8th Cir. 1988); United States v. Gordon-Nikkar, 518 F.2d 972, 975 (5th Cir. 1975) (holding that plans to commit perjury are beyond the scope of the attorney-client privilege).

244. *See, e.g.*, United States v. Laurins, 857 F.2d 529, 540 (9th Cir. 1988) (holding obstruction of justice to be a sufficiently serious offense to defeat the attorney-client privilege); United States v. Sutton, 732 F.2d 1483, 1494 (10th Cir. 1984) (finding that the attorney-client privilege did not protect a client's statements to his attorney that he intended to destroy records sought by the government); *In re* A.H. Robins Co., 107 F.R.D. 2, 14-15 (D. Kan. 1985) (applying the crime-fraud exception when the attorney and the client allegedly attempted to manufacture false evidence).

ney-client relationship may negate the privilege.[245] Thus, extending the rationale to improper deposition conferences is not a large leap and would help to curb the abusive use of such conferences.[246]

Presumptively prohibiting private conferences while a question is pending makes sense. Many breaks during pending questions are called for an improper motive—either to delay or interrupt the deposition or improperly to coach the witness.[247] Not permitting the attorney-client privilege to shield such improperly called conferences would, in all probability, reduce their likelihood of occurring.[248] On the other hand, the proposed rule still preserves true privileges.[249]

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245. IT&T Corp. v. United Tel. Co., 60 F.R.D. 177, 180 (M.D. Fla. 1973) ("The privilege may be overcome, not only where fraud or crime is involved, but also where there are other substantial abuses of the attorney-client relationship."); *cf.* Central Constr. Co. v. Home Indem. Co., 794 P.2d 595, 598 (Alaska 1990) ("'Acts constituting fraud are as broad and as varied as the human mind can invent. Deception and deceit in any form universally connote fraud. Public policy demands that the "fraud" exception to the attorney-client privilege . . . be given the broadest interpretation.'" (ellipsis in original) (quoting *In re* Callan, 300 A.2d 868, 877 (N.J. Super. Ct.), *aff'd*, 312 A.2d 881 (N.J. Super. Ct. App. Div. 1973), *rev'd on other grounds*, 331 A.2d 612 (N.J. 1975))).

246. *Cf.* G. Michael Halfenger, Note, *The Attorney Misconduct Exception to the Work Product Doctrine*, 58 U. CHI. L. REV. 1079, 1079 (1991) (arguing that the work product doctrine should not be applied when the evidence sought is generated by attorney misconduct). *But cf.* John A. Rupp, *Discovery 2000*, FOR DEF., Sept. 1996, at 9, 9 (describing the Discovery 2000 Project of the Defense Research Institute and indicating that a Task Force has been appointed to identify ways "to maintain and strengthen the attorney-client and work product privileges" because "[t]hese traditional privileges have been challenged by plaintiffs' expanding attempts to redefine the crime-fraud exception").

247. *See* FRANCIS H. HARE, JR. ET AL., FULL DISCLOSURE: COMBATING STONEWALLING AND OTHER DISCOVERY ABUSES 105 (1995) (acknowledging that objections are used to deprive examiners of discovery opportunities and that objections are employed to coach witnesses).

248. Harnessing one evil sometimes generates another. One evil that might be generated by this rule if counsel misused it would be satellite litigation over what must be revealed to the questioning attorney. Some have observed:

> The crime-fraud exception to the attorney-client privilege is one of the most formidable weapons in the plaintiff's arsenal. As discovery battles in major litigation have escalated in scope and significance, the opportunity to breach the twin bastions of the privilege and the work-product doctrine represents a potentially profound tactical advantage. Moreover, the relatively minimal showing required in some jurisdictions to invoke the exception makes it an irresistible target of creative counsel.

Brian A. Foster et al., *The Crime-Fraud Exception to the Attorney-Client Privilege*, FOR DEF., Sept. 1996, at 27, 27.

249. If the deponent's attorney objects to this procedure, the parties might submit the matter to the court. The court can hold an in camera review to determine if the private conference concerned whether to assert a privilege. *Cf.* United States v. Zolin, 491 U.S. 554, 565-73 (1989) (suggesting that an in camera review might be appropriate under some circumstances); Foster et al., *supra* note 248, at 31 (indicating that most jurisdictions permit some form of in camera review).

In addition, prohibiting conferences during pending questions might actually cause attorneys to prepare their clients better. Too many lawyers spend only a few minutes truly preparing their witnesses for depositions.[250] And too often, these "preparation" sessions consist of nothing more than providing the client with "tips" about how to answer deposition questions—for example, "answer only the question asked" and "don't speculate."[251] Because being deposed can be a traumatic experience,[252] clients deserve the best preparation an attorney can give. Before the deposition, attorneys should spend time with the client reviewing relevant documents, recounting the facts, and discussing deposition procedures.[253] The deposition is not a place for a client to hear this information for the first time.[254]

Moreover, private conferences merely call the deponent's credibility into question. As one commentator noted, "Because witness preparation is ordinarily conducted in private, it is difficult for the lawyer and witness to avoid the appearance that they have invented a convenient story for the jury."[255] Thus, when "preparation" occurs during the deposition, it merely casts doubt on the witness's veracity and credibility.[256]

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250. *See* MALONE & HOFFMAN, *supra* note 15, at 155 ("Only [about] . . . twenty percent of attorneys realize that [commonly used preparation] approaches . . . [do not deal] with the primary factor affecting the witness's performance at the deposition, which is his level of confidence about his ability to perform in the deposition environment."); Briscoe R. Smith & Edward D. Cavanagh, *Preparing a Witness to Testify in a Commercial Case*, LITIGATION, Summer 1992, at 36, 36 ("Often a lawyer will rely on a quick meeting with a witness in the adversary's waiting room before a deposition, expecting to control damage during the deposition by a barrage of speaking objections, directions not to answer, off-the-record conferences, and other diversions."); *cf.* N.D. ILL. L.R. 5.21 cmt. (proposed May 24, 1995) (rejected Feb. 24, 1997) (on file with author) ("Serious problems arise when counsel taking or defending depositions are unprepared. The result is just the opposite of what the Federal Rules of Civil Procedure are designed to accomplish.").

251. *See, e.g.*, Shartel, *supra* note 193, at 12 ("'Too many lawyers believe that preparation of a witness for a deposition consists of reading 20 rules on depositions . . . . It's not enough to say "don't volunteer anything" and "listen to the questions."'").

252. *See* MALONE & HOFFMAN, *supra* note 15, at 156-58, 180 (describing the anxieties of the deposed witness).

253. *See id.* ch. 13 ("Preparing the Witness to Be Deposed").

254. *See* Johnson, *supra* note 6, at 64 (explaining that letting a witness go in "cold and blind" is a "deadly" deposition sin).

255. John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 279 (1989); *accord* Standing Orders of the Court on Effective Discovery in Civil Cases, 102 F.R.D. 339, 382 (E.D.N.Y. 1984) ("[T]here is a widespread belief at the bar that such conferences . . . are abused by some attorneys to suggest testimony to the witness.").

256. *See* Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, 657 F.2d 890, 894 (7th Cir. 1981) (relating that defendants believed plaintiffs' counsel had coached a witness during 127 private conferences); IMWINKELRIED & BLUMOFF, *supra* note 38, § 6:27, at 55 ("The more frequently you confer with the deponent, the stronger is the appearance

Turning to the hypothetical, the first break in Ms. Sawyer's deposition was improper because it was called to assist the client, not to assert a privilege. In many jurisdictions, courts would conclude that the deponent's attorney acted improperly.[257] In some jurisdictions, he would have violated specific rules prohibiting conferences during pending questions.[258] In other jurisdictions, depending on what occurred during the conference, he might have violated ethical or criminal rules that prohibit witness coaching.[259] Of course, given the dearth of authority on private conferences during depositions, courts in some jurisdictions might conclude that he did not violate any rule or obligation, or might simply warn him not to repeat his conduct in future depositions.[260]

Apart from violating rules, Mr. Palmer may have lost his client's confidence, if Ms. Sawyer perceived that she had not been adequately prepared to testify.[261] Further, under the rule proposed in this Article, the questioning attorney would have been permitted to learn the substance of communications that occurred during this conference, thus further deteriorating the deponent's confidence in her attorney's competence.[262]

The questioning attorney, Ms. Davis, had several options about how to proceed after this first recess. After only one interruption, running to court may not have been the best option.[263] Ms. Davis did, however, follow the rule advocated by most experts—object and build a record of opposing counsel's conduct.[264] She asked that the conference be postponed until the witness answered, and when the deponent and her counsel left the room, she directed the court reporter to note the conference on the record and to time the conference.[265] If she ever had to seek judicial assistance, the record of misconduct would be clear.

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of the evil that you are using the conferences as a pretext to coach the deponent about the answers to the opposing attorney's questions.").

257. *See supra* notes 183-184.

258. *See supra* notes 183-184, 187 and accompanying text.

259. *See supra* notes 204-210, 227 and accompanying text.

260. *See supra* notes 101, 111-113 and accompanying text.

261. *See supra* notes 250-254 and accompanying text.

262. *See supra* notes 235-241 and accompanying text.

263. *See* IMWINKELRIED & BLUMOFF, *supra* note 38, § 5:39, at 81 (noting that "it is a mistake to run to the law-and-motion judge for an order after the first private conference between the deponent and the opposing attorney").

264. *See, e.g., id.* ("Your first response to the opposing attorney's conduct must be to build a good record.").

265. *Cf. id.* ("Time the conference; if it is lengthy, have the record reflect the duration of the conference.").

Another option would have been for Ms. Davis to let opposing counsel know she disapproved of his tactics and signal the deponent that something might be amiss. One commentator suggests the following when the deponent's counsel demands a recess while a question is pending:

> Offer[ ] the opposing counsel and his witness a five- or ten-minute recess by saying, "If you haven't had a chance to brief your witness in preparation for this deposition, why don't you go outside and talk to him now so that you can come back into the conference room and then we can proceed with the deposition without interruption."[266]

Such a statement might embarrass the attorney enough to stop future conferences.

In addition to building a record or chastising opposing counsel, Ms. Davis had many other options available. For example, Ms. Davis could have insisted that the parties stipulate to schedule breaks in advance and not to deviate from the schedule absent mutual agreement.[267] Or, when opposing counsel insisted on the conference, she could have stopped the deposition and immediately called a judge or magistrate to obtain a ruling prohibiting private conferences during pending questions and requiring the deponent to disclose conversations held during improper conferences.[268] Alternatively, at the con-

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266. MARK A. DOMBROFF, DISCOVERY § 8.20, at 309 (1986).

267. *See* WILLIAM H. FORTUNE ET AL., MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK: THE LIMITS OF ZEALOUS ADVOCACY § 6.7.5, at 265 (1996) (suggesting that scheduling breaks in advance will keep deponents' attorneys from derailing depositions).

268. The first rule before contacting a judge or magistrate by phone is to know whether she looks favorably on this type of dispute resolution. *Compare* Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., No. 91 Civ. 4544 (MGC), 1994 U.S. Dist. LEXIS 4024, at *7-8 (S.D.N.Y. Apr. 4, 1994) (mem.) ("Disputes . . . shall be brought to the attention of the court in the first instance by telephone conference without adjourning the deposition.") *and* Standing Orders of the Court on Effective Discovery in Civil Cases, 102 F.R.D. 339, 375 (E.D.N.Y. 1984) (declaring that when discovery disputes arise during a deposition, the attorneys or affected parties "shall notify the court by telephone and request a telephone conference with the court to resolve such dispute") *with* Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 146 F.R.D. 205, 226 (Fed. Cir. 1992) (Lamberth, J., panelist, commenting) ("I don't resolve [discovery disputes] by telephone. I want to see the lawyers' eyeballs when I resolve it and about 70 percent of the phone calls are resolved before the eyeballs get before me."). The United States District Court for the Eastern District of Texas, in connection with its Civil Justice Expense and Delay Reduction Plan, established a discovery hotline to provide instant rulings on deposition disputes. United States District Court for the Eastern District of Texas, *Civil Justice Expense and Delay Reduction Plan*, art. 6, ¶ 1, *reprinted in* TEXAS RULES OF COURT: FEDERAL 386 (West 1997); *see also* Cary, *supra* note 159, at 593-94 (suggesting that other districts implement similar hotlines). *But see Deposition Practice in the Late '90s: 'Call Waiting'?*, N.J. LAW., June 10, 1996, at 6, *available in* LEXIS, Legnew Library, Allnws File (criticizing a

clusion of the deposition, she could have filed a motion to compel, asking that the deponent be required to divulge the substance of the private conversation.[269] Some courts would have permitted the questioning attorney to explore the substance of conversations held during the conference.[270] Other courts, on a motion by the questioning attorney, might have sanctioned the deponent's counsel for delaying or impeding the deposition, especially if the conduct were repeated during the deposition.[271]

To protect her client from similar misconduct in the future, PharTech's counsel might consider videotaping the deposition.[272] It

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proposed rule that would have permitted attorneys to seek telephone resolution of disputes that arise during depositions).

269. *See* FED. R. CIV. P. 37(a)(2)(B) (authorizing the discovering party to move for an order compelling an answer).

270. *See, e.g.*, Langer v. Presbyterian Med. Ctr., Civil Action Nos. 87-4000, 91-1814, 88-1064, 1995 U.S. Dist. LEXIS 2199, at *35 (E.D. Pa. Feb. 17, 1995) ("It is well-established that the 'structural framework,' or 'external trappings' of the attorney-client relationship, as opposed to the substantive communications made during the relationship, are not privileged."), *vacated on reconsideration*, 1995 U.S. Dist. LEXIS 9448 (E.D. Pa. June 30, 1995); *In re* ML-Lee Acquisition Fund II, 848 F. Supp. 527, 567 (D. Del. 1994) (permitting the questioning attorney to inquire into the topic areas of private conferences); *supra* note 184 (identifying local rules covering private conferences). At a minimum, counsel is entitled to know whether a conference occurred; that fact is not privileged. *See* IMWINKELRIED & BLUMOFF, *supra* note 38, § 5:39, at 82.

271. Depending on the circumstances, sanctions in federal court might be available. *See* 28 U.S.C. § 1927 (1994) (providing sanctions for unreasonably or vexatiously multiplying the proceedings); FED. R. CIV. P. 30(d) (providing sanctions for impeding or delaying deposition examination); FED. R. CIV. P. 37 (providing sanctions for failure to obey discovery orders). In addition, courts have an inherent power to sanction abusive litigation practices. *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 42-44 (1991) (upholding a district court's exercise of its inherent judicial power to sanction improper conduct); Phillips v. Manufacturers Hanover Trust Co., No. 92 Civ. 8527 (KTD), 1994 U.S. Dist. LEXIS 3748, at *5-6 (S.D.N.Y. Mar. 29, 1994) (discussing the parameters of the court's inherent power to sanction misconduct). Sanctions for deposition conduct are not available under Federal Rule 26(g). *See* Dobkin v. Johns Hopkins Univ., No. HAR 93-2228, 1995 U.S. Dist. LEXIS 4458, at *5-6 (D. Md. Mar. 24, 1995) ("Rule 26(g) does not authorize sanctions for instructing a deponent not to answer questions at a deposition. Sanctions are available under this rule only where an attorney signs a discovery request, response, or objection in violation of the standards set forth in the rule."); GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 518 (2d ed. 1994) (noting that the scope of Rule 26(g) includes "all discovery requests, responses or objections served or filed in federal district court and to Rule 26(a)(1) and (3) disclosures"); *cf.* Cary, *supra* note 159, at 588-93 (discussing sanctions available for attorney misconduct during depositions, including Rule 30, Rule 37, 28 U.S.C. § 1927, and the court's inherent judicial power to regulate conduct, but excluding, by implication, Rule 26(g)).

272. *See, e.g.*, Milwaukee Concrete Studios, Ltd. v. Greeley Ornamental Concrete Prods., Inc., 140 F.R.D. 373, 379-80 (E.D. Wis. 1991) (authorizing the use of videotape in an oral deposition when confrontation and controversy between counsel were obstacles to efficient discovery); David M. Balabanian, *Medium v. Tedium: Video Depositions Come of Age*, *in* THE LITIGATION MANUAL, *supra* note 23, at 232. *See generally* Hugh B. Lewis, Survey, *The Video*

is amazing how a camera can sometimes change behavior for the better.[273] She might also consider requesting a discovery conference with the presiding judge or assigned magistrate judge,[274] for such a conference might curtail an opponent's unprofessional behavior merely by bringing it to the judge's attention. Alternatively, she might request a protective order[275] or standing order[276] that addresses deposition conduct and specifically prohibits conferences during pending questions.[277] Further, she might request that a special master or magistrate be appointed either to attend future depositions or to be available to handle disputes as they arise during the deposition.[278] As an

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Deposition as a Civil Litigation Tool, 13 CAMPBELL L. REV. 375 (1991) (reporting the findings of a research project on the video deposition's place in litigation).

273. *See, e.g.*, *Milwaukee Concrete*, 140 F.R.D. at 379-80 (noting that "[i]mplicit in [the defendant's] motion is a belief that the attorneys will behave themselves if they are aware that any misbehavior is being recorded on videotape"); Balabanian, *supra* note 272, at 232 (observing that video depositions can suppress attorney misbehavior); Lewis, *supra* note 272, at 376 (commenting that using video depositions "affects the demeanor of the attorneys").

274. *See* FED. R. CIV. P. 16 (indicating that discovery is an appropriate topic for a pretrial conference); Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, 657 F.2d 890, 903 (7th Cir. 1981) (suggesting that the parties seek a discovery conference to iron out discovery disputes); Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 146 F.R.D. 205, 226 (Fed. Cir. 1992) (Lamberth, J., panelist, commenting) (recommending that lawyers request Rule 16 conferences to resolve discovery disputes).

275. *See* FED. R. CIV. P. 26(c).

276. *See* MANUAL ON COMPLEX LITIGATION (THIRD), *supra* note 51, § 41.38(5)(b), at 518 (suggesting a standing order for effective discovery that deals with, among other things, handling objections and directions not to answer).

277. *See id.* § 41.38(5)(c), at 518 ("Private conferences between deponents and their attorneys in the course of interrogation are improper except for the purpose of determining whether a privilege should be asserted.").

278. *See, e.g.*, D. COLO. L.R. 30.1C(B) (indicating that a court may appoint a special master, at the expense of the party or attorney engaging in abusive conduct, to attend future depositions and report to the court); Mercer v. Gerry Baby Prods. Co., 160 F.R.D. 576, 577, 579 (S.D. Iowa 1995) (appointing a special master to manage discovery, to provide opportunities for alternative dispute resolution, and to foster settlement discussions); Carlucci v. Piper Aircraft Corp., 102 F.R.D. 472, 476 (S.D. Fla. 1984) (mem.) (appointing a special master to oversee all discovery proceedings when the personal animosity between lawyers disrupted the discovery process); Palm Beach County Sch. Bd. v. Morrison, 621 So. 2d 464, 468 (Fla. Dist. Ct. App. 1993) (appointing a special master to preside over the continuation of a deposition marked by many objections and instructions not to answer); Acri v. Golden Triangle Mgmt. Acceptance Co., 142 PITT. LEGAL J. 225, 230 (Pa. Ct. C.P. Allegheny County 1994) (asserting that it is appropriate to appoint a discovery master to supervise a deposition in an extreme case); *cf.* Miles W. Lord, *Discovery Abuse: Appointing Special Masters*, 9 HAMLINE L. REV. 63, 66 (1986) (discussing the use of special masters to help prevent discovery abuse in massive document productions).

extreme measure, she might request that future depositions be taken at the courthouse.[279]

Unlike the first conference, the conference called during the 3:05 p.m. session appears to be appropriate, because it was held to discuss a possible privilege covering the pending question. Although the excerpt does not show what happened after the conference, deponent's counsel acted properly before the conference. He stated on the record that he wished to discuss raising the doctor-patient privilege with his client. Therefore, questioning counsel knew what was going to be discussed during the private conference.

When Ms. Sawyer and Mr. Palmer returned to the room, Mr. Palmer should have indicated whether a privilege was being asserted. If it were, counsel should have again stated the basis for the privilege.[280] Although questioning counsel could not have asked about privileged information,[281] she could have probed about whether the privilege was properly raised.[282] She also could have asked whether any other matters were discussed.[283] If they were, she could have then explored those matters—because, under the rule proposed in this Article,[284] discussions about other matters would have been improper and thus would have lost the protection of the attorney-client privilege.

B. Witness-Initiated Conferences and Conferences to Discuss Documents

During the 11:15 a.m. session, questioning counsel showed the deponent a document and asked whether she had ever seen the document. Before answering, the witness asked to confer with her attorney. Should witness-initiated conferences be treated differently than

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279. *See, e.g.*, D. COLO. L.R. 30.1C(B) (describing the court's ability to require that depositions be taken at the courthouse or in the master's office so that disputes can be decided immediately); Goldman v. Banque de Paris et des Pays-Bas, 99 F.R.D. 554, 555 (S.D.N.Y. 1983) (ordering a deposition to be completed at a courthouse so that a judge could be "available for an immediate ruling as to any problem that might arise"). *But see Eggleston*, 657 F.2d at 902-03 ("Depositions cannot be taken in the judge's reception room so that the judge always will be readily available to either counsel.").

280. *See supra* note 235 and accompanying text.

281. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.4 (1994); *see also* Valassis v. Samelson, 143 F.R.D. 118, 124-25 (E.D. Mich. 1992) ("[Model Rule 4.4] has been interpreted as preventing an attorney from inquiring about privileged matters." (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 359 (1991); 2 HAZARD & HODES, *supra* note 131, § 4.2:107, at 738)).

282. *See supra* note 238 and accompanying text.

283. *See supra* note 241 and accompanying text.

284. *See supra* notes 235-241 and accompanying text.

attorney-initiated conferences? Should witnesses be allowed to confer with counsel before answering questions about a document?

The answer to both questions is no. Courts have not been particularly concerned with who initiates the conference. In *Hall*, the court explained:

> To allow private conferences initiated by the witness would be to allow the witness to listen to the question, ask his or her lawyer for the answer, and then parrot the lawyer's response. Again, this is not what depositions are all about—or, at least, it is not what they are supposed to be all about. If the witness does not understand the question, or needs some language further defined or some documents further explained, the witness can ask the deposing lawyer to clarify or further explain the question. After all, the lawyer who asked the question is in a better position to explain the question than is the witness's own lawyer. There is simply no qualitative distinction between private conferences initiated by a lawyer and those initiated by a witness. Neither should occur.[285]

The rule articulated in *Hall* makes sense. Again referencing the trial context, the witness is not allowed to break and speak with counsel while she is testifying.[286] This type of restriction does not violate the witness's constitutional rights.[287] Therefore, to allow a witness to call a break during a pending question would invoke most of the same ethical and legal concerns as an attorney-initiated conference. In addition, as the *Hall* court noted, if attorney-initiated conferences were prohibited but witness-initiated conferences were permitted, smart counsel would simply encourage or signal the witness when to break.[288] Thus, allowing witness-initiated conferences would, to some attorneys, become a very tempting loophole.

Courts also have not distinguished between conferences to discuss documents and conferences to discuss any other type of ques-

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285. Hall v. Clifton Precision, 150 F.R.D. 525, 528-29 (E.D. Pa. 1993) (footnote omitted); *accord* N.D. ILL. L.R. 5.23(A) (proposed May 24, 1995) (rejected Feb. 24, 1997) (on file with author) ("At any time during a deposition, examining counsel may instruct the deponent to ask examining counsel, rather than the deponent's own counsel, for clarification, definitions of any words, questions, or documents presented during the course of the deposition.").

286. *See supra* text accompanying note 214.

287. *See infra* notes 313-315 and accompanying text. *But cf.* Standing Orders of the Court on Effective Discovery in Civil Cases, 102 F.R.D. 339, 382-83 (E.D.N.Y. 1984) (suggesting that only attorney-initiated conferences are prohibited because "ordinarily witness-initiated private conferences are for *bona fide* purposes").

288. *Hall*, 150 F.R.D. at 528-29.

tion.[289] In other words, if a question is pending, a conference should not be called, except to assert a privilege. As the *Hall* court indicated, the questioning attorney "is entitled to have the witness, and the witness alone, answer questions about the document . . . . There is no valid reason why the [witness's] lawyer and the witness should have to confer about the document before the witness answers questions about it."[290]

A similar ruling was issued in *In re Amezaga*,[291] in which an attorney instructed his client not to answer deposition questions concerning exhibits that were not produced before the deposition began.[292] Following *Hall*'s lead, the court determined that "[w]hile the deposing attorney should furnish counsel with a copy of the document, there is no requirement that the witness and his lawyer discuss the document prior to the witness being questioned."[293] The court explained that the attorney did not present any valid reason—such as needing to discuss whether a privilege should be asserted—for conferring with the deponent, and the court therefore imposed monetary sanctions on the deponent's attorney for this and other similar conduct.[294]

Applying these principles to the Sawyer deposition, the witness-initiated break to discuss a document was improper for the same reasons the first break was improper.[295] It delayed the deposition and presented an opportunity for the attorney to coach his witness and possibly alter the truth. In addition, because the break was not called to discuss a possible privilege covering the pending question,

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289. *See, e.g., id.* at 529 ("The same reasoning [that prohibits lawyers and witnesses from holding conferences during depositions and recesses] applies to conferences about documents shown to the witness during the deposition.").

290. *Id.*; *accord* Damaj v. Farmers Ins. Co., 164 F.R.D. 559, 560-61 (N.D. Okla. 1995) (ruling that the deponent and the deponent's counsel are prohibited from discussing "documents presented to the [deponent] during the deposition prior to the [deponent] answering questions concerning the documents"). *But cf. In re* Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014, 1995 WL 925664, at *1 (E.D. Pa. Oct. 25, 1993) (Pretrial Order No. 153) ("Deposing counsel shall, ten days prior to the deposition, furnish deponent's counsel with all of the documents he or she expects to question the deponent about during the deposition.").

291. 195 B.R. 221 (Bankr. D.P.R. 1996).

292. *Id.* at 227. Opposing counsel represented that the documents used at the deposition were previously produced by the deponent. *Id.*

293. *Id.*

294. *Id.* at 228-29. The deponent's counsel "engaged in extensive and unnecessary colloquy, asserted groundless objections, improperly objected and took every opportunity to interrupt and argue with opposing counsel." *Id.* at 228.

295. *See supra* notes 191-196 and accompanying text.

PharTech's counsel should have the right to inquire what was discussed during the conference.[296]

C. *Private Conferences During Long Breaks*

The last break in the Sawyer deposition occurred late on the first day, when the attorneys decided to continue the deposition on another day. The deposition resumed about one week later. At the continuation, PharTech's attorney asked whether the deponent had conferred with her attorney during the long hiatus. The deponent's attorney objected and claimed that any communications that might have occurred during the recess were protected by the attorney-client privilege.

The propriety of private conferences during regularly scheduled breaks poses a more difficult question than conferences held while a question is pending. A conference during a scheduled break does not interrupt or delay the deposition.[297] Thus, it would not violate the spirit of the federal procedural rules that condemn delaying tactics.[298] Moreover, a conference during a normal break would not affect the answer to a pending question.[299] On the other hand, such a conference might permit an attorney to suggest changes to prior answers or coach the witness about questions that the attorney could now anticipate based on earlier questions.[300] Consequently, the potential exists that the conference might be used to violate ethical or legal rules against witness coaching.[301] Conversely, prohibiting a client from

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296. *See supra* notes 233-239 and accompanying text.

297. *See supra* note 184.

298. Such conferences might, however, violate the letter of the law in some jurisdictions. *See* Hall v. Clifton Precision, 150 F.R.D. 525, 529 (E.D. Pa. 1993) ("Private conferences are barred during the deposition, and the fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules."); *supra* note 184 (detailing the limited circumstances in which a witness may confer with counsel during a deposition, as discussed in various local rules).

299. *Cf.* Federal Bar Council, Committee on Second Circuit Courts, A Report on the Conduct of Depositions, 131 F.R.D. 613, 627 (1990) (arguing that a rule declaring attorney-client conferences during depositions presumptively improper "would impose harsh, rigid limitations on attorney/client interchange that are neither needed [nor] fair"). *But see Hall*, 150 F.R.D. at 529 (indicating that clever lawyers could use normal breaks during depositions to discuss strategies for responding to pending questions).

300. *See Hall*, 150 F.R.D. at 529 ("A clever lawyer or witness who finds that a deposition is going in an undesired or unanticipated direction could simply insist on a short recess to discuss the unanticipated yet desired answers.").

301. *See id.* at 528 (noting that "a lawyer must accept the facts as they develop" and holding that a lawyer and a client do not have an absolute right to confer during a deposition on the ground that "[t]here is no proper need for the witness's own lawyer to act as an intermediary . . . and help[ ] the witness to formulate answers"); *cf.* Geders v. United States,

talking to her attorney during a long break might penalize the client unnecessarily.[302]

In the criminal trial context, most courts have held that a testifying witness may confer with her attorney, if the break lasts overnight or longer.[303] In *Geders v. United States*,[304] for example, the judge presiding over a criminal trial instructed the defendant's attorney not to speak with his client, who was in the process of being cross-examined, "about anything" during the evening recess.[305] Although the attorney objected to this instruction, the trial judge reasoned that the attorney would not have been permitted to confer with his client had the recess not been called.[306]

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425 U.S. 80, 90 n.3 (1976) ("An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it.").

302. *See* Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1119 (5th Cir. 1980) (holding that an order prohibiting a civil defendant from conferring with counsel for seven days, including overnight recesses, violated the party's due process right to retain counsel).

303. *See infra* text accompanying notes 304-311 (discussing Geders v. United States, 425 U.S. 80, 91 (1976)); *see also* Mudd v. United States, 798 F.2d 1509, 1510 (D.C. Cir. 1986) ("[A]n order that denies a criminal defendant the right to consult with counsel during a substantial trial recess, even though limited to a discussion of testimony, is inconsistent with the [S]ixth [A]mendment of the Constitution."); United States v. Romano, 736 F.2d 1432, 1435-39 (11th Cir. 1984) (holding that the trial court violated the defendant's Sixth Amendment right to counsel by barring him from discussing his testimony with his attorney during a five-day recess), *vacated*, 755 F.2d 1401 (11th Cir. 1985); United States v. Venuto, 182 F.2d 519, 522 (3d Cir. 1950) (overruling the trial court's order that a defendant could not communicate with counsel over an 18-hour overnight recess from the defendant's cross-examination); Ashurst v. State, 424 So. 2d 691, 691-93 (Ala. Crim. App. 1982) (striking down an order barring a defendant from conferring with counsel during any recess); Bova v. State, 410 So. 2d 1343, 1345 (Fla. 1982) (finding that no matter how brief the recess, a defendant in a criminal proceeding must have access to his attorney); People v. Hagen, 446 N.Y.S.2d 91, 91 (App. Div. 1982) (mem.) (finding that the trial court violated the defendant's Sixth Amendment right to counsel by barring the defendant from discussing his ongoing testimony with his attorney during an overnight recess); *cf.* Bailey v. Redman, 657 F.2d 21, 22-25 (3d Cir. 1981) (per curiam) (holding that the trial court's order prohibiting the defendant from discussing ongoing testimony with his attorney during an overnight recess did not violate the Sixth Amendment because counsel did not object to the order and did not present evidence that the defendant would have conferred with counsel but for the order).

304. 425 U.S. 80 (1976).

305. *Id.* at 82. The recess lasted about 17 hours. *Id.* at 88.

306. *Id.* at 83 n.1. The following exchange occurred between the judge, the defendant's attorney (Mr. Rinehart), and the prosecutor (Mr. Blasingame):

> MR. BLASINGAME: Has this witness been instructed now that he is not to talk to anyone whatsoever, including his attorneys . . . ?
>
> MR. RINEHART: If he were instructed not to talk to his attorney, I feel that it would be improper. I think I always have the right to talk to my client.
>
> . . . .
>
> THE COURT: . . . [L]et's make this clear—you always have the right to talk to your client—but except for the accident—and "accident" means something over

The Supreme Court ruled that, in this case, the order preventing the criminal defendant from consulting with his attorney "about anything" during a seventeen-hour overnight recess violated his right to the assistance of counsel guaranteed by the Sixth Amendment.[307] The Court reasoned that during overnight recesses, attorney and client frequently discuss tactical decisions and review information made relevant by the client's testimony that day. The Court also realized that "the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance."[308]

However, the Court was sensitive that an attorney might attempt to coach a witness during the break. To address this concern, the Court noted that the prosecutor had ways to cope with potential "coaching" situations.[309] The prosecutor could, for example, cross-examine the witness about the extent of any coaching that might have occurred during the long recess.[310] Further, if the trial court determined that the risk of coaching was high, it could arrange the sequence of testimony so that a long recess might be avoided or limit communications for a shorter period of time than presented by these facts.[311]

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which you have no control—the cross-examination would have been right now and you would not have had an opportunity to talk to him.

. . . .

THE COURT: My question is: While a witness is subject to cross-examination, even though he is a defendant, does his attorney have the right to confer with him before he is cross-examined?

. . . .

MR. RINEHART: I feel that I do have the right to confer with him but not to coach him as to what he may say on cross-examination or how to answer questions.

THE COURT: Then what else would you need to talk to him about?

MR. RINEHART: I don't know. Such as whom should I call as the next witness.

. . . .

THE COURT: . . . I think [your client] would understand it if I told him just not to talk to you; *and I just think it is better that he not talk to you about anything.*

Id. at 83-85 n.1 (internal quotation marks omitted).

307. *Id.* at 91.

308. *Id.* at 88.

309. *Id.* at 89.

310. Specifically, the Court stated:

Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination.

Id. at 89-90.

311. *Id.* at 90.

Although the *Geders* decision was expressly limited to the facts presented,[312] and although it involved a criminal case, courts have followed a similar rationale in civil cases. In *Potashnick v. Port City Construction Co.*,[313] for example, the United States Court of Appeals for the Fifth Circuit held that an order prohibiting a civil defendant from conferring with counsel about any matter for a period of seven days, including overnight recesses, violated the party's right to due process under the Fifth Amendment.[314] The court reasoned that, even in a civil case, the trial judge's "denial of any attorney-client communication for such an extended period of time resulted in a significant deprivation of the effective assistance of counsel and thus impinged [upon the defendant's] constitutional right to retain counsel."[315]

Other courts have used similar reasoning.[316] In addition, at least one legislature has enacted a rule declaring that counsel may confer with a deponent if the recess exceeds five days.[317] Even Judge Gawthrop, author of *Hall v. Clifton Precision*,[318] recognized a party's right to consult with counsel during lengthy breaks.[319]

A variation of the *Geders/Potashnick* rule should be applied to long breaks in civil depositions. Attorneys should be allowed to communicate with their testifying client during breaks; however, these communications should not concern the substance of the client's prior or future testimony. It is certainly true that attorneys and clients need to speak regularly about the status of their cases and that prohibiting all communications for a day or more might adversely affect the client, especially if deadlines must be met. However, in the civil discovery context, during which substantial time lapses are common between significant events, few (if any) legitimate reasons exist why an attorney or client would need to discuss the client's actual testimony.[320] Thus, to permit attorney and client to discuss the substance of the client's

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312. *Id.* at 91. The Court declared that "[w]e need not reach, and we do not deal with, limitations imposed in other circumstances." *Id.*

313. 609 F.2d 1101 (5th Cir. 1980).

314. *Id.* at 1119.

315. *Id.*

316. See *supra* note 303 for representative cases.

317. DEL. SUPER. CT. CIV. R. 30(d) (for language, see *supra* note 102); *accord* North Am. Philips Corp. v. Aetna Cas. & Sur. Co., No. 88C-JA-155, 1995 WL 628447, at *6 (Del. Super. Ct. Apr. 22, 1995) (mem.) ("[A]ttorney/witness consultations during an interim of five days or more [are] presumptively proper and will not cause prejudice to the opposition.").

318. 150 F.R.D. 525 (E.D. Pa. 1993). For a detailed description of *Hall*, see *supra* Part I.A.1.c.

319. *See supra* note 78.

320. For additional reasons why this approach is logical, see *infra* notes 347-358 and accompanying text.

testimony during long breaks would only increase the odds that improper coaching would occur.[321] Because truth is the ultimate goal of discovery,[322] courts should adopt policies that promote that goal. This proposed approach furthers that ultimate goal without unduly impinging on the attorney-client relationship.[323]

D. Private Conferences During Short Breaks

On the first day of the Sawyer deposition, the parties agreed to an hour and fifteen-minute lunch recess. When the parties returned, Ms. Davis asked the deponent whether she had spoken to her attorney during the break and then proceeded to probe the substance of the attorney-client conversation.

In the criminal trial context, the United States Supreme Court has articulated different rules for attorney-client consultation during long and short breaks.[324] In *Perry v. Leeke*,[325] the Supreme Court addressed whether a trial court could prohibit a testifying defendant from speaking with his attorney during a fifteen-minute recess called at the end of the defendant's direct examination.[326] The state trial court ordered that the defendant "not be allowed to talk to anyone, including his lawyer, during the break."[327] After the recess, defense counsel moved for a mistrial; the judge denied a mistrial, stating that the defendant "'was not entitled to be cured or assisted or helped approaching his cross examination.'"[328] The Supreme Court ruled that a defendant does not have a constitutional right to confer with

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321. *See Hall*, 150 F.R.D. at 529 ("Private conferences are barred during the deposition, and the fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules. Otherwise, . . . [a] clever lawyer . . . could simply insist on a short recess to discuss the unanticipated yet desired answers.").

322. *See* Hickman v. Taylor, 329 U.S. 495, 507 (1947) (observing that civil discovery provides "[m]utual knowledge of all the relevant facts gathered by both parties . . . essential to proper litigation"); *cf.* United States v. Shaffer Equip. Co., 11 F.3d 450, 457-58 (4th Cir. 1993) (commenting that truth is the object of the adversarial system's process).

323. As in the private conference situation, this proposed rule could be enforced by permitting the questioning attorney to ask whether the substance of the testimony was discussed during the break. Improper discussions would not be protected by the attorney-client privilege and would thus be subject to disclosure. *See supra* notes 235-254 and *infra* note 356 (discussing potential enforcement problems).

324. *Compare* Geders v. United States, 425 U.S. 80, 91 (1976) (holding that a testifying witness may confer with counsel if the break lasts overnight or longer) *with* Perry v. Leeke, 488 U.S. 272, 284 (1989) (concluding that a testifying defendant does not have a right to advice from counsel during a short recess).

325. 488 U.S. 272 (1989).

326. *Id.* at 274.

327. *Id.*

328. *Id.* (quoting Appellant's Brief at 4-5).

counsel while he is actually testifying or during short breaks in the testimony.[329]

Although the Court indicated that a trial court could permit such consultation,[330] it ruled that a trial court could also prohibit a defendant from speaking with his attorney during a short break in the defendant's testimony, because "cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney."[331] It also posited that during "a short recess . . . it is appropriate to presume that nothing but the testimony will be discussed."[332]

In the civil deposition context, at least one court developed a rationale similar to that in *Perry* and has prohibited conferences during short breaks in the deposition. In *Hall v. Clifton Precision*,[333] the court stated:

> Private conferences are barred during the deposition, and the fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules. Otherwise,

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329. *Id.* at 281-82. The Court distinguished this situation from that in *Geders*, *see supra* Part III.C, by explaining that discussions between attorney and client during overnight recesses typically encompass matters beyond the defendant's own testimony—"matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain." *Perry*, 488 U.S. at 284. The Court continued:

> It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess. The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right. But in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice.
>
> Our conclusion does not mean that trial judges must forbid consultation between a defendant and his counsel during such brief recesses. As a matter of discretion in individual cases, . . . it may well be appropriate to permit such consultation. We merely hold that the Federal Constitution does not compel every trial judge to allow the defendant to consult with his lawyer while his testimony is in progress if the judge decides that there is a good reason to interrupt the trial for a few minutes.

Id. at 284-85 (citation and footnote omitted).

330. *See supra* note 329.

331. *Perry*, 488 U.S. at 282. The Court explained that "the truth-seeking function of the trial can be impeded in ways other than unethical 'coaching' [of the witness]." *Id.* For example, allowing a witness to confer with counsel might permit the witness to regain her composure or better understand the opponent's strategy, thus allowing her to give a better answer. *Id.*

332. *Id.* at 284.

333. 150 F.R.D. 525 (E.D. Pa. 1993). The *Hall* case is described in greater detail in *supra* Part I.A.1.c.

> . . . [a] clever lawyer or witness who finds that a deposition is going in an undesired or unanticipated direction could simply insist on a short recess to discuss the unanticipated yet desired answers, thereby circumventing the prohibition on private conferences.[334]

Again, the court's primary concern must be witness coaching, because conferences during scheduled breaks would not unduly prolong the deposition.

On the other hand, some jurisdictions do not automatically prohibit private conferences during normal breaks in the deposition.[335] In New Jersey, for example, a new civil procedure rule provides that "[o]nce the deponent has been sworn, there shall be no communication between the deponent and counsel during the course of the deposition while testimony is being taken except with regard to the assertion of a claim of privilege."[336] New Jersey Superior Court Judge Sylvia Pressler, in her comments to the new rule, stated that the rule "clearly does not address consultation during overnight, lunch, and other breaks."[337]

In addition, the United States District Court for the District of Columbia recently refused to sanction an attorney who conferred with his client during a five-minute recess, before which opposing counsel had completed his examination, to discuss matters that might be covered in direct examination to rehabilitate the client.[338] The court interpreted *Hall* to state only that "'a lawyer and client do not have an

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334. *Hall*, 150 F.R.D. at 529.

335. Even the trial court in *Geders* permitted the testifying defendant to confer with counsel during a lunch break, after cross-examination had been completed. *See* Geders v. United States, 425 U.S. 80, 89 (1976). In addition, many courts that have addressed the "short break" issue in criminal trials have held that denying a defendant counsel during any break violates the Sixth Amendment. *See, e.g.*, Sanders v. Lane, 861 F.2d 1033, 1034 (7th Cir. 1988); Bova v. Dugger, 858 F.2d 1539, 1540 (11th Cir. 1988) (per curiam); Mudd v. United States, 798 F.2d 1509, 1512 (D.C. Cir. 1986); Stubbs v. Bordenkircher, 689 F.2d 1205, 1206 (4th Cir. 1982); United States v. DiLapi, 651 F.2d 140, 148 (2d Cir. 1981); State v. Mebane, 529 A.2d 680, 685 (Conn. 1987); McFadden v. State, 424 So. 2d 918, 919-20 (Fla. Dist. Ct. App. 1982); Wooten-Bey v. State, 547 A.2d 1086, 1089 (Md. Ct. Spec. App. 1988), *aff'd*, 568 A.2d 16 (Md. 1990); People v. Hagen, 446 N.Y.S.2d 91, 91 (App. Div. 1982) (mem.). Although the constitutional right at issue in criminal cases (the Sixth Amendment) is different from that at issue in civil cases (the Fifth Amendment), given the dearth of cases on this issue in the civil context, these criminal cases are instructive.

336. N.J. SUPER. T. & SUR. CTS. R. 4:14-3(f).

337. Gianfranco A. Pietrafesa, *Rule Doesn't Bar Conferences*, N.J. L.J., Dec. 9, 1996, at 23, *available in* LEXIS, Legnew Library, Njlawj File (quoting Judge Sylvia Pressler). *But see* Peter Lynch, *New Deposition Rules Turn Rambo into a Potted Plant*, N.J. L.J., Oct. 28, 1996, at 35, *available in* LEXIS, Legnew Library, Njlawj File (interpreting the rule to prohibit conferences during deposition recesses).

338. *See* Odone v. Croda Int'l P.L.C., 170 F.R.D. 66, 70 (D.D.C. 1997) (mem.).

absolute right to confer during the course of the client's deposition,'" but not to prohibit all private conferences.[339] Because the deponent's counsel did not call the break, because opposing counsel had completed his deposition, and because the conference was held to determine whether the client misunderstood the question and needed to be rehabilitated on direct, the court felt sanctions were not warranted.[340] Although the court was not willing to impose sanctions, it noted that, "in retrospect, it would have been preferable for the plaintiff's attorney to ascertain on the record whether his client misinterpreted a document."[341] The court also observed that opposing counsel could have further examined the witness when he changed his position because of supposedly misunderstanding the original question.[342]

Given the paucity of cases on this "short break" issue in depositions and civil trials, and the conflict among the few authorities that do exist, no clear rule currently exists in most jurisdictions. However, except in limited circumstances,[343] the most sensible approach would be to prohibit the deponent and her attorney from discussing the substance of prior or future deposition testimony during short recesses agreed to by all counsel. The deponent could, however, confer with counsel about other matters during these breaks. After the break, the questioning attorney could ask whether deposition testimony had been discussed.[344] If the deponent indicates that testimony had been discussed, then the substance of the conversation concerning prior or

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339. *Id.* at 68 (quoting *Hall*, 150 F.R.D. at 528).

340. The court stated: "The Court . . . cannot penalize an attorney for utilizing a five-minute recess that he did not request to learn whether his client misunderstood or misinterpreted the questions and then for attempting to rehabilitate his client on the record." *Id.* at 69. The court also noted that the deponent was born in Italy and was not completely proficient in the English language. *See id.* at 69 n.6.

341. *Id.* at 69.

342. *Id.*

343. The deponent and her counsel should be permitted to confer during a short break when (1) they need to discuss whether to assert a privilege, *see supra* notes 228-232 and accompanying text, or (2) all other counsel have completed their examinations and the deponent's counsel is about to question his client, *see* N.D. ILL. L.R. 5.23 (proposed May 24, 1995) (rejected Feb. 24, 1997) (on file with author). The proposed Northern District of Illinois local rules explained:

> The reason for the second exception is to give a deponent the same right to confer with counsel as a witness at trial. At trial an officer of a defendant might be called as an adverse witness during plaintiff's case and called again during the defendant's case. Between testimony sessions the officer could consult with counsel.

Id. 5.23 cmt.

344. As noted earlier, the fact that a conversation occurred is not privileged. *See supra* note 270.

future testimony should be fair game for additional questions.[345] If the deponent indicates that testimony had not been discussed, then the substance of the conference would be protected, assuming all other requirements to preserve a privilege had been met.[346]

This approach is consistent with the one adopted during some trials.[347] This proposed standard—which is less harsh than that articulated by Judge Gawthrop in *Hall*[348]—also represents a logical compromise between competing interests. Primarily, this approach permits a client to communicate with her attorney about matters other than her deposition testimony. It therefore promotes the attorney-client relationship. In addition, it allows attorney and client to make efficient use of their time together. In these busy times, many attorneys and clients do not have the luxury of regularly communicating face-to-face. Permitting attorney and client to use breaks to discuss other aspects of the litigation, such as upcoming motions, the whereabouts of possible witnesses, and the schedule for future discovery, may actually help advance smooth litigation.

Further, allowing an attorney and client to communicate about matters other than the client's testimony does not outlaw all talk about the deposition. Instead, some limited "wood-shedding"[349] about form could be allowed without stepping onto a slippery slope. Indeed, little harm would be caused by allowing an attorney to remind the witness to listen to the question, to give verbal answers instead of head bobs, or to stop twisting in the chair.

On the other hand, courts should have the ability to control the course of discovery and punish deposition abuses.[350] Because the United States Supreme Court has ruled that a litigant's constitutional rights are not violated if she is prohibited from consulting counsel

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345. *See supra* notes 235-241 and accompanying text.

346. For example, if the "private conversation" were held in front of a third person, the privilege would be waived. *See, e.g.*, United States v. Evans, 113 F.3d 1457, 1464 (7th Cir. 1997) (holding that the attorney-client privilege was waived because the conversation was held in front of a third party); *In re* Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F. Supp. 381, 386 (S.D.N.Y. 1975) (mem.) (same).

347. *See, e.g.*, People v. Stroner, 432 N.E.2d 348, 351 (Ill. App. Ct. 1982) (approving trial court's instruction, given before a 30-minute recess, that permitted the testifying defendant to consult with his attorney about matters other than his testimony), *rev'd in part on other grounds*, 449 N.E.2d 1326 (Ill. 1983).

348. *See* Hall v. Clifton Precision, 150 F.R.D. 525, 529 (E.D. Pa. 1993) (prohibiting virtually all attorney-deponent communications during short recesses).

349. The term "wood-shedding" or "horse-shedding" refers to preparing the witness to testify. Douglas E. Acklin, *Witness Preparation: Beyond the Woodshed*, 27 A.F. L. REV. 21, 21 (1987); James W. McElhaney, *The Horse Shed*, LITIGATION, Summer 1981, at 43, 43.

350. *See Hall*, 150 F.R.D. at 527 (noting that the court has broad authority and discretion to control discovery).

during short breaks,[351] courts do have some ability to restrict private conferences, even during recesses.[352] Thus, when a party or attorney demonstrates a propensity for using conferences for improper purposes,[353] the court should not hesitate to sanction the offending party or attorney, or to prohibit prospectively conferences during short breaks.[354]

This proposed standard also sends a strong signal that witness coaching and other obstructionist tactics will not be tolerated. If testimony is discussed during the break, then the consequences can be high, because the offending communications will be subject to scrutiny by opposing counsel, the court, and if admitted at trial, the jury.[355] In addition, the witness's credibility may be irreparably tarnished by the perception—if not the reality—that testimony has been changed to gain a tactical advantage.[356]

Another attractive feature of the proposed standard is that it demonstrates confidence in attorneys' honesty and in the continuation of a self-regulating discovery system. The only other realistic solution would be to be prohibit all communications between attorney and deponent during the pendency of the deposition. But that alternative assumes the worst: It would send a loud message that attorneys cannot be trusted.

Finally, this standard is consistent with that proposed for long recesses: The witness can speak with his attorney during breaks, but the conversation may not concern the witness's prior or future deposition testimony.[357] As one professor wrote in his critique of *Perry*, having different standards for long and short breaks makes little sense:

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351. *See* Perry v. Leeke, 488 U.S. 272, 277 (1988); *see also supra* notes 213-215 and accompanying text.

352. *See Hall*, 150 F.R.D. at 529 (indicating that rules restricting attorney-client conferences during depositions also apply during recesses).

353. For what constitutes an "improper purpose," see *supra* notes 195-196 and accompanying text.

354. *See, e.g., In re* ML-Lee Acquisition Fund II, 848 F. Supp. 527, 567 (D. Del. 1994) ("[I]n future depositions . . . counsel are not to consult with their clients regarding the subject of their testimony while questions are pending and while deponents remain under oath.").

355. *See supra* notes 235-241 and accompanying text.

356. In any self-regulating system, enforcement may be a problem, because a client would rarely admit to any improprieties that occurred during a break. Although, being under oath, witnesses would hopefully tell the truth, questioning attorneys would bear heavy burdens in designing cross-examinations that would uncover improper coaching. The burdens would be equally heavy in either filing motions to compel or seeking sanctions to prohibit and punish the improper conduct.

357. *See supra* text accompanying notes 313-319.

> The same matters that might be discussed during an overnight break in defendant's testimony would be relevant during a shorter recess as well. The fact that there is less time to confer, or that the discussion of testimony may have a higher priority, does not mean that these other matters could not or would not be discussed. Indeed, an irony in the [Supreme Court] majority's argument is that longer recesses permit an unethical attorney to coach a client more effectively.[358]

The standard proposed in this Article avoids the problems created in the criminal context by the apparent inconsistency between *Geders* and *Perry*.

E. Summary Concerning the Propriety of Private Conferences

The propriety of private conferences during civil depositions is a serious problem that has not yet been solved.[359] Indeed, the lack of cases on the topic is somewhat puzzling, given the disruptive impact that private conferences can have on a deposition.[360] However, as one commentator postulated about witness preparation, "Practitioners themselves are partially responsible for the lack of rules and guidelines. Faced with the considerable inconveniences of conducting their own witness preparation in public, lawyers seem satisfied to leave each other's preparation alone. Without litigation, there is little judicial authority on the subject."[361] The same probably holds true in the analogous private conference area. Based on personal experience, most attorneys talk to their clients at some point during a deposition.

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358. Jay Sterling Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, 1990 WIS. L. REV. 1007, 1020. Professor Silver's concerns echo those articulated by Justice Thurgood Marshall in his *Perry* dissent:

> Because this [long break-short break] distinction has no constitutional or logical grounding, and rests on a recondite understanding of the role of counsel in our adversary system, I dissent.
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> . . . .
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> . . . In practical terms, the majority leaves the trial judge "to guess at whether she has committed a constitutional violation" . . . . Is it appropriate to presume that a 30-minute recess will involve a discussion of nontestimonial matters? How about a lunch break? Does it matter that defense counsel has promised only to discuss nontestimonial matters with his client? Does the majority's rationale encompass recesses during the defendant's direct or redirect testimony, or just those after the direct examination has concluded? These are not abstract inquiries, but the sort that have arisen, and will continue to arise, on a routine basis.

Perry v. Leeke, 488 U.S. 272, 285, 296 (1989) (Marshall, J., dissenting) (quoting Sanders v. Lane, 861 F.2d 1033, 1037 (7th Cir. 1988); other internal quotation marks and citations omitted).

359. *See supra* notes 324-342 and accompanying text.

360. *See supra* notes 192-196 and accompanying text.

361. Applegate, *supra* note 255, at 280 (footnote omitted).

Because most attorneys use private conferences, no one wants to complain too loudly.[362] But this rationale does not justify such abuse.

Because private conferences are easily used for improper and unethical purposes,[363] and because they violate Rule 30(c) of the Federal Rules of Civil Procedure and similar state court rules,[364] courts and legislatures should consider adopting rules to limit private conferences. The following rule would help prevent improper conferences while preserving the client's right to protect privileged information from disclosure:

PROPOSED RULE CONCERNING PRIVATE CONFERENCES DURING DEPOSITIONS

(1) *CONFERENCES DURING PENDING QUESTIONS.* A private conference held while a question about any matter is pending is presumptively improper, whether initiated by the deponent or the deponent's counsel. However, a private conference may be held while a question is pending if the conference is called for the limited purpose of determining whether a privilege should be asserted to the pending question. Before the conference concerning the privilege is held, the deponent's attorney should clearly state, on the record, the contemplated privilege.

(2) *CONFERENCES DURING RECESSES.* During any mutually agreed-upon recess in the deposition, the deponent may confer with his or her attorney. These communications may not concern or address the substance of the deponent's prior or anticipated future deposition testimony. However, after all other counsel have completed their examination of the deponent, the deponent and the deponent's counsel may privately confer before the deponent's counsel begins his or her examination. During this conference, the deponent and the deponent's counsel may discuss the substance

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362. In his article on witness preparation, Professor John S. Applegate noted:

> One is tempted to postulate that there is a tacit understanding among civil trial lawyers that they will not look too deeply into each other's witness preparation. The practical literature makes clear that preparation activities are ordinarily left untouched by discovery. . . .
>
> My own experience in practice tends to confirm the suggestion that trial lawyers have a tacit understanding that preparation activities are protected. Experienced litigators prepare witnesses with little apparent thought of waiver problems. Instead, they simply instruct witnesses not to answer substantive questions about their preparation beyond the fact that it occurred.

Id. at 280-81 n.12 (citations omitted).

363. *See supra* note 196 and accompanying text (regarding what constitutes an "improper purpose").

364. For the language of Federal Rule 30(c), see *supra* text accompanying note 211.

of the deponent's testimony without waiving the attorney-client privilege.

(3) *CONFIDENTIALITY OF ATTORNEY-CLIENT COMMUNICATIONS DURING PRIVATE CONFERENCES.* After any private conference or recess in the deposition, the questioning attorney may ask the deponent whether he or she conferred with counsel.

(a) If the deponent indicates that a conference was held, and the deponent or the deponent's counsel indicates that the conference concerned only whether to assert a privilege, then the questioning attorney may not inquire into the substance of the attorney-client communication, but may ask questions reasonably calculated to test the validity of the privilege.

(b) If the conference occurred during a pending question and the deponent indicates that matters other than whether to assert a privilege were discussed, then the questioning attorney may ask about the substance of those other conversations, and the deponent will be required to answer those questions.

(c) Except as provided in subsection (2), if the conference occurred during a mutually scheduled recess, and the deponent indicates that the deponent discussed the substance of his or her prior or anticipated future testimony with his or her attorney, then the questioning attorney may ask about the substance of those conversations, and the deponent will be required to answer those questions.

This proposed rule will help enforce the provisions of Rule 30(c) of the Federal Rules of Civil Procedure and similar state rules by making deposition testimony more like trial testimony.[365] As most cases are settled after some discovery has occurred, it is important that deposition testimony be afforded the same truth-guarding procedures as allowed at trial.[366] Although this proposed rule may well be contro-

365. *See* Damaj v. Farmers Ins. Co., 164 F.R.D. 559, 560 (N.D. Okla. 1995) ("Since the fact (truth) finding process in civil litigation is almost exclusively conducted in the discovery phase of litigation, it follows logically that the efficacy of the discovery process . . . would be enhanced by employing, to the extent possible, the same rules of procedure during discovery as employed at trial.").

366. *See id.* (criticizing an attorney for making unnecessary objections and showing the court's "concern[ ] . . . because the vast majority of the civil cases in this country are decided by way of settlements which are reached on the basis of 'facts' developed during discovery, particularly oral depositions"); Hall v. Clifton Precision, 150 F.R.D. 525, 531 (E.D. Pa. 1993) ("Depositions are the factual battleground where the vast majority of litigation actually takes place."); *cf.* GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 469 (2d ed. 1994) (citing studies showing that 90-95% of all civil and criminal cases are settled rather than tried).

versial, "there is an urgent need for a bright line rule governing attorney-client communication during depositions . . . [that would] prohibit any communication that would improperly interrupt the deposition and jeopardize the truth-finding process."[367] The rule proposed in this Article should promote truth over tactics, while encouraging attorneys to act as true professionals. It would also provide some certainty in this important, but infrequently addressed, area.

IV. OBJECTIONS AND INSTRUCTIONS NOT TO ANSWER

A common tactic in depositions is to impede the questioning lawyer's progress with objections or instructions not to answer.[368] Most litigators have encountered an opposing counsel who, while objecting to the question, includes narrative that suggests what the "correct" answer should be.[369] As one committee appointed to study deposition abuse concluded, "[f]requently, depositions degenerate into more 'testimony' from the attorney than from the witness."[370]

Although objections and instructions not to answer sometimes may be used to hamper progress during a deposition, some are proper.[371] Indeed, sometimes a lawyer has an ethical duty to object or instruct the witness not to answer.[372] Other times, applicable court rules might require the attorney to make the objection or waive it.[373] In still other situations, an attorney may have a legitimate need to detail the basis for the objection.[374] Although recent amendments to the Federal Rules of Civil Procedure have attempted to address what types of objections are appropriate and when an attorney may

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367. N.D. ILL. L.R. 5.23 cmt. (proposed May 24, 1995) (rejected Feb. 24, 1997) (on file with author).

368. *See Hall*, 150 F.R.D. at 531 (addressing improper "strategic interruptions, suggestions, statements, and arguments of counsel"); *see also* Browning, *supra* note 159, at 1094 (describing characteristics and tactics of Rambo litigators).

369. *See* Federal Bar Council, Committee on Second Circuit Courts, A Report on the Conduct of Depositions, 131 F.R.D. 613, 617 (1990) (observing that "[v]irtually every active litigator" has encountered witness coaching).

370. *Id.*

371. *See supra* note 32 and accompanying text.

372. *See supra* note 137.

373. *See supra* notes 32-36 and accompanying text.

374. *See, e.g.*, N.D. ILL. L.R. 5.22(B) (proposed May 24, 1995) (rejected Feb. 24, 1997) (on file with author).

instruct a witness not to answer,[375] serious questions remain unanswered.[376]

Here, the defense lawyer, Ms. Davis, is defending the deposition of Randall Lee, PharTech's national product manager for Ovar-X. The plaintiff's attorney, Scott Palmer, is taking the deposition.

> **August 12, 1996. Time: 1:45 p.m.**
> MR. PALMER: Mr. Lee, what tests did your client run on Ovar-X before applying to the FDA for approval?
> MS. DAVIS: If you know.
> MR. LEE: Well, I'm not quite sure. That's not really in my area.
> MR. PALMER: Whose area is it?
> MS. DAVIS: Again, if you know.
> MR. LEE: I'm not exactly certain. It would be the testing and development department, but it's hard for me to say right now who within that department.
> MR. PALMER: Ms. Davis, please do not coach the witness. If you have an objection, state it. Otherwise, please let the witness answer. Your statements are in clear violation of Federal Rule of Civil Procedure 30.
>
> * * * *
>
> **Time: 4:30 p.m.**
> MR. PALMER: What type of training does PharTech provide for doctors who intend to surgically implant and remove Ovar-X?
> MS. DAVIS: I object. Mr. Palmer, you've already asked that question four or five times. Mr. Lee has given you extensive information about PharTech's medical team that runs three-day seminars for doctors and then provides follow-up training when necessary. Please move on.
> MR. PALMER: Mr. Lee, you may answer the question.
> MS. DAVIS: No, Mr. Lee, do not answer the question. Mr. Palmer is not entitled to ask you the same question over and over and over again.
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> * * * *

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375. *See* FED. R. CIV. P. 30(d)(1) (stating that objections should be concise, non-argumentative, and non-suggestive, and that attorneys "may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under [rules governing bad faith conduct]").

376. *See* Cary, *supra* note 159, at 580 ("[T]he problem is not the lack of rules or guidelines to control the behavior, but the perception in the practicing bar that the available sanctions will not work, or are too expensive and cumbersome to utilize." (footnote omitted)).

Time: 5:00 p.m.
MR. PALMER: Mr. Lee, since I didn't get any background information from you at the beginning of the deposition, let me do that now before we leave. Please describe your work history and educational background, starting with college.
MS. DAVIS: Object to the form of the question. Compound.
MR. PALMER: Okay, please describe your educational background, starting with college.
MR. LEE: I graduated from Cornell University in 1983 with a degree in biochemistry. I then obtained an M.B.A. in 1985, with an emphasis on marketing and product development, from the University of Pennsylvania.
MR. PALMER: What about work? Have you always worked for PharTech?
MS. DAVIS: Objection. Compound.
MR. PALMER: Please describe your work history.
MR. LEE: I started with PharTech right out of college and have been with them ever since.
MR. PALMER: What were your duties?
MS. DAVIS: Object to the form of the question. Vague.
MR. PALMER: What was your first job at PharTech?
MR. LEE: I was a national sales trainee.
MR. PALMER: Why were you promoted?
MS. DAVIS: Objection. Calls for speculation.
MR. PALMER: Do you really have to object to every question I ask? These are not hard questions.

* * * *

During Mr. Lee's deposition, Ms. Davis interrupted in three different ways. During the 1:45 p.m. session, after Mr. Palmer asked a question, Ms. Davis did not object, but instead coached Mr. Lee not to answer unless he "knew" the answer. Next, she interrupted with a narrative speaking objection and instructed Mr. Lee not to answer, because she believed Mr. Palmer's questions were repetitive. Finally, she made many "proper" objections, which Mr. Palmer felt were interrupting the flow of the deposition. Were Ms. Davis's interruptions appropriate? Did Mr. Palmer react in the best possible manner?

A. Speaking Objections and Other Suggestions

Rule 30(d)(1) of the Federal Rules of Civil Procedure now states that "[a]ny objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner."[377] Some attorneys, like Ms. Davis, attempt to circumvent this rule by not

377. FED. R. CIV. P. 30(d)(1).

"objecting." Instead, they interject with phrases such as "if you know" or "if you understand the question."[378] They then rationalize their behavior by contending that the interruptions are necessary to clear up confusion, to protect the witness, or to protect the record.[379] The better view, however, is that Rule 30(d)(1) prohibits this suggestive behavior.[380] The effect of Ms. Davis's remarks is reflected in Mr. Lee's answers. After each remark by Ms. Davis during the 1:45 p.m. session, he responded that he did not know the answer. He was coached by Ms. Davis's suggestive statements.[381]

During the 4:30 p.m. session, Ms. Davis's interruptions mushroomed into an improper speaking objection, in which she elaborated on her reasons for objecting, rather than concisely stating her objection. Ms. Davis objected to Mr. Palmer's question on grounds

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378. *See, e.g.*, Sinclair v. Kmart Corp., No. 95-1170-JTM, 1996 U.S. Dist. LEXIS 19661, at *19-20 (D. Kan. Dec. 9, 1996) (describing an attorney's instruction to a deponent to answer "if you recall" or "if you remember" or "if you know"); Bergstein, *supra* note 18 (commenting that instructions to a deponent to answer a question with the qualification "if you remember" or "if you recall" characterize one form of the petty tactics used in abusive depositions); Duffy, *supra* note 78 (noting that a lawyer's interjection of "if you know" is "clearly improper"). A similar tactic is for the deponent's attorney to indicate that he, the attorney, does not understand the question or to state that the question is unclear. Such an objection is also improper. *See* Phillips v. Manufacturers Hanover Trust Co., No. 92 Civ. 8527 (KTD), 1994 U.S. Dist. LEXIS 3748, at *9 (S.D.N.Y. Mar. 29, 1994) (quoting from a deposition that included an attorney indicating she did not understand the question addressed to the deponent). As the *Hall v. Clifton Precision* court stated, "A lawyer's purported lack of understanding is not a proper reason to interrupt a deposition." 150 F.R.D. 525, 530 n.10 (E.D. Pa. 1993); *accord* Applied Telematics, Inc. v. Sprint Corp., No. 94-CV-4603, 1995 U.S. Dist. LEXIS 2191, at *6 (E.D. Pa. Feb. 22, 1995) (mem.) ("[An] attorney may not object to a question that the attorney does not understand. . . . Nor may the lawyer state for the record what his understanding of the question is." (citations omitted)); *How to Deal with Improper Objections and Tactics During Depositions*, FED. DISCOVERY NEWS, June 1995, at 3, *available in* LEXIS, Legnew Library, Lrpfd File (summarizing remarks of Florida attorney Lewis F. Collins, who stated that a lawyer's understanding is not relevant, so long as the deponent is instructed at the start of the deposition that he is entitled to clarifications, if necessary).

379. *See, e.g.*, *Sinclair*, 1996 U.S. Dist. LEXIS 19661, at *19-20 (describing counsel's baseless contention that objections were justified because the deponent might not have understood the question); O'Brien v. Amtrak, 163 F.R.D. 232, 236 (E.D. Pa. 1995) (mem.) (describing counsel's assertion that he was "simply doing his job by protecting the witnesses from improper questions . . . and ensuring that the record was accurate"); *cf.* Resolution Trust Corp. v. International Ins. Co., Civ. A. No. 89-4020, 1993 WL 98677, at *2 (E.D. La. Mar. 26, 1993) (minute entry) (commenting that an attorney who objects to the form of a question need not offer an explanation, and in fact should not, if it will coach the witness).

380. *See* FED. R. CIV. P. 30(d)(1) (stating that objections should be, among other things, "non-suggestive").

381. *See, e.g.*, *Sinclair*, 1996 U.S. Dist. LEXIS 19661, at *19 (observing that, after counsel's "if you remember" and "if you recall" remarks, the witness tended to respond that he did not remember or recall the answer).

that it had been asked and answered; she then proceeded to "repeat" the prior testimony. Although Ms. Davis might have believed that she was simply protecting her client, her actions violated the clear language of Rule 30(d) of the Federal Rules of Civil Procedure: She suggested the answer.[382]

Ms. Davis's conduct during the 1:45 p.m. and 4:30 p.m. sessions also violated Rule 30(c), the rule indicating that deposition testimony should proceed like trial testimony.[383] To quote one federal court, "It is no stretch to conclude that the objections interposed at the deposition would not have occurred had the testimony been taken before a judge and jury at trial."[384] It should be apparent to most readers that Ms. Davis's remarks either changed Mr. Lee's responses or prevented his response. Because the truth-finding process in civil litigation is conducted primarily during discovery, such truth-altering conduct should not be permitted.

Moreover, Ms. Davis's obstructionist conduct violated several mandatory ethical rules. Most obviously, she violated Model Rules 3.2, 3.4, 4.4, and 8.4(d), because her conduct delayed and hindered the litigation, obstructed the plaintiffs' access to evidence, and prejudiced the administration of justice.[385] In Model Code jurisdictions, Ms. Da-

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382. A "concise" objection should include the word "object" or "objection" and then include only one additional phrase (e.g., "objection, compound" or "objection, leading"). *See* N.D. ILL. L.R. 5.22(B) (proposed May 24, 1995) (rejected Feb. 24, 1997) (on file with author) ("Under [Federal Rule 30(d)(1)] counsel may interpose an objection by stating 'objection' and the legal grounds for the objection."). Controversy exists regarding how much detail should or must be given. May an attorney state, "Objection, form," or must she give the specific basis, such as "Objection, compound"? One treatise explains:

> In some jurisdictions, . . . you need not specify the precise ground for the objection. However, in other jurisdictions, at least when the examiner asks you to specify a ground for the objection, the failure to do so results in a waiver. Moreover, even in jurisdictions that do not demand a specification of the ground for the objection, many attorneys favor briefly naming the ground.

IMWINKELRIED & BLUMOFF, *supra* note 38, § 6:23, at 48 (footnotes omitted). Keeping in mind that the objection should be concise and non-suggestive, the best approach is to state the specific basis for the objection so that the examining attorney can more readily rephrase the question. At a minimum, attorneys should state the precise objection when the questioning attorney requests specificity or clarification. *But see infra* note 389 (suggesting that the deponent should leave the room if a lengthy explanation is to be given).

383. For the text of Rule 30(c), see *supra* text accompanying note 211.

384. Damaj v. Farmers Ins. Co., 164 F.R.D. 559, 560 (N.D. Okla. 1995); *accord* Armstrong v. Hussmann Corp., 163 F.R.D. 299, 303 (E.D. Mo. 1995) (mem.) ("Because attorneys are prohibited from making any comments, either on or off the record, in the presence of a judicial officer, which might suggest or limit a witness's answer to an unobjectionable question, such behavior is likewise prohibited at depositions.").

385. For the text of these rules, see *supra* notes 146-149, 151 and accompanying text.

vis's behavior violated DRs 1-102(A)(5), 7-101(A)(1), 7-102(A)(1), and 7-106(C)(6) for these same reasons.[386]

If Ms. Davis truly wanted to protect the record and her client from unclear questions, she could have interposed concise, non-suggestive objections.[387] If she believed that Mr. Palmer's questions rose to the level of bad faith, she should have sought relief from the court under Rule 30(d)(3).[388] If she felt that a lengthy objection was needed to protect the record, then she could have asked her client to leave while she stated the objection.[389] That way, opposing counsel would have the benefit of her thoughts, the record would be clear, but the witness would not be improperly influenced.

B. Instructions Not to Answer Based on Repetitive Questioning

During the 4:30 p.m. session, Ms. Davis instructed the witness not to answer because she believed Mr. Palmer's question had been previously asked and answered. Rule 30(d)(1) of the Federal Rules of Civil Procedure prohibits instructions not to answer except "when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3) [to terminate a deposition on bad-faith grounds]."[390] Although some federal courts permitted instructions not to answer based on repetitiveness or relevancy before the 1993 amendments,[391] such conduct is now "highly improper," regardless of counsel's intentions.[392] Because

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386. For the text of these rules, see *supra* notes 138, 140, 206 and accompanying text.

387. *Cf.* FED. R. CIV. P. 30(d)(1) (requiring concise, non-suggestive objections).

388. *See* Applied Telematics, Inc. v. Sprint Corp., No. 94-CV-4603, 1995 U.S. Dist. LEXIS 2191, at *7 (E.D. Pa. Feb. 22, 1995) (mem.) (considering a situation in which the plaintiff argued that his objections were proper because the questions had previously been asked and answered, and ruling that "[i]f the questions asked by counsel for defendant [became] unreasonable or harassing then plaintiff's counsel [could have objected] under Rule 30(d)(3)").

389. *See* Shartel, *supra* note 193, at 12 ("Another way of 'calling the defending attorney's bluff' is to ask the opposing attorney if the witness may briefly be allowed to step outside the room."); *see also* N.D. ILL. L.R. 5.22 cmt. (proposed May 24, 1995) (rejected Feb. 24, 1997) (on file with author) ("Reasons for the objection, if stated at all, are to be stated outside the presence of the deponent.").

390. FED. R. CIV. P. 30(d)(1).

391. *See, e.g.*, Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, 657 F.2d 890, 903 (7th Cir. 1981). For a discussion of objections and instructions not to answer based on relevancy, see *infra* Part V.

392. Dravo Corp. v. Liberty Mut. Ins. Co., 164 F.R.D. 70, 75 (D. Neb. 1995) (mem.) (quoting Ralston Purina Co. v. McFarland, 550 F.2d 967, 973 (4th Cir. 1977)); *accord* Frazier v. Southeastern Pa. Transp. Auth., 161 F.R.D. 309, 316 (E.D. Pa. 1995) (mem.); Ethicon Endo-Surgery v. United States Surgical Corp., 160 F.R.D. 98, 99 (S.D. Ohio 1995). *But see* D. MD. DISCOVERY GUIDELINES guide. 5(c) (prohibiting an attorney from repeatedly asking the deponent "the same or substantially identical question").

instructions not to answer also delay and hinder the litigation process, this conduct violates the same ethical rules broken by suggesting answers to the witness.[393]

The proper procedure when opposing counsel asks repetitious questions is to enter a concise objection: "Objection, asked and answered."[394] The witness should then answer the question.[395] If the answer confuses the record, the defending counsel can attempt to clarify the confusion by examining the witness after her opponent finishes.[396] If interrogating counsel persists in asking repetitious questions to the extent that it constitutes harassment, then the deponent's counsel should protect her witness by applying to the court for a protective order under Federal Rule of Civil Procedure 30(d)(3).[397]

The questioning attorney has a number of responses to Ms. Davis's improper actions. At the beginning of the deposition, the examining attorney should inform the witness that he is free to ask for clarification or to state when he does not know or recall an answer.[398] This instruction might eliminate some meddling by the deponent's attorney. When the defending attorney cues the witness or otherwise improperly interrupts the deposition, the questioning attorney might then warn the defending attorney—as Mr. Palmer did in this case—that her conduct violates established deposition procedures.[399]

One well-known professor suggests driving a wedge between the deponent and the deponent's counsel:

> The usual objection just makes it clear that you are not getting what you want—the witness's testimony. But the wedge focuses on how your opponent is treating the witness.
>
> Some appropriate responses are: "I object. You're not being fair to the witness. You're cutting him off before he

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393. *See supra* notes 385-386 and accompanying text.

394. *See* N.D. ILL. L.R. 5.22(B) (proposed May 24, 1995) (rejected Feb. 24, 1997) (on file with author) (providing examples of objections that comply with Federal Rule of Civil Procedure 30(d)(1) in that they are "stated 'concisely' and in a 'non-argumentative and non-suggestive manner'").

395. *See* FED. R. CIV. P. 30(c).

396. *See* Federal Bar Council, Committee on Second Circuit Courts, A Report on the Conduct of Depositions, 131 F.R.D. 613, 617-18 (1990).

397. *See Ethicon Endo-Surgery*, 160 F.R.D. at 99.

398. *See* Sinclair v. Kmart Corp., No. 95-1170-JTM, 1996 U.S. Dist. LEXIS 19661, at *20 (D. Kan. Dec. 9, 1996); *see also supra* note 285.

399. *See* IMWINKELRIED & BLUMOFF, *supra* note 38, § 5:40, at 83-84 (suggesting that one method of dealing with attorney misconduct during a deposition is to state to opposing counsel, and for the record, why opposing counsel's conduct violates established rules); *cf.* Shartel, *supra* note 193, at 11 (indicating that a good approach to deal with improper speaking objections is to warn the offending attorney that if the conduct continues, the court's authority will be invoked).

> has a chance to finish." Or, "Objection. Give the witness a chance to tell his story." Then say to the witness, "Have you finished what you were going to say?" Or, "Is there something you would like to add?"[400]

If informal dispute resolution methods do not work, judicial intervention is always an option.[401] And, as in other disputes, an attorney should make a record of the improper conduct.[402]

C. Numerous "Proper" Objections

Most attorneys know that courts will discipline those who interpose excessive "improper" objections and instructions not to answer.[403] But can counsel be sanctioned for raising numerous "proper" objections?

In federal court, objections to questioning, testimony, or conduct that "might be obviated, [or] removed" if presented at the deposition are waived if not raised during the deposition.[404] On the other hand, objections concerning the competency of the witness, relevancy, and materiality are not waived if omitted during the deposition, unless the ground for the objection might have been obviated if raised at that time.[405] However, in seeming contrast to these directives to make the objection or lose it, the advisory committee notes for Rule 30(d) ex-

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400. McElhaney, *supra* note 199, at 89; *accord* Kevin J. Dunne, *Going Awry: How Can a Deposition Go Wrong? Let Us Count Some Ways*, L.A. DAILY J., Nov. 17, 1995, Verdicts & Settlements supp. at 1 ("[C]ounsel's best defense is to zero in on the deponent and ask him or her to explain what it is about the question that is confusing, or ask the deponent what the deponent's understanding of the 'vague' word is, and go from there.").

401. For other alternatives, see *supra* notes 267-279 and accompanying text. For two extremes, compare *R.E. Linder Steel Erection Co. v. U.S. Fire Insurance Co.*, 102 F.R.D. 39, 41 (D. Md. 1983) (mem.), which entered an order under which "[f]or each interruption, counsel shall personally pay, as liquidated attorney's fees and expenses, to the interrogating counsel, the sum of $5.00," with Martin Berg, *Attorney Fined $1 Million Marks Sixth Day in Jail*, L.A. DAILY J., June 16, 1993, at 1, which reported that a judge in the Central District of California imposed a $1 million fine on an attorney for deposition and discovery abuses and then ordered him jailed for failing to pay an installment.

402. *See supra* note 264 and accompanying text.

403. *See, e.g.*, Damaj v. Farmers Ins. Co., 164 F.R.D. 559, 561 (N.D. Okla. 1995) (granting "Plaintiff's Motion for Order Directing Counsel to Cease Obstructionist Tactics During Oral Depositions" after defense counsel made objections on 64 pages of a 102-page deposition); *cf.* Amy Singer, *Two Days, 1,144 Interruptions*, AM. LAW., Apr. 1993, at 25, *available in* LEXIS, Legnew Library, Amlawr File (discussing attorneys against whom opposing counsel sought sanctions for making 1144 objections and interruptions during a deposition of which the transcript was less than 600 pages).

404. FED. R. CIV. P. 32(d)(3)(B).

405. FED. R. CIV. P. 32(d)(3)(A).

plain that "the making of an excessive number of unnecessary objections may itself constitute sanctionable conduct."[406]

To compound the confusion, as a leading discovery expert explained, "The reach of the 'might have been obviated or removed' clause in particular cases is unclear."[407] It applies to objections to the form of the question, but it may sometimes apply when the question lacks foundation.[408] Given this uncertainty, careful counselors would want to protect their clients' interests by objecting to all form-of-question problems, foundation problems, and other areas in which they believe a failure to object would result in waiver.[409]

The ethics rules further complicate the analysis. Both the Model Rules and the Model Code clearly indicate that attorneys must protect their clients within controlling procedural and court rules.[410] Raising any and all objections permitted by the Federal Rules of Civil Procedure would seem to be consistent with these ethical mandates. However, both the Model Rules and the Model Code prohibit attorneys from engaging in conduct that has no substantial purpose other than to delay or burden a third person.[411] Therefore, if the court or grievance committee perceives that legitimate objections are being used for an improper purpose, it may opt to sanction or enjoin the offender.[412]

What, then, is a diligent and ethical attorney to do? One alternative is to stipulate at the beginning of the deposition to reserve all objections until trial. An omnibus stipulation will typically benefit the examining attorney because it will permit him to proceed with rela-

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406. FED. R. CIV. P. 30(d)(1) advisory committee notes on the 1993 amendments. Or, as one group of authors noted, "'protection' can become a cover for obstruction." FORTUNE ET AL., *supra* note 267, § 6.7.4, at 264.

407. WILLIAM W. SCHWARZER ET AL., CIVIL DISCOVERY AND MANDATORY DISCLOSURE: A GUIDE TO EFFICIENT PRACTICE 3-45 (2d ed. 1994).

408. *Id.* at 3-46.

409. *See* FORTUNE ET AL., *supra* note 267, § 6.7.4, at 264 ("[T]here is no unanimity regarding which objections are 'obviable' or 'waivable'; therefore, many lawyers feel obligated to interpose a great number of substantive objections to avoid waiver . . . .").

410. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1982) (stating that lawyers must use only the "means permitted by law" in seeking the objectives of their clients (footnote omitted)); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 & cmt. (1994) (providing that measures taken to indicate a client's cause must be "lawful and ethical").

411. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1); MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.4.

412. *See* Leiching v. Consolidated Rail Corp., No. 92-CV-1170, 1996 U.S. Dist. LEXIS 20796, at *6 (N.D.N.Y. Oct. 24, 1996) (indicating a willingness to sanction an attorney for "constant objections to the form of questions" because of the delay and disruption that such objections can cause).

tively few interruptions.[413] It may also protect the defending attorney from sanctions.[414] This option, however, has serious drawbacks. If objections are reserved, the deponent's counsel may not be in a position to object immediately to protect the record and the client.[415] Instead of shortening the deposition, it may actually facilitate the questioner's taking more time, unrestrained by objections from the opposing counsel. In addition, an ingenious questioner might succeed in documenting something other than the truth if the deponent's counsel were required to remain mute on the sidelines. Further, if the stipulation is not properly crafted, important objections might be deemed waived.[416]

Under the current Federal Rules, probably the best alternative is for the deponent's attorney to make all *necessary* objections. At trial, most attorneys do not make every possible objection.[417] Instead, they raise objections only when reasonably certain that the answer will materially hurt their client's case and when the objection has a solid legal basis.[418] Attorneys defending depositions should do the same. But, when in doubt, attorneys should err in favor of protecting their clients, within the bounds of controlling rules.

Thus, in Randall Lee's deposition, Ms. Davis's objections to the form of the question were permissible under the Federal Rules of Civil Procedure. Had she not raised the objections, she would have waived them.[419] On the other hand, Mr. Palmer's questions, although not artfully asked, were easily understandable and not relevant to the merits. Therefore, some courts might have perceived that Ms. Davis was merely attempting to delay or hinder the examination. To have avoided such an appearance, she should have objected only when Mr. Lee's answers would have damaged PharTech's case.

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413. SCHWARZER ET AL., *supra* note 407, at 3-46.

414. *See* FED. R. CIV. P. 30(d)(2) (providing for sanctions where a party impedes or delays a deposition).

415. *See* MALONE & HOFFMAN, *supra* note 15, at 179 (discussing the importance of objections in protecting the record and the client).

416. *See* SCHWARZER ET AL., *supra* note 407, at 3-46 ("Because the effect of an omnibus stipulation is uncertain, it is preferable to spell out specifically which objections are saved and which are not.").

417. *Cf.* John C. Conti, *Trial Objections*, *in* THE LITIGATION MANUAL 663, 665 (John G. Koeltl ed., 2d ed. 1989) ("The simplistic notion that an objection must be raised to every technical violation of the rules of evidence should be discarded.").

418. *See* THOMAS A. MAUET, TRIAL TECHNIQUES 421-22 (4th ed. 1996) (suggesting when to make objections at trial).

419. *See* FED. R. CIV. P. 32(d)(3)(B).

D. Revising the Current Objection Rule

To bring more certainty to this area and to eliminate a tool of obstructionists, Congress—or, on a local level, individual districts—should consider revising Rule 32(d)(3). As it now reads, Rule 32(d)(3)(A) contains a category of permissible but unnecessary objections: Objections concerning competency, relevancy, and materiality generally need not, but can, be raised.[420] Thus, counsel who want to obstruct a deposition can do so by continuously raising these types of objections—because courts may be reluctant to sanction an attorney for conduct not expressly prohibited by the Federal Rules.[421] One solution is to rewrite Rule 32(d)(3) to eliminate permissible but unnecessary objections.[422] The revised rule would identify categories of objections that must be made or waived during the depositions and categories of objections that are both forbidden and preserved for trial. The revised rule also would increase the certainty that forbidden objections would not be waived if not immediately raised.[423] Using these parameters, the revised rule would read:

> **PROPOSED REVISION TO FEDERAL RULE OF CIVIL PROCEDURE 32(d)(3) AS TO TAKING DEPOSITIONS**
>
> (A) Objections concerning privilege, the form of a question or answer, the oath or affirmation, or the conduct of parties and counsel, must be made promptly at the deposition or waived.
>
> (B) No objection other than those listed in subsection (A) may be raised during a deposition. All objections not expressly permitted under subsection (A) are automatically preserved for trial. This rule does not affect Rule 30(d)(1) concerning instructions not to answer.
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> * * * *

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420. *See* FED. R. CIV. P. 32(d)(3)(A).

421. *See, e.g.*, Chapsky v. Baxter V. Mueller Div., Baxter Healthcare Corp., No. 93 C 6524, 1994 WL 327348, at *2 (N.D. Ill. July 6, 1994) (mem.) (declining to impose sanctions on an attorney who advised her client not to answer questions based on a relevancy objection, but warning that sanctions would be imposed if the conduct continued).

422. At least one court has taken a similar step. *See* Hall v. Clifton Precision, 150 F.R.D. 525, 528 n.3 (E.D. Pa. 1993) (deeming it improper to make competency, relevancy, or materiality objections during a deposition).

423. At least two authors have observed:

> Perhaps because of their lack of confidence in their own knowledge of the rules of evidence, or because they are unsure about what objections are waived and what objections are preserved, attorneys at depositions object and battle over objections 517 percent more, by actual count, than is actually necessary to represent their clients properly.

MALONE & HOFFMAN, *supra* note 15, § 14.5, at 185.

Examples of required objections would include the following: leading the witness, vague or ambiguous question, compound question, lack of foundation, argumentative, calls for a legal conclusion, calls for an improper lay opinion, and nonresponsive answer.[424] Contrarily, examples of forbidden objections would be as follows: competency of the witness, relevance, materiality, hearsay, cumulative, more prejudicial than probative, and calls for speculation.[425]

Applying the proposed rule to the hypothetical, Ms. Davis would not have been permitted to raise relevancy objections, and the relevancy objections clearly would have been preserved for trial. Thus, Ms. Davis's client would have been protected, and the deposition would have proceeded with fewer interruptions.

V. LIMITS OF PROPER QUESTIONING

Deposition abuse can occur when one party attempts to use liberal discovery rules to harass, intimidate, or attempt to extract a settlement from the other side.[426] Deposition abuse also can occur when

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424. *Cf. id.* § 14.5.1, at 188-91 (describing these objections as curable under current Rule 32(d)(3), and therefore waived if not made at the deposition).

425. *Cf. id.* § 14.5.3, at 193-94 (describing these objections as non-curable under current Rule 32(d)(3), and therefore not waived if no objection is made).

426. Monroe Inker, *Abusive Discovery Tactics in Depositions*, 26 FAM. L.Q. 27, 27 (1992). One class-action plaintiff encountered such an attorney:

> The defense counsel . . . seemed determined to instill fear in the individuals being deposed . . . . His approach was to bait, belittle, ridicule (even to the extent of mimicking the speech pattern and accent of one of the other plaintiffs) and threaten ("If you lose, you may be faced with some huge legal fees incurred by the defendant company").
>
> In addition to the psychological terror he attempted to instill, a principal tactic was to deliberately confuse. Much of his interrogation bore absolutely no relevancy to the issues at hand . . . ; obviously he was only collaterally interested in the truth. His objective, in the interest of winning, was to intimidate regardless of the facts and/or methods employed.

M. Vanderveer, *Face to Face with an Abusive Attorney*, NAT'L L.J., May 14, 1984, at 13, *available in* LEXIS, Legnew Library, Ntlawj File. One author has reported that in depositions concerning the intrauterine contraceptive Dalkon Shield, the manufacturer's attorneys frequently asked women very personal, embarrassing questions, such as in the following situation:

> [In] the Shield suit of an Iowa mother of two children who had suffered PID [pelvic inflammatory disease] and the consequent loss of her ovaries and womb[,] [A.H.] Robins's counsel took depositions from her and her husband, each in the presence of the other. To her, the company attorney put queries about her sexual relations before their marriage in 1963, *ten years before she was fitted with a Shield, and fifteen years before she was stricken with PID.*
>
> . . . .
>
> During a deposition in Minnesota in May 1982, lawyers for a Boston woman directed her not to answer questions by Robins counsel about which way she wiped, and whether, and how often, she engaged in oral and anal intercourse and

one attorney attempts to prevent the other from seeking permissible information that happens to be sensitive or embarrassing.[427] In many cases, however, it is difficult to distinguish when a line of questioning is distasteful but relevant and when it is being pursued primarily for harassment value. When does an examining attorney cross the line between acceptable questions and harassment? How does the defending attorney protect his client without violating rules against obstructing the discovery process?

In this scenario, Curtis Drizolli, counsel for Dr. Foster, is questioning one plaintiff, Matt Sawyer, about his loss-of-consortium claim. Mr. Sawyer is represented by Scott Palmer. Corinne Davis, counsel for PharTech, and the other plaintiff, Erin Sawyer, are also present.

> **September 13, 1996. Time: 9:30 a.m.**
> MR. DRIZOLLI: Good morning, Mr. Sawyer. My name is Curtis Drizolli, and I represent Dr. Foster in this action. Mr. Sawyer, I'm most interested in the basis of your loss-of-consortium claim.
> MR. SAWYER: Okay.
> MR. DRIZOLLI: I know that some of my questions might be embarrassing, but I need to know the answers. First, before your wife had the Ovar-X device implanted, how often did you have—uh—relations?
> MR. SAWYER: [To Mr. Palmer]: Do I really have to answer?
> MR. PALMER: Yes.
> MR. SAWYER: Well, we were newlyweds, so three or so times a week, most times, I guess.
> MR. DRIZOLLI: What about after she had the implant?
> MR. SAWYER: Well, during the first six months or so, she had problems occasionally, but I would guess still about the same—with some breaks when she wasn't feeling well.
> MR. DRIZOLLI: Okay, what about after the first six months?

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used so-called marital aids. Five months later, however, a judge compelled her to return to the Twin Cities to answer the questions.

MORTON MINTZ, AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD 194-95 (1985). Similarly, when a female doctor sued a New York hospital after she contracted AIDS by pricking her finger with a contaminated needle negligently left in a patient's bedding, the defense attorney sought to discredit her by "examin[ing] her love life and discuss[ing] her abortions." David Margolick, *Defense Tactics in the AIDS Doctor's Suit*, N.Y. TIMES, Jan. 23, 1990, at B1, *available in* LEXIS, News Library, Nyt File. The attorney argued this information was relevant because the doctor might have contracted AIDS from a transfusion or from sexual contact. *Id.*

427. *Cf.* Inker, *supra* note 426, at 27 ("Domestic relations litigants may be particularly vulnerable because *a spouse* or former spouse can reveal confidential information that will embarrass or otherwise harm the other spouse." (emphasis added)).

MR. SAWYER: She started feeling better. I guess she got used to the Ovar-X and how it affected her system. We were back to normal for awhile, but then she started feeling very poorly.
MR. DRIZOLLI: Then what happened?
MR. SAWYER: Well, she wasn't feeling well, so—uh—we dropped to just a couple a times a month—maybe less some months.
MR. DRIZOLLI: What about after she had the Ovar-X removed?
MR. SAWYER: Well, she had that scar on her arm, which was painful, but I guess things started to pick up. We had decided that we wanted children so we were—you know—trying.
MR. DRIZOLLI: So what's the basis of your loss of consortium claim?
MR. SAWYER: Well, ever since Erin was diagnosed with endometriosis, she really doesn't want me near her. I think she feels guilty about maybe not being able to have kids. She knows I wanted to have children.
MR. DRIZOLLI: During your marriage, have you ever had an affair with another woman?
MR. PALMER: I object. That's an outrageous question. It's not relevant.
MR. DRIZOLLI: Sir, it is relevant to the consortium claim. If you don't want me to ask these questions, drop that claim and I'll be glad to move on.
MR. SAWYER: I'll answer—no. I've never cheated on my wife.
MR. DRIZOLLI: Have you attended strip clubs or gentlemen's clubs since you were married?
MR. PALMER: Now you're really off base! I object. You're simply trying to embarrass the witness.
MR. SAWYER: I'd really rather not answer that question.
MR. DRIZOLLI: Okay. We'll mark that question and ask the court whether you need to answer it.
MR. DRIZOLLI: How are your finances?
MR. PALMER: What are you doing? Why is that relevant? You're just fishing.
MR. DRIZOLLI: It's relevant because I want to know if something other than Ovar-X chilled his relationship with his wife. My client has a right to know. Your client's trying to get a lot of money from my client, and I need to be able to defend her.
MR. PALMER: I'll let him answer the question if you will agree that this information will be kept confidential by you

and your client. I'll get you the paperwork for a confidentiality agreement tomorrow.
MR. DRIZOLLI: Okay, fair enough. Now, Mr. Sawyer, please answer my question.
MR. SAWYER: We're fine. We both have good jobs. That's not a problem.
MR. DRIZOLLI: Do you realize that if you lose this case, you and your wife may be liable to reimburse both defendants for their costs and attorneys' fees which, I might add, are considerable?
MR. PALMER: Objection, argumentative and irrelevant. Don't answer that.
MR. DRIZOLLI: Okay. I'll withdraw the question. Let me change the subject again. Your wife gained some weight while she was on Ovar-X, right?
MR. SAWYER: Yes.
MR. DRIZOLLI: How much?
MR. SAWYER: About twenty pounds.
MR. DRIZOLLI: Did you find your wife unattractive at that point?
[Ms. Sawyer begins to cry.]
MR. SAWYER: You're upsetting my wife. I love my wife.
MR. DRIZOLLI: Answer the question.
MR. SAWYER: I did answer it.
MR. DRIZOLLI: We'll let the judge decide whether you did or didn't. Earlier I asked whether you had seen any other women during your marriage. I forgot to ask whether you've had affairs with any men during that same period.
MR. PALMER: This deposition is over! You've really crossed the line now. Get the hell out of my office![428]

* * * *

A. Were the Questions Proper?

To determine whether Mr. Drizolli's questions were proper, the starting point should be Federal Rule 26(b)(1), which defines the scope of permissible discovery and provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."[429] The key "hurdle" words in this rule are "privileged" and "relevant."[430]

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428. *Cf.* Golembiewski v. Hallberg Ins. Agency, 635 N.E.2d 452, 456 (Ill. App. Ct. 1994) (quoting an attorney who told "the court reporter to leave and [told another] attorney to 'get the hell out of [his] office'" (second alteration in original)).

429. FED. R. CIV. P. 26(b)(1).

430. Inker, *supra* note 426, at 29.

Privileged information is information protected by any statutory or common law privilege and material protected by the work product doctrine.[431] None of Mr. Drizolli's questions required the deponent to divulge privileged information.[432] Thus, he easily cleared this hurdle.[433]

At trial, relevant information is that evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[434] Relevance in the discovery context, however, is very broad.[435] Under the Federal Rules, "relevance" does not mean that the information will be admissible at trial; instead, the information need only appear "reasonably calculated to lead to the discovery of admissible evidence."[436] Further, "[b]y linking rele-

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431. *Id.*

432. Even if a question had called for privileged information, neither the deponent nor the deponent's counsel objected. Thus, any privilege would have been waived. *See, e.g.*, Kymissis v. Rozzi, No. 93 Civ. 8609(JGK)RLE, 1997 WL 278055, at *3 (S.D.N.Y. May 23, 1997) ("If an attorney allows a deponent to testify concerning an area to which an alleged privilege would normally apply, the client is bound by the resulting waiver."); Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455, 459 (N.D. Cal. 1978) (mem.) (finding the privilege to be waived when the deponent described allegedly privileged conversations without objection from counsel).

433. Had Mr. Drizolli asked questions designed to elicit privileged information, he also would have run afoul of Rule 4.4 of the *Model Rules of Professional Conduct*. *See* Valassis v. Samelson, 143 F.R.D. 118, 124-25 (E.D. Mich. 1992) (stating that Rule 4.4 "has been interpreted as preventing an attorney from inquiring about privileged matters" (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 359 (1991) and 2 HAZARD & HODES, *supra* note 131, § 4.2:107, at 738)).

434. FED. R. EVID. 401. However, "Rule 401 is silent as to what factors the court must consider in determining whether an item of evidence is relevant. Thus, the determination of relevance is not automatic or mechanical." 2 WEINSTEIN'S FEDERAL EVIDENCE § 401.04[1], at 401-14 (Joseph M. McLaughlin ed., 2d ed. 1997).

435. *See, e.g.*, Liew v. Breen, 640 F.2d 1046, 1049 (9th Cir. 1981) ("For discovery purposes 'relevancy' is a broad term."); Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, 657 F.2d 890, 903 (7th Cir. 1981) ("Admissibility at trial is not the test."); Liz Claiborne, Inc. v. Mademoiselle Knitwear, Inc., No. 96 Civ. 2064 (RWS), 1997 U.S. Dist. LEXIS 1272, at *15 n.4 (S.D.N.Y. Feb. 7, 1997) ("The standard for discoverability of information under the Federal Rules of Civil Procedure is lower than the standard for admissibility of evidence under Rule 401 [of the Federal Rules of Evidence]."); Schaap v. Executive Indus., 130 F.R.D. 384, 386 (N.D. Ill. 1990) ("[R]elevancy 'is to be more loosely construed at the discovery stage than at the trial.'"); Cox v. E.I. DuPont de Nemours & Co., 38 F.R.D. 396, 398 (D.S.C. 1965) ("Fortunately, in the search for the ultimate, TRUTH, the Federal Courts, blessed with the rules of discovery, are not shackled with strict interpretations of relevancy."); *see also* 8A WRIGHT ET AL., *supra* note 61, § 2008 *passim* (discussing the meaning of the word "relevant" as used in Federal Rule of Civil Procedure 26(b)(1)).

436. FED. R. CIV. P. 26(b)(1); *accord* Chubb Integrated Sys. Ltd. v. National Bank, 103 F.R.D. 52, 59 (D.D.C. 1984) (mem.) ("Rule 26(b) makes a clear distinction between information that is relevant to the subject matter for pretrial discovery and the ultimate admissibility of that information at trial.").

vance to the 'subject matter' of the case," the rule does not restrict inquiry into the issues alleged in the pleadings.[437] As one treatise explains, the breadth of discovery relevance is reflected by courts ruling that discovery should be permitted on matters that " '"might conceivably have a bearing"' on the subject matter."[438] It is a flexible concept that is usually addressed on a case-by-case basis.[439] When in doubt, courts typically rule in favor of discoverability.[440] The relevancy hurdle, therefore, is much lower than the privilege hurdle.[441]

Even if the questioning attorney clears the Rule 26(b)(1) hurdle, the next hurdle is Rule 30(d)(3), which concerns depositions conducted in bad faith or in a manner to annoy, embarrass, or oppress the deponent:

> At any time during a 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, the court in which the action is pending . . . 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 as provided in Rule 26(c).[442]

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437. HARE ET AL., *supra* note 247, at 7 (citing Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1187 (D.S.C. 1974); United States v. IBM Corp., 66 F.R.D. 180, 182 (S.D.N.Y. 1974); La Chemise Lacoste v. Alligator Co., 60 F.R.D. 164, 170-71 (D. Del. 1973); Triangle Mfg. v. Paramount Bag Mfg., 35 F.R.D. 540, 542 (E.D.N.Y. 1964)); *see also supra* text accompanying note 429. Relevant subject matter includes affirmative defenses as well as claims. *See* HARE ET AL., *supra* note 247, at 7 (citing FED. R. CIV. P. 26(b)(1)).

438. HARE ET AL., *supra* note 247, at 9 (quoting United Nuclear Corp. v. General Atomic Co., 629 P.2d 231, 250 (N.M. 1980) (quoting *Triangle*, 35 F.R.D. at 542)); *accord* 8 WRIGHT ET AL., *supra* note 61, § 2008, at 108-09 ("[I]t is not too strong to say that a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action.").

439. 2 WEINSTEIN'S, *supra* note 434, § 401.07, at 401-43; *see also id.* § 401.04[3][b], at 401-32 (explaining that relevancy is determined not only by evidentiary rules, but also by controlling substantive law); *Eggleston*, 657 F.2d at 903 (requiring "flexible treatment" of what is considered relevant (internal quotation marks omitted)).

440. *See, e.g.*, Rolscreen Co. v. Pella Prods., 145 F.R.D. 92, 97 (S.D. Iowa 1992) (ordering deposition testimony although it "may prove to be duplicative"). *But see* 8 WRIGHT ET AL., *supra* note 61, § 2008, at 107-08 (indicating that, even under the liberal discovery rules, relevancy does not include information "that has no conceivable bearing on the case").

441. *See Eggleston*, 657 F.2d at 903 ("Relevancy, although mentioned in the rule along with privilege, does not necessarily deserve the same respect.").

442. FED. R. CIV. P. 30(d)(3). Rule 26(c) provides that "the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including that discovery not be had, that the discovery be conducted only on specified terms, that the discovery be obtained by another method, that certain matters not be inquired into, that the persons allowed to attend be limited, or that trade secret information not be divulged. FED. R. CIV. P. 26(c); *accord* D. COLO. L.R. 30.1C(A) (discussed at *supra* note 44).

Even assuming that the questioning attorney's conduct comports with controlling court rules or rules of civil procedure, his conduct may still violate mandatory ethical rules. Under the Model Rules, "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."[443] The Model Code contains similar prohibitions. Specifically, DR 7-106(C)(2) provides that a lawyer shall not "[a]sk any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person."[444] In addition, DR 7-102(A)(1) forbids a lawyer from acting "when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."[445] Thus, an attorney may violate an ethical rule by asking a relevant question with an improper motive.

Finally, a questioning attorney's conduct might run afoul of civility codes, some of which may be enforced by courts through threat of sanction.[446] For example, several codes proscribe attorneys from asking questions that "inquire into a deponent's personal affairs or question a deponent's integrity where such inquiry is irrelevant to the subject matter of the deposition" or that are harassing, repetitive, or argumentative.[447]

Here, Mr. Drizolli did not ask any questions calling for privileged information, so he cleared the first hurdle. Moreover, given the low relevancy threshold, many of Mr. Drizolli's questions, although pointed, would also survive the Rule 26(b) relevancy hurdle. Because the Sawyers pleaded loss of consortium, they opened their private relationship to scrutiny. Although many of the questions asked were personal and embarrassing, and even caused the deponent's wife to cry, they were relevant under the discovery definition of "relevant."[448] At a minimum, there was some possibility that most of the information sought would lead to the discovery of evidence that would be admissi-

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443. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.4 (1994).

444. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(C)(2) (1982).

445. *Id.* DR 7-102(A)(1).

446. *See supra* Part I.C.

447. BOSTON BAR ASS'N, CIVILITY STANDARDS FOR CIVIL LITIGATION stand. B(5)(e)-(k) (Mass. 1994), *reprinted in* BOSTON B.J., Sept.-Oct. 1994, at 11, 12; *see also* LOS ANGELES COUNTY BAR ASS'N, LITIGATION GUIDELINES guide. 5 (Cal. 1989) (prohibiting, among other things, inquiry into a deponent's personal affairs); ST. PETERSBURG BAR ASS'N, STANDARDS OF PROFESSIONAL COURTESY stand. E (Fla. 1992) (cautioning attorneys to avoid inquiring into a deponent's personal affairs).

448. *See supra* notes 435-441 and accompanying text (discussing the meaning of "relevant" under Rule 26(b)).

ble in connection with the Sawyers' loss-of-consortium claim.[449] In addition, Mr. Drizolli owed his client an ethical and legal duty to develop the facts fully and to craft a defense to the Sawyers' allegations.[450] Thus, he needed to ask some hard questions to satisfy that duty.

There was one question, however, that did not seek relevant information. At one point, Mr. Drizolli attempted to intimidate Mr. Sawyer by indicating that the Sawyers might be liable for the defendants' attorneys' fees if they lost. Whether Mr. Sawyer knew of this potential—and highly unlikely—liability was in no way relevant to the merits. Further, Mr. Drizolli did not need to know the information to defend his clients in the lawsuit. Instead, the question was asked merely to intimidate the Sawyers. Mr. Drizolli was trying to scare the Sawyers into settling the case.

In addition, one other question—the one concerning a potential same-sex affair—was probably designed merely to embarrass the witness. The witness had already indicated unequivocally that he had not cheated on his wife, yet Mr. Drizolli still insisted on asking the same-sex question. Because Rule 30(d),[451] the mandatory ethical codes,[452]

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449. During the deposition of a plaintiff in a case in which it was claimed the defendant intentionally caused the plaintiff emotional distress by sexually harassing her, the defendant's counsel asked the plaintiff questions concerning her sexual relationship with her husband both before and after the events at issue. James v. Miller, No. 86 C 10081, 1988 U.S. Dist. LEXIS 6793, at *2 (N.D. Ill. June 29, 1988) (mem.). "Specifically, the plaintiff was asked to state the frequency that she and her husband had sexual intercourse, the duration of their sexual intercourse, whether either party achieved climax, and, if so, how often, and finally whether the parties were satisfied after they had intercourse." *Id.* Although the plaintiff answered one of these questions, on advice of counsel, she refused to answer others. *Id.* When the defendant moved to compel answers to these questions, the plaintiff's attorney argued that the questions were not relevant because the plaintiff had not sought damages for loss of consortium or any sexual dysfunction or trauma. *Id.* The defendant argued that the information was relevant, or was at least calculated to lead to the discovery of admissible evidence. *Id.* at *2-3. Although the court sympathized with the plaintiff's sense of embarrassment, it granted the defendant's motion to compel because the plaintiff indicated that the defendant's actions had led to a decline in sexual relations between her and her husband. *Id.* at *3 & n.2. The court indicated that plaintiff's counsel could object to the questions, but could not instruct the client not to answer; it also indicated that the plaintiff could seek a limiting order under Rule 30(d). *See id.* at *4 & n.2.

450. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. 1 (1994) ("A lawyer should pursue a matter on behalf of a client despite opposition . . . and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.").

451. *See supra* text accompanying note 27 (quoting the portion of Rule 30(d) that permits a court to terminate or limit a deposition when it is being conducted in a manner as unreasonably to annoy, embarrass, or oppress the deponent).

452. *See supra* notes 138, 151 and accompanying text (discussing sections of the Model Rules and Model Code that prohibit attorneys from asking questions or engaging in conduct merely to harass or embarrass deponents).

and many civility codes[453] prohibit questions designed to embarrass, harass, and annoy, Mr. Drizolli stumbled when he approached these hurdles.

B. Did the Defending Attorney Respond Properly?

Mr. Drizolli was not the only attorney at this deposition faced with ethical and legal dilemmas. Mr. Palmer, the deponent's attorney, also had to grapple with some difficult issues. Unfortunately, he too stumbled both legally and ethically.

When a witness is faced with sensitive and potentially embarrassing questions, a defending lawyer's first inclination is to protect the witness.[454] For some attorneys, the protective mechanism might be to object;[455] others might ask the questioner to move to another line of inquiry.[456] Protecting the client, however, should begin with careful preparation and disclosure.[457] Even before an attorney files a claim that might require a client to reveal personal or sensitive information, the client should be informed about the pros and cons of pursuing such a claim. Indeed, the attorney has an ethical obligation to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[458] In a loss-of-consortium case, therefore, the attorney should warn the client about the types of questions he will face during discovery. If the client elects to proceed with the claim, then the attorney should carefully prepare the client so that the client will not be blindsided by very personal questions at the deposition.

If the questioning attorney oversteps the bounds of privilege, the attorney may instruct the client not to answer the questions.[459] Relevancy, however, is more problematic.

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453. *See, e.g., supra* notes 164-170 and accompanying text (quoting BOSTON BAR ASS'N, CIVILITY STANDARDS FOR CIVIL LITIGATION stand. B(5)(e)-(k) (Mass. 1994)).

454. *See supra* notes 426, 449 (providing examples of attorneys who instructed witnesses not to answer detailed questions about their sexual relationships).

455. *See* John R. Woodard III, *Discovery Abuse: "I Know It When I See It,"* BRIEF, Winter 1997, at 32, 38 (observing that an objection will often result in an opposing attorney abandoning a line of inquiry, thus sparing a deponent from examination "of an otherwise sensitive area").

456. In line with this approach, attorneys will often instruct their witnesses not to answer such a question. *See supra* note 426 (noting attorneys' instructions to their witness not to answer questions about how often she engaged in oral and anal intercourse and how often she used so-called marital aids).

457. *See supra* notes 198, 250-254 and accompanying text.

458. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1994).

459. FED. R. CIV. P. 30(d)(1).

Because of the broad definition of relevance during pretrial discovery,[460] a relevancy objection is difficult to sustain.[461] Moreover, an attorney cannot instruct a witness not to answer simply because the attorney believes that the question calls for irrelevant information.[462] In other words, a party cannot unilaterally restrict the scope of questioning on relevancy grounds.[463] As the United States Supreme Court indicated in *Hickman v. Taylor*,[464] "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."[465]

If an attorney in a federal court case instructs a witness not to answer a deposition question based on relevancy, then that attorney risks sanctions under Rule 30(d)(2) and Rule 37 for impeding the examination.[466] In addition, the attorney risks prosecution for violating ethical rules, because interposing improper objections in violation of controlling court rules runs afoul of Model Rules 3.2, 3.4, and 8.4(d), and DRs 1-102(A)(5), 7-101(A)(1), and 7-102(A)(1).[467]

What, then, should a lawyer do when a questioning attorney asks the deponent embarrassing questions or clearly irrelevant questions, and the attorney feels he must do more than simply object? In federal

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460. *See supra* notes 435-441 and accompanying text (discussing the breadth of the term "relevant" in the discovery context).

461. *See* Resolution Trust Corp. v. International Ins. Co., Civ. A. No. 89-4020, 1993 WL 98677, at *1-2 (E.D. La. Mar. 26, 1993) (minute entry) (chastising an attorney for instructing a witness not to answer on the grounds that the question lacked relevance); Rolscreen Co. v. Pella Prods., 145 F.R.D. 92, 95 (S.D. Iowa 1992) (stating that a relevancy objection "is a difficult objection upon which to prevail during the discovery phase of an action" (internal quotation marks omitted)). Under the Federal Rules of Civil Procedure, relevancy objections may be reserved for trial. FED. R. CIV. P. 32(d)(3)(A).

462. *See* Resolution Trust Co. v. Dabney, 73 F.3d 262, 266 (10th Cir. 1995) ("It is inappropriate to instruct a witness not to answer a question on the basis of relevance."); Standard Chlorine v. Sinibaldi, No. 91-188-SLR, 1994 U.S. Dist. LEXIS 3388, at *15 (D. Del. Mar. 21, 1994) (mem.) ("[C]ounsel's instruction not to answer a deposition question on grounds of relevance is manifestly at odds with proper deposition procedure.").

463. *See* Baine v. General Motors Corp., 141 F.R.D. 328, 330 (M.D. Ala. 1991) (holding that a party may not withhold information based on a unilateral determination of relevancy); Smith v. Logansport Community Sch. Corp., 139 F.R.D. 637, 648 (N.D. Ind. 1991) (mem.) (same).

464. 329 U.S. 495 (1947).

465. *Id.* at 507. *But see* Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, 657 F.2d 890, 904 (7th Cir. 1981) (declaring, before the 1993 amendments, that "the 'fishing license' nevertheless need ordinarily be only a limited one with an early expiration date").

466. *See* FED. R. CIV. P. 30(d)(2) (allowing for imposition of sanctions upon persons whose conduct "has frustrated the fair examination of the deponent"); FED. R. CIV. P. 37 (providing for sanctions when an attorney advises a deponent not to answer a question, and providing for a motion to compel an answer to that question).

467. *See supra* notes 138, 140, 147-148, 206 (quoting the relevant portions of these rules).

court, Rule 30(d) may provide the needed relief: "At any time during a deposition," a party or deponent may present a motion to the court indicating that the deposition "is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party."[468] In addition, Rule 30(d)(1) permits an attorney to counsel his client not to answer a question on the grounds that the question is designed to embarrass the deponent or is irrelevant, if the attorney intends to present a motion under Rule 30(d)(3).[469] The attorney, however, may not merely instruct the witness not to answer such a question without adjourning to present the Rule 30(d)(3) motion.[470]

If the deponent's attorney believes that the questioning attorney is entitled to the requested information, but also wants to restrict distribution of his client's sensitive information, he might ask the opposing counsel to sign a confidentiality agreement.[471] If the opponent will not entertain a confidentiality agreement, upon a showing of good cause, the court may enter a protective order.[472] After the deposition, if the deponent's attorney believes that the information gained during the deposition is prejudicial, he might consider filing a motion in limine to prevent the opponent from introducing the sensitive evidence at trial.[473]

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468. FED. R. CIV. P. 30(d)(3).

469. FED. R. CIV. P. 30(d)(1).

470. *Id.*; *accord* Smith v. Logansport Community Sch. Corp., 139 F.R.D. 637, 643 (N.D. Ind. 1991) (mem.) (calling an attorney's after-the-fact attempt to reconcile a unilateral termination with the requirements of Rule 30(d) "disingenuous, at best"). In one case in which Rule 30(d) was invoked, the court explained:

> The problem presented in this case, is that although several aspects of the instant deposition fall squarely within the Rule 30(d) requirement of unreasonableness and oppression of the deponent[,] defense counsel never made a Rule 30(d) motion to the Court to terminate the examination. In fact, defense counsel went so far as to arrogate to himself the right to terminate the examination in a unilateral fashion without consideration of the applicable legal authority. This tactic contravenes the requirement that an application to terminate must be made to the court.

Hearst/ABC-Viacom Entertainment Servs. v. Goodway Mktg., Inc., 145 F.R.D. 59, 62 (E.D. Pa. 1992) (mem.) (citation omitted).

471. *See* Sharjah Inv. Co. (UK) v. P.C. Telemart, Inc., 107 F.R.D. 81, 82-83 (S.D.N.Y. 1985) (discussing deposition transcripts subject to a stipulated confidentiality agreement).

472. *See* FED. R. CIV. P. 26(c) (providing for a court order sealing a deposition, which may be opened only by order of the court).

473. *See generally* Edna Selan Epstein, *Motions in Limine: A Primer*, LITIGATION, Spring 1982, at 34 (discussing the use of motions in limine to prevent the introduction of evidence at trial); Stephen A. Saltzburg, *Tactics of the Motion in Limine*, LITIGATION, Summer 1983, at 17 (discussing the impact that a motion in limine can have on a trial).

The first time Mr. Drizolli asked Mr. Sawyer a sensitive question, Mr. Sawyer hesitated and asked his own attorney whether he had to answer. Mr. Palmer correctly directed Mr. Sawyer to answer the question, which sought relevant, nonprivileged information. Later, Mr. Palmer objected to a question on grounds of relevance. But Mr. Palmer did not instruct his client not to answer the question, and the client quickly volunteered the answer. Mr. Palmer's conduct, however, soon deteriorated. Instead of stating objections, he started yelling at Mr. Drizolli. Such conduct is inappropriate and would provide a basis for sanctions under Rule 30(d)(2) of the Federal Rules of Civil Procedure; it also violates the letter and spirit of several ethical rules.[474]

Next, in response to a question concerning the plaintiffs' finances, Mr. Palmer suggested that he would not instruct the witness not to answer if opposing counsel would sign a confidentiality agreement. Although the attempt to stipulate concerning confidentiality was appropriate,[475] Mr. Palmer's threat to instruct the witness not to answer was inappropriate.[476] The better step would have been to seek protection under Rule 30(d)(3).[477] A few questions later, in response to Mr. Drizolli's comment regarding attorneys' fees, Mr. Palmer objected and then instructed the witness not to answer. Again, in federal court, such an instruction is prohibited under Rule 30(d)(1) absent a motion under Rule 30(d)(3).[478]

Finally, when Mr. Drizolli asked Mr. Sawyer about a possible male lover, Mr. Palmer exploded and ejected Mr. Drizolli from the office. Although such behavior might be understandable, it is inappropriate. In *Golembiewski v. Hallberg Insurance Agency*,[479] a case on which this part of the hypothetical is based, the trial court barred the deponent from testifying at trial, prohibited the offending attorney from presenting a defense, and ordered the attorney's firm to pay $900 to opposing counsel for time spent at the deposition.[480] Although the deponent and his counsel appealed this ruling, the appellate court affirmed the

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474. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1982) (prohibiting action that serves to harass or injure others); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 (1994) (prohibiting the obstruction of access to evidence).

475. *See* N.D. Ill. L.R. 5.22 cmt. (proposed May 24, 1995) (rejected Feb. 24, 1997) (on file with author) (indicating that a Rule 30(d) motion should not be presented to the court until the parties have made a good-faith effort to resolve the matter informally).

476. *See supra* note 470 and accompanying text.

477. *See supra* note 468 and accompanying text.

478. *See* FED. R. CIV. P. 30(d)(1).

479. 635 N.E.2d 452 (Ill. App. Ct. 1994).

480. *Id.* at 456. In *Golembiewski*, the court characterized the sanctioned attorney's conduct as representing "discovery practice at its worst" and pointed out that the deposition

ruling.[481] Thus, although Mr. Drizolli prompted Mr. Palmer's conduct, Mr. Palmer probably would have ended up in as much, if not more, trouble than Mr. Drizolli.

VI. INTERACTION WITH OPPOSING COUNSEL

The primary temptation for attorney misbehavior in depositions arises from the absence of a judge.[482] In this scenario, the defense lawyer adopts a "Rambo" strategy[483] and the plaintiff's lawyer must decide how to react to that strategy. Does she respond in kind? Does she seek judicial intervention? How does she protect her client's interest?

> **September 19, 1996. Time: 9:00 a.m.**
> MS. DAVIS: Good morning, doctor. My name is Corinne Davis, and I represent PharTech in this action. You've been sworn, and I assume your attorney has reviewed deposition procedures with you. So we'll cut right to the chase. Dr. Foster, how many medical malpractice claims have you had filed against you?
> MR. DRIZOLLI: That's not relevant, Miss. I object. It's your client's product that's gotten us into this mess. My client is a well-respected doctor and leader in the community.
> MS. DAVIS: Doctor, please answer my question.
> DR. FOSTER: Only one other suit has ever been filed against me. I won a summary judgment in that case and was totally vindicated.
> MS. DAVIS: What were the allegations in that case?
> MR. DRIZOLLI: Look, Miss. Let me help you out. Move on. No court will allow this information into evidence.
> MS. DAVIS: [To Mr. Drizolli] Do you have an objection? If so, please state it for the record. If not, I would appreciate it if you would stop commenting on my questions. You talk about me needing help—you're the one who needs help. If you continue, you're going to force me to call the court for an immediate ruling.

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transcript was "riddled with frivolous objections . . . and . . . improper instructions not to answer questions." *Id.*

481. *Id.*

482. *Cf.* Cholfin v. Gordon, No. CA943623, 1995 WL 809916, at *9 (Mass. Super. Ct. Mar. 22, 1995) (mem.) (reminding attorneys that a deposition is an extension of a judicial proceeding and should be conducted "with the same sense of solemnity . . . that would be required were the parties in the courtroom itself").

483. *See supra* note 159 and accompanying text (describing the "Rambo" attorney).

MR. DRIZOLLI: I've been in this business for a long time, and I'll talk whenever I want to. I'm friends with all the judges downtown. You're fighting a losing battle.

MS. DAVIS: [To Mr. Drizolli] Are you instructing your witness not to answer?

MR. DRIZOLLI: You can waste your time if you want to, but my client is a busy doctor with a lot of patients to see. Her time is valuable and I'm not going to let you waste it. Ask her something relevant.

MS. DAVIS: I did. I want an answer to my question.

MR. DRIZOLLI: Lady, where did you get your law degree? J.C. Penney? You're acting like this is your first deposition. Oh well—I guess I'll humor you. At least you're pleasant to look at. Dr. Foster, answer the pretty lady's question.

DR. FOSTER: It involved a situation in which I prescribed the patient some medication. The patient did not follow the instructions on the bottle and had some complications. He sued saying I didn't explain the instructions to him. But I had written everything down, and the pharmacy had put those instructions on the bottle, and he just did not follow them. When he admitted the truth, the judge threw out his case.

MR. DRIZOLLI: [To Ms. Davis] Are you happy now? What a waste of time. I hope your next questions are better than the last couple. Otherwise, this is going to be a really long day.

MS. DAVIS: Mr. Drizolli, please keep your commentary to yourself. When you're taking a deposition, you can talk. But you need to keep your big, fat mouth shut during my examination. You can ask all the questions you want once I'm finished.

MR. DRIZOLLI: Don't tell me what to do. You're really pissing me off. If you don't like how I represent my client, then you can just leave.

MS. DAVIS: I might just do that. And when I resume, I'll be back with a video camera so I can record your antics for the judge. I'm sure he'll be horrified.

MR. DRIZOLLI: You leave and you're not going to get to depose my client for a very long time. She's busy and doesn't have time for your nonsense.

MS. DAVIS: Well, I guess your threat will just force me to call the court for an immediate ruling.

MR. DRIZOLLI: I would caution you not to use any phone in this office unless you have my permission.

MS. DAVIS: Are you actually saying I can't use the phone?

MR. DRIZOLLI: You touch the phone and you'll be sorry.

MS. DAVIS: Then you leave me no choice. I'll see you before the judge.

* * * *

Complete fiction? Unfortunately not.[484] Extreme incivility is a form of discovery abuse[485] that occurs all too frequently. Here, the entire exchange is replete with uncivil exchanges—some more blatant than others.

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484. Mr. Drizolli's last two remarks are based on *Castillo v. St. Paul Fire & Marine Insurance Co.*, 828 F. Supp. 594, 597 (C.D. Ill. 1992), in which the following exchange occurred between two attorneys when one suggested that an impasse be resolved by an immediate telephone conference with the judge:

> [Attorney 1]: I would caution you not to use any telephones in this office unless you are invited to do so, counsel.
>
> [Attorney 2]: You're telling me I can't use your telephones?
>
> [Attorney 1]: . . . [Y]ou step outside this room and touch the telephone, and I'll take care of that in the way one does who has possessory rights.

Id. The J.C. Penney comment was based on an incident in which an older male attorney posed that question to the author early in the author's practice, and on *Unique Concepts, Inc. v. Brown*, 115 F.R.D. 292, 293 (S.D.N.Y. 1987), in which the defending counsel told the examining counsel, "I would almost agree to make a contribution of cash to you if you would promise to use it to take a course in how to ask questions in a deposition." Other cases and articles are replete with incidents involving attorneys' uncivil conduct during depositions. *See, e.g.*, Carroll v. Jaques, 926 F. Supp. 1282, 1286 (E.D. Tex. 1996) (explaining that defendant's attorney, among other things, called plaintiff's counsel an "idiot" and an "ass," and indicated that he "ought to be punched in the goddamn nose"), *aff'd sub nom.* Carroll v. Jacques Admiralty Law Firm, 110 F.3d 290 (5th Cir. 1997); Mercer v. Gerry Baby Prods. Co., 160 F.R.D. 576, 577 (S.D. Iowa 1995) (discussing how one lawyer told another to "[s]tick it in your ear"); Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 53-55 (Del. 1994) (discussed at *supra* notes 114-125 and accompanying text); Cholfin v. Gordon, No. CA943623, 1995 WL 809916, at *8 (Mass. Super. Ct. Mar. 22, 1995) (mem.) (explaining that one attorney called the defendant a "liar," an "animal," and a "son-of-a-bitch" (internal quotation marks omitted)); Corsini v. U-Haul Int'l, Inc., 630 N.Y.S.2d 45, 46 (App. Div. 1995) (describing how one attorney mimicked another's speech in a manner suggesting an ethnic slur and how the same attorney called the same person a "slime bag"); William Grady et al., *And Your Client Wears Combat Boots*, CHI. TRIB., Oct. 12, 1993, § 3, at 3, *available in* LEXIS, News Library, Chtrib File (reporting that, during a deposition, one attorney said to the other, "You look like a slob the way you're dressed, but you don't have to act like a slob"); *see also* Cary, *supra* note 159, app. (containing excerpts from abusive depositions). One news account reports that during one deposition, Houston attorney Joseph D. Jamail called another attorney "Fat Boy" and a "big fat tub of shit"; the other attorney called Jamail "Mr. Hairpiece." *Let's Work Together for a Lawyers' Civility Rights Act*, IND. LAW., Aug. 23, 1995, at 7, *available in* LEXIS, Legnew Library, Inlawr File [hereinafter *Let's Work Together*]. In another deposition, Jamail stated, "You could gag a maggot off a meatwagon." *Id.*

485. *See Corsini*, 630 N.Y.S.2d at 47 (explaining that "[d]iscovery abuse, . . . in the form of *extreme incivility* by an attorney with respect to an adversary, prior to and during a deposition, is not to be tolerated" (emphasis added)).

A. Gender Bias as Deposition Abuse

One subtle form of incivility concerns the issue of gender bias.[486] A tactic used by some attorneys to shake or frustrate opposing counsel is to refer to them in a manner that strips them of their professional status.[487] Often, this tactic is used by older males when the opponent is a younger female.[488] Here, for example, Mr. Drizolli twice referred to Ms. Davis as "Miss." He also referenced Ms. Davis's appearance. These types of statements are unprofessional and should be avoided.[489]

Attorneys should refer to each other as "Mr." or "Ms.,"[490] or they should call all participating attorneys by their first names. Distinctions should not be based on gender, age, or other characteristics, and certainly should not be used as a weapon to disrupt a deposition. Further, "[a]ny behavior that focuses attention away from the professional stature of an attorney and toward the personal serves to undermine the effectiveness of the recipient. Even assuming such behaviors are well-intentioned, the suggestion is that counsel's professional expertise is less important than, for instance, [his or her] physical appearance."[491]

In addition to being unprofessional, Mr. Drizolli's method of addressing Ms. Davis might actually constitute an ethical violation in some jurisdictions. For example, Rule 6.5 of the Michigan Rules of Professional Conduct provides: "A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected

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486. *See generally* Lorraine H. Weber, *Professionalism and Gender: A Practical Guide*, 69 MICH. B.J. 898 (1990) (discussing the need for non-biased professionalism among lawyers).

487. *Cf. supra* note 484.

488. *See* Cary, *supra* note 159, at 574 ("Rambo lawyers appear to take particular delight in demeaning inexperienced young women attorneys.").

489. Lorraine H. Weber explains:

> One of the ways that a lack of respect or status is conveyed is through the use of differential forms of address. Drawing distinctions in forms of address always runs the risk of creating the appearance that one side is disadvantaged. No individual should be addressed by their [sic] first name within a professional context. The use of "Mr." and "Ms." is the preferred form of address.
>
> All professional titles . . . should be used regardless of the gender of the individual. Under no circumstances should any terms of endearment such as "sweetie," "honey," or "dear," be used when speaking to a man or woman within the professional environment . . . . The use of familiar terms affects both a person's credibility and stature.

Weber, *supra* note 486, at 900.

490. *See id.*

491. *Id.*

personal characteristic."[492] Similarly, in a 1992 New York case, the court found that an attorney's reference to opposing counsel as "little lady" and "little girl" violated the state disciplinary code.[493]

B. Incivility Violates Procedural and Ethical Rules

Most attorneys would probably—and indeed, hopefully—agree that Mr. Drizolli's behavior in defending Dr. Foster's deposition was uncivil and unprofessional. However, did his conduct, beyond that discussed in the gender bias subpart, violate procedural and ethical rules? The answer, unequivocally, is yes.

Mr. Drizolli's conduct hindered, delayed, and disrupted the deposition. Therefore, Mr. Drizolli's conduct violated Rule 30(c) of the Federal Rules of Civil Procedure, which provides that the examination of a witness during a deposition "may proceed as permitted at the trial."[494] His obnoxious behavior would not have been tolerated at trial, and it should not be tolerated in the deposition setting. One court explained this ground for imposing sanctions for deposition misconduct:

> Although the deposition was not held in a courtroom, and there was no judge present, it was, nonetheless, part of a judicial proceeding . . . . A lawyer's duty to refrain from uncivil and abusive behavior is not diminished because the site of

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492. MICH. R. PROF. CONDUCT 6.5(a); *accord* COLO. R. PROF. CONDUCT 1.2(f) (indicating that discrimination against those involved in the litigation process is a disciplinary violation); MINN. R. PROF. CONDUCT 8.4(h) (prohibiting attorneys from committing "a discriminatory act, prohibited by federal, state or local statute or ordinance, that reflects adversely on the lawyer's fitness as a lawyer"); N.J. R. PROF. CONDUCT 8.4(g) (making it professional misconduct for a lawyer to "engage, in a professional capacity, in conduct involving discrimination . . . because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm"); R.I. SUP. CT. R. PROF. CONDUCT 8.4(d) (banning discrimination based on race, nationality, or sex against litigants, jurors, lawyers, and other individuals involved in the judicial process); Janis E. Clark, *Gender Bias Issues in the Legal Profession: Do the Kentucky Rules of Professional Conduct and the KBA Code of Professional Courtesy Help?*, KY. BENCH & B., Winter 1995, at 25 (discussing gender bias in the context of rules of professional conduct).

493. Principe v. Assay Partners, 586 N.Y.S.2d 182, 184-85 (Sup. Ct. 1992). Racial slurs also have been held unethical. *See, e.g.*, *In re* Williams, 414 N.W.2d 394, 399 (Minn. 1987) (per curiam) (adopting a referee's recommendation for the public reprimand of an attorney who intentionally used a racial slur in a deposition). *See generally* Annotation, *Attorney's Verbal Abuse of Another Attorney as Basis for Disciplinary Action*, 87 A.L.R.3D 351 (1978) (analyzing cases regarding whether an attorney's verbal abuse of another attorney constitutes a basis for disciplinary action).

494. FED. R. CIV. P. 30(c).

> the proceeding is a deposition room, or law office, rather than a courtroom.[495]

Mr. Drizolli's conduct also violated Federal Rule 30(d)(2), which permits a court to sanction an attorney who impedes or delays an examination.[496] Additionally, his tactics ran afoul of Federal Rule 1, which states that the Federal Rules should be "construed and administered to secure the just, speedy, and inexpensive determination of every action."[497]

Even further, Mr. Drizolli's conduct violated ethical duties he owed to the court, opposing counsel, and his client. How many rules did he break? Let us count the ways.[498] Using the Model Rules and the Model Code as guides,[499] he violated the following:

- Rule 3.2 and DR 7-102(A)(1), because his tactics hindered, not expedited, the litigation;[500]
- Rule 3.4, because he obstructed Ms. Davis's access to evidence;[501]
- Rule 3.5, because he engaged in conduct "intended to disrupt a tribunal";[502]
- Rule 4.4 and DR 7-102(A)(1), because he made statements for no purpose other than to embarrass or harass Ms. Davis;[503]

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495. Corsini v. U-Haul Int'l, Inc., 630 N.Y.S.2d 45, 47 (App. Div. 1995).

496. FED. R. CIV. P. 30(d)(2).

497. FED. R. CIV. P. 1.

498. Courts do take disciplinary actions against deposition misconduct. *See, e.g., In re* Schiff, 599 N.Y.S.2d 242, 242-43 (App. Div. 1993) (per curiam) (publicly censuring an attorney for deposition conduct, which included intimidating defendant's counsel and directing vulgar, obscene, and sexist comments at her, in violation of DR 1-102(A)(7) of the Model Code); Office of Disciplinary Counsel v. Levin, 517 N.E.2d 892, 894 (Ohio 1988) (per curiam) (publicly reprimanding an attorney for deposition misconduct that violated DRs 1-102(A)(5), 1-102(A)(6), 7-106(C)(2), 7-106(C)(5), 7-106(C)(6), and 7-106(C)(7) of the Model Code), *reinstatement granted*, 635 N.E.2d 380 (Ohio 1994).

499. Only mandatory disciplinary rules are listed in the text accompanying *infra* notes 500-506. At the least, however, his conduct also ran afoul of EC 7-1, 7-4, 7-10, 7-19, 7-24, 7-25, 7-37, 7-38, 7-39 of the Model Code. *See supra* Part I.B.

500. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1994) ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1982) (proscribing a lawyer from "delay[ing] a trial").

501. *See* Model Rules of Professional Conduct Rule 3.4(a) (prohibiting a lawyer from "unlawfully obstruct[ing] another party's access to evidence").

502. *Id.* Rule 3.5(c).

503. *See id.* Rule 4.4 ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . ."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (directing a lawyer not to take action on behalf of his client "when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another").

- DR 7-106(C)(6), because his conduct was discourteous and degraded the tribunal;[504]
- Rule 8.4(d) and DR 1-102(A)(5), because his conduct was "prejudicial to the administration of justice";[505] and
- DR 7-101(A)(1), because his "zealous advocacy" violated controlling procedural rules.[506]

In addition, he arguably violated Model Rule 1.5 and DR 2-106, because his tactics needlessly increased the costs of litigation—his client had to pay more than a truly fair fee.[507]

C. *Responding to Incivility*

How should an attorney react when faced with an obstreperous opponent? Some attorneys' first reaction would be to respond in kind.[508] This approach—retaliation—has some appeal. No attorney

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504. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(C)(6) ("In appearing in his professional capacity before a tribunal, a lawyer shall not . . . [e]ngage in undignified or discourteous conduct which is degrading to a tribunal.").

505. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(d); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(5); *accord* Cholfin v. Gordon, No. CA943623, 1995 WL 809916, at *12 (Mass. Super. Ct. Mar. 22, 1995) (mem.) (warning that "unchecked conduct . . . risks dissolving the entire litigation process in the acid of public disgust").

506. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (indicating that a lawyer may use only the "means permitted by law and the Disciplinary Rules" in pursuing the objectives of his client (footnote omitted)). One court stated:

> "An attorney does not have the duty to do all and whatever he can that may enable him to win his client's cause or to further his client's interest. His duty and efforts in these respects, although they should be prompted by his 'entire devotion' to the interest of his client, must be within and not without the bounds of the law."

In re Wines, 370 S.W.2d 328, 333 (Mo. 1963) (quoting a commissioner of a professional misconduct hearing); *accord* Richard M. Hunt, *Rude Lawyering Hurts Only the Client*, TEX. LAW., Apr. 4, 1994, at 4, *available in* LEXIS, Legnew Library, Txlawr File ("Standards of courtesy are not an addition to, but are rather implied in the concept of *zealous advocacy*, for *zealous advocacy* sees beyond the immediate moment to the long-term effects of every behavior on the conduct of the case as a whole . . . ." (emphasis added)).

507. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 ("A lawyer's fee shall be reasonable."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 ("A lawyer shall not . . . charge . . . an illegal or clearly excessive fee."); *cf.* Cary, *supra* note 159, at 576-77 ("If the attorney is charging . . . by the hour, then the parties are paying for the additional time it takes the attorneys to resolve disputes at the deposition. In addition, the party is usually paying for the extra transcript pages needed to cover the arguments and name-calling among counsel."); *Let's Work Together*, *supra* note 484 (referencing remarks by Justice Sandra Day O'Connor that abusive discovery tactics make the litigation process more expensive).

508. One commentator observed:

> Professional civility and courtesy rests on the understanding that what goes around comes around, not only over the course of a career, but even in the course of a single lawsuit. A lawyer who is rude and abusive to an opposing party in a deposition must expect that his client, when deposed, will also be abused. A

wants to appear weak in front of a client. In addition, responding in kind somewhat resembles the deterrence strategies employed during the "Cold War," when the first to launch was threatened with complete annihilation in a counterattack.[509] However, retaliation is not the best response, because retaliation may very well result in the same rule and ethics violations committed by opposing counsel.[510]

What then, should an aggrieved attorney do? 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.[511] 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. This method may save valuable deposi-

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lawyer who makes absurd objections in an attempt to pervert the legal process must understand that similar objections will be made to his efforts at discovery.

Hunt, *supra* note 506; *accord* Cary, *supra* note 159, at 575-76 (noting that one of the consequences of employing Rambo tactics "is the creation of a revenge motive in the opponent"); Eugene A. Cook, *Professionalism and the Practice of Law*, 23 TEX. TECH L. REV. 955, 971 (1992) ("A Rambo attitude only evokes retaliation from the other lawyers, making the problem even worse.").

509. *See* John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569, 575-79 (1989) (comparing discovery abuse to the "Prisoner's Dilemma"); *cf.* Judith L. Maute, *Sporting Theory of Justice: Taming Adversary Zeal with a Logical Sanctions Doctrine*, 20 CONN. L. REV. 7, 41-50 (1987) (analogizing discovery to competitive sports, where only one side can win).

510. *See* Ethicon Endo-Surgery v. United States Surgical Corp., 160 F.R.D. 98, 100 (S.D. Ohio 1995) ("Where either counsel engages in improper conduct, such as hurling accusations, arguing, or lecturing witnesses or attorneys, it is not proper for opposing counsel to respond in kind."); Castillo v. St. Paul Fire & Marine Ins. Co., 828 F. Supp. 594, 600 (C.D. Ill. 1992) (cautioning that it is not permissible to engage in unprofessional conduct just because other attorneys are acting unprofessionally). As one judge explained, engaging in unprofessional conduct may also adversely affect a lawyer's credibility with the judiciary:

> Just like you in this room have a book on every judge that you've practiced before and you tell war stories about that judge, we judges do the same thing. When a lawyer is involved in outrageous conduct or unprofessional conduct before me, when I'm sitting around having lunch with my colleagues, we talk about it. . . . Now, what does that mean? That means . . . that when that lawyer appears before me or some other judge in my building, and there's a contest of credibility among lawyers, whether it's conscious or subconscious, that lawyer is on the short end of the stick. And in the long run, that lawyer hurts himself or herself or their clients.

Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 146 F.R.D. 205, 229 (Fed. Cir. 1992) (Aspen, J., panelist, commenting).

511. It has been observed:

> Ignoring an SOB's outburst will often discourage him because it is hard to maintain a one-way argument. All you need do is ask the reporter to read the question back and then politely ask the witness to answer it. This tactic will often wear the SOB down and allow you to control the deposition.

Steven H. Wright & Pamela J. Coveney, *Bursting an SOB Litigator's Bubble During a Deposition*, MASS. LAW. WKLY., Dec. 9, 1991, at S1, *available in* LEXIS, Legnew Library, Malawt File.

tion time.[512] In addition, because attention spans tend to wane at the end of a deposition, the deponent's attorney may not object to the question if posed at a later time and in a slightly different way.

If the misconduct continues, make a record. As one attorney commented: "[Don't] try to win the argument, just make a record."[513] If the misconduct prevents a fair examination of the deponent, then stronger action might be needed, such as contacting the judge by phone or terminating the deposition to obtain a protective order or order compelling testimony.[514] If an attorney delivers such an ultimatum, she must keep her word or risk the opponent's escalating his obnoxious conduct.[515]

In the *Sawyer* case, Ms. Davis initially attempted to ignore Mr. Drizolli's improper interruptions. When the misconduct continued, she started to build the record. But she did not keep her cool entirely. On two occasions, she directed barbs at him. Fortunately, she regained her composure. As the interruptions persisted, she first con-

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512. *Id.*

513. *How to Protect Your Client at a Deposition from a Badgering Lawyer*, FED. DISCOVERY NEWS, Sept. 1996, at 2, *available in* LEXIS, Legnew Library, Lrpfd File (quoting New York City attorney Elizabeth S. Strong); *accord supra* note 264 and accompanying text (discussing the need to build a record of opposing counsel's misconduct); *cf.* Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 146 F.R.D. 205, 227 (Fed. Cir. 1992) (Professor Michael E. Tigar, panelist, commenting) ("If the abusive behavior continues, I shut the deposition down and go to the judge and—after a fair warning on the record—in big cities, we have a two four-letter word rule. . . . [T]he second four-letter word the opposing counsel uses, then we go to the district judge."). However, one should never lose sight of the bigger objective:

> Often, the SOB litigator becomes most obstreperous at critical junctures in the testimony, when the deponent is divulging damaging information. This is the time, when it is essential, to keep your eye on the ball. If you allow the record to become clouded with arguments between counsel, then the SOB litigator has succeeded.

Wright & Coveney, *supra* note 511.

514. *See supra* note 268 and accompanying text (discussing telephone conferences with the court to resolve deposition disputes); *supra* notes 275-277 and accompanying text (discussing protective orders and standing orders that address deposition conduct); *see also supra* notes 278-279 and accompanying text (advising how to handle prospectively an opponent who in the past has acted unprofessionally). However, one should keep in mind the fact that courts are loathe to resolve discovery disputes:

> Asking a court to resolve the conflict is an absolute last resort.
>
> Motions to compel discovery are among a judge's least favorite motions. Many judges view discovery disputes between attorneys in much the same manner that they view disputes between children on a playground. Judges generally believe that attorneys can, and should, resolve these disputes without involving the court.

Wright & Coveney, *supra* note 511.

515. *See* IMWINKELRIED & BLUMOFF, *supra* note 38, § 5:41, at 87 (noting that an attorney loses credibility by not following through with a threat to involve the court).

sidered terminating the deposition and resuming on video,[516] then indicated she would seek an immediate resolution via telephone, and finally was forced to terminate the deposition to seek judicial intervention. All in all, Ms. Davis acted appropriately under the circumstances, with her only transgressions being two sharp remarks to her opponent. She did not attempt to escalate the situation, and she diligently attempted to make a record and proceed with her questioning. When the matter is presented to the court, she will be in a good position to defend her conduct while condemning her opponent's.

Judges have shown little tolerance for incivility among members of the bar.[517] In fact, some have been fairly creative in punishing those who cross the line. For example, a Massachusetts state court barred an offending attorney from taking further depositions and prohibited her from attending oral depositions in the future, unless she was accompanied by another licensed attorney who would be permitted to speak on her behalf while any deposition was in progress.[518] Another court adopted a local rule that would refer offending attorneys to peer counseling.[519]

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516. *Cf. supra* note 273 and accompanying text (discussing use of videotaping to control an unruly opponent).

517. In one case, the court rebuked the attorneys at length for their incivility:

> The conduct this disgraceful record contains is the antithesis of the professional manner with which discovery . . . must proceed. To engage in the practice of law is to engage in a noble profession. It is to approach the resolution of disputes with a spirit of high mindedness and with knowledge that the client's problems and antagonisms are not the lawyer's. By providing professional assistance to those who cannot resolve disputes without outside intervention and by championing their causes and interests in a professional manner, lawyers daily perform services of great social utility. . . . Behavior of the type this record reveals demeans the participants, demeans the witnesses and demeans the very system and essence of justice itself. It simply cannot be tolerated. A deposition is an extension of a judicial proceeding. It should be attended and conducted with the same sense of solemnity and the same rules of etiquette that would be required were the parties in the courtroom itself. The lawyer conducting the examination must ask questions and obtain answers—not demean, insult or hurl epithets at the opposing witness or counsel. The lawyer representing a witness must make objections, when objections are required, succinctly and with the same brief precision required during the trial itself.

Cholfin v. Gordon, No. CA943623, 1995 WL 809916, at *9 (Mass. Super. Ct. Mar. 22, 1995) (mem.); *accord* Macario v. Pratt & Whitney Can., Inc., Civ. A. No. 90-3906, 1990 WL 187049, at *1 (E.D. Pa. Nov. 27, 1990) ("When the discovery process succumbs to nothing more than vituperative tirades between opposing counsel, nothing of substance can ever be accomplished other than the three sanctions motions now before the Court for its consideration.").

518. *Cholfin*, 1995 WL 809916, at *11.

519. *See* D.D.C. L.R. 711 (referring attorneys for counseling on matters of ethics).

Lawyers must treat each other as colleagues and professionals.[520] Incivility merely increases the costs of litigation,[521] prevents early settlements due to hard feelings,[522] and tarnishes the public images of lawyers.[523] Attorneys must always remember that they are hired to resolve disputes, not perpetuate or escalate them.[524]

CONCLUSION: THE BALANCING ACT REVISITED

Litigators inevitably must walk the tightrope between clients and the court. They must diligently represent their clients while upholding the integrity of the judicial system. Although this is a difficult feat, it is far from impossible. To succeed, lawyers must be familiar with all controlling and aspirational rules, must understand how these rules interrelate, and must be willing to abide by them. In addition, lawyers must realize that they can more effectively represent clients by following the rules than by flouting them. For example, an attorney will have little need to call a private conference while a question is pending if she has properly prepared her deponent to testify. Further, the client will benefit more from proper preparation than from an impromptu conference: The client will give more accurate testimony and will appear more credible.[525]

Some lawyers, however, will undoubtedly want to continue their obstructionist tactics, unpersuaded by the argument that following the rules benefits all involved. When faced with such Rambo opponents, attorneys must set the ethical example and resist the temptation to fight fire with fire.[526] The ethical attorney, however, is not without a substantial arsenal. With the rules on his side, the ethical attorney can use ethical and procedural rules as a shield, and if necessary, as a sword. If he cannot persuade the opponent to behave professionally

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520. *See* Cook, *supra* note 508, at 958-59 ("Professionalism is a necessary element of the legal system.").

521. *See supra* note 507 and accompanying text.

522. *But see* Cary, *supra* note 159, at 577 (observing that Rambo tactics may encourage parties to settle).

523. *See* Cook, *supra* note 508, at 976 (noting that Rambo litigators "do nothing but lower the esteem in which the legal profession is held by members of the general public"); *see also supra* note 505 and accompanying text.

524. *See supra* note 517.

525. *See supra* notes 198-199 and accompanying text.

526. *Cf.* Cary, *supra* note 159, at 572-78 (discussing how Rambo tactics harm all involved with the judicial process).

by requests to follow the rules, then he can seek protective orders and sanctions under controlling rules.[527]

When controlling rules seem to conflict, the attorney must attempt to reconcile the differences in a way that permits him to serve both the court and the client. Attorneys in the hypothetical illustrated ways to achieve this balance. For instance, in the private consultation section, when the defending attorney wanted to protect his client by determining whether a privilege should be asserted, he called a conference but acted courteously and expressly assured opposing counsel he was not taking a break to delay or interrupt the proceedings. Thus, he acted legally, professionally, and ethically by preserving a possible privilege, interacting civilly with opposing counsel, and not unduly delaying or hindering the examination.[528]

Courts can help attorneys walk the ethical-legal tightrope by enacting more specific rules concerning deposition conduct and by enforcing court rules concerning deposition procedure. Local and national ethics committees can help by providing more guidance concerning the interplay between legal and ethical duties and competing ethical duties. Law schools can help by offering courses on pretrial procedure and litigation ethics, during which students can simulate difficult situations and begin to learn why it pays to follow the rules instead of finding the loopholes.[529]

Finally, lawyers can help themselves, their clients, and the legal profession by treating depositions more like trials. Attorneys should act at depositions the way they would act at a trial before a judge and a jury. Few attorneys would hurl personal insults at opposing counsel during trial; few attorneys would attempt to call private conferences during their client's trial testimony; and few attorneys would instruct a client not to answer a question at trial. Because a deposition is a judicial proceeding, and because Rule 30(c) of the Federal Rules of Civil Procedure contemplates that a deposition examination should, except in limited ways, proceed like an examination at trial, attorneys should not engage in shenanigans simply because a judicial authority figure is not physically present.

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527. *See, e.g.*, FED. R. CIV. P. 26(c) (protective orders); FED. R. CIV. P. 30(d)(2) (sanctions for impeding or delaying a deposition); FED. R. CIV. P. 37 (sanctions for discovery abuse).

528. It is important to remember that even the ethical rules concerning zealous and diligent client-representation demand that the representation comport with controlling law and court rules. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101 (1982); MODEL RULES OF PROFESSIONAL CONDUCT pmbl. ¶ 2 (1994).

529. *See* Cary, *supra* note 159, at 593-601 (suggesting steps for the bench, the bar, and law schools to take to control Rambo litigators).