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Professionalism in Depositions: The Sound of Silence[†]

E. Phelps Gay

*People talking without speaking;
People hearing without listening.*

—Paul Simon
The Sound of Silence

I. INTRODUCTION

In recent years courts and commentators have decried the unprofessional behavior sometimes engaged in by attorneys during depositions.¹ Aggressive, obstructive, and even hostile conduct toward a deponent or opposing counsel, once considered by some to be good lawyering, are regarded as increasingly unacceptable. Judges, who at one time simply shook their heads while reading depositions in the privacy of their chambers, have become more outspoken in denouncing deposition misconduct and less hesitant to exercise their “inherent power” to control it.² Codes and creeds of professionalism now exhort attorneys

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¹ See, e.g., *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993); *In Re Anonymous Member of South Carolina Bar*, 552 S.E.2d 10 (S.C. 2001); Janeen Kerper & Gary L. Stuart, *Rambo Bites the Dust: Current Trends in Deposition Ethics*, 22 J. LEGAL PROF. 103 (1997-98); Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561 (1996); Sandra F. Gavin, *Playing by the Rules: Strategies for Defending Depositions*, 1999 L. REV. M.S.U.-D.C.L. 645; A. Darby Dickerson, *The Law and Ethics of Civil Practice Depositions*, 57 MD. L. REV. 273 (1998); 7 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 30.43[3] (3d ed. 2003).

² The South Carolina Supreme Court has stated that judges must use their authority to prevent abusive deposition tactics. *In Re Anonymous Member of the South Carolina Bar*, 552 S.E.2d 10, 18 (S.C. 2001). One example of judicial intervention appears in *Freeman v. Schointuck*, 192 F.R.D. 187 (D. Md. 2000), where defense counsel’s insulting, sarcastic, antagonistic, and threatening comments are reproduced at length. The court characterized counsel’s conduct as “appallingly unprofessional” and ordered him to write a letter of apology and take a professionalism course approved by the court. *Id.* at 189.



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Award in 2004 when this article was originally published in 2004.

to conduct themselves with dignity when taking and defending depositions.³ In 1993, the Federal Rules of Civil Procedure were amended to require that objections during a deposition be stated “concisely and in a non-argumentative and non-suggestive manner.”⁴ In an effort to rein in obnoxious deposition conduct, many states have enacted stringent new procedural rules.⁵ Most strikingly, one state has drawn the curtain on deposition misconduct by enacting a rule which specifies that only three brief objections are permissible, imposing sanctions or waivers for any further comment.⁶

³ See, e.g., The American Bar Association Lawyer's Creed of Professionalism of the ABA Tort Trial and Insurance Practice Section. Section (B)(8), provides that “[i]n depositions . . . I will conduct myself with dignity, avoid making groundless objections and refrain from engaging in acts of rudeness or disrespect.” See also ABA Guidelines for Litigation Conduct (1998), Lawyers' Duties to Other Counsel, Sections 20-22; The Texas Lawyer's Creed, Section III, No. 17 (“I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable.”); Rules for the Government of the Bar of Ohio, Appendix to Rule XV - Statement on Professionalism, A Lawyer's Aspirational Ideals (“[a]void rudeness and other acts of disrespect in all meetings, including depositions and negotiations”); A Lawyer's Creed of Professionalism of the State Bar of New Mexico, Section C (“[i]n depositions . . . I will conduct myself with dignity, avoid making groundless objections and refrain from disrespect.”).

⁴ FED. R. CIV. P. 30(d)(1).

⁵ See, e.g., ALASKA R. CIV. P. 30(d)(1); ARK. R. CIV. P. 30(d)(1); FLA. R. CIV. P. 1.310(c); IDAHO R. CIV. P. 30(d); KY. R. CIV. P. 30.03(3); ME. R. CIV. P. 30(d); MD. R. CIV. P. CIR. CT. 2-415(g); MASS. R. CIV. P. 30(c); MINN. R. CIV. P. 30.04(a); N.J. R. CT. 4:14-3(c); OKLA. STAT. ANN. tit. 12 § 3230(D), (E) (West Supp. 2003); R.I. R. CIV. P. 30(d)(1); TENN. R. CIV. P. 30.03; TEX. R. CIV. P. 199.5(d); UTAH R. CIV. P. 30(c), (d); VT. R. CIV. P. 30(d)(1); WASH. SUPER. CT. CIV. R. 30(h); WYO. R. CIV. P. 30(c), (d).

⁶ TEX. R. CIV. P. 199.5(e).

This article offers a survey of judicial decisions and a discussion of legislative initiatives aimed at “cleaning up” inappropriate deposition conduct. It suggests that the recent trend toward less obstructive and more civil behavior during depositions represents a step forward for the legal profession. As such, these judicial and legislative efforts should be continued and encouraged. Civility and cooperation can coexist with vigorous, even “zealous” representation of clients.⁷ Experience also suggests that when unnecessary objections and attorney colloquy are taken away, and a deposition focuses on the substance of the testimony, little is lost and much is gained.

II. COMPETITIVE OBSTRUCTIONISM

During the litigation explosion of the 1980's and 1990's, many lawyers developed the notion that “anything goes” when taking a deposition. Representing a client, a litigator could and should do everything possible to protect that client's interest. Then as now, most cases did not go to trial. Therefore, depositions provided the forum where evidence was fought for and obtained, the credibility and stamina of witnesses were tested, the fortitude of opposing counsel measured, and cases effectively won or lost. With no judge presiding, litigators felt emboldened (perhaps even obligated) to engage in obstructive or abusive conduct, displaying a level of rancor toward witnesses and opposing counsel that they would never exhibit in the presence of a judicial officer. A report by the Federal Bar Council Committee on Second Circuit Courts described the then-current method of taking and defending depositions as “too often an exercise in competitive obstructionism.”⁸ It concluded that depositions had become “theaters for posturing and maneuvering rather than efficient vehicles for the discovery of relevant facts or the perpetuation of testimony.”⁹

From a practical standpoint, this obstructionism took the form of: (1) objecting frequently to harass opposing counsel or interrupt the flow of the examination; (2) lodging “speaking objections,” designed to re-characterize testimony or signal the desired answer to a witness; (3) interjecting comments or questions such as “if you know,” “don't speculate,” or “did you understand the question?” ostensibly to “help” the witness; (4) orating at

⁷ Modern codes of ethics have deleted most references to “zealous advocacy.” See Judith L. Maute, *Sporting Theory of Justice: Taming Adversary Zeal with a Logical Sanctions Doctrine*, 20 CONN. L. REV. 7, 10 (1987). The official comments to new ABA Rule 1.3 (Diligence) still state that a lawyer should act “with zeal in advocacy upon the client's behalf,” but add that the “lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.” MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt.1 (2004).

⁸ *A Report on the Conduct of Depositions*, 131 F.R.D. 613, 613 (1990). See also *Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 371, 388 (1991) (Committee reported that depositions “can be one of the most uncivil phases of trial practice.”).

⁹ *A Report on the Conduct of Depositions*, 131 F.R.D. at 613.

length to “testify” for the witness; (5) staging off-the-record conferences with the witness to discuss a pending question and formulate an answer; (6) instructing the witness not to answer a question; or simply (7) rude, offensive behavior, designed to impress upon the client or opposing counsel that the attorney is a “hardball” litigator who cannot be intimidated and who stands ready to protect the client’s interests at any cost.

Examples abound. One of the most well known appears in *Paramount Communications Inc. v. QVC Network, Inc.*,¹⁰ where the Delaware Supreme Court felt compelled to reproduce this exchange between counsel:

Q. . . . 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 that. You could gag a maggot off a meat wagon. Now, we’ve helped you every way we can.¹¹

Reviewing this transcript, the court found that counsel had directed the witness not to answer questions, coached the witness by objecting in a manner suggesting an answer, and otherwise behaved in an “extraordinarily rude, uncivil, and vulgar” manner.¹² Had the attorney been admitted to practice in Delaware, he would have been severely sanctioned.¹³

Other examples of egregious deposition conduct are not hard to find. In *Carroll v. Jacques*,¹⁴ a legal malpractice case, the defendant attorney refused to answer questions and verbally abused plaintiff’s counsel, calling him an “idiot,”¹⁵ an “ass,”¹⁶ and a “slimy son-of-

¹⁰ 637 A.2d 34 (Del. 1994).

¹¹ *Id.* at 53-54.

¹² *Id.* at 53.

¹³ *Id.* at 55. A year after this decision, Delaware amended its court rules to address deposition misconduct. Gavin, *supra* note 1, at 654-55 n.41.

¹⁴ 926 F. Supp. 1282 (E.D. Tex. 1996), *aff’d sub nom.* Carroll v. The Jaques Admiralty Law Firm, 110 F.3d 290 (5th Cir. 1997).

¹⁵ *Id.* at 1286.

¹⁶ *Id.*

a-bitch,"¹⁷ suggesting finally that he "ought to be punched in the goddamn nose."¹⁸ For disrupting the litigation process and acting in bad faith, the trial court imposed a sanction of \$7,000. The Fifth Circuit Court of Appeals affirmed, noting that counsel's conduct "degrades the legal profession and mocks the search for truth that is at the heart of the litigation process."¹⁹

Similarly, in a New York personal injury case, an attorney-plaintiff refused to answer relevant questions and launched the following personal attack on defense counsel:

You're so scummy and so slimy and such a perversion of ethics or decency because you're such a scared little man, you're so insecure and so frightened and the only way you can impress your client is by being nasty, mean-spirited and ugly little man, and that's what you are. That's the kind of prostitution you are in.²⁰

The court found it "difficult to find one among the 217 pages of the deposition which does not contain willful evasion, gratuitous insult, argumentative response, or patent rudeness from the plaintiff."²¹ The plaintiff's behavior was "so lacking in professionalism and civility" that the ultimate sanction of dismissal proved to be the only appropriate remedy.²²

Significantly, the court drew no distinction between deposition and courtroom conduct. "Although the deposition was not held in a courtroom, and there was no judge present, it was, nonetheless, part of a judicial proceeding in the Supreme Court."²³ Thus, "[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."²⁴

Incivility and gender bias combined to justify sanctions in *Principe v. Assay Partners*.²⁵ During a deposition, counsel directed the following comments to an attorney for one of the defendants:

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Carroll v. The Jaques Admiralty Law Firm*, 110 F.3d 290, 294 (5th Cir. 1997). In contrast, the Third Circuit in *Saldana v. K-Mart Corp.*, 260 F.3d 228 (3d Cir. 2001) vacated sanctions imposed upon an attorney for repeated use of the "f" word, ruling that the quality and quantity of the transgressions "d[id] not support the invocation of the Court's inherent powers." *Id.* at 237. The language cited did not occur in the presence of the court, and it did not affect the affairs of the court or the orderly and expeditious disposition of cases before it. *Id.* at 238.

²⁰ *Corsini v. U-Haul Int'l, Inc.*, 630 N.Y.S.2d 45, 46 (App. Div. 1995).

²¹ *Id.*

²² *Id.* at 47.

²³ *Id.*

²⁴ *Id.*

²⁵ 586 N.Y.S.2d 182 (Sup. Ct. 1992).

“I don’t have to talk to you, little lady;”

“Tell that little mouse over there to pipe down;”

“What do you know, young girl;”

“Be quiet, little girl;”

“Go away, little girl.”²⁶

Characterizing such language as paradigmatic rudeness, the court observed that “[a]n attorney who exhibits a lack of civility, good manners and common courtesy tarnishes the image of the legal profession.”²⁷ Conduct projecting “‘offensive and invidious discriminatory distinctions . . . based on race . . . or gender . . . is especially offensive.’”²⁸ Where counsel engages in obstructionist tactics, uses insulting language, or otherwise fails to conform to accepted notions of conduct, sanctions are warranted. The offending attorney thus was ordered to make a contribution to the Client Security Fund.²⁹

Depositions in *R.E. Linder Steel Erection Co. v. U.S. Fire Insurance Co.*³⁰ were “contaminated from start to finish with interrupted questions, *ad hominem* comments, and argumentative colloquy, sometimes running on for pages.”³¹ One party’s request that a judicial officer preside at further depositions, although a good solution in theory, was “simply impractical, in view of the priorities and time pressures facing the judicial officers of this District.”³² Fashioning what it hoped might be a workable alternative, the court ordered that counsel pay liquidated attorney’s fees of \$5.00 for each interrupted question. Counsel would pay another \$5.00 for each line of the transcript containing argument with counsel, *ad hominem* comments, or other extraneous remarks.³³

Sanctions were imposed on plaintiff’s counsel in *Unique Concepts, Inc. v. Brown*³⁴ for similarly “contentious, abusive, obstructive, scurrilous, and insulting conduct in a Court ordered deposition.”³⁵ Reviewing the plaintiff’s deposition, the court found it “hard to find

²⁶ *Id.* at 184.

²⁷ *Id.* (quoting *In re McAlevy*, 354 A.2d 289, 291 (N.J. 1976)).

²⁸ *Id.* at 184 (quoting *In re Vincenti*, 554 A.2d 470, 474 (N.J. 1989)).

²⁹ *Id.* at 190. Compare *United States v. Wunsch*, 84 F.3d 1110, 1117 (9th Cir. 1996) (court held that a “single incident involving an isolated expression of a privately communicated bias” was not shown to adversely affect the administration of justice).

³⁰ 102 F.R.D. 39 (D. Md. 1983).

³¹ *Id.* at 40.

³² *Id.*

³³ *Id.* at 41.

³⁴ 115 F.R.D. 292 (S.D.N.Y. 1987).

³⁵ *Id.* at 294.

a page on which Rosen does not intrude on the examination with a speech, a question to the examiner, or an attempt to engage in colloquy distracting to the examiner.”³⁶ Among the attorney’s remarks to opposing counsel were the following:

“You are being an obnoxious little twit. Keep your mouth shut.”

“You are a very rude and impertinent young man.”³⁷

Under the circumstances the court characterized the deposition as “an exercise in futility.”³⁸ Pursuant to 28 U.S.C. §1927 and its inherent power to supervise and control its proceedings, the court ordered plaintiff to be re-deposed at the courthouse and imposed a fine on plaintiff’s counsel “without reimbursement from his client.”³⁹ Any repetition of the “pervasive misconduct” that plagued the proceedings would be treated as contempt of court.⁴⁰

In an Illinois antitrust action, an attorney interposed constant objections during the deposition of his client with frequent instructions not to answer. After sanctions were imposed for “deliberate frustration”⁴¹ of discovery efforts, the deposition was resumed, but counsel “contumaciously disobeyed the court’s order by interfering with the questions posed by defendants’ counsel, and by directing the doctor not to respond to certain questions already approved by the court.”⁴² Relations between counsel degenerated to such a degree that the witness’s attorney refused to let opposing counsel use the office telephone to call the court in order to resolve the dispute, as shown in this exchange:

MR. WALKER: I would caution you not to use any telephones in this office unless you are invited to do so, counsel.

MR. STANKO: You’re telling me I can’t use your telephones?

MR. WALKER: You can write your threatening letters to me. But, you step outside this room and touch the telephone, and I’ll take care of that in the way one does who has possessory rights.⁴³

³⁶ *Id.* at 292.

³⁷ *Id.* at 293 (citation omitted).

³⁸ *Id.*

³⁹ *Id.* at 294.

⁴⁰ *Id.*

⁴¹ *Castillo v. St. Paul Fire & Marine Ins. Co.*, 828 F. Supp. 594, 597 (C.D. Ill. 1992).

⁴² *Id.*

⁴³ *Id.* at 597.

As a result of this vexatious conduct, plaintiff's case was dismissed with prejudice, and the attorney was cited for civil contempt. Disciplinary proceedings ensued, resulting in counsel's suspension from federal practice for a period of one year.⁴⁴

It is important to recognize that these reported cases did not represent isolated or extreme instances of inappropriate deposition conduct. On the contrary, as noted by the Federal Bar Council Committee on Second Circuit Courts, obstructive behavior during depositions was fairly common. To many attorneys, this kind of behavior was a routine and expected part of the practice of law. However, concern about the effect of this "toxic advocacy"⁴⁵ on the profession and the public continued to grow. In 1993, the tide began to turn with two major developments: (1) an opinion rendered by a federal judge in Pennsylvania, and (2) the enactment of Rule 30 amendments to the Federal Rules of Civil Procedure.

III.

THE JUDICIAL BACKLASH: *HALL V. CLIFTON PRECISION*

The most influential decision on deposition misconduct was written in 1993 by Judge Robert S. Gawthrop of the Eastern District of Pennsylvania. In *Hall v. Clifton Precision*,⁴⁶ he addressed two discreet questions: (1) to what extent may a lawyer confer with the client off the record during a deposition? and (2) prior to the deposition, does a lawyer have a right to inspect the documents opposing counsel intends to show the client during a deposition? Judge Gawthrop seized the opportunity to address other issues relating to deposition misconduct and incivility. He issued an order which, together with the 1993 amendments to Rule 30 of the Federal Rules of Civil Procedure, changed the "culture" of deposition conduct.

At the outset of a deposition in *Hall*, plaintiff's counsel had advised his client that "'at any time if you want to stop and talk to me, all you have to do is indicate that to me.'"⁴⁷ Defense counsel replied that, "'[t]his witness is here to give testimony, to be answering my questions, and not to have conferences with counsel in order to aid him in developing his responses to my questions.'"⁴⁸

Judge Gawthrop quickly disposed of the position taken by plaintiff's counsel. The purpose of a deposition "is to find out what a witness saw, heard, or did — what the witness thinks."⁴⁹ It is "a question-and-answer conversation between the deposing lawyer and the

⁴⁴ *Id.* at 604.

⁴⁵ According to Gavin, *supra* note 1, at 656 n.46, "toxic advocacy consists of using the discovery process in a manner that results in harassment, annoyance, or imposition of undue burden or unnecessary expense."

⁴⁶ 150 F.R.D. 525 (E.D. Pa. 1993).

⁴⁷ *Id.* at 526 (citation omitted).

⁴⁸ *Id.* (citation omitted).

⁴⁹ *Id.* at 528.

witness.”⁵⁰ It is not the role of the witness’s lawyer “to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers.”⁵¹ The witness comes 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.”⁵²

Although a lawyer might frame the facts in a manner favorable to the client, he or she may not be “creative” with the facts. The lawyer “must accept the facts as they develop.”⁵³ Therefore, the “lawyer and client do not have an absolute right to confer” during the course of a deposition.⁵⁴

Judge Gawthrop noted that, according to Rule 30(c) of the Federal Rules of Civil Procedure, examination and cross-examination of witnesses during depositions “are to be conducted under the same testimonial rules as are trials.”⁵⁵ At trial the lawyer and witness are not permitted to “confer at their pleasure” once testimony is underway.⁵⁶ During 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.”⁵⁷ Private conferences “tend, at the very least, to give the appearance of obstructing the truth.”⁵⁸

Judge Gawthrop also did not distinguish between conferences initiated by the witness and those initiated by the lawyer. “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.”⁵⁹ If the witness does not understand the question, he or she should ask the *deposing* lawyer (not his own) to clarify or explain it.⁶⁰

Venturing into more controversial territory, Judge Gawthrop extended his ruling against private conferences to deposition recesses. “Once the deposition has begun, the prepara-

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* W. Bradley Wendel maintains that the lawyer’s role as advocate “does not apply with full force to discovery.” See W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895, 895 (1996). Since the function of discovery is to assist the court by “disclosing the facts necessary for the court to make an informed decision . . . advocacy comes into play only after the facts are fully disclosed.” *Id.*

⁵⁴ 150 F.R.D. at 528.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 528-29.

tion period is over”⁶¹ All private conferences are barred. The “fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules.”⁶²

On the second issue, Judge Gawthrop employed the same reasoning. When a document is presented to a witness, the witness should answer questions about it. The witness’s lawyer should be shown a copy of the document, but “there is no valid reason” why the lawyer and witness should confer about it before the witness answers a question.⁶³

Judge Gawthrop acknowledged an exception to the rule against private conferences when the purpose is to ascertain the propriety of a privilege. Assertion of a privilege is an important objection, justifying a conference. However, when a conference occurs, the attorney should note that fact on the record and disclose the subject of the conference, as well as the decision to assert the privilege or not.⁶⁴

Judge Gawthrop then turned his attention to witness coaching through suggestive objections. He cited a then-proposed (and subsequently enacted) amendment to Rule 30(d) of the Federal Rules of Civil Procedure requiring that objections be “stated concisely and in a non-argumentative and non-suggestive manner.”⁶⁵ Most objections, such as those based on relevance or materiality, are preserved for trial and need not be made. Other objections, such as those made to disrupt testimonial rhythm or to offer “strategic interruptions, suggestions, statements, and arguments of counsel,” undermine the purpose of a deposition, which is to find the truth.⁶⁶

Given the importance of depositions in modern litigation — “the factual battleground where the vast majority of litigation actually takes place”⁶⁷ — Judge Gawthrop recognized that this critical discovery device should not be abused. To that end he issued this admonition:

Counsel should never forget that even though the deposition may be taking place far from a real courtroom, with no black-robed overseer peering down upon them, as long as the deposition is conducted under the caption of this court . . . counsel

⁶¹ *Id.* at 529.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 529-30.

⁶⁵ *Id.* at 530.

⁶⁶ *Id.* at 531.

⁶⁷ *Id.*

are operating as officers of this court. They should comport themselves accordingly; should they be tempted to stray, they should remember that this judge is but a phone call away.⁶⁸

Judge Gawthrop concluded his opinion with an Order containing the following guidelines:

1. At the beginning of the deposition, deposing counsel shall instruct the witness to ask deposing counsel, rather than the witness's own counsel, for clarifications, definitions, or explanations of any words, questions, or documents presented during the course of the deposition. The witness shall abide by these instructions.
2. All objections, except those which would be waived if not made at the deposition under Federal Rules of Civil Procedure 32(d)(3)(B), and those necessary to assert a privilege, to enforce a limitation on evidence directed by the court, or to present a motion pursuant to Federal Rules of Civil Procedure 30(d), shall be preserved. Therefore, those objections need not and shall not be made during the course of depositions.
3. Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court.
4. Counsel shall not make objections or statements which might suggest an answer to a witness. Counsel's statements when making objections should be succinct and verbally economical, stating the basis of the objection and nothing more.
5. Counsel and their witness-clients shall not engage in private, off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding whether to assert a privilege.

⁶⁸ *Id.* According to one commentator, the judiciary should have a "'judge on call' system similar to the medical profession's arrangement of emergency care for patients." Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561, 593 (1996). In *Higginbotham, III, DDS v. KCS International, Inc.*, 202 F.R.D. 444, 456 (D. Md. 2001), the court noted that "there are times when it is appropriate to place a conference telephone call to the Judge's chambers and seek an immediate ruling." See also *McDonough v. Keniston*, 188 F.R.D. 22, 25 (D.N.H. 1998) (court ordered that the continuation of plaintiff's deposition be taken at a time when the magistrate was available by telephone to rule on any disputes that might arise). Additionally, the rule governing deposition conduct in Washington provides that a judge or special master "may make telephone rulings on objections made during depositions." WASH. SUPER. CT. CIV. R. 30(c).

6. Any conferences which occur pursuant to, or in violation of, guideline (5) are proper subject for inquiry by deposing counsel to ascertain whether there has been any witness-coaching and, if so, what.
7. Any conferences which occur pursuant to, or in violation of, guideline (5) shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall also be noted on the record.
8. Deposing counsel shall provide to the witness's counsel a copy of all documents shown to the witness during the deposition. The copies shall be provided either before the deposition begins or contemporaneously with the showing of each document to the witness. The witness and the witness's counsel do not have the right to discuss documents privately before the witness answers questions about them.
9. Depositions shall otherwise be conducted in compliance with the Opinion which accompanies this Order.⁶⁹

The three major limitations imposed by Judge Gawthrop — no consultation, no coaching, and (generally) no instruction not to answer — have drawn widespread comment and have generated substantial, though not unanimous, support. In some respects, particularly the prohibition on lawyer-witness conferences during recess, the *Hall* guidelines may be debatable. Several courts and commentators have criticized this aspect of *Hall* as going too

⁶⁹ 150 F.R.D. at 531-32.

far.⁷⁰ But events have shown that in *Hall* Judge Gawthrop touched a nerve. He sparked a debate on appropriate deposition conduct which continues to this day. It is no exaggeration to suggest that the movement to reform deposition conduct, which has gathered steam over the past decade, owes much to the boldness of Judge Gawthrop's opinion.

IV. *HALL'S WAKE*

That *Hall* signaled a sea-change in judicial willingness to control deposition conduct became immediately apparent. Within a few months, an Iowa magistrate expressed his own exasperation with "Rambo litigation." In *Van Pilsum v. Iowa State University of Science & Technology*,⁷¹ counsel for both parties disrupted plaintiff's deposition with extensive colloquy. Plaintiff's counsel repeatedly restated defense counsel's questions in order to "clarify" them. These objections were "thinly veiled instructions to the witness," who would then incorporate her attorney's language into her answer.⁷² There were also *ad hominem* attacks on opposing counsel's experience and ethics. Over the 167 pages of transcript, the court could find only four segments where five or more pages occurred without attorney interruption. Much of the transcript involved "discussion, argument, bickering, haranguing, and general interference" by counsel.⁷³ The court reporter frequently had to re-read a question because of the lengthy interval between a question and the witness's opportunity to answer.

⁷⁰ Establishing a protocol for depositions, a magistrate judge in Nevada agreed with *Hall's* "underlying concern and essential purpose," but said that in prohibiting all attorney-client conferences once a deposition starts it "goes too far." *In re Stratosphere Corp. Sec. Litig.*, 182 F.R.D. 614, 620 (D. Nev. 1998). Attorneys and clients regularly confer during trial and during breaks in a client's testimony when the court is in recess. "To deny a client any right to confer with his or her counsel about anything, once the client has been sworn to testify, and further to subject such a person to unfettered inquiry into anything which may have been discussed with the client's attorney . . . is a position this Court declines to take." *Id.* at 621. Other cases declining to follow *Hall* in its entirety include: *McKinley Infuser, Inc. v. Zdeb*, 200 F.R.D. 648 (D. Colo. 2001) (court declined to deny witness right to confer with counsel between sessions of his deposition); *Odone v. Croda Int'l PLC*, 170 F.R.D. 66 (D.D.C. 1997) (plaintiff and his attorney's consultation during five-minute recess did not warrant sanctions); *State ex rel. Means v. King*, 520 S.E.2d 875 (W. Va. 1999) (attorney may confer with client during recess or break in discovery as long as attorney does not request break for improper purpose).

By contrast, the South Carolina Supreme Court embraced the *Hall* prohibition on private conferences in *In re Anonymous Member of the South Carolina Bar*, 552 S.E.2d 10 (S.C. 2001). Also, in *United States v. Phillip Morris, Inc.*, 212 F.R.D. 418 (D.D.C. 2002), the court prohibited private conferences unless the deposition was recessed over non-consecutive days.

A spirited attack on *Hall* appears in David H. Taylor, *Rambo as Potted Plant: Local Rulemaking's Preemptive Strike Against Witness-Coaching during Depositions*, 40 VILL. L. REV. 1057 (1995).

⁷¹ 152 F.R.D. 179 (S.D. Iowa 1993).

⁷² *Id.* at 180.

⁷³ *Id.*

Although this conduct “may prove effective out of the presence of the court, and may be impressive to clients as well as ego-gratifying to those who practice it, [it] will not be tolerated by this court.”⁷⁴ The court ruled that all further depositions would take place in the federal courthouse in the presence of a discovery master. Acrimony between counsel “necessitates the provision of day care for counsel who, like small children, cannot get along and require adult supervision.”⁷⁵

In a Missouri employment discrimination case, attorneys for plaintiff frequently interrupted the interrogation of their client, “interpreting” questions, making suggestive objections, and instructing the client not to answer. For such vexatious conduct carried out in bad faith, they were ordered to pay attorneys’ fees and to comply with deposition guidelines similar to those issued by Judge Gawthrop in *Hall*.⁷⁶

Also of interest is *Damaj v. Farmers Insurance Co.*,⁷⁷ where an Oklahoma magistrate, ruling on a motion to order counsel to “cease obstructionist tactics,” largely adopted the *Hall* guidelines. Defense counsel interposed numerous speaking objections which either suggested the response to the witness or were unnecessarily disruptive. In a deposition consisting of 102 pages, objections were made on sixty-four of them. The court characterized the deposition as “primarily conversation and argument between counsel, as opposed to a question and answer session between the deposing attorney and the witness.”⁷⁸ Citing *Hall* with approval, the court expressed concern that frequent and suggestive objections would frustrate the objective of taking depositions. Such objections “tend to obscure or alter the facts of the case and consequently frustrate the entire civil justice system’s attempt to find the truth.”⁷⁹

The court’s order in *Damaj* was interesting in two respects. First, it provided that since most objections, other than those waived if not made during the deposition, are specifically preserved by the Federal Rules, “those objections need not and shall not be made during the course of depositions.”⁸⁰ Second, the court ruled that “[i]f the form of the question is objectionable, counsel should say nothing other than ‘object to the form of the question.’”⁸¹

⁷⁴ *Id.* at 181.

⁷⁵ *Id.*

⁷⁶ *Armstrong v. Hussmann Corp.*, 163 F.R.D. 299, 304 (E.D. Mo. 1995). *See also* *Phinney v. Paulshock*, 181 F.R.D. 185, 207 (D.N.H. 1998) (court-ordered payment of costs and letter of apology for deposition misconduct); *In re Amezaga*, 195 B.R. 221 (D.P.R. 1996) (obstructive conduct warranted sanctions against counsel personally).

⁷⁷ 164 F.R.D. 559, 559-60 (N.D. Okla. 1995).

⁷⁸ *Id.* at 560.

⁷⁹ *Id.*

⁸⁰ *Id.* at 561.

⁸¹ *Id.* The court added that should deposing counsel want clarification of the basis for the objection, “that inquiry shall be made outside the presence of a witness.” *Id.* The court’s ruling on specific language to be used in making an objection prefigured the Texas adoption of Rule 199.5.

More recently, in a strongly worded “message” opinion, the South Carolina Supreme Court advised its Bar members that obstructive deposition conduct would no longer be tolerated.⁸² Under a new rule modeled on the *Hall* guidelines, at the outset of a deposition, counsel “shall instruct the witness to ask deposing counsel, rather than the witness’ own counsel, for clarifications, definitions, or explanations of any words, questions or documents presented during the course of the deposition.”⁸³ Counsel “shall not make objections or statements which might suggest an answer to a witness.”⁸⁴ Furthermore, counsel and the witness “shall not engage in private, off-the-record conferences during depositions or during breaks or recesses regarding the substance of the testimony . . . except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order.”⁸⁵ Conferences that violate the rule are properly subject to inquiry by opposing counsel “to ascertain whether there has been any witness coaching.”⁸⁶

In addition, conferences called to calm down a nervous client, interrupt the flow of a deposition, or help the witness frame an answer are improper and warrant sanctions. Interjections such as “if you remember” and “don’t speculate” are improper because they suggest how to answer the question.⁸⁷ Such admonitions should be made before the deposition begins. It is also inappropriate to instruct a witness not to answer a question on the basis that the question has been “asked and answered.”⁸⁸ If repetitive questioning becomes harassment, a motion may be filed with the court.⁸⁹

The South Carolina court noted that in depositions attorneys “face great temptation to cross the limits of acceptable behavior in order to win the case at the expense of their ethical responsibilities to the court and their fellow attorneys.”⁹⁰ But the discovery is intended to “ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed.”⁹¹ Claiming to be zealous advocates will provide no sanctuary for attorneys who abuse the discovery process. Judges must use their full authority to preclude attorneys

⁸² *In re* Anonymous Member of the South Carolina Bar, 552 S.E.2d 10 (S.C. 2001).

⁸³ *Id.* at 15.

⁸⁴ *Id.* at 16.

⁸⁵ *Id.*

⁸⁶ *Id.* The rule also provides that deposing counsel shall give to opposing counsel all documents shown to the witness either before the deposition begins or contemporaneously while showing the document to the witness. Retreating somewhat from *Hall*, the rule states that if the documents have not been provided or identified two days before the deposition, the witness and counsel “may have a reasonable amount of time to discuss the documents before the witness answers questions concerning the document.” *Id.*

⁸⁷ *Id.* at 17.

⁸⁸ *Id.*

⁸⁹ *Id.* at 18.

⁹⁰ *Id.*

⁹¹ *Id.* (citing *In re* Alford Chevrolet-Geo, 997 S.W.2d 173, 180 (Tex. 1999)).

from “achieving success through abuse of the discovery rules rather than by the rule of law.”⁹² The court thus paid its respects to Judge Gawthrop’s “seminal opinion” in *Hall*: “Having adopted the *Hall* approach, our Court requires attorneys in South Carolina to operate under one of the most sweeping and comprehensive rules on deposition conduct in the nation.”⁹³

The *Hall* guidelines recently were embraced in *Plaisted v. Geisinger Medical Center*.⁹⁴ In a medical malpractice action, plaintiffs sought permission to re-depose certain doctors. They complained that defense counsel had improperly entered “coaching” objections, instructed witnesses not to answer, and departed the room twice while a question was pending. At one point counsel instructed the plaintiffs’ attorney to “ask the question and I’ll consider whether I’ll let him answer it or not.”⁹⁵ At another point, after objecting repeatedly, defense counsel stated, “[t]hat [question] won’t be answered. I have an urgent call I have to make.”⁹⁶

Observing that *Hall* had received “substantial attention in the legal literature,”⁹⁷ the *Plaisted* court adopted its “clear, workable guidelines.”⁹⁸ Those guidelines, articulated prior to the enactment of Rule 30(d) of the Federal Rules of Civil Procedure, are consistent with reducing the number of interruptions during depositions. Since defense counsel’s conduct violated both Rule 30(d) and the *Hall* guidelines, the court allowed plaintiffs to conduct “liberal re-questioning”⁹⁹ of the physicians in all areas where improper objections had been made. It also permitted the plaintiffs to explore discussions between defense counsel and the witness during two breaks which the court found were improperly taken.¹⁰⁰

As these cases demonstrate, *Hall* resonated with the federal judiciary. Judges increasingly adopted a proactive approach to controlling the toxic advocacy infecting deposition conduct. In addition, shortly after *Hall* was decided, significant changes were enacted within the text of Rule 30 of the Federal Rules of Civil Procedure. These changes proved important in the overall movement to shift the paradigm for deposition conduct from competitive obstructionism to civil and cooperative advocacy.

⁹² *Id.*

⁹³ *Id.* at 16.

⁹⁴ 210 F.R.D. 527, 532 (M.D. Pa. 2002).

⁹⁵ *Id.* at 530 (citation omitted).

⁹⁶ *Id.* at 532.

⁹⁷ *Id.* (quoting WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 30.43[6] (3d ed. 2000)).

⁹⁸ *Id.* at 533.

⁹⁹ *Id.* at 535.

¹⁰⁰ *Id.* at 533-35. The court also ordered that witnesses whose testimony was obstructed be re-deposed in *O’Brien v. Amtrak*, 163 F.R.D. 232 (E.D. Pa. 1995) and *Frazier v. Southeastern Pennsylvania Transportation Authority*, 161 F.R.D. 309 (E.D. Pa. 1995).

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

Rule 30 of the Federal Rules of Civil Procedure was amended in 1993. The Advisory Committee Notes to the amended rule expressed the same concerns about obstructive deposition behavior articulated by Judge Gawthrop. The Committee noted that “[d]epositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objection and colloquy, often suggesting how the deponent should respond.”¹⁰¹ Directions to a deponent not to answer a question “can be even more disruptive than objections.”¹⁰² The Committee sought to address these concerns directly by changing the text of the rule.

According to Rule 30(d)(1), any objection interposed during a deposition “must be stated concisely and in a non-argumentative and non-suggestive manner.”¹⁰³ An attorney may instruct a deponent not to answer a question only when necessary to preserve a privilege, enforce a limitation directed by the court, or present a motion under Rule 30(d)(4). “If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon those responsible an appropriate sanction, including the reasonable costs and attorney’s fees incurred by any parties as a result thereof.”¹⁰⁴ “The making of an excessive number of unnecessary objections may itself constitute sanctionable conduct”¹⁰⁵

Although difficult to quantify, the 1993 amendments to Rule 30 have clearly had a significant impact.¹⁰⁶ Judge Gawthrop’s opinion in *Hall* proved to be influential, but it was still one case decided by one federal district judge in one Pennsylvania district. Enshrining the reform of deposition conduct within the text of a federal procedural rule was another matter. Therefore, the 1993 amendments marked an important turning point: they expressed the collective judgment of the legal profession that improving attorney conduct during depositions had become a matter of the highest priority.

Case law interpreting amended Rule 30 illustrates the point. In *McDonough v. Keniston*,¹⁰⁷ defendants charged that plaintiff’s counsel had improperly obstructed plaintiff’s

¹⁰¹ FED. R. CIV. P. 30(d) advisory committee’s note (1993).

¹⁰² *Id.*

¹⁰³ The rule was amended in 2000 to remove reference to objections “to evidence” and limitations “on evidence,” making it clear that the rule applies to “any objection to a question or other issue arising during a deposition.” FED. R. CIV. P. 30(d) advisory committee’s note (2000).

¹⁰⁴ FED. R. CIV. P. 30(d)(3).

¹⁰⁵ FED. R. CIV. P. 30(d) advisory committee’s note (1993).

¹⁰⁶ This is demonstrated by the number of states that have adopted the federal rule’s language requiring that objections be stated concisely and in a non-argumentative and non-suggestive manner and which have placed restrictions on instructions not to answer. *See supra* note 5 and *infra* note 131.

¹⁰⁷ 188 F.R.D. 22 (D.N.H. 1998).

testimony with speaking objections and instructions not to answer. The deposition revealed that plaintiff's counsel repeatedly violated the amended version of Rule 30(d). At one point plaintiff was asked:

Q. . . . why don't you do your best to tell me what you say he did wrong?

Mr. Grabois: I think that's a very broad, broad question. I think it's too broad to be answered. It calls for legal characterization. He had no connection, he had no contact directly with Chuck Douglas¹⁰⁸

The court noted that the effect of this coaching became apparent when plaintiff adopted his lawyer's suggested answers. Defense counsel told his colleague, "You're not supposed to suggest an answer, it's specifically prohibited by the Federal Rules of Civil Procedure."¹⁰⁹ However, plaintiff's counsel persisted with speaking objections and instructions not to answer. The court later characterized this conduct as "flagrantly improper and in direct contravention of Rule 30."¹¹⁰

Interpreting the new rule, the court said it was "intended to curtail lengthy objections and colloquy."¹¹¹ "[C]ounsel's statements when making objections should be succinct and verbally economical, stating the basis of the objection and nothing more."¹¹² Speaking and coaching objections "are simply not permitted in depositions in federal cases."¹¹³ Under the new rules the remedy for "oppressive, annoying, and improper deposition questioning" is not to instruct the deponent to refrain from answering, but to suspend the deposition and file a motion under Rule 30(d)(3).¹¹⁴

Similarly, confronted with a motion to compel and to impose sanctions for speaking objections and for instructing the witness not to answer, a Florida judge held that the "1993 amendments to Rule 30 were intended to combat just the sort of conduct that is complained of here."¹¹⁵ Deposition testimony "is to be completely that of the deponent, not a version of the testimony which has been edited or glossed by the deponent's lawyer."¹¹⁶ The witness

¹⁰⁸ *Id.* at 24.

¹⁰⁹ *Id.* at 25.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 24.

¹¹² *Id.* (citing *Damaj v. Farmers Ins. Co.*, 164 F.R.D. 559, 561 (N.D. Okla. 1995)).

¹¹³ *Id.*

¹¹⁴ *Id.* See also *Boyd v. University of Maryland Medical System*, 173 F.R.D. 143, 145 (D. Md. 1997) (Court emphasized that Rule 32(d)(3) preserves an attorney's ability to "redress abusive deposition tactics by unilaterally terminating the deposition and filing a motion with the Court for an order to discontinue the objectionable questioning.").

¹¹⁵ *Quantachrome Corp. v. Micromeritics Instrument Corp.*, 189 F.R.D. 697, 700 (S.D. Fla. 1999).

¹¹⁶ *Id.*

must be allowed to answer a question, “free from any influence by his counsel.”¹¹⁷ If the witness is confused about a question, the witness may ask the deposing counsel for clarification. If counsel feels that a deposition is being conducted in “bad faith or in such manner as to unreasonably annoy, embarrass, or oppress” the deponent, counsel may instruct the witness not to answer, but only if he or she intends to move for a protective order.¹¹⁸

Objections should be limited to those permitted by Rule 32(d)(3). An objection based on form might require a brief explanation, but only at the request of deposing counsel. Any explanation “should be succinctly and directly stated without suggesting an answer to the deponent.”¹¹⁹ Instructions not to answer should be made only to preserve a privilege or to move for a protective order.

In *Fondren v. Republic American Life Insurance Co.*,¹²⁰ the court emphasized that the new federal rules provide clear guidance. They are understandable “without need of judicial gloss.”¹²¹ Adherence to the rules should eliminate obstructionist tactics. Rule 30(d)(1) “does not permit an attorney to instruct a witness not to answer repetitious, harassing or argumentative deposition questions except to present a motion under Rule 30(d)(3).”¹²² Since the attorney did not provide the instruction for that purpose, the instruction was improper. A refusal to answer, requiring the opposing party to seek a court order directing the deponent to answer, is “the exact opposite of what the Federal Rules of Civil Procedure clearly require.”¹²³

Relying in part on the 1993 amendments to Rule 30, a New York district judge imposed sanctions on defense counsel in *Morales v. Zondo, Inc.*¹²⁴ Deposition excerpts revealed that counsel made detailed objections, held private consultations with the witness, instructed the witness not to answer, instructed him how to answer, and engaged in various colloquies, interruptions, and *ad hominem* attacks which frustrated the fair examination of the deponent and unnecessarily prolonged the proceedings — all in violation of Rule 30(d)(2).¹²⁵

Although improved, the federal rules still send conflicting signals to attorneys regarding proper deposition conduct. Rule 30(c) provides that “[a]ll objections made at the time of the examination to . . . the evidence presented, the conduct of any party, or to any other

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 701 (quoting FED. R. CIV. P. 30(d)(3)).

¹¹⁹ *Id.* at n.4.

¹²⁰ 190 F.R.D. 597 (N.D. Okla. 1999).

¹²¹ *Id.* at 602.

¹²² *Id.* at 600.

¹²³ *Id.*

¹²⁴ 204 F.R.D. 50 (S.D.N.Y. 2001).

¹²⁵ *Id.* at 54-58.

aspect of the proceedings shall be noted by the officer upon the record of the deposition."¹²⁶ The examination "shall proceed with the testimony being taken subject to the objections."¹²⁷ The rules also provide that objections 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."¹²⁸

Given these provisions, the federal rules do not *require* that attorneys refrain from making objections during the course of a deposition.¹²⁹ Objections based upon relevancy and materiality may still be preserved even if not made, but there is no proscription against making them. When attorneys face the risk of waiving an objection because the ground is one "which might have been obviated or removed if presented at that time," they will understandably err on the side of caution by making the objection and preserving the record.¹³⁰

In practice, when defending or taking depositions, attorneys lodge objections for a variety of strategic or evidentiary reasons. For example, a defending lawyer may object to a question, even though an objection technically is not waived, to demonstrate defects in the opponent's case, place the objection on the record as a reminder to re-enter it at trial, or to induce the examining lawyer to abandon a particular line of questioning.¹³¹ Unless the rule specifies those objections which may be made and those which may not, attorneys are likely to continue making objections which they believe will enhance their client's cause. In the process, the goals sought to be achieved by the 1993 amendments to Rule 30(d) will be undermined.

¹²⁶ FED. R. CIV. P. 30(c).

¹²⁷ *Id.*

¹²⁸ FED. R. CIV. P. 32(d)(3)(A).

¹²⁹ *See, e.g.*, 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2113 at 97 (2d ed. 1994) (authors find it "noteworthy that the rule stops short of absolutely forbidding any objections whatsoever except those that would be waived unless raised").

¹³⁰ *See Quantachrome Corp. v. Micromeritics Instrument Corp.*, 189 F.R.D. 697, 700 (S.D. Fla. 1999) (It is "arguable whether objections based on relevancy should even be made during the deposition.").

One leading commentator has correctly observed that although objections grounded on relevance or materiality are preserved for trial and need not be made, "the caution and combativeness typically found in lawyers has made elimination of surplus objections a difficult task." 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 30.43 [1] (3d ed. 2003).

¹³¹ *See* 10 FEDERAL PROCEDURE, LAWYERS EDITION § 26:297 (George L. Bounds et al. eds. 1994).

VI.
 RULE 199.5 OF THE TEXAS RULES OF CIVIL PROCEDURE

In response to *Hall* and the 1993 amendments to Rule 30(d) of the Federal Rules of Civil Procedure, many states have changed their rules governing deposition conduct. Some have adopted the language of the federal rule; others have taken a more aggressive approach.¹³² A comprehensive review of the rules adopted by each state is beyond the scope of this article. However, Texas has enacted an interesting and innovative rule which marks a significant advance in the profession's ongoing effort to address the problem of deposition misconduct.

In 1999, the Texas Supreme Court promulgated a rule governing "Examination, Objection, and Conduct During Oral Depositions."¹³³ Resulting from years of study and debate, the rule incorporates important elements from *Hall*, professional codes and creeds, and the 1993 amendments to Rule 30(d) of the Federal Rules of Civil Procedure. The rule presents a model for other jurisdictions to consider in their efforts to ensure that depositions fulfill their purpose of facilitating the discovery of relevant facts.

The Texas rule provides in pertinent part:

(d) *Conduct During the Oral Deposition; Conferences.* The oral deposition must be conducted in the same manner as if the testimony were being obtained in court during trial. Counsel should cooperate with and be courteous to each other and to the witness. The witness should not be evasive and should not unduly delay

¹³² For example, the Washington rule contains a section on Conduct of Depositions explicitly addressing objections, instructions not to answer, responsiveness of the witness, conduct of examining counsel, private consultations, and observance of standards required in the courtroom during trial. WASH. SUPER. CT. CIV. R. 30(h).

The New Jersey rule provides that "[n]o objections shall be made during the taking of a deposition except 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." N.J. R. CT. 4:14-3(c). This is more restrictive than the federal rule which does not explicitly proscribe any objections.

In Alaska, "[n]o specification of the defect in the form of a question or the answer shall be stated unless requested by the party propounding the question." ALASKA R. CIV. P. 30(d)(1). In addition, the rule prohibits "[c]ontinual and unwarranted off the record conferences between the deponent and counsel following the propounding of questions and prior to the answer." *Id.*

The Maryland rule provides that if an objection could have the effect of coaching the deponent, then "the deponent, at the request of any party, shall be excused from the deposition during the making of the objection." MD. R. CIV. P. CIR. CT. 2-415(g). Committee notes to the Maryland rule provide examples of concise and non-argumentative objections such as "objection, leading;" "objection, asked and answered;" and "objection, compound question." *Id.* This is similar to Texas Rules of Civil Procedure, Rule 199.5.

¹³³ The Texas Supreme Court has constitutional and statutory authority to promulgate rules of civil procedure. TEX. CONST. art. V, § 31; TEX. GOV'T. CODE § 22.004 (2004).

the examination. Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments. If the lawyers and witnesses do not comply with this rule, the court may allow in evidence at trial of statements, objections, discussions, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony.

(e) *Objections.* Objections to questions during the oral deposition are limited to "Objection, leading" and "Objection, form." Objections to testimony during the oral deposition are limited to "Objection, nonresponsive." These objections are waived if not stated as phrased during the oral deposition. All other objections need not be made or recorded during the oral deposition to be later raised with the court. The objecting party must give a clear and concise explanation of an objection if requested by the party taking the oral deposition, or the objection is waived. Argumentative or suggestive objections or explanations waive objection and may be grounds for terminating the oral deposition or assessing costs or other sanctions. The officer taking the oral deposition will not rule on objections but must record them for ruling by the court. The officer taking the oral deposition must not fail to record testimony because an objection has been made.

(f) *Instructions Not to Answer.* An attorney may instruct a witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling pursuant to paragraph (g). The attorney instructing the witness not to answer must give a concise, nonargumentative, nonsuggestive explanation of the grounds for the instruction if requested by the party who asked the question.

(g) *Suspending the Deposition.* If the time limitations for the deposition have expired or the deposition is being conducted or defended in violation of these rules, a party or witness may suspend the oral deposition for the time necessary to obtain a ruling.

(h) *Good Faith Required.* An attorney must not ask a question at an oral deposition solely to harass or mislead the witness, for any other improper purpose, or without a good faith legal basis at the time. An attorney must not object to a question at an oral deposition, instruct the witness not to answer a question, or suspend the deposition unless there is a good faith factual and legal basis for doing so at the time.¹³⁴

¹³⁴ TEX. R. CIV. P. 199.

The Texas rule explicitly guides the practitioner in conducting depositions. Only three objections, each specified by two words, are permitted. The objections are waived if not stated as phrased. All other objections need not be made or recorded during the oral deposition to be raised later with the court. An argumentative or suggestive objection automatically waives the objection and may form the basis for terminating the deposition or imposing sanctions. As a result, Texas counsel cannot engage in unnecessary colloquy and cannot make unnecessary objections. They must allow the witness to testify virtually uninterrupted.

According to an authoritative source, the new Texas rules governing deposition conduct "have reduced time, expense, speaking objections, witness coaching, and arguments on the record, and generally have made the deposition process more economical and reasonable."¹³⁵ Lawyers have recounted that the rule is helpful particularly in acrimonious cases where speaking objections and attorney colloquy formerly might have added hours or days to a deposition.¹³⁶

One sign that the rule is accomplishing its mission is the paucity of case law interpreting it. The rule has the virtue of complete clarity: if counsel goes beyond the specified two-word objections, the enlarged objection is waived. Because of its self-enforcing mechanism, the rule has had the desired effect. In one reported case, counsel repeatedly interrupted an expert's examination with long, argumentative objections.¹³⁷ Plaintiff's counsel reminded him of the new rule: "You're entitled to make the objection as to form — and then you are to stop."¹³⁸ Opposing counsel did not comply. As a result, one of his expert witnesses was stricken. In so ruling, the court observed that the purpose of Rule 199.5(e) was "to prevent the kind of obstructive behavior that was exhibited here and to save substantive complaints for a later hearing before the trial court."¹³⁹

Prior to enactment of the Texas rule, some lawyers expressed concern that it would turn those defending a deposition into "potted plants."¹⁴⁰ The deposing attorney might abuse the witness with misleading and harassing questions, leaving the defending attorney powerless to prevent such conduct. But experience so far indicates that these difficulties have not materialized.

It should be noted that the Texas rule does permit an attorney to instruct a witness not to answer a question under certain circumstances. Less draconian than Rule 30(d) of the Federal Rules of Civil Procedure in this respect, Rule 199.5(f) allows an instruction not to

¹³⁵ Alexandra W. Albright et al., *The New Rules Governing Discovery*, HANDBOOK ON TEXAS DISCOVERY PRACTICE, at xiii (Texas Practice Series 2003 ed.).

¹³⁶ Robert H. Pemberton, *The First Year Under the New Discovery Rules*, THE BIG ISSUES THUS FAR (2000).

¹³⁷ *In re Harvest Cmty. of Houston, Inc.*, 88 S.W.3d 343 (Tex. App. 2002).

¹³⁸ *Id.* at 346.

¹³⁹ *Id.*

¹⁴⁰ David C. Kent, *The Lawyer as "Potted Plant,"* THE TEXAS LAWYER, Aug. 24, 1998, at 24.

answer in order to “protect a witness from an abusive question or one for which any answer would be misleading”¹⁴¹ According to the comments to Rule 199, a witness should not be required to answer “whether he has yet ceased conduct he denies ever doing . . . because any answer would necessarily be misleading on account of the way in which the question is put.”¹⁴² Abusive questions include those that “inquire into matters clearly beyond the scope of discovery or that are argumentative, repetitious, or harassing.”¹⁴³

The Texas rule removes the “toxic advocacy” which has plagued the profession and facilitates a return to depositions which focus on the substance of witness testimony. The games and nastiness which have deformed this discovery device are now on the wane, if not entirely eliminated. The text of the rule is sufficiently clear, and the self-enforcing penalty for violating it sufficiently severe, that the troublesome and expensive “satellite litigation” which often attends discovery practice has been forestalled. This is no small accomplishment.

VII. CONCLUSION

During the 1980’s and 1990’s, taking and defending depositions became an exercise in competitive obstructionism. Speaking objections, instructions not to answer, and uncivil conduct often combined to transform deposition proceedings into occasions for bickering and argument, as opposed to the discovery of relevant facts.

Judge Robert Gawthrop’s opinion in *Hall v. Clifton Precision* marked a turning point in judicial efforts to curb improper deposition conduct. The 1993 amendments to Rule 30(d)(1) of the Federal Rules of Civil Procedure also improved deposition “culture” by proscribing suggestive and argumentative objections and by limiting the occasions for which an attorney might instruct a deponent not to answer. The progeny of *Hall* and the 1993 amendments underscored the judiciary’s determination to restore civility, clarity, and cooperation to the taking of depositions.

In 1999, the Texas Supreme Court promulgated a new rule governing oral depositions, which appears to have registered a significant and salutary effect. The rule specifies three two-word objections that counsel are permitted to make and threatens waiver of objection

¹⁴¹ TEX. R. CIV. P. 199.5(f).

¹⁴² TEX. R. CIV. P. 199 cmt.4.

¹⁴³ *Id.* “The attorney instructing the witness not to answer must give a concise, nonargumentative, [and] nonsuggestive explanation of the grounds” therefor, if the party who asked the question requests. TEX. R. CIV. P. 199.5(f).

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if further comment or colloquy is offered. The apparent success of this new Texas rule suggests that it offers a model for other states in their efforts to improve the quality of depositions within their jurisdictions.

Effective advocacy in an adversarial system can survive and flourish without obstreperous and obstructive deposition conduct by counsel. As witnesses testify without unnecessary interruption, counsel can turn their professional skills to the evidence adduced and the legal issues that surround such evidence. In the process, depositions can return to their original function as efficient vehicles for the discovery of information relevant to the resolution of a dispute.