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LAWYERS GONE WILD: ARE DEPOSITIONS STILL A “CIVIL” PROCEDURE?

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Depositions are an extremely effective and widely used discovery device. Unfortunately, attorneys and litigants seeking to frustrate their opponents often abuse the deposition process by using obstructionist, or “Rambo,” tactics. This Note examines different types of deposition misconduct and the different approaches courts have used to remedy these problems. This Note then looks at deposition misconduct in Connecticut and the sanctioning power of its state courts. Finally, this Note sets forth several suggestions on how to better curb deposition misconduct, including more frequent judicial intervention, greater use of video depositions to provide better evidence of misconduct, and wider observance of the American College of Trial Lawyers Code of Pretrial Conduct.

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ARE DEPOSITIONS STILL A “CIVIL” PROCEDURE?

ERIC B. MILLER*

I. INTRODUCTION

Depositions are one of the most effective discovery tools in a lawyer’s arsenal. They are a way to gather information that has not been filtered by opposing counsel, they allow lawyers to evaluate deponents as witnesses, and they allow immediate follow-up on unexpected, spontaneous answers.¹ Depositions can also expose weaknesses in an opponent’s case and lead to discovering faults in one’s own. Statements made during depositions can be used for impeachment and for refreshing a witness’s recollection in the courtroom. Depositions are also a way to preserve witnesses’ testimony in case they cannot testify at trial. If one’s ultimate goal is settlement, depositions that show weaknesses in an opponent’s case can provide considerable settlement leverage. One court has rightly recognized the importance of depositions as “the factual battleground where the vast majority of litigation actually takes place.”²

The deposition process is, however, subject to abuse by attorneys and by litigants who seek to obstruct it. Vulgar and abusive language, witness coaching, “speaking” objections and improper instructions not to answer, and even physical violence have been known to occur, thus calling into question the usefulness of depositions as a discovery device. These problems arise from the reality that depositions are rarely supervised and largely unregulated.³ Different jurisdictions have implemented rules and codes to avoid these practices,⁴ but inside the deposition room, with no judge present, lawyers sometimes perceive unfettered opportunities to inquire or interfere with the inquiry, which too often leads to offensive

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¹ A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 MD. L. REV. 273, 278 (1998).

² Hall v. Clifton Precision, 150 F.R.D. 525, 531 (E.D. Pa. 1993).

³ See Interim Report of the Comm. on Civility of the Seventh Fed. Judicial Circuit, 143 F.R.D. 371, 388 (1991); James G. Carr & Craig T. Smith, *Depositions and the Court*, 32 TORT & INS. L.J. 635, 636 (1997); Dickerson, *supra* note 1, at 278; Alyson Nelson, *Deposition Conduct: Texas’s New Discovery Rules End Up Taking Another Jab at the Rambos of Litigation*, 30 TEX. TECH L. REV. 1471, 1474 (1999); Christopher J. Piazzola, *Ethical Versus Procedural Approaches to Civility: Why Ethics 2000 Should Have Adopted a Civility Rule*, 74 U. COLO. L. REV. 1197, 1215 (2003).

⁴ See *infra* notes 60–65 and accompanying text.

behavior. At the same time, courts do not address deposition misconduct with great regularity and often fail to sanction such misbehavior.

Several scholarly articles have suggested ways to remedy this misconduct, ranging from encouraging lawyers to study and practice the teachings of Jesus Christ,⁵ to simply telling lawyers to “shut up and knock it off.”⁶ This Note argues that courts should intervene with more frequency to establish clear expectations of proper behavior and to punish abuses of the deposition process. This Note proposes several methods for doing so.

Part II of this Note examines different kinds of misconduct that occur at depositions. Part III analyzes the different sanctions courts have traditionally used to address these types of behaviors and the sources of judicial authority for such actions. The approaches used by courts are usually either monetary or non-monetary in nature. After looking at what punishments courts have implemented, Part IV discusses Connecticut’s approach to disruptive deposition tactics, with a look at sanctioning power and the recent Connecticut Superior Court decision in *Faile v. Zarich*,⁷ and the Connecticut Supreme Court’s decision in *Ramin v. Ramin*.⁸ Part V concludes with suggestions for curbing abusive deposition practices, including more frequent judicial intervention, referrals to professional disciplinary boards, wider acceptance of the American College of Trial Lawyers Code of Pretrial Conduct, and more frequent videotaping of depositions to act as a deterrent to and provide stronger evidence of misconduct.

II. THE LAWYER DID WHAT?

It is worth noting a reality in researching deposition misconduct; sanctions for such misbehavior are not pursued in court with great regularity and it is difficult to get a good sense of what is happening at depositions if problems are not reported.⁹ A 1989 study of the Central District of Los Angeles County Superior Court found that motions seeking sanctions for deposition misconduct constituted only 15.9% of all sampled motions for pre-trial sanctions and 16.6% of all motions for discovery

⁵ L. Timothy Perrin, *Lawyer as Peacemaker: A Christian Response to Rambo Litigation*, 32 PEPP. L. REV. 519, 534–35 (2005).

⁶ Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618, 1619 (1996).

⁷ No. HHDX04CV5015994S, 2008 Conn. Super. LEXIS 1779 (Conn. Super. Ct. July 10, 2008).

⁸ 915 A.2d 790 (Conn. 2007).

⁹ See *Hall v. Clifton Precision*, 150 F.R.D. 525, 526 (E.D. Pa. 1993) (“Currently at bar is an issue on which, despite its presence in nearly every case brought under the Federal Rules of Civil Procedure, there is not a lot of caselaw: the conduct of lawyers at depositions.”); Carr & Smith, *supra* note 3, at 635 (“Though reported instances are rare, anecdotal indications suggest that abuse by inquiring counsel is recurrent, especially in metropolitan areas” (citing Marvin E. Aspen, *The Search For Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513 (1994))).

sanctions.¹⁰ Surveys of attorneys in the Seventh Circuit, conducted by the Committee on Civility of the Seventh Circuit in the early 1990s, demonstrated that deposition abuse is commonplace.¹¹ The examples that follow are therefore limited to reported and unreported decisions and scholarly articles, and undoubtedly do not accurately reflect the full extent of deposition misconduct around the country.

A. *Vulgar & Abusive Language*

One type of deposition misconduct is an attorney's use of vulgar or abusive language. In *Saldana v. Kmart Corp.*, the plaintiff's attorney, Lee Rohn, said "fuck" four times and was generally hostile and abusive to opposing counsel during pre-trial discovery.¹² On two occasions, during depositions, Rohn said: "Todd, I don't want to fuck around," and "I will put my remarks on the record as I'm entitled. I don't need to be lectured by you, sir. Don't fuck with me."¹³ After a jury verdict in her client's favor, Attorney Rohn—perhaps to rub it in—sent a letter to the defendant's expert witness which stated:

Since you threw down the gauntlet, I thought you would be interested in knowing what the jury decided. The jury awarded Ms. Bell \$475,000. They discounted your testimony completely and felt you were pompous and arrogant. I did concur with one of the jurors who referred to you as a Nazi.¹⁴

It is not surprising that these actions were brought to the court's attention.

No review of deposition misconduct would be complete without reference to the infamous Joe Jamail of the Texas Bar. In *Paramount Communications Inc. v. QVC Network Inc.*, the Delaware Supreme Court raised, sua sponte, the issue of Attorney Jamail's conduct at a deposition in a Delaware action that was taken in Texas, stating that they were forced "to add this Addendum. . . . One 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

¹⁰ Florrie Young Roberts, *Pre-Trial Sanctions: An Empirical Study*, 23 PAC. L.J. 1, 57 & n.101 (2001). This study sampled a two month period in the Central District of Los Angeles County Superior Court. It determined that out of 813 motions for pre-trial sanctions during that period, 516 were "studiable." A motion was "studiable" if it included points and authorities, declaration of the facts, amount of sanction requested, and an actual ruling by a judge. *Id.* at 3–4, 15 & n.32.

¹¹ See Interim Report of the Comm. on Civility of the Seventh Fed. Judicial Circuit, 143 F.R.D. 371, 388 (1991) (noting that surveyed attorneys frequently encountered hostility, witness coaching, improper instructions not to answer, and other abusive conduct during depositions).

¹² *Saldana v. Kmart Corp.*, 84 F. Supp. 2d 629, 637–38 (D.V.I. 1999), *rev'd in part*, 260 F.3d. 228 (3d Cir. 2001).

¹³ *Id.* at 637 (emphasis omitted).

¹⁴ *Id.* at 638.

lesson . . . of conduct not to be tolerated or repeated.”¹⁵ The Court recited a few choice excerpts to illustrate Mr. Jamail’s tactics:

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.

MR. JOHNSTON: Let’s just take it easy.

MR. JAMAIL: No, we’re not going to take it easy. Get done with this.

. . . .

MR. JOHNSTON: Are you finished?

MR. JAMAIL: I may be and you may be. Now, you want to sit here and talk to me, fine. This deposition is going to be over with. You don’t know what you’re doing. Obviously someone wrote out a long outline of stuff for you to ask. You have no concept of what you’re doing.

Now, I’ve tolerated you for three hours. If you’ve got another question, get on with it. This is going to stop one hour from now, period. Go.¹⁶

The court noted that, “[a]lthough busy and overburdened, Delaware trial courts are ‘but a phone call away’ and would be responsive to the plight of a party and its counsel bearing the brunt of such misconduct.”¹⁷

Attorneys can also be sanctioned for not acting to stop their witnesses from using profanity during depositions. In *GMAC Bank v. HTFC Corp.*, a breach of contract case, Aaron Wider, the owner of HTFC, was deposed in what the court called a “spectacular failure of the deposition process.”¹⁸ The deposition took two days, and the court found that “Wider used the word ‘fuck’ and variants thereof no less than 73 times,” compared with the word ‘contract’ which was used only fourteen times.¹⁹ Perhaps more

¹⁵ *Paramount Commc’ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 52 (Del. 1994).

¹⁶ *Id.* at 53–54.

¹⁷ *Id.* at 55 (quoting *Hall v. Clifton Precision*, 150 F.R.D. 525, 531 (E.D. Pa. 1993)).

¹⁸ *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 184 (E.D. Pa. 2008).

¹⁹ *Id.* at 187.

noteworthy in the eyes of the judge was Wider's attorney's failure to stop the offensive language during the deposition.²⁰

Courts have also issued orders when an attorney has made derogatory remarks to another attorney based on gender or marital status.²¹ In *Laddcap Value Partners, LP v. Lowenstein Sandler P.C.*, defense counsel took a three-day deposition of the plaintiff's representative.²² Thomas Decea, attorney for the plaintiff, "repeatedly directed the witness not to answer certain questions posed to him, which were, on many occasions, followed by inappropriate, insulting, and derogatory remarks against [Attorney Michelle] Rice concerning her gender, marital status, and competence," including asking Attorney Rice several times whether she was married.²³ A few examples include:

MR. DECEA: This is not a white collar interview that you're sitting here interviewing something with your cute little thing going on.

MS. RICE: My cute little thing?

MR. DECEA: This is a deposition that has rules about what kinds of questions you can ask and how to ask them. You've led him the entire morning. You led him all day Monday when there's no reason to lead him. If you want to lead him to get into a subject area I can understand that and I'll let that go, but when you get to the subject area ask him nonleading questions.

MS. RICE: Mr. Decea, you conduct the type of deposition you wish to conduct, I conduct the type of deposition I wish to conduct.

MR. DECEA: And I respect that. I'm just saying respect my defense, respect my defense of the litigation, that's all. Nothing personal, dear.

MS. RICE: Nothing personal, dear, let's see. I can't tell you the number of things that you have said were more than personal and certainly offensive and probably—

. . . .

²⁰ See *id.* at 196 (noting that Attorney Ziccardi's conduct during the deposition was undertaken in bad faith and his failure to intervene was willful).

²¹ See, e.g., *Principe v. Assay Partners*, 586 N.Y.S.2d 182, 184 (N.Y. Sup. Ct. 1992) (finding unprofessional conduct warranting sanctions where a male attorney stated to a female attorney: "I don't have to talk to you, little lady"; "[t]ell that little mouse over there to pipe down"; "[w]hat do you know, young girl"; "[b]e quiet, little girl"; and "[g]o away, little girl").

²² *Laddcap Value Partners, LP v. Lowenstein Sandler P.C.*, No. 600973-2007, 2007 WL 4901555, at *2 (N.Y. Sup. Ct. Dec. 5, 2007).

²³ *Id.*

MS. RICE: It doesn't matter.

MR. DECEA: It does, hon.

. . . .

MR. DECEA: You better get somebody else here to try this case, otherwise you're gonna be one sorry girl.

MS. RICE: A sorry girl?

MR. DECEA: Yes.²⁴

Surprisingly, Attorney Decea claimed—to no avail—that he was “not aware of any rule or law which require[d] civility between counsel.”²⁵

B. *Witness Coaching*

Another tactic used by attorneys inside the deposition room is witness coaching through suggestive or “speaking” objections. Ordinarily, objections to the form of the question should be made succinctly—to be preserved for trial—and then the witness may answer.²⁶ It is improper to have extended speaking objections suggesting an answer to a pending question. As the court in *Hall v. Clifton Precision* noted, “once a deposition begins, the right to counsel is somewhat tempered by the underlying goal of our discovery rules: getting to the truth. . . . Once a witness has been prepared . . . that witness is on his or her own.”²⁷ When attorneys begin to suggest answers for their witnesses, depositions stray from their truth-seeking function.

New York’s rule governing objections at depositions reads: “Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent [D]uring the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.”²⁸ *Simmons v. Minerley* involved extensive witness coaching at a deposition.²⁹ At his client’s deposition, plaintiff’s attorney, Mr. Genna, made numerous suggestive objections and gave instructions not to answer, including this exchange highlighted by the court:

The plaintiff was then asked by defendants’ counsel:

“In that Notice of Claim, did you allege that there was an

²⁴ *Id.* at *3–4.

²⁵ *Id.* at *1.

²⁶ See FED. R. CIV. P. 30(c)(2) (“An objection must be stated concisely in a non-argumentative and *nonsuggestive* manner.” (emphasis added)).

²⁷ *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993).

²⁸ N.Y. COMP. CODES R. & REGS. tit. 22, § 221.1(b) (2010).

²⁹ *Simmons v. Minerley*, No. 5554/06, 2007 WL 2409595, at *1 (N.Y. Sup. Ct. Aug. 24, 2007).

obstructed view of the intersection? Yes or no?”

At that point, Mr. Genna stated:

“I will not allow him to answer that *because what’s in the Notice—there’s no testimony that he’s read it and knows what’s in it, so there’s no foundation for that question. What the document says and what he knows it says may be two different things.*”

Mr. O’Connor stated:

“I know that. We’re not supposed to say any of this. We can do it outside of the presence of the witness.”³⁰

The court held that Attorney Genna’s objection to lack of foundation was improper under the New York rules—he should have objected and then let the deponent answer the question.³¹

In *R.E. Linder Steel Erection Co., Inc. v. U.S. Fire Insurance Co.*, the court noted that the attorneys on both sides were at fault for “depositions [that] have been contaminated from start to finish with interrupted questions, *ad hominem* comments, and argumentative colloquy, sometimes running on for pages.”³² As this Note later examines, the court came up with a creative penalty for the attorneys.³³ Courts are clearly becoming more and more “intolerant of “speaking” objections to questions [that have] the barely concealed purpose of communicating to the witness how [he or] she should answer.”³⁴

C. Improper Objections & Instructions Not To Answer

In most jurisdictions, attorneys at depositions may only object and instruct a deponent not to answer a question in order to preserve a privilege or to enforce a limitation from an order of the court.³⁵ If the questioning is being conducted in bad faith or so as to annoy or embarrass the deponent, some jurisdictions will allow objections and instructions not to answer so that the deponent’s attorney can seek the assistance of the court, often via a

³⁰ *Id.* at *6 (emphasis added).

³¹ *Id.*

³² *R.E. Linder Steel Erection Co., Inc. v. U.S. Fire Ins. Co.*, 102 F.R.D. 39, 40 (D. Md. 1983).

³³ See *infra* Part III.A.

³⁴ Victoria E. Briant, *Techniques and Potential Conflicts in the Handling of Depositions*, Course No. SN040 A.L.I.-A.B.A. 583, 596 (2007) (quoting *Heller v. Wofsey, Certilman, Haft, Lebow & Balin*, No. 86 Civ. 9867, 1989 U.S. Dist. LEXIS 7765, at *22 (S.D.N.Y. July 11, 1989)).

³⁵ See FED. R. CIV. P. 30(c)(2) (“A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).”); CONN. SUPERIOR COURT RULES § 13-30(b), in OFFICIAL 2010 CONNECTICUT PRACTICE BOOK 85, 200 (2010) [hereinafter CONN. PRACTICE BOOK], available at http://www.jud.ct.gov/Publications/PracticeBook/PB_2010.pdf (containing almost identical language to the Federal Rules); N.Y. COMP. CODES R. & REGS. tit. 22, § 221.2 (2010) (same).

motion for a protective order.³⁶ In *Riddell Sports Inc. v. Brooks*, the U.S. District Court for the Southern District of New York found that instructions not to answer that do not fall within these categories are generally inappropriate.³⁷ Likewise, the District Court of Maryland has held that instructions not to answer, which do not conform to the Federal Rules, are “presumptively improper.”³⁸

What objections are permitted at depositions? Relevance objections, for example, are usually not necessary and are improper.³⁹ Under the Federal Rules of Civil Procedure (“FRCP”), objections to the form of the question are proper if the question is:

1. Leading or suggestive;
2. Ambiguous or uncertain;
3. Compound;
4. Assum[ing] facts not in evidence;
5. Call[ing] for a narration;
6. Call[ing] for speculation or conjecture; or
7. Argumentative.⁴⁰

In Connecticut, certain objections are waived unless made during the deposition. This rule establishing waiver is embodied in Connecticut Practice Book section 13-31(c)(3)(B), which states:

Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers . . . and 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.⁴¹

In *Lowell v. Shustock*, the court noted that this rule “exists because of a recognition that many of the objections made at a deposition are entirely

³⁶ See FED. R. CIV. P. 30(d)(3)(A) (“At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party.”); CONN. SUPERIOR COURT RULES § 13-30(c), in CONN. PRACTICE BOOK, *supra* note 35, at 200 (using language tracking the Federal Rule); N.Y. COMP. CODES R. & REGS. tit. 22, § 221.2 (2008) (containing similar language as the Federal Rule, but adding: “A deponent shall answer all questions at a deposition, except . . . (c) when the question is plainly improper and would, if answered, cause significant prejudice to any person.”).

³⁷ *Riddell Sports Inc. v. Brooks*, 158 F.R.D. 555, 557 (S.D.N.Y. 1994).

³⁸ *Boyd v. Univ. of Md. Med. Sys.*, 173 F.R.D. 143, 147 (D. Md. 1997).

³⁹ See *In re Stratosphere Corp. Sec. Litig.*, 182 F.R.D. 614, 618 (D. Nev. 1998).

⁴⁰ *Id.* at 618.

⁴¹ CONN. SUPERIOR COURT RULES § 13-31(c)(3)(B), in CONN. PRACTICE BOOK, *supra* note 35, at 202.

capable of being fixed on the spot, and that doing so at the deposition stage helps trials go more smoothly.”⁴² Judge Miller ordered that the contested deposition continue, and that “[c]ounsel who want to preserve objections for trial will . . . be expected to state the ground for any form objection they choose to make when this deposition resumes.”⁴³

The FRCP contain an identical rule regarding waiver of objections if not made at depositions.⁴⁴ In *Oberlin v. Marlin American Corp.*, the Seventh Circuit held that defense counsel’s failure to object to the form of certain leading questions at the deposition resulted in a waiver of his right to object to their introduction at trial.⁴⁵ Similarly, in *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.*, a witness’s deposition was introduced at trial.⁴⁶ When the deposition was offered, the opposing attorney tried to object to some of the deposition questions as leading. The Sixth Circuit held that the attorney had waived his objection by not making it at the deposition.⁴⁷

D. Physical Violence

There have been rare instances where attorneys at depositions have engaged in physical altercations. In Connecticut in 2004, Attorney James Brewer took a videotaped deposition of Lt. Jack Casey of the West Hartford Police in a case concerning the suicide of a police officer.⁴⁸ Brewer began asking questions that defense Attorney O’Brien would not permit the deponent to answer.⁴⁹ Eventually, O’Brien declared the deposition to be adjourned, at which point Brewer physically attacked O’Brien and Casey.⁵⁰ Both O’Brien and Casey filed grievances and Brewer was charged with several felonies and misdemeanors.⁵¹ Ultimately, Brewer was convicted only of misdemeanor breach of peace.⁵² Brewer withdrew from practice after the deposition and received a ninety-day suspension.⁵³ In June 2005, Brewer was disbarred by Judge Holzberg for failing to comply with certain court orders regarding medical

⁴² *Lowell v. Shustock*, No. CV075008834S, 2007 Conn. Super. LEXIS 2759, at *6 (Conn. Super. Ct. Oct. 19, 2007).

⁴³ *Id.*

⁴⁴ See FED. R. CIV. P. 32(d)(3)(B) (“An objection to an error or irregularity at an oral examination is waived if: (i) it relates to . . . the form of a question or answer . . . or other matters that might have been corrected at that time; and (ii) it is not timely made during the deposition.”).

⁴⁵ *Oberlin v. Marlin Am. Corp.*, 596 F.2d 1322, 1328–29 (7th Cir. 1979).

⁴⁶ *Elyria-Lorain Broad. Co. v. Lorain Journal Co.*, 298 F.2d 356, 360 (6th Cir. 1961).

⁴⁷ *Id.*

⁴⁸ *Brewer v. Town of W. Hartford*, No. 3:05cv849, 2007 U.S. Dist. LEXIS 72734, at *2 (D. Conn. Sept. 28, 2007).

⁴⁹ *Id.*

⁵⁰ *Id.* at *2–3.

⁵¹ *Id.* at *3.

⁵² *Id.* at *4.

⁵³ *Id.* at *3.

examinations.⁵⁴ In September 2005, Judge Blue ordered a presentment at which Brewer failed to appear.⁵⁵ As a result, Judge Blue disbarred Brewer for a period of five years.⁵⁶

III. HOW COURTS ADDRESS DEPOSITION MISCONDUCT

Generally, courts have broad discretion to fashion sanctions for deposition misconduct.⁵⁷ But where does this power come from? Congress gave federal courts power to regulate attorney conduct in 28 U.S.C. § 1927, which states:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.⁵⁸

The statute provides that the sanctions can be imposed directly against the attorney where the judge finds the misconduct was the attorney's idea as opposed to the client's. Such sanctions are an important tool for courts in deterring and punishing misbehavior at depositions, and are also a way to protect clients from paying for the transgressions of their attorneys.⁵⁹

Different jurisdictions have also promulgated rules designed to regulate deposition conduct.⁶⁰ The FRCP provide that "[t]he court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent."⁶¹ Rule 30(d) was added in 1993 to give courts express power to punish excessive objecting, speaking objections, and improper instructions not to answer.⁶² Upon a motion, a district court can also issue orders pertaining to any step in the discovery process, including depositions. If the district court where the action is pending gives an order regarding discovery that is disobeyed, courts have additional authority under Rule 37(b)(2)(A), which states:

⁵⁴ *Id.* at *4.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See *Hall v. Clifton Precision*, 150 F.R.D. 525, 527 (E.D. Pa. 1993).

⁵⁸ 28 U.S.C. § 1927 (2006).

⁵⁹ Carr & Smith, *supra* note 3, at 644.

⁶⁰ See Dickerson, *supra* note 1, at 282–84 & nn.40–50. Specifically, FRCP 30 governs conduct at depositions. *AG Equip. Co. v. AIG Life Ins. Co.*, No. 07-CV-556-CVE-PJC, 2008 U.S. Dist. LEXIS 99915, at *5 (N.D. Okla. Dec. 10, 2008).

⁶¹ FED. R. CIV. P. 30(d)(2).

⁶² Dickerson, *supra* note 1, at 280–81; David F. Herr & Nicole Narotzky, *Sanctions in Civil Litigation: A Review of Sanctions by Rule, Statute, and Inherent Power*, Course No. SN009 A.L.I.-A.B.A. 1741, 1810–11 (2007).

If a party or a party's officer, director, or managing agent . . . fails to obey an order to provide or permit discovery . . . the court where the action is pending may issue further just orders. They may include the following:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.⁶³

Instead of or in addition to any of the above orders, district courts may also order expenses (including reasonable attorneys' fees) to be paid by the misbehaving party, the misbehaving party's attorney, or both, "unless the failure was substantially justified or is harmless."⁶⁴ While some of the available relief is to be used only in extreme circumstances, these rules give the courts considerable power to craft an appropriate sanction for an abusive party.⁶⁵

A court dealing with deposition misconduct has many options available. These can be grouped into two broader categories: monetary sanctions and non-monetary sanctions. This section examines how the courts resolved many of the instances of deposition misconduct discussed in Part II.

⁶³ FED. R. CIV. P. 37(b)(2)(A).

⁶⁴ FED. R. CIV. P. 37(b)(2)(C)(1).

⁶⁵ See *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (stating that "the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct"); *Schreiber v. Moe*, No. 06-2414, 2008 U.S. App. LEXIS 22927, at *13 (6th Cir. Nov. 5, 2008) (noting that dismissal is a "harsh sanction which the court should order only in extreme situations").

A. Monetary Sanctions

Courts will often order monetary sanctions when faced with conduct that frustrates the deposition process. Such sanctions can include reimbursement for costs of bringing the misconduct to the attention of the court, including associated reasonable attorneys' fees, or any other reason that the court deems appropriate.⁶⁶ In *GMAC Bank v. HTFC Corp.*, the court sanctioned the deponent, Aaron Wider, for "1) engaging in hostile, uncivil, and vulgar conduct; 2) impeding, delaying, and frustrating fair examination; and 3) failing to answer and providing intentionally evasive answers to deposition questions."⁶⁷ The court based its decision on FRCP 37(a)(3)(B)(i) and 30(d)(2).⁶⁸ The court also found that Wider's attorney, Joseph Ziccardi, "persistently failed to intercede and correct Wider's violations of the Federal Rules."⁶⁹ The court sanctioned Attorney Ziccardi, stating that "any reasonable attorney representing Wider would have intervened in an effort to curb Wider's misconduct."⁷⁰ Wider and Ziccardi were jointly and severally sanctioned over \$16,000 for GMAC's costs and attorneys' fees for the deposition, and were ordered to pay over \$13,000 for costs associated with bringing the motion to the court.⁷¹ The court denied Ziccardi's motion for reconsideration.⁷²

The trial court in *Simmons v. Minerley* found that the attorney's extensive witness coaching "not only failed to comport with the spirit of the [New York] Civil Practice Law and Rules," but also violated specific provisions of the rules.⁷³ Specifically, the judge found that the attorney "repeatedly directed his client not to answer; repeatedly interrupted the deposition; and repeatedly provided instructions in his statements as to how the witness should respond."⁷⁴ The judge ordered the attorney to pay \$2500 to defense counsel for the costs incurred as a result of his conduct at the deposition, and ordered the plaintiff to reappear for a further deposition.⁷⁵

Courts can also get creative with monetary sanctions, as is evidenced by the court's decision in *R.E. Linder Steel Erection Co. v. U.S. Fire Insurance Co.*⁷⁶ The judge found both attorneys at fault for frustrating the goal of discovery. Because both parties had engaged in the offensive

⁶⁶ See Carr & Smith, *supra* note 3, at 644.

⁶⁷ *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 186, 193 (E.D. Pa. 2008).

⁶⁸ *Id.* at 193. FRCP 37(a)(3)(B)(i) permits a party to move to compel disclosure when a deponent fails to answer a question asked. FED. R. CIV. P. 37(a)(3)(B)(i).

⁶⁹ *GMAC Bank*, 248 F.R.D. at 194-95.

⁷⁰ *Id.* at 197.

⁷¹ *Id.* at 193, 198.

⁷² *GMAC Bank v. HTFC Corp.*, 252 F.R.D. 253, 265 (E.D. Pa. 2008).

⁷³ *Simmons v. Minerley*, No. 5554/06, 2007 WL 2409595, at *7 (N.Y. Sup. Ct. Aug. 24, 2007).

⁷⁴ *Id.* at *6.

⁷⁵ *Id.* at *7.

⁷⁶ 102 F.R.D. 39, 41 (D. Md. 1983).

behavior, the court did not order immediate sanctions. Instead, the judge ordered that at future depositions, each interruption by either counsel would result in a \$5 penalty, and

any counsel who engages in any argument with other counsel, makes any *ad hominem* comments regarding other counsel or witnesses, or makes other extraneous remarks shall personally pay to all other counsel attending the deposition the sum of [five dollars] each, as liquidated attorney's fees and expenses, for each line or part thereof in the transcript, of such argument, comments, or remarks.⁷⁷

Clearly, courts have great leeway in drawing up the monetary sanctions that they deem appropriate.⁷⁸

B. *Non-Monetary Sanctions*

Courts also choose to order a wide range of non-monetary sanctions, as several of the judges did in the cases discussed in Part II. In *Saldana v. Kmart Corp.*, the district court noted that “[t]o Attorney Rohn, litigation is a form of mortal combat which she must win at any and all costs, rather than the structured and professional mechanism civilized society has established for peaceably resolving legitimate disputes.”⁷⁹ The court ordered Attorney Rohn to attend and complete a continuing legal education seminar on civility, to write letters of apology to the lawyers, witnesses, and court reporters she offended, and to pay her opponent's costs and attorney's fees for pursuing the motion for sanctions.⁸⁰

Surprisingly, the Third Circuit reversed, stating that because the “language complained of in this case did not occur in the presence of the Court and there is no evidence that it affected either the affairs of the Court or the ‘orderly and expeditious disposition’ of any cases before it,” the district court had abused its discretion in ordering sanctions.⁸¹ One scholar has described the district court's approach as an ethical one, since it was focused on the mere fact that the remarks were made, while characterizing the Third Circuit's reasoning as a procedural approach because the appellate judges were only concerning themselves with the overall impact on the litigation.⁸²

⁷⁷ *Id.*

⁷⁸ *See, e.g.,* Principe v. Assay Partners, 586 N.Y.S.2d 182, 190–91 (N.Y. Sup. Ct. 1992) (ordering an attorney to pay \$500 to the Clients' Security Fund and \$500 to opposing counsel for discriminatory language).

⁷⁹ *Saldana v. Kmart Corp.*, 84 F. Supp. 2d 629, 639 (V.I. 1999), *rev'd in part*, 260 F.3d 228 (3d Cir. 2001).

⁸⁰ *Id.* at 641.

⁸¹ *Saldana*, 260 F.3d at 238.

⁸² *See* Piazzola, *supra* note 3, at 1237.

In *Paramount Communications Inc. v. QVC Network Inc.*, the Delaware Supreme Court observed that “[t]he issue of discovery abuse, including lack of civility and professional misconduct during depositions, is a matter of considerable concern to Delaware courts and courts around the nation.”⁸³ The court noted that “[i]f a Delaware lawyer had engaged in the kind of misconduct committed by Mr. Jamail on this record, that lawyer would have been subject to censure or more serious sanctions.”⁸⁴ Finding that there was no mechanism in place to sanction an out-of-state lawyer not acting on a pro hac vice basis, the court ruled that Attorney Jamail would be given thirty days to file a voluntary appearance to argue why his obstructionist conduct “should not be considered as a bar to any future appearance [by him] in a Delaware proceeding.”⁸⁵ Mr. Jamail did not appear in Delaware court to contest.⁸⁶

In *Laddcap Value Partners, LP v. Lowenstein Sandler P.C.*, the court found the attorney’s discriminatory remarks “inherently and palpably adverse to the goals of justice and the legal profession,” as well as a violation of the recently amended Code of Professional Responsibility.⁸⁷ The judge noted the court’s “broad discretion” to oversee discovery including the ordering of a special referee to handle future issues and the issuance of sanctions.⁸⁸ The judge ordered a special referee to oversee future depositions in the case, which would be held at the courthouse.⁸⁹ Requiring that depositions be supervised and held at the courthouse can be an effective solution to deposition misconduct, but it can also further clog an already overburdened judiciary if the referee is another judge.

In *Hall v. Clifton Precision*, in light of the many conferences and objections during the depositions in question, Judge Gawthrop conducted an extensive review of the importance of focused and succinct depositions. He stated:

[I]n short, depositions are to be limited to what they were and are intended to be: question-and-answer sessions between a lawyer and a witness aimed at uncovering the facts in a lawsuit. When a deposition becomes something other than that because of the strategic interruptions, suggestions, statements, and arguments of counsel, it not only becomes

⁸³ *Paramount Commc’ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 52 (Del. 1994).

⁸⁴ *Id.* at 55.

⁸⁵ *Id.* at 56.

⁸⁶ Nelson, *supra* note 3, at 1477 (citing Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561, 567 n.13 (1996)).

⁸⁷ *Laddcap Value Partners, LP v. Lowenstein Sandler P.C.*, No. 600973-2007, 2007 WL 4901555, at *6 (N.Y. Sup. Ct. Dec. 5, 2007) (quoting *Principe v. Assay Partners*, 586 N.Y.S.2d 182, 185 (N.Y. Sup. Ct. 1992)).

⁸⁸ *Id.* at *3.

⁸⁹ *Id.* at *8.

unnecessarily long, but it ceases to serve the purpose of the Federal Rules of Civil Procedure: to find and fix the truth.⁹⁰

Instead of issuing sanctions immediately, Judge Gawthrop chose to set forth nine orders for subsequent deposition, including:

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. Counsels' [sic] 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.

6. Any conferences which occur pursuant to, or in violation of, guideline (5) are a proper subject for inquiry by deposing counsel to ascertain whether there has been any witness-coaching and, if so, what.⁹¹

⁹⁰ Hall v. Clifton Precision, 150 F.R.D. 525, 531 (E.D. Pa. 1993) (footnote omitted).

⁹¹ *Id.* at 531–32. The remaining orders were as follows:

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.

...
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.

Id.

At least one author has noted the importance of Judge Gawthrop's decision in *Hall*, calling it a "significant contribution to the case law on deposition conduct."⁹² In *Heller v. Consolidated Rail Corp.*, a later deposition conduct case, Judge Gawthrop emphasized that deponent's counsel did *not* have to remain "utterly mute," explaining that counsel must periodically "interrupt to protect [their] client from overreaching and abuse by an opponent, provided it is done within the rules."⁹³

Most cases involving deposition misconduct are situations where counsel for one party behaves badly to gain a perceived advantage over a more civilized adversary. Sometimes, however, the misconduct goes both ways. In *AG Equipment Co. v. AIG Life Insurance Co.*, the court found that "[b]oth lawyers made inappropriate speaking objections to deposition questions and improperly instructed witnesses not to answer questions" at several depositions.⁹⁴ The court stated:

Both sides have complained about opposing counsel's conduct during depositions and have submitted reams of deposition transcript pages to support their outrage. The Court's extensive review of these pages serves as a useful reminder that loaded guns, sharp objects and law degrees should be kept out of the reach of children.⁹⁵

The court ultimately sanctioned both of the attorneys \$250, to be paid to the Tulsa County Bar Association for the purpose of funding a continuing legal education course on proper deposition conduct and etiquette.⁹⁶

Courts can also take more drastic steps, such as suspending an attorney, as was the case in *Castillo v. St. Paul Fire & Marine Insurance Co.*⁹⁷ Dr. Castillo's deposition began with plaintiff's counsel objecting to producing a number of documents asserting privilege and claiming they were duplicative and irrelevant.⁹⁸ As the court noted, the deposition "did not get very far . . . even though it took all day and 281 pages of transcript," due to the many objections of plaintiff's counsel and the doctor's non-responsive answers and stonewalling.⁹⁹ Judge Baker did not find merit in the objections and stated that the conduct of plaintiff and his attorney was "the most outrageous example of evasion and obfuscation that I have seen in years," and "a deliberate frustration of defendants' attempt

⁹² Dickerson, *supra* note 1, at 292.

⁹³ *Heller v. Consol. Rail Corp.*, Civ. No. 95-3935, 1995 U.S. Dist. LEXIS 11615, at *9 n.2 (E.D. Pa. Aug. 7, 1995).

⁹⁴ *AG Equip. Co. v. AIG Life Ins. Co.*, No. 07-CV-556-CVE-PJC, 2008 U.S. Dist. LEXIS 99915, at *7-8 (N.D. Okla. Dec. 10, 2008) (footnotes omitted).

⁹⁵ *Id.* at *7.

⁹⁶ *Id.* at *9.

⁹⁷ 938 F.2d 776 (7th Cir. 1991).

⁹⁸ *Id.* at 778.

⁹⁹ *Id.*

to secure discovery.”¹⁰⁰ Judge Baker issued sanctions of over \$6300 to be paid by the plaintiff and his counsel, and ordered that the doctor answer the questions that had not been answered at the deposition “without interference from the doctor’s counsel.”¹⁰¹

At the second deposition, plaintiff’s counsel “willfully and contumaciously disobeyed the court’s order by interfering with the questions” and “directing the doctor not to respond to certain questions.”¹⁰² When defense counsel suggested that they call Judge Baker from the office phone—there were no cell phones yet—to resolve the impasse, plaintiff’s Attorney Walker responded:

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.¹⁰³

Judge Baker found Attorney Walker in contempt, dismissed the case with prejudice, and referred the matter to a panel of judges to determine what other discipline would be just.¹⁰⁴ The Seventh Circuit affirmed, noting that Judge Baker would only have abused his discretion by *not* imposing sanctions.¹⁰⁵

The disciplinary panel stated that “Mr. Walker’s knowing, deliberate, and willful disobedience of Judge Baker’s order is discovery abuse of a genre never before seen by this Court. Mr. Walker’s conduct is also the most egregious example of lawyer incivility that this Court has ever seen.”¹⁰⁶ Noting its inherent power and responsibility to regulate conduct of attorneys admitted to practice, the court ordered Mr. Walker to be suspended from the practice of law for at least one year and not to be readmitted until further order of the court.¹⁰⁷ As this was a case of first impression, the court also specifically noted their hope that this case would act as a deterrent, stating that this case established a new standard for lawyers in the district “who engage in unprofessional conduct when

¹⁰⁰ *Id.* at 777.

¹⁰¹ *Id.* at 779.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 779–80.

¹⁰⁵ *Id.* at 780–81.

¹⁰⁶ *Castillo v. St. Paul Fire & Marine Ins. Co.*, 828 F.Supp. 594, 600 (C.D. Ill. 1992).

¹⁰⁷ *Id.* at 604.

attending or taking depositions.”¹⁰⁸ Courts, vested with such broad authority, can get quite inventive in determining how to punish misconduct at depositions.¹⁰⁹

IV. THE CONNECTICUT EXPERIENCE

Connecticut courts have sanctioning power similar to that provided by the FRCP. As a preliminary matter, trial courts have the inherent authority to regulate the conduct of attorneys.¹¹⁰ When it comes to problems with discovery, Connecticut courts have “broad discretion” to impose sanctions for failure to comply with discovery rules.¹¹¹ Practice Book section 13-14(a) provides that in the case of failing to appear or testify at a deposition, “the judicial authority may, on motion, make such order as the ends of justice require.”¹¹² In addition, it has been long held that courts in Connecticut have the inherent power to issue sanctions to enforce the rules of court.¹¹³

In *Ranfone v. Ranfone*—a case brought to modify alimony payments—the plaintiff sought sanctions for conduct at a deposition, claiming that defense counsel improperly instructed his witness not to answer questions, coached his witness through objections, and terminated the deposition before it was over.¹¹⁴ The court found that the defense attorney had violated Practice Book section 13-30(b) and ordered sanctions in the amount of \$1000 to be paid by the defense attorney, not his client.¹¹⁵ The court declined to refer defense counsel to the Statewide Grievance

¹⁰⁸ *Id.* at 603.

¹⁰⁹ It is important to note that an attorney can feel the effects of a sanction—whether monetary or non-monetary—beyond the jurisdiction where the sanction was issued. Many jurisdictions make the granting of *pro hac vice* status contingent on the applicant setting forth in an affidavit all prior reprimands and disciplinary action taken against them, including an explanation of the relevant circumstances. See, e.g., CONN. SUPERIOR COURT RULES § 2-16, in CONN. PRACTICE BOOK, *supra* note 35, at 103 (requiring an attorney applying for *pro hac vice* status to certify in an affidavit “whether such applicant has . . . ever been reprimanded, suspended, placed on inactive status, disbarred, or otherwise disciplined . . . and, if so, [to] set[] forth the circumstances concerning such action”).

¹¹⁰ See *Burton v. Mottolese*, 835 A.2d 998, 1017 (Conn. 2003) (noting the court’s inherent authority to regulate conduct of members of the bar); *Bergeron v. Mackler*, 623 A.2d 489, 493 (Conn. 1993) (citing *State v. Jones*, 429 A.2d 936, 939 (Conn. 1980), *overruled in part by State v. Powell*, 442 A.2d 939, 944 (Conn. 1982)) (same).

¹¹¹ *Faille v. Zarich*, No. HHDX04CV5015994S, 2008 Conn. Super. LEXIS 1779, at *22–23 (Conn. Super. Ct. July 10, 2008) (quoting *Ne. Sav., F.A. v. Plymouth Commons Realty Corp.*, 642 A.2d 1194, 1196 (Conn. 1994)).

¹¹² CONN. SUPERIOR COURT RULES § 13-14(a), in CONN. PRACTICE BOOK, *supra* note 35, at 194.

¹¹³ See *Millbrook Owners Ass’n, Inc. v. Hamilton Standard*, 776 A.2d 1115, 1124 (Conn. 2001) (stating that “a court may, either under its inherent power to impose sanctions in order to compel observance of its rules and orders, or under the provisions of § 13-14, impose sanctions”); *Stanley v. City of Hartford*, 103 A.2d 147, 149 (Conn. 1954) (noting that “the court has inherent power to provide for the imposition of reasonable sanctions to compel the observance of its rules”).

¹¹⁴ *Ranfone v. Ranfone*, No. FA040490123S, 2007 Conn. Super. LEXIS 1045, at *1–2 (Conn. Super. Ct. Apr. 24, 2007).

¹¹⁵ *Id.* at *6, 8.

Committee.¹¹⁶ Upon reconsideration, however, the court vacated the order of sanctions, stating that “neither side is beyond reproach.”¹¹⁷

In a recent Connecticut Superior Court decision, a defense attorney was sanctioned for witness coaching and deliberate obstructive conduct.¹¹⁸ Judge Shapiro explained in detail what kinds of objections are permitted in a deposition. The judge noted that in Connecticut, “[e]vidence objected to shall be taken subject to the objections. Any objection during a deposition must be stated concisely and in a non-argumentative manner.”¹¹⁹ The judge further observed that “[c]ounsel at deposition[s] cannot act unprofessionally or interrupt or use speaking objections or testify for a witness.”¹²⁰ Judge Shapiro examined transcripts from three depositions taken in the case, and listed several examples of witness coaching by defense counsel including:

Q. [Plaintiffs’ counsel]: If you had been involved in Mr. Faile’s [the decedent] care on March 22, would you expect there to be an entry in the chart?

[Defense Counsel]: Objection to the form of the question. *Just to remind you, we don’t know if this is the whole chart.*

...

Q. [Plaintiffs’ counsel]: Would there have been also an attending cardiologist likewise on call?

A. Yes.

Q. [Plaintiffs’ counsel]: Was that Dr. Zarich that day?

A. Yes.

[Defense Counsel]: *Do you know that? Be careful of that because I don’t think he was on call that day, but I could be wrong.*

...

Q. [Plaintiffs’ counsel]: Did you tell him whether he would be admitted overnight following the procedure?

A. I’m not sure exactly what I told him at the time.

¹¹⁶ See *id.* at *8–9 (finding that the sanctions imposed “fit the conduct”).

¹¹⁷ *Ranfone v. Ranfone*, No. FA040490123S, 2007 Conn. Super. LEXIS 3344, at *7 (Conn. Super. Ct. Dec. 13, 2007).

¹¹⁸ *Faile v. Zarich*, No. CV 5015994S, 2008 Conn. Super. LEXIS 1779, at *1, 30 (Conn. Super. Ct. July 10, 2008).

¹¹⁹ *Id.* at *4 (quoting CONN. SUPERIOR COURT RULES § 13-30(b) (2008)) (alteration in original).

¹²⁰ *Id.* (quoting *Fletcher v. PGT Trucking, Inc.*, No. CV 9600547653S, 1998 Conn. Super. LEXIS 2794, at *3 (Conn. Super. Ct. Oct. 2, 1998)).

Q. [Plaintiffs' counsel]: What was your practice back then, when you had patients come in for catheterization as to how long they would be in the hospital?

[Defense Counsel]: Objection to the form. *And Mr. Faile didn't come in for a catheterization.*¹²¹

The court found these—along with numerous other examples—to be improper witness coaching by reminding the witness of prior testimony, suggesting answers, and commenting on the evidence, all in violation of Connecticut Practice Book section 13-30(b).¹²²

As the court noted, in Connecticut, sanctions for violating a discovery rule can be imposed if three conditions are met: “First, the order to be complied with must be reasonably clear . . . Second, the record must establish that the order was in fact violated . . . Third, the sanction imposed must be proportional to the violation.”¹²³ Ultimately, Judge Shapiro denied the motion to preclude defense counsel from defending future depositions, but did impose monetary sanctions against the lawyer equal to one-half of the plaintiffs' attorney's fees in connection with the deposition, and ordered defense counsel not to “suggest answers, [or] make comments about the facts of the case” at future depositions.¹²⁴

After this sanction order, two subsequent depositions were taken, but defense counsel continued to engage in obstructive tactics, thereby causing plaintiffs' counsel to file further motions for sanctions, to compel, and for protective order.¹²⁵ Specifically, Judge Shapiro found that defense counsel refused to allow the deponent to answer questions without procuring a protective order in violation of the Connecticut Practice Book and his previous sanction order.¹²⁶ Defense counsel also told plaintiffs' counsel several times to “ask his next question rather than allowing the witness to answer,” ignoring the court's previous orders.¹²⁷

The court found that re-depositions—and in the case of one witness, a third deposition—were appropriate, and determined that further sanctions were warranted.¹²⁸ Plaintiffs' counsel argued that in addition to violating the court's previous sanction orders, defense counsel violated Connecticut Rules of Professional Conduct 3.4(1), 3.4(3), 3.4(4), 3.4(6), and 8.4(4).¹²⁹

¹²¹ *Id.* at *10–11, *16–17 (alterations in original) (emphasis added).

¹²² *Id.* at *22.

¹²³ *Id.* at *2 (quoting *Wexler v. DeMaio*, 905 A.2d 1196, 1203–04 (Conn. 2006)) (omissions in original).

¹²⁴ *Id.* at *30.

¹²⁵ *Faile v. Zarich*, No. HHDX04CV065015994S, 2009 Conn. Super. LEXIS 1600, at *1–2 (Conn. Super. Ct. June 15, 2009).

¹²⁶ *Id.* at *7–8.

¹²⁷ *Id.* at *8.

¹²⁸ *Id.* at *8–11.

¹²⁹ *Id.* at *11.

The court noted that in Connecticut, a violation of a Rule of Professional Conduct may be found “where the attorney intended to engage in the conduct for which the attorney is sanctioned,” and that no scienter is required.¹³⁰ After considering each of the rules, the court found violations of Rules 3.4(1), 3.4(3), and 8.4(4).¹³¹

As for the proper penalty, the court noted that disqualification is a harsh remedy and that plaintiffs’ counsel did not meet its heavy burden of showing that disqualification was appropriate.¹³² Instead, Judge Shapiro noted that defense counsel had been sanctioned by various judges five previous times—including his prior order in the *Faile* case—and that because there were still future depositions to be conducted, further sanctions were necessary.¹³³ Judge Shapiro examined the plaintiffs’ claimed attorneys’ fees and determined that \$7,922.87 were applicable to the depositions and subsequent motions for sanctions.¹³⁴ The court, however, increased the amount by fifty percent “in order to attempt to deter improper conduct in the future,” ordering that defense counsel—and not the defendant—pay a total of \$11,884.31 to plaintiffs’ counsel within forty-five days.¹³⁵ The court also put defense counsel on notice that “if conduct . . . at future depositions is found to warrant additional sanctions . . . the court w[ould] consider disqualification as an additional sanction.”¹³⁶ Defense counsel filed a motion to reargue and/or for reconsideration, which Judge Shapiro denied.¹³⁷

Until January 1, 2009, Practice Book section 13-30(b) stated in pertinent part: “[A]ny objection during a deposition must be stated concisely and in a nonargumentative manner.”¹³⁸ Section 13-30(b) has now been modified. The old provision requiring concise and nonargumentative objections has been removed and replaced with: “Every

¹³⁰ *Id.* at *12.

¹³¹ *Id.* at *18. Rule 3.4 concerns fairness to opposing party and counsel. In pertinent part, Rule 3.4 provides that “[a] lawyer shall not: (1) [u]nlawfully obstruct another party’s access to evidence . . . ; [or] (3) [k]nowingly disobey an obligation under the rules of a tribunal.” CONN. RULES OF PROF’L CONDUCT R. 3.4, in CONN. PRACTICE BOOK, *supra* note 35, at 1, 38. Rule 8.4 covers a wide range of attorney misconduct, and subsection (4) specifically prohibits “[e]ngag[ing] in conduct that is prejudicial to the administration of justice.” CONN. RULES OF PROF’L CONDUCT R. 8.4, in CONN. PRACTICE BOOK, *supra* note 35, at 57. The court noted that conduct proscribed by Rule 3.4—which the court found to be present—is necessarily incompatible with Rule 8.4, therefore leading to a violation of Rule 8.4. *Faile*, 2009 Conn. Super. LEXIS 1600, at *17.

¹³² *Faile*, 2009 Conn. Super. LEXIS 1600, at *23. For a list of factors bearing on whether disqualification for attorney misconduct is appropriate in Connecticut, see *Briggs v. McWeeny*, 796 A.2d 516, 540–41 (Conn. 2002).

¹³³ *Faile*, 2009 Conn. Super. LEXIS 1600, at *25–26.

¹³⁴ *Id.* at *37.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Faile v. Zarich*, No. HHD04CV065015994S, 2009 Conn. Super. LEXIS 2406, at *1, 39 (Conn. Super. Ct. Sept. 10, 2009).

¹³⁸ CONN. SUPERIOR COURT RULES § 13-30(b), in OFFICIAL 2008 CONNECTICUT PRACTICE BOOK 83, 192 (2008).

objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity.”¹³⁹ This language could have been added in response to the *Faile* decision, in order to clamp down on witness coaching through objections, or the decision in *Lowell v. Schustock*, to require a clear statement of the grounds for any form objection. The commentary to these revisions states that the changes to section 13-30(b) were intended to “clarif[y] the procedure to be followed in making objections during depositions.”¹⁴⁰ It will be interesting to see what impact this new rule has on objection procedure.

In 1983, the American Bar Association House of Delegates adopted the Model Rules of Professional Conduct and, since then, forty-nine states, the District of Columbia, and the Virgin Islands have adopted them.¹⁴¹ Connecticut adopted the Model Rules—almost verbatim—in 1986,¹⁴² and its attorneys must observe them in practice.¹⁴³ Several of Connecticut’s Rules of Professional Conduct could be used by courts when dealing with attorneys who have misused the deposition process.¹⁴⁴ For example, Rule 3.2 requires attorneys to “make reasonable efforts to expedite litigation consistent with the interests of [their] client.”¹⁴⁵ Attorneys who prolong or frustrate depositions could be in violation of this rule. Rule 8.4 describes six categories of professional misconduct including: “[e]ngag[ing] in conduct that is prejudicial to the administration of justice.”¹⁴⁶ Those employing “Rambo” tactics during depositions could obviously run afoul of this provision. These rules can be enforced through grievances filed by clients, other attorneys,¹⁴⁷ or even by judges,¹⁴⁸ each of which go to the Statewide Grievance Committee.

¹³⁹ CONN. SUPERIOR COURT RULES § 13-30(b), in CONN. PRACTICE BOOK, *supra* note 35, at 200.

¹⁴⁰ CONN. SUPERIOR COURT RULES § 13-30(b) cmt. 2009, in OFFICIAL 2009 CONNECTICUT PRACTICE BOOK 85, 201 (2009).

¹⁴¹ American Bar Association, http://www.abanet.org/cpr/mrpc/model_rules.html (follow “Alphabetical List of States Adopting Model Rules” hyperlink) (last visited June 11, 2010).

¹⁴² *Id.*

¹⁴³ See generally CONN. RULES OF PROF’L CONDUCT, in CONN. PRACTICE BOOK, *supra* note 35, at 1.

¹⁴⁴ See *supra* notes 129–31 and accompanying text.

¹⁴⁵ CONN. RULES OF PROF’L CONDUCT R. 3.2, in CONN. PRACTICE BOOK, *supra* note 35, at 36; see also Final Report of the Comm. on Civility of the Seventh Fed. Judicial Circuit, 143 F.R.D. 441, 445 (1992) (“It is no secret that a lawyer’s contentiousness causes more work for the lawyers on both sides and slows down the progress of the litigation.”).

¹⁴⁶ CONN. RULES OF PROF’L CONDUCT R. 8.4(4), in CONN. PRACTICE BOOK, *supra* note 35, at 57.

¹⁴⁷ See CONN. RULES OF PROF’L CONDUCT at R. 8.3(a), in *id.* at 56 (requiring attorneys who know that another lawyer has committed a violation of the Rules to inform the “appropriate professional authority”).

¹⁴⁸ See *Burton v. Mottolese*, 835 A.2d 998, 1009–12 (Conn. 2003) (upholding the trial judge’s finding that the plaintiff had violated several of Connecticut’s Rules of Professional Conduct).

In Connecticut, discipline can also be imposed by the court without a referral to a grievance panel. In *Burton v. Mottolese*, the plaintiff—an attorney who had been disbarred by the judge with no prior disciplinary referral—claimed that the court did not have the authority to initiate disciplinary proceedings, arguing that the process required written grievances submitted to the Statewide Grievance Committee.¹⁴⁹ The Connecticut Supreme Court determined that trial courts have the inherent authority to discipline and regulate conduct of the members of the state bar.¹⁵⁰

It is clear that there are a number of methods for regulating attorney conduct in Connecticut through the courts—through motions, using inherent power, or using relevant Practice Book sections—or through the Statewide Grievance Committee, but *must* courts intervene if they are made aware of misconduct, or can they let the misbehavior slide in favor of clearing their dockets? An answer to this question came in the recent decision in *Ramin v. Ramin*.¹⁵¹

In *Ramin*, the Connecticut Supreme Court was faced with a situation where a superior court judge refused to hear a plaintiff's fifth motion for contempt—for failing to produce a number of documents.¹⁵² Because the trial court did not act to enforce its prior discovery orders—the subject of the first four motions for contempt—subsequent depositions were spent trying to uncover what the court had already ordered to be revealed, leading to “defiant, disrespectful and uncooperative” conduct by the defendant.¹⁵³ The defendant at one point threw his wallet at plaintiff's counsel, used obscenities frequently, and, during one part of the questioning, decided to read a magazine.¹⁵⁴ The Connecticut Supreme Court stated that the “defendant's behavior during his deposition exemplifies why a trial court *should not refuse* to sanction a noncompliant party for failure to obey court orders.”¹⁵⁵ The court reversed the trial court and remanded, noting that the trial court on remand could consider awarding attorneys' fees against the party whose litigation misconduct caused the fees to be incurred.¹⁵⁶

Ramin was important enough that the Connecticut Supreme Court issued its decision after rehearing the case en banc.¹⁵⁷ There are no statistics, but it would not be surprising to find that judges often let certain

¹⁴⁹ *Id.* at 1017.

¹⁵⁰ *Id.*

¹⁵¹ 915 A.2d 790 (Conn. 2007).

¹⁵² *Id.* at 795–98.

¹⁵³ *Id.* at 802.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* (emphasis added).

¹⁵⁶ *Id.* at 807.

¹⁵⁷ *Id.* at 792 n.*.

discovery tactics slide rather than make the client suffer for the lawyer's misbehavior. This is a consideration for any judge dealing with abuses of the litigation process, but the *Ramin* court was clearly telling trial judges that they can no longer ignore discovery problems that come to their attention. The question now becomes, how should trial courts handle discovery and, specifically, deposition misconduct?

V. SUGGESTIONS FOR HANDLING DEPOSITION MISCONDUCT

"Misconduct at depositions is not the province of one side or the other"¹⁵⁸ As discussed above, attorneys on both sides of a deposition—and even deponents themselves—can be guilty of abusing the deposition process. There have also been a number of sanctions that courts have crafted to penalize offending attorneys and parties, but these interventions only occur when the misconduct has reached a point where it requires a judge's attention. What steps can be taken to reduce the number of times judges have to impose sanctions by deterring "Rambo" tactics inside the deposition room in the first place?

At least one scholar has advocated for a broad "judge on call" system to allow attorneys who encounter trouble immediate access to judicial protection.¹⁵⁹ Professor Cary argued that this "judge on call" system should resemble the medical profession's emergency care system, with phone calls transcribed by court reporters, the judicial authority to "make immediate rulings on behavior at the deposition," and the authority to order costs paid by an attorney who loses on a motion and to impose other sanctions as the court sees fit.¹⁶⁰ Cary admits that a judge hotline would be expensive and time-consuming, but argues that the benefits would quickly outweigh the costs as attorneys would modify their behavior knowing that sanctions could come as swiftly as a phone call.¹⁶¹ Also weighing against an on-call system is the likelihood that the judge who picks up the phone would not be familiar with the case's history or past dealings between the attorneys during the instant case. Some districts do allow for judges to be on call to resolve discovery disputes when they arise.¹⁶² Other judges have ordered that future discovery be overseen by a magistrate or judge.¹⁶³ Many courts have backlogged dockets, and it is likely that a "judge on call" system would take up a great deal of judges' time, so this approach may have limited usefulness.

¹⁵⁸ Carr & Smith, *supra* note 3, at 635.

¹⁵⁹ Cary, *supra* note 86, at 593.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 593–94.

¹⁶² Carr & Smith, *supra* note 3, at 648.

¹⁶³ See, e.g., *Laddcap Value Partners, LP v. Lowenstein Sandler P.C.*, No. 52538, slip op. at 8 (N.Y. Sup. Ct. Dec. 5, 2007). For further discussion of this case, see *supra* Parts II.A. and III.B.

Professor Cary also recommends that lawyers take it upon themselves to report “Rambo” behavior to disciplinary committees with more frequency.¹⁶⁴ Cary notes that, often, attorneys do not want to complain, or be seen as tattletales or weaklings who cannot handle such problems on their own, or some lawyers decide that the behavior they encountered—while bad—was not *that* bad.¹⁶⁵ She notes, “Judges should not have to seek out examples of Rambo litigation in the deposition transcripts filed with the court.”¹⁶⁶

Professor Cary further advocates for law schools to take a proactive approach in curbing “Rambo” lawyering, as well as teaching students how to deal with situations where they have to deal with obstructionist tactics.¹⁶⁷ By exploring litigation misconduct and discussing sanctions, Cary believes that law schools can help students come up with remedies for this unfortunate byproduct of discovery.¹⁶⁸ This could easily be done in required courses on ethics and professionalism. Questions on these issues could also be added to the Multistate Professional Responsibility Examination, which would further require future lawyers to learn about deposition misconduct and the hazards of engaging in it.

When judges do become aware of deposition misconduct, they should take quick steps to intervene and use their authority—whether statutory or inherent—to halt the abuse. Many jurisdictions have enacted local rules—such as those contained in Connecticut’s Practice Book and New York’s Civil Practice Law and Rules—which give judges the power to sanction attorneys. In Connecticut, for example, judges should use the broad power given to them under Practice Book section 13-14 to make “such order[s] as the ends of justice require.”¹⁶⁹ Attorneys must know that the court will take action against them if they abuse or obstruct depositions. What good is a grant of power if attorneys do not think the court will actually use it?

One way to deter deposition misconduct is for a lawyer to demand that potentially troublesome depositions be videotaped. This could easily be ordered in response to a motion for protective order. If a deposition is videotaped, attorneys know that their conduct will be more easily evaluated by the judge should opposing counsel need to bring it to the court’s attention. It is easier to tell what happened at a deposition if it has been videotaped than it would be if a judge has to read the deposition

¹⁶⁴ Cary, *supra* note 86, at 595.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 600.

¹⁶⁸ *Id.* at 601.

¹⁶⁹ CONN. SUPERIOR COURT RULES § 13-14(a), *in* CONN. PRACTICE BOOK, *supra* note 35, at 194.

transcript. The FRCP allow for videotaped depositions.¹⁷⁰ Likewise, the Connecticut Practice Book permits videotaped depositions if any party provides written notice.¹⁷¹ Connecticut judges are also permitted to order a deposition to be videotaped upon motion.¹⁷²

The usefulness of videotaped depositions is demonstrated by *GMAC Bank v. HTFC Corp.*¹⁷³ The two-day deposition of Mr. Wider was videotaped and submitted to the court for use during the hearing on sanctions. Judge Robreno conducted an extensive review of the transcript and recordings, noting that “few depositions warrant sanctions more than this one.”¹⁷⁴ In addition to the abundant profanity used by Mr. Wider, the video recording allowed the court to uncover “further indicia of Wider’s intent to exploit and protract his deposition,” including “gleeful smirk[s]” at his attorney, the court reporter, and even the camera itself.¹⁷⁵ Wider also patted himself on the back “after a particularly odious instance of obstruction.”¹⁷⁶ Wider’s counsel argued that his conduct was justified because opposing counsel provoked him.¹⁷⁷ With the clear evidence from the video recording, Judge Robreno rejected this argument because counsel for GMAC was clearly courteous and respectful even in the face of relentless insults and mockery.¹⁷⁸ The video also allowed the court to see the true extent of Attorney Ziccardi’s failure to intervene.¹⁷⁹

Of course it is possible to abuse video depositions, as was the case in *Kelly v. GAF Corp.*¹⁸⁰ In *Kelly*, one of the witnesses was unavailable for trial so his testimony was taken by video deposition.¹⁸¹ As the judge pointed out, it is important with video depositions “to keep objections and bickering to a minimum.”¹⁸² Instead, defense counsel made numerous “inconsequential objections,” each of which required resolution by the court.¹⁸³ If the question and answer were ruled to be excluded, the audio was muted from the video, creating a silence for the jury.¹⁸⁴ Since there

¹⁷⁰ See FED. R. CIV. P. 30(b)(3)(A) (“The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, *audiovisual*, or stenographic means.” (emphasis added)).

¹⁷¹ CONN. SUPERIOR COURT RULES § 13-27(f)(2), in CONN. PRACTICE BOOK, *supra* note 35, at 198.

¹⁷² *Id.* § 13-27(f)(1).

¹⁷³ 248 F.R.D. 182, 185 (E.D. Pa. 2008). For further discussion of this case, see *supra* Parts II.A. and III.A.

¹⁷⁴ *GMAC Bank*, 248 F.R.D. at 185.

¹⁷⁵ *Id.* at 189.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 191.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 197.

¹⁸⁰ 115 F.R.D. 257 (E.D. Pa 1987).

¹⁸¹ *Id.* at 257.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 258.

were so many objections, the judge said the finished product was “a hodgepodge, completely lacking in direction and continuity.”¹⁸⁵ Judge Ditter noted that the practice of constantly objecting during a video deposition

provides a fertile field for mischief. An irresponsible attorney can make any number of objections, ranging from frivolous to spurious. The more he makes, the better things are in his favor. When the time comes to present the deposition in court, he can withdraw the objections or permit them to be overruled by the court. In any event, the result is a video presentation where there will be long pauses, a squeal or two from the television set, and the amusing spectacle of a witness jiggling around while the tape is speeded up until the next usable portion of the testimony is reached.¹⁸⁶

The judge ultimately ordered a new trial because the plaintiff was denied the opportunity to present crucial evidence.¹⁸⁷ While it is likely that video recording will reduce the amount of deposition misconduct, obstructionist tactics can still negatively impact the evidentiary value of the session, especially when the deponent will not be in court to testify and the recording must be played for the jury.

In the interest of avoiding further docket congestion, courts should refer instances of deposition misconduct to state grievance or disciplinary committees. This was the route ultimately taken in *Castillo v. St. Paul Fire*.¹⁸⁸ In *Castillo*, the referral panel was made up of judges, but most jurisdictions have established committees of lawyers and laypersons to deal with attorney misconduct. Some deposition disputes would be better handled by a separate committee, especially when the offending actor was the attorney and not the client.

In the unlikely event that a judge is not faced with a crowded docket, the judge may decide that he or she wants to take an active role and choose to hear and rule on each deposition dispute. This was the approach taken by Judge Shapiro in *Faile v. Zarich*¹⁸⁹ and Judge Miller in *Lowell v. Shustock*.¹⁹⁰ There are positives and negatives to each method, and it is not clear which would be better at handling deposition disputes.

Another way for courts to curb deposition misconduct would be to accept and endorse the American College of Trial Lawyers (“ACTL”)

¹⁸⁵ *Id.* at 257.

¹⁸⁶ *Id.* at 258.

¹⁸⁷ *Id.* at 259.

¹⁸⁸ *Castillo v. St. Paul Fire & Marine Ins. Co.*, 938 F.2d 776, 779–80 (7th Cir. 1991).

¹⁸⁹ 2008 Conn. Super. LEXIS 1779, at *1.

¹⁹⁰ 2007 Conn. Super. LEXIS 2759, at *3–6.

Code of Pretrial Conduct.¹⁹¹ The ACTL is composed of top trial attorneys from the United States and Canada, with membership extended by invitation only.¹⁹² The ACTL has promulgated a set of pretrial standards to supplement—not supplant—local and procedural rules and to provide guidance to trial lawyers on how to handle discovery.¹⁹³ According to the preamble, a trial lawyer in pretrial proceedings “owes opposing counsel duties of courtesy, candor, and cooperation in scheduling, serving papers, communicating in writing and in speech, conducting discovery, designating expert witnesses, and seeking to resolve cases without litigation.”¹⁹⁴

The standards themselves combine ethics with procedure, as opposed to local rules of professional conduct or the Model Rules, which tend to focus more on the ethical restraints on attorneys.¹⁹⁵ Standard 5 of the ACTL Code of Pretrial Conduct contains several tenets that lawyers should observe in discovery practice.¹⁹⁶ Standard 5(a)(1), for example, states that lawyers “should strictly follow all applicable rules in drafting and responding to written discovery and in conducting depositions.”¹⁹⁷ Also, with discovery practice in general, lawyers “should conduct discovery to elicit relevant facts and evidence, and not for an improper purpose, such as to harass, intimidate, or unduly burden another party or a witness.”¹⁹⁸ Subsection 5(e) contains five standards to be observed when conducting depositions, including:

(4) During a deposition, lawyers should conduct themselves with decorum and should *never verbally abuse or harass the witness or unnecessarily prolong the deposition.*¹⁹⁹

(5) During a deposition, lawyers *should strictly limit objections to those allowed by the applicable rules.* In general, lawyers should object only to preserve the record, to assert a valid privilege, or to protect the witness from unfair, ambiguous, or abusive questioning. *Objections should not be used to obstruct questioning, to improperly communicate*

¹⁹¹ AMERICAN COLLEGE OF TRIAL LAWYERS, CODE OF PRETRIAL CONDUCT AND CODE OF TRIAL CONDUCT (2002), available at http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=59.

¹⁹² American College of Trial Lawyers, About Us—Membership, <http://www.actl.com/Content/NavigationMenu/AboutUs/Membership/default.htm> (last visited June 11, 2010).

¹⁹³ AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* note 191, at Preamble.

¹⁹⁴ *Id.*

¹⁹⁵ See generally CONN. RULES OF PROF'L CONDUCT, in CONN. PRACTICE BOOK, *supra* note 35, at 1.

¹⁹⁶ See AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* note 191, § 5.

¹⁹⁷ *Id.* § 5(a)(1).

¹⁹⁸ *Id.* § 5(a)(2).

¹⁹⁹ *Id.* § 5(e)(4) (emphasis added).

with the witness, or to disrupt the search for facts or evidence germane to the case.²⁰⁰

It seems that these standards were created to combat the very examples of deposition misconduct examined throughout this Note. This is probably because the Code of Pretrial Conduct was written by distinguished trial lawyers *for* trial lawyers, in light of the many problems they have faced in this area. Pretrial standards like these should be endorsed by courts around the country and attorneys should be held to them. Judges could even go so far as to have the attorneys on cases before them agree on the record or sign a form, acknowledging that they will observe these standards throughout the case. Instances of deposition abuse will likely be reduced if attorneys adhere to standards like these.

VI. CONCLUSION

There is, of course, the ever-present dilemma of punishing clients for the sins of their lawyers. In 1986, the American Bar Association Commission on Professionalism “cautioned against imposing sanctions on innocent clients when they are not responsible for their lawyers’ improper acts, and instead suggested that in some cases the courts should report the misconduct to disciplinary commissions.”²⁰¹ It is important that clients do not get punished merely because they picked a “Rambo” attorney from the phone book. Many steps in discovery—e.g., interrogatories and depositions—can be completed with the client completely out of the loop. When the client is involved and the lawyer misbehaves at a deposition, however, as Mr. Wider did in the *GMAC* case, there should be consequences for the litigant.

Depositions are too important a discovery device to allow misconduct to continue unchecked. Attorneys should be prepared to go to the court if they encounter obstructionist tactics like those examined throughout this Note. Judges should also become more proactive in halting deposition abuse whenever they encounter it, whether it be through monetary sanctions,²⁰² issuing specific orders for future discovery,²⁰³ referrals to grievance and disciplinary committees,²⁰⁴ or taking further steps to penalize attorneys with non-monetary sanctions.²⁰⁵ The 1986 Commission on Professionalism recommended that “[t]he role of the judiciary in the conduct of litigation should be strengthened and courts should play a more

²⁰⁰ *Id.* § 5(e)(5) (emphasis added).

²⁰¹ Cary, *supra* note 86, at 594.

²⁰² *See supra* Part III.A.

²⁰³ *See supra* Parts II.B and III.B (discussing *Hall v. Clifton Precision*), and Parts II.C and IV (discussing *Lowell v. Shustock*).

²⁰⁴ *See supra* Part III.B (discussing *Castillo v. St. Paul Fire & Marine Ins. Co.*).

²⁰⁵ *See id.*

decisive role earlier in the litigation process.²⁰⁶ The Commission also recommended that judges impose sanctions for abuse of the litigation process more often.²⁰⁷

This Note has provided several suggestions on how to curb deposition abuse. Any deposition where misbehavior is a possibility should be recorded by video. Video depositions will act as a deterrent for “Rambo” tactics because any judge who reviews the recording will know exactly what happened. Another suggestion is for judges who become aware of deposition misconduct to refer attorneys to local grievance committees, a powerful deterrent to future misbehavior. Jurisdictions around the country should also endorse the standards set forth in the ACTL Code of Pretrial Conduct. These standards, created by trial attorneys for trial attorneys, give clear guidelines for attorneys on how to properly conduct depositions and leave no room for abusing the process. As Judge Gawthrop stated in *Hall*:

The pretrial tail now wags the trial dog. Thus, it is particularly important that [depositions] not be abused. Counsel should never forget that even though the deposition may be taking place far from a real courtroom, with no black-robed overseer peering down upon them, as long as the deposition is conducted under the caption of this court and proceeding under the authority of the rules of this court, counsel are operating as officers of this court. They should comport themselves accordingly; should they be tempted to stray, they should remember that this judge is but a phone call away.²⁰⁸

Many of the problems discussed in this Note would be far less pervasive if more judges demonstrated Judge Gawthrop’s willingness to become involved.

²⁰⁶ AMERICAN BAR ASS’N, COMMISSION ON PROFESSIONALISM, “. . . IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM, *reprinted in* 112 F.R.D. 243, 290 (1986).

²⁰⁷ *See id.* at 290–91.

²⁰⁸ *Hall v. Clifton Precision*, 150 F.R.D. 525, 531 (E.D. Pa. 1993).