

## OUTLINE FOR TABLE 5 PRESENTATION

### ABUSIVE LITIGATION – DISCOVERY

#### I. Examples of Abusive Discovery Practices

##### A. Improper Deposition Conduct

The New Hampshire Bar Association’s Litigation Guidelines offer a strong blueprint for how to avoid committing improper deposition conduct. Among the most notable guidelines are 6(F), which reads:

“Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment.”

and 6(G), which reads:

“Counsel at deposition should limit objections to those that are well founded and necessary for the protection of a client’s interest. Counsel should bear in mind that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought or to enforce a limitation on depositions or evidence directed by the court to present a motion pursuant to Fed.R.Civ.P. 30(d).”

The Guidelines warn against coaching witnesses or suggesting answers and advise against directing a client to refuse to answer questions unless they seek privileged information or are manifestly irrelevant or calculated to harass. They encourage counsel to act as if they are in the presence of a judicial officer when conducting or defending depositions, remaining courteous and professional with opposing counsel and the deponent.

One example of improper deposition conduct can be found in McDonough v. Keniston, 188 F.R.D. 22 (DNH 1998). In McDonough, the Court examined the relevant deposition transcript and determined that “[d]uring his client’s deposition plaintiff’s counsel repeatedly violated Rule 30(d)” and noted that the transcript contained “classic examples of witness coaching, speaking objections and improper instructions not to answer.” McDonough, 188 F.R.D. at 24. The Court responded by granting the Motion to Compel Answers and for Sanctions and specifically ordered both the reopening of the deposition and the plaintiff to “respond to the questions identified in the Motion to Compel, any reasonable follow up questions, and questions not completed by defense counsel”. Id. at 25. The Court also ordered that the continued deposition be scheduled at a time when the Court was available by telephone to rule on any disputes that may arise. Finally, the Court ordered the defendants to file a statement of the costs they incurred to take both the suspended and the continued deposition, including the court reporter’s fee, transcription fees, and their own attorney’s fees related to the actual taking of the deposition. Id.

The McDonough case provides an excellent example of both what qualifies as abusive deposition conduct, as well as what the potential consequences will be for such conduct.

## B. Abusive Practices with regard to Interrogatories and Document Requests

The NHBA Litigation Guidelines also address appropriate practice in Document Requests (Section 7) and Interrogatories (Section 8). As with disputes regarding deposition objections and answers, the NHBA Guidelines encourage counsel to resolve discovery disputes in the spirit of compromise, utilizing discovery motion practice only when absolutely necessary. Consistent with objections during depositions, the NHBA Guidelines on objections to interrogatories advise that “[o]bjections to interrogatories should be based on a good faith belief in their merit and not be made for the purpose of withholding relevant information. If an interrogatory is objection only in part, the unobjectionable portion should be answered.” NHBA Litigation Guidelines 8(G). The purposeful withholding of discoverable information is an abusive discovery tactic that can result in compulsion of the withheld information and/or documents, as well as sanctions.

## C. Falsely Claiming Discovery Abuse

Although encountering discovery abuse in practice can be frustrating and problematic, counsel must also be mindful of making false accusations of discovery abuse.

In Robertson’s Case, 137 N.H. 113 (1993), the Supreme Court affirmed a Committee on Professional Conduct decision, finding that an attorney had violated the Rules of Professional Conduct in falsely accusing opposing counsel of discovery abuse for the sole purpose of embarrassing and burdening opposing counsel. The Court affirmed the public censure and ordered the attorney to pay the assessed costs incurred by the Professional Conduct Committee and bar counsel in investigating and prosecuting the matter. Robertson’s Case, 137 N.H. at 118-119.

## II. Responses to Abusive Discovery Practices

### A. Motion to Compel and for Sanctions Pursuant to Fed. R. Civ. P. 30(d)(2) and Fed. R. Civ. P. 37.

Rule 30(d)(2) allows a court to sanction a party who has impeded, delayed, or frustrated the fair examination of a deponent. Rule 37 allows for a Motion to Compel disclosure or discovery, but such motion must include a certification that the movant has conferred or attempted to confer with the opposing party in good faith in an effort to obtain the information without court action.

Pursuant to Rule 37(a)(5), if the motion is granted, or if disclosure of the discovery is provided after filing, the court must require the party or deponent whose conduct prompted the motion, the party or attorney advising that conduct, or both, “to pay the movant’s reasonable expenses incurred in making the motion, including attorney’s fees.” FRCP 37(a)(5). Notably, if the movant filed motion without attempting in good faith to obtain the disclosure or discovery without court action, or if the opposing party’s nondisclosure or objection was substantially justified, the court must not order this payment. Additionally, the court must not order payment if “other circumstances make an award of expenses unjust.” FRCP 37(a)(5)(A).

With regard to abusive tactics at deposition and remedies for same, the Court in Phinney v. Paulshock, 181 F.R.D. 185 (DNH 1998) determined that an attorney's conduct in repeatedly interrupting plaintiffs' questioning without objecting, as well as frequently interrupting in the form of suggestions to the deponent as to how to answer the question, violated FRCP 30(c) and (d). The Court ordered the attorney to reimburse plaintiffs for the stenographic cost of the deposition in question, and further ordered him to write a letter of apology to opposing counsel for his "deposition misconduct". Phinney, 181 F.R.D. at 207.

- B. Motion to Compel pursuant to N.H. Super. Ct. Civ. R. 29(e) and for Attorney's Fees pursuant to N.H. Super. Ct. Civ. R. 29(h)

This Rule allows a party to move the court to compel the opposing party to answer questions or to provide discovery that the opposing party previously refused to answer or provide. It is important to note that Rule 29(e) requires the parties to make a good faith effort to settle the discovery dispute by agreement before filing a Motion to Compel. If the opposing party continues its abusive practices and refuses to provide the information without order from the court, a Motion to Compel may be necessary. Per Rule 29(h), the court may order the offending party to pay the moving party's reasonable related expenses, including attorney's fees.