What is decorum?

Conduct that benefits the dignity or an occasion, especially a formal one; propriety in speech, manner, conduct, and dress

-

- Black's Law Dictionary 10th Edition

Addressing the Court

UTCR 3.050

- Parties must:
  - (1) Rise from their positions at counsel table and remain standing while addressing the court or the jury, except during voir dire;
  - (2) Not approach the bench except by permission; and
  - (3) Be allowed to move freely about the courtroom during trial unless otherwise instructed by the court

RPC 8.2 Judicial & Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard to its truth or falsity concerning the qualifications or integrity of a judge or adjudicatory officer, or of a candidate for election or appointment to a judicial or other adjudicatory office.

RPC 8.4 Misconduct

(a) It is professional misconduct for a lawyer to:

(3) engage in conduct involving dishonesty, fraud, or misrepresentation that reflects adversely on a lawyer's fitness to practice law;

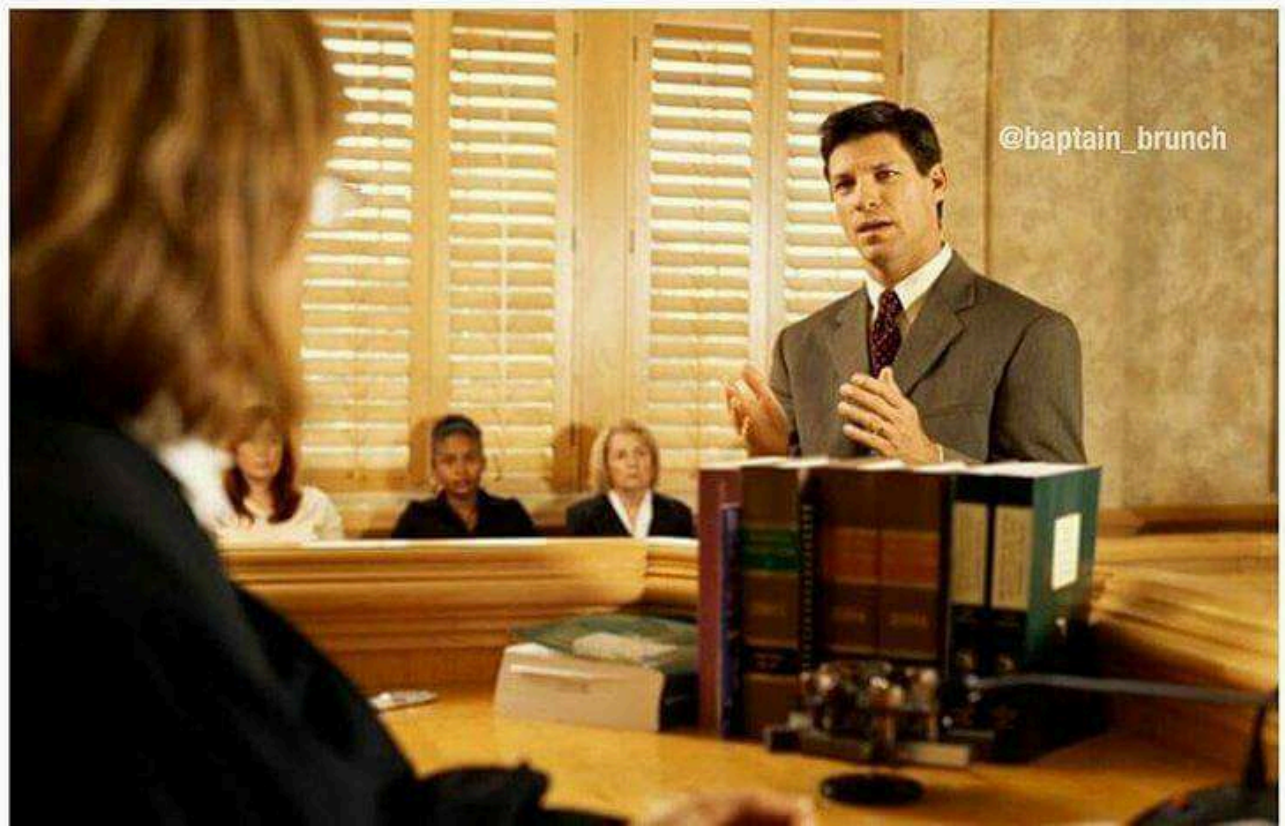
(4) engage in conduct that is prejudicial to the administration of justice

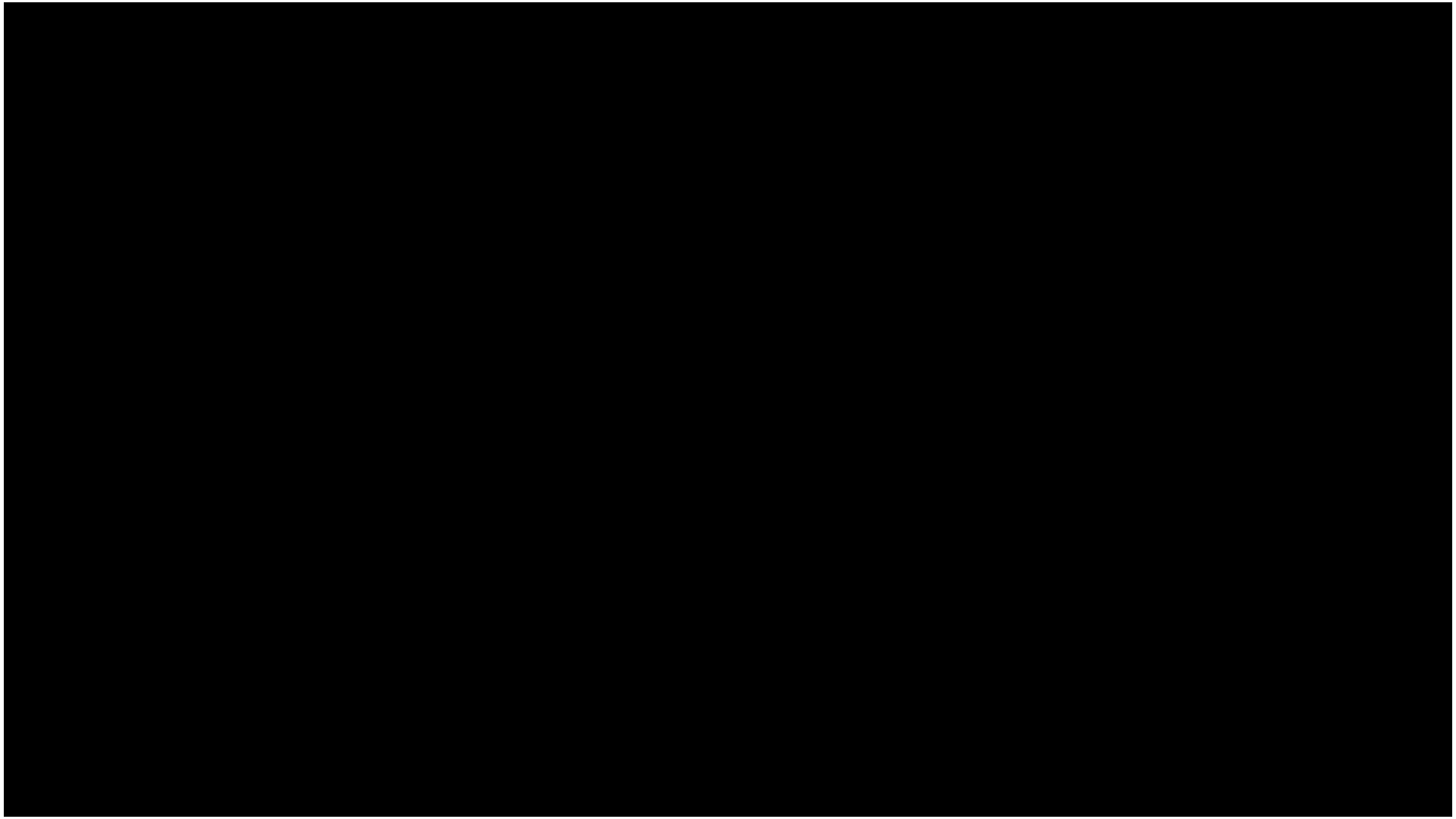
Lawyer: my client is trapped inside a penny

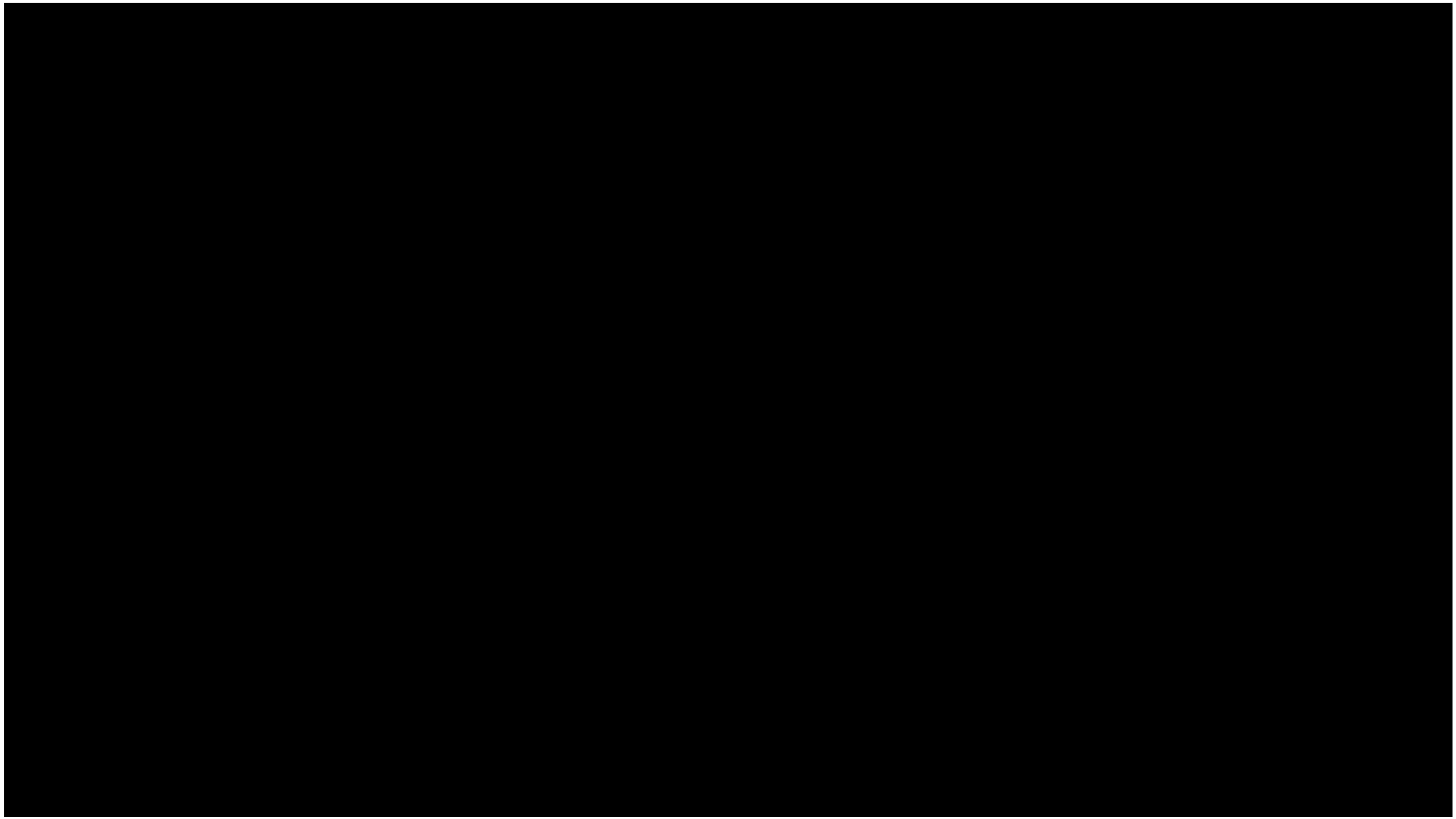
Judge: what?

Lawyer: he's in a cent

Judge: you're going to jail with him







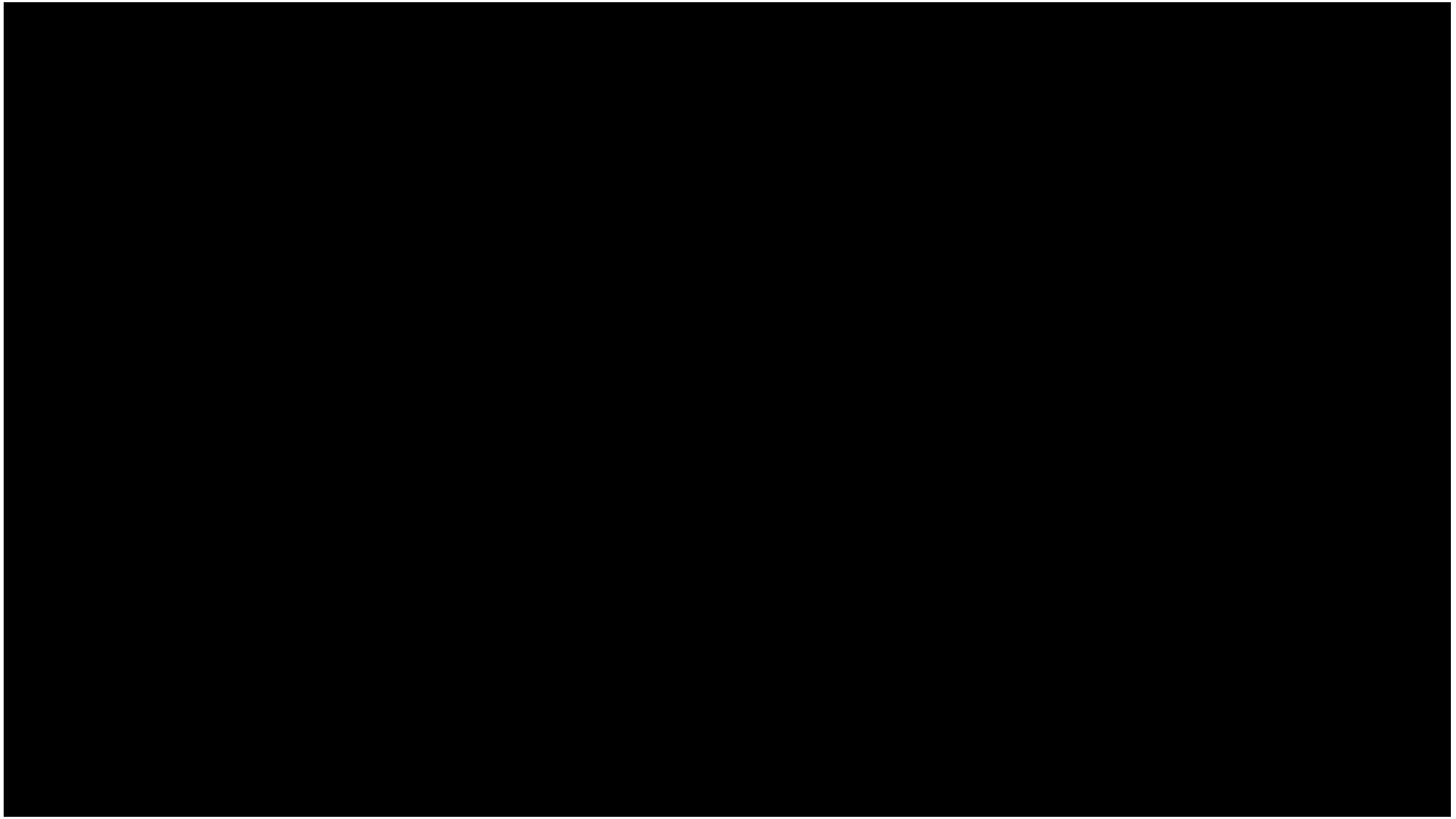
Addressing Each Other

UTCR 3.030 Manner of Address

- During trial, the litigants and litigants' attorneys must not address adult witnesses, jurors or opposing parties by their first names, and, except in voir dire, must not address jurors individually

RPC 4.4 Respect for the Rights of 3rd Persons

(a) In representing a client or lawyer or the lawyer's own interests, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, harass or burden a third person, or knowingly use methods of obtaining evidence that violate legal rights of such person



Dressing for Court

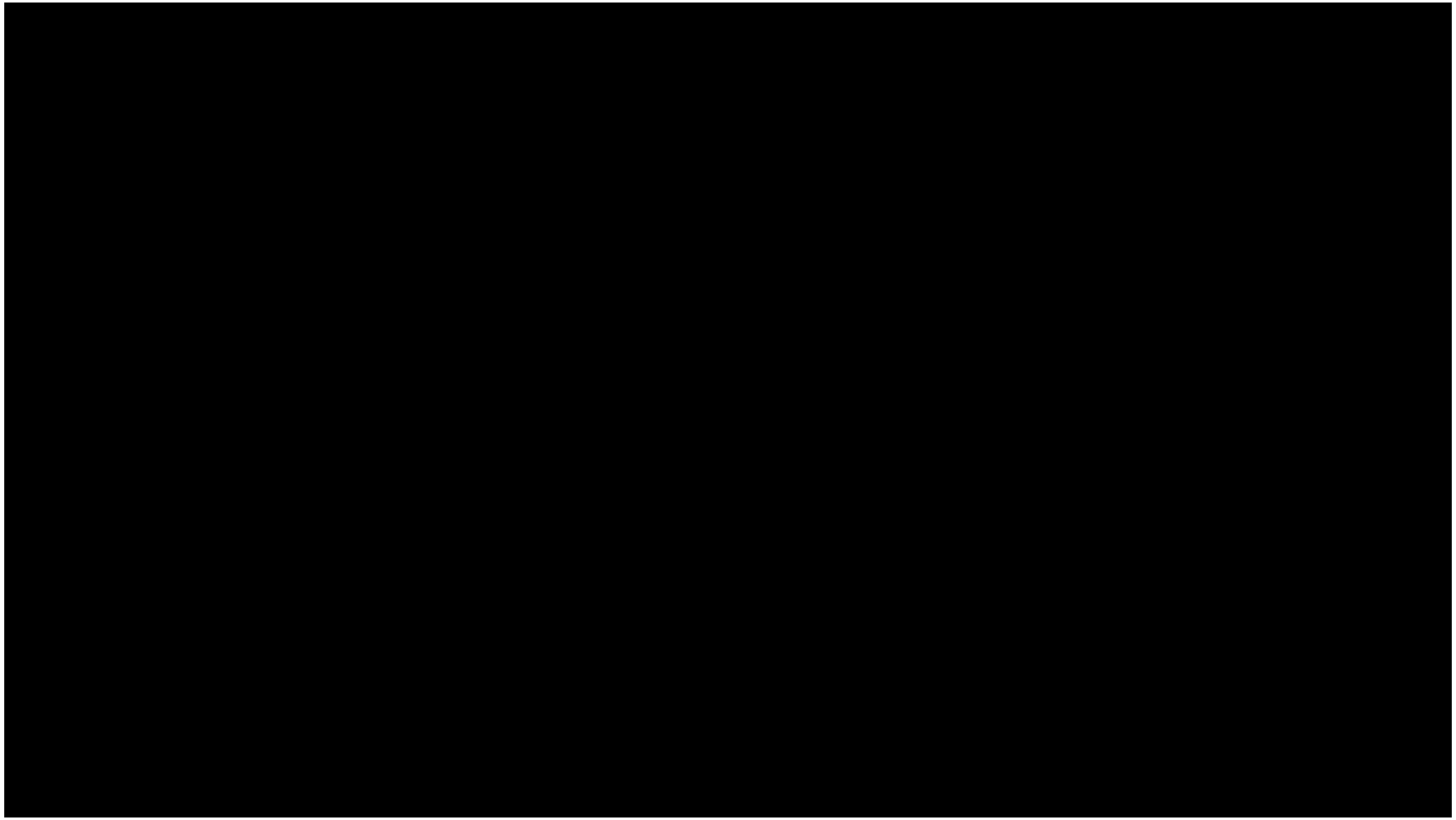
- 3.010 PROPER APPAREL (1) All persons attending the court must be dressed so as not to detract from the dignity of court. A person may wear a religiously-required head covering unless the court orders otherwise. Members of the public not dressed in accordance with this rule may be removed from the courtroom. (2) When appearing in court, all attorneys and court officials must wear appropriate attire. 3.020 PROPER APPAREL FOR INCARCERATED WITNESSES AND DEFENDANTS APPEARING IN CRIMINAL PROCEEDINGS Incarcerated witnesses and defendants appearing for trial must be dressed in neat, clean civilian clothing, unless otherwise ordered by the court. 3.010 PROPER APPAREL (1) All persons attending the court must be dressed so as not to detract from the dignity of court. A person may wear a religiously-required head covering unless the court orders otherwise. Members of the public not dressed in accordance with this rule may be removed from the courtroom. (2) When appearing in court, all attorneys and court officials must wear appropriate attire.
- 3.020 PROPER APPAREL FOR INCARCERATED WITNESSES AND DEFENDANTS APPEARING IN CRIMINAL PROCEEDINGS Incarcerated witnesses and defendants appearing for trial must be dressed in neat, clean civilian clothing, unless otherwise ordered by the court.

Yes

NO

Decorum in Depositions

Security National Bank in the Real World



Oregon Rules of Civil Procedure

- ORCP 36D(3): **Objections.** All objections made at the time of the examination shall be noted on the record. A party or deponent shall state objections *concisely and in a non-argumentative and non-suggestive manner.* Evidence *shall* be taken subject to the objection, except that a party may instruct a deponent not to answer a question, and a deponent may decline to answer a question, only:
- (a) when necessary to present or preserve a motion under section E of this rule;
- (b) to enforce a limitation on examination ordered by the court; or
- (c) to preserve a privilege or constitutional or statutory right.

Oregon Rules of Civil Procedure Cont.

- **E Motion for court assistance; expenses.**
- E(1) **Motion for court assistance.** At any time during the taking of a deposition, upon motion and a showing by a party or a deponent that the deposition is being *conducted or hindered* in bad faith, or in a manner not consistent with these rules, or *in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party*, the court may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope or manner of the taking of the deposition as provided in section C of Rule 36. The motion shall be presented to the court in which the action is pending, except that non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order terminates the examination, it shall be resumed thereafter only on order of the court in which the action is pending. Upon demand of the moving party or deponent, the parties shall suspend the taking of the deposition for the time necessary to make a motion under this subsection.
- E(2) **Allowance of expenses.** Subsection A(4) of Rule 46 shall apply to the award of expenses incurred in relation to a motion under this section.

Oregon Specific

- Multnomah County Motion Judges consensus Statement August 2018 States: (2)(B)(5) Speaking Objections - Attorneys should not state anything more than the legal specific grounds for the objections to preserve the record, and objection should be made without comment. *“Objections as to form” should be specific enough to allow the questioning party to rephrase and ask a non-objectionable question and sufficiently specific so that a judge can rule on the objection later. Failure to do so may not preserve the objection.*

A Closer Example

Rules that Apply to Your Client

- UTCR Chapter 3 Decorum in Proceedings
- 3.030 MANNER OF ADDRESS During trial, the litigants and litigants' attorneys must not address adult witnesses, jurors or opposing parties by their first names, and, except in voir dire, must not address jurors individually.
- 3.040 ADVICE TO CLIENTS AND WITNESSES OF COURTROOM FORMALITIES Attorneys must advise their clients and witnesses of the formalities of the court and must encourage their cooperation. Self-represented parties must similarly advise their witnesses and encourage their cooperation.

UTCR Continued

- 3.050 PROPER POSITION OF PARTIES BEFORE COURT Parties must: (1) Rise from their positions at counsel table and remain standing while addressing the court or the jury, except during voir dire; (2) Not approach the bench except by permission; and (3) Be allowed to move freely about the courtroom during trial unless otherwise instructed by the court.

An Example from Depositions

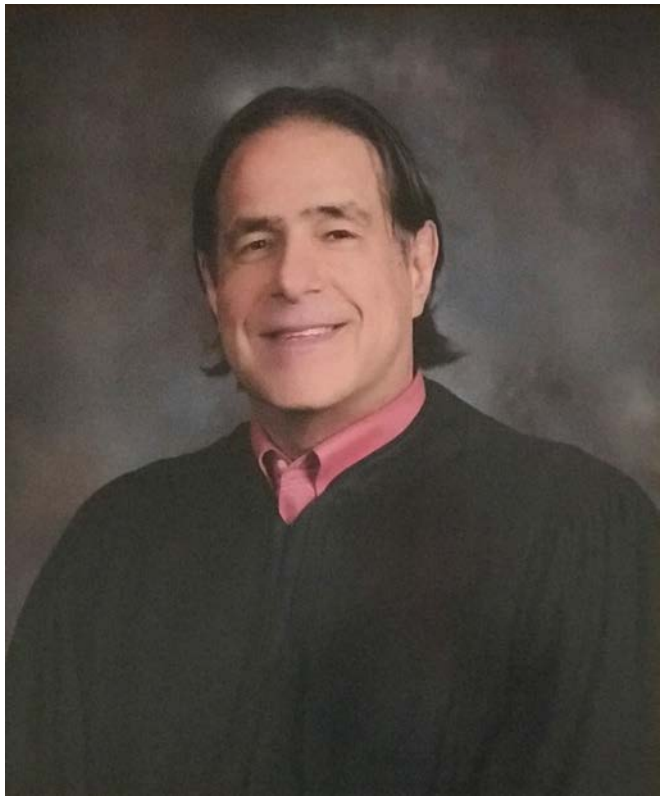
Security Nat'l Bank of Sioux City, Iowa v. Abbott Laboratories: Sanctions Order

- Bank, as conservator of a minor, sued Abbott Labs on design defect, manufacturing defect and warning defect claims

- Jury found in favor of Abbott Labs

Security Nat'l Bank of Sioux City, Iowa v. Abbott Laboratories: Sanctions Order

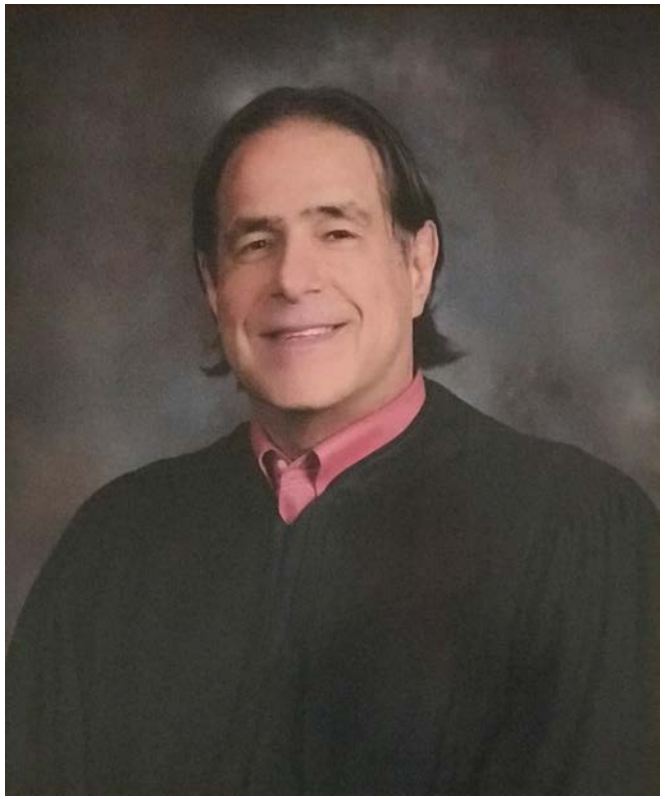
- "While obstructionist tactics pervade all aspects of pretrial discovery, this case involves discovery through depositions. Earlier this year . . . I was called upon by the parties to rule on numerous objections to deposition transcripts that the parties intended to use at trial. I noticed that the deposition transcripts were littered with what I perceived to be meritless objections made by one of the defendant's lawyers . . . . I was shocked by what I read."



Judge Mark W. Bennett,
U.S. District Court for the
North District of Iowa

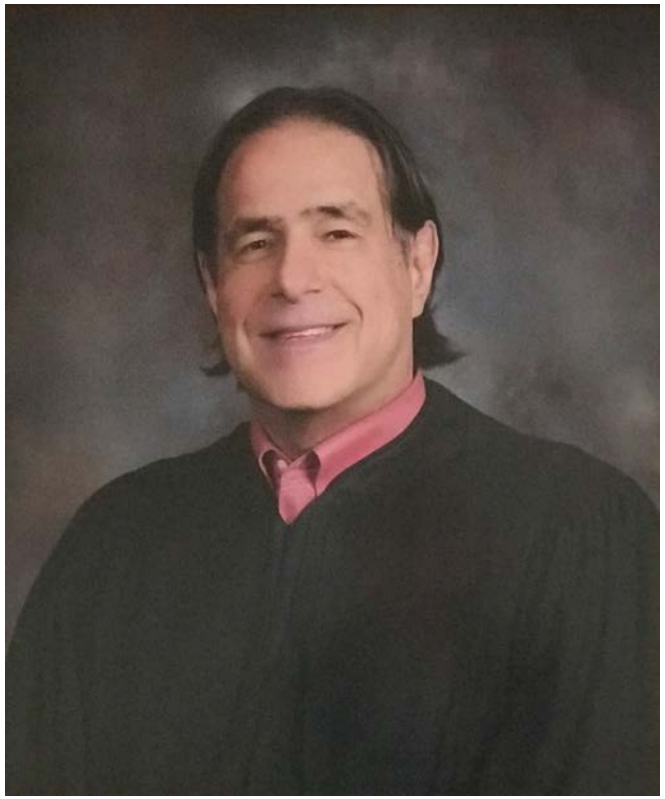
Security Nat'l Bank of Sioux City, Iowa v. Abbott Laboratories: Sanctions Order

- Supplemental show cause order filed *sua sponte* on day judgment was filed
- Three areas of concern from depositions:
  - Excessive use of "form" objections
  - Attempts to coach witnesses
  - Interruptions and attempts to clarify opposing counsel's questions



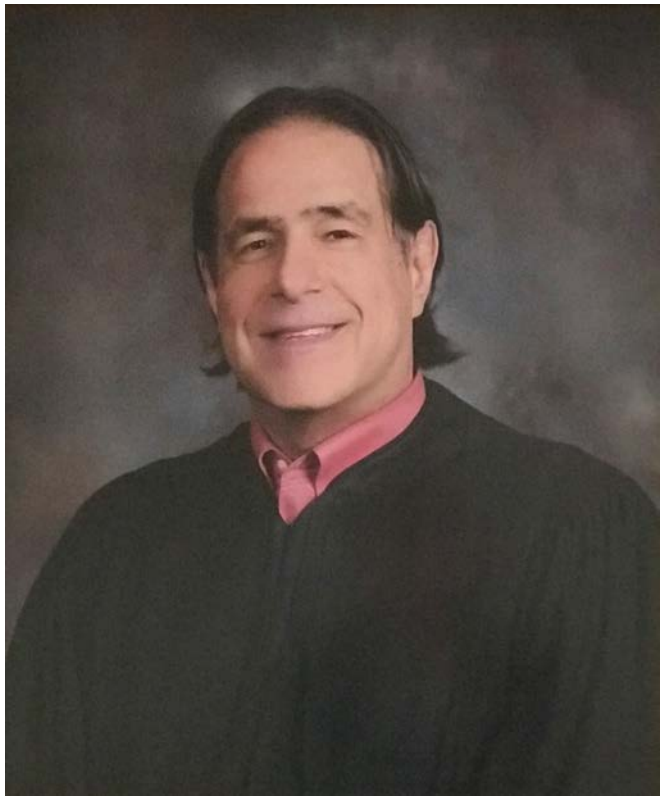
Security Nat'l Bank of Sioux City, Iowa v. Abbott Laboratories: Sanctions Order

- Rejected arguments that counsel had acted in good faith
- Sanctions appropriate if "impede[d], delay[ed], or frustrate[d] the fair examination of the deponent." (Fed. R. Civ. P. 30(d)(2)



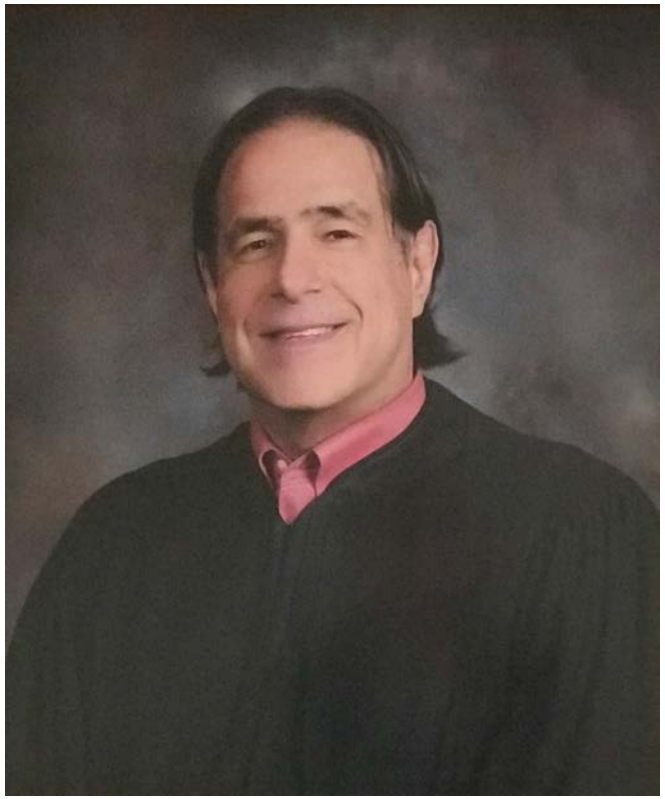
Form Objections

- 115+ objections to form in two depositions
  - “quibble with the questioner’s word choice”
  - “voice absurdly hyper-technical truths”
  - “invent[] novel objections not grounded in the rules of evidence or common law”
- “While unspecified ‘form’ objections are certainly concise, they do nothing to alert the examiner to a question’s alleged defect.”
- However, not the basis of sanctions in case due to contradicting authority among circuit court cases.



Witness Coaching

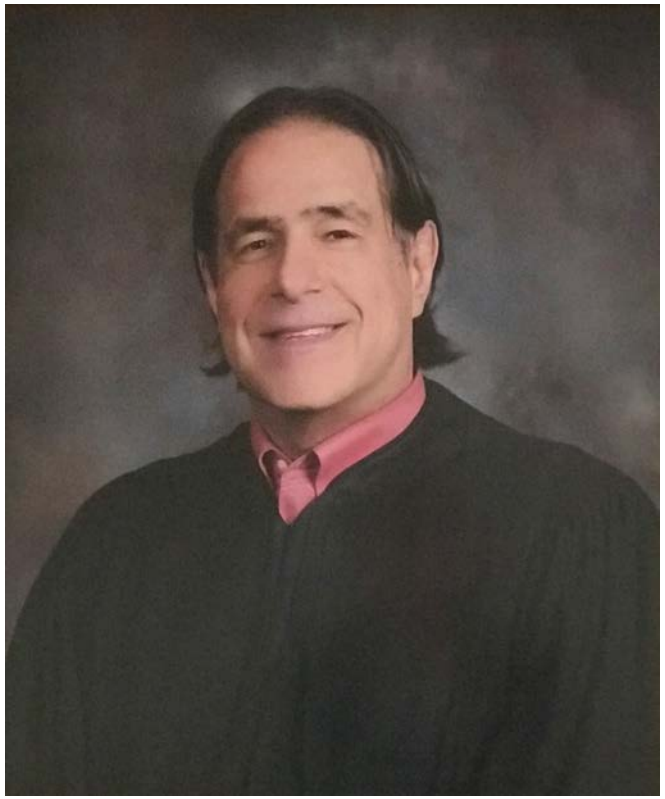
- Clear prohibition against coaching in FRCP 30(c)(2).
- "Clarification inducing objections" that usually followed "completely reasonable questions."
  - Objection/rephrase
  - "The *witness*—not the lawyer—gets to decide whether he or she understands a particular question."
- "Answer if you know"
  - "not-so-subtly suggests that the witness may not know the answer, inviting the witness to dodge or qualify an otherwise clear question."
- Direct coaching to give particular answers
  - Rephrasing/reinterpreting questions
  - Interjecting additional information
  - Answering question first
  - Audible disagreement with answer
- Violates FRCP 30 by suggesting how to answer
- "[D]efires common sense to suggest that Counsel's omnipresent commentary sped up the depositions"



Excessive Interruptions

- Violation of Rule 30 in that depositions were “unreasonably prolonged” (see notes to Rule 30)

- Form Objections and Witness coaching “impeded, delayed and frustrated the fair examination of witnesses during the depositions.”



Sanctions

- Deterrence important because “so many litigators are *trained* to make obstructionist objections.”
- “Out-of-the-box” sanction for deterrence:
  - “Counsel must write and produce a training video in which Counsel, or another partner in Counsel’s firm, appears and explains the holding and rationale of this opinion, and provides specific steps lawyers must take to comply with its rationale in future depositions in any federal and state court.”
- Disclose being made pursuant to federal court sanction; file with the court under seal; once approved, circulate to all lawyers at Counsel’s worldwide firm who do state/federal litigation.
- Noteworthy trial skills, expertise and preparation do not excuse pretrial conduct.

8th Circuit Appeal

- Courts may, under Rule 30(d)(2), impose sanctions on their own accord "in order to deter ongoing and future misconduct."
- Rule 16 conferences can provide the court opportunities to oversee discovery process; no Rule 16 conference had been held
- Sanctions should be imposed "within a time frame that has a nexus to the behavior sought to be deterred." Judge criticized deposition behavior 16 months after depositions conducted without complaint from opposing counsel or magistrate
- No prior notice of such unusual sanction
- Without ruling on the conduct, the 8th Circuit determined that defense counsel had "already suffered 'inevitable financial and personal costs' . . . and any additional sanction proceeding so long after the disputed conduct would not usefully serve the deterrent purpose of Rule 30(d)(2).

OREGON RULES OF PROFESSIONAL CONDUCT

ADVOCATE

RULE 3.3
CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if permitted, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false;

(4) conceal or fail to disclose to a tribunal that which the lawyer is required by law to reveal; or

(5) engage in other illegal conduct or conduct contrary to these Rules.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if permitted, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, but in no event require disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Adopted 01/01/05

Amended 12/01/10: Paragraphs (a)(3) and (b) amended to substitute "if permitted" for "if necessary;" paragraph (c) amended to make it clear that remedial measures do not require disclosure of information protected by Rule 1.6.

Defined Terms (see Rule 1.0):

"Believes"

"Fraudulent"

"Knowingly"

"Known"

"Knows"

"Matter"

"Reasonable"

"Reasonably believes"

"Tribunal"

Comparison to Oregon Code

Paragraph (a)(1) is similar to DR 7-102(A)(5), but also requires correction of a previously made statement that turns out to be false.

Paragraph (a)(2) is the same as DR 7-106(B)(1).

Paragraph (a)(3) combines the prohibition in DR 7-102(A)(4) against presenting perjured testimony or false evidence with the remedial measures required in DR 7-102(B). The rule clarifies that only materially false evidence requires remedial action. While the rule allows a criminal defense lawyer to refuse to offer evidence the lawyer reasonably believes is false, it recognizes that the lawyer must allow a criminal defendant to testify.

Paragraphs (a)(4) and (5) are the same as DR 7-102(A)(3) and (8), respectively.

Paragraph (b) is similar to and consistent with the interpretations of DR 7-102(B)(1).

Paragraph (c) continues the duty of candor to the end of the proceeding, but, notwithstanding the language in paragraphs (a)(3) and (b), does not require disclosure of confidential client information otherwise protected by Rule 1.6.

Paragraph (d) has no equivalent in the Oregon Code.

Comparison to ABA Model Rule

Subsections (4) and (5) of paragraph (a) do not exist in the Model Rule. Also, MR 3.3 (c) requires disclosure even if the information is protected by Rule 1.6.

* * * * *

OREGON CODE OF PROFESSIONAL RESPONSIBILITY

(Effective through December 31, 2004)

DISCIPLINARY RULE 7

ZEALOUSLY REPRESENTING CLIENTS WITHIN THE BOUNDS OF THE LAW

DR 7-102(A)(3)–(5), (8), (B)
REPRESENTING A CLIENT WITHIN THE BOUNDS OF THE LAW

(A) In the lawyer's representation of a client or in representing the lawyer's own interests, a lawyer shall not:

. . . .

(3) Conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

. . . .

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:

(1) The lawyer's client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the lawyer's client to rectify the same, and if the lawyer's client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal except when the information is a confidence as defined in DR 4-101(A).

(2) A person other than the lawyer's client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

DR 7-106(B)(1)
TRIAL CONDUCT

(B) In presenting a matter to a tribunal, a lawyer shall disclose:

(1) Legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the lawyer's client and which is not disclosed by opposing counsel.

OREGON RULES OF PROFESSIONAL CONDUCT

ADVOCATE

RULE 3.4
FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) knowingly and unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence; counsel or assist a witness to testify falsely; offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case; except that a lawyer may advance, guarantee or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for the witness's loss of time in attending or testifying; or

(3) a reasonable fee for the professional services of an expert witness.

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, knowingly make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;

(f) advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for purposes of making the person unavailable as a witness therein; or

(g) threaten to present criminal charges to obtain an advantage in a civil matter unless the lawyer reasonably believes the charge to be true and if the purpose of the lawyer is to compel or induce the person threatened to take reasonable action to make good the wrong which is the subject of the charge.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Believes"

"Knowingly"

"Matter"

"Reasonable"

"Reasonably"

"Reasonably believes"

"Tribunal"

Comparison to Oregon Code

Paragraph (a) is similar to DR 7-109(A).

Paragraph (b) includes the rules regarding witness contact from DR 7-109, and also the prohibition against falsifying evidence that is found in DR 7-102(A)(6).

Paragraph (c) is generally equivalent to DR 7-106(C)(7).

Paragraph (d) has no equivalent in the Oregon Code.

Paragraph (e) is the same as DR 7-106(C)(1), (3) and (4).

Paragraph (f) retains the language of DR 7-109(B).

Paragraph (g) retains DR 7-105.

Comparison to ABA Model Rule

Paragraphs (a), (c), (d) and (e) are the Model Code, with the addition of a "knowingly" standard in (a) and (d). Paragraph (b) has been amended to retain the specific rules regarding contact with witnesses from DR 7-109, beginning with "...or pay...." Paragraph (f) in the Model Rule prohibits requesting a person other than a client to refrain from volunteering information except when the person is a relative, employee or other agent of the client and the lawyer believes the person's interests will not be adversely affected. Paragraph (g) does not exist in the Model Rules.

* * * * *

OREGON CODE OF PROFESSIONAL RESPONSIBILITY

(Effective through December 31, 2004)

DISCIPLINARY RULE 7

ZEALOUSLY REPRESENTING CLIENTS WITHIN THE BOUNDS OF THE LAW

DR 7-102(A)(6)

REPRESENTING A CLIENT WITHIN THE BOUNDS OF THE LAW

(A) In the lawyer's representation of a client or in representing the lawyer's own interests, a lawyer shall not:

. . . .

(6) Participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.

DR 7-105
THREATENING CRIMINAL PROSECUTION

(A) Except as provided below, a lawyer shall not threaten to present criminal charges to obtain an advantage in a civil matter. A lawyer may threaten to present such charges if, but only if, the lawyer reasonably believes the charge to be true and if the purpose of the lawyer is to compel or induce the person threatened to take reasonable action to make good the wrong which is the subject of the charge.

DR 7-106(A), (C)(1), (3)–(4), (7)
TRIAL CONDUCT

(A) A lawyer shall not disregard or advise the lawyer's client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling.

. . . .

(C) In appearing in the lawyer's professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that the lawyer has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

. . . .

(3) Assert the lawyer's personal knowledge of the facts in issue except when testifying as a witness.

(4) Assert the lawyer's personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant or as to the guilt or innocence of a criminal defendant but the lawyer may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

. . . .

(7) Intentionally or habitually violate any established rule of procedure or of evidence.

DR 7-109
CONTACT WITH WITNESSES

(A) A lawyer shall not suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or produce.

(B) A lawyer shall not advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein.

(C) A lawyer shall not pay, offer to pay, or acquiesce in payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case but a lawyer may advance, guarantee or acquiesce in the payment of:

(1) Expenses reasonably incurred by a witness in attending or testifying.

(2) Reasonable compensation to a witness for the witness' loss of time in attending or testifying.

(3) A reasonable fee for the professional services of an expert witness.

OREGON RULES OF PROFESSIONAL CONDUCT

ADVOCATE

RULE 3.5
IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte on the merits of a cause with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment;

(d) engage in conduct intended to disrupt a tribunal; or

(e) fail to reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of their families, of which the lawyer has knowledge.

Adopted 01/01/05

Amended 12/01/06: Paragraph (b) amended to add "on the merits of the cause."

Defined Terms (see Rule 1.0):

"Known"

"Tribunal"

Comparison to Oregon Code

Paragraph (a) has no counterpart in the Oregon Code.

Paragraph (b) replaces DR 7-110, making ex parte contact subject only to law and court order, without additional notice requirements.

Paragraph (c) is similar to DR 7-108(A)-(F).

Paragraph (d) is similar to DR 7-106(C)(6).

Paragraph (e) retains the DR 7-108(G).

Comparison to ABA Model Rule

This is essentially the ABA Model Rule, with the addition of paragraph (e), which has no counterpart in the Model Rule.

* * * * *

OREGON CODE OF PROFESSIONAL RESPONSIBILITY

(Effective through December 31, 2004)

DISCIPLINARY RULE 7
ZEALOUSLY REPRESENTING CLIENTS WITHIN THE BOUNDS OF THE LAW

DR 7-106(C)(6)
TRIAL CONDUCT

(C) In appearing in the lawyer's professional capacity before a tribunal, a lawyer shall not:

. . . .

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

DR 7-108
COMMUNICATION WITH OR INVESTIGATION OF JURORS

(A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case.

(B) During the trial of a case:

(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.

(2) A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(C) DR 7-108(A) and (B) do not prohibit a lawyer from communicating with veniremen or jurors in the course of official proceedings.

(D) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service.

(E) A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror.

(F) All restrictions imposed by DR 7-108 upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.

(G) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of their families, of which the lawyer has knowledge.

DR 7-110
CONTACT WITH OFFICIALS

(A) A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal except as permitted by Judicial Rule 3 of the Code of Judicial Conduct but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Judicial Rule 4 of the Code of Judicial Conduct.

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending except:

(1) In the course of official proceedings in the cause.

(2) In writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party if the adverse party is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if the adverse party is not represented by a lawyer.

(4) As otherwise authorized by law or by Judicial Rule 2 of the Code of Judicial Conduct.

CHAPTER 3—Decorum In Proceedings

3.010 PROPER APPAREL

(1) All persons attending the court must be dressed so as not to detract from the dignity of court. A person may wear a religiously-required head covering unless the court orders otherwise. Members of the public not dressed in accordance with this rule may be removed from the courtroom.

(2) When appearing in court, all attorneys and court officials must wear appropriate attire.

3.020 PROPER APPAREL FOR INCARCERATED WITNESSES AND DEFENDANTS APPEARING IN CRIMINAL PROCEEDINGS

Incarcerated witnesses and defendants appearing for trial must be dressed in neat, clean civilian clothing, unless otherwise ordered by the court.

3.030 MANNER OF ADDRESS

During trial, the litigants and litigants' attorneys must not address adult witnesses, jurors or opposing parties by their first names, and, except in *voir dire*, must not address jurors individually.

3.040 ADVICE TO CLIENTS AND WITNESSES OF COURTROOM FORMALITIES

Attorneys must advise their clients and witnesses of the formalities of the court and must encourage their cooperation. Self-represented parties must similarly advise their witnesses and encourage their cooperation.

3.050 PROPER POSITION OF PARTIES BEFORE COURT

Parties must:

(1) Rise from their positions at counsel table and remain standing while addressing the court or the jury, except during *voir dire*;

(2) Not approach the bench except by permission; and

(3) Be allowed to move freely about the courtroom during trial unless otherwise instructed by the court.

1991 Commentary:

This 1991 change is not intended by the Committee to transfer control of the conduct of the trial process from the trial judge to the litigants. The change is intended to facilitate the identification of exhibits by witnesses; the use of diagrams, photographs, and other exhibits by the examining attorney and witnesses; and to encourage the effective use of demonstrative evidence and exhibits in a manner facilitating the fact finder's understanding of the evidence. The Committee recognizes that there is the potential for abuse of this rule change, which may be distracting or

disruptive of the proceedings, and thus the court retains the ability to maintain appropriate decorum and order.

The Committee recognizes that there are a number of factors which may affect the extent to which free movement is appropriate in a particular case. Without attempting to be all inclusive, these factors may include such things as: the physical layout of the courtroom; the age of the witness; the emotional/physical condition of the witness; the size, number, and nature of exhibits; etc. The Committee therefore encourages communication between the litigants and the trial judge at the commencement of trial covering these considerations and resolving any uncertainty.

3.060 DEFENDANT IN CRIMINAL TRIAL

During arraignment, plea and sentence, the defendant must stand unless otherwise permitted by the court.

3.070 PERSONS PERMITTED WITHIN BAR OF COURT

Except as otherwise permitted by the court, during the trial of any case or the presentation of any matter to the court, no persons, including members of litigants' families, shall be permitted within the bar of the courtroom, other than clients, attorneys, court personnel and witnesses when called to the stand.

3.080 PROCEDURE FOR SWEARING WITNESSES

The swearing of witnesses shall be conducted as a serious ceremony and not as a mere formality.

3.090 UNDUE RECOGNITION OR FAMILIARITY BY JUDGE

Judges shall refrain from showing undue recognition of or familiarity with any person in the courtroom.

3.100 PROPER USE OF COURT CHAMBERS

Except when court business is being conducted, parties must not congregate in the court's chambers or use the facilities or the court's entryway between the chambers and the bench without the permission of the court.

3.110 CONFERENCES IN CHAMBERS

Conferences may be conducted in chambers and shall be conducted without litigants present unless required by the court, requested by a party or otherwise required.

3.120 COMMUNICATION WITH JURORS

(1) Except as necessary during trial, and except as provided in subsection (2), parties, witnesses or court employees must not initiate contact with any juror concerning any case which that juror was sworn to try.

(2) After a sufficient showing to the court and on order of the court, a party may have contact with a juror in the presence of the court and opposing parties when:

(a) There is a reasonable ground to believe that there has been a mistake in the announcing or recording of a verdict; or

(b) There is a reasonable ground to believe that a juror or the jury has been guilty of fraud or misconduct sufficient to justify setting aside or modifying the verdict or judgment.

3.130 DISCLOSURE OF RELATED MATTERS WHEN SEEKING COURT ORDER

When a party seeks to obtain an order from a judge, the party must inform that judge of any ruling, hearing or application for a ruling or hearing before any other judge that concerns the subject of the order requested.

3.140 RESIGNATION OF ATTORNEYS

(1) An application to resign, a notice of termination, or a notice of substitution made pursuant to ORS 9.380 must contain the court contact information under UTCR 1.110 of the party and of the new attorney, if one is being substituted, and the date of any scheduled trial or hearing. It must be served on that party and the opposing party's attorney. If no attorney has appeared for the opposing party, the application must be served on the opposing party. A notice of withdrawal, termination, or substitution of attorney must be promptly filed.

(2) The attorney who files the initial appearance for a party, or who personally appears for a party at arraignment on an offense, is deemed to be that party's attorney-of-record, unless at that time the attorney otherwise notifies the court and opposing party(ies) in open court or complies with subsection (1).

(3) When an attorney is employed or appointed to appear in an already pending case, the attorney must immediately notify the court and the opposing party in writing or in open court. That attorney shall be deemed to be the attorney-of-record unless that attorney otherwise notifies the court.

1987 Commentary:

In subsection (3), a change of attorneys in a pending case requires notification to the opposing party and to the court. This rule makes no changes to ORCP procedures for taking a default judgment. It only addresses who will be considered the attorney of record in a case.

1991 Commentary:

UTCR 3.140 is intended neither to establish new standards of professional responsibility nor to provide a method of discharging existing standards of professional responsibility. See DR 2-110.

3.150 NO REACTION TO JURY VERDICT

After the jury returns a verdict, all persons present in the courtroom must remain seated until the jury has left the room and must refrain from visibly or audibly reacting to the verdict in a manner which disrupts the dignity of the courtroom.

3.160 EXPLANATION OF PROCEEDINGS TO JURORS

In jury cases, after sustaining a dismissal of the case before verdict, the judge, in dismissing the jury, should, without discussion of the facts, briefly explain the procedure and why a verdict was unnecessary.

3.170 ASSOCIATION OF OUT-OF-STATE COUNSEL (*PRO HAC VICE*)

(1) An attorney authorized to practice law before the highest court of record in any state or country ("out-of-state attorney") may appear on behalf of a party in any action, suit, or proceeding pending in this state before a court or administrative body even though that attorney is not licensed to practice law in this state, if the attorney satisfies all of the following requirements:

(a) Shows that the attorney is an attorney in good standing in another state or country.

(b) Certifies that the attorney is not subject to pending disciplinary proceedings in any other jurisdiction or provides a description of the nature and status of any pending disciplinary proceedings.

(c) Associates with an active member in good standing of the Oregon State Bar ("local attorney") who must participate meaningfully in the matter.

(d) Certifies that the attorney will: comply with applicable statutes, law, and procedural rules of the state of Oregon; be familiar with and comply with the disciplinary rules of the Oregon State Bar; and submit to the jurisdiction of the Oregon courts and the Oregon State Bar with respect to acts and omissions occurring during the out-of-state attorney's admission under this rule.

(e) If the attorney will engage in the private practice of law in this state, provides a certificate of insurance covering the attorney's activities in this state and providing professional liability insurance substantially equivalent to the Oregon State Bar Professional Liability Fund plan.

(f) Agrees, as a continuing obligation under this rule, to notify the trial court or administrative body promptly of any changes in the out-of-state attorney's insurance or status.

(g) If application will be for an appearance before a court, pays any fees required by subsection (6) below for appearance under this rule. No fee is required if application will be for an appearance before an administrative body.

(2) The information required by subsection (1) of this rule must be presented as follows:

(a) If application will be for an appearance before a court, to the Oregon State Bar (Bar) in a form established by the Bar. The Bar may accomplish the submission of information by requiring a certificate with attachments or other means administratively convenient to the Bar. Upon receipt of all information necessary under subsection (1) of this section and receipt of the fee required by subsection (6) below, the Bar will acknowledge receipt in a form determined by the Bar. In making the acknowledgment, the Bar may attach copies or comment on any submitted material the Bar finds may be appropriate for a court to consider with an application under this section. The local attorney must then submit the Bar's acknowledgment with any information the Bar includes to the court by motion signed by the local attorney requesting the court to grant application under this section. The court may rely on the acknowledgment of the Bar as a basis to conclude that all information required to be submitted and fees required to be paid for granting an application under this section have been submitted and paid. Bar records on materials it receives under this section will be available to a court on request for two years or such longer period as the Bar considers administratively convenient.

(b) If the application is for an appearance before an administrative body, to the administrator of the agency before which the proceeding will occur or that person's designee or to any other appropriate officer, employee or designee of that agency as set forth by procedures or rules established by that agency. Application may be accomplished by an application certificate with attachments or other means administratively convenient to and established by the agency. Agency records on materials the agency or designee receives under this section will be available to the Bar on request for two years or such longer period as the agency considers administratively convenient.

(3) The court or administrative body shall grant the application by order if the application satisfies the requirements of this rule, unless the court or administrative body determines for good cause shown that granting the application would not be in the best interest of the court or administrative body or the parties. At any time and upon good cause shown, the court or administrative body may revoke the out-of-state attorney's permission to appear in the matter.

(4) Each time a court or administrative body grants an application under this rule or revokes an out-of-state attorney's permission to appear in a matter, the local attorney must provide a notice to the Bar of such occurrence in a manner and within the time determined by the Bar.

(5) This rule applies to all judicial and administrative proceedings in this state. When a court or administrative body grants an application for approval to appear under this rule, the authorization allows that individual attorney to appear in all proceedings for a single case that occur within a year after the application is granted. Applications will not be granted for firms. There must be separate application and approval for any of the following: appearance by another out-of-state attorney representing the same or any other party; representation by the same out-of-state attorney in this state on another matter; any appearance that occurs later than that one-year period. The Bar or an administrative body may establish such abbreviated procedures and requirements as Bar or body finds

administratively convenient to limit unnecessary submission of duplicate information by an attorney who has already had application granted to appear in one proceeding and is seeking to appear in other proceedings or to renew an application at the end of a current one-year grant for a case.

(6) Except as otherwise provided in this rule, for each application under this rule to appear before a court, the applicant must pay to the Bar a fee of $500 at the time of submission of information under subsection (2) of this section, including when application is sought to renew an application at the end of a current one-year grant for a case. The fee will not be refundable.

(7) Subject to the following, the Bar or any administrative agency acting under this section, may use electronic means to accomplish acts required or authorized under this section:

(a) The Bar shall provide acknowledgment under paragraph (2)(a) of this rule for court purposes by electronic means only upon approval of the State Court Administrator.

(b) No administrative agency may provide electronic means of notifying the Bar of a grant of application or revocation under this section without prior approval of the Bar.

(8) An applicant is not required to pay the fee established by subsection (6) of this section if the applicant establishes to the satisfaction of the Bar that the applicant is employed by a government body and will be representing that government body in an official capacity in the proceeding that will be the subject of the application.

(9) An applicant is not required to associate with local counsel pursuant to subsection (1)(c) of this section or pay the fee established by subsection (6) of this section if the applicant establishes to the satisfaction of the Bar that:

(a) The applicant seeks to appear in an Oregon court for the limited purpose of participating in a child custody proceeding as defined by 25 USC §1903, pursuant to the Indian Child Welfare Act of 1978, 25 USC §1901 et seq.;

(b) The applicant represents an Indian tribe, parent, or Indian custodian, as defined by 25 USC §1903; and

(c) One of the following:

(i) If the applicant represents an Indian tribe, the Indian child's tribe has executed an affidavit asserting the tribe's intent to intervene and participate in the state court proceeding and affirming the child's membership or eligibility of membership under tribal law; or

(ii) If the applicant represents a parent or Indian custodian, the tribe has affirmed the child's membership or eligibility of membership under tribal law.

NOTE: UTCR 3.170 is adopted by the Oregon Supreme Court under ORS 9.241 and may be modified only by order of that Court.

3.180 ELECTRONIC RECORDING AND WRITING ON COURTHOUSE PREMISES

(1) As used in this rule:

(a) "Electronic recording" includes video recording, audio recording, live streaming, and still photography by cell phone, tablet, computer, camera, tape recorder, or any other means. "Electronic recording" does not include "electronic writing."

(b) "Electronic writing" means the taking of notes or otherwise writing by electronic means and includes but is not limited to the use of word processing software and the composition of texts, emails, instant messages, and postings to social media and networking services.

(2) Upon request made prior to the start of a proceeding, and after notice to all parties, electronic recording shall be allowed in any courtroom except as provided under this rule. The court shall permit one video camera, one still camera and one audio recorder. The court may permit additional electronic recording consistent with this rule.

(3) A person who seeks to electronically record all or any portion of a court proceeding must obtain express permission from the court prior to any proceeding. No fee may be charged. The granting of such permission to any individual person or entity is subject to the court's discretion, which may include considerations of the need to preserve the solemnity, decorum, or dignity of the court; the protection of the parties, witnesses, or jurors; or whether the requestor has demonstrated an understanding of all provisions of this rule.

(4) Except as otherwise provided in this rule:

(a) The court shall not wholly prohibit all electronic recording of a court proceeding unless the court makes findings of fact on the record setting forth substantial reasons that establish:

(i) There is a reasonable likelihood that the electronic recording will interfere with the rights of the parties to a fair trial or will affect the presentation of evidence or the outcome of the trial; or

(ii) There is a reasonable likelihood that the costs or other burdens imposed by the electronic recording will interfere with the efficient administration of justice.

(b) "Wholly prohibit all electronic recording" means issuing an order prohibiting all recording of a proceeding by all persons. The court's denial of a particular request under the factors in section (3) does not constitute an order prohibiting all recording by all persons and does not require findings of fact on the record, even if the person whose request is denied is the only person who has requested permission to record a proceeding.

(5) Except with the express prior permission of the court, a person may not:

(a) Electronically record any court proceeding;

(b) Electronically record in any area under the control and supervision of the court;

(c) Engage in electronic writing;

(d) Even if granted permission to record, send any electronic recording from within a courtroom; or

(e) Even if granted permission to engage in electronic writing, send any electronic writing from within a courtroom.

(6) The provisions of subsections 5(c) and (e) of this rule do not apply to attorneys or to agents of attorneys unless otherwise ordered by the court.

(7) The court may limit electronic recording of particular components of the proceeding if the court finds that:

(a) The limitation is necessary to preserve the solemnity, decorum or dignity of the court or to protect the parties, witnesses, or jurors;

(b) The use of electronic recording equipment interferes with the proceedings; or

(c) The electronic recording of a particular witness would endanger the welfare of the witness or materially hamper the testimony of the witness.

(8) If a person violates this rule or any other requirement imposed by the court, the court may order the person, and any organization with which the person is affiliated, to terminate electronic recording or electronic writing.

(9) Notwithstanding any other provision of this rule, the following may not be electronically recorded by any person at any time:

(a) Proceedings in chambers.

(b) Any notes or conversations intended to be private including but not limited to counsel and judges conferring at the bench and conferences involving counsel and their clients.

(c) Dissolution, juvenile, paternity, adoption, custody, visitation, support, civil commitment, trade secrets, and abuse, restraining and stalking order proceedings.

(d) Proceedings involving a sex crime, if the victim has requested that the proceeding not be electronically recorded.

(e) *Voir dire*.

(f) Any juror anywhere under the control and supervision of the court during the entire course of the trial in which the juror sits.

(g) Recesses or any other time the court is off the record.

(10) The court may prescribe the location of and the manner of operating electronic equipment within a courtroom. Artificial lighting is not permitted. Any pooling arrangement made necessary by limitations on equipment or personnel imposed by the court is the sole responsibility of the persons seeking to electronically record. The court will not mediate disputes. If the persons seeking to electronically record are unable to agree on the manner in which the recording will be conducted or distributed, the court may terminate any or all such recording.

(11) A judicial district may, by SLR:

(a) Designate areas outside a courtroom and under the control and supervision of the court, including hallways or entrances, where electronic recording is allowed without prior permission, unless otherwise ordered in a particular instance.

(b) Adopt procedures to obtain permission for electronic recording or electronic writing;

(c) SLR 3.181 is reserved for any SLR adopted under this subsection.

(12) For the purpose of determining whether this rule or other requirements imposed by the court have been violated, or to assure the effective administration of justice, a person engaged in electronic recording under this rule must, upon request and without expense to the court, provide to the court, for *in camera* review, an electronic recording in a format accessible to the court. The copy may be retained by the court and may be sealed if necessary for the further administration of justice.

(13) This rule does not:

(a) Limit the court's contempt powers;

(b) Operate to waive ORS 44.510 to 44.540 (media shield law); or

(c) Apply to court personnel engaged in the performance of official duties.

NOTE: UTCR 3.180 was adopted by the entire Oregon Supreme Court, and any changes to the rule will be made only with the consent of the Supreme Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

THE SECURITY NATIONAL BANK OF SIOUX CITY, IOWA, as Conservator for J.M.K., a Minor,

Plaintiff,

vs.

ABBOTT LABORATORIES,

Defendant.

No. C 11-4017-MWB

MEMORANDUM OPINION AND ORDER REGARDING SANCTIONS

TABLE OF CONTENTS

I. PROCEDURAL HISTORY 5

II. ANALYSIS 7
A. Standards for Deposition Sanctions 7
B. Deposition Conduct 10
1. "Form" Objections 10
2. Witness Coaching 18
3. Excessive Interruptions 30
C. Appropriate Sanction 31

III. CONCLUSION 34

Something is rotten, but contrary to Marcellus's suggestion to Horatio, it's not in Denmark.[1] Rather, it's in discovery in modern federal civil litigation right here in the United States. Over two decades ago, Griffin Bell—a former United States Attorney General, United States appeals court judge, and private practitioner—observed: "The criticism of the civil justice system has reached a crescendo in recent years. Because

[1] WILLIAM SHAKESPEARE, HAMLET, act 1, sc. 4.

much of the cost of litigation is incurred in discovery, the discovery process has been the focal point of considerable criticism."[2] How little things have changed.

Discovery—a process intended to facilitate the free flow of information between parties—is now too often mired in obstructionism. Today's "litigators" are quick to dispute discovery requests, slow to produce information, and all-too-eager to object at every stage of the process. They often object using boilerplate language containing every objection imaginable, despite the fact that courts have resoundingly disapproved of such boilerplate objections.[3] Some litigators do this to grandstand for their client, to intentionally obstruct the flow of clearly discoverable information, to try and win a war of attrition, or to intimidate and harass the opposing party. Others do it simply because it's how they were taught. As my distinguished colleague and renowned expert on civil procedure Judge Paul Grimm of the District of Maryland has written: "It would appear that there is something in the DNA of the American civil justice system that resists cooperation during discovery."[4] Whatever the reason, obstructionist discovery conduct is born of a warped view of zealous advocacy, often formed by insecurities and fear of the truth. This conduct fuels the astronomically costly litigation industry at the expense of "the just, speedy, and inexpensive determination of every action and proceeding."

---

[2] Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 1 (1992).

[3] *See* Matthew L. Jarvey, Note, *Boilerplate Discovery Objections: How They Are Used, Why They Are Wrong, and What We Can Do About Them*, 61 DRAKE L. REV. 913, 917 n.20 (2013) (collecting cases disapproving of boilerplate objections); *St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 513 (N.D. Iowa 2000) (same).

[4] Hon. Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. REV. 495, 530 (2013).

Fed. R. Civ. P. 1. It persists because most litigators and a few real trial lawyers—even very good ones, like the lawyers in this case—have come to accept it as part of the routine chicanery of federal discovery practice.[5]

But the litigators and trial lawyers do not deserve all the blame for obstructionist discovery conduct because judges so often ignore this conduct,[6] and by doing so we

---

[5] Judge Grimm and David Yellin aptly describe some of the misplaced motivations behind obstructionist tactics:

> The truth is that lawyers and clients avoid cooperating with their adversary during discovery—despite the fact that it is in their clear interest to do so—for a variety of inadequate and unconvincing reasons. They do not cooperate because they want to make the discovery process as expensive and punitive as possible for their adversary, in order to force a settlement to end the costs rather than having the case decided on the merits. They do not cooperate because they wrongly assume that cooperation requires them to compromise the legitimate legal positions that they have a good faith basis to hold. Lawyers do not cooperate because they have a misguided sense that they have an ethical duty to be oppositional during the discovery process—to "protect" their client's interests—often even at the substantial economic expense of the client. Clients do not cooperate during discovery because they want to retaliate against their adversary, or "get back" at them for the events that led to the litigation. But the least persuasive of the reasons for not cooperating during the discovery process is the entirely misplaced notion that the "adversary system" somehow prohibits it.

Id. at 525-26 (footnotes omitted). Amen Brother Grimm and Mr. Yellin for being so insightful and refreshingly candid.

[6] *Cf.* Daniel C. Girard & Todd I. Espinosa, *Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules*, 87 DENV. U. L. REV. 473, 475 (2010) ("The Federal Rules prohibit evasive responses . . . . In practice, however, these

reinforce—even *incentivize*—obstructionist tactics.[7] Most litigators, while often inept in jury trials (only because they so seldom experience them), are both smart and savvy and will continue to do what has worked for them in the past. Obstructionist litigators, like Ivan Pavlov's dogs, salivate when they see discovery requests and are conditioned to unleash their treasure chest of obstructive weaponry. Unlike Pavlov's dogs, their rewards are not food but successfully blocking or impeding the flow of discoverable information. Unless judges impose serious adverse consequences, like court-imposed sanctions, litigators' conditional reflexes will persist. The point of court-imposed sanctions is to stop reinforcing winning through obstruction.

While obstructionist tactics pervade all aspects of pretrial discovery, this case involves discovery abuse perpetrated during depositions. Earlier this year, in preparation for a hard-fought product liability jury trial, I was called upon by the parties to rule on numerous objections to deposition transcripts that the parties intended to use at trial. I noticed that the deposition transcripts were littered with what I perceived to be meritless objections made by one of the defendant's lawyers, whom I refer to here as "Counsel." I was shocked by what I read. Thus, for the reasons discussed below, I find that Counsel's deposition conduct warrants sanctions.

I do not come to this decision lightly. Counsel's partner, who advocated for Counsel during the sanctions hearing related to this case (and who is one of the best trial lawyers I have ever encountered), urged that sanctions by a federal judge, especially on

---

rules are not enforced. Service of evasive discovery responses has become a routine—and rewarding—litigation tactic.").

[7] *Cf. id.* at 483 ("The reluctance of courts to impose sanctions under Rule 37 has encouraged the use of evasive and dilatory behavior in response to discovery requests. Such behavior serves no purpose other than to increase the cost and delays of litigation.").

a lawyer with an outstanding career, like Counsel, should be imposed, if at all, with great hesitation and a full appreciation for how a serious sanction could affect that lawyer's career. I wholeheartedly agree. I am still able to count each of the sanctions I have imposed on lawyers in my twenty years as a district court judge on less than all the fingers of one hand. Virtually all of those sanctions have been imposed on (or threatened to be imposed on) lawyers from out-of-state law firms.[8]

I. PROCEDURAL HISTORY

This matter arises out of a product liability case tried to a jury in January of 2014. Plaintiff Security National Bank (SNB), acting as conservator for a minor child, J.M.K., sued Defendant Abbott Laboratories (Abbott), claiming that J.M.K. suffered permanent brain damage after consuming baby formula, produced by Abbott, that allegedly contained a dangerous bacteria called enterobacter sakazakii. SNB went to trial against Abbott on design defect, manufacturing defect, and warning defect claims. On January 17, 2014, a jury found in favor of Abbott on SNB's product liability claims. The Clerk entered judgment in favor of Abbott on January 21, 2014.

During the trial, I addressed Counsel's conduct in defending depositions related to this case. Specifically, I filed a *sua sponte* order to show cause as to why I should not

[8] Iowa trial lawyers have a long and storied tradition and culture of civility that is first taught at the state's two law schools, the University of Iowa College of Law and the Drake University Law School. I know this because I have taught and lectured at both of these outstanding law schools that produce the bulk of Iowa lawyers. Civility is then taken very seriously, nourished and lead by the Iowa Supreme Court, and continually reinforced by the Iowa State Bar Association, the Iowa Academy of Trial Lawyers, and all of the other legal organizations in the state, as well as senior members of the bar, law firm partners from large to small firms, and solo practitioners across the state. There is great pride in being an Iowa lawyer, and describing someone as an Iowa lawyer almost always connotes that lawyer's high commitment to civility and professionalism. Of course, there are stinkers in the Iowa bar, but they are few and far between.

sanction Counsel for the "serious pattern of obstructive conduct" that Counsel exhibited during depositions by making hundreds of "form" objections that ostensibly lacked a valid basis. Because I did not want to burden Counsel with the distraction of a sanctions hearing during trial, I suggested we table any discussion of sanctions until after the trial was over. Thus, the same day the judgment was filed, I entered a supplemental order to show cause, ordering Counsel to address three issues that potentially warrant sanctions: (1) Counsel's excessive use of "form" objections; (2) Counsel's numerous attempts to coach witnesses; and (3) Counsel's ubiquitous interruptions and attempts to clarify questions posed by opposing counsel. My supplemental order focused on Counsel's conduct in defending two particular depositions—those of Bridget Barrett-Reis and Sharon Bottock—but I noted that I would consider any relevant depositions in deciding whether to impose sanctions. On January 24, 2014, Counsel requested a substantial extension of time to respond to my supplemental order, which I granted. On April 21, 2014, Counsel responded to my supplemental order to show cause. My chambers later contacted Counsel to set this matter for telephonic hearing. Counsel requested another one-month delay, which I granted. Counsel filed an additional brief on July 9, 2014, and the hearing was finally held on July 17, 2014. During the hearing, I requested that Counsel follow up with an e-mail suggesting an appropriate sanction, should I decide to impose one. On July 21, 2014, Counsel's partner sent an e-mail to me declining to suggest a sanction, and urging me not to impose sanctions.

After reviewing Counsel's submissions, I find that Counsel's conduct during depositions warrants sanctions. I discuss below the basis for imposing sanctions and the particular sanction that I deem appropriate in this case.

II. ANALYSIS

A. Standards for Deposition Sanctions

"It is well established that a federal court may consider collateral issues [like sanctions] after an action is no longer pending." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990). Because Counsel's deposition conduct is at issue here, Federal Rule of Civil Procedure 30 applies. Rule 30(d)(2) provides: "The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent." Rule 30(d)(2) does not limit the types of sanctions available; it only requires that the sanctions be "appropriate." *See Francisco v. Verizon S., Inc.*, 756 F. Supp. 2d 705, 712 (E.D. Va. 2010), *aff'd*, 442 F. App'x 752 (4th Cir. 2011) ("Although Rule 30(d)(2) does not define the phrase 'appropriate sanction,' the imposition of discovery sanctions is generally within the sound discretion of the trial court." (citations omitted)).

District courts also have a "'well-acknowledged' inherent power . . . to levy sanctions in response to abusive litigation practices." *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 765 (1980). "A primary aspect of that [power] is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991). "[T]he inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." *Id.* at 49.

Counsel incorrectly argues—without citing to any dispositive authority—that I may not impose sanctions *sua sponte* under Rule 30(d)(2). Because SNB's lawyers did not file a motion for sanctions, Counsel argues that I am without power to impose them under the Federal Rules.[9] Rule 30(d)(2)'s text, however, imposes no such limitation on a

[9] The fact that SNB's lawyers did not move for sanctions further suggests that lawyers

court's authority to sanction deposition conduct. The rule contains no motion-related preconditions whatsoever; it simply provides that "[t]he court may impose an appropriate sanction" on a person who obstructs a deposition. The advisory committee notes further suggest that courts may issue Rule 30(d)(2) sanctions without a motion from a party. The notes provide that sanctions under Rule 30(d) are congruent to those under Rule 26(g):

> The rule also explicitly authorizes the court to impose the cost resulting from obstructive tactics that unreasonably prolong a deposition on the person engaged in such obstruction. This sanction may be imposed on a non-party witness as well as a party or attorney, but is otherwise congruent with Rule 26(g).

Fed. R. Civ. P. 30, advisory committee notes (1993 amendments). Under Rule 26(g), courts may issue sanctions *sua sponte*: "If a certification violates this rule without substantial justification, the court, on motion *or on its own*, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both." Fed. R. Civ. P. 26(g)(3) (emphasis added). In addition to Rule 30(d)'s text and the advisory committee notes, the United States Supreme Court has noted that "court[s] generally may act *sua sponte* in imposing sanctions under the Rules." *Chambers*, 501 U.S. at 43 n.8; *see also Jurczenko v. Fast Prop. Solutions, Inc.*, No. 1:09 CV 1127, 2010 WL 2891584, at *2-4 (N.D. Ohio July 20, 2010) (imposing sanctions under Rule 30(d)(2) where party moved for sanctions only under Rule 37(d)). And even if I lacked the power to issue

---

have simply become numb to obstructionist discovery tactics, either because they are used to them, they choose to take the high ground, or perhaps because they use such tactics themselves. (After observing SNB's lead lawyer at trial, I seriously doubt the latter.) Based on my 39 years as a member of the federal bar, I surmise that SNB's lawyer did not move for sanctions because he has other enterobacter sakazakii cases against Counsel and did not want to undermine his ongoing relationship with Counsel by seeking sanctions. This rationale makes particular sense in a case like this where all of the information SNB's lawyer needed to prove SNB's manufacturing and product defect claim resided with Abbott and Counsel, and where there was no other avenue to obtaining case-critical information.

sanctions under Rule 30(d), I would retain the authority to sanction Counsel under my inherent power. *See In re Itel Sec. Litig.*, 791 F.2d 672, 675 (9th Cir. 1986) ("Sanctions may also be awarded sua sponte under the court's inherent power." (citing *Roadway Exp.*, 447 U.S. at 765)).

Counsel also claims to have acted in good faith during the depositions related to this case. Even if that is true, it is inapposite. In imposing sanctions under either Rule 30(d)(2) or my inherent power, I need not find that Counsel acted in bad faith. "[T]he imposition of sanctions under Federal Rule[] of Civil Procedure 30(d)(2) . . . does not require a finding of bad faith." *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 196 (E.D. Pa. 2008). Rather, the person sanctioned need only have "impede[d], delay[ed], or frustrate[d] the fair examination of the deponent." Fed. R. Civ. P. 30(d)(2). And only the most extreme sanctions under a court's inherent power—like assessing attorney's fees or dismissing with prejudice—require a bad-faith finding. *See Chambers*, 501 U.S. at 45-46 (noting that "a court may assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons" (citations and internal quotation marks omitted)); *Stevenson v. Union Pac. R. Co.*, 354 F.3d 739, 751 (8th Cir. 2004) ("A bad faith finding is specifically required in order to assess attorneys' fees." (citations omitted)); *Lorin Corp. v. Goto & Co., Ltd.*, 700 F.2d 1202, 1207 (8th Cir. 1983) ("Dismissal with prejudice is an extreme sanction and should not be imposed unless the default was wilful or in bad faith."). For less extreme sanctions, like those at issue here, "a finding of bad faith is not always necessary to the court's exercise of its inherent power to impose sanctions." *Stevenson*, 354 F.3d at 745 (citations omitted); *see also Harlan v. Lewis*, 982 F.2d 1255, 1260 (8th Cir. 1993) ("We do not believe *Roadway* extends the 'bad faith' requirement to every possible disciplinary exercise of the court's inherent power, especially because such an extension would apply the requirement to even the most routine exercises of the inherent power. We find no statement in *Roadway*,

Chambers, or any other decision cited by the parties, that the Supreme Court intended this 'bad faith' requirement to limit the application of monetary sanctions under the inherent power." (internal citations and footnote omitted)). Still, while I need not find bad faith before imposing sanctions, I find it difficult to believe that Counsel could, in good faith, engage in the conduct outlined in this opinion.

The Eighth Circuit Court of Appeals "review[s] the imposition of discovery sanctions for an abuse of discretion." *Craig v. St. Anthony's Med. Ctr.*, 384 F. App'x 531, 532 (8th Cir. 2010).

B. Deposition Conduct

In defending depositions related to this case, Counsel proliferated hundreds of unnecessary objections and interruptions during the examiner's questioning. Most of these objections completely lacked merit and often ended up influencing how the witnesses responded to questions. In particular, Counsel engaged in three broad categories of improper conduct. First, Counsel interposed an astounding number of "form" objections, many of which stated no recognized basis for objection. Second, Counsel repeatedly objected and interjected in ways that coached the witness to give a particular answer or to unnecessarily quibble with the examiner. Finally, Counsel excessively interrupted the depositions that Counsel defended, frustrating and delaying the fair examination of witnesses. I will address each category of conduct in turn.

1. "Form" Objections

In the two depositions I asked Counsel to review in my order to show cause, Counsel objected to the "form" of the examiner's question at least 115 times. That means that Counsel's "form" objections can be found on roughly 50% of the pages[10] of both the Barrett-Reis and Bottock depositions. Counsel made "form" objections with similar

[10] I calculated this number based on the number of deposition pages that actually contained testimony, excluding pages like the title page, etc.

frequency while defending other depositions, too. Sometimes Counsel followed these "form" objections with a particular basis for objection, like "speculation" or "narrative." Other times, Counsel simply objected to "form," requiring the reader (and, presumably, the examiner) to guess as to the objection's basis.

In addition to the sheer number of "form" objections Counsel interposed, Counsel also demonstrated the "form" objection's considerable range, using it for a number of purposes. For example, Counsel used "form" objections to quibble with the questioner's word choice (for no apparent reason, other than, perhaps, to coach the witness to give a desired answer):

> Q. Would it be fair to say that in your career, work with human milk fortifier has been a significant part of your job?
>
> COUNSEL: Object to the form of the question. "Significant," it's vague and ambiguous. You can answer it.
>
> A. Yeah, I can't really say it's been a significant part. It's been a part of my job, but "significant" is rather difficult because I have a wide range of things that I do there.

(Barrett-Reis Depo. 56:19 to 57:4).[11] Counsel used "form" objections to voice absurdly hyper-technical truths:

> Q. Are there certain levels that one can get, that have catwalks or some similar apparatus so I can get to the dryer?
>
> A. The dryer is totally enclosed. You cannot get into the dryer from any of the levels.
>
> Q. Can I get on the outside of the dryer?

[11] In reproducing portions of the deposition transcripts for this opinion, I occasionally change the notation identifying the speaker for reasons of anonymity, consistency, and ease of reading. For example, I do not use Counsel's name, which appears in the transcripts. I also use "A." to indicate a witness's answer, whereas some of the transcripts use the phrase "the witness." The words used by the speakers, however, remain unaltered.

> COUNSEL: Object to the form of the question; outside of the dryer? Everything is—I mean, outside of the dryer is a huge expanse of space; anything that's not inside the dryer is outside the dryer, so I object to it as vague and ambiguous. Object to the form of the question.
>
> A. Rephrase the question.

(Bottock Depo. 130:3-15). Counsel also used "form" objections to break new ground, inventing novel objections not grounded in the rules of evidence or common law:

> Q. Are you familiar with the term "immunocompromised"?
>
> A. Yes.
>
> Q. And that would include premature babies?
>
> COUNSEL: Object to the form of the question, "that would include premature babies?" It's a non sequitur.[12]

(Barrett-Reis Depo. 54:15-21). (In case there is any doubt, *non sequitur* is not a proper objection.) But, whatever their purpose, Counsel's "form" objections rarely, if ever, followed a truly objectionable question.

In my view, objecting to "form" is like objecting to "improper"—it does no more than vaguely suggest that the objector takes issue with the question. It is not itself a

---

[12] In response to my order to show cause, Counsel claims that "the question was misleading, confusing, vague and ambiguous[,]" and that it "call[ed] for a medical opinion or conclusion" (docket no. 193, at 13). None of these reasons relate to Counsel's original claim that the question was a non sequitur. But, in any event, there is absolutely nothing confusing about the question, nor does it call for a medical conclusion (the witness held a PhD in nutritional science, though). This litany of adjectives—"misleading, confusing, vague and ambiguous"—are all too common in federal depositions and roll too easily and too frequently off the lips of lawyers who engage in repeated obstructionist conduct. Multiple objections like this are often a harbinger of obstructionist lawyers. That Counsel would cite those objections in "defense" of Counsel's conduct suggests very strongly that Counsel just doesn't get it, and further undermines Counsel's claim of good faith. That these objections are part of an oft-used litigation strategy does not suggest that Counsel made them in good faith.

ground for objection, nor does it preserve any objection. Instead, "form" objections refer to a *category* of objections, which includes objections to "leading questions, lack of foundation, assuming facts not in evidence, mischaracterization or misleading question, non-responsive answer, lack of personal knowledge, testimony by counsel, speculation, asked and answered, argumentative question, and witness' answers that were beyond the scope of the question." *NGM Ins. Co. v. Walker Const. & Dev., LLC*, No. 1:11-CV-146, 2012 WL 6553272, at *2 (E.D. Tenn. Dec. 13, 2012). At trial, when I asked Counsel to define what "form" objections entail, Counsel gave an even broader definition. Counsel first stated simply, "I know it when I hear it." Counsel then settled on the barely narrower definition that "form" objections include "anything that can be remedied at the time of the deposition so that you do not waive the objection if the deposition is used at a hearing or trial." Given that "form" may refer to any number of objections, saying "form" to challenge a leading question is as useful as saying "exception" to admit an excited utterance.

Yet, many lawyers—and courts for that matter—assume that uttering the word "form" is sufficient to state a valid objection. This assumption presumably comes from the terminology used in the Federal Rules. Rule 30(c)(2) governs deposition objections and provides in part:

> An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner.

The advisory committee notes clarify the types of objections that must be noted on a deposition record:

> While objections may, under the revised rule, be made during a deposition, they ordinarily should be limited to those that under Rule 32(d)(3) might be waived if not made at that time, *i.e.*, objections on grounds that might be immediately obviated, removed, or cured, *such as to the form of a question* or the responsiveness of an answer.

Fed. R. Civ. P. 30, advisory committee notes (1993 amendments) (emphasis added). These notes refer to Rule 32(d)(3), which provides that certain objections are waived if not made during a deposition:

> An objection to an error or irregularity at an oral examination is waived if:
>
> > (i) it relates to the manner of taking the deposition, the *form of a question* or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and
> >
> > (ii) it is not timely made during the deposition.

Fed. R. Civ. P. 32(d)(3)(B) (emphasis added). Together, these rules provide that any objection to the form of a question must be made on the record at a deposition, or that objection is waived.

But these rules do *not* endorse the notion that "form" is a freestanding objection. They simply describe categories of objections—like those to the form of a question—that must be noted during a deposition. Nothing about the text of Rules 30 or 32 suggests that a lawyer preserves the universe of "form" objections simply by objecting to "form." I agree with my colleague, Magistrate Judge Scoles, in his analysis of this issue:

> [Some] contend that the objection should be limited to the words "I object to the form of the question." The Rule, however, is not so restrictive. Rather, it simply provides that the objection must be "stated concisely in a nonargumentative and nonsuggestive manner." . . . [T]he general practice in Iowa permits an objector to state in a few words the manner in which the question is defective as to form (e.g., compound,

> vague as to time, misstates the record, etc.). This process alerts the questioner to the alleged defect, and affords an opportunity to cure the objection.

Rakes v. Life Investors Ins. Co. of Am., No. C06-0099, 2008 WL 429060, at *5 (N.D. Iowa Feb. 14, 2008); *see also Cincinnati Ins. Co. v. Serrano*, No. 11-2075-JAR, 2012 WL 28071, at *5 (D. Kan. Jan. 5, 2012) ("Although the [rules] talk about objections based on the 'form' of the question (or responsiveness of the answer), this does not mean that an objection may not briefly specify the nature of the form objection (e.g. 'compound,' 'leading,' 'assumes facts not in evidence')."). I would go further, however, and note that lawyers are *required*, not just permitted, to state the basis for their objections.

Moreover, "form" objections are inefficient and frustrate the goals underlying the Federal Rules. The Rules contemplate that objections should be concise and afford the examiner the opportunity to cure the objection. *See* Fed. R. Civ. P. 30(c)(2) (noting that "objection[s] must be stated concisely"); *id.*, advisory committee notes (1993 amendments) (noting that "[d]epositions frequently have been unduly prolonged . . . by lengthy objections and colloquy" and that objections "ordinarily should be limited to those . . . grounds that might be immediately obviated, removed, or cured, such as to the form of a question"). While unspecified "form" objections are certainly concise, they do nothing to alert the examiner to a question's alleged defect. Because they lack specificity, "form" objections do not allow the examiner to immediately cure the objection. Instead, the examiner must ask the objector to clarify, which takes *more* time and *increases* the amount of objection banter between the lawyers. Briefly stating the particular ground for the objection, on the other hand, is no less concise and allows the examiner to ask a remedial question without further clarification.

Additionally, it is difficult, if not impossible, for courts to judge the validity of unspecified "form" objections:

> [U]nless an objector states with some specificity the nature of his objection, rather than mimicking the general language of the rule, i.e., "objection to the form of the question," it is impossible to determine, based upon the transcript of the deposition itself, whether the objection was proper when made or merely frivolous.

Mayor & City Council of Baltimore v. Theiss, 729 A.2d 965, 976 (Md. 1999). When called upon to rule on an unspecified "form" objection, a judge either must be clairvoyant or must guess as to the objection's basis. Neither option is particularly realistic or satisfying. This is reason enough to require a specific objection.

Requiring lawyers to state the basis for their objections is not the same thing as requiring "speaking objections" in which lawyers amplify or argue the basis for their objections. For example, "Objection, hearsay" is a proper objection. By contrast, "Objection, the last assertion by Mr. Jones was an out-of-court statement by Ms. Day, said in the hotel room, that Mr. Jones allegedly heard, that he never testified to in a deposition, and that is now being offered for the truth of Ms. Day's statement" is an improper speaking objection. I have always required the former and barred the latter.

I recognize, however, that not all courts share my views regarding "form" objections. In fact, some courts explicitly *require* lawyers to state nothing more than unspecified "form" objections during depositions. *See Offshore Marine Contractors, Inc. v. Palm Energy Offshore, L.L.C.*, No. CIV.A. 10-4151, 2013 WL 1412197, at *4 (E.D. La. Apr. 8, 2013) ("The Court finds that the behavior of counsel for OMC does not warrant sanctions here. Indeed, most of the objections by OMC's counsel are simple form objections with no unwarranted, lengthy speaking objections."); *Serrano*, 2012 WL 28071, at *5 ("But such an objection [to a vague question] to avoid a suggestive speaking objection should be limited to an objection 'to form,' unless opposing counsel requests further clarification of the objection."); *Druck Corp. v. Macro Fund (U.S.) Ltd.*, No. 02 CIV.6164(RO)(DFE), 2005 WL 1949519, at *4 (S.D.N.Y. Aug. 12, 2005) ("Any

'objection as to form' must say only those four words, unless the questioner asks the objector to state a reason."); *Turner v. Glock, Inc.*, No. CIV.A. 1:02CV825, 2004 WL 5511620, at *1 (E.D. Tex. Mar. 29, 2004) ("All other objections to questions during an oral deposition must be limited to 'Objection, leading' and 'Objection, form.' These particular objections are waived if not stated as phrased above during the oral deposition."); *Auscape Int'l v. Nat'l Geographic Soc'y*, No. 02 CIV. 6441(LAK), 2002 WL 31014829, at *1 (S.D.N.Y. Sept. 6, 2002) ("Once counsel representing any party states, 'Objection' following a question, then all parties have preserved all possible objections to the form of the question unless the objector states a particular ground or grounds of objection, in which case that ground or those grounds alone are preserved."); *In re St. Jude Med., Inc.*, No. 1396, 2002 WL 1050311, at *5 (D. Minn. May 24, 2002) ("Objecting counsel shall say simply the word 'objection', and no more, to preserve all objections as to form.").[13] For the reasons discussed above, I think this approach makes little legal or practical sense.

But, because there is authority validating "form" objections, I do not impose sanctions based on the fact that Counsel used these objections while defending depositions. Counsel's "form" objections, however, amplified two other issues: witness coaching and excessive interruptions. As I discuss below, *those* aspects of Counsel's deposition conduct warrant sanctions. Thus, I impose sanctions related to Counsel's "form" objections only to the extent that those objections facilitated the coaching and interruptions. Although I do not impose sanctions based on Counsel's "form" objections

[13] The record contains no indication that Counsel knew of, or relied on, these, or similar cases when Counsel made "form" objections during depositions. Counsel did not claim to know of these cases, or similar lines of authority, at the time Counsel made the "form" objections, in Counsel's response to either of my show-cause orders, or at the sanctions hearing.

in this case, lawyers should consider themselves warned: Unspecified "form" objections are improper and will invite sanctions if lawyers choose to use them in the future.

2. Witness Coaching

While there appears to be disagreement about the validity of "form" objections, the law clearly prohibits a lawyer from coaching a witness during a deposition. Under Rule 30(c)(2), deposition "objection[s] must be stated concisely in a nonargumentative and nonsuggestive manner." *See also* Fed. R. Civ. P. 30, advisory committee notes (1993 amendments) ("Depositions frequently have been . . . unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond."). This clause mandates what should already be obvious—lawyers may not comment on questions in any way that might affect the witness's answer:

> The Federal Rules of Evidence contain no provision allowing lawyers to interrupt the trial testimony of a witness to make a statement. Such behavior should likewise be prohibited at depositions, since it tends to obstruct the taking of the witness's testimony. It should go without saying that lawyers are strictly prohibited from making any comments, either on or off the record, which might suggest or limit a witness's answer to an unobjectionable question.

Hall v. Clifton Precision, 150 F.R.D. 525, 530-31 (E.D. Pa. 1993); *see also Specht v. Google, Inc.*, 268 F.R.D. 596, 598 (N.D. Ill. 2010) ("Objections that are argumentative or that suggest an answer to a witness are called 'speaking objections' and are improper under Rule 30(c)(2).").

Despite the Federal Rules' prohibition on witness coaching, Counsel's repeated interjections frequently prompted witnesses to give particular, desired answers to the examiner's questions. This happened in a number of ways. To start, Counsel often made "clarification-inducing" objections—objections that prompted witnesses to request that the examiner clarify otherwise cogent questions. For example, Counsel regularly

objected that questions were "vague," called for "speculation," were "ambiguous," or were "hypothetical." These objections usually followed completely reasonable questions. But, after hearing these objections, the witness would usually ask for clarification, or even refuse to answer the question:

> Q. Is there—do you believe that there's—if there's any kind of a correlation that could be drawn from OAL environmental samples to the quality of the finished product?
>
> COUNSEL: Objection; vague and ambiguous.
>
> A. That would be speculation.
>
> Q. Well, if there were high numbers of OAL, Eb samples in the factory, wouldn't that be a cause for concern about the microbiological quality of the finished product?
>
> COUNSEL: Object to the form of the question. It's a hypothetical; lacks facts.
>
> A. Yeah, those are hypotheticals.
>
> . . .
>
> Q. Would that be a concern of yours?
>
> COUNSEL: Same objection.
>
> A. Not going to answer.
>
> Q. You're not going to answer?
>
> A. Yeah, I mean, it's speculation. It would be guessing.
>
> COUNSEL: You don't have to guess.

(Bottock Depo. 106:24 to 108:2). While it is impossible to know for certain what a witness would have said absent Counsel's objections, I find it inconceivable that the witnesses deposed in this case would so regularly request clarification were they not tipped-off by Counsel's objections. *See McDonough v. Keniston*, 188 F.R.D. 22, 24 (D.N.H. 1998) ("The effectiveness of [witness] coaching is clearly demonstrated when

the [witness] subsequently adopts his lawyer's coaching and complains of the broadness of the question . . . ."); *Cordova v. United States*, No. CIV.05 563 JB/LFG, 2006 WL 4109659, at *3 (D.N.M. July 30, 2006) (awarding sanctions based on a lawyer's deposition coaching because "it became impossible to know if [a witness's] answers emanated from her own line of reasoning or whether she adopted [the] lawyer's reasoning from listening to his objections").

These same objections spilled over into the trial. The following colloquy occurred during the plaintiff's cross-examination of Counsel's expert:

> Q. . . . Isn't [J.M.K.'s mother] saying that every time she used a bottle she boiled it first?
>
> COUNSEL: Your Honor, I would just object that in the—it's not clear from the context of this one page or several pages what it is they're talking about in terms of which feedings, if he can point it out to him.
>
> THE COURT: And so what is the nature of that objection? I haven't ever heard that one before.
>
> COUNSEL: It's confusing.
>
> THE COURT: Well, it may be confusing to you, but he didn't ask the question to you. He asked it of the witness.
>
> COUNSEL: Okay. Might be confusing to the witness.
>
> THE COURT: Yeah, that's suggesting an answer which is exactly the problem I had with your depositions.
>
> COUNSEL: I would just object to the form of the question then, Your Honor.
>
> THE COURT: That's not a proper objection, so it's overruled.
>
> A. As I read this, I can't be certain as to what exactly she's referring to at what point here.

Once again, after Counsel's objection suggested that the question "might" confuse the witness, the witness replied that he "[couldn't] be certain" as to what was being asked.

But perhaps the most egregious examples of clarification-inducing objections arose when Counsel defended the deposition of Sharon Bottock. During that deposition, Counsel lodged no fewer than 65 "form" objections, many of which did not specify any particular basis. Immediately after most of these "form" objections, the witness gave the seemingly Pavlovian response, "Rephrase." At times, the transcript feels like a tag-team match, with Counsel and witness delivering the one-two punch of "objection"–"rephrase":

> Q. . . . I'm wondering if you could perhaps in a . . . little bit less technical language explain to me what they're talking about in that portion of the exhibit.
>
> COUNSEL: Object to the form of the question.
>
> A. So rephrase.
>
> Q. Could you tell me what they're saying here?
>
> COUNSEL: Same objection.
>
> A. Rephrase it again.
>
> . . .
>
> Q. So it—that's what they're talking about, the two types, the finished product and the overs? Does it separate those two things?
>
> A. Yes.
>
> Q. What's an "over"?
>
> COUNSEL: Object to the form. He doesn't want you to characterize it. He wants to know what's it made out of, I think.[14]

[14] Here, Counsel reinterprets the question for the witness—an issue that I address below.

Q. I mean, is it too big?

COUNSEL: Object to the form of the question.

A. Rephrase.

(Bottock Depo. 58:20 to 59:25). Note the witness's first answer in this colloquy: *So* rephrase. The witness's language makes clear that she is requesting—actually, *commanding*—the examiner to rephrase based on Counsel's objection.

These clarification-inducing objections are improper. Unless a question is truly so vague or ambiguous that the defending lawyer cannot possibly discern its subject matter, the defending lawyer may not suggest to the witness that the lawyer deems the question to be unclear. Lawyers may not object simply because *they* find a question to be vague, nor may they assume that the witness will not understand the question. The *witness*—not the lawyer—gets to decide whether he or she understands a particular question:

> Only the witness knows whether she understands a question, and the witness has a duty to request clarification if needed. This duty is traditionally explained to the witness by the questioner before the deposition. If defending counsel feels that an answer evidences a failure to understand a question, this may be remedied on cross-examination.

Serrano, 2012 WL 28071, at *5; *see also Hall*, 150 F.R.D. at 528-29 ("If the witness does not understand the question, or needs some language further defined or some documents further explained, the witness can ask the deposing lawyer to clarify or further explain the question. After all, the lawyer who asked the question is in a better position to explain the question than is the witness's own lawyer." (footnote omitted)); Peter M. Panken & Mirande Valbrune, *Enforcing the Prohibitions Against Coaching Deposition Witnesses*, Prac. Litig., Sept. 2006, at 15, 16 ("It is improper for an attorney to interpret that the witness does not understand a question because the lawyer doesn't understand a

question. And the lawyer certainly shouldn't suggest a response. If the witness needs clarification, the witness may ask the deposing lawyer for clarification. A lawyer's purported lack of understanding is not a proper reason to interrupt a deposition.").

Counsel's clarification-inducing objections are reminiscent of the improper objections at issue in *Phillips v. Manufacturers Hanover Trust Co.*, No. 92 CIV. 8527 (KTD), 1994 WL 116078 (S.D.N.Y. Mar. 29, 1994). In *Phillips*, a lawyer

> objected or otherwise interjected during [the examiner's] questioning of the deponent at least 49 times though the deposition lasted only an hour and a half. Indeed, approximately 60 percent of the pages of the transcript contain such interruptions. Many of these were objections as to form, which are waived if not made at the deposition, Fed. R. Civ. P. 32(d)(3)(B), but on numerous occasions [the lawyer's] objections appeared to have no basis. . . . Moreover, after 21 of [the lawyer's] objections as to form, the deponent asked for clarification or claimed he did not understand the question. . . . [The lawyer] objected as to form, and the deponent then stated he did not understand the question, subsequently asking that it be narrowed.

Id. at *3. In considering whether to impose sanctions, the court described the lawyer's conduct as "inappropriate" and "obnoxious." *Id.* The court also noted that the lawyer's conduct frustrated the deposition:

> Such interplay clearly did hamper the free flow of the deposition. Rather than answer [the examiner's] questions to the best of his ability, the deponent hesitated, asking for clarification of apparently unambiguous questions. . . . In addition, the deponent asked for such clarifications almost exclusively after [the lawyer] objected or interrupted in some fashion.

Id. Finally, the court recognized that the lawyer's conduct violated Rule 30, but chose not to impose sanctions because, at the time, Rule 30 was newly amended and because

the examiner was able to finish the deposition. *Id.* at *4. The court warned, however, that "a repeat performance [would] result in sanctions." *Id.*

Like the lawyer in *Phillips*, Counsel's endless "vague" and "form" objections (and their variants described above) frustrated the free flow of the depositions Counsel defended. They frequently induced witnesses to request clarification to otherwise unambiguous questions. Counsel's "form" objections also emboldened witnesses to quibble about the legal basis for certain questions—*e.g.*, "That would be speculation"—and to stonewall the examiner—*e.g.*, "Not going to answer." In short, these objections were suggestive and amounted to witness coaching, thereby violating Rule 30.

But Counsel's clarification-inducing objections are only part of the problem. In a related tactic, Counsel frequently concluded objections by telling the witness, "You can answer if you know" or something similar. Predictably, after receiving this instruction, witnesses would often claim to be unable to answer the question:

> Q. Are these the ingredients that are added after preparation or after pasteurization?
>
> COUNSEL: If you know. Don't guess.
>
> A. If you could rephrase the question. There's no ingredients on 28.
>
> COUNSEL: So you can't answer the question.

(Bottock Depo. 47:12-18).

> Q. If it's high enough to kill bacteria, why does Abbott prior to that go through a process of pasteurization?
>
> COUNSEL: If you know, and you're not a production person so don't feel like you have to guess.
>
> A. I don't know.

(Bottock Depo. 48:12-17).

> Q. Does it describe the heat treatment that you referred to a few moments ago, the heat treatment that occurs in the dryer phase?
>
> . . .
>
> COUNSEL: Okay. Do you know his question? He's asking you if this is what you're describing.
>
> A. Yeah, I don't know.

(Bottock Depo. 57:8-21).

> Q. . . . Is there any particular reason that that language is stated with respect to powdered infant formula?
>
> COUNSEL: If you know. Don't—if you know.
>
> A. No, I—no, not to my knowledge.
>
> COUNSEL: If you know. I mean, do you know or not know?
>
> A. I don't know.

(Barrett-Reis Depo. 49:10-18). These responses are unsurprising. When a lawyer tells a witness to answer "if you know," it not-so-subtly suggests that the witness may not know the answer, inviting the witness to dodge or qualify an otherwise clear question. For this reason, "[i]nstructions to a witness that they may answer a question 'if they know' or 'if they understand the question' are raw, unmitigated coaching, and are never appropriate." *Serrano*, 2012 WL 28071, at *5; *see also Specht*, 268 F.R.D. at 599 ("Mr. Fleming egregiously violated Rule 30(c)(2) by instructing Mr. Murphy not to answer a question because his answer would be a 'guess.'"); *Oleson v. Kmart Corp.*, 175 F.R.D. 560, 567 (D. Kan. 1997) (noting that an attorney violated Rule 30 when he "interrupted [a] deposition in mid-question, objected to the assumption of facts by the witness, and advised the witness that he was not obligated to assume facts").

Lastly, Counsel often directly coached the witness to give a particular, substantive answer. This happened in a few ways. Sometimes Counsel reinterpreted or rephrased the examiner's questions:

> Q. To what extent do you have knowledge of the testing procedures that Abbott employs in raw materials or the environment, the plant environment or final product?
>
> A. Very limited knowledge, again, because that would be product development.
>
> COUNSEL: He's just asking you what do you have. Do you have any? If it's no, then just say "no."
>
> A. Okay.

(Barrett-Reis Depo. 20:16 to 21:2).

> Q. . . . Do you know when that occurs or does it occur on a regular basis?
>
> COUNSEL: Object to the form, regular basis. It says, "Once a year." He means the same time once a year presumably but—
>
> A. On an annual basis, the time may vary when we close the facility to fumigate.

(Bottock Depo. 34:5-11).

> Q. At any rate, you'll see that on both the first page of Exhibit 22 and the first page of Exhibit 23, there's a picture of the product, and both of them have the word "NeoSure" on the product. Would you be able to tell me what the difference between those two products is?
>
> . . .
>
> COUNSEL: Well, he said difference between the products. It lacks foundation that there's a difference between the products.
>
> Q. There may not be. I don't know. Can you tell me?

> COUNSEL: Well, the question is—I object to the form of the question. He's not asking you just about the label. He's asking you is there a difference in the product. So can you answer that?

(Barrett-Reis Depo. 29:2-20). Sometimes Counsel gave the witness additional information to consider in answering a question:

> Q. For that particular infant who is not premature, like in this case was a twin, do you believe that NeoSure is an appropriate version of powdered infant formula?
>
> COUNSEL: Object to the form. Lack of foundation in terms of what this baby—whether this baby was preterm or not. It's not in evidence in this deposition nor in the record anyplace. And I object to the form of the question as calling for speculation.
>
> Q. Go ahead.
>
> COUNSEL: You can answer.
>
> A. I can't answer it without more information.

(Barrett-Reis Depo. 99:7-19). Sometimes Counsel answered the examiner's question first, followed by the witness:

> Q. . . . Is that accurate or is there something that they, you know, just chose not to put—
>
> COUNSEL: If you know. She didn't write this.
>
> A. Yes, I didn't write this.

(Bottock Depo. 27:20-25)

> Q. Okay. The part that counsel just read, is that basically an accurate summary of the process?
>
> COUNSEL: In general.
>
> A. In general.

(Bottock Depo. 28:21-24).

> Q. . . . And then under "Follow-Up Test" for Eb it's essentially the same thing as E. sak negative; right?
>
> COUNSEL: It says zero.
>
> A. It says zero.
>
> Q. But which would—that would be the same type of finding if it said E. sak negative; right?
>
> COUNSEL: In other words, there's no Eb. There's no Eb; there's no—
>
> A. It's zero. There's no Eb.

(Bottock Depo. 114:14-24). Counsel even audibly disagreed with a witness's answer, prompting the witness to change her response to a question:

> Q. My question is, was that a test—do you know if that test was performed in Casa Grande or Columbus?
>
> A. I don't.
>
> COUNSEL: Yes, you do. Read it.
>
> A. Yes, the micro—the batch records show finished micro testing were acceptable for the batch in question.

(Bottock Depo. 86:9-15).

All of the objections described in this section violate Rule 30 by suggesting, in one way or another, how the witness should answer a question. More troublingly, these objections allowed Counsel to commandeer the depositions, influencing the testimony in ways not contemplated by the Federal Rules. Instead of allowing for a question-and-answer session between examiner and witness, Counsel acted as an intermediary, which frustrated the purpose of the deposition:

> The underlying purpose of a deposition is to find out what a witness saw, heard, or did—what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no

> proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness—not the lawyer—who is the witness.

Hall, 150 F.R.D. at 528 (footnote omitted); *see also Alexander v. F.B.I.*, 186 F.R.D. 21, 52-53 (D.D.C. 1998) (noting that "[i]t is highly inappropriate for counsel for the witness to provide the witness with responses to deposition questions by means of an objection" or to "rephrase or alter the question" asked of the witness); Panken & Valbrune, *supra*, at 16 ("[C]ounsel is not permitted to state on the record an interpretation of questions, because those interpretations are irrelevant and are often suggestive of a particularly desired answer.").

In response to my order to show cause, Counsel explains what motivated many of the objections that I perceive to be coaching:

> In many places during the depositions of Abbott witnesses . . . where it was clear that the plaintiff's counsel was on the wrong track factually . . . defense counsel attempted to steer him to the correct ground. When things got bogged down, hours in, defense counsel also attempted to speed up the process by helping to clarify or facilitate things, for which the plaintiff's counsel seemed appreciative.

(Docket no. 193, at 4-5) (footnote omitted). It is not for the defending lawyer to decide whether the examiner is on the "wrong track," nor is it the defending lawyer's prerogative to "steer [the examiner] to the correct ground." While lawyers are encouraged to be collegial and helpful to one another during depositions, Counsel's conduct, on balance, was neither. It defies common sense to suggest that Counsel's omnipresent commentary sped up the depositions in this case. Moreover, most of

Counsel's commentary during depositions were *objections*, not benign attempts to clarify. Because this commentary coached witnesses to give particular answers, I find that sanctions are appropriate.

3. Excessive Interruptions

Beyond the "form" objections and witness coaching, Counsel's interruptions while defending depositions were grossly excessive. Counsel's name appears at least 92 times in the transcript of the Barrett-Reis deposition (about once per page), and 381 times in the transcript of the Bottock deposition (approaching three times per page). Counsel's name appears with similar frequency in the other depositions that Counsel defended. And, as I noted earlier, nearly all of Counsel's objections and interruptions are unnecessary and unwarranted.

These excessive and unnecessary interruptions are an independent reason to impose sanctions. The notes accompanying Rule 30 provide that sanctions may be appropriate "when a deposition is unreasonably prolonged" and that "[t]he making of an excessive number of unnecessary objections may itself constitute sanctionable conduct . . . ." Fed. R. Civ. P. 30, advisory committee notes (1993 amendments); *see also Craig*, 384 F. App'x at 533 ("The notes also explain that an excessive number of unnecessary objections may constitute actionable conduct, though the objections be not argumentative or suggestive."). At least two courts in this circuit have imposed sanctions based, in part, on a lawyer's excessive and unnecessary objections during depositions. *See id.* (affirming a monetary sanction against a lawyer who made "a substantial number of argumentative objections together with suggestive objections" that "impeded, delayed, or frustrated [a] deposition"); *Van Pilsum v. Iowa State Univ. of Sci. & Tech.*, 152 F.R.D. 179, 181 (S.D. Iowa 1993) (sanctioning a lawyer who had "no justification for . . . monopoliz[ing] 20% of his client's deposition" and whose objections "were for the most part groundless, and were only disputatious grandstanding").

By interposing many unnecessary comments, clarifications, and objections, Counsel impeded, delayed, and frustrated the fair examination of witnesses during the depositions Counsel defended. Thus, sanctions are independently appropriate based on Counsel's excessive interruptions.

C. Appropriate Sanction

Based on Counsel's deposition conduct, I would be well within my discretion to impose substantial monetary sanctions on Counsel. But I am less interested in negatively affecting Counsel's pocketbook than I am in positively affecting Counsel's obstructive deposition practices. I am also interested in deterring others who might be inclined to comport themselves similarly to Counsel. The Federal Rules specifically acknowledge that one function of discovery sanctions should be deterrence. *See* Fed. R. Civ. P. 26, advisory committee notes (1983 amendments) ("Sanctions to deter discovery abuse would be more effective if they were diligently applied '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 in the absence of such a deterrent.'" (quoting *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976)). Deterrence is especially important given that so many litigators are *trained* to make obstructionist objections. For instance, at trial, when I challenged Counsel's use of "form" objections, Counsel responded, "Well, I'm sorry, Your Honor, but that was my training . . . ." While monetary sanctions are certainly warranted for Counsel's witness coaching and excessive interruptions, a more outside-the-box sanction[15] may better serve the goal of

[15] For examples of outside-the-box discovery sanctions, see the following cases: *St. Paul Reinsurance Co.*, 198 F.R.D. at 518 (imposing a write-a-bar-journal-article sanction); *R.E. Linder Steel Erection Co., Inc. v. U.S. Fire Ins. Co.*, 102 F.R.D. 39, 41 (D. Md. 1983) (imposing a $5.00-per-inturruption sanction); *Huggins v. Coatesville Area Sch. Dist.*, No. CIV.A. 07-4917, 2009 WL 2973044, at *4 (E.D. Pa. Sept. 16, 2009) (imposing a sit-down-and-share-a-meal-together sanction).

changing improper tactics that modern litigators are trained to use. *See* Matthew L. Jarvey, Note, *Boilerplate Discovery Objections: How They Are Used, Why They Are Wrong, and What We Can Do About Them*, 61 DRAKE L. REV. 913, 931-36 (2013) (discussing the importance of unorthodox sanctions in deterring discovery abuse).

In light of this goal, I impose the following sanction: Counsel must write and produce a training video in which Counsel, or another partner in Counsel's firm, appears and explains the holding and rationale of this opinion, and provides specific steps lawyers must take to comply with its rationale in future depositions in any federal and state court.[16] The video must specifically address the impropriety of unspecified "form" objections, witness coaching, and excessive interruptions. The lawyer appearing in the video may mention the few jurisdictions that actually require only unspecified "form" objections and may suggest that such objections are proper in only those jurisdictions. The lawyer in the video must state that the video is being produced and distributed pursuant to a federal court's sanction order regarding a partner in the firm, but the lawyer need not state the name of the partner, the case the sanctions arose under, or the court issuing this order. Upon completing the video, Counsel must file it with this court, under seal, for my review and approval. If and when I approve the video, Counsel must (1) notify certain lawyers at Counsel's firm about the video via e-mail and (2) provide those lawyers with access to the video. The lawyers who must receive this notice and access include each lawyer at Counsel's firm—including its branch offices worldwide—who engages in federal or state litigation or who works in any practice group in which at least two of the lawyers have filed an appearance in any state or federal case in the United States. After

[16] I am not the first judge to suggest a video-related sanction. In *Florida Bar v. Ratiner*, 46 So. 3d 35, 41 n.4 (Fla. 2010), the Florida Supreme Court noted that law students and members of the Florida bar could view footage of a videotaped deposition in which a later-suspended lawyer behaved unprofessionally toward his opposing counsel as part of a course on professionalism.

providing these lawyers with notice of and access to the video, Counsel must file in this court, under seal, (1) an affidavit certifying that Counsel complied with this order and received no assistance (other than technical help or help from the lawyer appearing in the video) in creating the video's content and (2) a copy of the e-mail notifying the appropriate lawyers in Counsel's firm about the video. The lawyer appearing in the video need not state during the video that he or she agrees with this opinion, or that Counsel was the lawyer whose deposition conduct prompted this sanction. Counsel need not make the video publicly available to anyone outside Counsel's firm. Failure to comply with this order within 90 days may result in additional sanctions.

To be clear, had Counsel made only a handful of improper objections or comments while taking depositions, I would not have raised these issues *sua sponte*. Depositions can be stressful and contentious, and lawyers are bound to make the occasional improper objection. But Counsel's improper objections, coaching, and interruptions went far beyond what judges should tolerate of any lawyer, let alone one as experienced and skilled as Counsel. Counsel's baseless interjections and obstructionist commentary were ubiquitous; they pervaded the depositions in this case and even spilled over into the trial. It is the repeated nature of Counsel's obstructionist deposition conduct that warrants sanctions here.

Finally, I note that, despite Counsel's deposition conduct, I was greatly impressed by how Counsel performed at trial. Unlike the "litigators" I discussed earlier, Counsel was extremely well-prepared, had clearly mastered the facts of this case, and did a great job of incorporating electronic evidence into Counsel's direct- and cross-examinations. Those aspects of Counsel's noteworthy trial skills, expertise, and preparation are laudable, but they do not excuse Counsel's pretrial conduct.

If Counsel appeals this sanctions order I will, *sua sponte*, automatically stay it pending the appeal.

III. CONCLUSION

For the reasons stated in this opinion, I find that sanctions are appropriate in response to Counsel's improper deposition conduct, which impeded, delayed, and frustrated the fair examination of witnesses in the depositions related to this case that Counsel defended. I therefore impose the sanction described above.

IT IS SO ORDERED.

DATED this 28th day of July, 2014.

Mark W. Bennett

MARK W. BENNETT
U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA

Example 1

This is an example of Respondent leaking the underlying liability settlement information to the Underinsured Motorist Arbitration panel. Apparently Respondent was worried the Arbitration panel would think the Plaintiff received $25,000 or more from the underlying liability policy limit settlement and took steps to assure the panel was aware underlying liability settlement amounts were only $10,000 by recording this information into the deposition transcript. Respondent then submitted the entire deposition to the bindng arbitration panel(fact finders) prior to the arbitration date in spite of Plaintiff's position and Respondent's apparent agreement during the deposition.

As a courtesy Plaintiff's counsel provided Defense Counsel the underlying liability settlement amount off the record. Respondent thereafter spoke the amount on the record incorrectly stating Plaintiff was agreeing. Plaintiff expressed concern for recording the amount into the deposition. Even though Respondent advised in the deposition transcript he would not submit the entire deposition transcript to the panel, he nevertheless improperly provided the panel the entire deposition transcript. Further, Plaintiff sought to prevent providing the entire deposition testimony because much was not admissible evidence or properly before a fact finder to begin with.

record?

MR. We can go off the record. I don't care.

(Discussion held off the record.)

MR. [illegible]: Okay. You don't mind me putting on the record that she got ten grand? It is what it is. It's not a big point.

MS. My problem is, are you going to be giving this deposition to the arbitrator?

MR. Well, no. No, I'm not going to give this information to the arbitrator.

MS. So I've had defense attorneys -- I don't know where they started doing this -- sending the entire deposition to an arbitration panel and then the arbitration panel reads it all.

MR. No, I agree with you that we should not inform the arbitrator of credits and offsets. We just treat it like a jury trial. We're talking about -- this is a useful conversation to have on the record -- this is like a jury trial. You get a number, and then apply credits and offsets. If we disagree, you take it back to the same panel.

MS. [illegible]: And I agree, so the deposition will not be sent.

MR. [illegible]: Yes.

Attorneys at Law

December 19, 2018

Via UPS Ground

Mediation & Arbitration

Portland, OR 97205

Keizer OR 97303

Tucson AZ 85742

Re: Claimant : N
Date of Loss :
Arbitration : **01/15/2019 at 9:00 a.m.**

Dear Mr.

Enclosed you will find Respondent's Prehearing Statement of Proof, together with exhibits for your consideration.

We look forward to arbitrating this matter before you on January 15, 2019. If you have any questions, please do not hesitate to call.

Very truly yours,

Enclosure

104/5631

3.	Reed Wilson, M.D. Medical Evaluations of Oregon-Washington 2525 NW Lovejoy, Ste. 301, Portland, OR 97210	Dr. Wilson will testify live and by way of report and declarations regarding his findings from his review of Claimant's medical records and his examination of her.
4.	Edward Grossenbacher, M.D. Medical Evaluations of Oregon-Washington 2525 NW Lovejoy. Ste. 301, Portland, OR 97210	Dr. Grossenbacher will by deposition and way of report and declarations regarding his findings from his review of Claimant's medical records and his examination of her.

Respondent reserves the right to call any other witnesses who may be identified in Claimant's prehearing statement of proof.

B. EXHIBITS AND DOCUMENTARY EVIDENCE:

Copies of the following documents have been provided pursuant to UTCR 13.170.

1. Photographs of the vehicle Claimant was a passenger in at the time of the accident, Bates Nos. DEF000001-19;

2. Salem Police Department Collision Report, Bates Nos. DEF000020-21;

3. Medical records from Salem Hospital, dated 08/09/2007-06/18/2012, Bates Nos. DEF000022-105;

4. Medical records from Willamette Family Medical Center, dated 08/10/2007-08/11/2014, Bates Nos. DEF000106-147;

5. Diagnostic reports, dated 08/09/2007-01/23/2014, Bates Nos. DEF000148-157;

6. Deposition transcript with exhibit of T taken on 03/08/2018, Bates Nos. DEF000158-254; and

///

///

///

Example 2

The injured party requested $10,000 to settle. Defendant's insurer offered $2,280. A complaint was filed requesting $10,000. Plaintiff had 12 chiropractic visits plus 3 medical visits, MRI and a specialist appointment. Plaintiff was a passenger. Liability was admitted. Plaintiff pled back, neck and shoulder injuries with some additional headaches and prior headaches. Defendant took a 4 ½ hour deposition and inquired on embarrassing subjects such as rectal pain, panic attacks and cleavage.

IN THE CIRCUIT COURT FOR THE STATE OF OREGON

COUNTY OF MARION

Plaintiff,	)	
vs.	)	Case No.
Defendant.	)	

THE ORAL DEPOSITION OF

was taken on the of , 2018, at the Law Offices of , Salem, Oregon, between the hours of 1:27 p.m. and 6:07 p.m., pursuant to Notice and Oregon Rules of Civil Procedure.

Reported by:

Cheryl L. Haase, RPR
28290 Kingsbury Rd.
Lebanon, Oregon 97355
(541)409-2190 cheryl.haase@gmail.com

... Yes, but we could be here for hours talking about things that have nothing to do --

-- with the injuries that she's claimed.

Q. Ma'am, do you have rectal pain as an ongoing problem?

A. Not anymore.

Q. How long ago did it cease being a problem for you?

A. I don't remember what -- it was -- I know for sure it was after 2010 for sure because I had a hemorrhoidectomy.

Q. Oh, you had a procedure?

A. Yes.

Q. I didn't see it in your records. When did you have the procedure?

A. I don't know when. I just know it was I think maybe a year after my third son. I had hemorrhoids really bad and they were miserable, and they ended up getting -- cutting them off.

Q. Outstanding.

A. I do remember the driver that hit us, once we came together, she said I believe -- yes. She said, I'm sorry. It's my fault. And then she -- that's when the other lady interrupted her, and then she blew off the other lady. And then my driver and then your driver discussed exchanging information. And then --

That's what I remember.

Q. Okay.

A. So --

Q. I can't help but notice, because of what you're wearing, you have tattoos right in the cleavage area of your breast. I can see them. They're clearly visible to me?

A. Yeah.

Q. Did that hurt? Was that painful to have those tattoos?

A. It hurt a little bit, yeah.

Q. Okay. If you don't remember, it's fine.

I'm not going to ask you to expose anything other than you're naturally exposing here, but what tattoos do you have on your upper part of your breast there? What is that?

What are your tattoos? What does it say?

A. Says Br

Q.

A. My husband's name.

Q. That's just tattooed across your chest?

A. It's tattooed with two paw prints.

Q. Okay. I'm not going to ask you to explain anything other than what you're just showing because of the clothing you're wearing. I'll move on.

Example 3

This involved a small case with request for settlement of $10,000 or less. Medical bills totaled about $3,500. The only offer was $1,800. During depositions Plaintiff's counsel learned Defendant was in the course and scope of her employment at the time of the incident. Plaintiff's counsel was still well within the statute of limitations and sought to add the employer. She sent an email asking opposing counsel to stipulate to filing an amended complaint to add the employer as an additional defendant under the theory of respondeat superior.

In response, the attorney attacked the Plaintiff attorney's intelligence and ability in order to obtain an advantage and/or redirect the case.

From:
Sent: Thursday, November 9, 2017 4:25 PM
To:
Subject:

TimeMattersID: M4801A841AAEF535
TM Contact:
TM Matter No: 160420
TM Matter Reference:

S-

I will take it under advisement and give it the weight it deserves. WOW!!!!

Attorney at Law

Salem, OR 97302; Phone:

From:
Sent: Thursday, November 9, 2017 4:19 PM
To:
Subject: RE:

K am not stipulating. You are over-litigating this case. I am not trying to impolite, but honestly... what am I missing here?
Please consider reaching out to the Oregon Trial Lawyers Association listserv and roundtable the value of this case.

Attorney at Law

Example 4

The minor deponent was an injured teenager. The deposing attorney erroneously accused the deponent's attorney of failing to produce medical records and other discovery during the deposition over and over. Faced with an extremely heated and hostile series of questions and comments over an extended period of time, the minor deponent's attorney stopped the deposition and filed for a protective order. The deponent's attorney also sent proof that the discovery had been produced timely plus resent every document again. Thereafter, without apology, the erroneous attorney subsequently admitted he "found" the deponents discovery responses.

The adverse attorney subpoenaed the teen's confidential school records and deponent's attorney requested a courtesy copy. This adverse attorney responded by attacking the other attorney's teen client's reputation and the attorney for representing him.

From:
Sent: Friday, August 15, 2014 7:15 PM
To:
Subject: RE: 26673532 0101

K

I got them in today's mail. The service I retain to obtain the records is supposed to send you a copy of whatever it obtained. If you don't get it by Tuesday, let my assistant know and she will follow up.

I'll leave it up to the judge to decide whether the records would come into evidence. I'm confident that they will. But the strength of your client's case is not why I wrote whether you still want to represent him. He is a bad guy. It was clear to me when he tried to intimidate me during his deposition and it will be clear to a jury. Review the records – it shows he is a racist, misogynist bully. Why represent him?

Have a good weekend.

L

From:
Sent: Friday, August 15, 2014 7:04 PM
To:
Subject: RE: 6673532 0101

L

Have you sent it to me yet? I haven't received it and I can't think of much in it that would be relevant.

K

Sent from my T-Mobile 4G LTE Device

-------- Original message --------
From:
Date:08/15/2014 4:05 PM (GMT-
To:
Cc:
Subject: 6673532 0101

K

Did you read your client's school file yet? Do you still want to represent this guy???

Portland, Oregon 97201