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Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation

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RAMBO DEPOSITIONS:
CONTROLLING AN ETHICAL CANCER IN CIVIL
LITIGATION

*Jean M. Cary**

CONTENTS

I.	INTRODUCTION	562
II.	EGREGIOUS EXAMPLES OF DEPOSITION CONDUCT	565
III.	THE GROWTH OF THE RAMBO CANCER AT DEPOSITIONS— HURTS EVERY CONSTITUENCY IN THE LEGAL SYSTEM	572
	<i>A. Courts</i>	572
	<i>B. Lawyers</i>	573
	<i>C. Parties</i>	576
	<i>D. The Public</i>	578
IV.	EXISTING REMEDIES AND THEIR EFFECTIVENESS IN DETECTING INCIVILITY IN DEPOSITIONS	579
	<i>A. Limitations on the Number and Length of Depositions</i>	581
	<i>B. Definitions of Appropriate Objections and Instructions Not to Answer</i>	582
	<i>C. Protective Orders</i>	584
	<i>D. Pretrial Orders, Standing Orders, and Local Rules</i>	586
	<i>E. Sanctions</i>	588

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1. Rule 30	588
2. Rule 37	588
3. 28 U.S.C. § 1927	591
4. Courts' Inherent Judicial Power to Regulate Conduct	592
V. REMEDIES	593
A. <i>Swift Justice</i>	593
B. <i>Lawyers Should Report Rambo Behavior to the Courts and Bar Disciplinary Committees</i>	595
C. <i>More Active Local Bar Associations</i>	597
D. <i>Professionalism Committees Should Be Established in Law Firms to Monitor Activities of the Firm</i>	598
E. <i>Continuing Legal Education Programs Should Train Lawyers in How to Effectively Control a Rambo Opponent</i>	599
F. <i>Rambo Behavior Should Be Discussed and Condemned in Law Schools</i>	600
VI. CONCLUSION	601
APPENDIX	602

I. INTRODUCTION

In the movies, a sweat-drenched, disheveled John Rambo¹ fights through clinging jungle vines with guns blazing as he mows down his enemies. In law offices across the country, the John Rambos of the legal world are invading deposition rooms, yelling obscenities at opposing counsel, and attempting to mow down their "enemies" with nasty verbal invectives. Unlike the silver screen stars, the John Rambos of the legal world are not heroes. Instead, they are ruining the practice of law for those engaged in the legitimate process of civil discovery.

These "Rambo lawyers" justify their rude, profane, and intimidating

1. See DAVID MORRELL, *FIRST BLOOD* (1972). One of the ironies of the term "Rambo" as applied to rude litigators is that even though the original John Rambo was a trained killer, he was slow to anger and did not kill until pushed. Those he ultimately defeated had drawn "first blood," giving him no choice but to respond. If Rambo lawyers did the same, i.e., responded in a "Rambo-like" way only when "pushed," they might be respected instead of condemned.

language by claiming that their clients expect them to be the toughest, most obnoxious lawyers in the deposition room. They argue that high stakes require “hard-ball” tactics, including intimidation of the opposing attorney. They declare that their job is to seize control of the deposition, and the earlier they can assert their dominance in the deposition room, the more information they can hide from their opponent.²

In the movies, John Rambo acts outside the law to achieve justice. The heroic results he achieves justify the illegal acts he employs. In the deposition room, the John Rambos of the litigation world act outside the rules of “civil” discovery and claim that the ethical proscription to “zealously represent” their clients justifies their behavior.³ They are wrong. Their tactics in the deposition room are indefensible and must be stopped.

The control of this growing cancer in the civil litigation system is important but frustrating. Before the bench, practicing bar, and academic world can control Rambo in the deposition room, we must arrive at a definition of unacceptable behavior in depositions. Included in this Article are transcripts of depositions that illustrate extremely rude comments by attorneys to their legal opponents. From these cases, this

2. For a definition of Rambo litigation tactics, see Gideon Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 LOY. L.A. L. REV. 81, 81 n.2 (1991) (equating Rambo litigation tactics with “scorched earth,” “take no prisoners,” and “Godzilla litigation”). See also *The Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 146 F.R.D. 205, 216 (1992) [hereinafter *Judicial Conference*] (Judge Nies, during his discussion of “The Rambo litigator,” defined a Rambo lawyer as an “uncivil lawyer.”). One commentator has described the six traits of a Rambo litigator as follows:

- [1.] A mindset that litigation is war and that describes trial practice in military terms.
- [2.] A conviction that it is invariably in your interest to make life miserable for your opponent.
- [3.] A disdain for common courtesies and civility, assuming that they ill-befit the true warrior.
- [4.] A wondrous facility for manipulating facts and engaging in revisionist history.
- [5.] A hair-trigger willingness to fire off unnecessary motions and to use discovery for intimidation rather than fact-finding.
- [6.] An urge to put the trial lawyer on center stage rather than the client or his cause.

Robert N. Saylor, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A. J., Mar. 1, 1988, at 79.

3. There is a tension in the Model Code of Professional Responsibility between an attorney's duty to zealously represent his clients and a duty to prevent any ill feeling that may exist between the clients from carrying over to the relationship between the opposing attorneys. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1, 7-37 (1981). “In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude and demeanor towards opposing lawyers.” *Id.* EC 7-37.

Article proposes a point of unity at which certain behavior is unacceptable in any context.

Once we have a consensus that certain behavior is unacceptable, we can approach the harder question for the practicing bar, the courts, and the law schools—how to stop the cruel name-calling and personal attacks by attorneys toward each other without resorting to blanket orders and rules that interfere with an attorney's ability to provide effective representation to his client.

The use of the extreme examples contained in this Article hopefully will set the stage for a bright-line distinction between what all can agree is acceptable and unacceptable behavior among attorneys in depositions. The ensuing danger from an analysis of these compelling examples is that courts may jump to the conclusion that the only way to control the behavior of an offending attorney is to prohibit all attorneys from taking certain actions at a deposition. This Article is intended to set the stage for a thoughtful discussion of how to control the egregious behavior of a few without severely restricting the discovery process for all.

The secondary goal of this Article is to persuade inexperienced attorneys that they do not have to endure the trial by fire fanned by the Rambo lawyers. While most lawyers condemn these Rambo tactics, and many courts and legal opponents have begun to develop effective responses, most litigating attorneys seem to believe that nothing can be done to control the John Rambos of the legal profession once they enter the deposition room.

This Article seeks to dispel the cynical belief that nothing can be done, by focusing on several examples of outrageous behavior among attorneys where courts have responded with severe sanctions. These cases demonstrate that courts can and do impose sanctions on outrageous behavior when asked.

The cases also show that the rules are already in place to control the behavior. The enactment of more rules to control a harmful, but relatively small proportion of the practicing bar is not necessary.⁴ What is needed is swifter enforcement of the existing rules, training of attorneys as to how to effectively handle Rambo opponents, and discussion among all members of the legal community centering on

4. "It's a rare thing to see Rambo tactics. The vast majority, overwhelming majority of lawyers practice professionally and competently in my courtroom." *Judicial Conference*, *supra* note 2, at 230 (comments of the Hon. Marvin E. Aspen, District Court Judge, United States District Court for the Northern District of Illinois, Chair of the Committee on Civility of the Seventh Federal Judicial Circuit); *see also infra* Part IV.

condemnation and elimination of the verbal attacks of other attorneys occurring out of the presence of judges in deposition rooms across the country.⁵

Part II of this Article presents the transcripts of three egregious examples of Rambo behavior occurring during depositions. Part III demonstrates how this Rambo behavior hurts every constituency of the legal system. Part IV describes the current remedies that are available to control Rambo behavior. Part V proposes six ways the bench, the bar, and the law school community can control the behavior without enacting new rules, codes of conduct, or orders that limit the behavior of all attorneys during depositions.

Rambo lawyers in depositions can and must be stopped. This can be accomplished if each of the affected constituencies (courts, lawyers, law schools, clients, and members of the public) drop their passivity and affirmatively act to control their unwitting acceptance of the Rambo cancer.

II. EGREGIOUS EXAMPLES OF DEPOSITION CONDUCT

Unfortunately, "Rambo lawyers" are not just lurking in the back rooms of state courts. They are asserting themselves in the plush offices of corporate law firms and in multi-party federal court cases. Their deposition tactics distract clients, lawyers, and courts from the purpose of civil discovery and instead embroil all concerned in needless and costly satellite litigation.

Three transcripts, gleaned from federal and state court decisions, illustrate recent "Rambo tactics" employed in the deposition room and the severe judicial response to the unprofessional behavior.

In the first case, *Paramount Communications, Inc. v. QVC Network, Inc.*,⁶ Mr. Johnston, Delaware counsel for the defendant, QVC, arranged to take a deposition of a witness, J. Hugh Liedtke, in Texas. Joseph D. Jamail⁷ appeared on behalf of Mr. Liedtke at the Texas deposition. Mr. Jamail did not make a formal appearance in the Delaware proceeding but

5. See *infra* Part V.

6. 637 A.2d 34 (Del. 1994).

7. Joe Jamail is best known for winning a \$10.53 billion jury verdict in 1987 on behalf of his client, Pennzoil Company, against Texaco, Inc. L. Hugh Liedtke, whom he represented at the deposition in *Paramount Communications, Inc.*, was also chairman of the board of directors of Pennzoil Company. See Benjamin Weiser, *Are Too! Am Not! Are Too! Am Not!: Judges Try to Impose a Civil Tone as Depositions Get Increasingly Down and Dirty*, WASH. POST, Mar. 10, 1994, at B10.

attended the deposition as private counsel for the deponent.⁸ The following exchange occurred during Mr. Liedtke's deposition:

A. [Mr. Liedtke:] I vaguely recall [Mr. Oresman's letter]. . . . I think I did read it, probably.

. . . .

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

MR. JAMAIL: Don't answer that.

How would he know what was going on in Mr. Oresman's mind?

Don't answer it.

Go on to your next question.

MR. JOHNSTON: No, Joe—

MR. JAMAIL: He's not going to answer that. Certify it. I'm going to shut it down if you don't go to your next question.

MR. JOHNSTON: No, Joe, Joe—

MR. JAMAIL: Don't "Joe" me, asshole. You can ask some questions, but get off of that. I'm tired of you. You could gag a maggot off a meat wagon. Now, we've helped you every way we can.

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

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

MR. JOHNSTON: We will go on to the next question.

MR. JAMAIL: Do it now.

MR. JOHNSTON: We will go on to the next question. We're not trying to excite anyone.

MR. JAMAIL: Come on. Quit talking. Ask the question. Nobody wants to socialize with you.

MR. JOHNSTON: I'm not trying to socialize. We'll go on to another question. We're continuing the deposition.

MR. JAMAIL: Well, go on and shut up.

MR. JOHNSTON: Are you finished?

MR. JAMAIL: Yeah, you—

MR. JOHNSTON: Are you finished?

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

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

MR. JOHNSTON: Are you finished?

8. *See id.*

MR. THOMAS: Come on, Mr. Johnston, move it.

MR. JOHNSTON: I don't need this kind of abuse.

MR. THOMAS: Then just ask the next question.

Q. (By Mr. Johnston) All right. To try to move forward, Mr. Liedtke, . . . I'll show you what's been marked as Liedtke 14 and it is a covering letter dated October 29 from Steven Cohen of Wachtell, Lipton, Rosen & Katz including QVC's Amendment Number 1 to its Schedule 14D-1, and my question—

A. No.

Q. —to you, sir, is whether you've seen that?

A. No. Look, I don't know what your intent in asking all these questions is, but, my God, I am not going to play boy lawyer.

Q. Mr. Liedtke—

A. Okay. Go ahead and ask your question.

Q. —I'm trying to move forward in this deposition that we are entitled to take. I'm trying to streamline it.

MR. JAMAIL: Come on with your next question. Don't even talk with this witness.

MR. JOHNSTON: I'm trying to move forward with it.

MR. JAMAIL: You understand me? Don't talk to this witness except by question. Did you hear me?

MR. JOHNSTON: I heard you fine.

MR. JAMAIL: You fee makers think you can come here and sit in somebody's office, get your meter running, get your full day's fee by asking stupid questions. Let's go with it.⁹

The Delaware Supreme Court was so outraged by the behavior of Mr. Jamail that it raised the issue of professionalism *sua sponte* in an addendum to a lengthy opinion on the merits of the case.¹⁰ The court characterized the behavior of Mr. Jamail as “extraordinarily rude, uncivil, and vulgar,”¹¹ and concluded that “[t]his kind of misconduct is not to be tolerated in any Delaware court proceeding, including depositions taken in other states in which witnesses appear represented by their own counsel.”¹² The court then gave Mr. Jamail thirty days to make a voluntary appearance to show cause why his conduct should not be a bar to any future appearance in a Delaware proceeding.¹³

9. *Paramount Communications, Inc.*, 637 A.2d at 53-54 (addendum to the opinion relating to the issue of professionalism in depositions) (alterations in original).

10. *See id.* at 52 n.23.

11. *Id.* at 53.

12. *Id.* at 56.

13. *See id.* Mr. Jamail did not respond to the Delaware Supreme Court. *See* Telephone Interview with Gail Laferty, Attorney, Delaware Supreme Court Clerk's Office (Sept. 5, 1995). He

Other courts have been similarly quick to stop the spreading cancer of Rambo tactics in depositions once they have been alerted to the problem. In *Principe v. Assay Partners*,¹⁴ Beth Rex, an associate in a law firm, was representing the fourth-party defendant in a deposition when Lawrence Clarke, another attorney at the deposition, made the following remarks to Ms. Rex in front of numerous attorneys, the witness, and the reporter:

"I don't have to talk to you, little lady";
"Tell that little mouse over there to pipe down";
"What do you know, young girl";
"Be quiet, little girl";
"Go away, little girl."¹⁵

Ms. Rex stated that these comments "were accompanied by disparaging gestures . . . dismissively flicking his fingers and waving a back hand at me."¹⁶ The court examined the transcript and the accompanying affidavit and concluded that the words used by Mr. Clarke "are a paradigm of rudeness, and condescend, disparage, and degrade a colleague upon the basis that she is female."¹⁷ The court condemned Mr. Clarke's behavior as unprofessional conduct:

Offensive or abusive language by counsel is not proper professional conduct. An attorney who exhibits a lack of civility, good manners and common courtesy tarnishes the image of the legal profession, and an attorney's "conduct . . . that projects offensive and invidious discriminatory distinctions . . . based on race . . . or gender . . . is especially offensive."¹⁸

Judge Diane A. Lebedeff found that Mr. Clarke's behavior was not confined to a single incident, but that the objectionable remarks and

was quoted in *The Wall Street Journal* as saying that he was not concerned about the ruling by the Delaware Supreme Court. See Wade Lambert, *Jamail's Vitriolic Talk in Delaware Leads to a 16-Page Court Rebuke*, WALL ST. J., Feb. 8, 1994, at B6. He referred to the judges as "bureaucrats in robes," and he speculated that the judge who wrote the opinion "thinks he is Emily Post." *Id.* Jamail also expressed no interest in appearing in Delaware cases. See *id.*

When *The Washington Post* writer, Benjamin Weiser, questioned Jamail about the Delaware ruling, Jamail responded, "The judges are confused by real-life advocacy They want to make lawyers dance to their tune of mediocrity I can only assume that they are frustrated in their jobs." Weiser, *supra* note 7, at B10.

14. 586 N.Y.S.2d 182 (Sup. Ct. 1992).

15. *Id.* at 184.

16. *Id.*

17. *Id.*

18. *Id.* (citations omitted).

conduct were repeated several times.¹⁹ The court decided that it did not “need to inquire whether the offensive remarks and conduct sprang from a misogynous or other maladapted point of view and acknowledge[d] that they could have stemmed from a tactical desire to make opposing counsel uncomfortable.”²⁰ The court complimented both Ms. Rex’s law firm and its corporate client for refusing to allow insulting behavior toward a woman associate during a deposition to remain a “dirty little secret.”²¹ Judge Lebedeff wrote:

It is clear that they prize Ms. Rex, who is, in fact, an able attorney whose vigorous prose and oral argument have been observed by this court during the conduct of this litigation. Seeking sanctions from this court is not a display of an inability to overlook obnoxious conduct, but an indication of a commitment to basic concepts of justice and respect for the mores of the profession of law. The movant has turned to the court to give force to a basic professional tenet.²²

The court then fined Mr. Clarke \$500 to be paid to the Clients’ Security Fund and \$500 to be paid to the movant’s attorney as a reasonable attorney’s fee.²³ The court further directed that these fines were to be paid by Mr. Clarke personally and not by his client.²⁴

In the third case in this series the federal district court, in *Castillo v. St. Paul Fire & Marine Insurance Co.*,²⁵ took swift steps to curb the plaintiff’s and his counsel’s behavior. Discovery had gotten off to a rocky start with the plaintiff’s first deposition, in which his counsel instructed him not to answer numerous questions.²⁶ Defense counsel sought answers to their unanswered questions through a motion to compel.²⁷ The court assessed fees and expenses of \$6,317.66 against the plaintiff and his counsel and ordered that the questions that had not been answered at the first deposition be answered forthwith.²⁸ At the second deposition, James Walker, another attorney from the same firm that

19. *See id.* at 186.

20. *Id.* at 187.

21. *Id.* at 185.

22. *Id.* at 186.

23. *See id.* at 190-91.

24. *See id.* at 189.

25. 828 F. Supp. 594 (C.D. Ill. 1992). For more information about the circumstances surrounding this case, see *Castillo v. St. Paul Fire & Marine Insurance Co.*, 938 F.2d 776 (7th Cir. 1991).

26. *See Castillo*, 828 F. Supp. at 596.

27. *See id.* at 596-97.

28. *See id.* at 597.

represented the plaintiff in the first deposition, appeared for the plaintiff.²⁹

Defense counsel had to abort this second deposition when the plaintiff's counsel instructed his client not to answer several questions that the court had ordered him to answer.³⁰ One of the defense attorneys suggested that the attorneys seek an immediate judicial ruling by calling the judge, a remedy proposed by the trial judge at the first court hearing on the motion to compel.³¹ When the defense counsel attempted to call the judge, the following colloquy occurred on the record:

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

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

MR. WALKER: You can write your threatening letters to me. But, you step outside this room and touch the telephone, and I'll take care of that in the way one does who has possessory rights.³²

After reviewing the record described above, the trial court dismissed the complaint with prejudice and found the plaintiff's counsel in civil contempt, which could be purged by paying the expenses and fees of the defense.³³ The court then referred plaintiff's counsel to a three-judge panel to determine the appropriate discipline.³⁴

The three-judge panel found that it had the "inherent power and responsibility to supervise the conduct of attorneys who are admitted to practice before it."³⁵ It then condemned Mr. Walker's failure to apologize and his attempt to justify his behavior by claiming that his conduct was consistent with the ordinary practice of other lawyers in the district:

Mr. Walker's knowing, deliberate, and willful disobedience of Judge Baker's order is discovery abuse of a genre never before seen by this Court. Mr. Walker's conduct is also the most egregious example of lawyer incivility that this Court has ever seen. Further, even if Mr. Walker's assessment of the general level of deposition practice were

29. *See id.*

30. *See id.*

31. *See id.*

32. *Id.*

33. *See id.*

34. *See id.* at 598.

35. *Id.*

accurate, which it is not, this would not excuse Mr. Walker's unprofessional conduct.³⁶

The three-judge panel then suspended Walker from the practice of law for one year.³⁷

The Rambo tactics employed by the attorneys in depositions in these three cases threw a monkey wrench into the civil discovery process and interfered with their opponents' right to obtain information. In two of these cases the lawyers victimized by these Rambo attorneys had to engage in needless satellite discovery to obtain information. Rambo lawyers who delay, distract, and eventually stop the gathering of information in depositions are part of the larger problem of abuse of the rules of civil discovery. These lawyers are perhaps the most important part of the problem because depositions are probably a lawyer's most effective discovery tool.

The above examples show three situations in which attorneys used name-calling and threats to intimidate their legal opponents. These Rambos attempted to gain a tactical advantage by demeaning their opponents. None of the above comments slipped out in the heat of battle, nor were they isolated. They were both intentional and strategic. In the first case, Joe Jamail intended to slow access to information by insulting the deposing attorney and attempting to throw him off his game plan.³⁸ In the second case, Lawrence Clarke made at least five different demeaning comments designed to anger and humiliate his opponent during the course of one deposition.³⁹ In the third case, Mr. Walker intentionally ignored a court order to provide information and threatened his opponent when he sought judicial relief.⁴⁰

Based on these cases and the cases described below, this Article proposes that the bench, the bar, and the academic community agree that name-calling, demeaning gestures, and personal threats are unacceptable in any context. They are particularly reprehensible when they are used in an attempt to obtain a strategic advantage in a deposition.

36. *Id.* at 600.

37. *See id.* at 604.

38. *See supra* text accompanying notes 6-13.

39. *See supra* text accompanying note 15.

40. *See supra* text accompanying notes 25-37.

III. THE GROWTH OF THE RAMBO CANCER AT DEPOSITIONS—HURTS EVERY CONSTITUENCY IN THE LEGAL SYSTEM

The John Rambos of the deposition room consume enormous amounts of time, energy, and money. Judges, lawyers, litigants, and the general public all pay the price of the obstreperous tactics used by these legal “warriors” during “civil” discovery.

A. Courts

Instead of devoting valuable judicial time to the resolution of meritorious issues, judges are wasting time controlling these legal bullies. Hearings on motions to compel must be scheduled, briefs must be read, arguments must be attended, and time consuming orders must be drafted in order to control the John Rambos of the deposition room.

Judges hate playing the role of the parent who must resolve petty disputes among attorneys in the deposition process.⁴¹ Some judges have become so annoyed with Rambo deposition tactics that they have ordered all future depositions in a particular case to take place at the courthouse so that they can promptly intervene to stop unruly behavior.⁴² Although an order to conduct depositions at the courthouse achieves results,⁴³ the implementing judge loses even more valuable time supervising a process that should not require judicial involvement.

Other judges have avoided the personal cost of daily supervision by appointing discovery masters to monitor future depositions.⁴⁴ In a

41. See Martha Middleton, *Judging Well: Controlling Rambo Litigators*, PROF. LAW., Aug. 1992, at 1; see also *Castillo v. St. Paul Fire & Marine Ins. Co.*, 938 F.2d 776, 780 (7th Cir. 1991) (“We find this unfortunate situation . . . professionally disagreeable . . . Hopefully we will be spared further cases of this nature which only thwart and disrupt our judicial processes. . .”).

42. See *Guerrero v. Board of Educ.*, No. C92-2971, 1994 U.S. Dist. LEXIS 9259, at *17-18 (N.D. Cal. July 5, 1994) (order imposing disciplinary action), *rev'd on other grounds*, No. 94-16415, 1995 U.S. App. LEXIS 34992 (9th Cir. Dec. 8, 1995).

43. See *id.* at *18. The court had to supervise several depositions by requiring that the depositions be conducted at the courthouse so that the court was available to resolve disputes. The court noted that “[d]uring these depositions, [it] never received a complaint of inappropriate conduct.” *Id.*

44. See *Van Pilsun v. Iowa State Univ. of Science & Tech.*, 152 F.R.D. 179 (S.D. Iowa 1993) (order imposing sanctions and granting protective order). The court stated:

The use of a discovery master is rare in this district. However, the acrimony which exists between these counsel does not serve their clients or the justice system. It necessitates the provision of day care for counsel who, like small children, cannot get along and require adult supervision. Although this is an added expense to the clients it will save time and money in the long run by the more efficient progress of discovery and

particular case, some have assigned magistrates to oversee future depositions.⁴⁵ Other judges have gone so far as to prohibit all off-the-record consultation between an attorney and his witness once the deposition has begun.⁴⁶

Regardless of the remedy they have chosen, judges are finding that Rambo tactics obstruct the search for truth that discovery should promote.

B. Lawyers

Over and over, the lawyers who have been victimized by the John Rambos of the deposition room complain that these few lawyers take the pleasure out of practicing law.⁴⁷ In his report to the Chief Judge of the United States Court of Appeals for the Seventh Circuit, Judge Marvin E. Aspen explained that the survey conducted among the lawyers and the

the elimination of time spent in motions to compel.

Id. at 181.

45. *See* R.W. Int'l Corp. v. Welch Foods, Inc., 133 F.R.D. 8, 10 (D.P.R. 1990), *rev'd*, 937 F.2d 11 (1st Cir. 1991); American Directory Serv. Agency, Inc. v. Beam, 131 F.R.D. 15, 16 (D.D.C. 1990) (order imposing sanctions).

46. *See* Johnson v. Wayne Manor Apartments, 152 F.R.D. 56, 58 (E.D. Pa. 1993) (order directing submission to depositions and payment of sanctions); Hall v. Clifton Precision, 150 F.R.D. 525, 531-32 (E.D. Pa. 1993) (order concerning conduct during depositions). For a thoughtful article on the negative consequences of blanket rules prohibiting discussions between attorneys and their witnesses during the course of a deposition, see David H. Taylor, *Rambo as Potted Plant: Local Rulemaking's Preemptive Strike Against Witness-Coaching During Depositions*, 40 VILL. L. REV. 1057 (1995).

47. *See Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 371, 388 (1991) [hereinafter *Interim Report*]. The Committee found that 94% of the lawyers who perceived a civility problem targeted discovery as the primary setting for uncivil conduct, *see id.* at 380, and concluded that depositions were one of the most uncivil phases of trial practice, *see id.* at 388. One commentator noted:

Dirty tricks are an unfortunate reality in the practice of law. We have all faced the aggravation and frustration generated by cases where the opposing lawyer relies on dirty tricks to gain an upper hand. And we have all wished that these "Rambo" lawyers could somehow be made to pay for their tricks.

Marsha B. Elser, *Making Them Pay for Dirty Tricks*, FAIRSHARE, May 1993, at 6.

Eugene A. Cook, Justice of the Supreme Court of Texas, has been outspoken against the tactics of Rambo litigators. "These Rambo litigators taint the heritage of the profession and wring the enjoyment and pleasure from the law practice, which should be exciting, challenging, and rewarding." Eugene A. Cook et al., *A Guide to the Texas Lawyer's Creed: A Mandate for Professionalism*, 10 REV. LITIG. 673, 674 (1991) [hereinafter Cook et al., *Mandate for Professionalism*] (footnote omitted). "The Rambo litigators commit three great sins: they take the fun out of practicing law, they make legal representation unaffordable for middle America, and they crowd our already congested dockets." Eugene A. Cook, *Professionalism and the Practice of Law*, 23 TEX. TECH L. REV. 955, 970 (1992) [hereinafter Cook, *Practice of Law*].

judiciary of the Seventh Circuit found “widespread dissatisfaction among judges and lawyers at the gradual changing of the practice of law from an occupation characterized by congenial professional relationships to one of abrasive confrontations.”⁴⁸ Personal attacks in a deposition room create painful job stress and frayed tempers. Victims of this verbal abuse dread entering the deposition room.

The Rambos of the deposition room often focus their tirades on the most vulnerable opponent—the new attorney. Like sharks circling at the smell of blood, the John Rambos of the deposition room appear to smell the inexperience and fear of these new attorneys. Instead of acting as mentors to the new attorney, or even as “worthy opponents,” Rambos take advantage of the new attorney with intimidating language and sarcastic insults.⁴⁹

Rambo lawyers appear to take particular delight in demeaning inexperienced young women attorneys.⁵⁰ Although there are certainly

48. *Interim Report*, *supra* note 47, at 375.

49. See DAVID M. MALONE & PETER T. HOFFMAN, *THE EFFECTIVE DEPOSITION: TECHNIQUES AND STRATEGIES THAT WORK* 192 (Nat'l Inst. for Trial Advocacy ed., 1993).

In *Unique Concepts, Inc. v. Brown*, 115 F.R.D. 292 (S.D.N.Y. 1987) (order imposing sanctions on plaintiffs' counsel), the defending attorney accused the examining attorney of being “an obnoxious little twit,” and “a very rude and impertinent young man” and instructed him to keep his mouth shut. *Id.* at 293. When the examining attorney cautioned the defending attorney that his conduct would result in a request to the court for sanctions, the defending attorney countered, “[i]f you want to go down to Judge Pollack and ask for sanctions because of that, go ahead. I would almost agree to make a contribution of cash to you if you would promise to use it to take a course in how to ask questions in a deposition.” *Id.*; see also *Stengel v. Kawasaki Heavy Indus.*, 116 F.R.D. 263, 267-68 (N.D. Tex. 1987) (granting discovery sanctions in favor of the plaintiff's attorney for the defendant attorneys' “unprofessional and insulting sidebar comments”).

50. See *Stengel*, 116 F.R.D. at 263; *Principe v. Assay Partners*, 586 N.Y.S.2d 182, 184 (Sup. Ct. 1992). In *Stengel*, there is a description of a hearing at which the female court reporter testified that when the plaintiff's counsel left the room for a short recess, two of the defense's counsel and deponent's attorney engaged in a conversation in which they made it plain that they were going to intentionally “jerk” the plaintiff's counsel around. The following examples of comments made toward the plaintiff's counsel during the remainder of the deposition illustrate the result of this agreement:

“[H]ow much can you tell us about what you did on October 2, 1984, Ma'am?” (This statement was obviously directed to counsel for the Plaintiff.) . . .

“Counsel, either you are not listening to the witness or you are trying to badger him I don't know which it is”

“[P]erhaps Ms. Stone could take her own deposition.”

“[W]ho was the unpleasant person that took this deposition.” . . .

“At the hearing before the Magistrate, will you continue to unleash a torrent of nasty names and vituperative accusations as you continue to do in the written comments with which you have interlard (sic) the file in this case with ad hominem until hell won't have it?” . . .

“[W]hy don't you take your own deposition, counsel.”

women who engage in Rambo tactics themselves,⁵¹ more women seem to fear being the victims of Rambo behavior. Inexperienced women attorneys are more likely to request suggestions in how to control the Rambos of the deposition room than their male counterparts. When questioned, these women often acknowledge that they have already encountered a bully who tried to take advantage of them at a deposition.⁵²

Rambo lawyers do not limit their attacks on their opponents to those who lack litigation experience. They have threatened opposing counsel with physical violence, denigrated their opponent's religious background, used gutter language in addressing their opponents, and accused opposing counsel of having mental problems.⁵³ They seem to know no limit in doing whatever they perceive will give them an advantage in the deposition room. Sometimes they attack using rudeness, profanity, and even physical gestures.⁵⁴ At other times, they hide behind a misapplication of the rules, directing witnesses not to answer questions even though an answer is clearly required, interrupting answers to stop the flow of information, and improperly clarifying questions or coaching the witness through speaking objections.⁵⁵

One of the unfortunate consequences of these tactics is the creation of a revenge motive in the opponent. After a strenuous round of attacks,

"[I]f you don't know how to produce evidence and ask a witness questions about something that is admissible form, either for impeachment or for some other purpose, then you can't blame Kawasaki for stonewalling to cover up your own inadequacies." . . . "Your (sic) not any more skillful in asking the question than the other lawyer was in asking the question." (He was speaking with reference to Hall's deposition in another lawsuit.)

Stengel, 116 F.R.D. at 267-68.

51. See *Guerrero v. Board of Educ.*, No. C92-2971, 1994 U.S. Dist. LEXIS 9259, at *33-43 (N.D. Cal. July 5, 1994) (order imposing disciplinary action), *rev'd on other grounds*, No. 94-16415, 1995 U.S. App. LEXIS 34992 (9th Cir. Dec. 8, 1995).

52. This conclusion is based on conversations with dozens of attorneys who have attended continuing legal education deposition programs sponsored by the National Institute for Trial Advocacy ("NITA") in New York; Washington, D.C.; Dallas; Chicago; Atlanta; Denver; Cleveland; and Fort Lauderdale.

According to Professor Andrew Schepard, "[i]t is the young women attorneys who are particularly worried about how to handle these Rambos. We have tried to respond to their requests for training by devoting an entire afternoon of our program to a workshop on how to control obstreperous opposing counsel during a deposition." Telephone Interview with Andrew Schepard, Director, Northeast Deposition Program, jointly sponsored by NITA and Hofstra University (Aug. 30, 1995).

53. See *infra* Appendix for a summary of relevant cases.

54. See *supra* Part II.

55. See *infra* Part IV.B.

the ethical lawyer, who has had to endure hours of abuse, may stoop to the same behavior. It is easy to understand his or her decision. He is angry. He has not been able to obtain properly discoverable information from the deponent because the opposing Rambo lawyer has inappropriately instructed his client not to answer. If the ethical lawyer is billing by the hour, he knows he will have to justify his bill to the client; and if he has charged his client a flat retainer, he may be losing money as the deposition drags on without the transfer of information. Within the confines of the deposition room, the Rambo tactics seem to be working; access to information has been blocked and the opposing lawyer is angry.⁵⁶

It is at this point that some lawyers begin firing back with their own invectives. William Schwarzer noted that “[l]awyers sometimes adopt abusive tactics in the hope of exhausting and discouraging an opponent or perhaps in self-defense against the abuse raining down on them.”⁵⁷ Justice Eugene A. Cook of the Supreme Court of Texas described how the verbal abuse breeds more abuse, in stating that “[a] Rambo attitude only evokes retaliation from other lawyers, making the problem even worse.”⁵⁸

Without a judge present to control the behavior of the initiating lawyer, the ethical lawyer may perceive the Rambo tactics as actually working and that no sanctions will result.⁵⁹ It is this cynicism that fosters the behavior that is so harmful to the lawyers involved.

C. Parties

In addition to harming the judiciary and the lawyers, the John Rambos of the deposition room also harm the parties. The incivility of one lawyer to another lawyer costs both money and time to all concerned.

If the attorney is charging the party by the hour, then the parties are paying for the additional time it takes the attorneys to resolve disputes

56. See Cook, *Practice of Law*, *supra* note 47, at 973 (describing hardball litigators who, “in a series of depositions that stretched out over 15 days, asked the opposing attorney to define ‘when,’ ‘where,’ ‘own,’ and ‘describe’”).

57. William W. Schwarzer, *Mistakes Lawyers Make in Discovery*, LITIG., Winter 1989, at 31, 32 (1989).

58. Cook, *Practice of Law*, *supra* note 47, at 971.

59. See Byron C. Keeling, *A Prescription for Healing the Crisis in Professionalism: Shifting the Burden of Enforcing Professional Standards of Conduct*, 25 TEX. TECH L. REV. 31, 36-37 (1993) (explaining that hardball litigation tactics often compel opposing attorneys to give up the fight and initiate settlement negotiations).

at the deposition. In addition, the party is usually paying for the extra transcript pages needed to cover the arguments and name-calling among counsel.

If the arguments cannot be resolved at the deposition, then the parties may pay attorney's fees for the court time required for motions to compel or motions for sanctions. If the court decides to enter sanctions, the parties may risk the imposition of costs or even the dismissal of their claims when sanctions are awarded against their attorneys.⁶⁰ Parties may also incur the costs of discovery masters to supervise future depositions⁶¹ and may have to pay for the retaking of depositions if the court orders a second deposition.⁶²

The parties who are deposed may find that they are also paying for their attorney's Rambo tactics with the loss of their own time. The defending attorney who has been a victim of Rambo tactics may stoop to using the same tactics when he deposes the other side.⁶³ These litigants may discover that they are spending many hours watching useless squabbles between counsel at depositions.

The parties who become victims of this practice may well settle to avoid the needless cost and energy of fighting the opposing attorney. Byron Keeling described this settlement process as follows:

Hardball litigators gamble that groundless motions and abusive discovery tactics will compel their opponents to give up the fight. More often than not, the gamble works. Procedural tactics shackle opposing counsel with reams of paperwork, producing exorbitant litigation costs. Further, procedural tactics shackle the trial court with rounds of satellite litigation, causing huge delays and driving litigation costs even higher. Faced with these obstacles, even the most deserving opponents are constrained to initiate settlement negotiations. To paraphrase an old

60. In *Castillo v. St. Paul Fire & Marine Insurance Co.*, 938 F.2d 776 (7th Cir. 1991), the Seventh Circuit upheld the dismissal of the plaintiff's case with prejudice after he followed his attorney's instructions at two different depositions and refused to answer questions posed to him. *See id.* at 780. After the first deposition the lower court assessed fees and expenses of \$6,317.66 to be borne equally by the plaintiff and his counsel for counsel's "deliberate frustration of defendants' discovery attempts." *Id.* at 779; *see also* *Hinkle v. Sam Blanken & Co.*, 507 A.2d 1046, 1049-50 (D.C. 1986) (affirming grant of default judgment against appellants for their willful "non-compliance with discovery requests").

61. *See* *Van Pilsum v. Iowa State Univ. of Science & Tech.*, 152 F.R.D. 179, 181 (S.D. Iowa 1993) (order imposing sanctions and granting protective order).

62. *See* *Kelvey v. Coughlin*, 625 A.2d 775, 776-77 (R.I. 1993).

63. *See supra* text accompanying notes 57-58.

maxim, "justice delayed, and justice obtained at excessive cost, is often justice denied."⁶⁴

Finally, in addition to the financial costs and the loss of time, litigants may find that these tactics exact an emotional toll on them. They are subpoenaed to attend depositions in which the attorneys engage in rude name-calling, foul language, and even in some cases, threats of physical violence. They cannot leave the deposition or escape the abusive tactics. Even if they are not participants, they are compelled to watch the warfare between the lawyers.

D. *The Public*

The John Rambos of the deposition room harm the public's perception of the legal profession. Former Chief Justice Warren Burger, in a recent lecture delivered at Fordham University, expressed concern about a serious decline in professionalism among attorneys.⁶⁵ Some commentators have blamed the Rambo litigators for tainting the heritage of the profession and wringing the enjoyment and pleasure from the practice of law.⁶⁶

Justice Cook recently described the public's view of the legal profession:

The public's view of lawyers is at a critically low level. In a study conducted by the ABA Committee on Professionalism, only 6% of the corporate users of legal services rated "all or most" lawyers as deserving to be called professionals. Only 7% of survey respondents saw professionalism increasing among lawyers, while 68% said it had decreased over time.⁶⁷

Rambos feed the public's negative perception that lawyers are out for their own gain and will do anything to win, including *ad hominem* attacks on other attorneys and witnesses during depositions. Since there is no judge present at the deposition to exercise immediate control over the Rambo lawyers, deponents leave these depositions with the perception that whoever has the toughest lawyer and enough resources to wear the other side down will carry the day.⁶⁸ The deponent, and any friends

64. Keeling, *supra* note 59, at 36-37 (footnotes omitted).

65. See Warren E. Burger, *The Decline of Professionalism*, 63 *FORDHAM L. REV.* 949 (1995).

66. See Cook et al., *Mandate for Professionalism*, *supra* note 47, at 674.

67. Cook, *Practice of Law*, *supra* note 47, at 967 (footnote omitted).

68. "[I]n a market in which the client seeks a champion not a chaperon, a reputation for aggressiveness may well be worth the costs in sanctions necessary to earn it." Ronald J. Gilson, *The*

and family with whom he has shared the story, may never learn that the legal system has sought to control its own members, even if judicial sanctions are eventually imposed on the offending lawyer.

Pointed criticism of Rambos has expanded beyond legal publications to the lay press. For instance, *The Washington Post* recently published an article describing Rambo tactics in a deposition:

Depositions are supposed to be the law at its most courtly—meetings held before a trial and outside the presence of a judge, where lawyers try to elicit information from witnesses in a dignified manner. But critics say depositions increasingly have become the occasion for Rambo-like tactics, with lawyers vying to verbally bludgeon witnesses and intimidate opposing counsel.⁶⁹

When the non-legal press criticizes Rambo tactics, it is clear that the general public is informed and concerned about the conduct.

Rambo lawyers claim that their obligation to zealously advocate for their clients justifies their behavior.⁷⁰ They charge that efforts to impose civility and professionalism are “nothing more than an attempt by the aristocracy of the bar—the good old boys—to preserve their own status.”⁷¹ They are wrong. The public and the bar are fed up with their behavior.

IV. EXISTING REMEDIES AND THEIR EFFECTIVENESS IN DETERRING INCIVILITY IN DEPOSITIONS

The Federal Rules of Civil Procedure (“Federal Rules”) already provides remedies to control most Rambo behavior in depositions.⁷²

Devolution of the Legal Profession: A Demand Side Perspective, 49 MD. L. REV. 869, 909 (1990); see also *Interim Report*, *supra* note 47, at 393 (stating that perceived “client pressures for results are important negative factors” contributing to incivility).

69. Weiser, *supra* note 7, at B10.

70. One commentator has stated:

The duty of zealousness was expressed in Canon 7, ABA Model Code of Professional Responsibility, and its predecessor. The Model Rules do not expressly impose an obligation of zealousness. The old standard has been abandoned in favor of the commentary to Model Rule 1.1:

6. “Having accepted employment, a lawyer should act with competence, commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”

W. Ted Minick, *Fixing the Truth*, in A.L.I.-A.B.A. COURSE OF STUDY: LENDER LIABILITY AND OTHER COMPLEX LITIGATION INVOLVING FINANCIAL INSTITUTIONS 509, 513-14 n.10 (1994).

71. *Id.* at 513.

72. See FED. R. CIV. P. 11, 16, 26, 30, 37; see also 28 U.S.C. § 1927 (1994) (imposing costs on attorneys who multiply “the proceedings in any case unreasonably and vexatiously”). Rule 11 also

States that have adopted rules of procedure based on the federal system have the same remedies available in their state courts.⁷³ Therefore, the problem is not the lack of rules or guidelines to control the behavior,⁷⁴ but the perception in the practicing bar that the available sanctions will not work, or are too expensive and cumbersome to utilize.

As stated above, in many federal courts, and in those states that have adopted rules containing language similar to the Federal Rules, litigants who encounter problems in depositions can seek judicial assistance under several different rules. However, federal court practitioners should be cautious in assuming the universal availability of these remedies. Some of the remedies that are available in certain federal districts may not be available in other districts due to the adoption of local rules and the provisions of the 1993 Amendments to the Federal Rules ("1993 Amendments") that permit districts to "opt out" of certain provisions of the Federal Rules.⁷⁵

provides the potential for sanctions for improper conduct of attorneys, but does not directly address behavior during depositions. Rather, the Federal Rules is concerned with behavior and representations made to the courts and, therefore, will not be specifically addressed in this Article. However, the incivility represented by Rambo lawyers often extends throughout all dealings in a case, and lawyers who receive sanctions under Federal Rules 16, 26, 30, 37, and 28 U.S.C. § 1927 for their behavior during discovery, including depositions, are often the same lawyers whose conduct eventually leads to Rule 11 sanctions. Many times a court will find itself faced with imposing sanctions under several of these provisions upon the same lawyer whose behavior remains inappropriate at various stages of a dispute. *See, e.g.,* *Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1552-57 (10th Cir. 1996) (upholding sanctions order pursuant to Rules 16 and 37); *Blue v. United States Dept. of Army*, 914 F.2d 525, 537-40 (4th Cir. 1990) (upholding sanctions order pursuant to Rules 11, 16, and 28 U.S.C. § 1927); *Record Data, Inc. v. Schoolcraft*, No. 83-C9537, 1989 U.S. Dist. LEXIS 219, *12-13 (N.D. Ill. Jan. 10, 1989) (imposing sanctions pursuant to Rule 37 and 28 U.S.C. § 1927).

73. *See* Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical, Comparative Study*, 75 MARQ. L. REV. 313, 315-16 & nn.8-9 (1992).

74. Several bar associations have adopted civility rules. *See Proposed Standards for Professional Conduct Within the Seventh Federal Judicial Circuit*, reprinted in *Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 441 app. A (1992) [hereinafter *Proposed Standards*]; *Guidelines for Conduct of the Section of Litigation of the A.B.A.*, LITIG. NEWS, Dec.-Jan. 1996, at 6. The American Bar Association ("A.B.A.") Standing Committee on Professionalism recommended, and the A.B.A. approved, the following statement: "The . . . Guidelines are designed to encourage us, judges and lawyers, to meet our obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service." *Id.*

75. In 1988, Congress enacted procedures for the promulgation of local rules in each federal district court. *See* 28 U.S.C. § 2071(b) (1994). Many district courts did adopt local rules, including rules governing civil discovery. Then, in 1990, Congress adopted the Civil Justice Reform Act, 28 U.S.C. §§ 471-482 (1994), which mandated the adoption of a plan in each federal district to reduce cost and delay in civil litigation. Many of the plans contemplate local rules placing limits on the

A. Limitations on the Number and Length of Depositions

Anecdotal information from several surveys concerning civility in the bar confirms that unlimited and lengthy depositions aggravate busy attorneys and increase the likelihood of rude and unprofessional behavior among attorneys.⁷⁶ The 1993 Amendments provide courts with the

amount of discovery that each side can conduct. Finally, in 1993, Congress adopted the Amendments to the Federal Rules. See AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE, 146 F.R.D. 401 (1993). Included in these amendments is a provision that districts may choose to "opt out" of certain provisions of the Federal Rules, including the rules regarding discovery and depositions. See FED. R. CIV. P. 26(a)(1), (b)(2). These changes have resulted in confusion about which rules apply in which district. Carl Tobias has referred to this era as the "Balkanization of Federal Procedure." Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992-93).

76. Comments from lawyers about the difficulties of taking depositions, derived from *Interim Report*, *supra* note 47, include the following:

Abusive and unethical conduct re: coaching of witnesses during deposition question and answer.

Attorneys are frequently unnecessarily hostile towards their opponents, particularly in depositions.

....

Deliberate stall tactics forcing motions to compel; objections at depositions on grounds other than form; counsel testifying for witnesses at depositions; lengthy arguments over inane matters at depositions.

Refusing to cooperate in scheduling depositions, refusing to comply with the rules, pushing the other side to move to compel before giving in.

....

Failure to respond properly to discovery. Improper conduct at depositions—advising witnesses not to answer questions; harassing questions.

Id. at 388.

Comments from lawyers with respect to the service of overly burdensome or intentionally harassing discovery, in response to a survey, were gathered and distributed informally through the North Carolina Bar Association and through publication in the *State Bar Quarterly* in 1993. See *Lawyers' Views of Professionalism and Civility in North Carolina* (Greensboro Bar Ass'n Found., ed., Feb. 29, 1996) (CLE program, on file with the *Hofstra Law Review*) [hereinafter *Greensboro Lawyers' Views*]. A total of 644 responses were received. Some comments were as follows:

[1.] My perception is that some attorneys abuse the discovery process and raise frivolous legal arguments as a basis to increase fees. This is creating an unfavorable public image of our profession which I hope and believe is unwarranted.

[2.] By lawyers with a by the hour case resulting in protracted, useless litigation. . . .

[3.] Lots of it unnecessary—except to build a file. . . .

[4.] Increase the cost of proceedings [and] chill the process of negotiations.

[5.] It is unnecessary [and] sent only to allow more billable hours for defense firms.

[6.] These tactics delay resolution of disputes, increase client costs [and] promote public dissatisfaction with the legal profession.

Id. (Vignettes) at 14.

authority to limit both the number and length of depositions.⁷⁷ Although these limits may not eliminate the rude and unprofessional behavior, they may reduce the opportunity for it.

Attorneys who anticipate problems with lengthy and burdensome depositions in a specific case may now make motions under Rules 26(b)(2) and 30(a)(2) for an order limiting the number and length of depositions,⁷⁸ or they may request a limit on the number of depositions at a pretrial conference under Rule 16.⁷⁹ Finally, in some federal jurisdictions, attorneys do not need a case-specific court order because the federal court has adopted local rules that limit both the number and the length of depositions in all cases tried in that jurisdiction.⁸⁰

B. Definitions of Appropriate Objections and Instructions Not to Answer

Prior to the 1993 Amendments, the Federal Rules did not specifically define appropriate objections in a deposition or appropriate grounds for instructing a witness not to answer a question. Attorneys often locked horns at the deposition on the merits of objections that were thinly veiled attempts to coach a witness or instructions not to answer that were stonewalling tactics.⁸¹ Because there was no judge present at the

77. Rule 30(a)(2)(A) now provides that a party must obtain leave of court if a proposed deposition would result in more than ten depositions by the plaintiffs, defendants, or third-party defendants. Rule 30(a)(2)(B) now provides that a party must obtain leave of court before deposing a person who has already been deposed in the case. Rule 26(b)(2) now provides that a court may alter the number of depositions to be taken in a case and may also limit the length of those depositions under Rule 30.

78. See FED. R. CIV. P. 26(c), 30(d).

79. See *id.* 16(c)(6).

80. See *Cascella v. GDV, Inc.*, No. CIV.A.5899, 1981 WL 15129, at *1-2 (Del. Ch. Jan. 15, 1981); *In re Asbestos Litigation*, 492 A.2d 256, 257-58 (Del. Super. Ct. 1985); see also U.S. DIST. CT. M.D.N.C. R. 204 (providing a presumptive limit of seven depositions for the plaintiffs, defendants, and third-party defendants unless the case is classified as "exceptional," in which case the presumptive limit is raised to ten depositions for the plaintiffs, defendants, and third-party defendants).

81. The Advisory Committee's Notes to the Federal Rules provide:

Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond. 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. . . .

Directions to a deponent not to answer a question can be even more disruptive than objections.

FED. R. CIV. P. 30 advisory committee's note (1993 Amendments).

deposition to make an immediate ruling on either the objection or the instruction not to answer, counsel often resorted to lengthy arguments about whether a deponent had to respond to a particular question.⁸²

The 1993 Amendment to Rule 30(d)(1) added a provision dealing with this behavior at depositions:

Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3).⁸³

According to the Advisory Committee's Notes, these changes were made to prevent lengthy objections and colloquy suggesting how the deponent should respond to a question.⁸⁴ The drafters also hoped that the amendments would reduce the number of disruptions to the deposition caused by instructions to the deponent not to answer a question.⁸⁵

82. See *Unique Concepts, Inc. v. Brown*, 115 F.R.D. 292 (S.D.N.Y. 1987) (order imposing sanction on plaintiffs' counsel). In *Unique Concepts*, the federal district court found that it was "hard to find a page [of the deposition transcript] on which [defending counsel did] not intrude on the examination with a speech, a question to the examiner, or an attempt to engage in colloquy distracting to the examiner." *Id.* In a motion for sanctions, the examining attorney calculated "that of the 147 pages of the . . . deposition transcript, [the defending attorney] appear[ed] on 132 pages . . . with statements other than an objection to the form of the question." *Id.* at 293; see also *Van Pilsum v. Iowa State Univ. of Science & Tech.*, 152 F.R.D. 179, 180 (S.D. Iowa 1993) (order imposing sanctions and granting protective order). The court held:

From a review of the transcript of the deposition, it appears [the plaintiff] ha[d] no difficulties understanding or communicating in the English language. However, her counsel, Mr. Barrett repeatedly took it upon himself to restate Defendants' counsel's questions in order to "clarify" them for the Plaintiff. Mr. Barrett consistently interrupted Mr. Young and the witness, interposing "objections" which were thinly veiled instructions to the witness, who would then incorporate Mr. Barrett's language into her answer.

Id. at 180.

The court then stated that the plaintiff's counsel engaged in *ad hominem* attacks on Mr. Young's ethics, litigation experience, and honesty In fact, of the 4025 lines of transcript, only seventy percent contain questions by Mr. Young and answers by Ms. Van Pilsum. The balance is discussion, argument, bickering, haranguing, and general interference by Mr. Barrett (818 lines) and response by Mr. Young (340 lines).

Id. (footnote omitted).

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

84. See *supra* note 81.

85. The Advisory Committee's Notes to the Federal Rules provide:

Directions to a deponent not to answer a question can be even more disruptive than objections. The second sentence of new paragraph (1) [of Rule 30(d)] prohibits such directions except in the three circumstances indicated: to claim a privilege or protection against disclosure . . . , to enforce a court directive limiting the scope or length of

Although the mere enactment of these rules will not stop the rude arguments between counsel over objections and instructions not to answer, the 1993 Amendments should make it more difficult for obstreperous lawyers to defend their conduct at hearings on motions to compel the answers to questions they and their clients avoided at the deposition. Judges now have a standard against which to measure the objections and the instructions not to answer.

C. Protective Orders

Tempers explode and defending attorneys resort to playground tactics of bullying and throwing out personal insults when they are frustrated by an opponent's continued pursuit of a line of questioning that they feel is irrelevant or potentially privileged. The defending attorney may decide that it is his job to protect the deponent from an area of inquiry at any cost. The examining attorney, on the other hand, often concludes (perhaps correctly) that the deponent must be hiding important information for the defending attorney to get so obstreperous in his client's defense. Because no judge is present to make an immediate ruling, each attorney resorts to Rambo tactics to win control of the deposition room.

The Federal Rules provide defending attorneys with methods to protect their witnesses without resorting to these tactics. When a deponent's attorney is concerned that the examining attorney may inquire into areas that are privileged, or may attempt to embarrass, humiliate, or badger the witness, the deponent's attorney may seek a protective order under Rules 30(d)(3) or 26(c).⁸⁶ Even if the defending attorney does not get a protective order prior to the deposition, he may adjourn the deposition to seek a protective order if the inquiry proceeds into

permissible discovery, or to suspend a deposition to enable presentation of a motion under paragraph (3).

FED. R. CIV. P. 30 advisory committee's note (1993 Amendments).

86. Rule 30(d)(3) of the Federal Rules provides:

At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c).

Id. 30(d)(3); see also *id.* 26(c) (outlining the procedure to get a motion for a protective order to limit discovery).

privileged, embarrassing, or humiliating areas.⁸⁷ Although protective orders do not prevent rude behavior between counsel, they do delineate areas of inquiry which are off limits during the deposition, thereby obviating the need for counsel to argue about the appropriateness of any particular line of inquiry at the deposition.

The entry of a protective order rightfully permits the defending attorney to instruct a witness not to answer a question that inquires into an area covered by the protective order.⁸⁸ Attorneys who anticipate that their opponent will engage in a fishing expedition may seek a judicial ruling prior to the deposition, defining the appropriate topics for questioning at the deposition.⁸⁹

Although protective orders are a possible solution to burdensome lines of inquiry at depositions, not all courts are responsive to the request for a protective order. Judges are sometimes loathe to enter an order eliminating a line of questioning when they do not know all the issues in the case. For instance, in *Szczesnik v. McDonald's Corp.*,⁹⁰ the plaintiff's counsel sought a protective order, limiting the areas of interrogation, after two days of deposing the plaintiff. The underlying case involved employment discrimination based on gender, breach of employment contract, and tortious interference with the employment relationship between the plaintiff and her employer.⁹¹ The court refused to enter a protective order even though it documented the abusive questions the defense counsel had used during the previous two days of deposition.⁹² The court concluded that it would be difficult for it to determine relevant areas of inquiry. However, it did impose a limit of a single day of not more than five hours to conclude the deposition, noting

87. *See id.* 30(d)(3).

88. *See id.* 26(c)(4).

89. *See id.*

90. 41 Empl. Prac. Dec. (CCH) ¶ 36,490 (N.D. Ill. 1986).

91. *See id.*

92. The court noted:

1. Defendant's counsel repeatedly belabored points of miniscule relevance, e.g., plaintiff's daughters' marital history; who cooked in plaintiff's home; the installation of a washer and dryer.

2. Defendant's counsel repeatedly argued with the deponents by characterizing previous testimony as "lies", "lying", "I think you lied".

3. Defendant's counsel repeatedly used sarcasm, e.g., "Oh, really", "Was this a negligent lie?"

4. Defendant's counsel repeatedly badgered the witnesses.

5. Defendant's counsel repeatedly displayed a lack of civility to plaintiff's counsel.

Id. (citations omitted).

the “[d]efendant’s counsel [would], therefore, by necessity have to confine himself to relevant questions and avoid disruptive behavior.”⁹³

D. Pretrial Orders, Standing Orders, and Local Rules

Under Rules 16 and 26(f) of the Federal Rules, attorneys may now seek pretrial orders that limit abusive discovery tactics during depositions.⁹⁴ Some judges are now routinely imposing restrictions on deposition practices in all their pretrial orders,⁹⁵ while others are entering case-specific pretrial orders that include limitations on behavior in depositions.⁹⁶ For instance, in *In re San Juan Dupont Plaza Hotel Fire Litigation*, the United States District Court for the District of Puerto Rico ordered that only objections concerning privileged matters and those matters that could be corrected immediately (i.e., the form of the question) could be raised during the deposition.⁹⁷ The court also prohibited coaching or argumentative interruptions during any depositions.⁹⁸ In *Flynn v. Goldman, Sachs & Co.*,⁹⁹ the United States Magis-

93. *Id.*

94. “At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to . . . the control and scheduling of discovery, including orders affecting disclosures and discovery . . .” FED. R. CIV. P. 16(c).

Rule 26(f) provides:

Except in actions exempted by local rule or when otherwise ordered, the parties shall . . . meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, . . . make or arrange for the disclosures required by subdivision (a)(1), and . . . develop a discovery plan. The plan shall indicate the parties’ views and proposals concerning:

. . . .
(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court . . . under Rule 16(b) and (c).

Id. 26(f).

95. See *In re All Pending and Future Litig. Before the Honorable G. Ross Anderson, Jr.*, No.6:93mc161 (D.S.C. Dec. 16, 1993) (order establishing guidelines on taking of depositions in matters before the court); *Hall v. Clifton Precision*, 150 F.R.D. 525, 527 (E.D. Pa. 1993) (order concerning conduct during depositions).

96. See *In re Domestic Air Transp. Antitrust Litig.*, No.1:90-CV-2485-MHS, MDL 861, 1990 U.S. Dist. LEXIS 20095, at *19-28 (N.D. Ga. 1990) (order setting forth deposition guidelines for the parties); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 1988 U.S. Dist. LEXIS 17332, at *107-11 (D.P.R. Dec. 2, 1988) (order requiring specific conduct during depositions).

97. See 1988 U.S. Dist. LEXIS 17332, at *107.

98. See *id.*

trate was so frustrated with counsel's inability or unwillingness to comply with informal procedures for resolution of discovery disputes that she ordered that instructions not to answer a deposition question could only be given on grounds of privilege,¹⁰⁰ and ordered that any disputes arising at the deposition be submitted to her by telephone conference with the court reporter recording the telephone call.¹⁰¹

Although these blanket pretrial orders may restrict Rambo behavior, they may also restrict effective and necessary representation of clients at a deposition. For example, when a court prohibits all objections except as to the form of the question and matters of privilege, attorneys who need to explain an objection cannot do so. If an individual and a corporation have both been sued, the attorney representing the individual may want to object to the question, "When did you first learn of the discriminating act?" in order to clarify whether the question refers to the individual or the corporation. However, under the wording of the blanket pretrial order, his or her only option is to say, "Objection, vague." The opposing attorney and the deponent may not understand the problem with the question. Needless time will be wasted by all concerned, pursuing a line of questions about which the client may have no knowledge, when a simple explanation by the defending attorney would have clarified the situation.

Similarly, when judges enter blanket orders prohibiting all consultations between clients and their defending attorneys once a deposition has begun,¹⁰² they may stop the coaching of witnesses, an occurrence that often leads to frayed tempers among the attorneys.¹⁰³ The judges, however, may also stop any necessary consultation between the attorney and his or her client concerning whether a mistake has been made or fraudulent testimony has been given.¹⁰⁴

99. No. 91 CIV.0035 (KMW), 1991 U.S. Dist. LEXIS 15785 (S.D.N.Y. Nov. 1, 1991) (order compelling document production and depositions).

100. *See id.* at *20.

101. *See id.* at *20-21.

102. *See, e.g.,* Johnson v. Wayne Manor Apartments, 152 F.R.D. 56, 59 (E.D. Pa. 1993) (order directing submission to depositions and payment of sanctions); Hall v. Clifton Precision, 150 F.R.D. 525, 531-32 (E.D. Pa. 1993) (order concerning conduct during depositions).

103. *See* Guerrero v. Board of Educ., No. C92-2971, 1994 U.S. Dist. LEXIS 9259, at *14-21 (N.D. Cal. July 5, 1994) (order imposing disciplinary action), *rev'd on other grounds*, No. 94-16415, 1995 U.S. App. LEXIS 34992 (9th Cir. Dec. 8, 1995); American Directory Serv. Agency, Inc. v. Beam, 131 F.R.D. 15, 18-19 & n.6 (D.D.C. 1990) (order imposing sanctions); *In re Williams*, 414 N.W.2d 394, 397-98 (Minn. 1987) (en banc) (per curiam), *appeal dismissed sub nom.* Williams v. Lawyers Prof'l Responsibility Bd., 485 U.S. 950 (1988).

104. *See* Taylor, *supra* note 46, at 1068.

E. Sanctions

In the last decade, courts have sanctioned Rambo lawyers for their verbal attacks on clients, deponents, and other attorneys during depositions. The courts justified their sanctions under the Federal Rules, 28 U.S.C. § 1927, and their inherent judicial power to govern the practices of the attorneys appearing before them. The rules are in place to protect the victims of this Rambo behavior, and the courts are enforcing the rules.

1. Rule 30

The drafters of Rule 30 anticipated the need to protect deponents and parties from the Rambo behavior of deposing attorneys. If an examining attorney conducts a deposition "in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party" the defending attorney may seek a court order to stop or limit the scope and manner of the deposition.¹⁰⁵ If the court grants relief, the deponent or party may also seek an award of expenses incurred in relation to the motion.¹⁰⁶ Thus, Rule 30 protects the deponent or party who has been a victim of Rambo behavior.

2. Rule 37

The drafters of the Federal Rules also anticipated the need for protecting a party and his attorney from Rambo attorneys who improperly instruct their clients not to answer questions at a deposition. If a witness chooses to follow his attorney's instructions to stonewall when he is asked a proper question at a deposition, he runs the risk of having sanctions entered against him under Rule 37.¹⁰⁷ In addition to the

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

106. *See id.*

107. Rule 37(a)(2)(B) provides:

If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), . . . the discovering party may move for an order compelling an answer The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

Id. 37(a)(2)(B).

Rule 37(a)(3) provides: "For purposes of this subdivision an evasive or incomplete

enumerated sanctions of Rule 37, the court may also order the retaking of the deposition, thereby inconveniencing the witness and costing the client additional money.¹⁰⁸

In *Castillo v. St. Paul Fire & Marine Insurance Co.*,¹⁰⁹ the plaintiff, a doctor who refused to renew his insurance to the limits required by the hospital, followed his attorney's instructions and refused to answer basic questions about damages and the allegations of the complaint.¹¹⁰ The Seventh Circuit affirmed the district court's assessment of fees and expenses in the amount of \$6,317.66 against the doctor

disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond." *Id.* 37(a)(3).

Rule 37(a)(4)(A) provides:

If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees

Id. 37(a)(4)(A).

Rule 37(b)(2) provides:

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

. . . .

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Id. 37(b)(2).

108. *See, e.g., Johnson v. Wayne Manor Apartments*, 152 F.R.D. 56, 59-60 (E.D. Pa. 1993) (order directing submission to depositions and payment of sanctions).

109. 938 F.2d 776 (7th Cir. 1991).

110. *See id.* at 778.

and his counsel, with payment to be equally divided between them.¹¹¹ At the rescheduled deposition, the plaintiff again followed his counsel's instructions not to answer certain questions, even though the district court had already approved the questions. When the case again came before the district court on a motion asking for sanctions, the court, relying on Rule 37(b) dismissed the doctor's case with prejudice.¹¹² Fees and costs of \$5,085.50 were also awarded to the defendants.¹¹³ The Seventh Circuit affirmed, stating that "[t]he doctor and his counsel fully deserve the sanctions imposed and leave no alternative but to affirm the district court in all respects."¹¹⁴

Not all clients participate in the Rambo tactics employed by their counsel to the extent undertaken by the physician described above. In situations where the client may merely be following the advice of counsel not to answer a question, the courts have sanctioned the attorney personally, but not the client.¹¹⁵ For instance, in *Van Pilsum v. Iowa State University of Science & Technology*,¹¹⁶ the district court sanctioned the plaintiff's attorney for his repeated objections and "*ad hominem* attacks on [the opposing attorney's] ethics, litigation experience, and honesty."¹¹⁷ The court then noted that "[i]n the course of the 167 page deposition, there [were] only four segments where five or more pages occurred without an interruption from [plaintiff's attorney]."¹¹⁸ The district court condemned the plaintiff's attorney's "Rambo Litigation" style "which may prove effective out of the presence of the court, and may be impressive to clients as well as ego-gratifying to those who practice it."¹¹⁹ The court then stated that it would not tolerate the behavior and, pursuant to Rule 37(a)(4), ordered the plaintiff's counsel to personally pay half the cost of the deposition, but the plaintiff was not punished by the court.¹²⁰ The court further ordered that future depositions be conducted in the presence of a discovery master.¹²¹

111. *See id.* at 779.

112. *See id.*

113. *See id.* at 780.

114. *Id.*

115. *See Brignoli v. Balch, Hardy & Scheinman, Inc.*, 126 F.R.D. 462, 466-67 (S.D.N.Y. 1989) (order imposing sanctions).

116. 152 F.R.D. 179 (S.D. Iowa 1993) (order imposing sanctions and granting protective order).

117. *Id.* at 180.

118. *Id.*

119. *Id.* at 181.

120. *See id.*

121. *See id.*

3. 28 U.S.C. § 1927

In addition to the relief provided by the Federal Rules, federal statutes also provide remedies against unruly attorneys who abuse the deposition process. Several courts have imposed monetary sanctions against attorneys under 28 U.S.C. § 1927 when an attorney's intentional actions during depositions have unnecessarily prolonged the discovery process.¹²² The statute provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.¹²³

In *Unique Concepts, Inc. v. Brown*,¹²⁴ the Southern District of New York imposed sanctions pursuant to § 1927 against the plaintiff's counsel, Samuel J. Rosen, for his "abusive, disruptive, unreasonable, and dilatory behavior during" the deposition of the plaintiff.¹²⁵ The defendant calculated "that of the 147 pages of the . . . deposition transcript, Rosen appears on 132 pages (91%) with statements other than an objection to the form of the question."¹²⁶ The court concluded that Rosen's misconduct was in bad faith and rose to the level appropriate for sanctions.¹²⁷ First, the court ordered a reexamination of the plaintiff and then ordered Rosen, "personally and without reimbursement from his client," to pay \$693.25 to the defendant for the transcript cost of the useless deposition, as well as a fine of \$250 to be paid "to the Clerk of the Court for contentious, abusive, obstructive, scurrilous, and insulting conduct in a Court ordered deposition."¹²⁸

Likewise, in *American Directory Service Agency, Inc. v. Beam*,¹²⁹ the United States District Court for the District of Columbia imposed

122. See, e.g., *American Directory Serv. Agency, Inc. v. Beam*, 131 F.R.D. 15, 17-19 (D.D.C. 1990) (order imposing sanctions); *Brignoli v. Balch, Hardy & Scheinman, Inc.*, 126 F.R.D. 462, 466 (S.D.N.Y. 1989) (order imposing sanctions); *Unique Concepts, Inc. v. Brown*, 115 F.R.D. 292, 293-94 (S.D.N.Y. 1987) (order imposing sanctions on plaintiffs' counsel).

123. 28 U.S.C. § 1927 (1994).

124. 115 F.R.D. at 292.

125. *Unique Concepts*, 115 F.R.D. at 292.

126. *Id.* at 293. See *supra* note 49 for a verbatim transcript of some of the *ad hominem* attacks made by Rosen.

127. See *Unique Concepts*, 115 F.R.D. at 294.

128. *Id.*

129. 131 F.R.D. 15 (D.D.C. 1990) (order imposing sanctions).

personal sanctions under § 1927 against an attorney, Laurance J. Ochs, whose conduct the court described as “nothing less than outrageous.”¹³⁰ The court found that the attorney “coached” responses, and he frequently instructed his clients not to answer at all. In addition, Ochs’ repeated objections, puerile arguments with opposing counsel, and vexatious requests for clarification prevented the elicitation of any meaningful testimony and needlessly added to the expense of th[e] litigation.”¹³¹ The court ordered Ochs to personally “pay to Beam the reasonable expenses, including attorneys’ fees, incurred [by the] depositions and the subsequent cross-motions for sanctions.”¹³²

4. Courts’ Inherent Judicial Power to Regulate Conduct

In addition to remedies provided under state rules, the Federal Rules, and federal statutes, courts that are trying to control Rambo behavior in depositions also rely on their inherent power to regulate the conduct of those attorneys appearing before them. In 1985, the United States Supreme Court reaffirmed the power of a court to discipline attorneys practicing before it in stating that “[c]ourts have long recognized an inherent authority to suspend or disbar lawyers.”¹³³

One United States district court judge, Barbara A. Caulfield, found that she had the inherent authority to sanction an attorney who committed eight instances of unprofessional conduct at depositions.¹³⁴ Citing two cases involving the discipline of attorneys for actions occurring during depositions, Judge Caulfield held that “[c]ourts have imposed discipline for a wide range of conduct, including offensive and threatening speech.”¹³⁵ In one case cited by Judge Caulfield, a Colorado court disciplined an “attorney for making uncomplimentary observations and physical threats during [the] deposition and shoving deponent’s wife after [the] deposition.”¹³⁶ In another case cited by Judge Caulfield, the attorney, Mr. Levin, threatened during the deposition, “among other things, to take his questioner’s mustache off his face, to give [opposing counsel] the beating of his life, to slap him across his face, and to break

130. *Id.* at 18.

131. *Id.* (footnote omitted).

132. *Id.* at 19.

133. *In re Snyder*, 472 U.S. 634, 643 (1985).

134. *See Guerrero v. Board of Educ.*, No. C92-2971, 1994 U.S. Dist. LEXIS 9259, at *33 (N.D. Cal. July 5, 1994) (order imposing disciplinary action), *rev’d on other grounds*, No. 94-16415, 1995 U.S. App. LEXIS 34992 (9th Cir. Dec. 8, 1995).

135. *Id.* at *30.

136. *Id.* (citing *People v. Genchi*, 824 P.2d 815, 816 (Colo. 1992) (en banc)).

his head.”¹³⁷ The Ohio Supreme Court affirmed the board’s recommendation that Mr. Levin be publicly reprimanded and indefinitely suspended from the practice of law, with the cost of the proceeding to be taxed against him.¹³⁸ Relying on her inherent authority to discipline the attorney appearing before her, Judge Caulfield suspended the attorney from practicing law before the United States District Court for the Northern District of California in certain types of cases and required the attorney to inform all clients of the order.¹³⁹

V. REMEDIES

The rules allowing courts to control Rambo behavior during depositions are already in place. Instead of enacting more rules or implementing local court orders to prevent all speaking objections and consultations between deponents and their counsel, the bench, the bar, and the law schools need to act on a case-by-case basis to control those litigants who attempt to gain a tactical advantage through name-calling, demeaning gestures, and personal threats.

A. *Swift Justice*

When a lawyer encounters trouble in a deposition, he needs immediate access to judicial protection. The judiciary needs to arrange for a “judge on call” system similar to the medical profession’s arrangement of emergency care for patients. In some judicial districts, these services can be provided by magistrates, but in other areas, judges would need to rotate the position. The “judge on call” would need to be available for telephone hearings which could be transcribed by the court reporter. The judge must be vested with the authority to make immediate rulings on behavior at the deposition and on the appropriateness of a line of questioning during the deposition. In addition, the judge on call would need the authority to mandate the payment of costs for any attorney who loses on a motion, as well as the power to impose further sanctions if the behavior is particularly egregious.

Although this arrangement would be expensive and time-consuming for an already overworked judiciary, the benefits would soon justify the costs. Lawyers who face swift sanctions if they misbehave would modify

137. Office of Disciplinary Counsel v. Levin, 517 N.E.2d 892, 893 (Ohio 1988) (per curiam); see *Guerrero*, 1994 U.S. Dist. LEXIS 9259, at *30-31.

138. See *Levin*, 517 N.E.2d at 895.

139. See *Guerrero*, 1994 U.S. Dist. LEXIS 9259, at *44.

their behavior accordingly. In addition, fewer full court hearings would be held on motions to compel and motions for sanctions because the problems would have been resolved during the session with the "judge on call."

Over the last decade many groups have recommended that trial judges take a more active role in the conduct of litigation. In 1986, the A.B.A. Commission on Professionalism ("Professionalism Commission") recommended that "[t]he role of the judiciary in the conduct of litigation should be strengthened and courts should play a more decisive role earlier in the litigation process."¹⁴⁰ The Professionalism Commission also encouraged judges to impose sanctions for abuse of the litigation process, noting that the Federal Rules permit the imposition of sanctions for such abuses.¹⁴¹ Furthermore, the Professionalism Commission cautioned against imposing sanctions on innocent clients when they are not responsible for their lawyers' improper acts, and instead suggested that in some cases the courts should report the misconduct to disciplinary commissions.¹⁴²

Congress also recognized a need for a more active judiciary; thus, it enacted the Civil Justice Reform Act.¹⁴³ According to the legislative history, one of the six cornerstone principles of the Act was "imposing greater controls on the discovery process."¹⁴⁴ Congress reported that reform of the present system depended on "the importance of courts exercising early, active, and continuous control over case progress."¹⁴⁵

In its 1992 report, *Lawyer Regulation for a New Century*,¹⁴⁶ the A.B.A. Commission on Evaluation of Disciplinary Enforcement ("Disciplinary Commission") recommended that "[r]egulation of the legal profession should remain under the authority of the judicial branch of

140. A.B.A. Comm'n on Professionalism, ". . . *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 290 (1986) [hereinafter *Lawyer Professionalism*].

141. *See id.* at 265, 291-92.

142. *See id.* at 291.

143. 28 U.S.C. §§ 471-482 (1994).

144. S. REP. NO. 101-416, at 15 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6817; *see also* Matthew R. Kipp & Paul B. Lewis, *Legislatively Directed Judicial Activism: Some Reflections on the Meaning of the Civil Justice Reform Act*, 28 U. MICH. J.L. REFORM 305, 337 (1995) (noting the importance of active judicial involvement in all aspects of case administration).

145. Kipp & Lewis, *supra* note 144, at 337 (quoting S. REP. NO. 101-416, at 16).

146. A.B.A. CENTER FOR PROFESSIONAL RESPONSIBILITY, *LAWYER REGULATION FOR A NEW CENTURY, REPORT OF THE COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT* (1992) [hereinafter *LAWYER REGULATION*].

government."¹⁴⁷ The Disciplinary Commission expressed grave concern that if the courts did not exercise control over the discipline of attorneys, other groups may attempt to intervene and regulate the behavior.¹⁴⁸

The "judge on call" proposal would enable courts to swiftly intervene on a case-by-case basis. Its adoption would eliminate the need for blanket rules or standing orders that prohibit all speaking objections or all consultations between the defending attorney and his witness once the deposition has begun.¹⁴⁹

The judiciary has a strong responsibility to regulate the Rambo behavior of attorneys, and the creation of a "judge on call" would increase judicial involvement. However, the bar and the law schools share this responsibility. One commentator has warned that if we place the responsibility for correcting Rambo behavior solely on the judiciary we will end up with "Terminator Judges" disciplining Rambo lawyers.¹⁵⁰ Therefore, the following proposed remedies focus on the practicing bar and the law schools.

B. Lawyers Should Report Rambo Behavior to the Courts and Bar Disciplinary Committees

Often lawyers are loathe to complain about the Rambo behavior they have encountered in depositions. They may feel that complaining will accomplish nothing, the remedy will be so delayed as to be useless, the expense of a motion to compel will not be justified, or the behavior, while bad, is not *so* bad.¹⁵¹

In fact, one of the most egregious examples of Rambo behavior occurring during a deposition discussed in this Article was not reported to a court, but was uncovered by a court, *sua sponte*.¹⁵² Judges should not have to seek out examples of Rambo litigation in the deposition transcripts filed with the court. Lawyers should report the Rambo behavior when it occurs.

This suggestion does not mean that a lawyer should report every

147. *Id.* at 1.

148. *See id.* at 1-8.

149. *See supra* Part IV.D for a further discussion of these blanket orders.

150. *See* Robert E. Keeton, *Times Are Changing for Trials in Court*, 21 FLA. ST. U. L. REV. 1, 15-17 (1993).

151. "The most unfortunate consequence of the procedural battles that hardball litigators wage against their opponents is that, ultimately, they force the parties in litigation to sacrifice substantive justice for procedural detail." Keeling, *supra* note 59, at 36.

152. *See* *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 51-54 & n.23 (Del. 1994) (addendum to the opinion relating to the issue of professionalism in depositions).

angry word uttered during the heat of battle. In an en banc decision, the Minnesota Supreme Court distinguished between an intemperate comment uttered in anger and the intentional racial slur that provoked the comment.¹⁵³ The court issued a public reprimand for the racial slur and rejected the respondent's equal protection argument. It stated that the "[r]espondent overlook[ed] the lack of provocation for his own remarks and the understandable provocation for opposing counsel's response."¹⁵⁴

One commentator has recommended that victims of Rambo behavior report the incident and make the Rambo lawyer pay for the bad behavior.¹⁵⁵ She recommends that attorneys create a "Rambo file" documenting every bit of aggravation that takes place during the course of the litigation.¹⁵⁶ She then recommends that the file be used to document Rambo lawyers' lack of professionalism:

Use it in fee hearings and, under your own local statutes and rules of civil procedure, to impose sanctions and penalties for frivolous or vexations [sic] litigation. In the next case where you must face off with Rambo, arm yourself with your file and learn from it. Use all available remedies to make Rambo pay for his/her dirty tricks until (s)he learns his/her lessons.¹⁵⁷

When Rambo behavior begins to cost money, then it will stop.

Lawyers must stop their passivity about Rambo depositions. Not only should they report name-calling, demeaning gestures, and personal threats occurring during depositions to judges and bar disciplinary committees, but they should create an atmosphere in their firm where young associates will feel comfortable to complain about their mistreatment by opposing attorneys in depositions. If young associates feel support from senior partners, they will not feel isolated and helpless. They will also learn that the behavior they have encountered is wrong, is not condoned by the firm, and should not be imitated.

153. See *In re Williams*, 414 N.W.2d 394 (Minn. 1987) (en banc) (per curiam), *appeal dismissed sub nom. Williams v. Lawyers Prof'l Responsibility Bd.*, 485 U.S. 950 (1988). See *infra* Appendix for a transcript of the deposition.

154. *Williams*, 414 N.W.2d at 398.

155. See Elser, *supra* note 47, at 7.

156. See *id.*

157. *Id.*

C. *More Active Local Bar Associations*

In 1988, the A.B.A. House of Delegates adopted The Lawyer's Creed of Professionalism and recommended that state and local bars adopt similar creeds.¹⁵⁸ In the past decade, many local bar associations have enacted civility codes to counter Rambo behavior.¹⁵⁹

Despite the enactment of these codes of conduct, Rambo behavior continues.¹⁶⁰ Instead of the enactment of a written civility code, what is needed is the reemergence of the unwritten, but universally accepted, code of conduct adhered to by an earlier generation of lawyers. Byron C. Keeling has described this earlier code of conduct:

The unwritten professional code of conduct encouraged mutual cooperation, and indeed, it required lawyers to abjure nuisance suits and tactical maneuvers that were inconsistent with this goal. Lawyers who violated the code of conduct could expect two consequences: they would lose their social standing with fellow members of the legal profession, and, given the small size of the organized bar, they would suffer appropriate retaliation in kind.¹⁶¹

Although some may say that the size of the current bar¹⁶² precludes a reemergence of this unwritten code of conduct, this Author believes that the possibility exists for this code to once again become a way of life for the practicing bar. Workshops and conferences can teach and promote this unwritten code of civility.

158. See Laws. Man. on Prof. Conduct (ABA/BNA) ¶ 01:401 (Aug. 31, 1988).

159. See *Interim Report*, *supra* note 47, at 422-23 (describing ethical codes in the following bars: Akron (Ohio); Arizona; A.B.A. Tort and Insurance Practice Section; Dallas (Texas); Hillsborough County (Florida); Houston (Texas); Kansas City (Missouri); Kentucky; Lafayette County (Mississippi); Los Angeles County (California); Maine; Massachusetts; Memphis and Shelby County (Tennessee); Mississippi; Montana; Multnomah (Oregon); Nashville (Tennessee); Nebraska; North Carolina; Pulaski County (Arkansas); Shreveport (Louisiana); and Texas).

160. One commentator has recommended the enactment of a new model rule to control mounting *ad hominem* attacks occurring throughout the legal process. Although the mandatory nature of the rule she proposes might make a difference, and would certainly do no harm in the battle to control this behavior, this Author believes that enforcement of the current rules and codes will be more effective than the enactment of yet another rule that is ignored. For a thoughtful discussion of this problem, see Lydia P. Arnold, Note, *Ad Hominem Attacks: Possible Solutions for a Growing Problem*, 8 GEO. J. LEGAL ETHICS 1075 (1995).

161. Keeling, *supra* note 59, at 32-33 (footnotes omitted).

162. The legal profession has grown from approximately 286,000 lawyers in 1960 to over 896,000 lawyers in 1995. See BARBARA A. CURRAN & CLARA N. CARSON, AMERICAN BAR FOUNDATION, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990'S, at 1 (1994).

The size of many local bars precludes the possibility of an attorney knowing every other attorney in town. However, with the creation of small discussion groups at local bar conferences, attorneys can once again create the collegiality of lunch at the local diner. In these small discussion groups, attorneys can begin to share their experiences of Rambo behavior. When the experience is no longer a "dirty little secret," but a shared horror, fruitful discussion of potential corrective behavior can occur.

In North Carolina, during the last two years, four different local bar associations hosted three-hour programs on civility in the legal profession.¹⁶³ In each program participants were divided into discussion groups of twelve to twenty-five attorneys. To facilitate a discussion, each group assigned roles and acted out five scripted vignettes illustrating Rambo behavior. After the initial reticence common to all group activities, many attorneys shared their experiences with Rambo behavior and discussed ways in which the local bar could control its own members.¹⁶⁴

Civility codes will not create civility. Lawyers do not need more codes, but instead an open and participatory discussion of the problem so that the bar can once again regulate its own.

D. Professionalism Committees Should Be Established in Law Firms to Monitor Activities of the Firm

Law firms need to establish committees within the firm in which professionalism is discussed and monitored. Young attorneys need to know they will be supported when they refuse to engage in Rambo tactics. They need to know that senior partners and clients will not be permitted to bully them into Rambo behavior.

163. See Lawyers' Views of Professionalism and Civility in North Carolina (Mecklenburg County Bar ed., Nov. 4, 1994) (CLE program on file with the *Hofstra Law Review*); Lawyers' View of Professionalism and Civility in North Carolina (Rowan/Cabarrus County Bar ed., Jan. 26, 1996) (CLE program on file with the *Hofstra Law Review*); Greensboro Lawyers' Views, *supra* note 76.

164. See *supra* note 162.

E. Continuing Legal Education Programs Should Train Lawyers in How to Effectively Control a Rambo Opponent

Many Rambo tactics in a deposition can be effectively controlled and minimized by a well-prepared attorney.¹⁶⁵ Continuing legal education classes on deposition-taking should include workshops on the control of the Rambo lawyer.¹⁶⁶

For instance, if the deposing attorney asks simply worded questions, he avoids the numerous objections and legal wrangling that ensue over the wording of complicated questions. The defending attorney has a much harder time justifying his unnecessary objections if the questions are clear and simple.¹⁶⁷ The effective wording of questions is a skill that can be taught and practiced in simulated depositions.

The deposing attorney can also be taught to ignore unnecessary objections that are made to harass the attorney. If the deposing attorney does not rise to the bait, but instead asks the question again and waits for the witness to answer, the defending attorney will often stop the harassment because it does not work.¹⁶⁸

If the deposing attorney knows in advance that the defending attorney is particularly difficult, he can schedule the deposition at the courthouse so that there is easy access to a judge or magistrate if arguments arise during the deposition.¹⁶⁹ The deposing attorney can also schedule the deposition for videotaping with the hope that the defending attorney will avoid making his obstreperous comments on a videotape that can be played before a judge.¹⁷⁰

165. "In fact, the freight-train roar of a confrontational lawyer at full throttle may often be the equivalent of a 'smokescreen of strategic bluster' that camouflages the lawyer's own perplexity." Richard K. Neumann, Jr., *On Strategy*, 59 *FORDHAM L. REV.* 299, 314 (1990) (footnote omitted).

166. NITA continuing legal education workshops, which are held across the country and include a workshop entitled "Taking and Defending Depositions," include at least a one-hour session on effective ways to handle the obstreperous lawyer.

167. See MALONE & HOFFMAN, *supra* note 49, at 195. In this book, the authors recommend various strategies for dealing with "obnoxious or obstructionist defending counsel" when taking depositions. *Id.* at 190-98. One of their recommendations is that attorneys ask good questions. "One of the most effective ways to frustrate the opposing counsel who is waiting to pounce upon every minor flaw in questioning is to ask good questions to begin with." *Id.* at 195.

168. See *id.* at 193.

169. See *Guerrero v. Board of Educ.*, No. C92-2971, 1994 U.S. Dist. LEXIS 9259, at *17-18 (N.D. Cal. July 5, 1994) (order imposing disciplinary action), *rev'd on other grounds*, No. 94-16415, 1995 U.S. App. LEXIS 34992 (9th Cir. Dec. 8, 1995).

170. The 1993 Amendments made it clear that the use of videotaped depositions is proper without prior court approval. See *FED. R. CIV. P.* (30)(b)(2). If a party chooses to use videotape,

Occasionally, the deposing attorney will encounter a Rambo attorney who is blocking access to information due to a misapprehension of the purpose of the deposition process and the rules that permit an appropriate inquiry. The deposing attorney needs to be taught to recognize this opponent.¹⁷¹ The deposing attorney can be taught how to go off the record in order to educate the Rambo opponent with a copy of the rules and interpretative case law. Often, the Rambo opponent will temper his behavior when he is informed of the sanctions judges have meted out in other cases.

Finally, the deposing attorney can be taught to effectively warn the opponent to stop the Rambo behavior; otherwise, judicial intervention will be sought for the inappropriate behavior. When the Rambo behavior actually interferes with the acquisition of information, the attorney can be taught how to make a detailed record of the Rambo behavior for later use in a motion to compel.¹⁷² Of course, when the warning is made, the deposing attorney must be prepared to seek judicial redress for the behavior.

These simple provisions and many additional techniques can be taught to empower the victim to stop the opponent's Rambo behavior.

F. Rambo Behavior Should Be Discussed and Condemned in Law Schools

Law schools need to offer skills training classes that include vignettes or problem situations in which one attorney encounters a Rambo opponent in a deposition. Law professors, as well as practicing attorneys and judges, can then use these vignettes to illustrate ways the victim of the behavior can respond to disarm the Rambo opponent.

Professors should then facilitate a discussion of why the Rambo behavior is unacceptable and how the behavior can be stopped. The discussion should not stop with a listing of potential sanctions, but

however, a transcript must be provided and notice given to the court if the deposition is intended to be offered into evidence at trial. *See id.* 26(a)(3)(B), 32(c).

171. *See MALONE & HOFFMAN, supra* note 49, at 191.

172. *See id.* at 197. One of the strategies the authors recommend when dealing with "obnoxious or obstructionist defending counsel" is to make an accurate record of the deposition proceedings for later use in demonstrating the incivility of the Rambo lawyer. By using language such as, "let the record reflect that [opposing counsel] is again [calling the witness or opposing counsel names, instructing his client not to answer a legitimate question]," the attorney can show the Rambo lawyer that he is aware of the tactics and does not intend to let him get away with the behavior. *Id.* The authors point out, however, that this is an unnecessary tactic when the opposing counsel's tactics are unsuccessful, "having little effect on the witness's answers." *Id.*

should continue with an analysis of how these new attorneys will take responsibility for ending Rambo behavior.

Professors may find that egregious examples of Rambo behavior, similar to those documented above, will start the class discussion with a consensus on the definition of unacceptable behavior. From this beginning, professors can lead students through a thoughtful analysis of the causes and remedies for Rambo behavior.

VI. CONCLUSION

Rambo behavior during depositions can and must be stopped. This Article documents outrageous behavior that most of us can agree is totally unacceptable. This Article addresses the most extreme examples to clarify the seriousness of the problem and to define a point of unity among the bench, bar, and academic world that name-calling, demeaning gestures, and personal threats are unacceptable in any context.

This Article's secondary goal is to reassure inexperienced attorneys that they have accessible remedies when they encounter a Rambo at a deposition. Many attorneys have the mistaken belief that judges will not take any action to stop obstreperous behavior during depositions. They believe motions for sanctions are useless.¹⁷³ As can be seen from the many cases described above, judges do take Rambo behavior seriously and do mete out sanctions to stop the behavior.¹⁷⁴

Once we have a consensus that certain extreme behavior is wrong and a form of redress is necessary, we can then channel the discussion into the more difficult subject of methods of stopping the behavior without resorting to blanket rules and orders that will interfere with necessary access to information in depositions. Instead of issuing blanket orders to control the behavior, judges will need to approach each incident of Rambo behavior on a case-by-case basis.

While these thoughtful discussions evolve, the practicing lawyers still need protection from the Rambos. Therefore, the solutions this Article proposes are on two fronts: quick punishment for the current offender so as to protect the victim, and education and discussions to find a way to stop the unacceptable behavior, while still preserving the deposition process.

173. Often when lawyers get to the courthouse, the judge suggests that they "work out their differences." Minick, *supra* note 70, at 519.

174. See *supra* Part IV.E.

APPENDIX

A. Threats of Physical Violence in a Deposition

In *Office of Disciplinary Counsel v. Levin*,¹⁷⁵ Jack M. Levin, an attorney, represented himself, with the assistance of his son and associate, Dennis Levin. The court found that at his deposition, Jack Levin threatened to

take his questioner's mustache off his face, to give [opposing counsel] the beating of his life, to slap him across his face, and to break his head. Respondent also accused [opposing counsel] of behaving in an undignified and obscene fashion. Respondent addressed [opposing counsel] in a variety of expletives and otherwise unprofessional terms, including, but not limited to: "lying son-of-bitch," "asshole," "child and a punk," "fat slob," "fucker" and "cocksucker." The proceeding eventually deteriorated to the point that a local common pleas court judge threatened to eject the parties from the courthouse.¹⁷⁶

B. Insults to Religious Background of Opponent

In *In re Williams*,¹⁷⁷ the following colloquy occurred on the record, at a pretrial deposition of the plaintiff, when a dispute arose regarding a witness's right to "review a pleading while being asked questions about it":

Mr. Rosen: If you're going to hand the complaint to him to coach him we are going to see the Judge.

Mr. Williams: Just get your foul odious body on the other side.

Mr. Rosen: Then don't show the witness anymore—

Mr. Williams: I'm giving the witness the Complaint—

Mr. Rosen: You're not entitled to coach the witness any further, you're not entitled to—

Mr. Williams: Don't use your little sheeny Hebrew tricks on me, Rosen.

Mr. Rosen: Off the record—

Mr. Williams: No, on the record.

175. 517 N.E.2d 892 (Ohio 1988) (per curiam).

176. *Id.* at 893-94.

177. 414 N.W.2d 394, 397 (Minn. 1987) (en banc) (per curiam), *appeal dismissed sub nom. Williams v. Lawyers Prof'l Responsibility Bd.*, 485 U.S. 950 (1988).

Mr. Rosen: You son of a bitch.

Mr. Cox: Let's call a recess.

Mr. Rosen: Tell the Judge I called him a rotten son of a bitch for calling me a sheeny Hebrew and I want to go see the Judge right now.¹⁷⁸

C. *The Use of Gutter Language in Addressing Opposing Counsel*

In *Mink v. Conifer Park, Inc.*,¹⁷⁹ the court sanctioned plaintiff's counsel for his disruptive tactics and use of coarse gutter language in addressing opposing counsel.¹⁸⁰

In *Office of Disciplinary Counsel v. Levin*,¹⁸¹ the court held that an attorney's conduct during the deposition in which he engaged in abusive language, had an abusive demeanor, and made threats, warranted a public reprimand.

Joseph Jamail and Edward Carstarphen had the following on-the-record discussion during a 1992 pollution case against Monsanto Company, first published in *The American Lawyer*, as reported by Benjamin Weiser in *The Washington Post*:¹⁸²

Jamail: You don't run this deposition, you understand?

Carstarphen: Neither do you, Joe.

Jamail: You watch and see. You watch and see who does, big boy. And don't be telling other lawyers to shut up. That isn't your goddamned job, fat boy.

Carstarphen: Well, that's not your job, Mr. Hairpiece.

(The witness tried to speak, but could not make himself heard.)

Jamail: What do you want to do about it, [obscenity]?

Carstarphen: You're not going to bully this guy.

Jamail: Oh, you big [obscenity], sit down.¹⁸³

In *Mercer v. Gerry Baby Products Co.*,¹⁸⁴ the court found the following:

178. *Id.* at 397-98.

179. 531 N.Y.S.2d 400, 403 (App. Div. 1988).

180. *See id.*; *see also In re Williams*, 414 N.W.2d at 398 (concluding that attorney-respondent repeatedly engaged in obstreperous, disruptive, and abusive behavior at a panel hearing for disciplinary proceedings).

181. 517 N.E.2d 892 (Ohio 1988).

182. Weiser, *supra* note 7, at B10.

183. *Id.* at B12.

184. 160 F.R.D. 576 (S.D. Iowa 1995) (order granting sanctions and appointing special master to oversee discovery).

The depositions have been fraught with interruptions, instructions not to answer and unilateral time limitations. They have included great moments in legal oratory such as:

Mr. Wallace: "Please sit down, do not hover over the witness."

Mr. Gordon: "Stick it in your ear."

Neither the letter nor the spirit of the *Code of Professionalism of the Iowa State Bar Association* . . . has been met.¹⁸⁵

In *Guerrero v. Board of Education*,¹⁸⁶ the federal district court conducted a hearing to determine the appropriate sanctions to impose on plaintiffs' attorney, Kate Dixon, for her continuing interference in depositions. Defense attorney Harrington testified that at a deposition of one of Ms. Dixon's clients, Dixon insulted Harrington when he stood up to inquire if Ms. Dixon would like a soda or a cup of coffee. At that point, Mr. Harrington reported that Ms. Dixon "stood up and looked at me and she said, 'I know what you want, you want to suck Dr. Corona's cock. You want it up your ass.'"¹⁸⁷

Another of Ms. Dixon's opposing attorneys, JoAnne Lowe, described one deposition in which "Ms. Dixon looked like she was going to come up across the table. She would get up and lean across the table towards Mr. Giambroni, and on one occasion, I recall her fist being closed."¹⁸⁸

Finally, the third defense attorney, Francis Giambroni, testified that Ms. Dixon had called him "an 'asshole' [both] on and off the record at depositions."¹⁸⁹

After a lengthy hearing, the federal district court in *Guerrero* found twenty-six separate instances in which Ms. Dixon had violated standards of professional conduct.¹⁹⁰ Eight of the instances had occurred during depositions, including

swiping a pad of paper at opposing attorney's coffee cup; making physical contact with opposing attorney; accusing opposing counsel of desiring to engage in sodomy with a client; making physically intimidating gestures (leaning across the table with fists clenched);

185. *Id.* at 577-78.

186. No. C92-2971, 1994 U.S. Dist. LEXIS 9259 (N.D. Cal. July 5, 1994) (order imposing disciplinary action), *rev'd on other grounds*, No. 94-16415, 1995 U.S. App. LEXIS 34992 (9th Cir. Dec. 8, 1995).

187. *Id.* at *14-15.

188. *Id.* at *19.

189. *Id.* at *20.

190. *See id.* at *33-34.

calling opposing counsel an “asshole” on and off the record; shouting, yelling, and calling the questioning attorney names which disrupted the proceedings, prompting child witnesses to cry; and reciting answers to a pending question for a witness she was representing, rather than letting the witness answer.¹⁹¹

In an unusual move, the district court crafted a set of sanctions to fit the particular offending attorney. After dismissing the complaint without prejudice for failure to state a claim for relief, the court suspended Ms. Dixon from the practice of law before the United States District Court for the Northern District of California for a period of two years in the following cases:

- a. Any class action;
- b. Any case in which the rights of any minor [were] at issue;
- c. Any case [involving the] corporal punishment of minors . . . ;
- d. Any case in which the operation and/or administration of any educational institution . . . [was] at issue; and
- e. Any case [involving the particular opponents of the current case].¹⁹²

The district court judge then instructed Ms. Dixon to inform all clients of the order.¹⁹³

D. Accusations of Mental Problems

In *American Directory Service Agency, Inc. v. Beam*,¹⁹⁴ the magistrate ordered, prior to the deposition, that certain issues could be explored in the deposition.¹⁹⁵ During the deposition, Ochs, the defending attorney claimed that the questions were “‘far outside the scope’ of the magistrate’s . . . Order.”¹⁹⁶ When the examining attorney repeated a question, Ochs delivered the following “diatribe”:

OCHS: I know you want . . . the identity of customers so that you can go talk to [them]—for what purpose, to harass my client. This is a harassment case, and when you go to our customers to seek information

191. *Id.* at *35 n.14.

192. *Id.* at *44.

193. *See id.* at *45.

194. 131 F.R.D. 15 (D.D.C. 1990) (order imposing sanctions).

195. *See id.* at 18.

196. *Id.* at 18 n.5.

which has nothing to do with jurisdiction . . . , I think it is highly inappropriate.

CLAXTON: You're fantasizing.

OCHS: You are fantasizing with this entire case and listening to a fantasy woman as far as I am concerned.

CLAXTON: Well, your hang-ups on the personalities involved are your problem to deal with. I am simply trying to conduct a deposition.

OCHS: You are simply seeking information which [sic] to harass my clients with.¹⁹⁷

In *C & F Packing Co. v. Dorskocil Cos.*,¹⁹⁸ the following exchange occurred:

Q: . . . Have you ever considered what the exposure might be if you lose this case, ever?

A: On the advice of counsel I'm not going to answer the question.

Q: You can't answer that question for me today, is that right?

A: On the advice of counsel I'm not going to answer that question.

Q: Did you ever sit down with Mr.—by the way is that what you were told to say after the break?

A: No, I was not given any instructions on the break.

Q: Did you ever sit down and talk with Mr. Dorskocil—

MR. MORSE: Mr. Niro, please.

Q: Did you ever sit down a—

MR. MORSE: Because you have paranoia you don't have to take it out on this witness. We had no discussions about this testimony during that break.

MR. NIRO: I'm going to ask you for an apology on this record now. Don't accuse me of any mental illness.

MR. MORSE: You're correct. I apologize.

MR. NIRO: I accept your apology.

MR. MORSE: Forget that I ever accused you of any mental illness. The record will speak for itself.

MR. NIRO: You should control yourself. If you can't control yourself in these proceedings, then I suggest we take a break and you can calm yourself—¹⁹⁹

197. *Id.* (alteration in original).

198. 126 F.R.D. 662 (N.D. Ill. 1989) (order imposing sanctions).

199. *Id.* at 684.