# Taking a Swim in the Legal "*Shark Tank*"

## I'Anson Hoffman Inn of Court
## Presentation by Pupilage Group I

Wednesday, November 12, 2014
Norfolk Yacht & Country Club

Supplemental Materials

Pitch 1: Substantial Assistance and "Ghostwriting"

- Virginia Rules of Professional Conduct 1.2, 3.3, 4.1, and 8.4
- Virginia State Bar Legal Ethics Opinion 1874: Limited Scope Representation – Reviewing Pleadings for *Pro Se* Litigants – Substantial Assistance and "Ghostwriting"
- *Wilfredo Sejas v. MortgageIT, Inc.*, 1:11cv469 (E.D. Va. June 20, 2011) Memorandum Opinion

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- Virginia Rules of Professional Conduct 1.3, 1.7, 1.8, and 8 (selected segments and applicable comments)
- Virginia State Bar Legal Ethics Opinion 1857: Waivers of Ineffective Assistance of Counsel Claims
- *United States v. Lemaster*, 403 F.3d 216, 220 (4th Cir. 2005)
- "Government Rethinks Waivers With Guilty Pleas," *Wall Street Journal*, Sept. 26, 2014

Pitch 4: The Saga of the Hipster Family: The Intersection of Rule 4.2 and Guardians *Ad Litem*

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# Pitch 1: Substantial Assistance and "Ghostwriting"

Casper Scrivener

Mr. Scrivener is a partner in a three-attorney law firm that handles a variety of civil matters. He knows Ann Tagon because her son plays little-league baseball with his son. She attends every game and regularly strains the chain-link fence with her exhortations to run, slide, knock that boy down, etc.

She has become a regular client. Her primary business capitalizes on recent health-food trends and sells chia popsicles, flaxseed donuts, and gluten-free chocolate cakes, but despite her wholesome image, she somehow constantly finds herself embroiled in litigation.

One day at the diamond, in between games, Ms. Tagon sidles up to Mr. Scrivener with the now familiar introduction, "I have a little issue," she says. "I think I have this one worked out, but I'd like to get your opinion."

Given that she is a veteran of courtroom entanglements, Ms. Tagon knows the procedures and the language, and she has drafted a Grounds of Defense for a Warrant in Debt in Small Claims Court for the City of Williamsburg. She unrolls her draft and hands it to Mr. Scrivener, who politely reviews it. The facts and law are straightforward; he makes some notes with the pen he always carries in his right pocket.

Ms. Tagon thanks him, and offers to pay for the pizza that evening. Mr. Scrivener doesn't hear of the suit again until several months later at a birthday party.

While the boys are trying to beat candy out of a colorful donkey, Mr. Scrivener learns that Ms. Tagon's small-claims battle did not turn out well. Not to be bested, she plans to sue the other party, an organic farmer, in Circuit Court for a variety of torts, including tortious interference and intentional infliction of emotional distress.

Invigorated by her earlier court appearance, she plans to handle the case *pro se*, but she doesn't want the farmer to escape justice because of some measly technicality. For that reason, she proposes—or more accurately, demands—that Mr. Scrivener edit her drafted pleading for a fixed sum. She says she will pay for four hours. It's clear that's what she wants; Ms. Tagon is a capable businesswoman who always knows what she wants, so Mr. Scrivener does not discuss it further and he says he will help.

This suit is going to take place in Albemarle County, a jurisdiction where Mr. Scrivener does not practice, but he has some vague recollection that the judge there wrote a scathing opinion lambasting attorneys assisting *pro se* litigants. He knows colleagues who practice there, and is on a listserv that covers the area, but no one returns his calls or messages over the next few days. With Ms. Tagon calling him hourly, he decides the best course of action would be to provide a letter to the court, advising the court that his firm had provided legal advice and assisted with the pleading. Just as he finishes the letter, Ms. Tagon appears at his door to get the package.

Mr. Scrivener tells her that although he finished editing all of the counts in the lawsuit, the four hours did not allow him time to complete his research. He does not think, however, that she has a good legal basis for counts 1-6, 8 or 23-35. He recommends that she allow him another couple of hours. Ms. Tagon firmly informs him

that four hours should have been plenty of time for any decent lawyer. She'll finish the pleading herself. She takes his work and the letter.

Mr. Scrivener does not communicate with the court, nor with Ms. Tagon until a trophy ceremony a couple of months later. She does not believe the trophies are of reasonable quality and would like to bring suit.

In answering the following questions about the hypothetical situation above, refer in particular to ethics rules 1.2, 3.3, 4.1, and 8.4, which are set forth below.

1. Did Casper Scrivener violate any rules by:

    a. Helping Ms. Tagon with her Grounds of Defense?
    b. Assisting only with a portion of Ms. Tagon's suit in Circuit Court?

2. Did Casper Scrivener have a duty, and, if so, did he meet his duty to:

    a. Investigate whether the judge had an opinion on ghostwriting?
    b. Write the letter notifying the court of his assistance, and determine whether the letter was submitted?
    c. Determine whether the pleading was changed before submission?
    d. Complete additional research even though he would not be paid for it?

Rule 1.2
Scope of Representation
(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
(b) A lawyer may limit the objectives of the representation if the client consents after consultation.
(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.
(d) A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.
(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Rule 3.3
Candor Toward The Tribunal
(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal;
(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6;
(3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or
(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
(b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
(c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.
(d) A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

Rule 4.1
Truthfulness In Statements To Others
In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of fact or law; or
(b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

Rule 8.4
It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;
(d) state or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official; or
(e) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

LEO 1874: LIMITED SCOPE REPRESENTATION—REVIEWING PLEADINGS FOR PRO SE LITIGANTS—SUBSTANTIAL ASSISTANCE AND "GHOSTWRITING"

Law Firm has contracted with a pre-paid legal services plan ("Plan") to review and comment to Plan Members on certain documents submitted to Law Firm by Plan Members. "Plan Members" or "Members" are persons who contract with the Plan for access to services provided by Law Firm. Law Firm is compensated by the Plan for this document review service (and a wide range of other designated services) on a membership per capita basis.[1] In addition to the services designated for payment on a membership per capita basis, the Plan allows a Member to request certain other legal services by the Law Firm, including representation before tribunals, on a discounted hourly fee-for-service basis in which the fee is paid by the Member to the Law Firm.

A Member requests Law Firm to review and provide legal advice on a Warrant In Debt with a Bill of Particulars that the Member has prepared for *pro se* filing in a General District Court and a petition for a change of custody that the Member has prepared for filing *pro se* in a Juvenile and Domestic Relations District Court. A review of these documents may fall under the designated document review service described above for which Law Firm is paid on a capitated basis. Law Firm agrees to review and provide advice on these documents, provided the Member agrees to transmit a letter to the court at the time of the filing of the documents that includes this language:

> At the request of [Member] Law Firm has reviewed the attached pleading or document or a version thereof that [Member] has informed Law Firm that he/she intends to file in this court *pro se*. Law Firm has provided legal advice to [Member] regarding the pleading or document. Member has neither retained Law Firm to represent [Member] before this court in the proceeding initiated by the attached pleading or a version thereof nor has Law Firm agreed to represent [Member] in such proceeding. This letter is merely notice to the court that Law Firm has reviewed and provided legal advice to [Member] with regard to the attached pleading or a version thereof to assist [Member] in accurately presenting his/her claim to the court in the proceeding.

*Questions Presented*

You have asked the Committee to address these questions:

1. Has Law Firm fully satisfied its ethical obligations of notice to the court as described in LEOs 1127, 1592, 1761 and 1803 by the actions described above?

For the reasons set out in this opinion, absent a court rule or law to the contrary, there is no ethical obligation to notify the court of the lawyer's assistance to the *pro se* litigant. To the extent that LEOs 1127, 1592, 1761 and 1803 are inconsistent with this opinion, they are overruled.

[1] Law Firm's compensation is based on the number of members residing in the Law Firm's state, not on the number of times a Member calls Law Firm for the designated service.

2. Does Law Firm have an affirmative obligation to determine if the pleading or a version thereof was filed and the letter transmitted to the court with it?

No.

3. If Law Firm determines that the pleading or a version thereof was filed without the letter, does Law Firm have an obligation to transmit a similar notice to the court?

No.

4. Does Law Firm have an obligation to determine if the pleading was filed in the form reviewed by the Law Firm and to advise the tribunal if any change was made prior to its filing?

No.

5. Does Law Firm have an obligation to determine in advance whether or not the court in which the pleading or document will be filed will consider the notice to be an appearance and Law Firm ruled counsel of record and then so notify the Member prior to filing?

The question of whether the assistance provided to a *pro se* litigant constitutes an "appearance" is a question of law beyond the purview of this Committee. A lawyer owes a duty of competence to a client, even if the representation has been limited by agreement. This would include determining a particular court's rules, decisions or policies in regard to "ghostwriting" or providing undisclosed assistance to *pro se* litigants and advising a *pro se* litigant of any applicable law.

6. Does Law Firm have an obligation to appear as counsel of record in the proceeding even if Member refuses to engage Law Firm or compensate Law Firm on the discounted fee-for-service basis as provided in the Plan?

Probably not, but this depends on whether the court has deemed the lawyer to have entered an appearance on behalf of the Member. See discussion below.

7. Does Law Firm have an obligation to determine if the opposing party or parties to the proceeding are represented by counsel and, if so, to provide counsel with a similar notice?

No. Because the representation in your hypothetical will have terminated, no further ethical obligations are owed.

8. Would any answer to the questions above change if Member directly compensated Law Firm for the requested review on a fee-for-service basis if the review was not covered under the capitated payment portion of the Plan?

No.

## DISCUSSION

Question 1 assumes that Law Firm has an obligation to notify the court if it has provided assistance to a member that seeks a document review of a pleading that *the member has prepared* and intends to file *pro se*. This assumption appears to be based on the Committee's prior

guidance in Legal Ethics Opinions 1127 and 1592. The Committee will review and analyze each.

*Legal Ethics Opinion 1127*

In LEO 1127, the Committee was asked whether it is ethically permissible for a lawyer to advise and assist a *pro se* litigant in pending employment litigation by providing legal advice, legal research, recommendations for courses of action to follow in discovery and redrafting of documents prepared by the litigant himself. The Committee opined that there was nothing in the Code of Professional Responsibility that prohibited a lawyer from rendering such assistance to a *pro se* litigant. However, in LEO 1127, the Committee pointed to former DR 7-105(A), which requires that a lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding. Rule 3.4(d) of the current Rules of Professional Conduct adopts the identical language. Rule 3.4(d) is violated when a lawyer *knowingly* disregards "a standing rule or a ruling of a tribunal made in the course of a proceeding." (Emphasis added). LEO 1127 explains that the lawyer cannot disregard a court's rule or requirement that the identity of the drafter of a pleading be disclosed. While this may be a correct statement of an ethics rule, the rules of procedure in state and federal court generally do not require the identification of a lawyer who prepares a pleading for a *pro se* litigant.[2] The rules of procedure require that a pleading be signed by a lawyer admitted to practice before that court, or by the unrepresented party.[3] In your hypothetical, the *pro se* litigant signs and files the pleading, not the lawyer. In effect, LEO 1127 advises lawyers to avoid violating a non-existent rule of procedure. Absent a standing rule of procedure that requires disclosure of the *drafter* of a pleading, who does not sign that pleading nor enter an appearance as counsel of record, neither Rule 3.4(d) nor former DR 7-105(A) comes into play.

By way of example, United States District Court Judge Henry Morgan held:

> The Court believes that the practice of lawyers ghost-writing legal documents to be filed with the Court by litigants who state they are proceeding *pro se* is inconsistent with the intent of certain procedural, ethical, and substantive rules of the Court. While there is no specific rule that prohibits ghost-writing, the Court believes that this practice (1) unfairly exploits the Fourth Circuit's mandate that the pleadings of *pro se* parties be held to a less stringent standard than pleadings drafted by lawyers, *see, e.g., White v. White*, 886 F.2d 721, 725 (4th Cir. 1989) (citations omitted), (2) effectively nullifies the certification requirement of Rule 11 of the Federal Rules of Civil Procedure ("Rule 11"), and (3) circumvents the withdrawal of appearance requirements of Rule 83.1(G) of the Local Rules for the United States District Court for the Eastern District of Virginia ("Rule 83.1(G)").

*Laremont-Lopez v. Southeastern Tidewater Opportunity Center*, 968 F. Supp. 1075, 1077-78 (E.D. Va. 1997).

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[2] 11 U.S.C. §110 requires that non-lawyer bankruptcy petition preparers sign and make certifications on the petition prepared for a *pro se* debtor.

[3] Va. S. Ct. R. 1:4(c): "Counsel or an unrepresented party who files a pleading shall sign it and state his address."

In this case, there was no rule of procedure requiring that the identity of the drafting attorney be disclosed, as discussed and assumed in LEO 1127. Further, it is more likely that the lawyers chastised by Judge Morgan in *Laremont-Lopez* reasonably believed that they were acting in good faith and did not *knowingly* disregard any standing rules in the federal court. Without a rule of procedure prohibiting their conduct, how could they know? The attorneys in this case maintained that they were retained by the plaintiffs for the discrete limited purpose of drafting the complaints. They argued that at the time the complaints were filed their representation of the plaintiffs had terminated, and thus, it was appropriate for the plaintiffs to sign the pleadings as unrepresented litigants. In short, their position is that they did not sign the pleadings because they no longer represented the plaintiffs. *Laremont-Lopez, supra,* 968 F. Supp. at 1078. It is hard to question this argument. Indeed, Judge Morgan allowed that the attorneys' reasoning was "not at odds with the plain language of Rule 11" but nevertheless held that they had circumvented the rule by not having signed the pleadings. But this still begs the question of whether the lawyers in this case had *knowingly* disregarded any standing rule that required disclosure of their identity as the drafter of pleadings filed by the *pro se* litigants. As to the lawyers in *Laremont-Lopez,* the court found that they had not:

> The Court FINDS that the practice of ghost-writing legal documents to be filed with the Court by litigants designated as proceeding *pro se* is inconsistent with the procedural, ethical and substantive rules of this Court. While the Court believes that the Attorneys should have known that this practice was improper, *there is no specific rule which deals with such ghost-writing.* Therefore, the Court FINDS that there is insufficient evidence to find that the Attorneys knowingly and intentionally violated its Rules. In the absence of such intentional wrongdoing, the Court FINDS that disciplinary proceedings and contempt sanctions are unwarranted.

*Laremont-Lopez, supra,* 968 F. Supp. at 1079-80. (Emphasis added). Judge Morgan found that the lawyer's conduct was *inconsistent* with the rules but did not find that they had *violated* any of those rules. However, lawyers are now on notice, because of *Laremont-Lopez* and other federal court cases, that "ghostwriting" may be forbidden in some courts, and should take heed, even if such conduct does not violate any specific standing rule of court.

*Legal Ethics Opinion 1592*

In this opinion, the Committee addressed a situation in which an attorney was retained by an uninsured motorist insurance carrier to defend the carrier in an action in which the uninsured motorist ("Defendant Motorist") has appeared *pro se*. Although Attorney A had not entered an appearance on behalf of the Defendant Motorist, the Defendant Motorist consulted with Attorney A, and Attorney A assisted Defendant Motorist and/or gave Defendant Motorist advice in regard to responding to discovery requests propounded by the Plaintiff in the case. The Committee opined:

> Under DR 7-105(A), and indications from the courts that *attorneys who draft pleadings for pro se clients would be deemed by the court to be counsel of record for the pro se client*, any disregard by either Attorney A or Defendant Motorist of a court's requirement that the drafter of pleadings be revealed would be violative of that disciplinary rule. Such failure to disclose would also be violative of DR 7-

> 102(A)(3). Further, such failure to disclose Attorney A's substantial assistance, including the drafting of pleadings and motions, may also be a misrepresentation to the court and to opposing counsel and, therefore, violative of DR 1-102(A)(4). The committee cautions that Attorney A may wish to obtain Defendant Motorist's assurance that he will disclose A's assistance to the court and adverse counsel. See LEO #1127; Association of the Bar of the City of New York Opinion 1987-2 (3/23/87), ABA/BNA Law. Man. on Prof. Conduct, 901:6404.

(Emphasis added). LEO 1592 does not cite any specific cases for the italicized language nor was this conclusion reached in any of the "ghostwriting" opinions rendered in the federal courts in the Eastern District of Virginia. Moreover, controlling authority in state court says just the opposite. *Walker v. American Ass'n of Prof. Eye Care*, 268 Va. 117, 597 S.E.2d 47, (2004) (lawyer who assisted *pro se* plaintiff with preparation of motion for judgment signed only by plaintiff as a *pro se* litigant and filed pleading with court together with filing fee did not appear on plaintiff's behalf as counsel of record). Without any supporting authority, LEO 1592 reaches the conclusion that a lawyer who assists a *pro se* litigant by preparing a pleading or providing her with legal assistance is deemed by the court to have entered an "appearance" as counsel of record on behalf of that person. That conclusion is incorrect, but at least one circuit court has deemed the litigant "represented by counsel" when a lawyer prepared for a client a motion for judgment for the client to sign and proceed *pro se*. *See Walker, supra.*

LEO 1592 concluded that the lawyer violated DR 7-105(A) following the approach taken in LEO 1127. The opinion also cites former DR 7-102(A)(3), which states: "In his representation of a client a lawyer shall not. . .conceal or knowingly fail to disclose that which he is required by law to reveal." Application of this rule under these circumstances raises some questions. First, as the attorney argued in *Laremont-Lopez*, the lawyer-client relationship was concluded when the "ghostwriting" attorney completed the drafting of the pleading. So when the *pro se* litigant filed his pleading with the court, he was not represented by counsel. DR 7-102(A)(3) on its face speaks to misconduct by a lawyer in the course of representing a client. The rule seems inapplicable to the circumstances presented in the opinion. Second, was the lawyer "required by law" to disclose that he or she assisted the *pro se* litigant? As stated in the discussion of LEO 1127, there was no rule violated when the attorney failed to disclose his identity as the drafter of the pleading. Judge Morgan was frustrated by the fact that the attorney had circumvented some other rules, but made no finding that the rules had been violated by the "ghostwriting" attorney and acknowledged that there was no rule forbidding "ghostwritten" pleadings. Finally, LEO 1592 cites DR 1-102(A)(4) as having been violated when the lawyer failed to disclose his "substantial assistance" to an unrepresented defendant motorist. This rule is nearly identical to current Rule 8.4 (b): "A lawyer shall not. . .engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law." Application of this rule assumes, of course, that the "ghostwriting" lawyer is being dishonest or deceitful for not having disclosed his assistance to the *pro se* litigant, even though no standing court rule or law required such disclosure.

*Other Bar Opinions*

State and local ethics committees have reached different conclusions on whether disclosure of a lawyer's assistance to a *pro se* litigant is required by the Rules of Professional Conduct. Some have opined that no disclosure is required.[4] Others, in contrast, have expressed the view that the identity of the lawyer providing assistance must be disclosed on the theory that failure to do so would both be misleading to the court and adversary counsel, and would allow the lawyer to evade responsibility for frivolous litigation under applicable court rules.[5] The ABA's Standing Committee on Ethics and Professional Responsibility took the "middle ground" approach adopted in LEOs 1127 and 1592 stating that disclosure of at least the fact of legal assistance must be made to avoid misleading the court and other parties, but that the lawyer providing the assistance need not be identified.[6] The ABA has since taken the position, as have other jurisdictions, that the fact of assistance need not be disclosed, a position this Committee has likewise chosen to adopt, overruling LEOs 1127 and 1592 to the extent they are inconsistent with this opinion. *See* ABA Formal Op. 07-446 (May 5, 2007). The Committee concludes that there is not a provision in the Rules of Professional Conduct that prohibits undisclosed assistance to a *pro se* litigant as long as the lawyer does not do so in a manner that violates a rule of conduct that otherwise would apply to the lawyer's conduct. This Committee does not believe that the failure to disclose that fact would constitute fraudulent or otherwise dishonest conduct on the

[4] New York County Law Ass'n Ethics Op. 742 (2010)(disclosure of lawyer's assistance not required unless necessary by law, rule of court or court order); New Jersey Ethics Op. 713 (2008)(disclosure not required unless lawyer behind the scene controlling litigation); ABA Formal Op. 446-07(2007)(litigants ordinarily have the right to proceed without representation and may do so without revealing that they have received legal assistance in the absence of a law or rule requiring disclosure). Some state bar opinions have struck a "middle ground" stating that the lawyer's assistance should be disclosed if not the lawyer's identity. Arizona Eth. Op. 06-03 (July 2006) (Limited Scope Representation; Confidentiality; Coaching; Ghost Writing); Illinois State Bar Ass'n Op. 849 (Dec, 9,1983) (Limiting Scope of Representation); Maine State Bar Eth. Op. 89 (Aug. 31, 1988); Los Angeles County Bar Ass'n Eth. Op. 502 (Nov. 4, 1999) (Lawyers' Duties When Preparing Pleadings or Negotiating Settlement for In Pro Per Litigant); Los Angeles County Bar Ass'n Eth. Op.483 (Mar. 20, 1995) (Limited Representation of In Pro Per Litigants). *But see* Alaska Eth. Op. 93-1 (March 19, 1993) (Preparation of a Client's Legal Pleadings in a Civil Action Without Filing an Entry of Appearance) (lawyer's assistance must be disclosed unless lawyer merely helped client fill out forms designed for pro se litigants).

[5] Colorado Bar Ass'n Eth. Op. 101 (Jan. 17, 1998) (Unbundled Legal Services) (Addendum added Dec. 16, 2006, noting that Colorado Rules of Professional Conduct amended to state that a lawyer providing limited representation to *pro se* party involved in court proceeding must provide lawyer's name, address, telephone number and registration number in pleadings); Connecticut Inf. Eth. Op 98-5 (Jan. 30, 1998) (Duties to the Court Owed by a Lawyer Assisting a *Pro Se* Litigant); Delaware State Bar Ass'n Committee on Prof'l Eth. Op. 1994-2 (May 6, 1994); Kentucky Bar Ass'n Eth. Op. E-343 (Jan. 1991); New York State Bar Ass'n Committee on Prof'l Eth. Op. 613 (Sept. 24, 1990).

[6] ABA Inf. Op. 1414 (June 6, 1978) (Conduct of Lawyer Who Assists Litigant Appearing *Pro Se*), in FORMAL AND INFORMAL ETHICS OPINIONS: FORMAL OPINIONS 316-348, INFORMAL OPINIONS 1285-1495, at 1414 (ABA 1986). *See also* Florida Bar Ass'n Eth. Op.79-7 (Reconsideration) (Feb. 15, 2000); Iowa Supreme Court Bd. Of Prof'l Eth. & Conduct Op. 96-31 (June 5, 1997) (Ghost Writing Pleadings); Massachusetts Bar Ass'n Eth. Op. 98-1 (May 29, 1998); New Hampshire Bar Association (May 12, 1999) (Unbundled Services: Assisting the *Pro Se* Litigant); Utah 74 (1981); Association of the Bar of the City of New York, Committee on Prof'l & Jud. Eth. Formal Op. 1987-2 (Mar. 23, 1987).

part of the lawyer or client, and therefore there would be no violation of Rules 1.2(d), 3.3(b), 4.1(b), or 8.4(c).

*Analysis*

LEOs 1127 and 1592 did not address the right of the client and the lawyer to agree to limit the scope of the engagement as explicitly authorized by Rule 1.2(b): "[a] lawyer may limit the objectives of the representation if the client consents after consultation." Perhaps that is because there was no counterpart in the Code of Professional Responsibility for current Rule 1.2(b).[7] With Virginia's adoption of most of the ABA Model Rules in 2000, a discussion of Rule 1.2(b) and "unbundling" legal services became a hot topic not only in Virginia but across the country as well.

We agree with the reasoning in ABA Formal Op. 07-446 that:

> The fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation. Litigants ordinarily have the right to proceed without representation and may do so without revealing that they have received legal assistance in the absence of a law or rule requiring disclosure.

Some case decisions and ethics opinions have required disclosure of the lawyer's assistance on the basis that *pro se* litigants are treated more leniently and held to less stringent standards than litigants that are represented by counsel. This Committee does not share this concern and believes that a *pro se* litigant that receives undisclosed assistance by a lawyer will not receive any unwarranted special treatment. In many instances, if the lawyer has been competent and effective with his undisclosed assistance it will be obvious to the court and other parties that a lawyer has been involved. If the undisclosed lawyer has not been competent or effective, the *pro se* litigant will have no advantage. We see no reason to conclude, as some decisions and opinions have, that undisclosed assistance will give the *pro se* litigant an "unfair advantage." As noted by one commentator:

> Practically speaking ... ghostwriting is obvious from the face of the legal papers, a fact that prompts objections to ghostwriting in the first place.... Thus, where the court sees the higher quality of the pleadings, there is no reason to apply any liberality in construction because liberality is, by definition, only necessary where pleadings are obscure. If the pleading can be clearly understood, but an essential fact or element is missing, neither an attorney-drafted nor a pro se-drafted complaint should survive the motion. A court that refuses to dismiss or enter

[7] DR 7-101(B)(1) stated that a lawyer may, "with the express or implied authority of his client, exercise his professional judgment to limit or vary his client objectives and waive or fail to assert and waive or fail to assert a right or position of his client." This provision seems quite different from current Rule 1.2(c) as the former rule only authorizes the lawyer to waive or fail to assert positions of the client in mid-stream after the representation has begun. In contrast, and more appropriate to the subject of "ghostwriting" a pleading for a *pro se* litigant, Rule 1.2(c) and Comment [6] focus on an agreement reached between lawyer and client at the outset of the representation. Most of the newer ethics opinions on "ghostwriting" rely heavily on Rule 1.2 and the right to limit the scope of the representation.

> summary judgment against a non-ghostwritten pro se pleading that lacks essential facts or elements commits reversible error in the same manner as if it refuses to deny such dispositive motions against an attorney-drafted complaint.

Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145, 1157-58 (2002). Critics are concerned that a litigant appearing *pro se* will receive an unfair benefit from a tribunal as a result of undisclosed legal assistance. That concern, in the Committee's view, is outweighed by the court having a properly pleaded motion, complaint, answer, or other document to consider and the broader access to justice that limited assistance may promote. The Committee believes, therefore, that the nature or extent of such assistance is immaterial and need not be disclosed.

Nor does the Committee believe that providing undisclosed assistance to a *pro se* litigant violates Rule 3.3. Similarly, this Committee believes that non-disclosure of the lawyer's assistance is not an act of dishonesty, fraud, deceit or misrepresentation that is prohibited by Rule 8.4(c) nor is the lawyer assisting the *pro se* litigant in conduct that is illegal or fraudulent in contravention of Rule 1.2(c). Finally, we believe that assistance to a *pro se* litigant is not a material fact that must be disclosed to another party under Rule 4.1. The Committee believes that a lawyer who has been asked by a *pro se* litigant for limited assistance on some discrete tasks and who undertakes them in a manner that comports with Rule 1.2(b) and all other applicable rules of conduct should not be subject to discipline for having done so.

This opinion assumes that the lawyer is practicing in a jurisdiction where no law or tribunal rule requires disclosure of such participation, prohibits litigants from employing lawyers (e.g., small claims courts), or otherwise regulates such undisclosed advice or drafting. If there is such a regulation, the boundaries of the lawyer's obligation are beyond the scope of this opinion.

Your inquiries in Questions 1-4 have been answered on the basis that the Rules of Professional Conduct do not obligate the lawyer to ensure that the court is informed that a *pro se* litigant has received assistance from the lawyer. The Committee adds that it is not practical to require that lawyers *ensure* that a court is informed of his assistance to a *pro se* litigant after the lawyer-client relationship has ended and the lawyer has no control over what pleadings are actually filed with the court.

In regard to your Question Number 5, whether the court in which the pleading is filed will regard Law Firm as having entered an appearance on behalf of Member is a question of law beyond the Committee's purview.[8] However, as part of the lawyer's duty of competence under Rule 1.1, the lawyer should exercise diligence and research the particular court's view of "ghostwriting" pleadings for a *pro se* litigant. As one court stated:

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[8] *See Walker v. American Ass'n of Prof. Eye Care*, 268 Va. 117, 597 S.E.2d 47 (2004)(lawyer who assisted *pro se* litigant with motion for judgment signed only by plaintiff as *pro se* party and filed pleading with clerk's office with filing fee did not enter an appearance on behalf of plaintiff).

> Nevertheless, the Court considers it improper for lawyers to draft or assist in drafting complaints or other documents submitted to the Court on behalf of litigants designated as *pro se*.[9]

Thus, regardless of whether the preparation of a pleading for a *pro se* litigant constitutes an "appearance," the lawyer must make a reasonable effort to determine if the particular court will permit the preparation of a lawsuit on behalf of a *pro se* litigant that is not signed by the lawyer preparing the document, as some courts do not allow such a practice on procedural, ethical and substantive grounds.[10] As some courts have complained that "ghostwriting" evades the lawyer's obligations under Rule 11 of the Federal Rules of Civil Procedure, Law Firm must also be mindful of its obligation to not assist a Member in the preparation of a pleading that is frivolous. See Rule 3.1.[11]

This Committee observes that, in contrast to the federal court precedents, a majority of state courts and state bar ethics opinions point to a positive trend toward acceptance of undisclosed assistance to *pro se* litigants. *See* Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 286-88 (2010)(reporting that of 24 states that have addressed this issue, 13 permit ghostwriting, and of those 13 states, 10 permit undisclosed ghostwriting while 3 require a statement on the pleading to

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[9] *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F.Supp. 1075, 1077 (E.D. Va. 1997). *See also Sejas v. MortgageIT, Inc.*, 1:11cv469 (JCC) (E.D. Va. 2011):

> [T]his Court admonishes Plaintiff that 'the practice of ghost-writing legal documents to be filed with the Court by litigants designated as proceeding *pro se* is inconsistent with the procedural, ethical and substantive rules of this Court.' *Laremont-Lopez v. Southeast Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1080-81 (E.D. Va. 1997). The Court further warns any attorney providing ghostwriting assistance that he or she is behaving unethically. *Davis v. Back*, No. 3:09cv557, 2010 WL 1779982, at *13 (E.D. Va. April 29, 2010) (Ellis, J.).

[10] *Barnett v. LeMaster*, 12 F. App'x 774, 778–79 (10th Cir. 2001) (stating that where the party entered a *pro se* appearance as well as filed and signed his appeal *pro se*, the attorney who drafted the brief knowingly committed a gross misrepresentation to this court); *Duran v. Carris*, 238 F.3d 1268, 1272 (10th Cir. 2001) (determining that attorney ghostwriting of *pro se* litigant's appellate brief constitute[d] a misrepresentation to this court by litigant and attorney); *Laremont-Lopez v. SoutheasternTidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1078 (E.D. Va. 1997) (finding that attorney ghostwriting of *pro se* litigants' complaints constitute[d] a misrepresentation to the Court); *United States v. Eleven Vehicles*, 966 F. Supp. 361, 367 (E.D. Pa. 1997) ("Clearly, the party's representation to the Court that he is pro se is not true when the pleadings are being prepared by the lawyer. A lawyer should not silently acquiesce to such representation."); *In re Mungo*, 305 B.R. 762, 769 (Bankr. D.S.C. 2003) ("[T]his Court prohibits attorneys from ghost-writing pleadings and motions for litigants that appear pro se because such an act is a misrepresentation that violates an attorney's duty and professional responsibility to provide the utmost candor toward the Court."); *see also Johnson v. Bd. of County Comm'rs*, 868 F. Supp. 1226, 1232 (D. Colo. 1994) ("Having a litigant appear to be *pro se* when in truth an attorney is authoring pleadings and necessarily guiding the course of the litigation with an unseen hand . . . is far below the level of candor which must be met by members of the bar."), *aff'd*, 85 F.3d 489 (10th Cir. 1995); *In re Merriam*, 250 B.R. 724, 733 (Bankr. D. Colo. 2000) (finding that attorney ghostwriting of *pro se* litigant's court documents violates the attorney's duty of honesty and candor to the court).

[11] "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

indicate it was prepared with the assistance of counsel; 10 states expressly forbid ghostwriting). Even some federal courts have "softened" their position toward ghostwriting. The Second Circuit, in an attorney disciplinary case styled *In re Fengling Liu*, Doc. No. 09-90006-am, 2011 U.S. App. LEXIS 23326 (Nov. 22, 2011), while publicly reprimanding an immigration lawyer for other misconduct, found that her ghostwritten pleadings were not improper:

> We also conclude that there is no evidence suggesting that Liu knew, or should have known, that she was withholding material information from Court or that she otherwise acted in bad faith. The petitions for review not at issue were fairly simple and unlikely to cause any confusion or prejudice. Additionally, there is no indication that Liu sought, or was aware that she might obtain, any unfair advantage through her ghostwriting. Finally, Liu's motive in preparing the petitions—to preserve the petitioner's right of review by satisfying the thirty-day jurisdictional deadline—demonstrated concern for clients rather than a desire to mislead this Court or opposing parties. Under these circumstances, we conclude that Liu's ghostwriting did not constitute misconduct and therefore does not warrant the imposition of discipline.

In response to Question Number 6, this is a question of law beyond the Committee's purview. Assuming the court deems Law Firm to have appeared as counsel for Member, Law Firm would have a duty to perform the tasks required of counsel of record to protect Member's interests in the pending case unless and until Law Firm is granted leave to withdraw, even if Member refuses to pay for Law Firm's services.

As to your Question Number 7, to perform only the limited and discrete task of preparing a pleading for a person to file *pro se*, the Committee does not believe the Rules of Professional Conduct require that notice of that limited representation be given to an opposing party or their counsel.

As to your Question Number 8, the Committee believes that the manner in which Law Firm is compensated does not affect how the questions in this opinion are addressed.

## Conclusion

To sum up, the Committee does not believe that nondisclosure of the fact of legal assistance is dishonest so as to violate Rules 3.3 or 8.4(c). Whether it is dishonest for the lawyer to provide undisclosed assistance to a *pro se* litigant turns on whether the court would be misled by failure to disclose such assistance. The lawyer is making no representation to the tribunal regarding the nature or scope of the representation, and indeed, may be obliged under Rule 1.6 not to reveal the fact of the representation. Absent an affirmative statement by the client that can be attributed to the lawyer that the documents were prepared without legal assistance, the lawyer has not made any false statements of fact to the court prohibited by Rule 3.3, nor has been dishonest within the meaning of Rule 8.4(c). The non-disclosure of the lawyer's behind-the-scenes assistance is not material to the court's determination of the merits of the *pro se* litigant's position or case and therefore the court is not misled by the non-disclosure.

While this Committee opines that undisclosed assistance to a *pro se* litigant is permissible under the Rules of Professional Conduct, if a lawyer agrees to prepare a lawsuit for a *pro se*

litigant, he or she must do so competently and may not prepare one that is frivolous. *See* Rules 1.1 and 3.1. Preparing a lawsuit for a person to file *pro se* requires that the lawyer make a sufficient inquiry of the facts and research of applicable law to ensure that the pleading contains claims that are not frivolous. Further, depending on the complexity of the case and the sophistication of the limited scope client, the preparation of a lawsuit for the limited scope client may not be an appropriate means by which to accomplish the client's objectives. *See* Rule 1.2. When limited scope representation is considered for a *pro se* litigant, the lawyer must meet the "consultation" requirement of Rule 1.2 by explaining to the client the advantages and disadvantages of limited scope versus full representation.

This Committee concludes that the Rules of Professional Conduct do not prohibit undisclosed assistance to a *pro se* litigant. However, lawyers who undertake to prepare or assist in the preparation of a pleading for a *pro se* litigant may advise the *pro se* litigant to insert a statement to the effect that "this document was prepared with the assistance of a licensed and active member of the Virginia State Bar." Because the fact of the lawyer's assistance may be confidential under Rule 1.6(a), the lawyer should not include such a statement if the client objects to revealing that fact.

This opinion is advisory only and is not binding on any court or tribunal.

Committee Opinion
July 28, 2014

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

| | | |
|---|---|---|
| Wilfredo Sejas, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | 1:11cv469 (JCC) |
| | ) | |
| MortgageIT, Inc., | ) | |
| | ) | |
| Defendant. | ) | |

**M E M O R A N D U M  O P I N I O N**

This matter is before the Court on Defendant MortgageIT, Inc.'s ("Defendant" or "MortgageIT") Motion to Dismiss ("MTD"). For the following reasons, the Court will grant dismissal.

## I. Background

Plaintiff Wilfredo Sejas, *pro se* ("Plaintiff" or "Sejas"), alleges in his Complaint [Dkt. 1, Ex. A] that he signed a Deed of Trust and promissory note for a property located at 7651 Rugby Court, Manassas, Virginia, 20109 (the "Property"), with Defendant as beneficiary. (Complaint ¶¶ 2, 6.) He claims that the Deed of Trust is defective for lack of proper acknowledgement and that the Certificate of Acknowledgement is also "defective." (Complaint ¶ 7.) And he claims that Defendant instructed a Substitute Trustee to carry

out a foreclosure sale of the property without having had the authority to do so, and without properly notifying Plaintiff. (Complaint ¶¶ 8, 9.)

Several unusual aspects of this case should be noted from the outset. It appears quite similar to *Sejas v. MortgageIT, Inc., et al.*, Case No. 153CL09003947-00, filed in Prince William Circuit Court on October 15, 2009. In that earlier case, where Plaintiff was represented by counsel, Plaintiff claimed at Paragraph 11 of his complaint that he "does not speak, read, or write English." Remarkably, however, Plaintiff's instant Complaint is written in English, meaning either that his English skills have improved dramatically in the past two years or that his pleadings are being ghost-written. To the extent the latter case proves true, this Court admonishes Plaintiff that "the practice of ghost-writing legal documents to be filed with the Court by litigants designated as proceeding *pro se* is inconsistent with the procedural, ethical and substantive rules of this Court." *Laremont-Lopez v. Se. Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1080-81 (E.D. Va. 1997). The Court further warns any attorney providing ghost-writing assistance that he or she is behaving unethically. *Davis v. Back*, No. 3:09cv557, 2010 WL 1779982, at *13 (E.D. Va. April 29, 2010) (Ellis, J.).

Also, perhaps relatedly, Plaintiff's recent Motion for a Continuance [Dkt. 11] contained Plaintiff's signature, but underneath listed the name "Wyman P. Rodriguez, pro se." And finally, the phone number listed at the end of that pleading is not that of Mr. Sejas, as the Court learned in attempting to notify Mr. Sejas that the Motion to Dismiss would be decided on the pleadings. Needless to say, these facts are suspicious.

Plaintiff's Complaint includes claims of Wrongful Foreclosure (Count I), Trespass (Count II), Breach of Contract (Count III), and seeks Declaratory Relief (Count IV). Defendant Moved to Dismiss on May 13, 2011. [Dkt. 7 ("Mot.").] Plaintiff failed to respond to that motion until June 3, 2011, when he moved for a continuance [Dkt. 11], which the Court denied on June 7, 2011 [Dkt. 12]. Defendant's motion is before the Court.

**II. Standard of Review**

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint. *See Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994). In deciding such a motion, a court must first be mindful of the liberal pleading standards under Rule 8, which require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8. A court must take "the material allegations of the complaint" as admitted and liberally construe the complaint

in favor of a plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

While Rule 8 does not require "detailed factual allegations," a plaintiff must still provide "more than labels and conclusions" because "a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citation omitted). Indeed, the legal framework of the complaint must be supported by factual allegations that "raise a right to relief above the speculative level." *Id.* at 1965. In its recent decision, *Ashcroft v. Iqbal*, 129 S. Ct 1937 (2009), the Supreme Court expanded upon *Twombly* by articulating a two-pronged analytical approach to be followed in any Rule 12(b)(6) test. First, a court must identify and reject legal conclusions unsupported by factual allegations because they are not entitled to the presumption of truth. *Id.* at 1951. "[B]are assertions" that amount to nothing more than a "formulaic recitation of the elements" do not suffice. *Id.* (citations omitted). Second, assuming the veracity of "well-pleaded factual allegations," a court must conduct a "context-specific" analysis drawing on "its judicial experience and common sense" and determine whether the factual allegations "plausibly suggest an entitlement to relief." *Id.* at 1950-51. The plausibility standard requires more than a showing of "a sheer possibility that a defendant has

acted unlawfully." *Id.* at 1949. In other words, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

The Court construes the *pro se* Complaint in this case more liberally than those drafted by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972). Further, the Court is aware that "[h]owever inartfully pleaded by a *pro se* plaintiff, allegations are sufficient to call for an opportunity to offer supporting evidence unless it is beyond doubt that the plaintiff can prove no set of facts entitling him to relief." *Thompson v. Echols*, No. 99-6304, 1999 WL 717280, at *1 (4th Cir. 1999) (citing *Cruz v. Beto*, 405 U.S. 319 (1972)). Nevertheless, while *pro se* litigants cannot "be expected to frame legal issues with the clarity and precision ideally evident in the work of those trained in law, neither can district courts be required to conjure up and decide issues never fairly presented to them." *Beaudett v. City of Hampton*, 775 F.2d 1274, 1276 (4th Cir. 1985). Thus, even in cases involving *pro se* litigants, as in here, the Court "cannot be expected to construct full blown claims from sentence fragments." *Id.* at 1278.

**III. Analysis**

Defendant seeks dismissal on grounds of res judicata and failure to state a claim under Federal Rule of Civil

Procedure 12(b)(6). As this Court will dismiss for res judicata, it need not reach the Rule 12(b)(6) issue.

The doctrine of res judicata bars additional litigation on matters decided in earlier litigation between the same parties. Federal courts apply state res judicata law in determining the preclusive effects of a state court judgment. *Greengael, LC v. Board of Sup'rs of Culpeper Cnty., Va.*, 313 F. App'x 577, 579 (4th Cir. 2008) (citing *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 293 (2005); *In re Genesys Data Tech., Inc.*, 204 F.3d 124, 129 (4th Cir. 2000)). Virginia's claim preclusion[1] doctrine bars "relitigation of the same cause of action, or any part thereof, which could have been litigated between the same parties and their privies." *Martin-Bangura v. Va. Dep't. of Mental Health*, 640 F. Supp. 2d 729, 738 (E.D. Va. 2009) (quoting *Smith v. Ware*, 244 Va. 374, 421 (1992)). A party asserting that a claim is precluded must also "show that the previous judgment was a valid, final judgment on the merits." *Id.* "The doctrine protects litigants from multiple lawsuits, conserves judicial resources, and fosters

[1] As the Supreme Court has recently reiterated, "[t]he preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). At issue here is "claim preclusion," or the doctrine that "forecloses successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit." *Id.* (internal quotation marks and citation omitted).

certainty and reliance in legal relationships." *State Water Control Bd. v. Smithfield Foods, Inc.*, 261 Va. 209, 214 (2001).

Virginia Rule of Supreme Court 1:6 adopts what is commonly known as the "conduct, transaction, or occurrence" test for res judicata claim preclusion, stating:

> A party whose claim for relief arising from identified conduct, a transaction, or an occurrence, is decided on the merits by a final judgment, shall be forever barred from prosecuting any second or subsequent civil action against the same opposing party or parties on any claim or cause of action that arises from that same conduct, transaction or occurrence, whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit, and regardless of the legal elements or the evidence upon which any claims in the prior proceeding depended, or the particular remedies sought.

"[T]he terms of this Rule make clear [that] claim preclusion in Virginia operates to bar any claim that could have been brought in conjunction with a prior claim, where the claim sought to be barred arose out of the same conduct, transaction, or occurrence as the previously litigated claim." *Martin-Bangura v. Va. Dept. of Mental Health*, 640 F. Supp. 2d 729, 738 (E.D. Va. 2009).

Here, Plaintiff's complaint raises allegations of fraud and conspiracy regarding the mortgage-loan transaction and subsequent foreclosure proceedings on the Property. These

claims were raised, indeed in far more detail, in Plaintiff's previous Prince William County Court claim, which resulted in dismissal with prejudice on April 30, 2010. [Dkt. 8, Ex. 3.] The opening paragraph of the complaint in that case sums it up well, arguing that "Defendants were not persons entitled to enforce, not holders, and not holders in due course in connection with the subject mortgage loan to Mr. Sejas," and seeking relief for "the Defendants' illegal and malicious actions in violation of the Virginia law and other malfeasance in the origination, granting, and eventual securitization of the residential mortgage loan to Mr. Sejas." [Dkt. 8, Ex. 2, at 2 (footnote omitted).]

Thus, the instant case is essentially identical to an earlier case with a final judgment on the merits, with the same parties, and with claims arising from the same conduct, transaction, or occurrence as the earlier case. This case is therefore barred under the doctrine of res judicata.

## IV. Conclusion

For the reasons stated above, the Court will grant Defendant's Motion for Dismissal.

/s/
James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

June 20, 2011
Alexandria, Virginia

# Pitch 2: "Videos a No No:" Getting Creative with Discovery Sanctions

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

| | |
|---|---|
| THE SECURITY NATIONAL BANK OF SIOUX CITY, IOWA, as Conservator for J.M.K., a Minor,<br><br>Plaintiff,<br><br>vs.<br><br>ABBOTT LABORATORIES,<br><br>Defendant. | No. C 11-4017-MWB<br><br>**MEMORANDUM OPINION AND ORDER REGARDING SANCTIONS** |

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Something is rotten, but contrary to Marcellus's suggestion to Horatio, it's not in Denmark.[1] Rather, it's in discovery in modern federal civil litigation right here in the United States. Over two decades ago, Griffin Bell—a former United States Attorney General, United States appeals court judge, and private practitioner—observed: "The criticism of the civil justice system has reached a crescendo in recent years. Because much of the cost of litigation is incurred in discovery, the discovery process has been the focal point of considerable criticism."[2] How little things have changed.

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

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

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

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

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

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

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

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

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

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

[6] *Cf.* Daniel C. Girard & Todd I. Espinosa, *Limiting Evasive Discovery: A Proposal for Three Cost Saving Amendments to the Federal Rules*, 87 DENV. U. L. REV. 473, 475 (2010) ("The Federal Rules prohibit evasive responses . . . . In practice, however, these rules are not enforced. Service of evasive discovery responses has become a routine—and rewarding—litigation tactic.").



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

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

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

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

a lawyer with an outstanding career, like Counsel, should be imposed, if at all, with great hesitation and a full appreciation for how a serious sanction could affect that lawyer's career. I wholeheartedly agree. I am still able to count each of the sanctions I have imposed on lawyers in my twenty years as a district court judge on less than all the fingers of one hand. Virtually all of those sanctions have been imposed on (or threatened to be imposed on) lawyers from out-of-state law firms.[5]

## *I. PROCEDURAL HISTORY*

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

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

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



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

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

## *II. ANALYSIS*

### *A. Standards for Deposition Sanctions*

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

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

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

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



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

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

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

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

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



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

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

### *B. Deposition Conduct*

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

#### *1. "Form" Objections*

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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



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

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

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

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

'objection as to form' must say only those four words, unless the questioner asks the objector to state a reason."); *Turner v. Glock, Inc.*, No. CIV.A. 1:02CV825, 2004 WL 5511620, at *1 (E.D. Tex. Mar. 29, 2004) ("All other objections to questions during an oral deposition must be limited to 'Objection, leading' and 'Objection, form.' These particular objections are waived if not stated as phrased above during the oral deposition."); *Auscape Int'l v. Nat'l Geographic Soc'y*, No. 02 CIV. 6441(LAK), 2002 WL 31014829, at *1 (S.D.N.Y. Sept. 6, 2002) ("Once counsel representing any party states, 'Objection' following a question, then all parties have preserved all possible objections to the form of the question unless the objector states a particular ground or grounds of objection, in which case that ground or those grounds alone are preserved."); *In re St. Jude Med., Inc.*, No. 1396, 2002 WL 1050311, at *5 (D. Minn. May 24, 2002) ("Objecting counsel shall say simply the word 'objection', and no more, to preserve all objections as to form.").[15] For the reasons discussed above, I think this approach makes little legal or practical sense.

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

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



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

*2. Witness Coaching*

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

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

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

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

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

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

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



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

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

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

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

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

> Q. . . . I'm wondering if you could perhaps in a . . . little bit less technical language explain to me what they're talking about in that portion of the exhibit.
>
> COUNSEL: Object to the form of the question.
>
> A. So rephrase.
>
> Q. Could you tell me what they're saying here?
>
> COUNSEL: Same objection.
>
> A. Rephrase it again.
>
> . . .
>
> Q. So it – that's what they're talking about, the two types, the finished product and the overs? Does it separate those two things?
>
> A. Yes.
>
> Q. What's an "over"?
>
> COUNSEL: Object to the form. He doesn't want you to characterize it. He wants to know what's it made out of, I think.[11]

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



> Q. I mean, is it too big?
>
> COUNSEL: Object to the form of the question.
>
> A. Rephrase.

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

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

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

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

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

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

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

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

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

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



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

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

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

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

(Bottock Depo. 47:12-18).

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

(Bottock Depo. 48:12-17).

Q. Does it describe the heat treatment that you referred to a few moments ago, the heat treatment that occurs in the dryer phase?

. . .

COUNSEL: Okay. Do you know his question? He's asking you if this is what you're describing.

A. Yeah, I don't know.

(Bottock Depo. 57:8 21).

Q. . . . Is there any particular reason that that language is stated with respect to powdered infant formula?

COUNSEL: If you know. Don't—if you know.

A. No, I—no, not to my knowledge.

COUNSEL: If you know. I mean, do you know or not know?

A. I don't know.

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



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

Q. To what extent do you have knowledge of the testing procedures that Abbott employs in raw materials or the environment, the plant environment or final product?

A. Very limited knowledge, again, because that would be product development.

COUNSEL: He's just asking you what do you have. Do you have any? If it's no, then just say "no."

A. Okay.

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

Q. . . . Do you know when that occurs or does it occur on a regular basis?

COUNSEL: Object to the form, regular basis. It says, "Once a year." He means the same time once a year presumably but—

A. On an annual basis, the time may vary when we close the facility to fumigate.

(Bottock Depo. 34:5-11).

Q. At any rate, you'll see that on both the first page of Exhibit 22 and the first page of Exhibit 23, there's a picture of the product, and both of them have the word "NeoSure" on the product. Would you be able to tell me what the difference between those two products is?

. . .

COUNSEL: Well, he said difference between the products. It lacks foundation that there's a difference between the products.

Q. There may not be. I don't know. Can you tell me?

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

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

Q. For that particular infant who is not premature, like in this case was a twin, do you believe that NeoSure is an appropriate version of powdered infant formula?

COUNSEL: Object to the form. Lack of foundation in terms of what this baby – whether this baby was preterm or not. It's not in evidence in this deposition nor in the record anyplace. And I object to the form of the question as calling for speculation.

Q. Go ahead.

COUNSEL: You can answer.

A. I can't answer it without more information.

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

Q. . . . Is that accurate or is there something that they, you know, just chose not to put—

COUNSEL: If you know. She didn't write this.

A. Yes, I didn't write this.

(Bottock Depo. 27:20-25)

Q. Okay. The part that counsel just read, is that basically an accurate summary of the process?

COUNSEL: In general.

A. In general.

(Bottock Depo. 28:21-24).



Q. . . . And then under "Follow-Up Test" for Eb it's essentially the same thing as E. sak negative; right?

COUNSEL: It says zero.

A. It says zero.

Q. But which would – that would be the same type of finding if it said E. sak negative; right?

COUNSEL: In other words, there's no Eb. There's no Eb; there's no—

A. It's zero. There's no Eb.

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

Q. My question is, was that a test—do you know if that test was performed in Casa Grande or Columbus?

A. I don't.

COUNSEL: Yes, you do. Read it.

A. Yes, the micro—the batch records show finished micro testing were acceptable for the batch in question.

(Bottock Depo. 86:9-15).

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

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

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

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

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

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

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



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

*3. Excessive Interruptions*

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

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

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

### C. *Appropriate Sanction*

Based on Counsel's deposition conduct, I would be well within my discretion to impose substantial monetary sanctions on Counsel. But I am less interested in negatively affecting Counsel's pocketbook than I am in positively affecting Counsel's obstructive deposition practices. I am also interested in deterring others who might be inclined to comport themselves similarly to Counsel. The Federal Rules specifically acknowledge that one function of discovery sanctions should be deterrence. *See* Fed. R. Civ. P. 26, advisory committee notes (1983 amendments) ("Sanctions to deter discovery abuse would be more effective if they were diligently applied 'not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.'" (quoting *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976)). Deterrence is especially important given that so many litigators are *trained* to make obstructionist objections. For instance, at trial, when I challenged Counsel's use of "form" objections, Counsel responded, "Well, I'm sorry, Your Honor, but that was my training . . . ." While monetary sanctions are certainly warranted for Counsel's witness coaching and excessive interruptions, a more outside-the-box sanction[15] may better serve the goal of

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



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

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

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

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

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

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

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



## *III. CONCLUSION*

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

**IT IS SO ORDERED.**

**DATED** this 28th day of July, 2014.

Mark W. Bennett

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

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 30

# Rule 30. Depositions by Oral Examination

Currentness

**(a) When a Deposition May Be Taken.**

**(1)** ***Without Leave.*** A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

**(2)** ***With Leave.*** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

**(A)** if the parties have not stipulated to the deposition and:

**(i)** the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;

**(ii)** the deponent has already been deposed in the case; or

**(iii)** the party seeks to take the deposition before the time specified in Rule 26(d), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and be unavailable for examination in this country after that time; or

**(B)** if the deponent is confined in prison.

**(b) Notice of the Deposition; Other Formal Requirements.**

**(1)** ***Notice in General.*** A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

**(2)** ***Producing Documents.*** If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a

party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

**(3)** ***Method of Recording.***

**(A)** *Method Stated in the Notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

**(B)** *Additional Method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

**(4)** ***By Remote Means.*** The parties may stipulate--or the court may on motion order--that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b)(1), the deposition takes place where the deponent answers the questions.

**(5)** ***Officer's Duties.***

**(A)** *Before the Deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

**(i)** the officer's name and business address;

**(ii)** the date, time, and place of the deposition;

**(iii)** the deponent's name;

**(iv)** the officer's administration of the oath or affirmation to the deponent; and

**(v)**the identity of all persons present.

**(B)** *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded non-stenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) *After the Deposition.* At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

**(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.**

(1) ***Examination and Cross-Examination.*** The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) ***Objections.*** An objection at the time of the examination--whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition--must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(3) ***Participating Through Written Questions.*** Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

**(d) Duration; Sanction; Motion to Terminate or Limit.**

(1) ***Duration.*** Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) *Sanction.* The court may impose an appropriate sanction--including the reasonable expenses and attorney's fees incurred by any party--on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) *Motion to Terminate or Limit.*

(A) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order.* The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) *Award of Expenses.* Rule 37(a)(5) applies to the award of expenses.

**(e) Review by the Witness; Changes.**

(1) ***Review; Statement of Changes.*** On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) ***Changes Indicated in the Officer's Certificate.*** The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

**(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.**

(1) ***Certification and Delivery.*** The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) ***Documents and Tangible Things.***

(A) *Originals and Copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals--after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked--in which event the originals may be used as if attached to the deposition.

(B) *Order Regarding the Originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) ***Copies of the Transcript or Recording.*** Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) ***Notice of Filing.*** A party who files the deposition must promptly notify all other parties of the filing.

**(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses.** A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

**CREDIT(S)**

(Amended January 21, 1963, effective July 1, 1963; March 30, 1970, effective July 1, 1970; March 1, 1971, effective July 1, 1971; November 20, 1972, effective July 1, 1975; April 29, 1980, effective August 1, 1980; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective December 1, 2000; April 30, 2007, effective December 1, 2007.)

**ADVISORY COMMITTEE NOTES**

1937 Adoption

**Note to Subdivision (a).** This is in accordance with common practice. See U.S.C., Title 28, [former] § 639 (Depositions *de bene esse*; when and where taken; notice), the relevant provisions of which are incorporated in this rule; West's Ann.Code Civ.Proc. § 2031; and statutes cited in respect to notice in the Note to Rule 26(a). The provision for enlarging or shortening the time of notice has been added to give flexibility to the rule.

**Note to Subdivisions (b) and (d).** These are introduced as a safeguard for the protection of parties and deponents on account of the unlimited right of discovery given by Rule 26.

**Note to Subdivisions (c) and (e).** These follow the general plan of [former] Equity Rule 51 (Evidence Taken Before Examiners, Etc.) and U.S.C., Title 28, [former] §§ 640 (Depositions *de bene esse*; mode of taking), and [former] 641 (Same; transmission to court), but are more specific. They also permit the deponent to require the officer to make changes in the deposition if the deponent is not satisfied with it. See also [former] Equity Rule 50 (Stenographer--Appointment--Fees.)

**Note to Subdivision (f).** Compare [former] Equity Rule 55 (Depositions Deemed Published When Filed.)

**Note to Subdivision (g).** This is similar to 2 Minn.Stat. (Mason, 1927) § 9833, but is more extensive.

1963 Amendments

This amendment corresponds to the change in Rule 4(d)(4). See Advisory Committee's Note to that amendment.

1970 Amendments

**Subdivision (a).** This subdivision contains the provisions of existing Rule 26(a), transferred here as part of the rearrangement relating to Rule 26. Existing Rule 30(a) is transferred to 30(b). Changes in language have been made to conform to the new arrangement.

This subdivision is further revised in regard to the requirement of leave of court for taking a deposition. The present procedure, requiring a plaintiff to obtain leave of court if he serves notice of taking a deposition within 20 days after commencement of the action, is changed in several respects. First, leave is required by reference to the time the deposition is to be taken rather than the date of serving notice of taking. Second, the 20-day period is extended to 30 days and runs from the service of summons and complaint on any defendant, rather than the commencement of the action. *Cf.* Ill.S.Ct.R. 19-1 S-H Ill.Ann.Stat. § 101.19-1. Third, leave is not required beyond the time that defendant initiates discovery, thus showing that he has retained counsel. As under the present practice, a party not afforded a reasonable opportunity to appear at a deposition, because he has not yet been served with process, is protected against use of the deposition at trial against him. See Rule 32(a), transferred from 26(d). Moreover, he can later redepose the witness if he so desires.

The purpose of requiring the plaintiff to obtain leave of court is, as stated by the Advisory Committee that proposed the present language of Rule 26(a), to protect "a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit." Note to 1948 amendment of Rule 26(a), quoted in 3A Barron & Holtzoff, *Federal Practice and Procedure* 455-456 (Wright ed. 1958). In order to assure defendant of this opportunity, the period is lengthened to 30 days. This protection, however, is relevant to the time of taking the deposition, not to the time that notice is served. Similarly, the protective period should run from the service of process rather than the filing of the complaint with the court. As stated in the note to Rule 26(d), the courts have used the service of notice as a convenient reference point for assigning priority in taking depositions, but with the elimination of priority in new Rule 26(d) the reference point is no longer needed. The new procedure is consistent in principle with the provisions of Rules 33, 34, and 36 as revised.

Plaintiff is excused from obtaining leave even during the initial 30-day period if he gives the special notice provided in subdivision (b)(2). The required notice must state that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or out of the United States, or on a voyage to sea, and will be unavailable for examination unless deposed within the 30-day period.

These events occur most often in maritime litigation, when seamen are transferred from one port to another or are about to go to sea. Yet, there are analogous situations in nonmaritime litigation, and although the maritime problems are more common, a rule limited to claims in the admiralty and maritime jurisdiction is not justified.

In the recent unification of the civil and admiralty rules, this problem was temporarily met through addition in Rule 26(a) of a provision that depositions *de bene esse* may continue to be taken as to admiralty and maritime claims within the meaning of Rule 9(h). It was recognized at the time that "a uniform rule applicable alike to what are now civil actions and suits in admiralty" was clearly preferable, but the de bene esse procedure was adopted "for the time being at least." See Advisory Committee's Note in Report of the Judicial Conference: Proposed Amendments to Rules of Civil Procedure 43-44 (1966).

The changes in Rule 30(a) and the new Rule 30(b)(2) provide a formula applicable to ordinary civil as well as maritime claims. They replace the provision for depositions *de bene esse*. They authorize an early deposition without leave of court where the witness is about to depart and, unless his deposition is promptly taken, (1) it will be impossible or very difficult to depose him before trial or (2) his deposition can later be taken but only with substantially increased effort and expense. *Cf. S.S. Hai Chang*, 1966 A.M.C. 2239 (S.D.N.Y.1966), in which the deposing party is required to prepay expenses and counsel fees of the other party's lawyer when the action is pending in New York and depositions are to be taken on the West Coast. Defendant is protected by a provision that the deposition cannot be used against him if he was unable through exercise of diligence to obtain counsel to represent him.

The distance of 100 miles from place of trial is derived from the *de bene esse* provision and also conforms to the reach of a subpoena of the trial court, as provided in Rule 45(c). See also S.D.N.Y. Civ.R. 5(a). Some parts of the *de bene esse* provision are omitted from Rule 30(b)(2). Modern deposition practice adequately covers the witness who lives more than 100 miles away from place of trial. If a witness is aged or infirm, leave of court can be obtained.

**Subdivision (b).** Existing Rule 30(b) on protective orders has been transferred to Rule 26(c), and existing Rule 30(a) relating to the notice of taking deposition has been transferred to this subdivision. Because new material has been added, subsection numbers have been inserted.

**Subdivision (b)(1).** If a subpoena duces tecum is to be served, a copy thereof or a designation of the materials to be produced must accompany the notice. Each party is thereby enabled to prepare for the deposition more effectively.

**Subdivision (b)(2).** This subdivision is discussed in the note to subdivision (a), to which it relates.

**Subdivision (b)(3).** This provision is derived from existing Rule 30(a), with a minor change of language.

**Subdivision (b)(4).** In order to facilitate less expensive procedures, provision is made for the recording of testimony by other than stenographic means--*e.g.*, by mechanical, electronic, or photographic means. Because these methods give rise to problems of accuracy and trustworthiness, the party taking the deposition is required to apply for a court order. The order is to specify how the testimony is to be recorded, preserved, and filed, and it may contain whatever additional safeguards the court deems necessary.

**Subdivision (b)(5).** A provision is added to enable a party, through service of notice, to require another party to produce documents or things at the taking of his deposition. This may now be done as to a nonparty deponent through use of a subpoena duces tecum as authorized by Rule 45, but some courts have held that documents may be secured from a party only under Rule 34. See 2A Barron & Holtzoff, *Federal Practice and Procedure* § 644.1

n. 83.2, § 792 n. 16 (Wright ed. 1961). With the elimination of "good cause" from Rule 34, the reason for this restrictive doctrine has disappeared. *Cf.* N.Y.C.P.L.R. § 3111.

Whether production of documents or things should be obtained directly under Rule 34 or at the deposition under this rule will depend on the nature and volume of the documents or things. Both methods are made available. When the documents are few and simple, and closely related to the oral examination, ability to proceed via this rule will facilitate discovery. If the discovering party insists on examining many and complex documents at the taking of the deposition, thereby causing undue burdens on others, the latter may, under Rules 26(c) or 30(d), apply for a court order that the examining party proceed via Rule 34 alone.

**Subdivision (b)(6).** A new provision is added, whereby a party may name a corporation, partnership, association, or governmental agency as the deponent and designate the matters on which he requests examination, and the organization shall then name one or more of its officers, directors, or managing agents, or other persons consenting to appear and testify on its behalf with respect to matters known or reasonably available to the organization. *Cf.* Alberta Sup.Ct.R. 255. The organization may designate persons other than officers, directors, and managing agents, but only with their consent. Thus, an employee or agent who has an independent or conflicting interest in the litigation--for example, in a personal injury case--can refuse to testify on behalf of the organization.

This procedure supplements the existing practice whereby the examining party designates the corporate official to be deposed. Thus, if the examining party believes that certain officials who have not testified pursuant to this subdivision have added information, he may depose them. On the other hand, a court's decision whether to issue a protective order may take account of the availability and use made of the procedures provided in this subdivision.

The new procedure should be viewed as an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process. It will reduce the difficulties now encountered in determining, prior to the taking of a deposition, whether a particular employee or agent is a "managing agent." See Note, *Discovery Against Corporations Under the Federal Rules*, 47 Iowa L.Rev. 1006-1016 (1962). It will curb the "bandying" by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it. *Cf. Haney v. Woodward & Lothrop, Inc.*, 330 F.2d 940, 944 (4th Cir. 1964). The provision should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge. Some courts have held that under the existing rules a corporation should not be burdened with choosing which person is to appear for it. E.g., *United States v. Gahagan Dredging Corp.*, 24 F.R.D. 328, 329 (S.D.N.Y.1958). This burden is not essentially different from that of answering interrogatories under Rule 33, and is in any case lighter than that of an examining party ignorant of who in the corporation has knowledge.

**Subdivision (c).** A new sentence is inserted at the beginning, representing the transfer of existing Rule 26(c) to this subdivision. Another addition conforms to the new provision in subdivision (b)(4).

The present rule provides that transcription shall be carried out unless all parties waive it. In view of the many depositions taken from which nothing useful is discovered, the revised language provides that transcription is to be performed if any party requests it. The fact of the request is relevant to the exercise of the court's discretion in determining who shall pay for transcription.

Parties choosing to serve written questions rather than participate personally in an oral deposition are directed to serve their questions on the party taking the deposition, since the officer is often not identified in advance. Confidentiality is preserved, since the questions may be served in a sealed envelope.

**Subdivision (d).** The assessment of expenses incurred in relation to motions made under this subdivision (d) is made subject to the provisions of Rule 37(a). The standards for assessment of expenses are more fully set out in Rule 37(a), and these standards should apply to the essentially similar motions of this subdivision.

**Subdivision (e).** The provision relating to the refusal of a witness to sign his deposition is tightened through insertion of a 30-day time period.

**Subdivision (f)(1).** A provision is added which codifies in a flexible way the procedure for handling exhibits related to the deposition and at the same time assures each party that he may inspect and copy documents and things produced by a nonparty witness in response to a subpoena duces tecum. As a general rule and in the absence of agreement to the contrary or order of the court, exhibits produced without objection are to be annexed to and returned with the deposition, but a witness may substitute copies for purposes of marking and he may obtain return of the exhibits. The right of the parties to inspect exhibits for identification and to make copies is assured. *Cf.* N.Y.C.P.L.R. § 3116(c).

1971 Amendments

The subdivision permits a party to name a corporation or other form of organization as a deponent in the notice of examination and to describe in the notice the matters about which discovery is desired. The organization is then obliged to designate natural persons to testify on its behalf. The amendment clarifies the procedure to be followed if a party desires to examine a non-party organization through persons designated by the organization. Under the rules, a subpoena rather than a notice of examination is served on a non-party to compel attendance at the taking of a deposition. The amendment provides that a subpoena may name a non-party organization as the deponent and may indicate the matters about which discovery is desired. In that event, the non-party organization must respond by designating natural persons, who are then obliged to testify as to matters known or reasonably available to the organization. To insure that a non-party organization that is not represented by counsel has knowledge of its duty to designate, the amendment directs the party seeking discovery to advise of the duty in the body of the subpoena.

1972 Amendments

**Subdivision (c).** Existing Rule 43(b), which is to be abrogated, deals with the use of leading questions, the calling, interrogation, impeachment, and scope of cross-examination of adverse parties, officers, etc. These topics are dealt with in many places in the Rules of Evidence. Moreover, many pertinent topics included in the Rules of Evidence are not mentioned in Rule 43(b), e.g. privilege. A reference to the Rules of Evidence generally is therefore made in subdivision (c) of Rule 30.

1980 Amendments

**Subdivision (b)(4).** It has been proposed that electronic recording of depositions be authorized as a matter of course, subject to the right of a party to seek an order that a deposition be recorded by stenographic means. The Committee is not satisfied that a case has been made for a reversal of present practice. The amendment is made to encourage parties to agree to the use of electronic recording of depositions so that conflicting claims with respect to the potential of electronic recording for reducing costs of depositions can be appraised in the light of greater experience. The provision that the parties may stipulate that depositions may be recorded by other than stenographic means seems implicit in Rule 29. The amendment makes it explicit. The provision that the stipulation or order shall designate the person before whom the deposition is to be taken is added to encourage the naming of the recording technician as that person, eliminating the necessity of the presence of one whose only function is to administer the oath. See Rules 28(a) and 29.

**Subdivision (b)(7).** Depositions by telephone are now authorized by Rule 29 upon stipulation of the parties. The amendment authorizes that method by order of the court. The final sentence is added to make it clear that when a deposition is taken by telephone it is taken in the district and at the place where the witness is to answer the questions rather than that where the questions are propounded.

**Subdivision (f)(1).** For the reasons set out in the Note following the amendment of Rule 5(d), the court may wish to permit the parties to retain depositions unless they are to be used in the action. The amendment of the first paragraph permits the court to so order.

The amendment of the second paragraph is clarifying. The purpose of the paragraph is to permit a person who produces materials at a deposition to offer copies for marking and annexation to the deposition. Such copies are a "substitute" for the originals, which are not to be marked and which can thereafter be used or even disposed of by the person who produces them. In the light of that purpose, the former language of the paragraph had been justly termed "opaque." Wright & Miller, *Federal Practice and Procedure: Civil* § 2114.

1987 Amendments

The amendments are technical. No substantive change is intended.

1993 Amendments

**Subdivision (a).** Paragraph (1) retains the first and third sentences from the former subdivision (a) without significant modification. The second and fourth sentences are relocated.

Paragraph (2) collects all provisions bearing on requirements of leave of court to take a deposition.

Paragraph (2)(A) is new. It provides a limit on the number of depositions the parties may take, absent leave of court or stipulation with the other parties. One aim of this revision is to assure judicial review under the standards stated in Rule 26(b)(2) before any side will be allowed to take more than ten depositions in a case without agreement of the other parties. A second objective is to emphasize that counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case. Leave to take additional depositions should be granted when consistent with the principles of Rule 26(b)(2), and in some cases the ten-per-side limit should be reduced in accordance with those same principles. Consideration should ordinarily be given at the planning meeting of the parties under Rule 26(f) and at the time of a scheduling conference under Rule 16(b) as to enlargements or reductions in the number of depositions, eliminating the need for special motions.

A deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition even though more than one person may be designated to testify.

In multi-party cases, the parties on any side are expected to confer and agree as to which depositions are most needed, given the presumptive limit on the number of depositions they can take without leave of court. If these disputes cannot be amicably resolved, the court can be requested to resolve the dispute or permit additional depositions.

Paragraph (2)(B) is new. It requires leave of court if any witness is to be deposed in the action more than once. This requirement does not apply when a deposition is temporarily recessed for convenience of counsel or the deponent or to enable additional materials to be gathered before resuming the deposition. If significant travel costs would be incurred to resume the deposition, the parties should consider the feasibility of conducting the balance of the examination by telephonic means.

Paragraph (2)(C) revises the second sentence of the former subdivision (a) as to when depositions may be taken. Consistent with the changes made in Rule 26(d), providing that formal discovery ordinarily not commence until after the litigants have met and conferred as directed in revised Rule 26(f), the rule requires leave of court or agreement of the parties if a deposition is to be taken before that time (except when a witness is about to leave the country).

**Subdivision (b).** The primary change in subdivision (b) is that parties will be authorized to record deposition testimony by nonstenographic means without first having to obtain permission of the court or agreement from other counsel.

Former subdivision (b)(2) is partly relocated in subdivision (a)(2)(C) of this rule. The latter two sentences of the first paragraph are deleted, in part because they are redundant to Rule 26(g) and in part because Rule 11 no longer applies to discovery requests. The second paragraph of the former subdivision (b)(2), relating to use of depositions at trial where a party was unable to obtain counsel in time for an accelerated deposition, is relocated in Rule 32.

New paragraph (2) confers on the party taking the deposition the choice of the method of recording, without the need to obtain prior court approval for one taken other than stenographically. A party choosing to record a deposition only by videotape or audiotape should understand that a transcript will be required by Rule 26(a)(3)(B) and Rule 32(c) if the deposition is later to be offered as evidence at trial or on a dispositive motion under Rule 56. Objections to the nonstenographic recording of a deposition, when warranted by the circumstances, can be presented to the court under Rule 26(c).

Paragraph (3) provides that other parties may arrange, at their own expense, for the recording of a deposition by a means (stenographic, visual, or sound) in addition to the method designated by the person noticing the deposition. The former provisions of this paragraph, relating to the court's power to change the date of a deposition, have been eliminated as redundant in view of Rule 26(c)(2).

Revised paragraph (4) requires that all depositions be recorded by an officer designated or appointed under Rule 28 and contains special provisions designed to provide basic safeguards to assure the utility and integrity of recordings taken other than stenographically.

Paragraph (7) is revised to authorize the taking of a deposition not only by telephone but also by other remote electronic means, such as satellite television, when agreed to by the parties or authorized by the court.

**Subdivision (c).** Minor changes are made in this subdivision to reflect those made in subdivision (b) and to complement the new provisions of subdivision (d)(1), aimed at reducing the number of interruptions during depositions.

In addition, the revision addresses a recurring problem as to whether other potential deponents can attend a deposition. Courts have disagreed, some holding that witnesses should be excluded through invocation of Rule 615 of the evidence rules, and others holding that witnesses may attend unless excluded by an order under Rule 26(c)(5). The revision provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under Rule 26(c)(5) when appropriate; and, if exclusion is ordered, consideration should be given as to whether the excluded witnesses likewise should be precluded from reading, or being otherwise informed about, the testimony given in the earlier depositions. The revision addresses only the matter of attendance by potential deponents, and does not attempt to resolve issues concerning attendance by others, such as members of the public or press.

**Subdivision (d).** The first sentence of new paragraph (1) provides that any objections during a deposition must be made concisely and in a non-argumentative and non-suggestive manner. 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. Under Rule 32(b), other objections can, even without the so-called "usual stipulation" preserving objections, be raised for the first time at trial and therefore should be kept to a minimum during a deposition.

Directions to a deponent not to answer a question can be even more disruptive than objections. The second sentence of new paragraph (1) prohibits such directions except in the three circumstances indicated: to claim a privilege or protection against disclosure (*e.g.*, as work product), to enforce a court directive limiting the scope or length of permissible discovery, or to suspend a deposition to enable presentation of a motion under paragraph (3).

Paragraph (2) is added to this subdivision to dispel any doubts regarding the power of the court by order or local rule to establish limits on the length of depositions. The rule also explicitly authorizes the court to impose the cost resulting from obstructive tactics that unreasonably prolong a deposition on the person engaged in such obstruction. This sanction may be imposed on a non-party witness as well as a party or attorney, but is otherwise congruent with Rule 26(g).

It is anticipated that limits on the length of depositions prescribed by local rules would be presumptive only, subject to modification by the court or by agreement of the parties. Such modifications typically should be discussed by the parties in their meeting under Rule 26(f) and included in the scheduling order required by Rule 16(b). Additional time, moreover, should be allowed under the revised rule when justified under the principles stated in Rule 26(b)(2). To reduce the number of special motions, local rules should ordinarily permit--and indeed encourage--the parties to agree to additional time, as when, during the taking of a deposition, it becomes clear that some additional examination is needed.

Paragraph (3) authorizes appropriate sanctions not only when a deposition is unreasonably prolonged, but also when an attorney engages in other practices that improperly frustrate the fair examination of the deponent, such as making improper objections or giving directions not to answer prohibited by paragraph (1). In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. The making of an excessive number of unnecessary objections may itself constitute sanctionable conduct, as may the refusal of an attorney to agree with other counsel on a fair apportionment of the time allowed for examination of a deponent or a refusal to agree to a reasonable request for some additional time to complete a deposition, when that is permitted by the local rule or order.

**Subdivision (e).** Various changes are made in this subdivision to reduce problems sometimes encountered when depositions are taken stenographically. Reporters frequently have difficulties obtaining signatures--and the return of depositions--from deponents. Under the revision pre-filing review by the deponent is required only if requested before the deposition is completed. If review is requested, the deponent will be allowed 30 days to review the transcript or recording and to indicate any changes in form or substance. Signature of the deponent will be required only if review is requested and changes are made.

**Subdivision (f).** Minor changes are made in this subdivision to reflect those made in subdivision (b). In courts which direct that depositions not be automatically filed, the reporter can transmit the transcript or recording to the attorney taking the deposition (or ordering the transcript or record), who then becomes custodian for the court of the original record of the deposition. Pursuant to subdivision (f)(2), as under the prior rule, any other party is

entitled to secure a copy of the deposition from the officer designated to take the deposition; accordingly, unless ordered or agreed, the officer must retain a copy of the recording or the stenographic notes.

**2000 Amendment**

**Subdivision (d).** Paragraph (1) has been amended to clarify the terms regarding behavior during depositions. The references to objections " to evidence" and limitations "on evidence" have been removed to avoid disputes about what is "evidence" and whether an objection is to, or a limitation is on, discovery instead. It is intended that the rule apply to any objection to a question or other issue arising during a deposition, and to any limitation imposed by the court in connection with a deposition, which might relate to duration or other matters.

The current rule places limitations on instructions that a witness not answer only when the instruction is made by a "party." Similar limitations should apply with regard to anyone who might purport to instruct a witness not to answer a question. Accordingly, the rule is amended to apply the limitation to instructions by any person. The amendment is not intended to confer new authority on nonparties to instruct witnesses to refuse to answer deposition questions. The amendment makes it clear that, whatever the legitimacy of giving such instructions, the nonparty is subject to the same limitations as parties.

Paragraph (2) imposes a presumptive durational limitation of one day of seven hours for any deposition. The Committee has been informed that overlong depositions can result in undue costs and delays in some circumstances. This limitation contemplates that there will be reasonable breaks during the day for lunch and other reasons, and that the only time to be counted is the time occupied by the actual deposition. For purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition. The presumptive duration may be extended, or otherwise altered, by agreement. Absent agreement, a court order is needed. The party seeking a court order to extend the examination, or otherwise alter the limitations, is expected to show good cause to justify such an order.

Parties considering extending the time for a deposition--and courts asked to order an extension--might consider a variety of factors. For example, if the witness needs an interpreter, that may prolong the examination. If the examination will cover events occurring over a long period of time, that may justify allowing additional time. In cases in which the witness will be questioned about numerous or lengthy documents, it is often desirable for the interrogating party to send copies of the documents to the witness sufficiently in advance of the deposition so that the witness can become familiar with them. Should the witness nevertheless not read the documents in advance, thereby prolonging the deposition, a court could consider that a reason for extending the time limit. If the examination reveals that documents have been requested but not produced, that may justify further examination once production has occurred. In multi-party cases, the need for each party to examine the witness may warrant additional time, although duplicative questioning should be avoided and parties with similar interests should strive to designate one lawyer to question about areas of common interest. Similarly, should the lawyer for the witness want to examine the witness, that may require additional time. Finally, with regard to expert witnesses, there may more often be a need for additional time--even after the submission of the report required by Rule 26(a)(2)--for full exploration of the theories upon which the witness relies.

It is expected that in most instances the parties and the witness will make reasonable accommodations to avoid the need for resort to the court. The limitation is phrased in terms of a single day on the assumption that ordinarily a single day would be preferable to a deposition extending over multiple days; if alternative arrangements would better suit the parties, they may agree to them. It is also assumed that there will be reasonable breaks during the day. Preoccupation with timing is to be avoided.

The rule directs the court to allow additional time where consistent with Rule 26(b)(2) if needed for a fair examination of the deponent. In addition, if the deponent or another person impedes or delays the examination, the court must authorize extra time. The amendment makes clear that additional time should also be allowed where the examination is impeded by an "other circumstance," which might include a power outage, a health emergency, or other event.

In keeping with the amendment to Rule 26(b)(2), the provision added in 1993 granting authority to adopt a local rule limiting the time permitted for depositions has been removed. The court may enter a case-specific order directing shorter depositions for all depositions in a case or with regard to a specific witness. The court may also order that a deposition be taken for limited periods on several days.

Paragraph (3) includes sanctions provisions formerly included in paragraph (2). It authorizes the court to impose an appropriate sanction on any person responsible for an impediment that frustrated the fair examination of the deponent. This could include the deponent, any party, or any other person involved in the deposition. If the impediment or delay results from an "other circumstance" under paragraph (2), ordinarily no sanction would be appropriate.

Former paragraph (3) has been renumbered (4) but is otherwise unchanged.

**Subdivision (f)(1)**: This subdivision is amended because Rule 5(d) has been amended to direct that discovery materials, including depositions, ordinarily should not be filed. The rule already has provisions directing that the lawyer who arranged for the transcript or recording preserve the deposition. Rule 5(d) provides that, once the deposition is used in the proceeding, the attorney must file it with the court.

"Shall" is replaced by "must" or "may" under the program to conform amended rules to current style conventions when there is no ambiguity.

**GAP Report**

The Advisory Committee recommends deleting the requirement in the published proposed amendments that the deponent consent to extending a deposition beyond one day, and adding an amendment to Rule 30(f)(1) to conform to the published amendment to Rule 5(d) regarding filing of depositions. It also recommends conforming the Committee Note with regard to the deponent veto, and adding material to the Note to provide direction on computation of the durational limitation on depositions, to provide examples of situations in which the parties might agree--or the court order--that a deposition be extended, and to make clear that no new authority to instruct a witness is conferred by the amendment. One minor wording improvement in the Note is also suggested.

2007 Amendment

The language of Rule 30 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The right to arrange a deposition transcription should be open to any party, regardless of the means of recording and regardless of who noticed the deposition.

"[O]ther entity" is added to the list of organizations that may be named as deponent. The purpose is to ensure that the deposition process can be used to reach information known or reasonably available to an organization no matter what abstract fictive concept is used to describe the organization. Nothing is gained by wrangling over the

place to fit into current rule language such entities as limited liability companies, limited partnerships, business trusts, more exotic common-law creations, or forms developed in other countries.

Notes of Decisions (1022)

Fed. Rules Civ. Proc. Rule 30, 28 U.S.C.A., FRCP Rule 30
Including Amendments Received Through 10-20-14

End of Document

# Pitch 3: Bad Lawyer Waivers

**Virginia Rule of Professional Conduct 1.3 – DILIGENCE**

Rule 1.3(c) – A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

**Applicable Comments**

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. *See* Rule 1.2. A lawyer's work load should be controlled so that each matter can be handled adequately.

[2] Additionally, lawyers have long recognized that a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client's needs and interests. Consequently, diligence includes not only an adversarial strategy but also the vigorous pursuit of the client's interest in reaching a solution that satisfies the interests of all parties. The client can be represented zealously in either setting.

**Virginia Rule of Professional Conduct 1.7 – CONFLICT OF INTEREST: GENERAL RULE**

Rule 1.7(a)(2) – Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

**Applicable Comments**

[6] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients.

[19] A client may consent to representation notwithstanding a conflict. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer

cannot properly ask the latter to consent. A lawyer's obligations regarding conflicts of interest are not present solely at the onset of the attorney-client relationship; rather, such obligations are ongoing such that a change in circumstances may require a lawyer to obtain new consent from a client after additional, adequate disclosure regarding that change in circumstances.

**Virginia Rule of Professional Conduct 1.8 – CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS**

Rule 1.8(h) – A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice, except that a lawyer may make such an agreement with a client of which the lawyer is an employee as long as the client is independently represented in making the agreement.

**Virginia Rule of Professional Conduct 8 – MISCONDUCT**

Rule 8.4(a) – It is professional misconduct for a lawyer to: violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

LEGAL ETHICS OPINION 1857

# MAY A PROSECUTOR OFFER, AND MAY A CRIMINAL DEFENSE LAWYER ADVISE HIS CLIENT TO ACCEPT, A PLEA AGREEMENT THAT REQUIRES A WAIVER OF THE RIGHT TO LATER CLAIM INEFFECTIVE ASSISTANCE OF COUNSEL?

In this hypothetical, a defense lawyer represents a client who intends to plead guilty. The plea agreement provides that "I waive any right I may have to collaterally attack, in any future proceeding, any order issued in this matter and agree I will not file any document which seeks to disturb any such order. I agree and understand that if I file any court document seeking to disturb, in any way, any order imposed in my case, such action shall constitute a failure to comply with a provision of this agreement." This provision is standard in all plea agreements offered by the prosecutor's office, however, defense counsel has concerns that this provision may have the legal effect of waiving the client's right to later claim ineffective assistance of counsel. The defense lawyer asks whether he can ethically advise his client as to whether to waive that right and whether the prosecutor can ethically require this waiver as a term of a plea agreement.

## QUESTIONS PRESENTED

1. May a defense lawyer advise a client to enter into a plea agreement with language that may effectively waive the right to allege ineffective assistance of counsel as part of a waiver of the right to collaterally attack a conviction covered by a plea agreement?

2. If the defendant's lawyer declines to advise him on the issue, does the prosecutor's suggestion that the defendant agree to the provision knowingly take advantage of an unrepresented defendant?

## APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rule 1.3(c)[1], Rule 1.7(a)(2)[2], Rule 1.8(h)[3], and Rule 8.4(a)[4]. Additionally, Legal Ethics Opinions 1122, 1558, and 1817 are relevant to the conflict of interest analysis.

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[1] Rule 1.3 Diligence

* * *

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

[2] Rule 1.7 Conflict of Interest: General Rule

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

* * *

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

[3] Rule 1.8 Conflict of Interest: Prohibited Transactions

* * *

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to the client for malpractice.

* * *

[4] Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

ANALYSIS

Federal courts have consistently held that such a provision is legally enforceable against the defendant. In *U.S. v. Lemaster*, 403 F.3d 216, 220 (4th Cir. 2005), the court held that there is no reason to distinguish between a waiver of direct appeal rights and a waiver of collateral attack rights, and therefore a waiver of all collateral attack rights is valid so long as the waiver is knowing and voluntary. In general, a defense lawyer may counsel a client to enter into a lawful plea agreement; however, in this case, the content of the plea agreement raises ethical concerns, to the extent that the language of the plea agreement has the intent and effect of waiving the client's right to claim ineffective assistance of counsel.

Though they are not in full agreement on the rationale for their opinions, several states have found that it is unethical for a defense lawyer to advise his client to accept such a plea bargain provision, and that it is unethical for a prosecutor to propose such a provision.[5] Only one state has found such a provision ethically permissible, on the grounds that Rule 1.8(h) applies exclusively to waivers of malpractice liability.[6]

*Defense lawyer's duties*

The Committee agrees with the majority of states that have considered this issue that, to the extent that a plea agreement provision operates as a waiver of the client's right to claim ineffective assistance of counsel, a defense lawyer may not ethically counsel his client to accept that provision. There is a concurrent conflict of interest as defined by Rule 1.7(a)(2) between the lawyer's personal interests and the interests of the client. Defense counsel undoubtedly has a personal interest in the issue of whether he has been constitutionally ineffective, and cannot reasonably be expected to provide his client with an objective evaluation of his representation in an ongoing case. This conflict was discussed in LEO 1122, which concluded that a lawyer should not represent a client on appeal when the issue is the lawyer's own ineffective assistance because "he would have to assert a position which would expose him to personal liability." Likewise, LEO 1558 concluded that a lawyer could not argue that he had improperly pressured his client into accepting a guilty plea, because of the conflict between the interests of the client and the lawyer's interest in protecting himself. Further, both conflicts cannot be cured even with client consent. LEO 1817 recently reaffirmed the accuracy of this conflict of interest analysis.

A defense lawyer who counsels his client to agree to this provision also violates Rule 1.3(c). The client has a constitutional right to the effective assistance of counsel and the defense lawyer's recommendation to bargain that right away prejudices the client.

Although other states have interpreted their versions of Rule 1.8(h) to bar the defense lawyer from advising his client on this issue,[7] Virginia's Rule 1.8(h) does not apply in this situation because the defense lawyer is not making the agreement in this case – he is advising his client whether to enter into an agreement sought by the government.

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(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another:

* * *

[5] Advisory Committee of the Supreme Court of Missouri, Formal Opinion 126 (2009); The North Carolina State Bar Ethics Commission, Formal Opinion RPC 129 (1993); Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, Opinion 2001-6 (2001); Vermont Bar Association, Advisory Ethics Opinion 95-04 (1995).

[6] State Bar of Arizona Commission on the Rules of Professional Conduct, Opinion 95-08 (1995).

[7] The North Carolina State Bar Ethics Commission, Formal Opinion RPC 129 (1993); Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, Opinion 2001-6 (2001); Vermont Bar Association, Advisory Ethics Opinion 95-04 (1995).

*Prosecutor's duties*

Your second question presented addresses the prosecutor's role in seeking this waiver. The Committee is of the opinion that it is a violation of Rule 8.4(a) for the prosecutor to offer a plea agreement containing a provision that has the intent and legal effect of waiving the defendant's right to claim ineffective assistance of counsel. Because the prosecutor refuses to offer a plea agreement that does not include this provision, he is implicitly requesting that the defense lawyer counsel his client to accept this provision, which is an inducement to the defense lawyer to violate Rules 1.3(c) and 1.7.

This opinion is advisory only based upon the facts as presented, and not binding on any court or tribunal.

Committee Opinion
July 21, 2011

and the Board therefore did not err in refusing to apply it.

III.

For the foregoing reasons, we grant the Board's application for enforcement.

*APPLICATION FOR ENFORCEMENT GRANTED*

**UNITED STATES of America, Plaintiff–Appellee,**

v.

**Edgar Sterling LEMASTER, Defendant–Appellant.**

**No. 04–6448.**

United States Court of Appeals, Fourth Circuit.

Argued: Feb. 1, 2005.

Decided: April 11, 2005.

**Background:** Defendant who was convicted pursuant to his guilty plea to mail fraud moved to vacate his conviction, alleging that his counsel was constitutionally ineffective. The United States District Court for the Western District of Virginia, James C. Turk, J., dismissed the motion, and movant appealed.

**Holdings:** The Court of Appeals, Williams, Circuit Judge, held that:

(1) in a matter of first impression in the Fourth Circuit, a criminal defendant may waive his right to attack his conviction and sentence collaterally, so long as the waiver is knowing and voluntary, and

(2) movant's sworn statements during his plea colloquy and sentencing hearing conclusively established that his plea agreement and waiver were knowing and voluntary, and thus, no evidentiary hearing was required on his motion to vacate on ground that his counsel was constitutionally ineffective.

Affirmed.

**1. Criminal Law ⇐1026.10(1)**

Just as criminal defendants may waive constitutional procedural rights, such as the right to a jury trial, so, too, they may waive statutory procedural rights, such as the right to appeal their conviction and sentence. U.S.C.A. Const.Amend. 6.

**2. Criminal Law ⇐1026.10(1)**

A criminal defendant may waive his right to attack his conviction and sentence collaterally, so long as the waiver is knowing and voluntary. 28 U.S.C.A. § 2255.

**3. Criminal Law ⇐1655(3)**

When deciding whether an evidentiary hearing is necessary to resolve a motion to vacate contesting a guilty plea, first a court must determine whether the movant's allegations, when viewed against the record of the plea hearing, were so palpably incredible, so patently frivolous or false as to warrant summary dismissal. 28 U.S.C.A. § 2255; Fed.Rules Cr.Proc.Rule 11, 18 U.S.C.A.

**4. Criminal Law ⇐321**

A defendant's solemn declarations in open court affirming a plea agreement carry a strong presumption of verity. Fed. Rules Cr.Proc.Rule 11, 18 U.S.C.A.

**5. Criminal Law ⇐1617**

In the absence of extraordinary circumstances, allegations in a motion to vacate that directly contradict the movant's sworn statements made during a properly

conducted plea colloquy are always palpably incredible and patently frivolous or false. 28 U.S.C.A. § 2255; Fed.Rules Cr. Proc.Rule 11, 18 U.S.C.A.

6. Criminal Law ⇐1655(3)

Defendant's sworn statements during his plea colloquy and sentencing hearing on mail fraud charge conclusively established that his plea agreement and waiver were knowing and voluntary, and thus, no evidentiary hearing was required on his motion to vacate on ground that his counsel was constitutionally ineffective, despite allegations in the motion tending to show that his plea agreement and waiver were unknowing and involuntary, where, inter alia, he affirmed multiple times during plea colloquy that he discussed terms of plea agreement and all matters pertaining to the charges with his attorney and that he was satisfied with his attorney and his advice, and he reaffirmed his assent to the plea agreement five months later during his sentencing hearing. U.S.C.A. Const. Amend. 6; 28 U.S.C.A. § 2255; Fed.Rules Cr.Proc.Rule 11, 18 U.S.C.A.

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**ARGUED:** Rick Bettan, Third Year Law Student, University of Virginia School of Law, Appellate Litigation Clinic, Charlottesville, Virginia, for Appellant. Steven Randall Ramseyer, Assistant United States Attorney, Office of the United States Attorney, Abingdon, Virginia, for Appellee. **ON BRIEF:** Neal Walters, University of Virginia School of Law, Appellate Litigation Clinic, Charlottesville, Virginia, for Appellant. John L. Brownlee, United States Attorney, Abingdon, Virginia, for Appellee.

Before WILKINSON, WILLIAMS, and TRAXLER, Circuit Judges.

Affirmed by published opinion. Judge WILLIAMS wrote the opinion, in which Judge WILKINSON and Judge TRAXLER joined.

## OPINION

WILLIAMS, Circuit Judge:

Edgar Sterling Lemaster pleaded guilty to mail fraud under 18 U.S.C.A. § 1341 (West 2000) and was sentenced to 60 months' imprisonment. In his written plea agreement, Lemaster waived his right to attack his conviction and sentence collaterally. Nonetheless, Lemaster filed a motion under 28 U.S.C.A. § 2255 (West Supp. 2004) alleging that his counsel was constitutionally ineffective. The district court summarily concluded that Lemaster had knowingly and voluntarily waived his collateral-attack rights and dismissed Lemaster's motion. Lemaster now appeals, contending that his waiver was unknowing and involuntary or, in the alternative, that the district court should have held an evidentiary hearing on his motion. Because the allegations in Lemaster's motion tending to show that his plea agreement and waiver were unknowing and involuntary directly contradict his sworn statements during his Rule 11 colloquy and sentencing hearing, we affirm.

### I.

Lemaster designed and perpetrated a relatively straightforward scheme to defraud coal and mining companies. Lemaster would contact the companies and solicit money for advertising space in a publication called the *Mine Safety Health Publication Calendar*. If the companies were interested, Lemaster would instruct them to mail a check to a private mailbox company as payment for the advertising. At Lemaster's instruction, the mailbox company would cash the checks and forward the

proceeds to him. Lemaster received funds from a large number of companies, but he produced few, if any, calendars.

After his fraud was discovered, Lemaster was indicted and pleaded guilty to mail fraud. Lemaster was sixty-six at the time of his arrest and holds a college degree. The written plea agreement contained, among other provisions, a waiver of Lemaster's rights to appeal and to attack his conviction and sentence collaterally. The waiver read as follows:

> WAIVER OF RIGHT TO APPEAL AND WAIVER OF RIGHT TO COLLATERALLY ATTACK
>
> I hereby waive my right of appeal as to any and all issues in this case, and consent to the final disposition of this matter by the United States District Court. In addition, I waive any right I may have to collaterally attack, in any future proceeding, my conviction and/or sentence imposed in this case.

(J.A. 48.) The transcript of Lemaster's Federal Rule of Criminal Procedure 11 proceedings contains the following exchanges between Lemaster, the prosecutor and the district court regarding Lemaster's understanding of the plea agreement:

> **[Prosecutor]:** Do you understand by signing this plea agreement you are agreeing that you are waiving any right you have to appeal?
>
> **The Defendant:** Yes.
>
> **[Prosecutor]:** And as to a collateral attack, you understand the same thing applies, that in the absence of the plea agreement you would have a right to file a collateral attack?
>
> **The Defendant:** Yes.
>
> **[Prosecutor]:** And do you understand by signing this plea agreement you're agreeing to waive that right?
>
> **The Defendant:** Yeah.
>
> . . . .
>
> **The Court:** All right. The plea agreement provides that you, you agree not to appeal this case or to collaterally attack the case. . . . [Y]ou have no right of appeal generally. And you have no right to collaterally attack the matter. You understand all that?
>
> **The Defendant:** Yes, sir.

(J.A. 70–76.) The court also sought to ascertain the voluntariness of Lemaster's plea:

> **The Court:** As far as you know the meaning of the word voluntary, what it means to you, do you consider that you're voluntarily entering into this plea of guilty?
>
> **The Defendant:** Yes, sir.
>
> . . .
>
> **The Court:** Have there been any threats or force applied to you in any way to compel you to plead guilty?
>
> **The Defendant:** No, sir.

(J.A. at 72–73.)

To further ensure the voluntariness of Lemaster's guilty plea, the court and the prosecutor questioned Lemaster on his satisfaction with his attorney in the following manner:

> **[Prosecutor]:** You're indicating in the plea agreement that you discussed the terms of the plea agreement and all matters pertaining to the charges against you with your attorney, and you're satisfied with your attorney and your attorney's advice; is that correct?
>
> **The Defendant:** Yes.
>
> **[Prosecutor]:** You're indicating you have made known to the court at any time any dissatisfaction you may have with your attorney's representation?
>
> **The Defendant:** Yes.
>
> **[Prosecutor]:** You agree that you'll let the court know no later than at the time of sentencing any dissatisfaction or com-

plaints you have with your attorney's representation?

**The Defendant:** Yes.

**[Prosecutor]:** Mr. Lemaster, do you have any complaints with your attorney's representation at this time?

**The Defendant:** No.

. . .

**[Prosecutor]:** You're indicating in the plea agreement you've discussed the terms of the plea agreement with your attorney, you're satisfied with your attorney and his advice of counsel, and being aware of all the possible consequences of your plea, you've independently decided to enter this plea of your own free will, and you're affirming that agreement by your signature below, is that correct?

**The Defendant:** That's true.

. . .

**The Court:** You're satisfied with your attorney up to this point in time?

**The Defendant:** Yes, sir.

(J.A. 66–73.) Lemaster agreed that he understood that he would "be sentenced to imprisonment for a term of 60 months." (J.A. at 63.)

The district court accepted Lemaster's plea, sentenced Lemaster to 60 months' imprisonment and three years of supervised release, and ordered Lemaster to pay $160,646.02 in restitution. Lemaster did not directly appeal his conviction and sentence. Instead, Lemaster timely filed a *pro se* § 2255 motion arguing that his attorney was ineffective. Liberally construed, Lemaster's petition alleged, inter alia, that his guilty plea, and thus his waiver of collateral-attack rights, was unknowing and involuntary because (1) his counsel's initial explanation of the proposed plea agreement differed substantially from the final version of the plea agreement and that his counsel failed to explain the changes to him; (2) his counsel failed to inform him, or misinformed him, of the potential punishment that he faced under the plea agreement; and (3) Lemaster was threatened that he would be denied adequate medical care unless he pleaded guilty. (J.A. at 6–8.) Lemaster's petition also contained several other claims of constitutional error, none of which relate to the voluntariness of his plea agreement or waiver of collateral-attack rights.[1]

Without holding an evidentiary hearing, the district court dismissed Lemaster's motion, concluding that Lemaster had knowingly and voluntarily waived his right to file a § 2255 motion. Lemaster now appeals. We granted Lemaster a certificate of appealability, and we have jurisdiction to review the district court's final order on a § 2255 motion under 28 U.S.C.A. § 2253 (West Supp.2004).

## II.

[1] "[T]he guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned." *Blackledge v. Allison*, 431 U.S. 63, 71, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). The advantages of

1. In addition to the claims discussed in the text, Lemaster alleged in his § 2255 motion that his counsel was constitutionally ineffective in the following respects: (1) counsel failed to provide Lemaster with a copy of the presentencing report; (2) counsel failed to object to the presentencing report as directed by Lemaster; (3) counsel failed to request a downward departure based on Lemaster's diminished capacity; (4) counsel failed to request a downward departure based on Lemaster's deteriorating medical condition; and (5) counsel ignored Lemaster's correspondence. (J.A. at 7–8.) Because the district court held that Lemaster knowingly and voluntarily waived his right to collaterally attack his conviction and sentence, it declined to address these claims on the merits.

plea bargains "can be secured, however, only if dispositions by guilty plea are accorded a great measure of finality." *Id.* To this end, the Government often secures waivers of appellate rights from criminal defendants as part of their plea agreements. We have long enforced knowing and voluntary waivers of appellate rights because, just as criminal defendants may waive constitutional procedural rights, such as the right to a jury trial, so, too, they may waive statutory procedural rights, such as the right to appeal their conviction and sentence. *United States v. Wiggins*, 905 F.2d 51, 53 (4th Cir.1990).

[2] Although it is well settled that a defendant may waive his right to appeal directly from his conviction and sentence, we have never considered whether a defendant may also waive his right to attack his conviction and sentence collaterally. *But see United States v. Cannady*, 283 F.3d 641, 645 n. 3 (4th Cir.2002) (noting that courts have generally enforced waivers of collateral attack rights). Every Circuit Court of Appeals to consider the issue, however, has held that the right to attack a sentence collaterally may be waived so long as the waiver is knowing and voluntary. *See Garcia-Santos v. United States*, 273 F.3d 506, 509 (2nd Cir.2001); *United States v. Cockerham*, 237 F.3d 1179, 1183 (10th Cir.2001); *DeRoo v. United States*, 223 F.3d 919, 923 (8th Cir.2000); *Watson v. United States*, 165 F.3d 486, 489 (6th Cir.1999); *Jones v. United States*, 167 F.3d 1142, 1145 (7th Cir.1999); *United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir.1994); *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir.1993). Like our sister circuits, "we see no reason to distinguish the enforceability of a waiver of direct-appeal rights from a waiver of collateral-attack rights in [a] plea agreement." *DeRoo*, 223 F.3d at 923. Accordingly, we hold that a criminal defendant may waive his right to attack his conviction and sentence collaterally, so long as the waiver is knowing and voluntary. Thus, if Lemaster's waiver of collateral-attack rights was knowing and voluntary, Lemaster cannot challenge his conviction or sentence in a § 2255 motion.[2]

[3] Having anticipated this holding, Lemaster argues that the district court erred by holding that his waiver of collateral-attack rights was knowing and voluntary without holding an evidentiary hearing. When deciding whether an evidentiary hearing is necessary to resolve a § 2255 motion contesting a guilty plea, first "a court must determine 'whether the petitioner's allegations, when viewed against the record of the Rule 11 plea hearing, were so palpably incredible, so patently frivolous or false as to warrant summary dismissal.'" *United States v. White*, 366 F.3d 291, 296 (4th Cir.2004) (quoting *Blackledge v. Allison*, 431 U.S. 63, 76, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977) (alterations omitted)). "Only if a

2. Lemaster does not argue that his allegations fall within the narrow class of claims that we have allowed a defendant to raise on direct appeal despite a general waiver of appellate rights. *See United States v. Marin*, 961 F.2d 493, (4th Cir.1992) ("[A] defendant could not be said to have waived his right to appellate review of a sentence imposed in excess of the maximum penalty provided by statute or based on a constitutionally impermissible factor such as race."); *United States v. Attar*, 38 F.3d 727, 732 (4th Cir.1994) (holding that a general waiver of appellate rights could not be construed to bar a defendant from raising a claim that he had been wholly deprived of counsel during his sentencing proceedings). Accordingly, we have no occasion to consider whether a district court should address similar claims in a § 2255 motion despite a general waiver of collateral attack rights. As we noted above, however, we see no reason to distinguish between waivers of direct-appeal rights and waivers of collateral-attack rights.

petitioner's allegations can be so characterized can they be summarily dismissed." *Id.* at 296–97.[3]

[4, 5] "[A] defendant's solemn declarations in open court affirming [a plea] agreement ... 'carry a strong presumption of verity,'" *id.* at 295 (quoting *Blackledge*, 431 U.S. at 74, 97 S.Ct. 1621), because courts must be able to rely on the defendant's statements made under oath during a properly conducted Rule 11 plea colloquy. *United States v. Bowman*, 348 F.3d 408, 417 (4th Cir.2003). "Indeed, because they do carry such a presumption, they present 'a formidable barrier in any subsequent collateral proceedings.'" *White*, 366 F.3d at 295–96 (quoting *Blackledge*, 431 U.S. at 74, 97 S.Ct. 1621). Thus, in the absence of extraordinary circumstances, *see id.* at 300 (holding that admittedly ineffective representation, which the Government conceded rendered the guilty plea involuntary, was "the type of 'extraordinary circumstance [ ]' that warrant[ed] an evidentiary hearing" to determine whether the prosecutor orally agreed that the defendant could plead guilty conditionally); *Fontaine v. United States*, 411 U.S. 213, 93 S.Ct. 1461, 36 L.Ed.2d 169 (1973) (holding that the district court should have held an evidentiary hearing when the petitioner introduced documentary evidence supporting his claim that he was severely ill, both physically and mentally, and uncounselled at the time of his Rule 11 colloquy), allegations in a § 2255 motion that directly contradict the petitioner's sworn statements made during a properly conducted Rule 11 colloquy are always "palpably incredible" and "patently frivolous or false." *See Crawford v. United States*, 519 F.2d 347, 350 (4th Cir.1975) (holding that "the district court was not required to conduct an evidentiary exploration of the truth of an allegation in a § 2255 motion which amounted to no more than a bare contradiction of statements made by [the petitioner] when he pleaded guilty"), *partially overruled on other grounds by United States v. Whitley*, 759 F.2d 327 (4th Cir.1985) (en banc); *Lasiter v. Thomas*, 89 F.3d 699, 702–03 (10th Cir.1996) ("[The petitioner] [i]s bound by his solemn declarations in open court and his unsubstantiated efforts to refute that record [a]re not sufficient to require a hearing. This case does not involve the most extraordinary circumstances.") (internal quotation marks omitted); *Ouellette v. United States*, 862 F.2d 371, 377–78 (1st Cir.1988) (holding that an evidentiary hearing is not required when a petitioner's uncorroborated allegations are directly contradicted by his testimony at the time of his plea colloquy); *see also Bowman*, 348 F.3d at 417 ("[W]hen a defendant says he lied at the Rule 11 colloquy, he bears a heavy burden in seeking to nullify the process."). Thus, in the absence of extraordinary circumstances,

3. We have never clearly articulated the standard by which we review a district court's decision whether to hold an evidentiary hearing on a § 2255 motion. Many of our published opinions appear to review such decisions de novo, but do so without announcing a standard of review. *see, e.g., United States v. Witherspoon*, 231 F.3d 923, 926 (4th Cir. 2000). In contrast, our unpublished decisions often use abuse of discretion as the standard, *see, e.g., United States v. Ramirez*, 122 Fed.Appx. 14 (4th Cir.2005); *cf. Raines v. United States*, 423 F.2d 526, 531 (4th Cir. 1970) ("It is within the discretion of the district judge to deny without a hearing Section 2255 motions which state only legal conclusions with no supporting factual allegations.") (internal quotation marks omitted), as do numerous opinions of our sister circuits. *See, e.g., Cooper v. United States*, 378 F.3d 638, 641 (7th Cir.2004); *Covey v. United States*, 377 F.3d 903, 909 (8th Cir.2004). Because the parties did not address our standard of review, and because we would affirm under either standard, we need not decide whether any deference is owed to a district court's decision not to hold an evidentiary hearing on a § 2255 motion.

the truth of sworn statements made during a Rule 11 colloquy is conclusively established, and a district court should, without holding an evidentiary hearing, dismiss any § 2255 motion that necessarily relies on allegations that contradict the sworn statements. Otherwise, a primary virtue of Rule 11 colloquies would be eliminated—"permit[ting] quick disposition of baseless collateral attacks," *Blackledge*, 431 U.S. at 79 n. 19, 97 S.Ct. 1621 (1977).

[6] Against this background, we evaluate the allegations in Lemaster's § 2255 motion. Only three of Lemaster's allegations implicate the voluntariness of his waiver of collateral-attack rights. First, Lemaster alleged that his counsel's initial explanation of the proposed plea agreement differed substantially from the final plea agreement and that his counsel failed to explain the changes in the plea agreement to him. Second, Lemaster alleged that his counsel failed to inform him, or misinformed him, of the potential punishment that he faced under the plea agreement. Finally, Lemaster alleged that he was threatened that he would be denied adequate medical care unless he pleaded guilty. All three of these allegations directly contradict Lemaster's "[s]olemn declarations in open court." *Blackledge*, 431 U.S. at 74, 97 S.Ct. 1621.

During his plea colloquy, Lemaster affirmed multiple times that he "discussed the terms of the plea agreement and all matters pertaining to the charges against [him] with [his] attorney" and that he was "satisfied with [his] attorney and his advice of counsel." (J.A. at 66.) Lemaster also agreed that "being aware of all the possible consequences of [the] plea, [he] independently decid[ed] to enter [ ]his plea of [his] own free will." (J.A. at 70.) The plea agreement states that Lemaster would be "sentenced to imprisonment for a term of 60 months," (J.A. at 48), which is consistent with Lemaster's understanding of the maximum sentence to which he was exposed. Lemaster also affirmed that "as far as [he] kn[e]w the meaning of the word voluntary ... [he] consider[ed] that [he was] voluntarily entering into [ ]his plea of guilty." (J.A. at 72.) Lemaster indicated that he had not been "coerced, threat[ened], or promised anything else ... in exchange for [his] plea of guilty." (J.A. at 69.) He agreed that no "threats or force [had been] applied to [him] in any way to compel [him] to plead guilty." (J.A. at 73.)

In addition to his statements during the Rule 11 colloquy, Lemaster reaffirmed his assent to the plea agreement five months later during his sentencing hearing. At that hearing, Lemaster told the district court that he had not been in his "right capacity" during the plea colloquy because of his medical problems,[4] but that he "kn[e]w what [he was] doing ... today much better." (J.A. at 89, 93.) The district court noted that Lemaster had "appeared to be perfectly normal" at the plea colloquy, but nonetheless gave Lemaster a chance to repudiate his plea agreement. (J.A. at 89.) Lemaster declined the district court's offer, affirming that he "consider[ed][him]self bound by th[e] plea agreement." (J.A. at 92.) Lemaster also agreed that he "waive[d][his] right to appeal anything on the sentence." (J.A. at 95.)

In the face of Lemaster's testimony during his Rule 11 colloquy and sentencing hearing, the contrary allegations in his § 2255 motion are palpably incredible and patently frivolous or false. The Government has not conceded that Lemaster's

4. At the time of his plea, Lemaster suffered from severe degenerative changes in his hip, stomach ulcers, obesity, and an unspecified heart condition. (J.A. at 207.)

counsel was ineffective or that his plea was involuntary, *cf. White*, 366 F.3d at 295–96, and Lemaster points to no other extraordinary circumstance that would entitle him to an evidentiary hearing. Accordingly, the district court was not required to hold an evidentiary hearing and was correct to find, on the basis of Lemaster's assertions during his Rule 11 colloquy and sentencing hearing, that Lemaster's guilty plea and waiver of collateral-attack rights were knowing and voluntary.

III.

Because the transcripts of Lemaster's Rule 11 colloquy and sentencing hearing conclusively establish that Lemaster knowingly and voluntarily waived his right to attack his conviction and sentence collaterally, we affirm the district court's summary dismissal of Lemaster's § 2255 motion.

*AFFIRMED.*

DIRECTV INCORPORATED, Plaintiff–Appellant,

v.

Dennis NICHOLAS, Defendant–Appellee.

No. 04–1845.

United States Court of Appeals, Fourth Circuit.

April 13, 2005.

Argued: March 16, 2005.

Decided: April 13, 2005.

**Background:** Provider of satellite television broadcasts brought action against user of pirate access device who allegedly intercepted encrypted satellite transmissions of provider. The United States District Court for the Eastern District of North Carolina, Terrence W. Boyle, Chief District Judge, granted defendant's motion to dismiss and plaintiff appealed.

**Holding:** The Court of Appeals, Hamilton, Senior Circuit Judge, held that provider could bring private civil action against user who allegedly intercepted encrypted satellite transmissions.

Vacated and remanded.

**1. Action ⇐5**

Provider of satellite television broadcasts could bring private civil action against user of pirate access device who allegedly intercepted encrypted satellite transmissions of provider under federal wiretap laws prohibiting intentional interception of electronic communications. 18 U.S.C.A. §§ 2511, 2520(c)(2).

**2. Statutes ⇐188**

When interpreting statutes, the appellate court starts with the plain language.

**3. Statutes ⇐181(2), 190**

When a statute's language is plain, the sole function of the courts, at least where the disposition required by the text is not absurd, is to enforce it according to its terms.

**4. Statutes ⇐188**

In interpreting the plain language of a statute, the appellate court gives the words of a statute their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import.

**5. Statutes ⇐208**

In interpreting the plain language of a statute, statutory language must be read

U.S. NEWS

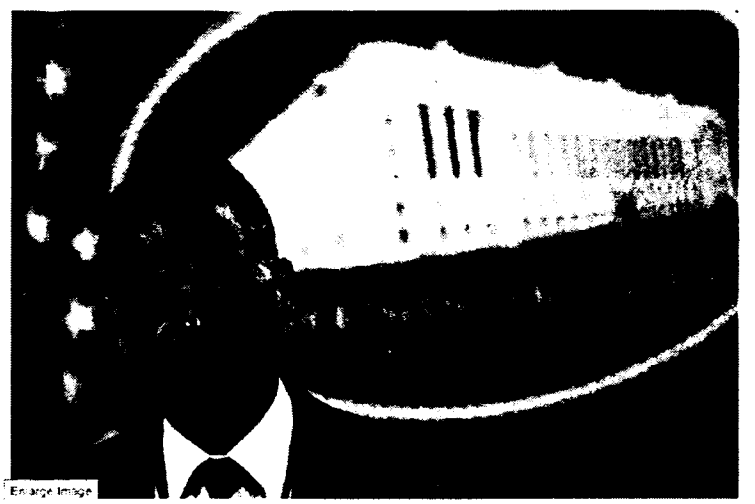
# Government Rethinks Waivers With Guilty Pleas

## Defense Lawyers Say Giving Up Right to Appeal Presents Conflicts of Inter



By JOE PALAZZOLO CONNECT

Updated Sept. 26, 2014 12:19 p.m. ET



Enlarge Image

Attorney General Eric Holder is expected to announce the policy shift on waivers as soon as next week. *AFP/Getty Images*

In a significant policy shift, federal prosecutors no longer will ask criminal defendants who plead guilty to waive their right to appeal over bad legal advice.

Attorney General Eric Holder is expected to announce the development as soon as next week, a Justice Department official said.

The waivers are used by about one-third of the 94 U.S. attorneys' offices and have come under increased scrutiny by legal ethics authorities in recent years. While federal prosecutors say the waivers pre-empt frivolous litigation and preserve resources, defense lawyers and federal public defenders argue they create a conflict of interest and insulate attorney conduct from judicial review.

More
Eric Holder Successor Could Have Close White House Ties

The debate has grown in importance now that nearly all charges in federal and state courts are settled with plea bargains. These agreements represented more than 97% of all federal convictions in 2013, said the Administrative Office of the U.S. Courts.

By signing a waiver—usually a paragraph in a plea agreement—a defendant agrees not to challenge her conviction by filing a claim alleging that an attorney provided ineffective assistance. If the defendant were to try anyway, a court could enforce the waiver without considering the merits of the claim.

In a ruling last month, the Kentucky Supreme Court became the first to pronounce such waivers unethical, saying they put defense lawyers in the awkward position of having "to advise a client on the attorney's own conduct."

The U.S. Attorneys in Kentucky, David J. Hale and Kerry B. Harvey, unsuccessfully challenged the Kentucky ethics opinion, arguing that it conflicted with federal court rulings that have upheld waivers and undercut the government's "bargained-for benefit of finality."

Bar associations in 11 other states, including Florida, Utah, Pennsylvania and Virginia, have advised lawyers that the waivers are improper. The ethics opinions aren't binding on federal judges but they can be influential. Chief Judge Joy Flowers Conti of the U.S. District Court in Pittsburgh said in an August ruling that enforcing such a waiver amounted to a "miscarriage of justice," citing an ethics opinion issued in her state this year.

The question of whether the waivers are ethical is separate from whether they are legal.

Several federal courts have approved the use of waivers but have also said they would be problematic if bad legal advice directly led a defendant to agree to a waiver or plead guilty instead of going to trial, said Nancy J. King, a law professor at Vanderbilt University who has studied the use of the waivers.

Opponents of the waivers say they strip key protections from defendants who are increasingly unlikely to go to trial.

"There's got to be some kind of safety valve, some kind of check on all the pleas that get churned out, instead of us just running them through the assembly line," said Peter Joy, a law professor at Washington University who co-wrote a law review article on the waivers this year.

Legal experts point to a raft of cases in which defendants pleaded guilty and were later exonerated as a strong argument in favor of preserving the right to an effective lawyer.

Mr. Joy and other legal experts say the waivers became more common following a trio of Supreme Court decisions in the past decade that recognized a constitutional right to counsel during plea deals. This year, Donna Lee Elm, a federal public defender in Florida, examined more than 100 plea agreements from each of the 94 federal districts and found that 36% of them contained broad waivers that encompassed claims of bad legal assistance.

Even without the waivers, defendants rarely succeed in undoing their convictions based on claims of shoddy lawyering, so many of the appeals are fruitless.

Dewayne J. Joseph said his lawyer gave him a choice: plead guilty to drug charges and serve 10 years in prison, or go to trial, lose and rot away for 20. "I was too scared to go through with the trial," he wrote in a January court filing he typed from prison in McKean County, Pa., where he is serving nearly 17 years in prison for his role in a cocaine-distribution ring, despite his decision to plead guilty.

When he tried to reduce his sentence, arguing that his lawyer gave him bad advice, Senior U.S. District Judge Donetta W. Ambrose, another member of the Pittsburgh court, reminded him that he had waived that right.

"Although the attorney ethics surrounding such waivers have recently been called into question, our Court of Appeals has since affirmed their enforceability," wrote Judge Ambrose in a May ruling.

There is no evidence Mr. Joseph would have succeeded, anyway. Prosecutors sought a stiffer sentence after he testified on behalf of a co-defendant, against his lawyer's advice.

"Fifteen times I told him, 'Take the Fifth, take the Fifth,'" said his lawyer Philip P. DiLucente, referring to the Fifth Amendment right against self-incrimination.

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# Pitch 4: The Saga of the Hipster Family: The Intersection of Rule 4.2 and Guardians *Ad Litem*

LEO 1870

DOES THE ETHICAL RESTRICTION AGAINST COMMUNICATING WITH REPRESENTED PERSONS APPLY IN MATTERS WHERE A GUARDIAN *AD LITEM* HAS BEEN APPOINTED FOR A MINOR CHILD? ARE GOVERNMENT ATTORNEYS PROHIBITED FROM COMMUNICATING OR DIRECTING INVESTIGATORS TO COMMUNICATE WITH REPRESENTED PERSONS IN SUCH MATTERS?

This opinion answers the following questions:

1) May an attorney representing a parent or guardian in a matter communicate with a minor child for whom the court has appointed a guardian *ad litem* ("GAL") without the GAL's consent or legal authority?

2) May a GAL representing a minor child in a matter communicate with a parent or other person represented by an attorney in the matter without that person's attorney's consent or legal authority?

3) May a government attorney communicate with a represented person, including a child for whom a GAL has been appointed, or request or direct social workers and others performing investigative functions regarding the matter to do so without the GAL's or other attorney's consent or legal authority?

**1. Communications by a Parent's/Guardian's Lawyer with Child Represented by GAL**

Virginia Rule of Professional Conduct 4.2 provides:

> **RULE 4.2 Communication With Persons Represented By Counsel**
>
> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Thus, a parent's or guardian's attorney would be restricted from communicating with the child if the guardian *ad litem* were deemed the child's lawyer. In Virginia, as elsewhere[1], guardians *ad litem* represent the child *as an attorney*.

> The GAL acts **as an attorney** and not a witness, which means that he or she should not be cross-examined and, more importantly, should not testify. The GAL should rely primarily on opening statements, presentation of evidence and closing arguments to present the salient information the GAL feels the court needs to make its decisions. ***

[1] In some jurisdictions, guardians *ad litem* are called "law guardians."

> The role and responsibility of the GAL is to represent, **as an attorney,** the child's best interests before the court. The GAL is a full and active participant in the proceedings who independently investigates, assesses and advocates for the child's best interests. Decision-making power resides with the court.[2]

(Emphasis added).

Courts and ethics authorities in other jurisdictions have held that Rule 4.2 prohibits a parent's lawyer from communicating with the client's child once a GAL has been appointed, unless the guardian consents or a court authorizes such contact.

In *Disciplinary Proceedings Against Kinast*, 530 N.W.2d 387, 192 Wis.2d 36 (1995), an attorney representing a wife in a custody dispute had his client bring the two minor children to his office, where he had a five-minute conversation with them in the presence of their mother, during which he purportedly asked them about school and commented that they would probably like to live with both of their parents. The attorney, Kinast, accomplished this without the consent or knowledge of the children's court-appointed guardian *ad litem*, despite Kinast's knowledge that an attorney had been appointed to serve as such for the children.

In determining that Rule 4.2[3] had been violated by Kinast, the Supreme Court of Wisconsin cleared up the bar's "confusion" surrounding this subject, opining that

> [T]he rule prohibiting a party's lawyer from communicating with another party without the consent of that party's attorney is intended to protect litigants from being intimidated, confused or otherwise imposed upon by counsel for an adverse party. **Children involved in divorce litigation are no less entitled to the protection that rule affords than are adult parties to the litigation.** Any confusion that may exist among lawyers in Rock County or elsewhere in the state regarding the application of SCR 20:4.2 to children represented by a guardian ad litem is hereby resolved.[4]

(Emphasis added).

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[2] "Standards to Govern the Performance of Guardians *Ad Litem* for Children" (2003) Judicial Counsel of Virginia. *See*, also, Rule 8:6 of the Rules of the Supreme Court of Virginia, wherein it is stated: "When appointed for a child, the guardian ad litem shall vigorously **represent the child**, fully protecting the child's interest and welfare." [Emphasis added.]

[3] Wisconsin's version of the Rule, SCR 20:4.2, then applied to contact with a "party" versus a "person," but the Court overrode a referee's finding of no ethical violation, finding that children were indeed parties in custody litigation.

[4] 530 N.W.2d at 390, 391.

In *Auclair v. Auclair*, 127 Md.App. 1, 730 A.2d. 1260 (1999), the Court of Special Appeals of Maryland cited *Kinast* with approval but left open the opportunity for mature minor children represented by a guardian *ad litem* to seek out advice from a private attorney.[5] The *Auclair* case involved minor children who sought to intervene as parties in their parents' divorce case. The appellate court would have allowed the minor children "access to legal counsel with respect to matters not within the purview of the guardian's realm of responsibility." 730 A.2d. 1275.

State bar ethics committees have reached the same conclusion as courts that Rule 4.2 prohibits a parent's attorney from communicating with a minor child regarding the custody dispute, absent the consent of the child's guardian *ad litem* or a court order authorizing such contact.

The State Bar Association of North Dakota Ethics Committee was confronted with the question of whether it was ethically permissible for a client to bring a child to the attorney's office so that the child's affidavit might be obtained in connection with a proceeding for modification of custody. In Opinion No. 09-06, the Committee opined:

> Rule 4.2 of the Rules of Professional Conduct addresses communication with persons who are represented by counsel. The Rule provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." When a guardian ad litem has been appointed to represent a child's best interests, it is the opinion of the Ethics Committee that Rule 4.2 would prohibit communication with the child without the consent of the guardian ad litem or court order. A guardian ad litem appointed under N.D.C.C. § 14-09-06.4 must be a licensed attorney and functions independently in the same manner as an attorney for a party to the action. N.D.R.Ct. 8.7

New York State Bar Association Committee on Professional Ethics Opinion #656 (38-93) answered in the negative the question, "May the attorney for a parent in a child custody proceeding question a child for whom the court has appointed a law guardian without the law guardian's consent?" Quoting from an earlier opinion, the ethics committee opined:

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[5] "Consequently, although we hold that Rule 4.2 of the Maryland Rules of Professional Conduct applies to communications with minors for whom guardians have been appointed, under the unique facts of this case, we are not persuaded that private counsel should be prohibited from consulting with the children because of the ages, intelligence, and maturity of appellants and the real or perceived inability of the guardian ad litem to be the investigative arm of the court and reporter of the children's preferences to the court, while simultaneously acting as advocate for appellants." 730 A.2d. 1276.

> Where a person is represented by counsel, there is an absolute proscription which serves to bar any and all communications relating to the matter for which that person has retained counsel .... If a person is represented by counsel, absent such counsel's consent, the ethics of our profession require that no lawyer other than his own communicate with him on the subject of the representation and all forms of communications are proscribed.

The New York opinion also addresses the question of whether parental consent to have the parent's attorney speak to a child plays a role in whether the attorney may speak to the represented child: "In light of the purposes of the rule, **the presence or absence of consent by the child's parent for the parent's attorney to speak with the child is not pertinent**; the rule requires that the consent of the child's law guardian be obtained before counsel for either parent may communicate with the child." (Emphasis added). In other words, the parent's consent does not override the need for consent of the GAL representing the child.

The Utah State Bar Ethics Advisory Opinion Committee, in Opinion No. 07-02 (2007), stated that "except in the narrow circumstance described below involving a 'mature' minor, we conclude that another attorney may not communicate with the represented minor about the subject of the representation without either obtaining (a) prior consent of the GAL or (b) permission from the court. In the context of custody, dependency, abuse or neglect cases, the 'best interest' of the represented person, as well as the wishes of the represented person, would both be within the 'subject of the representation' by the GAL."

As was recognized by the *Auclair* court, *supra.*, the Utah opinion acknowledges that there will be times when "mature" minors may wish to obtain a second opinion or their own independent representation from an otherwise uninvolved attorney. Thus,

> [w]hen a guardian ad litem is appointed by the court to represent a person in a judicial proceeding, another attorney may not communicate with the represented person about the subject of the representation unless the attorney first obtains the consent of the GAL or an appropriate order from a court of competent jurisdiction. Except, however, if a mature minor independently and voluntarily attempts to obtain a second opinion or independent representation from an uninvolved attorney, that attorney does not violate Rule 4.2 by speaking with the minor, even if the communication is without the GAL's prior permission or consent. Minors also have statutory and constitutional rights that are independent of the rights of their parents and guardians.

Utah State Bar Ethics Adv. Op 07-02, *supra* at para. 24. Consistent with a minor child's right to consult counsel found in *Auclair* and the Utah ethics opinion, this Committee opines that Rule 4.2 does not restrict another lawyer from communicating with a minor child who is seeking a

"second opinion" or "replacement counsel" without the guardian's knowledge or consent. Those exceptions are contained in Comment [3][6] to Rule 4.2. Obviously, no such lawyer should *also* be a parent's lawyer, due to the inherent conflict of interest and the inability of such lawyer to be disinterested.

## 2. Communication by a GAL with a Parent or Guardian Represented by an Attorney

Just as the attorney representing a parent or guardian may not communicate with a child represented by a GAL without the GAL's consent or legal authority, neither may the GAL communicate regarding the matter with a represented parent or guardian of the child without that parent's or guardian's attorney's consent or authorization conferred by a court order or other legal authority. As is clear in the foregoing analysis, such a restriction upon the GAL is necessary under Rule 4.2 because the duties and functions of the GAL are those of an attorney representing a client except when it would be inconsistent with the "Standards to Govern the Performance of Guardians *Ad Litem* for Children," referred to above. Further, this Committee has previously opined that a lawyer serving as a GAL for a child is also subject to the applicable Rules of Professional Conduct governing lawyers unless those ethical obligations are inconsistent with the lawyer's obligations or duties as a GAL. *See, e.g.* Virginia Legal Ethics Op. 1725 (1999) (lawyer serving as GAL for child subject to conflict of interest rules). Virginia Legal Ethics Op. 1729 (1999) (When the duties do not conflict, the lawyer serving as GAL should follow the course of action required by the Code of Professional Responsibility).

This Committee acknowledges that a GAL appointed to represent a child is authorized and charged to communicate with or interview all parties to the dispute including the child's parents and any other persons having relevant information.[7] The court's order appointing the lawyer as GAL states, in pertinent part:

> The guardian *ad litem* appointed to represent the child shall have access to the following persons and documents without further order of the Court:
>
> A. The child.
>
> B. Parties to the proceeding.
>
> C. Court Appointed Special Advocate (CASA), local department of social services and court services unit worker in the case, and school personnel involved with the child.

[6] Comment [3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule. A lawyer is permitted to communicate with a person represented by counsel without obtaining the consent of the lawyer currently representing that person, if that person is seeking a "second opinion" or replacement counsel.

[7] Form DC 5-14. *Order for Appointment of Guardian ad Litem; GAL Standards, supra* at S-4.

Form DC 514, *Order for Appointment of Guardian Ad Litem*, District Court Manual, Forms Volume (December 2007). This does not mean, however, that a lawyer appointed as GAL pursuant to this order may disregard the lawyer's ethical obligations under the Rules of Professional Conduct in the discharge of his or her duties as GAL. To the contrary, the *Standards to Govern the Performance of Guardians ad Litem for Children* make clear that "[a]ttorneys who serve as GALs are subject to the Rules of Professional Conduct promulgated by the Virginia State Bar as they would be in any other case, except when the special duties of a GAL conflict with such rules."[8] This Committee's review of applicable law reveals no authority that a lawyer serving as GAL is "authorized by law" to have *ex parte* contacts or interviews with represented parents in the context of the GAL's investigation, solely by virtue of his or her appointment as GAL. Rule 4.2 recognizes that in particular and exceptional circumstances a court order may *specifically authorize* the GAL to communicate directly with a parent that is represented by counsel.[9] However, this Committee believes that a lawyer serving as GAL is not, solely by virtue of his or her appointment, "authorized by law" to have direct *ex parte* interviews or communications with parents or other persons the GAL knows to be represented by counsel in that matter.

**3. Attorney-Directed Communications by Social Workers and Others Performing Investigative Functions with Represented Persons in Matters Where a GAL Has Been Appointed**

In Virginia Legal Ethics Opinion 1755, the Committee noted that Rule 8.4(a)[10] prohibits an attorney from violating Rule 4.2 through the acts of others. Consistent with this precept, ABA Formal Legal Ethics Op. 95-396 (1995), in its analysis of an attorney's use of investigators, states as follows:

> Since a lawyer is barred under Rule 4.2 from communicating with a represented party about the subject matter of the representation, she may not circumvent the Rule by sending an investigator to do on her behalf that which she is herself forbidden to do. [Footnote omitted.] Whether in a civil or a criminal matter, if the investigator

[8] *Standards to Govern the Performance of Guardians ad Litem for Children* at S-2.

[9] Comment [4] to Rule 4.2 states, in relevant part, " a lawyer having independent justification or legal authorization for communicating with the other party is permitted to do so."

[10] **RULE 8.4 Misconduct**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another[.]

> acts as the lawyer's "alter-ego," the lawyer is ethically responsible for the investigator's conduct.

Pursuant to law, social workers, police officers, and other government employees routinely investigate allegations of crimes against and mistreatment of minor children.[11] The matters are often investigated before a parent or guardian has counsel, and before a prosecutor on behalf of the Commonwealth or a local government attorney representing a social services department knows of the matter. Under those circumstances, it is clear that Rule 4.2 is not applicable because no lawyer is yet involved and as such cannot be directing the communications. Additionally, these public employees are both authorized by law and specifically trained to conduct these investigations.

Subject to the exceptions discussed in this opinion, once a prosecutor or local government attorney assumes responsibility to represent the Commonwealth or other governmental entity in a matter, he or she may not:

a) communicate regarding the civil matter with a represented person, including a child for whom a GAL has been appointed in that matter; and/or

b) use a social worker, police officer, or other investigator as an intermediary to circumvent Rule 4.2 in order to communicate with a represented person, including a child in regard to the civil matter in which a GAL has been appointed. However, investigative contacts regarding possible violations of criminal law made at the request of a prosecutor or lawyer representing a social services agency *are* "authorized by law," and therefore ethically permissible when judicial precedent has approved such contacts prior to the attachment of one's right to counsel. *See*, Comment [5] to Rule 4.2.[12] Under this "law enforcement" exception to Rule 4.2, a government lawyer may not only instruct or direct a non-lawyer investigator or agent to communicate, but may also give advice regarding the content of the communication with a represented person. Unless a GAL has been appointed to represent a child in a criminal proceeding, criminal prosecutors may communicate directly and indirectly with the child/victim, even if such communication involves subject matter related to a pending or contemplated civil proceeding involving the child.

Attorneys who represent government agencies in pending or contemplated civil proceedings may communicate directly or indirectly with a minor child prior to the time that a court has appointed a GAL to represent a child in the matter. Once the government attorney

[11] *See, e.g.*, Va. Code §63.2-1518.

[12] Comment [5] In circumstances where applicable judicial precedent has approved investigative contacts in pre-indictment, non-custodial circumstances, and they are not prohibited by any provision of the United States Constitution or the Virginia Constitution, they should be considered to be authorized by law within the meaning of the Rule. Similarly, communications in civil matters may be considered authorized by law if they have been approved by judicial precedent. This Rule does not prohibit a lawyer from providing advice regarding the legality of an interrogation or the legality of other investigative conduct.

becomes aware that a GAL has been appointed to represent the child in the particular civil proceeding, the government attorney who, in representing the agency, is representing another party in that proceeding must obtain the consent of the GAL before communicating with the child, either directly or indirectly through the agency of a social worker or investigator.[13] If the government attorney cannot obtain the appointed GAL's consent to have such contacts with the child, and no court order authorizes such contact, that attorney should move the court to authorize such contact with the child.

## CONCLUSION

When a lawyer has been appointed to serve as a GAL for a child in a civil proceeding, Rule 4.2 applies and prohibits counsel for another party in that proceeding from communicating *ex parte* with the child about the subject matter of that proceeding, unless the GAL consents to such communication or unless the law or court order authorizes that lawyer to communicate *ex parte* with the represented child. Similarly, the lawyer serving as GAL for the child is bound by Rule 4.2 and may not have *ex parte* communications with another represented party in that proceeding, unless counsel for that party consents, or unless the GAL is authorized by law or court order to have such communication.

Rule 4.2 also applies to lawyer-directed communications with a represented person by non-lawyers. However, a government lawyer does not violate Rule 4.2 merely by requesting a social worker or investigator to communicate with a represented person, including a child for whom a GAL has been appointed, if the law entitles or charges the investigator or social worker to have such communication. While the government lawyer may request that the social worker or investigator contact and interview a represented person, and advise generally what information the lawyer seeks, the lawyer may not "mastermind" or "script" the interview or dictate the content of the communication. Such conduct would be viewed as circumventing Rule 4.2 through the actions of another. Rule 8.4(a).

Committee Opinion
October 4, 2013

[13] As stated previously, Rule 4.2 does not prohibit a non-lawyer social worker or investigator from independently contacting the represented child; however the Rule does come into play when the government lawyer directs or controls the content of the communication through an intermediary such as a social worker or investigator.