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THE ETHICS OF WITNESS PREP

A general overview of the line between proper preparation and impermissible coaching

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The line between witness preparation and impermissible witness coaching turns on whether the lawyer is helping the witness tell the truth more clearly or shaping the substance of that truth. Ethical rules and professional norms prohibit coaching because it risks distorting the fact-finding process, whereas legitimate preparation is not only permitted but essential to ensuring that testimony is clear, complete, and reliable. As the Iowa Supreme Court has stated, "[a]ttorneys certainly have the right to prepare their witnesses. It would be foolhardy not to." *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002).

Proper preparation includes familiarizing the witness with courtroom or deposition procedure, reviewing relevant documents, refreshing recollection (appropriately), and practicing how to listen carefully and answer questions accurately and concisely. It may also involve discussing areas of potential cross-examination and emphasizing the importance of honesty, including the appropriateness of saying "I don't know" or "I don't remember."

By contrast, coaching occurs when an attorney suggests or scripts specific answers, encourages a witness to adopt a particular version of disputed facts, or subtly signals what testimony would be most helpful to the case regardless of its truth. Witness coaching implicates several Iowa Rules of Professional Conduct:

- Iowa RPC 32:1.2(d) – Allocation of Authority
- Iowa RPC 32:3.3 – Candor Toward Tribunal
- Iowa RPC 32:3.4(b) – Fairness to Opposing Party + Counsel
- Iowa RPC 32:4.4(a) – Respect for Rights of Third Persons
- Iowa RPC 32:8.4 – Misconduct

The U.S. Supreme Court has made plain that "[a]n attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it."

Geders v. United States, 425 U.S. 80, 91 (1976). Any violation of [the Rules of Professional Conduct] would constitute a most serious breach of the attorney's duty to the court." *Id.*

To learn more about the distinction between necessary witness preparation and improper witness coaching, the following may be helpful:

- ABA Formal Opinion 508, *The Ethics of Witness Preparation* (Aug. 5, 2023) (attached).[1]

- *Sec. Nat. Bank of Sioux City, Iowa v. Abbott Lab'ys*, 299 F.R.D. 595, 604 (N.D. Iowa 2014) (Bennett, J.), *rev'd sub nom. Sec. Nat'l Bank of Sioux City, IA v. Jones Day*, 800 F.3d 936 (8th Cir. 2015) (attached)

- Restatement (Third) of the Law Governing Lawyers § 116 (2000) (attached).

- Richard C. Wydick, *The Ethics of Witness Coaching*, 17 Cardozo L. Rev. 1 (1995).

- Roberta K. Flowers, *Witness Preparation: Regulating the Profession's Dirty Little Secret*, 38 Hastings Const. L.Q. 1007, 1008 (2011).

- Daniel S. Medwed, *Coaxing, Coaching and Coercing: Witness Preparation by Prosecutors Revisited*, 16 Ohio St. J. Crim. L. 379 (2019).

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[1]The Iowa Supreme Court often follows ABA Opinions. *See, e.g.*, *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Templeton*, 784 N.W.2d 761, 768–69 (Iowa 2010); *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Moothart*, 860 N.W.2d 598, 606 (Iowa 2015); *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Morrison*, 727 N.W.2d 115, 118 (Iowa 2007); *Sorci v. Iowa Dist. Ct. for Polk Cnty.*, 671 N.W.2d 482, 492 (Iowa 2003).

APPLICABLE IOWA RULES OF PROFESSIONAL CONDUCT
(Excerpted)

RULE 32:1.2(d)

(d) 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.

[Comment 9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

RULE 32:3.3(a)(3)

(a) A lawyer shall not knowingly:

. . .

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

[Comment 6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[Comment 9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

RULE 32:3.4(b)

A lawyer shall not . . . (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.

[Comment 1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

RULE 32:4.4(A)

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

RULE 32:8.4

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 act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

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

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 508 **August 5, 2023**

The Ethics of Witness Preparation

A lawyer's role in preparing a witness to testify and providing testimonial guidance is not only an accepted professional function; it is considered an essential tactical component of a lawyer's advocacy in a matter in which a client or witness will provide testimony. Under the Model Rules of Professional Conduct[1] *governing the client-lawyer relationship and a lawyer's duties as an advisor, the failure adequately to prepare a witness would in many situations be classified as an ethical violation. But, in some witness-preparation situations, a lawyer clearly steps over the line of what is ethically permissible. Counseling a witness to give false testimony or assisting a witness in offering false testimony, for example, is a violation of at least Model Rule 3.4(b). The task of delineating what is necessary and proper and what is ethically prohibited during witness preparation has become more urgent with the advent of commonly used remote technologies, some of which can be used to surreptitiously "coach" witnesses in new and ethically problematic ways.*

Introduction

> **Jack McCall:** Well, I'm a hard case for you, counselor. And no mistake, everyone in there saw me shoot him.
> **Lawyer:** If you'll let me set our strategy, I don't think we'll dispute what people saw.
> **Jack:** Now, I guess you're here to break me out.
> (*Lawyer chuckles*)
> **Lawyer:** Son, did James Butler Hickok ever kill a -- relative of yours?
> **Jack:** James Butler Hickok?
> **Lawyer:** Wild Bill Hickok. Did he ever kill a brother of yours or -- or the like?
> **Jack**: A brother?
> **Lawyer:** I'm asking you if what happened in that saloon was vengeance, for the death of a family member? Possibly a brother in Abilene. Or the like.
> **Jack:** (*Jack smirks, cocks head pensively*) A brother in Abilene . . . .
> (*Lawyer smiles, pats Jack twice on the knee, and exits*).[2]

Preparing a witness or a client to testify in advance of a deposition or adjudicative proceeding – or in some situations providing a client or witness with midstream guidance during the testimonial process – is such a familiar component of a lawyer's trial-advocacy repertoire that it

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through 2023. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.
[2] THE TRIAL OF JACK MCCALL, DEADWOOD, season 1, episode 5 (Home Box Office, Inc. 2010).

needs little introduction or explanation. Many would condemn a lawyer's failure to prepare a client or witness.[3] Failure to do so competently and diligently can constitute an ethics violation.[4] But, in some witness-preparation situations, a lawyer clearly steps over the line of what is ethically permissible. Certain categories of lawyer activity are firmly established as unethically interfering with the integrity of the justice system and unethically obstructing another party's access to evidence. Among the rules applicable to such conduct are Rule 1.2 (Scope of Representation and Allocation of Authority between Client and Lawyer), Rule 3.3 (Candor Toward the Tribunal), Rule 3.4 (Fairness to Opposing Party and Counsel), Rule 4.4 (Respect for Rights of Third Persons), and Rule 8.4 (Misconduct).

The distinction between legitimate witness preparation and guidance versus unethical efforts to influence witness testimony, a practice sometimes known as coaching, horseshedding, woodshedding, or sandpapering,[5] can be ambiguous owing in large part to the concurrent ethical duties to diligently and competently represent the client and to refrain from improperly influencing witnesses.[6] For purposes of this opinion, the term coach is used to signify unethical or ethically questionable conduct. The task of delineating what is necessary and proper and what is ethically prohibited during witness preparation has become more urgent with the advent of commonly used remote technologies, some of which can be used to surreptitiously "coach" witnesses in new and ethically problematic ways.

Analysis

Some quantum of client and witness preparation is appropriate and an affirmative ethical responsibility. But lawyers "must respect the important ethical distinction between discussing

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[3] William Hodes, *The Professional Duty to Horseshed Witnesses Zealously Within the Bounds of the Law*, 30 TEXAS TECH. L. REV. 1343 (1999) ("Journey not far enough, and a lawyer deserves sanction for failing to carry out the most basic duties encompassed by the client-lawyer relationship.") (footnote omitted); Roberta K. Flowers, *Witness Preparation: Regulation of the Profession's Dirty Little Secret*, 38 HASTINGS CONST. L.Q. 1007, 1009 (2011) ("Witness preparation is considered by most criminal attorneys—prosecutors and criminal defense attorneys alike—to be an essential part of trial advocacy.") (footnote omitted); Adam Liptak, *Crossing a Fine Line on Witness Coaching*, N.Y. TIMES (Mar. 16, 2006) ("[L]awyers often spend hours preparing witnesses to testify, a practice that is not only accepted but also generally considered necessary. Lawyers have been punished for incompetent representation for failing to interview and prepare witnesses.").

[4] *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (Competence) & cmt. [5]; MODEL RULES OF PROF'L CONDUCT R. 1.3 (Diligence).

[5] BLACK'S LAW DICTIONARY 885 (11th ed. 2019) (defining horseshedding as "The instruction of a witness favorable to one's case (esp. a client) about the proper method of responding to questions while giving testimony."). To be sure, a witness can be coached to tell the truth, which would not ordinarily be unethical. The practice of emphasizing continuously the importance of telling the truth, and that truthfully and accurately recounting facts is ultimately the witness's responsibility, is a useful guardrail to avoid coaching. *See* Resolution Tr. Corp. v. Bright, 6 F.3d 336, 341 (5th Cir. 1993) (district court's disbarment of two lawyers for aggressively pushing witness regarding choice of words was an abuse of discretion where there was no evidence that conduct was in bad faith or testimony was false; evidence that lawyers told witness to read the affidavit carefully before signing it undermined allegation that lawyers' conduct was an attempt to cause witness testify falsely under oath).

[6] Many commentators have underscored this tension. *See, e.g.*, Tom Barber, *Restrictions on Lawyers Communicating with Witnesses During Testimony: Law, Lore, Opinions, and the Rule*, 83 FLA. BAR JOURNAL 58 (July-Aug. 2009) (noting that "there is considerable disagreement as to the definition of 'coaching' as opposed to legitimate preparation").

testimony and seeking improperly to influence it."[7] There is, in general, a distinction between manipulative conduct during client/witness preparation and active interference with or attempts to influence testimony while a witness is testifying. This opinion addresses both, because either can implicate a lawyer's ethical duties.

With remote proceedings having become commonplace, the sense that brazen witness-coaching behaviors are occurring or could easily occur has been validated by a number of reported instances of misconduct.[8] This development should guide the manner in which courts and lawyers are superintending the use of remote technology.

A. What Preparatory Conduct is Ethical?

Providing a witness with effective preparatory guidance is undoubtedly a component of the "thoroughness and preparation" element of Model Rule 1.1.[9] It is accepted that lawyers can engage in, for example, the following activities:

- remind the witness that they will be under oath
- emphasize the importance of telling the truth
- explain that telling the truth can include a truthful answer of "I do not recall"[10]
- explain case strategy and procedure, including the nature of the testimonial process or the purpose of the deposition
- suggest proper attire[11] and appropriate demeanor and decorum
- provide context for the witness's testimony
- inquire into the witness's probable testimony and recollection
- identify other testimony that is expected to be presented and explore the witness's version of events in light of that testimony

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[7] *See* Geders v. United States, 425 U.S. 80, 90 n.3 (1976) (citing Ethical Consideration 7-26 of the ABA Code of Professional Responsibility (1975)); *see also* Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993) ("The goal of obtaining the facts of a case is defeated when the lawyer and not the witness is answering questions or influencing the answers to them.").

[8] The risk of witness-preparation misconduct is not particularly augmented in a remote environment because such interactions still occur "behind closed doors," so to speak. Technology-driven efforts to influence in-progress witness testimony—signaling or messaging a witness testifying remotely, out of the sight of opposing counsel and the adjudicative officer—has generated increased scrutiny.

[9] *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (Competence) & cmt. [5]. Other germane rules include MODEL RULES OF PROF'L CONDUCT R. 1.3 (Diligence), 1.4 (Communication), and 2.1 (Advisor). *See, e.g.*, Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993) (an attorney has right and duty to prepare a client for deposition); Maryland v. Earp, 571 A.2d 1227, 1234 (Md. 1990) ("[a]ttorneys have not only the right but also the duty to fully investigate the case and to interview persons who may be witnesses."); John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 287-88 (1989), ("The practical literature uniformly views the failure to interview witnesses prior to testimony as a combination of strategic lunacy and gross negligence.").

[10] Telling a witness that a truthful answer of "I do not recall" is an acceptable response and ethically distinguishable from telling a witness, "The less you recall the better." The latter is a statement that affirmatively encourages a witness to "forget" information, i.e., to lie under oath about what is remembered. It is the ethical equivalent of telling a witness affirmatively to testify to something that is contrary to fact. *See* MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (a lawyer shall not counsel or assist a witness to testify falsely).

[11] Vanessa Friedman, *Caroll, Clothes and Credibility*, N.Y. TIMES (May 9, 2023) (noting that witness's attire and demeanor were so effective that people wondered if someone was stage-managing the style: "Well, her lawyers, duh. It has long been understood that appearance is part of any courtroom drama.").

- review documents or physical evidence with the witness, including using documents to refresh a witness's recollection of the facts
- identify lines of questioning and potential cross-examination
- suggest choice of words that might be employed to make the witness's meaning clear[12]
- tell the witness not to answer a question until it has been completely asked
- emphasize the importance of remaining calm and not arguing with the questioning lawyer
- tell the witness to testify only about what they know and remember and not to guess or speculate
- familiarize the witness with the idea of focusing on answering the question, i.e., not volunteering information.[13]

When it comes to preparation of a client or witness for a testimonial event such as a trial or deposition, there is a fair amount of latitude in the types of lawyer-orchestrated preparatory activities that are recognized as permissible.[14]

B. Unethical Pre-Testimony Coaching

Within the broad class of lawyer conduct directed at a client's or witness's future testimony, certain categories of lawyer activity are firmly established as unethically interfering with the integrity of the justice system and unethically obstructing another party's access to evidence. A lawyer violates ethical obligations by counseling a witness to give false testimony, assisting a witness in offering false testimony, advising a client or witness to disobey a court order regulating discovery or trial process, offering an unlawful inducement to a witness, or procuring a witness's absence from a proceeding.[15]

Prominent among the ethics rules in this area is Model Rule 3.4(b), which prohibits a lawyer from advising or assisting a witness—whether a client or not—to give false testimony.[16]

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[12] THE RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 116, cmt. b (2000), emphasizes that in suggesting choice of words "a lawyer may not assist the witness to testify falsely as to a material fact," which would constitute knowingly counseling or assisting a witness to testify falsely or otherwise to offer false evidence. *Id*. (citing RESTATEMENT § 120(1)(a)).
[13] Many of these techniques are expressly referenced in the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §116, cmt. b.
[14] *See generally* JONATHAN L. ROSNER, PREPARING WITNESSES (2022-23 ed.); DANIEL I. SMALL, PREPARING WITNESSES: A PRACTICAL GUIDE FOR LAWYERS AND THEIR CLIENTS (5th ed. 2020); Video: Jan Mills Spaeth, *Become a Strong and Credible Witness: Witness Preparation for Deposition and Trial* (2019) (streaming HD video); JAMES M. MILLER, FROM THE TRENCHES II: MASTERING THE ART OF PREPARING WITNESSES (2019); KENNETH R. BERMAN, REINVENTING WITNESS PREPARATION: UNLOCKING THE SECRETS TO TESTIMONIAL SUCCESS (2018).
[15] *See, e.g.*, *In re* Stroh, 97 Wash. 2d 289, 300, 644 P.2d 1161, 1167 (1982) (disbarring lawyer following conviction for tampering with a witness; "Under no circumstances may false testimony knowingly be introduced into a hearing by an officer of the court.").
[16] MODEL RULES OF PROF'L CONDUCT R. 3.4(b). Such conduct might also constitute assisting the client to engage in conduct that the lawyer knows is criminal, i.e., perjury, in violation of Model Rule 1.2(d), as well as offering false evidence in violation of Model Rule 3.3(a)(3). MODEL RULES OF PROF'L CONDUCT R. 1.2(d) & 3.3(a)(3). For examples of discipline for transgressing these rules, *see, e.g.*, *In re* Peasley, 90 P. 3d 764 (Ariz. 2004) (lawyer who coached witness to lie disbarred); *In re* Paul Storment, 873 S.W.2d 227 (Mo. 1994) (lawyer disbarred in Missouri and reciprocally suspended for two-years in Illinois for advising client during recess to deny material facts of

Instigating a witness to lie can occur in ways beyond an outright instruction to fabricate testimony. For example, it is unethical to tell a witness to "downplay" the number of times a witness and a lawyer met to prepare for trial[17] or to encourage a client to misrepresent a location of a slip and fall accident to have a viable claim.[18] Other representative examples of unacceptable witness coaching and influencing behaviors include programming a witness's testimony,[19] knowingly violating sequestration orders,[20] and encouraging a witness to present fabricated testimony.[21]

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another witness's testimony that lawyer knew were true and prompting client on redirect to testify to known false testimony); *see also In re* Attorney Discipline Matter, 98 F.3d 1082 (8th Cir. 1996) (affirming reciprocal disbarment of same Missouri lawyer); *In re* Mitchell, 244 Ga. 766, 262 S.E.2d 89 (1979) (disbarring lawyer who had instructed six witnesses to say that a fictitious man by the name of "David Thompson" was the real father of a child whose paternity was disputed); *In re* Oberhellmann, 873 S.W.2d 851, 852 (Mo. 1994) (disbarring lawyer who, during client's deposition, instructed client to lie about a number of things, including client's place of residence).

[17] *In re* Meltzer, 21 N.Y.S.3d 63, 64 (2015) (accepting lawyer's resignation and ordering disbarment in matter arising from lawyer's instructions that witness "downplay" the number of times they met to discuss testimony to prepare for trial in the event witness was asked such a question on cross-examination).

[18] *In re* Rios, 965 N.Y.S.2d 418, 421, 423-24 (2013) (lawyer disciplined for violation of New York RPC 8.4(c)).

[19] *In re* Brooke P. Halsey, Jr., Case No. 02-O-10195-PEM (State Bar of California Hearing Dep't, Aug. 1, 2006) (prosecutor's secret pre-trial coaching of forensic pathologist who had performed autopsy of victim was so intrusive and extensive that it "tampered with the heart of [the witness's] testimony"). Except in extreme cases of witness programming such as *Halsey*, the extent to which a lawyer can "script" or "prefabricate" otherwise truthful witness testimony has not been definitively resolved. Compare United States v. Welton, 2009 U.S. Dist. Lexis 138113 (C.D. Cal. 2009) ("While directing a witness to use (or avoid using) particular words when phrasing an answer is unacceptable conduct, particularly for a prosecutor . . . there is no evidence that [the witness] testified falsely . . . as a result of the advice she received from the [prosecuting attorney]") with Resolution Tr. Corp. v. Bright, 6 F.3d 336 (5th Cir. 1993) (drawing distinction between asking witness to swear to facts which are knowingly false and placing statements in draft affidavit that have not been previously discussed with witness). *See generally* Matthew Hector, *The Beau Brindley Case: Witness Preparation v. Coaching*, 103 ILL. BAR JOURNAL 11, 11 (2015) (analyzing federal district court for the Northern District of Illinois's decision that use of question-and-answer scripts to prepare witnesses for trial was not prohibited coaching, and noting that there is "no bright line" between rigorous witness preparation and improper witness coaching).

[20] Transcript of Evidentiary Hearing Before the Honorable Leonie M. Brinkema, U.S. District Court Judge, United States v. Zacarias Moussaoui, No. 01-692 (E.D. Va. Mar. 14, 2006) (lawyer representing Transportation Security Administration emailed trial transcripts to a group of potential witnesses who were under a sequestration order; the court barred the government from introducing that evidence, and the lawyer was referred to the Pennsylvania Disciplinary Board). *See also* Miller v. Universal City Studios, Inc., 650 F.2d 1365 (5th Cir. 1981) (court ordered exclusion of witness testimony *where* lawyer violated sequestration order by allowing an expert witness to view the transcripts of other witness contrary to an order based on Fed. R. Evid. 615). *But see* State v. Blakeney, 137 Vt. 495, 408 A.2d 636 (1979) (sequestration order excluding witnesses from courtroom in no way restricted the right of counsel to confer with their clients or witnesses; purpose of the order was not to segregate witnesses from counsel who called them, although issuance of such an order would be within the sound discretion of the trial judge in an appropriate case).

[21] *In re* Edson, 108 N.J. 464, 471-73 (1987) (lawyer disbarred after providing an undercover detective posing as a client with a memo fabricating facts to be used as the detectives' testimony, in violation of New Jersey RPC 1.2(d), RPC 8.4(a), (b), (c), and (d)). Even merely permitting a client to testify to fabricated evidence is sanctionable as offering false evidence. *See* Attorney Griev. Comm'n v. Elmendorf, 404 Md. 353, 946 A.2d 542 (2006) (leaving person with the impression that they could mislead the court in a divorce action by attesting to compliance with 6-month waiting period violated Rule 8.4(d)); Patsy's Brand, Inc. v. I.O.B. Realty, Inc., No.98 CIV 10175(JSM), 2002 WL 59434 (S.D.N.Y. Jan 16, 2002) (citing Rule 3.3(a)(3), court sua sponte sanctioned law firm for permitting client to submit false affidavit; although client insisted affidavit was true, where "no reasonable lawyer would believe it" in light of other evidence known to law firm).

It is also unethical to compensate a lay witness for the substance of their testimony or to condition such payment on the content of the witness's testimony,[22] even if that payment is for "truthful" testimony.[23] Other types of unlawful inducements are similarly unethical.[24] For example, donating money to a witness's favorite charity was held to be an improper attempt to influence testimony.[25] In addition, offering a witness money or other incentives *not* to testify is a species of witness tampering and flatly prohibited by the Model Rules.[26]

C. Unethical Conduct During Witness Testimony

While the methods of advance witness preparation are variable and there is a broad range of acceptable methods, the equation changes when a lawyer's efforts to refine witness testimony happen during a trial or deposition. Overtly attempting to manipulate testimony-in-progress would in most situations constitute at least conduct prejudicial to the administration of justice in violation of Model Rule 8.4(d). Violation of a court rule or order restricting such coaching behaviors would be knowing disobedience of the rules of a tribunal in violation of Model Rule 3.4(c).[27]

Winking at a witness during trial testimony, kicking a deponent under the table, or passing notes or whispering to a witness mid-testimony are classic examples of efforts to improperly influence a witness's in-progress testimony.[28] Other more subtle types of signaling also implicate ethical

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[22] MODEL RULES OF PROF'L CONDUCT R. 3.4, Comment [3] ("The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee."). Most states permit "reasonable" compensation to occurrence witnesses for time and expenses in preparing to testify, although some jurisdictions place restrictions on testimony for actual courtroom time. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-402 (1996) (nonexpert witness may be compensated for time spent attending trial or deposition or preparing for testimony if payment is not conditioned upon the content of testimony and does not violate any law). *See generally* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.4, at 425-27 (10th ed. 2023) (discussion of Witness Fees).

[23] *In re* Discipline of Callister, No. 70901 (Nev. 2017) (lawyer suspended for offering to pay a witness $7,000 for his "honest testimony" in support of certain facts and threatening the witness with personal liability and "the legal implications of perjury" if he testified the other way).

[24] *E.g.*, People v. Gifford, 76 P.3d 519 (Colo. O.P.D.J. 2003) (advising client to offer ex-wife real estate in exchange for favorable testimony in criminal case). *See generally* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.4, at 424 (10th ed. 2023) (discussion of Offering Illegal Inducement to Witness).

[25] Christopher v. DePuy Orthopaedics, Inc., 888 F.3d 753 (5th Cir. 2018) (granting relief from judgment under FED. R. CIV. P. 60(b) where lawyer had represented that experts were non-retained and serving "pro bono," but lawyer had secretly donated $10,000 to one expert's private school alma mater before trial and collectively paid the two experts $65,000 after trial).

[26] *See, e.g.*, *In re* Discipline of Kronenberg, 155 Wash.2d 184, 198 (2005) (disbarment appropriate for lawyer who gave victim-witness $3,000 and a one-way bus ticket to Oklahoma so witness would not testify against defendant in a criminal case, in violation of Washington State RPC 8.4(a)-(d) bribing and tampering with a witness and 8.4(c) for deceiving prosecutors about procuring the witness's absence; lawyer also deemed unfit to practice law).

[27] In some cases, such conduct may also be a violation of MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (unlawfully obstructing another party's access to evidence). *See generally* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.4, at 422 & 427-29 (10th ed. 2023) (discussions of Obstructing Another Party's Access to Evidence and Obeying Obligation to Tribunal).

[28] *See, e.g.*, Vnuk v. Berwick Hospital Co., No. 3:14-CV-01432, 2016 WL 907714, at *4 (M.D. Pa. Mar. 2, 2016) (finding lawyer violated court rules by conferring with witness over break, passing notes and whispering during deposition). One commentator likened lawyer-to-witness gesturing to the catcher's signal to the pitcher in a baseball

obligations and at times result in court-ordered sanctions. A familiar type of covert coaching is the so-called "speaking objection," or "suggestive objection." These are "statements that go beyond just stating the objection or the basis for the objection and are intended—or at least suspected of being intended—to coach the witness and impede the deposing attorney's discovery."[29] The rules in many state and federal jurisdictions prohibit objections that have the effect of coaching a witness, and may also prohibit lawyers from instructing a witness not to answer a question unless specifically authorized to do so.[30] Some jurisdictions have enacted rules for the conduct of depositions that expressly restrict speaking objections.[31]

Relatedly, when a witness's testimony is underway, lawyers sometimes attempt to exercise midcourse testimonial influence and undertake damage control during a break or recess and may even seek or insist upon such breaks while a question is pending for the apparent purpose of coaching the witness in a private conference. Although there is no express ethical prohibition on communications between witness and counsel during a break in testimony, adjudicative officers have, at times, exercised control over these circumstances, including entering specific orders and imposing deposition guidelines and/or sanctions.[32]

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game advising what pitch to throw. Holland & Hart, *Witnesses: Don't Rely on 'Catcher Signals'*, JDSUPRA (Apr. 26, 2021), available at https://www.jdsupra.com/legalnews/witnesses-don-t-rely-on-catcher-signals-5364552/.

[29] Michael Roundy, *Speaking Objections Risk Sanctions*, ABA LITIGATION SECTION PRACTICE POINTS, *available at* https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2019/speaking-objections-risk-sanctions/?login (May 31, 2019). Openly asking a witness to correct an inadvertent misstatement when the witness obviously misunderstood a question or simply misspoke is not a coaching concern. In some circumstances involving false witness testimony, a lawyer may have an ethical duty to take reasonable remedial measures to correct the testimony. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3, cmt. [10]. *See generally* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.3, at 412-13 (10th ed. 2023) (discussion of Remedial Measures).

[30] *E.g.*, FED. R. CIV. P. 30(c)(2) ("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)."); Sec. Nat. Bank of Sioux City, Iowa v. Day, 800 F.3d 936, 942 (8th Cir. 2015) (lawyers should not use an objection to instruct the witnesses how to answer or not answer a question); Deville v. Givaudan Fragrances Corp., 419 F. App'x 201, 209 (3d Cir. 2011) (affirming imposition of sanctions upon finding that attorney "testified on behalf of witness by way of suggestive speaking objections"); Goode v. Ramsaur, No. 20-cv-00947-DDD-KLM, 2023 U.S. Dist. LEXIS 80236 *13-24 (D. Colo. May 8, 2023) (finding sanctionable counsel's conduct involving countless speaking objections during deposition); Sec. Nat. Bank of Sioux City, Iowa v. Abbott Laboratories, 299 F.R.D. 595, 604 (N.D. Iowa 2014) (objections must be stated in a non-suggestive manner).

[31] Brightman v. Corizon, Inc., 2021 NY Slip Op 50735(U), ¶ 2, 72 Misc. 3d 1213(A), 150 N.Y.S.3d 233 (Sup. Ct. 2021) (referencing New York's Uniform Rules for the Conduct of Depositions, which expressly limit speaking objections: "Speaking objections are thus singled out as undesirable: they are not necessary to preserve an objection to form, they disrupt and impede the conduct of the deposition, and they risk coaching the deponent on how to answer a pending question.").

[32] *See, e.g.*, Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993) (holding that a lawyer and client "do not have an absolute right to confer during the course of the client's deposition"; noting that deposition guidelines restricting private conferences would be undermined "by a lawyer's making of lengthy objections which contain information suggestive of an answer to a pending question," i.e., speaking objections); Brightman v. Corizon, Inc., 2021 NY Slip Op 50735(U), ¶ 2, 72 Misc. 3d 1213(A), 150 N.Y.S.3d 233 (Sup. Ct. 2021) (discussing prohibition in Uniform Rules for the Conduct of Deposition on a lawyer interrupting the deposition for the purpose of communicating with the deponent, as well as the trial court's discretion to bar consultation between a party and counsel while the party is testifying to the extent consistent with the party's constitutional rights). *See also Deville v. Givaudan Fragrances Corp.*, 419 F. Appx. 201, 207 (3rd Cir. 2011) (upholding sanctions for abusive, unprofessional and obstructive conduct during deposition); *Specht v. Google, Inc.*, 268 F.R.D. 596, 598-599, 603 (N.D. Ill. 2010)

Lawyers should both refrain from efforts to physically signal witnesses when testimony is in progress and attend closely to the strictures imposed by court rule, local rule, or court order.

1. Misconduct in Remote Settings

The use of remote communications platforms and other technologies in adjudicative proceedings and depositions, provides opportunities and temptations for lawyers to surreptitiously tell or signal witnesses what to say or not say in the proceedings of a tribunal.

This is not a novel phenomenon. When the ubiquity of cell phone technology made it convenient to communicate with another person covertly, some lawyers began to abuse it. In a troubling example of text-message-based coaching, a Florida lawyer, in a worker's compensation case, was disciplined for sending text messages to a witness regarding the witness's testimony while a deposition was in progress, which texts included coaching and specific directions on how to respond to questions.[33] Similarly, it is improper for a lawyer to text a witness who is testifying at trial.[34]

The logistics of trials and depositions using remote meeting technologies are such that a lawyer and a witness may be in one location, with the opposing lawyer at another location, and, in trial situations, an adjudicative officer in yet another. In these circumstances, many things can happen that cannot readily be monitored by participants in the other remote locations.[35] It would be relatively easy for an off-camera lawyer or someone acting at the lawyer's behest to signal a witness with undetectable winks, nods, thumbs up or down, passed notes, or the like. Surreptitious off-camera activities such as texting the witness or other real-time electronic messaging are possible and easily done.

Allegations of misconduct in remote proceedings have been addressed by regulators and the judiciary. A lawyer has been disciplined for providing a client with answers to questions while

(imposing sanctions for speaking objections that obstructed deposition); *BNSF Ry. Co. v. San Joaquin Valley RR Co.*, 2009 WL 3872043, *3 (E.D. Cal. Nov. 17, 2009) (imposing sanctions for inappropriate and burdensome objections).

[33] When confronted about the text messages by counsel taking the deposition, the lawyer falsely denied texting the witness and stated he was only receiving a text from his daughter. Then, after agreeing to put his cellphone away, the lawyer continued sending texts, and inadvertently sent text messages intended for the witness to deposing counsel. The Florida Bar v. James, 329 So.3d 108, 109-112 (Fla. 2021) (finding violation of Florida Bar Rules 3-4.3 (commission of any act that is unlawful or contrary to honesty and justice), 4-3.4(a) (obstructing another party's access to evidence), Rule 4-8.4(d) (conduct prejudicial to the administration of justice)).

[34] *See* Sky Dev. Inc v. Vistaview Dev. Inc., 41 So. 3d 918 (Fla. Dist. Ct. App. 2010) (lawyer who texted witness while witness was testifying at trial constituted a "blatant showing of fraud, pretense, collusion or other similar wrongdoing"); Wei Ngai v. Old Navy, No. 07-5653 (KSH) (PS), 2009 U.S. Dist. LEXIS 67117, at 4 (D.N.J. July 31, 2009) (during remote video-conference deposition with lawyer in one state while deponent was in another, lawyer and deponent exchanged five text messages; because lawyer also accidentally sent a text meant for deponent to opposing counsel, the texting came to light; in ordering production of the text messages, court rejected assertion of attorney-client privilege for the texts, which violated FED. R. CIV. P. 30(c) ("depositions are to be conducted in the same manner as trial examination") because texts were equivalent to passing notes to client with the intent "to influence the fact finding goal of the deposition process").

[35] *See* Wei Ngai v. Old Navy, Civil Action No. 07-5653 (KSH) (PS), 2009 U.S. Dist. LEXIS 67117, at *2 (D.N.J. July 31, 2009) (in dispute over defense counsel's sending of text messages to witness during remote deposition, plaintiff's counsel noted that the deponent and defense counsel were only visible from the "chest up" and that she was unable to observe defense counsel's hands during the deposition).

off camera during a remote proceeding.[36] Another example involved a lawyer representing the defendant in a federal lawsuit, who, during a remote deposition, was overheard by opposing counsel providing the client with an answer to a question, after which the client repeated the answer as the client's own. After reviewing the deposition footage, opposing counsel found 50 additional circumstances where the lawyer had provided the client with answers to questions while off-camera during the remote deposition.[37]

Lawyers have a duty to comply with the rules of professional conduct and rules of court that prohibit witness coaching, in all testimonial contexts regardless of the format of the deposition, hearing, or trial. Remote coaching, like its historical antecedents, puts the perpetrating lawyer at risk of adjudicative rebukes and court-ordered sanctions,[38] as well as disciplinary sanctions.[39]

2. Systemic Precautions for Addressing Such Misconduct

All lawyers have an ethical obligation to understand how relevant technology works.[40] Some degree of sophistication regarding the nature of the technology used in remote proceedings will help avoid inadvertent missteps.[41] An understanding of the coaching-related risks of remote technology will also enable lawyers and adjudicative officers concerned about potential surreptitious coaching to structure remote proceedings in ways that will deter its occurrence and enhance the ability to detect it.

What systemic precautions will prove useful in helping to prevent and detect incidences of problematic remote coaching and empower adjudicators to intervene as appropriate to control questionable lawyer conduct during remote trials and depositions? The following suggested

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[36] *In re* Claridge, PDJ 2021-9088 (Ariz. Jan. 21, 2022) (suspending lawyer for 60 days by consent where lawyer used chat feature to instruct client during cross-examination at trial using GoToMeeting platform, in violation of Arizona Ethics Rule 3.4(a) ER 8.4(c), and ER 8.4(d)).

[37] Barksdale School Portraits, LLC v. Williams, 339 F.R.D. 341 (D. Mass. 2021) (disqualifying lawyer from case, ordering that jurors be allowed to hear both the deposition witness's testimony and the lawyer's coaching and draw their own conclusions regarding the credibility of the testimony, and referring matter to another federal district court judge to evaluate potential discipline); *see also In re* Jeffrey Rosin, No. 21-mc-91571-LTS (U.S. Dist. Ct. for the Dist. of Mass., Jan. 19, 2022) (ordering lawyer in *Barksdale School Portraits* case to contact a group called Lawyers Concerned for Lawyers "for the limited purpose of receiving and completing counseling on better management of emotions and judgment in the face of adversity").

[38] *See, e.g.*, *Barksdale School Portraits*, *supra* note 37; Johnson v. Statewide Investigative Services Inc., No. 20-C-114 (N.D. Ill., March 4, 2021) (magistrate judge accepted lawyer's explanations of questionable conduct during Zoom deposition, finding that what happened during deposition was the result of a lack of professionalism and collegiality rather than an unethical attempt to coach witness).

[39] The most severe sanctions to date were the disciplinary suspensions in the *James* and *Claridge* cases, discussed *supra* at notes 33 & 36. *See* Zack Needles, *Ethics Authorities Go Relatively Easy on Virtual Witness Coaching—For Now*, LAW.COM (Feb. 2, 2022) (noting that "ethics authorities have shown a fair amount of mercy to the offending lawyers, perhaps in recognition of the fact that virtual litigation is still pretty weird for everyone involved.").

[40] MODEL RULES OF PROF'L CONDUCT R. 1.1, cmt. [8].

[41] In Johnson v. Statewide Investigative Services Inc., No. 20-C-114 (N.D. Ill., March 4, 2021), a dispute over what appeared to be remote coaching, the trial judge firmly rejected a lawyer's proffered explanation that the problems occurred because he was not "technologically savvy," noting that at the time of the deposition, lawyers across the country had been primarily conducting their practices using technology for ten months: "This has included a host of different videoconferencing platforms for court hearings, depositions, and appellate arguments. Thus, while [a lawyer's] lack of technology expertise may have sufficed as an explanation at one point in time, it is no longer valid or credible."

approaches—though not ethically required under the Model Rules—provide a starting point:

- Skillful cross-examination[42]
- Court orders directing uninterrupted testimony[43]
- Motions to terminate or limit a deposition or for sanctions[44]
- Inclusion of protocols in remote deposition orders, scheduling orders, and proposed discovery plans[45]
- Administrative orders governing the conduct of remote depositions[46]
- Inclusion of remote protocols in trial plans and pretrial orders[47]

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[42] This remedy was recommended by the United States Supreme Court. *See* Geders v. United States, 425 U.S. 80, 89-90 (1976) ("The opposing counsel in the adversary system is not without weapons to cope with 'coached' witnesses. A prosecutor may cross-examine a defendant as to the extent of any 'coaching' during a recess, subject, of course, to the control of the court. Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination.").

[43] This remedy also was recommended by the United States Supreme Court as a component of the judge's power to control the progress and shape of the trial. *See* Geders v. United States, 425 U.S. 80, 90 (1976) ("[T]he trial judge, if he doubts that defense counsel will observe the ethical limits on guiding witnesses, may direct that the examination of the witness continue without interruption until completed. If the judge considers the risk high he may arrange the sequence of testimony so that direct- and cross-examination of a witness will be completed without interruption. That this would not be feasible in some cases due to the length of direct- and cross-examination does not alter the availability, in most cases, of a solution that does not cut off communication for so long a period as presented by this record. Inconvenience to the parties, witnesses, counsel, and court personnel may occasionally result if a luncheon or other recess is postponed or if a court continues in session several hours beyond the normal adjournment hour. In this day of crowded dockets, courts must frequently sit through and beyond normal recess; convenience occasionally must yield to concern for the integrity of the trial itself.").

[44] *See* FED. R. CIV. P. 30(d); STEVEN BAIKER-MCKEE & WILLIAM M. JANSSEN, FEDERAL CIVIL RULES HANDBOOK 871 (2022 ed.) (a party may move to terminate a deposition if it is being conducted in bad faith or in an unreasonably annoying, embarrassing, or oppressive manner; a court may impose an "appropriate sanction" on a person engaging in obstructive behavior). *See* ADVISORY COMMITTEE NOTES TO THE FEDERAL RULES OF CIVIL PROCEDURE, 1980 AMENDMENT TO FED. R. CIV. P. 26, Subdivision (f) (1980) ("In the judgment of the Committee abuse can best be prevented by intervention by the court as soon as abuse is threatened.").

[45] Such protocols can be agreed to as part of a stipulation to a deposition by remote means or ordered by the court when authorizing that a deposition be taken by remote means. *See* FED. R. CIV. P. 30(b)(4). Protocols could also be included in a proposed discovery plan. *See* FED. R. CIV. P. 26(f). A number of courts routinely require that depositions be conducted in accordance with the stringent procedures set forth in *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993). *E.g.*, Kelleher v. Wells Fargo Ins. Servs., No. 10-6247-NLH-KMW, 2011 U.S. Dist. LEXIS 13074, at *2 (D.N.J. Feb. 10, 2011). For an example of a remote deposition protocol, see Uniform Civil Rules for New York State Trial Courts, Rule 202.70(g), Appendix G, STIPULATION AND PROPOSED ORDER CONCERNING PROTOCOL FOR CONDUCTING REMOTE DEPOSITIONS, *available at* https://www.nycourts.gov/LegacyPDFS/RULES/trialcourts/202.70(g)%20-%20Rule%2037-Appendix%20G.pdf (last visited Aug. 25, 2023).

[46] *See, e.g.*, SUPREME JUDICIAL COURT OF MASSACHUSETTS UPDATED ORDER REGARDING REMOTE DEPOSITIONS (Oct. 23, 2020), *available at* https://www.mass.gov/supreme-judicial-court-rules/supreme-judicial-court-updated-order-regarding-remote-depositions.

[47] *See* FED. R. CIV. P. 16(c) & (e). *See, e.g.*, STATE OF NEW YORK UNIFIED COURT SYSTEM, VIRTUAL BENCH TRIAL PROTOCOLS AND PROCEDURES (including Proposed Stipulation and Order for Virtual Bench Trial Protocols and Procedures), *available at* https://www.nycourts.gov/whatsnew/pdf/VirtualBenchTrial-Protocols-2112021.pdf (last visited Aug. 25, 2023).

- Development of guidelines and best practices for conduct in remote proceedings[48]
- Professionalism/Civility/Courtesy Codes[49]

Structuring remote proceedings in advance by way of agreement, court order, or collectively adopted behavioral norms will create greater transparency and provide helpful guardrails to guide lawyers away from unethical conduct.

Conclusion

Under the Model Rules of Professional Conduct, a lawyer's failure to prepare and guide a witness would in many situations violate the ethical duties of competence and diligence. Witness preparation becomes unethical when the conduct transgresses Model Rules governing prohibiting interference with the integrity of the justice system and obstructing another party's access to evidence. The use of technology in the profession, particularly remote-meeting technologies, presents distinct opportunities for surreptitious witness coaching. But the Model Rules that constrain unethical witness coaching extend to all testimonial contexts, regardless of format. It is prudent for lawyers and adjudicators to consider prophylactic measures designed for use in remote proceedings to prevent and detect incidences of unethical coaching conduct.

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[48] *See* NATIONAL CENTER FOR STATE COURTS, REMOTE PROCEEDINGS TOOLKIT 47-50 (Proceedings Conduct) (2002), *available at* https://www.ncsc.org/__data/assets/pdf_file/0027/82377/Remote-Proceeding-Toolkit-Final.pdf; WASHINGTON STATE SUPREME COURT, REMOTE JURY TRIALS WORK GROUP BEST PRACTICES IN RESPONSE TO FREQUENTLY ASKED QUESTIONS (FAQ) (June 2021) (including links to resources such as sample orders for remote/virtual jury trials), *available at* https://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.remotejurytrialsworkgroup.

[49] *See, e.g.*, COLORADO PRINCIPLES OF PROFESSIONALISM, PRINCIPLE 7.2.5 (2011) ("We will refrain from coaching deponents by objecting, commenting, or acting in any other manner that suggests a particular answer to a question."), *available at* https://www.cobar.org/For-Members/Committees/Professionalism-Coordinating-Council/Principles-of-Professionalism#9712573-colorado-principles-of-professionalism (2011). A compilation of Professionalism Codes from around the United States can be found on the ABA Center for Professional Responsibility Resources page of the ABA website, *available at* https://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes/.

Restatement (Third) of the Law Governing Lawyers § 116 (2000)

Restatement of the Law - The Law Governing Lawyers | October 2024 Update

Restatement (Third) of The Law Governing Lawyers

Chapter 7. Representing Clients in Litigation

Topic 4. Advocates and Evidence

§ 116 Interviewing and Preparing a Prospective Witness

Comment:
Reporter's Note
Case Citations - by Jurisdiction

(1) A lawyer may interview a witness for the purpose of preparing the witness to testify.
(2) A lawyer may not unlawfully obstruct another party's access to a witness.
(3) A lawyer may not unlawfully induce or assist a prospective witness to evade or ignore process obliging the witness to appear to testify.
(4) A lawyer may not request a person to refrain from voluntarily giving relevant testimony or information to another party, unless:

(a) the person is the lawyer's client in the matter; or

(b) (i) the person is not the lawyer's client but is a relative or employee or other agent of the lawyer or the lawyer's client, and (ii) the lawyer reasonably believes compliance will not materially and adversely affect the person's interests.

Comment:

a. *Scope and cross-references.* Subsection (1) states the general rule permitting preparation of a witness. Subsequent subsections set out limitations on the extent to which a lawyer may affect the availability of a witness to another party. On compensating witnesses, see § 117. Rules regarding the presentation of evidence, including rules concerning subornation of perjury and similar acts, are set out in § 120. For limitations on secret tape recording or other investigations of a witness, see § 106, Comment *b*; on cross-examining witnesses, see § 106, Comment *c*. For limitations on contacting other parties represented by counsel, including employees and agents of other parties, see §§ 99- 102. On limitation on contact with unrepresented persons, see § 103.

The rules stated in this Section are derived primarily from lawyer-code provisions. Similar restrictions are found in criminal statutes, which however may contain different specifications of prohibited acts.

b. Preparing a witness to testify. Under litigation practice uniformly followed in the United States, a lawyer may interview prospective witnesses prior to their testifying. A prospective witness is generally under no obligation to submit to such an interview. As a practical matter, rules requiring inquiry to support factual allegations in a complaint or other document (see § 110, Comment *c*) may require a lawyer to interview witnesses to gain the necessary factual foundation. Competent preparation for trial (see generally § 52(1)) (general negligence standard might also require pre-testimonial interviews with witnesses).

The work-product immunity (see Chapter 5, Topic 3) and the obligation of confidentiality regarding trial-preparation material (see § 60(1)), result in the process of witness preparation normally being confidential. Compare § 80(2)(b) (loss of confidentiality of material otherwise protected by attorney-client privilege); § 92(1) (same for work-product immunity).

Attempting to induce a witness to testify falsely as to a material fact is a crime, either subornation of perjury or obstruction of justice, and is ground for professional discipline and other remedies (see § 120, Comment *l*). It may also constitute fraud, warranting denial of the attorney-client privilege to client-lawyer communications relating to preparation of the witness (see § 82).

In preparing a witness to testify, a lawyer may invite the witness to provide truthful testimony favorable to the lawyer's client. Preparation consistent with the rule of this Section may include the following: discussing the role of the witness and effective courtroom demeanor; discussing the witness's recollection and probable testimony; revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light; discussing the applicability of law to the events in issue; reviewing the factual context into which the witness's observations or opinions will fit; reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross-examination that the witness should be prepared to meet. Witness preparation may include rehearsal of testimony. A lawyer may suggest choice of words that might be employed to make the witness's meaning clear. However, a lawyer may not assist the witness to testify falsely as to a material fact (see § 120(1)(a)).

c. Obstructing another party's access to a witness. Except as stated in Subsection (4) and discussed in Comment *e,* a lawyer generally may not attempt to prevent a witness from being interviewed by another party. The rule applies whether the interview would produce testimony favorable to the party or otherwise. A lawyer may not offer threats or financial or other inducements to a witness not to cooperate with another party. However, a lawyer is under no obligation to reveal the identity or probable testimony of a potential witness except as required by rules governing pretrial discovery or by other law.

The rule of Subsection (2) is limited to attempts to obstruct access to a witness "unlawfully." In limited circumstances, such obstruction may be lawful. For example, a prosecutor may be legally entitled to place an eligible person in a witness-protection program.

d. Inducing or assisting a witness to evade or ignore a subpoena or similar process. A lawyer may not attempt unlawfully to induce a witness to ignore a subpoena or similar order to appear for testimony or unlawfully counsel the witness to evade service of the order, as by leaving the jurisdiction or hiding out (see generally § 105). Misleading a witness for the purpose of inducing the witness not to provide testimony is also wrongful.

A lawyer may advise a client to resist testifying on any nonfrivolous ground (see § 110), if doing so is in the client's interest. A lawyer for a party may properly inform a nonclient witness of the right to resist an unlawful order to testify, the privilege against self-incrimination, or other basis for objection to testifying, but the lawyer may not attempt unlawfully to persuade the nonclient witness not to testify on those or other grounds. Such activities may constitute the crime of obstruction of justice or a similar offense. In communicating with a prospective witness, a lawyer must also observe limitations on dealings with an unrepresented person (see § 99).

e. Requesting a person not to cooperate with another party. A lawyer may inform any person of the right not to be interviewed by any other party, but a lawyer may not request that a person exercise that right or attempt otherwise to induce noncooperation, except as permitted under Subsection (4). A lawyer may also advise of the right to insist on conditions, such as that the lawyer or the person's own lawyer be present during any interview or that the interview be recorded. It is also permissible in the course of preparing a friendly witness for testimony at a deposition or hearing (see Comment *b* hereto) to warn the witness not to volunteer testimony not directly responsive to a question.

Only in the circumstances stated in Subsection (4) may a lawyer seek to have a witness refrain from voluntarily giving relevant information to another party. A lawyer may properly demand that a person who is not otherwise excepted from the Subsection observe a legal obligation of confidentiality to the lawyer's client. For example, a physician or member of the clergy who is considered to be an independent contractor may nonetheless owe a legal duty of confidentiality to the client, which the client's lawyer may properly insist that the person observe.

Subsection (4) applies only with respect to those in the described relationships—a witness who is the lawyer's client in the matter or a relative or employee or other agent of the lawyer's client or the lawyer, such as an investigator or expert witness. Such a request can protect confidential information and respond to that person's special loyalty to the lawyer's client. Such a request is appropriate with respect to a former employee only if the person continues to maintain a confidential relationship with the former employer, such as an employee continuing to consult with respect to the matter involved in the representation, or if the person possesses extensive confidential information of the former employer (see § 102, Comment *d*). A prosecutor is under the same restrictions as defense counsel with respect to such requests or advice. For purposes of this rule, a victim or witness is not a client of the prosecutor. The lawyer also must reasonably believe that compliance with the request will not materially and adversely affect the person's interests. For example, a lawyer may not seek to induce noncooperation if it is evident that the person is unrepresented and is likely to be sued as a result. In all instances, a lawyer must not misrepresent whom the lawyer represents and the nature of the lawyer's interest in making the request for confidentiality of information (see §§ 98 & 103). On contact with a person represented by counsel, see § 99 and following.

Once a trial has begun, the tribunal may sequester witnesses. A sequester order may include a direction not to discuss the witness's testimony with a third party, including a lawyer for another person. A lawyer must comply with such an order (see § 105).

f. Remedies. The rule of Subsection (4) is taken from the lawyer codes, with violations sanctioned through professional discipline. On possible criminal sanctions, see Comment *b.* In an appropriate case, a tribunal may enter other procedural orders to correct the effects of a violation, including punishing an offending lawyer for contempt (see § 105, Comment *e*), and such measures as providing additional discovery to a party, extending time to obtain the presence of an absent witness, changing the burden of proof as to an issue, and ordering a new trial.

Reporter's Note

*Comment b. Preparing a witness to testify.*The position of the Section and Comment on witness preparation is supported by relatively sparse authority but, it is believed, by the uniform practice of lawyers in all jurisdictions. See generally Geders v. United States, 425 U.S. 80, 88-91, 96 S.Ct. 1330, 1335-36, 47 L.Ed.2d 592 (1976); Resolution Trust Corp. v. Bright, 6 F.3d 336 (5th Cir.1993) (with some factual support and fairly presenting contested matters to witness, lawyer could aggressively and persistently attempt to persuade witness that her initial version of events was inaccurate); Christy v. Pennsylvania Turnpike

Comm'n, 160 F.R.D. 51 (E.D.Pa.1995) (in view of ethical right and duty of lawyer to prepare witness to testify, court would not grant protective order preventing counsel from doing so); Hamdi & Ibrahim Mango Co. v. Fire Ass'n, 20 F.R.D. 181, 182 (S.D.N.Y.1957) ("It is usual and legitimate practice for ethical and diligent counsel to confer with a witness whom he is about to call prior to his giving testimony, whether the testimony is to be given on deposition or at trial"; on other hand, prior conversations with counsel are proper subject of cross-examination of witness); State v. McCormick, 259 S.E.2d 880, 882 (N.C.1979); compare, e.g., In re Eldridge, 82 N.Y. 161, 171 (1880) (lawyer's "duty is to extract the facts from the witness, not pour them into him"); see generally, e.g., ALI-ABA Civil Trial Manual, ch. 7 (1981); R. Keeton, Trial Tactics and Methods § 2.14 (2d ed.1973); R. Underwood & W. Fortune, Trial Ethics § 11.3 (1988); 3 J. Wigmore, Evidence § 788 (J. Chadbourn rev.1970); Wydick, The Ethics of Witness Coaching, 17 Cardozo L. Rev. 1 (1995); Applegate, Witness Preparation, 68 Tex. L. Rev. 277 (1989); Note, Professional Conduct and the Preparation of Witnesses for Trial, 1 Geo. J. Leg. Ethics 289 (1987). One court has attempted to prohibit all communications between counsel and a witness during the course of testimony at a deposition or trial. See Hall v. Clifton Precision, 150 F.R.D. 525 (E.D.Pa.1993).

On the confidentiality of witness interview sessions, see generally, e.g., International Business Mach. v. Edelstein, 526 F.2d 37, 41-42 (2d Cir.1975) (per curiam) (striking down trial court's protective order requiring interview of person on government's witness list only in presence of government counsel or with stenographic reporter present for later examination of transcript by court); David v. State, 601 S.W.2d 864, 867 (Ark.1980) (lawyer for defendant has right to interview own witness without presence of deputy sheriff, as ordered by trial court). But cf., e.g., State v. Lenarchick, 247 N.W.2d 80, 99 A.L.R.3d 906 (Wis.1976) (permissible for court, reasonably concerned about veracity of nonclient witness's trial testimony, to condition midtrial interview on presence of opposing counsel); Commonwealth v. Balliro, 209 N.E.2d 308 (Mass.1965) (same).

On application of the crime-fraud exception to the attorney-client privilege because of improper coaching of a witness, see, e.g., Whetstone v. Olson, 732 P.2d 159, 162 (Wash.Ct.App.1986).

Comment c. Obstructing another party's access to a witness. On the right to interview nonclient witnesses for an opposing party, see, e.g., Woodruff v. Tomlin, 593 F.2d 33, 42 (6th Cir.1979), cert. denied, 449 U.S. 888, 101 S.Ct. 246, 66 L.Ed.2d 114 (1980); Flamma v. Atlantic City Fire Dept., 573 A.2d 158, 161 (N.J.1990), citing authorities. On attempting to sell witnesses' names, see In re Sablowsky, 529 A.2d 289 (D.C.1987) (discipline of lawyer who tried to sell name of witness important to lawyers in unrelated medical-malpractice action). On offering consideration to a witness in return for the witness's promise not to testify, see, e.g., In re Lutz, 607 P.2d 1078 (Idaho 1980) (discipline for drafting and attempting to enforce against owner of automobile a covenant not to testify against lawyer's client in pending driving-while-intoxicated prosecution in return for client's payment for damage to automobile); In re Boothe, 740 P.2d 785 (Or.1987) (conditioning offer to settle dispute with client on client's promise not to testify against lawyer in lawyer-discipline proceeding). The leading case prohibiting settlements under which a co-party agrees not to present expert testimony is Williamson v. Superior Court, 582 P.2d 126 (Cal.1978).

Comment d. Inducing or assisting a witness to evade or ignore a subpoena or similar process. See generally ABA Model Rules of Professional Conduct, Rule 3.4(a) (1983) ("A lawyer shall not: (a) unlawfully obstruct another party's access to evidence …"); ABA Model Code of Professional Responsibility, DR 7-109(B) (1969) ("A lawyer shall not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein"). Corruptly dissuading a person from attending a proceeding to give testimony is commonly made a crime. E.g., ALI Model Penal Code § 241.6(1)(c) and (d) (1985); Cal. Penal Code § 136.1(a) (West 1991). See also, e.g., Cal. R. Prof. Conduct, Rule 5-310(A) (1989) (lawyer shall not "advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein"); In re Conway, 526 A.2d 658 (N.J.1987) (disbarment of lawyer convicted of conspiracy to secure dismissal of criminal prosecution by bribing witness); In re Swyer, 556 N.Y.S.2d 177 (N.Y.App.Div.1990) (suspension of lawyer for attempting to induce witness not to testify at client's parole revocation hearing); In re Gaines, 360 S.E.2d 313 (S.C.1987) (same); cf. Waste Conversion, Inc. v. Rollins Envtl. Servs.

(NJ), Inc., 893 F.2d 605, 610-11 (3d Cir.1990) (en banc) (on facts here, divided court holds no criminal contempt in light of practice of instructing client not to produce employee for deposition pending resolution of motion resisting discovery).

On the general prohibition against lawyers inducing a witness to evade service of a subpoena, see, e.g., In re Holmes, 193 Cal.Rptr. 790 (Cal.Ct.App.1983) (contempt for lawyer in civil case to advise prospective witness in civil case to evade subpoena); In re Geron, 486 N.E.2d 514 (Ind.1985) (directing client to leave courthouse so as not to be available to testify). On using false statements or other improper devices to procure the absence of witnesses, see, e.g., Florida Bar v. Fischer, 549 So.2d 1368 (Fla.1989) (discipline of lawyer who had secretary call adverse witness with false message that court session was canceled); In re Simmons, 757 P.2d 519 (Wash.1988) (disbarment of lawyer who gave gallon of whiskey to opposing party's witness known to have drinking problem, in hope that witness would be unavailable for trial or would testify favorably).

Several authorities take the position in the Comment that a lawyer may inform a nonclient witness of the right to invoke the privilege against self-incrimination. E.g., McNeal v. Hollowell, 481 F.2d 1145 (5th Cir.1973), cert. denied, 415 U.S. 951, 94 S.Ct. 1476, 39 L.Ed.2d 567 (1974) (advice to witness in presence of witness's lawyer); People v. Wolf, 514 N.E.2d 1218 (Ill.App.Ct.1987) (advice to unrepresented witness); ABA Informal Opin. 575 (1962) (same). See generally Green, Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law, 69 N.C. L. Rev. 687 (1991). Some recent cases, however, take the position that advising a nonparty witness of the availability of the self-incrimination privilege is or should be impermissible. E.g., State v. Fosse, 424 N.W.2d 725 (Wis.Ct.App.1988) (proper for court to declare mistrial on finding that defense lawyer had so advised prosecution witness); see authorities cited in Green, supra, 69 N.C. L. Rev. at 715-16. Some of the latter cases rely on the prohibition in the lawyer codes against giving an unrepresented person advice. Compare § 103, Comment *d*.

The court in United States v. Cintolo, 818 F.2d 980, 990-92 (1st Cir.), cert. denied, 484 U.S. 913, 108 S.Ct. 259, 98 L.Ed.2d 216 (1987), held that a lawyer could be found guilty of obstruction of justice for corruptly inducing a client-witness to plead the Fifth Amendment. The court's analysis turned on the lawyer's active inducement, another client's conflict of interest with the witness, and the lawyer's motive to benefit a criminal organization that was paying his fee. See also, e.g., West Virginia St. Bar v. Farber, 408 S.E.2d 274 (W.Va.1991), cert. denied, 502 U.S. 1073, 112 S.Ct. 970, 117 L.Ed.2d 135 (1992) (discipline of lawyer who counseled witness at hearing not to testify on self-incrimination grounds despite prior grant of transactional immunity). See generally Annot., 8 A.L.R.4th 769 (1981).

On the applicability of the standard in the Comment to a prosecutor's dealings with a potential defense witness, including informing the witness of the witness's right to invoke the self-incrimination privilege, see, e.g., United States v. Jackson, 935 F.2d 832, 846-47 (7th Cir.1991) (permissible for prosecutor to warn potential defense witness of highly incriminating nature of statement, when warning was given in presence of judge and defense counsel and was not badgering in tone or phrasing or obviously threatening); United States v. Blackwell, 694 F.2d 1325, 1334 (D.C.Cir.1982). Courts, in dicta, have even assumed a duty on the part of prosecutors to warn prospective witnesses who are not represented by counsel of the risk that testimony they are about to give may be used against them. E.g., United States v. Jackson, supra, 935 F.2d at 847; United States v. Pinto, 850 F.2d 927, 934 & n.1 (2d Cir.), cert. denied, 488 U.S. 867, 109 S.Ct. 174, 102 L.Ed.2d 143 (1988) (ABA Standards for the Administration of Criminal Justice, Prosecution Function § 33.2(b) (1979) requires prosecutor to “advise the witness concerning possible self-incrimination and the possible need for counsel”). On the other hand, a prosecutor's threat to prosecute a potential defense witness for perjury may be prejudicial error if it induces a refusal to testify. See generally Annot., 88 A.L.R.4th 388 (1991).

On the absence of any duty to inform a nonclient prospective witness of such rights as the privilege against self-incrimination before conducting an interview or calling the witness, see, e.g., Murrell v. State, 679 S.W.2d 397, 399 (Mo.Ct.App.1984).

*Comment e. Requesting a person not to cooperate with another party.*Subsection (4) is taken from ABA Model Rules of Professional Conduct, Rule 3.4(f) (1983):

> A lawyer shall not:
>
> > (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
> > (1) the person is a relative or an employee or other agent of a client; and
> > (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

The ABA Model Code of Professional Responsibility (1969) contained no equivalent provision. Orders sequestering witnesses, including orders prohibiting witnesses from discussing their testimony with a lawyer (the witnesses' own lawyer in the case of parties), were approved in Perry v. Leeke, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989), and in Hall v. Clifton Precision, 150 F.R.D. 525 (E.D.Pa.1993). But see, e.g., Reams v. Stutler, 642 S.W.2d 586, 589 (Ky.1982) (abuse of discretion to prohibit lawyer from conferring with own witness (expert) during recess in testimony). On the right of an accused-witness in a criminal-defense representation to consult with the witness's counsel during an overnight or similar recess in the client's testimony, see Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976); see generally C. Wolfram, Modern Legal Ethics § 14.6.4 at 819-20 (1986).

The line between informing a witness of the right not to cooperate or to cooperate only under restrictive conditions and attempting to induce noncooperation may be a fine one. On the prohibition against a prosecutor's instructing a witness not to cooperate with the defense, see, e.g., Gregory v. United States, 369 F.2d 185, 187-88 (D.C.Cir.1966), cert. denied, 396 U.S. 865, 90 S.Ct. 143, 24 L.Ed.2d 119 (1969); United States v. Henricksen, 564 F.2d 197 (5th Cir.1977) (plea bargain required co-defendant not to testify in any manner regarding defendant); Gilbert v. State, 547 So.2d 246, 249 (Fla.Dist.Ct.App.1989) (prohibition under rule of criminal procedure); State v. York, 632 P.2d 1261, 1263-65 (Or.1981); Lewis v. Court of Common Pleas, 260 A.2d 184, 188 (Pa.1969). On informing a witness of the right not to cooperate, compare, e.g., United States ex rel. Trantino v. Hatrack, 408 F.Supp. 476, 481-82 (D.N.J.1976), aff'd in part & rev'd in part on other grounds, 563 F.2d 86 (3d Cir.1977), cert. denied, 435 U.S. 928, 98 S.Ct. 1499, 55 L.Ed.2d 524 (1978) (emphasizing witness's right not to cooperate is not equivalent to instructing witness to remain silent), with, e.g., State v. York, supra, 632 P.2d at 1264 (improper for prosecutor to advise witnesses of consequences of cooperation and adding “that it would be better if they didn't say anything”).

*Comment f. Remedies.*E.g., United States v. Carrigan, 804 F.2d 599 (10th Cir.1986) (approving extraordinary relief of permitting pretrial depositions in criminal case of witnesses who had been induced by prosecutor not to cooperate with defense); Haffer v. Temple University, 115 F.R.D. 506, 509 (E.D.Pa.1987) (adverse inferences permitted to be drawn due to absence of subpoenaed witness whose absence opposing counsel at least acquiesced in).

Case Citations - by Jurisdiction

C.A.2
M.D.Ala.
D.D.C.
D.N.M.Bkrtcy.Ct.

Colo.O.P.D.J.
Ky.

C.A.2

C.A.2, 2021. Cit. in sup. State Office of the Attorney General sued anti-abortion protestors, alleging that their activities outside a reproductive health-care facility violated the federal Freedom of Access to Clinic Entrances Act and its state and local analogs. The district court denied plaintiff's motion for a preliminary injunction, finding, among other things, that the testimony of a witness for plaintiff, who used hidden cameras while escorting patients to the facility to aid plaintiff's investigation, was not entirely credible. While affirming in part, this court held that the advice the witness gave her colleagues when discussing upcoming depositions did not demonstrate questionable candor. The court cited Restatement Third of the Law Governing Lawyers § 116 in pointing out that her advice—to say only what was necessary to answer the question and no more—was fairly standard advice that attorneys often told their clients, and that the witness did not encourage her colleagues to make misrepresentations or otherwise act dishonestly. New York v. Griepp, 991 F.3d 81, 101.

M.D.Ala.

M.D.Ala.2022. Subsec. (1) and com. (b) quot. in sup. After public-school official was convicted of identity theft, wire fraud, and conspiracy to commit offenses against the United States in connection with a scheme to obtain educational funding by fraudulently enrolling private-school students as full-time public school virtual students, defendant filed a motion for new trial, alleging, inter alia, that the government impermissibly coached a co-defendant as a witness against defendant. This court denied defendant's motion for new trial, holding that the government's conduct regarding the co-defendant did not constitute impermissible coaching. The court explained that, under Restatement Third of the Law Governing Lawyers § 116, the government was permitted to discuss the co-defendant's role as witness and effective courtroom demeanor, and here, the record did not indicate that the co-defendant's participation in a "mock trial" with the government and receipt of advice from the government's attorneys to remain calm went beyond permissible witness preparation. United States v. Carter, 614 F.Supp.3d 1081, 1107.

D.D.C.

D.D.C.2004. Subsec. (2) cit. in disc. During Title VII action against Office of the Senate Sergeant-at-Arms, objection was made to questions posed during deposition of witness. The court held, inter alia, that counsel for a government agency, by purporting to represent employees as well as agency, could not assert any greater privilege than was available to the agency itself; counsel could not withhold consent for other party to interview present or former employees, whether or not counsel also represented employees, because obstructing other party's access to witness solely for sake of obstruction was improper. Banks v. Office of The Senate Sergeant-At-Arms, 222 F.R.D. 1, 6.

D.N.M.Bkrtcy.Ct.

D.N.M.Bkrtcy.Ct.2018. Cit. in sup.; com. (b) quot. in sup. Patients filed adversary proceedings against, among others, Chapter 11 debtor hospital and manager that provided non-medical administrative services to hospital, alleging medical malpractice and negligence relating to an experimental lower-back procedure that was performed on them at the hospital. After patients settled with hospital, the bankruptcy court conducted a bench trial and allocated manager's comparative fault at 16.5%. This court denied patients' subsequent motions for reconsideration or to reopen evidence on the ground that counsel for manager engaged in serious misconduct that tainted the evidence by allegedly attempting to "refresh" or "manipulate" the testimony of a physician employed by hospital, holding that the evidence relating to counsel's efforts to refresh the physician's recollection did not show any attorney misconduct. The court explained that, under Restatement Third of the Law Governing Lawyers § 116, an attorney who refreshed a witness's recollection in an effort to have the witness recall events more favorably to the attorney's client did not engage in misconduct so long as the attorney did not assist the witness to testify falsely as to a material fact. In re Otero County Hospital Association, Inc., 584 B.R. 746, 780.

Colo.O.P.D.J.

Colo.O.P.D.J.2016. Subsec. (3) quot. in sup. After attorney was convicted of disorderly conduct arising from a domestic dispute with his former spouse, state office of attorney regulation filed a disciplinary complaint against attorney, alleging, inter alia, that attorney tampered with witnesses to his disciplinary hearing when he made numerous communications to his former spouse advising her to ignore or evade subpoenas from the office and to change her testimony before the tribunal. This court entered an order suspending attorney, holding that attorney's improper actions towards his former spouse justified sanctions. The court observed that attorney's communications to his former spouse were unlawful obstructions to the office's access to evidence, which, under Restatement Third of the Law Governing Lawyers § 116(3), was an ethical violation. People v. Olson, 470 P.3d 789, 802.

Ky.

Ky.2013. Cit. in conc. and diss. op. State bar association brought charges of professional misconduct against attorney who had represented another lawyer in a disciplinary matter, arguing that the terms of a settlement agreement that attorney had negotiated in the underlying matter violated a rule of professional conduct by requiring the complaining party to refuse to cooperate voluntarily with the bar association in any investigation into the matter. After the trial commissioner adjudged attorney guilty of professional misconduct, bar association's board of governors overturned that determination on appeal. This court reversed in part, and issued an order privately reprimanding attorney. The concurring and dissenting opinion argued that the rule was not intended to apply to confidentiality and non-cooperation provisions in settlement agreements, and that it would therefore find attorney not guilty of violating the rule. Kentucky Bar Ass'n v. Unnamed Attorney, 414 S.W.3d 412, 423.

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

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

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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

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

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

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

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[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

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

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

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

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

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

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

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

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

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

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

I. *PROCEDURAL HISTORY*

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

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

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

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

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

II. ANALYSIS

A. Standards for Deposition Sanctions

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

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

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

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

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

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

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

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

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

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

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

B. Deposition Conduct

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

1. "Form" Objections

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

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

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

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

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

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

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

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[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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I recognize, however, that not all courts share my views regarding "form" objections. In fact, some courts explicitly *require* lawyers to state nothing more than unspecified "form" objections during depositions. *See Offshore Marine Contractors, Inc. v. Palm Energy Offshore, L.L.C.*, No. CIV.A. 10-4151, 2013 WL 1412197, at *4 (E.D. La. Apr. 8, 2013) ("The Court finds that the behavior of counsel for OMC does not warrant sanctions here. Indeed, most of the objections by OMC's counsel are simple form objections with no unwarranted, lengthy speaking objections."); *Serrano*, 2012 WL 28071, at *5 ("But such an objection [to a vague question] to avoid a suggestive speaking objection should be limited to an objection 'to form,' unless opposing counsel requests further clarification of the objection."); *Druck Corp. v. Macro Fund (U.S.) Ltd.*, No. 02 CIV.6164(RO)(DFE), 2005 WL 1949519, at *4 (S.D.N.Y. Aug. 12, 2005) ("Any 'objection as to form' must say only those four words, unless the questioner asks the objector to state a reason."); *Turner v. Glock, Inc.*, No. CIV.A. 1:02CV825, 2004 WL 5511620, at *1 (E.D. Tex. Mar. 29, 2004) ("All other objections to questions during an oral deposition must be limited to 'Objection, leading' and 'Objection, form.' These particular objections are waived if not stated as phrased above during the oral deposition."); *Auscape Int'l v. Nat'l Geographic Soc'y*, No. 02 CIV. 6441(LAK), 2002 WL 31014829, at *1 (S.D.N.Y. Sept. 6, 2002) ("Once counsel representing any party states, 'Objection' following a question, then all parties have preserved all possible objections to the form of the question unless the objector states a particular ground or grounds of objection, in which case that ground or those grounds alone are preserved."); *In re St. Jude Med., Inc.*, No. 1396, 2002 WL 1050311, at *5 (D. Minn. May 24, 2002) ("Objecting counsel shall say simply the word 'objection', and no more, to preserve all objections as to form.").[13] For the reasons discussed above, I think this approach makes little legal or practical sense.

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

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

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

2. Witness Coaching

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

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

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

Despite the Federal Rules' prohibition on witness coaching, Counsel's repeated interjections frequently prompted witnesses to give particular, desired answers to the examiner's questions. This happened in a number of ways. To start, Counsel often made "clarification-inducing" objections—objections that prompted witnesses to request that the examiner clarify otherwise cogent questions. For example, Counsel regularly objected that questions were "vague," called for "speculation," were "ambiguous," or were "hypothetical." These objections usually followed completely reasonable questions. But, after hearing these objections, the witness would usually ask for clarification, or even refuse to answer the question:

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

(Bottock Depo. 106:24 to 108:2). While it is impossible to know for certain what a witness would have said absent Counsel's objections, I find it inconceivable that the witnesses deposed in this case would so regularly request clarification were they not tipped-off by Counsel's objections. *See McDonough v. Keniston*, 188 F.R.D. 22, 24 (D.N.H. 1998) ("The effectiveness of [witness] coaching is clearly demonstrated when the [witness] subsequently adopts his lawyer's coaching and complains of the broadness of the question . . . ."); *Cordova v. United States*, No. CIV.05 563 JB/LFG, 2006 WL 4109659, at *3 (D.N.M. July 30, 2006) (awarding sanctions based on a lawyer's deposition coaching because "it became impossible to know if [a witness's] answers emanated from her own line of reasoning or whether she adopted [the] lawyer's reasoning from listening to his objections").

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

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

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

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

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

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

Q. I mean, is it too big?

COUNSEL: Object to the form of the question.

A. Rephrase.

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

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

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

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

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

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

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

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

Id. Finally, the court recognized that the lawyer's conduct violated Rule 30, but chose not to impose sanctions because, at the time, Rule 30 was newly amended and because the examiner was able to finish the deposition. *Id.* at *4. The court warned, however, that "a repeat performance [would] result in sanctions." *Id.*

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

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

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

(Bottock Depo. 47:12-18).

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

(Bottock Depo. 48:12-17).

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

(Bottock Depo. 57:8-21).

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

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

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

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

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

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

(Bottock Depo. 34:5-11).

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

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

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

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

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

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

(Bottock Depo. 27:20-25)

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

(Bottock Depo. 28:21-24).

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

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

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

(Bottock Depo. 86:9-15).

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

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

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

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

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

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

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

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

3. Excessive Interruptions

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

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

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

C. Appropriate Sanction

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

IT IS SO ORDERED.

DATED this 28th day of July, 2014.

Mark W. Bennett

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