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1998

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# ARTICLES

## Deposition Dilemmas: Vexatious Scheduling and Errata Sheets

A. DARBY DICKERSON\*

### INTRODUCTION

Civil depositions. A contradiction? An oxymoron?<sup>1</sup> Unfortunately, the answer in too many instances is “yes.” Too frequently, depositions are anything but civil.

Depositions are an extensively used and rampantly abused discovery tool.<sup>2</sup> Many attorneys prefer depositions over other discovery methods because depositions permit the lawyer to question a witness face-to-face, to judge the witness’s demeanor,<sup>3</sup> and to gather information that has not been unduly filtered by opposing counsel.<sup>4</sup> Moreover, because of the question-and-answer format,<sup>5</sup> an attorney can easily follow-up when a witness gives an unexpected or incomplete answer, or when the attorney realizes she has asked an inartful question.

Despite their usefulness and popularity, depositions have provided the scene

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1. Others have called “civil litigation” and “civil procedure” oxymorons. *See, e.g.*, *Green v. GTE Cal., Inc.*, 34 Cal. Rptr. 2d 517, 518 (Cal. Ct. App. 1994) (“If this case is an example, the term ‘civil procedure’ is an oxymoron.”); Sarah Evans Barker, *Ritual & Civility — What Difference Does a Good “Oyez” Make?*, RES GESTAE, July 1995, at 10, 11 (“A large number of people today think the term ‘civil lawsuit’ is an oxymoron and believe that most modern lawyers think it is better to be despised than forgotten.”).

2. *See* GARY L. STUART, THE ETHICAL TRIAL LAWYER §18.1, at 305 (1994).

3. *See, e.g.*, *National Life Ins. Co. v. Hartford Accident & Idem. Co.*, 615 F.2d 595, 599–600 n.5 (3d Cir. 1980).

4. *See* DAVID M. MALONE & PETER T. HOFFMAN, THE EFFECTIVE DEPOSITION 27–31 (2d ed. 1996) (examining the advantages of using depositions as a discovery device); *see also* *Mill-Run Tours, Inc. v. Khashoggi*, 124 F.R.D. 547, 549 (S.D.N.Y. 1989) (explaining that “written questions provide an opportunity for counsel to assist the witness in providing answers so carefully tailored that they are likely to generate additional discovery disputes”); STUART, *supra* note 2, § 18.1, at 305.

5. *See In re Amezaga*, 195 B.R. 221, 227 (Bankr. D.P.R. 1996) (explaining that “a deposition is a ‘question-and-answer conversation’ between the witness and the attorneys used to gather facts about the case and the witness’ actions and experiences”).

for episodes of extremely unprofessional and unethical<sup>6</sup> attorney misconduct.<sup>7</sup> Although courts<sup>8</sup> and bar associations<sup>9</sup> have beseeched attorneys to act ethically

6. Professionalism and ethics are related, but distinct, concepts. Harold Clarke, former Justice of the Supreme Court of Georgia, explained the difference, stating that "legal ethics is the standard of conduct required of all lawyers, while professionalism is a higher standard expected of all lawyers." D.C. Offutt, Jr., *Professionalism*, W. VA. LAW., Oct. 1997, at \*4, available in WL, TP-ALL Database, 11-OCT W. Va. Law. 4; accord E. Norman Veasey, *The Role of Supreme Courts in Addressing Professionalism of Lawyers and Judges*, PROF. LAW., Aug. 1997, at 2, available in WL, TP-ALL Database, 8 Prof. Law. 2, \*8 (instructing that "[e]thics is a set of rules that lawyers must obey. Violations of these rules can result in disciplinary action or disbarment. Professionalism, however, is not what a lawyer must do or must not do. It is a higher calling of what a lawyer should do to serve a client and the public.").

7. For articles that recount many instances of attorney misconduct during depositions, see Jean M Cary, *Rambo Depositions: Controlling on Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561 (1966), and A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 MD. L. REV. 2734 (1998).

In 1989, The United States Court of Appeals for the Seventh Circuit appointed a nine-member Seventh Circuit Committee on Civility, which was chaired by Judge Marvin E. Aspen, a United States district Judge in the Northern District of Illinois. See *Interim Report of the Committee on Civility of the Seventh Judicial Circuit*, 143 F.R.D. 371, 374 (1991). As part of its work, the committee distributed a four-page civility questionnaire to jurists and more than 1500 members of the Seventh Circuit Bar Association. *Id.* at 377. Of the practitioners responding to the survey, 94% indicated that a civility problem existed among attorneys during discovery. *Id.* at 386. According to the report, "Depositions, conducted by lawyers without direct judicial supervision, can be one of the most uncivil phases of trial practice." *Id.* at 388.

In 1990, the Committee on Second Circuit Courts found, after questioning many practitioners, that "the current method of taking and defending depositions is too often an exercise in competitive obstructionism." Federal Bar Counsel, Committee on Second Circuit Courts, *A Report on the Conduct of Depositions*, 131 F.R.D. 613, 613 (1990) [hereinafter *Deposition Report*]. This Committee called for more specific rules concerning deposition conduct, some of which were incorporated into the 1993 amendments to the Federal Rules of Civil Procedure. *Id.* at 615-22. In its opening remarks, the Committee commented that "[d]epositions have often become theaters for posturing and maneuvering rather than efficient vehicles for the discovery of relevant facts or the perpetuation of testimony." *Id.* at 613.

8. See *Hall v. Clifton Precision*, 150 F.R.D. 525, 531 (E.D. Pa. 1993) (directing lawyers to comport themselves ethically during depositions even though they are not under the direct supervision of the "black-robed overseer"); *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1994) (including an addendum to the case addressing the seriousness of the "issue of professionalism involving deposition practice in proceedings in Delaware trial courts"). For detailed descriptions of these cases, see Dickerson, *supra* note 7, at 286-90 and 295-96.

9. According to the ABA's Center for Professionalism, at least the following jurisdictions have adopted some type of aspirational conduct code to encourage attorneys to act more professionally during litigation: Alabama State Bar, Mobile, Ala. Bar Ass'n, State Bar of Arizona, Pulaski County (Ark.) Bar Ass'n, Beverly Hills (Cal.) Bar Ass'n, Los Angeles County Bar Ass'n, Orange County (Cal.) Bar Ass'n, Boulder County (Colo.) Bar Ass'n, Colorado Bar Ass'n, El Paso County (Colo.) Bar Ass'n, Connecticut Bar Ass'n, Delaware State Bar Ass'n, D.C. Bar, Florida Bar Association, The Florida Bar, Trial Lawyers Section, Hillsborough County (Fla.) Bar Ass'n, Prange County (Fla.) Bar Ass'n, Palm Beach County, Fla. Bar Association, Tallahassee (Fla.) Bar Ass'n, Hawaii State Bar Ass'n, Evansville (Ind.) Bar Ass'n, Indianapolis Bar Ass'n, Iowa State Bar Ass'n, Johnson County (Kan.) Bar Ass'n, Kansas Bar Association, Wichita (Kan.) Bar Ass'n, Kentucky Bar Ass'n, Louisville Bar Ass'n, Baton Rouge (La.) Bar Ass'n, Louisiana Trial Lawyers Ass'n, Louisiana State Bar, Shreveport (La.) Bar Ass'n, Maryland State Bar Ass'n, Montgomery County (Md.) Bar Ass'n, Prince George's County (Md.) Bar Ass'n, Boston Bar Ass'n, Massachusetts Bar Ass'n, Genesee County (Mich.) Bar Ass'n, Grand Rapids (Mich.) Bar Ass'n, Lafayette County (Miss.) Bar Ass'n, Mississippi State Bar, Missouri Bar, Bar Ass'n of Metropolitan St. Louis, State Bar of Montana, State of Nebraska, Camden (N.J.) Bar Ass'n, State Bar of New Mexico, Brooklyn (N.Y.) Bar Ass'n, Monroe County (N.Y.) Bar Ass'n, New York State Bar Ass'n, North Carolina Bar Ass'n, North Carolina Wake County/Tenth Judicial District Bar, Akron (Ohio) Bar Ass'n, Cleveland Bar Ass'n, Oklahoma County Bar Ass'n, Multnomah (Ore.) Bar Ass'n, Bucks County (Pa.) Bar Ass'n, Northampton (Pa.)

and professionally, the uncivil conduct continues, especially in the deposition arena.<sup>10</sup>

In this Author's opinion,<sup>11</sup> three factors account for most deposition misconduct. First, the stakes at a deposition can be high — or at least perceived to be high by the litigants and their counsel. When evaluating the strength of their client's case, litigators often accord great weight to witnesses' and attorneys' performances during depositions.<sup>12</sup> Thus, if an attorney's client performs well while the opponent performs poorly, the attorney may attach a higher settlement

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Bar Ass'n, Philadelphia Bar Ass'n, Rhode Island Bar Ass'n, South Carolina Bar, Memphis (Tenn.) Bar Ass'n, Nashville Bar Ass'n, Tennessee Bar Ass'n, Dallas Bar Ass'n, San Antonio Bar Ass'n, State Bar of Texas, Travis County (Tex.) Bar Ass'n, Texas Trial Lawyers Ass'n, Texas Ass'n of Defense Counsel, Vermont Bar Ass'n, Virginia Bar, Fairfax (Va.) Bar Ass'n, Norfolk and Portsmouth (Va.) Bar Ass'n, Bar Ass'n of the City of Richmond, Seattle-King County (Wash.) Bar Ass'n, Spokane County Bar Ass'n, Tacoma-Pierce County Bar Ass'n, West Virginia State Bar. Packet from Debi Taylor, Project Coordinator, ABA Center for Professional Responsibility (June 30, 1997) (copies of each code are on file with Author). Recently, the Atlanta Bar Association also adopted a civility code. *Atlanta Bar Association Embraces Civility*, FED. DISCOVERY NEWS, Mar. 1997, at 5. In addition, in the Middle District of Florida, a group of trial attorneys gathered to prepare a handbook on local discovery practices that contains provisions similar to many civility codes. See DISCOVERY PRACTICE IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA I(A)(1) (stating that "discovery in this District is normally practiced with a spirit of ordinary cooperation and civility"). For more information on civility codes, see Dickerson, *supra* note 7, at 302-05. In addition, several listed codes can be accessed on the Web site for Stetson's Institute for Litigation Ethics, *Stetson Law — State and County Bar Codes of Professional Ethics* (last modified Apr. 9, 1998) <<http://www.law.stetson.edu/litethics>>.

10. See Thomas E. Willging et al., *An Empirical Study Of Discovery And Disclosure Practice Under The 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 539, 554 (1998) (reporting that about 10% of attorneys still experience problems with counsel coaching witnesses during depositions, improperly instructing witnesses not to answer, and generally acting unreasonably, despite the 1993 amendments to Federal Rule of Civil Procedure 30(d)(1), and that 26% of the attorneys surveyed reported experiencing problems with opposing counsel during depositions).

11. Of course, others have advanced additional theories. For example, Gary L. Stuart, an Arizona practitioner, opined that deposition abuse stems at least in part from the expense association with depositions. See STUART, *supra* note 2, § 18.1, at 305.

The contentious and abusive trial lawyer sees the deposition as an opportunity to drive up litigation costs by depositing an endless list of witnesses and asking burdensome, mundane, and repetitive questions. Such crushing burdens are used to force in terrorem settlement because the opposing party, not wanting to face such an arduous process, finds settlement a simpler and more attractive alternative.

*Id.* Judge Thomas Gibbs Gee and LawProse, Inc. President Bryan A. Garner identified several factors they believe contribute to incivility within the legal profession. The factors include the growing size of the Bar, the opening of the profession to individuals from all social and economic classes, modern technology, the "do-your-own-thing" attitude that developed during the 1960s, consumerism and inadequate training in law school. See Thomas Gibbs Gee & Bryan A. Garner, *The Uncivil Lawyer*, 15 REV. LITIG. 177, 181-86 (1996).

12. DENNIS R. RUPLEE & DIANA S. DONALDSON, *THE DEPOSITION HANDBOOK* 1 (1988); see also W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895, 938 (1966) (quoting *Hall v. Clifton Precision*, 150 F.R.D. 525, 531 (E.D. Pa. 1993) ("Depositions are the factual battleground where the vast majority of litigation actually takes place. . . . The pretrial tail now wags the trial dog. Thus, it is particularly important that this discovery device not be abused. Counsel should not forget that even though the deposition may be taking place far from a real courtroom, with no black-robed overseer peering down upon them, as long as the deposition is conducted under the caption of this court and proceeding under the authority of the rules of this court, counsel are operating as officer of this court.")).

value to the case. Moreover, deposition transcripts are often an important trial resource, sometimes substituting for live witnesses, and at other times serving as fodder for cross-examination and impeachment.<sup>13</sup> Depositions are a dress rehearsal — and due to high settlement rates<sup>14</sup> are often a substitute — for trial. Therefore, attorneys tend to attach more importance to depositions than to most “paper discovery.” Consequently, because of the perceived stakes, some attorneys will risk breaking ethical and legal rules to gain what they believe to be an advantage in the litigation.<sup>15</sup>

Second, depositions, like most other aspects of civil discovery, are not supervised by judges.<sup>16</sup> Thus, in the absence of a looming authority figure, many attorneys will attempt antics they would never dream of trying in court.<sup>17</sup>

Finally, many jurisdictions lack rules, or at least meaningful rules, on important aspects of deposition practice.<sup>18</sup> And the rules that do address deposition conduct — typically local “civility codes”<sup>19</sup> — frequently do not contain any

13. SUPLEE & DONALDSON, *supra* note 12, at 1.

14. See Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 670 (1986) (reporting that about 90% of state and federal cases settle or are dismissed before trial); Marc Galanter & Mia Cahill, “*Most Cases Settle*”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340 (1994) (noting that approximately two thirds of federal cases settle); A. Leo Levin, *Court-Annexed Arbitration*, 16 MICH J. L. REF. 537, 545–47 (1983) (indicating that, in the 1980s, about 93% or all civil cases filed never reached trial). In 1997, these statistics remained virtually the same. See The Federal Judiciary Homepage, Publications and Directories: Judicial Business of the United State Courts 1997 (visited July 9, 1998) <<http://www.uscourts.gov/publications.html>> (Table C-4 reflects that, in most categories of civil cases, well below 10% reached trial; the total of all civil cases reaching trial in 1997 was 3%).

15. See James G. Carr & Craig T. Smith, *Depositions and the Court*, 32 TORT & INS. L.J. 635, 635 (1997) (reporting that “[a]ll too frequently judges encounter lawyers who resort to misconduct because they believe that “the deposition is a battle that can and simply must be won, at whatever cost” (footnote omitted)).

16. See SUPLEE & DONALDSON, *supra* note 12, at 53 (commenting that “[t]he expectation under the Federal Rules of Civil Procedure is that depositions ordinarily will proceed without court involvement”).

17. As one commentator observed, “No experience more clearly demonstrates the decline of civility in the practice of law than viewing attorney conduct at a deposition. In this ring, unfettered by a judicial referee, some lawyers conceive themselves gladiators free to ignore such rules as there are and to bully witnesses and adversaries.” Melvyn H. Bergstein, *Dirty Depositions: Soiling a Truth-Finding Process*, N.J. L.J., Jan. 15, 1996, at 11; see also Lori Tripoli, *Tough Times for S.O.B. Litigators, Sort of . . . Civility Standards Coax Correct Courtroom Conduct*, INSIDE LITIG., Mar. 1998, at 16, available in WL, TP-ALL Database, 12 No. 3 INLIT 16, \*16 (commenting that “[m]any lawyers are smart enough to misbehave beyond the prying eyes of a judge”).

18. According to Professor Patrick J. Schiltz, for formal rules of professional responsibility frequently lack relevance to most attorneys’ everyday practice:

The (substantial) irrelevance of the rules is in part a reflection of their generality and vagueness. They are not very specific about very much. Even when they are specific, they often leave ample wiggle room for clever lawyers — who, after all, spend much of their professional time manipulating rules.

Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 713–714 (1998) (footnote omitted); see also N. Lee Cooper & Stephen F. Humphreys, *Beyond the Rules: Lawyer Image and the Scope of Professionalism*, 26 CUMB. L. REV. 923, 928 (1995–96) (noting that “not even the ABA contends that the Model Code or subsequent Model Rules have resolved the problems of professionalism for lawyers”).

19. For a list of civility codes, see *supra* note 9.

enforcement mechanism.<sup>20</sup> Without clear, mandatory standards, many judges are reluctant to sanction offending attorneys,<sup>21</sup> even though they have the inherent power to do so.<sup>22</sup> Thus, attorneys, sensing that sanctions or discipline will not be immediately or easily imposed, are emboldened to harass the opponent.

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20. See Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 ST. THOMAS L. REV. 113, 115 (1995) ("Civility codes by-and-large contain no meaningful provisions for how to respond to out-of-court transgressions, and often prohibit taking formal action even with respect to in-court matters."); cf. Geoffrey C. Hazard, Jr., *Civility Code May Lead to Less Civility*, NAT'L L.J., Feb. 26, 1990, at 14 (maintaining that "[t]he problem with codes of civility . . . is not their intention; there is no doubt that professionalism in the bar is sorely in need of repair. The problem is the appropriateness of [the] means. If the present mandatory rules of professional discipline are not being observed, a new pledge of allegiance is unlikely to improve the level of observance."). However, some courts have announced that they will enforce local aspirational creeds by sanctioning offending attorneys. See, e.g., *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284 (N.D. Tex. 1988) (en banc) (noting the kinds of actions to be taken against malevolent counsel for misconduct); see also M.D. ALA., GUIDELINES TO CIVIL DISCOVERY PRACTICE § I(A) (incorporating courtesy standards into local rules and informing practitioners that "discovery in this district is normally practiced with a spirit of ordinary civil courtesy and honesty"); E.D. OKLA. LOC. R. Rule 1.3 (B) (indicating that "the Court may deal with unprofessional conduct in any manner deemed appropriate that is consistent with the Constitution and laws of the United States").

21. Many commentators have observed judges' reluctance to enforce professional and ethical rules and have called for judges to be more proactive in this area. See, e.g. Schiltz, *supra* note 18, at 714 (stating that judges do not like punishing attorneys because most attorney misconduct does not involve felonies and because most offenses "were likely committed at one time or another by many of those who now enforce the rules of professional responsibility"); Randall T. Shepard, *What Judges Can Do About Legal Professionalism*, 32 WAKE FOREST L. REV. 621, 630 (1997) (encouraging judges to be more proactive in enforcing ethics and civility violations and observing that "[d]ifficult as it is, trial judges must adopt a more demanding posture toward violations of professional norms. Reports are made to state disciplinary commissions, but in all likelihood a good many worthy ones never arrive. By demanding more and not accepting less, judges can have a significant impact on the professional conduct of lawyers in their courts."); Jerome J. Shestack, *Advancing Professionalism Needs Judicial Help*, A.B.A. J., Apr. 1998, at 8, 8 (writing that "[j]udges are particularly suited to advance professionalism because of their authority, the respect in which they are held, and because they are charged with safeguarding a just rule of law. Some judges eschew any obligation to encourage, monitor [,] or enforce professional values, claiming it detracts from their judicial duties."); Tripoli, *supra* note 17, at \*17 (quoting United States District Judge Marvin E. Aspen, who urged more judges to take action when they learn of attorney misconduct); see also *Harp v. City*, 161 F.R.D. 398, 402 (E.D. Ark. 1995) ("Judges are wont to decry the lack of civility and cooperation amongst the members of the trial bar. The judiciary, however, is not without blame. For some reason too many judges have no trouble restraining their enthusiasm for resolving discovery disputes (this puts it mildly). Obviously, if a party wants to obstruct and delay, the inability to get a decision on a discovery dispute assists the obstructor. Members of the bench should keep in mind that the word 'judge' is a verb as well as a noun."). See generally *People ex rel. Karlin v. Culkin*, 162 N.E. 487, 493 (N.Y. 1928) (Cardozo, J.) (advising that if "the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work").

22. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991) (reviewing the lower "court's imposition of sanctions under its inherent power for abuse of discretion"); see also 28 U.S.C. § 1927 (1994) (granting courts the authority to impose money sanctions on attorneys who "multipl[y] the proceedings in a case unreasonably and vexatiously"); *Unique Concepts, Inc. v. Brown*, 115 F.R.D. 292, 293-94 (S.D.N.Y. 1987) (imposing § 1927 sanctions when an attorney is engaged in "abusive, disruptive, unreasonable, and dilatory behavior" during the deposition; specifically, the offending attorney made improper statements on 132 pages of a 147-page deposition transcript). For examples of specific provisions of the Federal Rules of Civil Procedure under which courts may also impose sanctions for deposition misconduct, see Federal Rules of Civil Procedure 26(g)(3), 30(d)(3), 37(b). See generally Cary, *supra* note 7, at 588-92 (discussing various sources of courts' "sanction power").

In this high stakes, unsupervised, seemingly unregulated environment, deposition abuse thrives. The abuse, in turn, increases litigation costs<sup>23</sup> and diminishes lawyers' public image.<sup>24</sup> Accordingly, the bench and bar must develop solutions that will allow depositions to retain their usefulness, but that will eradicate many of the most egregious forms of abuse.

Although much has been written about attorneys' conduct during the actual deposition, less has been written about misconduct that occurs before and after the deposition session. Such topics may seem mundane; however, misconduct before and after the deposition can impact the deposition and the litigation just as significantly as wrongdoing during the session. To begin the quest for solutions, this Article will address two types of dilemmas concerning pre- and post-deposition conduct.<sup>25</sup> The dilemmas involve vexatious scheduling<sup>26</sup> and concerns that arise when deponents use errata sheets to change their testimony.<sup>27</sup> Using a hypothetical employment discrimination case,<sup>28</sup> various scenarios will be examined to explore the efficacy of current ethical and legal rules that affect these areas of deposition procedure.<sup>29</sup> For each scenario, this Article will analyze whether the participating attorneys' conduct was legal, ethical, and professional under current standards. In addition, this Article will propose alternatives and solutions that might help attorneys and judges avoid similar dilemmas in future

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23. See Susan Keilitz et al., *Attorneys' View of Civil Discovery*, JUDGES J., Spring 1993, at 2, 3 (reporting that, in a 1988 survey, "attorneys cited lawyers' abuses of the discovery process as the single greatest contributor to high transaction costs"); see also Byron C. Keeling, *A Prescription for Healing the Crisis in Professionalism: Shifting the Burden of Enforcing Professional Standards of Conduct*, 25 TEX. TECH L. REV. 31, 37 (1993) (observing that "[p]rocedural tactics shackle opposing counsel with reams of paperwork, producing exorbitant litigation costs" (footnote omitted)); Willging et al., *supra* note 10, at 540 (reporting that "[d]epositions accounted for by far the greatest amount of discovery expense that flows through the attorney").

24. As one court recently explained:

The deposition process is dependent upon the professionalism of counsel as they voluntarily comply with FED. R. CIV. P. 30. It requires counsel to cooperate with each other and with the deponents. The court is not present during the deposition to rule on objections or to enforce the rules. When counsel obstructs the process, there is not only a violation of the rules but there is an adverse reflection on the legal profession in the eyes of the witnesses whose most significant contact with attorneys may be through the taking of his or her deposition.

Oleson v. Kmart Corp., 175 F.R.D. 570, 573 (D. Kan. 1997); see also Keeling, *supra* note 23, at 38 (warning that "[u]ntil the profession takes active steps to eliminate [discovery] abuses, the public will continue to hold the legal profession in the same moral contempt that it reserves for used car salesmen" (citing Thomas M. Reavley, *A Perspective on the Moral Responsibility of Lawyers*, 19 TEX. TECH L. REV. 1393, 1393 (1988))).

25. See Dickerson, *supra* note 7 (addressing four other problem areas associated with civil depositions: holding private conferences with your deponent, interjecting improper objections and instructions not to answer, asking personal and potentially embarrassing questions, and interacting uncivilly with opposing counsel).

26. See Part III of this Article, *infra* (concerning scheduling depositions).

27. See Part IV of this Article, *infra* (concerning changing deposition testimony through errata sheets).

28. Part II of this Article, *infra*.

29. See Dickerson, *supra* note 7, at 277-306 (discussing various sources of rules that affect deposition conduct).

cases. This Article focuses on federal law, but references state law for purposes of comparison.

## I. HYPOTHETICAL

In 1988, Kayla Johnson graduated from college with a degree in business administration. In 1990, after receiving her M.B.A. from a top business school and passing the C.P.A. exam, Johnson joined a branch of Maxwell, Taylor & Robertson, a national accounting firm based in New York City.

Assigned to the taxation services department, Johnson began to specialize in not-for-profit and charitable entities. After about three years, she was working on some of the firm's most significant matters. She logged for more hours than the firm demanded of its associates; she also joined the local institute of certified public accountants and regularly participated in VITA<sup>30</sup> and Habitat for Humanity projects. According to her annual reviews, she was on-track for partnership after her seventh year at the firm. The only comments she received were that she needed to get some auditing experience and that she should keep up the good work.

In 1995, Johnson had a daughter and took a three-month, paid leave under the firm's written maternity policy. When Johnson returned to work, she continued to meet the firm's minimum monthly hour requirement, although she did not work as many hours as she had before her daughter's birth. She also resumed her work in the community.

At her 1996 review, Johnson was surprised to learn that her overall rating was "Good," instead of "Excellent," the rating she had received in prior years. The partner who conducted the review, Paul Ferguson, commented that several partners questioned Johnson's dedication to the firm and that a few indicated she did not have as much audit experience as other associates in her class. While Ferguson commended her community service, he emphasized that Johnson needed to concentrate on business development, as the ability to bring in new business was crucial for those desiring partnership. Although Ferguson told Johnson she was still "on the partnership track," Ferguson asked whether she had ever considered the "senior associate" option, which would allow her to remain at the firm but would not require her to work as many hours or to generate new business. Flabbergasted by these comments, Johnson did not respond and left the meeting on the verge of tears.

The next day, Johnson approached Peter Wallace, a branch director and the partner with whom she had worked the most during her years at the firm. Wallace

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30. VITA stands for "Volunteer Income Tax Assistance" and is a program sponsored by the Law Student Division of the American Bar Association. For further information, see Glenda A. Berg, *The ABA Law Student Division*, A.B.A.J., May 1985, at 45 (describing how volunteers help low-income individuals prepare their tax returns).



assured Johnson that he had given her a positive review, and told her not to worry about the previous day's meeting. According to Wallace, an associate's review the year before a partnership vote was often harsher than others because the executive committee wanted to push individuals to do their best work in their final year as an associate. He told Johnson to continue doing quality work and to exceed the minimum billable requirement. He also told her that he would try to help her get some auditing experience.

During the next six months, Johnson exceeded the billable quota each month. She joined the Junior League in an effort to generate business. In addition, she convinced a partner to allow her to participate in a significant client audit. Then, Johnson learned that she was pregnant with her second child. Excited about her good news, she did not hesitate to tell others at the firm.

A few weeks after her announcement, Ferguson came into Johnson's office and asked whether she was going to take another three-month maternity leave. Johnson replied that she would, as permitted by firm policy. Ferguson then suggested that, since the executive committee was about to begin evaluating seventh-year associates for partnership, Johnson should either voluntarily remove her name from consideration for at least one year or take senior associate status. Not wanting to antagonize a senior partner, Johnson said she would carefully consider her options. After discussing the matter with her husband and Wallace, Johnson sent Ferguson an e-mail message indicating that she wanted to be considered for partnership on the regular schedule. Worried about her situations, Johnson redoubled her efforts to bring new business into the firm.

Eventually, her efforts paid off and a member of her Junior League group retained her to prepare its corporate tax returns and annual audit. Ferguson complimented her on the referral, but told Johnson she did not have the experience to handle the matter by herself and assigned a male partner as the lead accountant. Ferguson reassured Johnson that she would be the billing accountant, would receive credit for landing a new client, and would handle most day-to-day matters. Johnson felt she had little choice but to agree with Ferguson's decisions.

The next month, all seventh-year associates met individually with members of the executive committee to discuss whether they would be nominated for partnership. Of the fifteen associates who started in the branch with the class of 1990, six remained — three males and three females. Of three females, one other had taken a maternity leave.

When Johnson met with Ferguson, he confirmed her worst fears: the branch's executive committee did not intend to nominate her for partnership. The committee would, however, permit her to become a senior associate (which would take her off of the partnership track). Angered and upset, Johnson asked why, after being told for years that she was "on track," she was not even being considered for partnership. Johnson also reiterated that she really wanted, her name could be submitted for a vote, but that the executive committee would not support her.

Two weeks later, the entire branch partnership met at a local country club for the partnership vote. All six eligible associates' names were submitted for a vote. The branch's executive committee supported each nominee, except for Johnson. While the other five associates were elected into the partnership, Johnson's partnership bid failed. After the vote, Ferguson reiterated that Johnson could become a senior associate. Alternatively, she could stay with the firm for an additional six months (which would include her three-month maternity leave) while seeking another position. Johnson appealed the decision to the national executive committee, which supported the local partners.

Johnson then filed a sexual discrimination complaint with the Equal Employment Opportunity Commission (EEOC). The EEOC issued a right to sue letter, and Johnson immediately retained Janice Newman, a solo practitioner, to sue the firm on her behalf. Newman filed the suit in federal court;<sup>31</sup> the complaint alleged sexual discrimination under Title VII of the Civil Rights Act of 1964.<sup>32</sup> The complaint named the firm as the sole defendant. The firm then hired attorney Kathleen Hopkins to answer and defend the case. At this point, the case is in discovery.

## II. SCHEDULING DEPOSITIONS

Deposition misconduct can begin long before the witness is sworn to testify. One form of "pre-deposition" misconduct involves vexatious scheduling.

Scheduling depositions can be one of the most frustrating parts of discovery practice. Even when everyone cooperates, scheduling can be agonizing, because it is difficult to coordinate attorneys' and witnesses' varying schedules. Yet, the headaches increase exponentially when an opposing counsel employs vexatious scheduling tactics. Indeed, E. Norman Veasey, Chief Justice of the Delaware Supreme court and Chair of the ABA Ethics 2000 project<sup>33</sup> characterized

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31. Assume that the court does not have any local rules that address deposition procedure or conduct. Also assume that the court requires attorneys to adhere to the *Model Rules of Professional Conduct*. See Alex W. Newton & Bruce J. McKee, *Preliminary and Ethical Considerations*, in *FEDERAL APPELLATE PRACTICE: 11TH CIRCUIT*, 2-i,2-1 (Susan H. Black et al. eds., 1996) (explaining that most federal courts enforce the ethical code adopted by the state within which the court sits, that some courts enforce the A.B.A.'s *Model Rules*, and that at least one court applies the state ethical rules to the extent they are not inconsistent with the *Model Rules*, in which case the *Model Rules* govern).

32. 42 U.S.C. § 2000e (1994).

33. According to the ABA Center for Professional Responsibility:

The Commission on the Evaluation of the Rules of Professional Conduct, or "Ethics 2000," is charged with: 1) conducting a comprehensive study and evaluation of the ethical and professionalism precepts of the legal profession; 2) examining and evaluating the ABA Model Rules of Professional Conduct and the rules governing professional conduct in the state and federal jurisdictions; 3) conducting original research, surveys and hearings; and 4) formulating recommendations for action.

ABA Center for Professional Responsibility, *Ethics 2000 — Commission on the Evaluation of the Rules of Professional Conduct* (visited June 9, 1998) <<http://www.abanet.org/cpr/ethics2k.html>>; see also James

vexatious scheduling as a “frivolous and abusive litigation tactic.”<sup>34</sup> Since initial contacts among opposing counsel can set the tone for later contacts, problems in deposition scheduling can lead to other problems in the pretrial process. Accordingly, attorneys and judges must take vexatious scheduling problems seriously and attempt to halt this form of discovery abuse.

Vexatious scheduling can take a variety of forms. Attorneys can refuse to cooperate in scheduling depositions; they can schedule depositions with little notice; they can cancel depositions at the last minute, fail to appear with their client, or continually seek to reschedule depositions; or they can seek to depose witnesses merely to harass the other side. To analyze various vexatious scheduling problems, consider several scenarios encountered by the attorneys in *Johnson v. Maxwell, Taylor & Robertson*.

#### A. SCENARIO ONE: ADVANCE COORDINATION AND REASONABLE NOTICE

Janice Newman, Ms. Johnson’s attorney, decided the first person she wanted to depose was Peter Wallace, the partner with whom Ms. Johnson worked the most at the firm and a director of Ms. Johnson’s branch office. She felt that Mr. Wallace would be a sympathetic witness and would provide information about procedures the firm uses to select new partners.

After reviewing her calendar and her client’s calendar, Ms. Newman sent a written deposition notice to Kathleen Hopkins, the firm’s attorney. She sent the notice by regular mail on a Monday. The notice indicated that Ms. Newman would depose Mr. Wallace that Friday. The notice arrived at Ms. Hopkins’ office on Tuesday, but she was out of the office and did not have an opportunity to review her mail, including the notice, until Wednesday afternoon — less than forty-eight hours before the noticed deposition.

Ms. Hopkins was furious, as Ms. Johnson had not previously discussed the deposition with her or asked for convenient deposition dates. She immediately called Ms. Newman and asked to reschedule the deposition for another date. Ms. Newman replied that she wanted to make sure that Wallace was deposed first and that Hopkins did not “sneak in” another deposition. Newman told Hopkins that she intended to go forward with the deposition unless ordered by the court to change the date.

This scenario raises two critical questions. First, did Ms. Newman act properly when noticing the deposition? More specifically, did she act properly when noticing the deposition without first coordinating with Ms. Hopkins, and can she schedule a deposition on such short notice? Second, what are Ms. Hopkins’

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Podgers, *Model Rules Get the Once-Over: Ethics 2000 Project Launches Review of ABA Professionalism Standards*, ABA J., Dec. 1997, at 90 (describing the Ethics 2000 project and Judge Veasey’s role).

34. See Veasey, *supra* note 6, at 10; see also William D. Underwood, *Divergence in the Age of Cost and Delay Reduction: The Texas Experience with Federal Civil Justice Reform*, 25 TEX. TECH L. REV. 261, 273 (1994) (listing “refusing to cooperate in scheduling” as a common form of discovery abuse).

options concerning how to proceed? The first step in answering these questions is to study applicable ethics and legal rules, civility codes, and case law.

## 1. Applicable Authorities

### a. *Federal Rules of Civil Procedure*

Federal Rules of Civil Procedure 30(b) addresses the procedure for scheduling depositions. The rule states that “[a] party desiring to take the deposition of any person upon oral examination shall give reasonable notice to every other party to the action.”<sup>35</sup> Rule 30, however, does not indicate what constitutes “reasonable notice.” Moreover, the rule does not encourage attorneys to coordinate with opposing counsel before notice is sent.

However, other sections of the Federal Rules of Civil Procedure provide additional guidance concerning scheduling. For example, rule 26(f) requires counsel to meet early in the case to discuss various matters, including discovery

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35. FED. R. CIV. P. 30(b)(1). The rule goes on to indicate the types of information, such as the name of the deponent and the date of the deposition, that must be included in the notice. *Id.* Depositions may be also taken pursuant to informal agreements. *See* FED. R. CIV. P. 29(1) (stating that “the parties may by written stipulation . . . provide that depositions may be taken before any person, at any time or place upon any notice”); *Smith v. Midland Brake, Inc.*, 162 F.R.D. 683, 687 (D. Kan. 1995) (noting that the parties can agree to waive formal notice); EDWARD J. IMWINKELRIED & THEODORE Y. BLUMOFF, *PRETRIAL DISCOVERY STRATEGY AND TACTICS* §5:13 (1997) (indicating that “you can rely exclusively on informal arrangements with the principals; you can reach informal agreement and then follow up with the service of formal notices and subpoenas; or you can serve formal notices and subpoenas without prior informal agreement”). However, the safest course is to serve a formal deposition notice even when the parties have reached an informal agreement. *See id.* § 5:15 (cautioning that failure to serve a formal deposition notice will prevent you from being able to seek sanctions should the deponent not appear); *accord* *Lauson v. Stop-N-Go-Foods, Inc.*, 133 F.R.D. 92 (W.D.N.Y. 1990) (refusing to allow introduction of deposition testimony when the deposition was noticed orally and not in writing — even though the party opposing introduction had originally noticed the deposition in writing and had withdrawn the notice two days before the deposition, at which time the other party gave oral notice of her intent to proceed with the deposition). In *C&F Packing Co. v. Doskocil Cos.*, 126 F.R.D. 662 (N.D. Ill. 1989), the court emphasized that, depending on the circumstances, both written and oral notice may be required. In this case, counsel were taking out-of-town depositions. *Id.* at 678. One side decided to add a deposition to the schedule and a dispute arose concerning whether counsel gave actual and appropriate notice. *Id.* at 677–78. After parsing conflicting accounts, the court found that counsel gave less than two hours’ oral notice of the deposition. *Id.* at 678. The court deemed such short, oral notice unreasonable, and then explained:

Under these circumstances, the only reasonable notice would have consisted of both written and oral notice accompanied by a good faith effort to schedule the deposition at a mutually convenient time. Written notice was essential because it ensures that the other side has knowledge of the deposition and its time and place and because it prevents precisely the types of disputes which have arisen here. Written notice may only be dispensed with in the most unusual circumstances . . . Oral notice was essential as well because [the] attempted written noticed occurred . . . late [in the] afternoon the evening before depositions were scheduled to begin . . . creating a substantial possibility that written notice would not come to the attention of opposing counsel even if it were properly sent. Finally, good faith consultation, which is strongly encouraged in all cases, became a necessity in this case because of the history of discovery problems, the frantic pace of discovery, and [other extenuating circumstances].

*Id.* at 678–79 (citation and footnote omitted).

and deposition scheduling.<sup>36</sup> If followed, this rule forces counsel to cooperate, and should help prevent many scheduling problems. By its express terms, however, the rule allows local districts to “opt out” of this provision,<sup>37</sup> which many did.<sup>38</sup> Therefore, Rule 26(f) many not prove useful in many jurisdictions.<sup>39</sup>

Rule 26(d) addresses the timing and sequence of discovery. It provides that methods of discovery may be used in any sequence and “the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party’s discovery.”<sup>40</sup> The rule also states that the court can control the timing and sequence of discovery “for the convenience of the parties and witnesses and in the interests of justice.”<sup>41</sup> Before this rule, which was added in 1970, attorneys had little incentive to schedule depositions by agreement, because one side could obtain a significant advantage merely by serving the first deposition notice.<sup>42</sup> The drafters, by eliminating priorities, felt the new rule

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36. FED. R. CIV. P. 26(f); *see also* FED. R. CIV. P. 16(c) (authorizing courts, during pretrial conferences, to “control and schedule” discovery).

37. *See* FED. R. CIV. P. (26(f) (indicating that the provision applies “[e]xcept in actions exempted by local rule”).

38. *See* 8 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* xiv-xxxix (2d ed. Supp. 1997) (indicating that the following federal district courts have opted out of Rule 26(f), either in whole or in part: Middle District of Alabama, Eastern District of Arkansas, Western District of Arkansas, Central District of California, Eastern District of California, Northern District of California, Southern District of California, District of Colorado, District of Delaware, Southern District of Georgia, Northern District of Florida, Southern District of Florida, Northern District of Indiana, Southern District of Indiana, District of Kansas, Eastern District of Kentucky, Western District of Louisiana, District of Maine, District of Maryland, District of Montana, District of New Hampshire, District of New Mexico, Eastern District of New York, Southern District of New York, Western District of North Carolina, Middle District of North Carolina, Western District of North Carolina, Southern District of Ohio, Western District of Oklahoma, District of Oregon, Eastern District of Pennsylvania, Western District of Pennsylvania, District of Puerto Rico, District of Rhode Island, District of South Carolina, Eastern District of Tennessee, Western District of Tennessee, Eastern District of Texas, Northern District of Texas (Judges Buchmeyer, Fish, and Sanders; others follow the rule), Western District of Texas, Eastern District of Virginia, Western District of Washington, Southern District of West Virginia, Eastern District of Wisconsin, Western District of Wisconsin and District of Wyoming).

39. On June 19, 1998, the Standing Committee on Rules of Practice and procedure approved for publication and public comment a package of amendments to the discovery rules that was developed by the Advisory Committee on Civil Rules. Among the proposed amendments are changes to Rules 26(D) and (f) and would remove the local opt-out and retain the moratorium on formal discovery until the Rule 26(f) conference. *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, \_\_\_\_ F.R.D. \_\_\_\_ (1998) (draft copy on file with Author).

40. FED. R. CIV. P. 26(d).

41. *Id.*; *accord* Occidental Chem. Corp. v. OHM Remediation Serv., 168 F.R.D. 13, 14 (W.D.N.Y. 1996) (explaining that “a discovery priority is not established base don which party noticed a deposition first, but rather, Rule 26(d) authorizes the court to order the sequence of discovery upon motion”). Courts will exercise this discretion when the parties resort to gamesmanship. For example, in *United States v. Bartsch*, 110 F.R.D. 128, 129 (N.D. Ill. 1986), the court issued a scheduling order when the plaintiff served his deposition notice one day after the defendant served his notice and set the deposition date one day before the defendant’s date. *Accord* Monacello v. City of Phila., No. 87–2380. 1988 U.S. Dist. LEXIS 2430, at \*3 (E.D. Pa. Mar. 22, 1988) (lamenting that “[g]amesmanship” and “pouting” has [sic] apparently become part of this litigation” and exercising its discretion to determine the sequence of depositions).

42. Before 1970, the Federal Rules of Civil Procedure did not address the sequence or order in which discovery could or should be taken. *See* 8 WRIGHT ET AL., *supra* note 38, § 2045, at 585. The courts, however,

would encourage attorneys to schedule depositions by agreement.<sup>43</sup> Unfortunately, since vexatious scheduling is still a problem, the drafters' goal was not entirely achieved.

On the reasonable notice issue, Rule 32(a)(3) currently provides that a deposition cannot be used "against a party who, having received less than [eleven] days notice of a deposition, has promptly upon receiving such notice filed a motion for protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time."<sup>44</sup> This section was added in 1993 "to deal with the situation when a party, receiving minimal notice of a proposed deposition, is unable to obtain a court ruling on its motion for a protective order seeking a delay . . . the deposition."<sup>45</sup> Therefore, a party who receives less than eleven days' notice of a deposition "can, provided its motion for a protective order is filed promptly, be spared the risks resulting from nonattendance at the deposition held before its motion is ruled upon."<sup>46</sup> Before this amendment, the deponent who received short notice either had to appear for deposition or actually obtain a protective order postponing the deposition.<sup>47</sup>

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tended to hold that the party who served a deposition notice first was allowed to complete at least that deposition before another party could take another deposition. *Id.* Some courts even held that a party who noticed a deposition first did not have to respond to interrogatories, requests for admission, or requests for production of documents until it had completed the noticed deposition. *Id.* Unfortunately, the defendant almost always won this "priority" race, because, under the pre-1970 rules, the defendant could serve discovery requests, including a notice of deposition, at any time after the action was commenced, while the plaintiff was required to wait 20 days. *See id.* § 2045, at 588 (citing Federal Rule of Civil Procedure 26(a) as worded before the 1970 amendments). Because some defendants used the rule to delay the plaintiff's ability to conduct discovery, current Rule 26(d) was added as part of the 1970 amendments. *See id.* § 2046, at 590. The stated rationale behind the amendment was that "one party's initiation of discovery should not wait upon the other's completion, unless delay is dictated by special considerations." *See id.* (citing *Advisory Committee Notes to 1970 Amendment of Rule 26(d)*, 48 F.R.D. 487, 507 (1970)).

43. *See id.* § 2046, at 591 ("In practice, it was hoped that the 1970 amendment would be a spur to agreement among the attorneys on when depositions are to be taken."). The advisory committee hoped that "[o]nce it is clear to lawyers that they bargain on an equal footing, they are usually able to arrange for an orderly succession of depositions without judicial intervention." *See id.* (citing *Advisory Committee to 1970 Amendment of Rule 26(d)*, 48 F.R.D. 487, 507 (1970)).

44. FED. R. CIV. P. 32(a)(3); *see also* FED. R. CIV. P. 26(c)(2) (permitting parties to seek a protective order that the requested discovery be taken at a different time).

45. FED. R. CIV. P. 32(a) committee notes to 1993 amendments, *reprinted in* STEVEN BAICKER-McKEE ET AL., *FEDERAL CIVIL RULES HANDBOOK 1993-94*, at 214 (1993). The committee notes also explain that a party typically does not obtain protection merely by filing a motion for protective order under Rule 26, but that protection requires a ruling on the motion. *Id.*

46. *Id.* The committee notes continue: "Although the revision of Rule 32(a) covers only the risk that the deposition could be used against the non-appearing movant, it should also follow that, when the proposed deponent is the movant, the deponent would have 'just cause' for failing to appear for purposes of Rule 37(d)(1)." *Id. But cf.* FED. R. CIV. P. 37(d) (indicating that the failure of a party or party's managing agent to appear for deposition, "may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c)").

47. *See Hepperle v. Johnston*, 490 F.2d 609, 613 (5<sup>th</sup> Cir. 1979) (ruling that the trial court's inaction on the pro se litigant's motion for protective order to postpone his deposition did not relieve the litigant from his duty to appear at the noticed deposition); *Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257, 269 (9<sup>th</sup> Cir. 1964) ("Rule 30(b) places the burden on the proposed deponent to get an order, not just to make a motion. And if there

Although amended Rule 32 provides some guidance concerning "reasonable-ness," that guidance is still murky, as the committee notes stress that "[i]nclusion of this provision is not intended to signify that [eleven] days' notice is the minimum advance notice for all depositions or that greater than [ten] days should necessarily be deemed sufficient in all situations."<sup>48</sup>

Related to the issue of reasonable notice is what happens to an attorney who provides unreasonable notice. Since the attorney signs the deposition notice, the notice is subject to Rule 26(g)(2),<sup>49</sup> which requires the attorney to certify that the discovery request is not being "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" and is "not unreasonable or unduly burdensome or expensive."<sup>50</sup> Added in 1983, rule 26(g) "imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by

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is not time to have his motion heard, the least that he can be expected to do is to get an order postponing the time of the deposition until his motion can be heard. He might also appear and seek to adjourn the deposition until an order can be obtained. But unless he has obtained a court order that postpones or dispenses with his duty to appear, the duty remains."); *Williams v. American Tel. & Tel. Co.*, 134 F.R.D. 302, 303 (M.D. Fla. 1991) (holding that a party is not excused from complying with requested discovery merely by filing a protective order, and further deeming untimely a motion for protective order that was finally filed in the required format more than two weeks after the scheduled deposition and more than five weeks after the deposition notice was served); *Goodwin v. City of Boston*, 118 F.R.D. 298, 298 (D. Mass. 1988) (explaining that "[t]he filing of a motion to quash or a motion for protective order does not automatically operate to stay a deposition or other discovery" and encouraging counsel to try to informally reschedule depositions in such situations). *But cf.* *Lock 26 Constructors v. John Massman Contracting Co.*, 127 F.R.D. 542, 543 (D. Kan. 1989) (concluding that while a party typically must obtain a protective order before the date set for the deposition, "[t]he rule does not necessarily apply . . . if the party had no opportunity to move for a protective order"). Even after the 1993 amendments, a party who desires to postpone a deposition noticed more than 11 days in advance must follow this same procedure. *See e.g.*, *Robert Billet Promotions, Inc. v. IMI Cornelius, Inc.*, No. CIV. A. 95-1376, 1995 WL 67385, at \*2 (E.D. Pa. Nov. 8, 1995) (informing attorneys that "[o]nce a deposition is properly noticed, a party who opposed the deposition and cannot amicably resolve the dispute must either attend the deposition or file for a protective order from the court"); *Aluminum Shapes, Inc. v. Paul Frank Roofing & Waterproofing Co.*, No. CIV. A. 94-0202, 1994 WL 410507, at \*2 (E.D. Pa. Aug. 5, 1994) (emphasizing that a "deponent who realizes he cannot appear at a scheduled deposition bears the burden . . . to get an order postponing the deposition").

48. FED. R. CIV. P. 32(a) committee notes to 1993 amendments, *reprinted in* BAICKER-MCKEE ET AL., *supra* note 45, at 214.

49. *See, e.g.*, *Havadjias v. Vanguard Ins. Co.*, 46 F.3d 1141 (table), 1995 WL 41396, at \*3 (9th Cir. Jan. 25, 1995) (imposing Rule 26(g) sanctions on pro se litigants who, among other things, sent notices scheduling 40 depositions at the same time and further finding that the discovery requests were unreasonable and frivolous because the litigants signed each of the requests thereby certifying that they were proper under Rule 26(g)); *Imperial Chems. Indus., PLC v. Barr Labs, Inc.*, 126 F.R.D. 467, 472-73 (S.D.N.Y. 1989) (indicating that deposition notices are subject to the requirements of Rule 26(g) and imposing Rule 26(g) sanctions when counsel in a patent case served notices of deposition that called for deposing six expert witnesses from around the world on a single day, in a single place, and for utilizing the most expensive discovery method available to authenticate documents whose authenticity was not disputed); *see also* WILLIAM W. SCHWARTZ ET AL., *CIVIL DISCOVERY AND MANDATORY DISCLOSURE* § 3[B][1], at 3-9 (2d ed. 1994) (commenting that "[d]epositions that harass, delay, or unduly burden the opponent violate the rule [Rule 26(g)]").

50. FED. R. CIV. P. 26(g)(2)(B), (C).

explicitly encouraging the imposition of sanctions.”<sup>51</sup> Thus, if a discovery request violates this rule, the court, *sua sponte* or upon motion, “shall impose” sanctions on the offending attorney or party if the offending attorney or party acted “[w]ithout substantial justification.”<sup>52</sup> At least one federal court has imposed Rule 26(g) sanctions when an attorney gave unreasonable short notice of a deposition.<sup>53</sup>

### b. Local Rules and Civility Codes

To address perceived voids in the federal rules, various courts and bar associations have adopted local rules or civility codes that concern deposition scheduling. These provisions frequently require or encourage attorneys to accommodate the schedules of opposing counsel and the deponent, and typically direct attorneys to make a good-faith effort to coordinate the deposition with opposing counsel before sending an unexpected notice.<sup>54</sup> Some also try to prevent

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51. *Advisory Committee Notes to the 1983 Amendments to the Federal Rules of Civil Procedure*, 97 F.R.D. 165, 218 (1983), quoted in 8 WRIGHT ET AL., *supra* note 38, § 2052, at 626.

52. FED. R. CIV. P. 26 (g)(3). See generally 8 WRIGHT ET AL., *supra* note 38, § 2052 (discussing Rule 26(g) sanctions). As one federal court explained, “[N]o finding of subjective bad faith is required” to impose Rule 26(g) sanctions. *Imperial Chems. Indus. PLC*, 126 F.R.D. at 472. When the court determines that an attorney acted in bad faith, then 28 U.S.C. § 1927 provides “independent authority for sanctions.” *Id.*

53. See *Imperial Chems. Indus. PLC*, 126 F.R.D. at 473 (“The third notice of deposition, specifying on unreasonably short notice the most expensive method for discovery for matters not shown to be in dispute in this action, violated the third clause of Rule 26(g).”).

54. See, e.g., STANDARDS FOR PROFESSIONAL CONDUCT WITHIN THE SEVENTH FEDERAL JUDICIAL CIRCUIT §10 (“Lawyers’ Duties to Other Counsel”), reprinted in ILL. COMP. STAT. ANN., 7th Cir. Ct. App., App. IV (1997) and in IND. CODE ANN., 7TH CIR. CT. APPEALS RULE 60 (1998) (providing: “We will not use any form of discovery or discovery scheduling as a means of harassment.”); *id.* § 14 (providing: “We will consult other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts.”); M.D. ALA., GUIDELINES TO CIVIL DISCOVERY PRACTICE IN THE MIDDLE DISTRICT OF ALABAMA, guideline II(A) [hereinafter M.D. ALA. GUIDELINES] (“A courteous lawyer is normally expected to accommodate the schedules of opposing lawyers. In doing so he can either prearrange a deposition or notice the deposition while at the same time indicating a willingness to be reasonable about any necessary rescheduling.”); N.D. CAL. LOC. R. 30-2 (stating that “the noticing party shall consult with opposing counsel about the deposition schedule so that the convenience of counsel, witnesses, and parties may be accommodated, if possible”); S.D. CAL. LOC. R. 83.4(a)(1)(g) (directing counsel to confer with opposing counsel “when possible” to schedule” to schedule depositions); M.D. GA., STANDARDS OF CONDUCT B(5)(c) (indicating that “[b]efore issuing notice of deposition, a lawyer should contact all lawyers of record in an attempt to reach agreement on a schedule for all depositions and all lawyers should attempt in good faith to abide by any agreement reached”); C.D. ILL. LOC. R. 30.1 (stating that “[i]n scheduling any deposition, counsel must make a good faith effort to coordinate with all opposing counsel the scheduling of a time that is mutually convenient to all opposing counsel and parties”); D. MD. DISCOVERY GUIDELINES, guideline 4(a) (specifying that “[a]ttorneys are expected to make a good faith effort to coordinate deposition dates with opposing counsel, parties, and non-party deponents, prior to noticing a deposition”); E.D. MICH. CIVILITY PRINCIPLES § 14 (“Attorney’s Responsibility to Other Counsel”) (“We will consult other counsel regarding scheduling matters in a good-faith effort to avoid scheduling conflicts.”); N.D. OHIO LOC. R. 30.1(b)(1) (expecting counsel “to make a timely and good faith effort to confer and agree to schedules for the taking of depositions”); E.D. PA. LOC. R., App. D., *Code of Professional Conduct* 3 (“I will respect other lawyers’ schedule as my own, and will seek agreement on meetings, depositions, hearings, and trial dates. . . .”); W.D. TEX. LOC. R., App. M, III(14) (adopting the aspirational *Texas Lawyer’s Creed* stating that “I will not



problems by requiring the parties to develop a deposition schedule and to submit that schedule as part of a case management report or joint scheduling proposal.<sup>55</sup>

In addition, some jurisdictions have enacted rules that articulate exactly what constitutes "reasonable notice."<sup>56</sup> For example, the United States District Court

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arbitrarily schedule a deposition . . . until a good faith effort has been made to schedule it by agreement"); E.D. WASH. LOC. R. 83.1(k)(2)(e) (adopting a civility code that provides, in pertinent part, that "I will try to consult with opposing counsel before scheduling depositions"); COLO. R. CT. 1-12(1) (requiring that, before an attorney serves a deposition notice, that she "make a good faith effort to schedule it by agreement at a time reasonably convenient and economically efficient to the proposed deponent and counsel for all parties"); GA. CT. R., GA. STATE BAR APP., *Aspirational Statement of Professionalism* (a)(3) ("As to opposing parties and their counsel") (encouraging attorneys to "[c]onsult with opposing counsel in the scheduling of appearances, meetings, and depositions"); IOWA STANDARDS FOR PROFESSIONAL CONDUCT § 16 ("Lawyer's Duties to Other Counsel") ("We will consult other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts."); KY. BAR CODE PROF. COURTESY 3 (indicating that "[a] lawyer should respect opposing counsel's schedule by seeking agreement on deposition dates . . . rather than merely serving notice") MD. R. CT., DISCOVERY GUIDELINES, guideline 7(a) (encouraging attorneys "to make a good faith attempt to clear depositions dates with all opposing counsel or parties before noticing a deposition"); N.M. R. CT., *A Lawyer's Creed of Professionalism of the State Bar of New Mexico* C94 ("I will endeavor to consult with opposing counsel before scheduling depositions . . ."); OHIO SUPREME COURT COMMISSION ON PROFESSIONALISM, *A Lawyer's Creed*, available in LEXIS, Allrul Library ("I shall endeavor to consult with and cooperate with you in scheduling meetings, depositions, and hearings."); OHIO SUPREME COURT COMMISSION ON PROFESSIONALISM, *A Lawyer's Aspirational Ideals* (a)(3) ("As to opposing parties and their counsel"), available in LEXIS, Allrul Library (indicating that attorneys should "[c]onsult with opposing counsel in the scheduling of appearances, meetings, and depositions"); R.I. SUP. CT. R., *Standards for Professional Conduct Within the Rhode Island Judicial System* B910 ("I will not use any form of discovery or discovery scheduling matters in a good faith effort to avoid scheduling conflicts"); TENN. (DAVIDSON COUNTY) LOC. R. 5.04(f)(3), available in LEXIS, Allrul Library (explaining that "[a] lawyer should respect his or her opponent's schedule by seeking agreement on deposition dates . . . rather than merely serving notice"); W. VA. PROF. COND. Standard B92 (cautioning that "[a] lawyer should not use any form of discovery or discovery scheduling as a means of harassment or to increase litigation expense"); L.A. COUNTY SUPERIOR CT. R. 7.12(e)(2) (providing that "[i]n scheduling depositions, reasonable consideration should be given to accommodating schedules of the deponent, where it is possible to do so without prejudicing the client's rights"); S.F. COUNTY SUPERIOR COURT DISCOVERY MANUAL §344 (indicating that "[i]f a deposition is noticed without prior consultation with opposing counsel and if as soon as possible thereafter opposing counsel presents a valid reason for continuing same, the rescheduling of the deposition should be arranged by counsel without court intervention"); see also MANUAL FOR COMPLEX LITIGATION § 41.38(3) (3d ed. 1995) (indicating that "[a]bsent extraordinary circumstances, counsel shall consult in advance with opposing counsel and unrepresented proposed deponents in an effort to schedule depositions at mutually convenient times and places").

55. See D. COLO. LOC. R. 29.1 (indicating that the scheduling order should include "[a] list of the names of the persons to be deposed and a prospective schedule for taking depositions"); S.D. IND. LOC. R. 16.1(d) (including a deposition schedule among items required for case management reports); M.D.N.C. LOC. R. 26.1(b)(1) (requiring parties "to formulate a preliminary deposition schedule" and "to communicate throughout the discovery period to update the schedule"); ARIZ. R. CIV. P. SUPERIOR CT. 16(c)(1) (requiring the parties to develop a deposition schedule); MD. R. CIV. P. 2-401(c) (encouraging parties "to reach agreement on a plan for the scheduling and completion of discovery").

56. See, e.g., E. COLO. LOC. R. 30.1A (providing that "reasonable notice" "shall be not less than eleven days, as computed under FED. R. CIV. P.6"); M.D. FLA. LOC. R. 30.2 (a) (requiring at least 10 days' written notice to every other party and the deponent); S.D. FLA. LOC. R. 26.1(J) (indicating that, "[u]nless otherwise stipulated by all interested parties[,] . . . a party desiring to take [an oral deposition within the State] shall give at least five (5) working days' notice in writing to every other party . . . and to the deponent (if the deposition is not of a party), and a part desiring to take the deposition in another State . . . shall give at least ten (10) working days' notice"); D. KAN. LOC. R. 30.1 (stating that at least five days' notice is required); D. MD. DISC. GUIDELINES,

for the District of New Mexico requires that an attorney serve the deposition notice fourteen days in advance,<sup>57</sup> while the Northern District of Oklahoma requires only five days' notice.<sup>58</sup> The United States District Court for the Southern District of Florida requires at least five working days' notice for in-state depositions and at least ten working days' notice for out-of-state depositions.<sup>59</sup> On average, ten or eleven days' notice is the norm.<sup>60</sup>

All federal jurisdictions follow the "no priority" rule in Federal Rule of Civil Procedure 26(d) for deposition sequencing. The reason for districts' acceptance of Rule 26(d) is found in the advisory committee notes to the 1970 amendments, which emphasize that while courts may set a priority in a particular case, "a local court rule purporting to confer priority in certain classes of cases would be inconsistent with this subdivision [rule 26(d)] and thus void."<sup>61</sup> Most state rules concerning sequencing also mirror the federal rule.<sup>62</sup> Some local civility codes, however, indicate that "[w]hen a deposition is noticed by another party in the

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guideline 8(b) (indicating that "eleven days notice shall be deemed to be 'reasonable notice' within the meaning of FED. R. CIV. P. 30(b)(1)"); D.N.M. LOC. R. 30.1 (noting that "[s]ervice of notice of deposition . . . must be made at least fourteen (14) calendar days before the scheduled deposition"); N.D. OKLA. LOC. R. 30.1A (stating that "reasonable notice" "shall be five (5) days"); E.D. VA. LOC. R. 30(H) (providing for at least 11 days' notice); CAL. CODE CIV. P. § 2025(f) (requiring 10 days' notice); W.D. WASH. LOC. R. 32 (tracking the language of FED. R. CIV. P. 32); COLO. R. CIV. P. 121, § 1-12(1) (indicating that, "[u]nless otherwise ordered by the court, reasonable notice for the taking of depositions . . . shall not be less than 5 days as computed pursuant to C.R.C.P. 6"); MASS. R. CIV. P. 30(b)(1) (requiring seven days' notice); Mo. Ct. R. 57.03(b)(1) (requiring at least seven days' notice); N.J.R. TAX CT. 4:14-2(a) (requiring at least 10 days' written notice); N.M. LOC. DIST. R., 1<sup>ST</sup> JUD. DIST. 1-302(B) (announcing that depositions notices "shall be served not less than five (5) days prior to the date scheduled for the deposition"); S.C. CT. R. 30(b)(1) (requiring 10 days' notice). Several state rules track Federal Rule of Civil Procedure 32, discussed at *supra* notes 44-48 and accompanying text, which seems to require 11 days' advance notice, unless the court or parties have indicated otherwise. *See, e.g.*, ALASKA CT. R. 32(a)(3)(F); ARK. R. CT. 32(a)(3); DEL. SUPER. CT. R. 32(a)(3); D.C. SUPER. CT. R. 32(a)(3); N.D.R. CIV. P. 32 (j)(3); R.I. SUPER. R. CIV. P. 32(a)(3)(E).

57. D.N.M. LOC. R. 30.1

58. N.D. OKLA. LOC. R. 30.1A.

59. S.D. FLA. LOC. R. 26.1(J), *supra* note 56.

60. *See supra* note 56 (listing the notice requirements of various courts).

61. *See* 8 WRIGHT ET AL., *supra* note 38, § 2047, at 594 (quoting *Advisory Committee Notes to 1970 Amendment of Rule 26(d)*, 48 F.R.D. 487, 507 (1970)); *e.g.*, D. ALASKA LOC. R. 26(d)(3); W.D. WASH. LOC. R. 26(d) (stating that "methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.")

62. ALA. R. CIV. P. 26(d); ARIZ. R. CIV. P. 26(d); ARK. R. CIV. P. 26(d); D.C. SUPER. CT. R. CIV. P. 26(d); FLA. R. CIV. P. 1.280(d); GA. CODE ANN. § 9-11-26(d) (1997); HAW. R. CIV. P. 26(d); IDAHO R. CIV. P. 26(d); ILL. SUP. CT. R. 201(e); IND. R. TR. P. 26(D); IOWA R. CIV. P. 124; KAN. CIV. PROC. CODE ANN. § 60-226(D) (WEST 1997); KY R. CIV. P. § 26.04 (1998); ME. R. CIV. P. 26(D); MD. R. CIV. P. 2-401(b); MASS. R. CIV. P. 26(d); MICH. CT. P. 2.302(D); MINN. STAT. ANN. § 26.04 (West 1998); MISS. R. CIV. P. 26(d); MO. SUP. CT. R. CIV. P. 56.01(d); MONT. R. CIV. P. 256(d); NEB. CT. R. 26(d); N.D.R. CIV. P. 26(d); OHIO R. CIV. P. 26(D); OKLA. STAT. ANN. tit. 12, § 3226(D) (West 1997); 42 PA. CONS. STAT. ANN. § 4007.3 (West 1998); R.I. SUP. CT. R. CIV. P. 26(d); S.C.R. CIV. P. 26(d); S.D. CODIFIED LAWS ANN. § 15-6-26(d) (West 1997); TENN. R. CIV. P. 26.04; UTAH R. CIV. P. 26(d); VT. R. CIV. P. 26(d); VA. SUP. CT. R. 4:1(d); WASH. SUPER. CT. CIV. R. 26(d); W. VA. R. CIV. P. 26(d); WIS. STAT. ANN. § 804.01(4) (West 1998); WYO. R. CIV. P. 26(d).

reasonably near future, counsel should ordinarily not notice another deposition for an earlier date without the agreement of opposing counsel.”<sup>63</sup>

### c. Case Law

Published cases on deposition scheduling are relatively rare.<sup>64</sup> The dearth of cases may be partially attributable to courts’ insistence that counsel resolve scheduling disputes without judicial aid. As one court explained:

It is an accepted practice . . . for attorneys to make an effort to agree among themselves on the arrangements for the taking of depositions before resorting to the giving of formal notice. This enables them to make arrangements that will suit the convenience of all interested parties. It is a very commendable procedure and one that should be encouraged.<sup>65</sup>

When counsel failed to resolve informally a scheduling dispute, another court stressed: “Obstructive refusal to make reasonable accommodation . . . not only impairs the civility of our profession and the pleasures of the practice of law, but also needlessly increases litigation expense to the client.”<sup>66</sup> However, the courts also realize that nothing in the federal rules requires counsel to coordinate with others affected by the notice.<sup>67</sup> Thus, some conflicts are bound to require judicial intervention.

Regarding reasonable notice, courts emphasize that what constitutes “reasonable notice” depends on the circumstances.<sup>68</sup> As a general rule, even before the

63. *E.g.*, L.A. COUNTY SUPER. CT. R. 7.12.

64. Although one group of commentators opined that “[t]here has been very little controversy as to what constitutes ‘reasonable’ time,” *see* 8 WRIGHT ET AL., *supra* note 38, § 2111, at 69, other reasons why few published cases exist are that most scheduling disputes are very case-specific, thus judges might not be inclined to publish them, and that most such disputes probably end in signed orders as opposed to memorandum opinions.

65. *Warning Lites Co. v. S.H. Leggit*, 32 F.R.D. 431, 433 (W.D. Tex. 1963).

66. *Boston Safe Deposit & Trust Co. v. Operadora Dulcinea*, 73 F.3d 368 (9th Cir. 1995) (table), *available in* 1995 WL 756276, at \*2 (quoting *Hauser v. Farrell*, 14 F.3d 1338, 1344 (9th Cir. 1994)); *accord* *Seabrook Med. Sys., Inc. v. Baxter Healthcare Corp.*, 164 F.R.D. 232, 232 (S.D. Ohio 1995) (explaining that counsel should coordinate depositions in advance); *Rhodesman v. Robertson & Penn, Inc.*, 141 F.R.D. 514, 515 (D. Kan. 1992) (indicating that “[t]he court expects counsel to work out a mutually agreed upon schedule for the taking of depositions”); *Batson v. Neal Spelce Assoc., Inc.*, 112 F.R.D. 632, 645 (W.D. Tex. 1986) (expressing displeasure at having to intervene after counsel failed to resolve a deposition scheduling dispute); *Gero v. Cutler*, 332 A.2d 593, 594 (N.J. 1975) (lamenting that “[w]e may perhaps appropriately pause at this point to record our awareness that experienced trial lawyers work out among themselves, every day of the week, problems of scheduling and expenses and the like in connection with depositions, rather than consume valuable court time to resolve any differences. That informal approach is not only highly desirable, it is probably indispensable to the continued efficient functioning of our judicial system.”); *see also supra* note 35 (describing the *C&F Packing* case).

67. *See, e.g.*, *Bogan v. Northwestern Mut. Life Ins. Co.*, 152 F.R.D. 9, 11 (S.D.N.Y. 1993) (mentioning that “[a] party noticing a deposition initiates the proceeding and may do [so] without the consent of the others affected”).

68. *See, e.g.*, *C&F Packing Co. v. Dorskocil Cos., Inc.*, 126 F.R.D. 662, 678 (N.D. Ill. 1989) (maintaining that

1993 amendments, depositions noticed less than five days in advance, without extenuating or emergency circumstances, were typically deemed unreasonable.<sup>69</sup> One court criticized an attempt to notice a deposition on less than one day's notice when it believed counsel was trying to catch his opponent "off-guard with the deposition of a former employee . . . whose testimony was expected to be hostile [to the opponent]."<sup>70</sup> However, another court held that one day's notice was reasonable when all parties were already in Oslo, Norway taking depositions in the case.<sup>71</sup> On the other hand, one court ruled that a notice mailed nine days in advance and received six days in advance was unreasonable when the noticing attorney attempted to change a previously-entered scheduling agreement.<sup>72</sup> Therefore, before the 1993 amendments, attorneys could never be quite sure what

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"the reasonableness of notice must be determined under the individual circumstances of each case"); *Radio Corp. of Am. v. Rauland Corp.*, 21 F.R.D. 113, 115 (N.D. Ill. 1957) (explaining that "[t]he Federal rules do not specify any minimum notice of the taking of depositions, and the court must determine in any case what is reasonable under all of the circumstances").

69. *Compare* *Hart v. United States*, 772 F.2d 285 (6th Cir. 1985) (deeming three hours' oral notice of deposition unreasonable, when deposition was to be held about 40 miles away, even though the deposition had been discussed during a court proceeding and even though the testimony was needed for an impending trial); *Mims v. Central Mfrs. Mut. Ins. Co.*, 178 F.2d 56 (5th Cir. 1949) (characterizing as unreasonable three days' notice, when depositions were to be held in scattered cities); *Kupritz v. Savannah College of Art & Design*, 155 F.R.D. 84, 88 (E.D. Pa. 1994) (finding subpoena served, in the correct form, at 1:45 p.m. for a deposition scheduled to commence at 1:30 p.m. the same day, did not constitute reasonable notice under Rule 45); *C&F Packing Co. v. Doskocil Cos.*, 126 F.R.D. 662, 678, 680-81 (N.D. Ill. 1989) (emphasizing that one-and-one-half hours' oral notice of a deposition is not reasonable and entering a scheduling order requiring each party to give at least seven calendar days' written notice of future depositions); *Lloyd v. Cessna Aircraft Co.*, 430 F. Supp. 25, 26 (E.D. Tenn. 1976) (calling two actual days' notice "patently unreasonable, improper[,] and invalid," especially when there was no special need to take the depositions on such short notice and when depositions were scheduled to occur in other states), *with* *Pearl v. Keystone Consol. Indus., Inc.*, 884 F.2d 1047, 1052 (7th Cir. 1989) (allowing admission of deposition taken on six days' notice when plaintiff did not move to delay the deposition); *Jones v. United States*, 720 F. Supp. 355, 366 (S.D.N.Y. 1989) (finding eight days' notice reasonable). State courts have issued similar holdings. *See, e.g.,* *Nielsen v. Nielsen*, 141 P.2d 415 (Colo. 1943) (finding three days' notice unreasonable); *Bogan v. Kreski*, 546 So. 2d 1132, 1133 (Fla. Dist. Ct. App. 1989) (holding that a notice mailed one day before the scheduled deposition "could not constitute reasonable notice as required by the rule"); *Broward Indus. Plating v. Wiby*, 394 So. 2d 1117, 1120 (Fla. Dist. Ct. App. 1981) (finding that one day's notice of deposition was unreasonable and that the deposition could not be used at trial against the absent party); *cf. Florida Bar v. Martocci*, 699 So. 2d 1357, 1358, 1360 (Fla. 1997) (criticizing counsel for, among other things, faxing a notice to opposing counsel office on a Saturday for a deposition to occur the next Monday, and calling such conduct "patently unprofessional"); *In re Guardianship of Gallagher*, 2 Ohio B.R. 238 (Ohio Ct. App. 1981) (finding less than one week's notice unreasonable).

70. *C&F Packing Co. v. Doskocil Cos.*, 126 F.R.D. 662, 679 (N.D. Ill. 1989).

71. *See Radio Corp. of Am.*, 21 F.R.D. at 114-15; *see also* *Federal Aviation Admin. v. Landy*, 705 F.2d 624, 634-35 (2d Cir. 1983) (permitting deposition on four days' notice when opposing counsel neither contacted the attorney scheduling the deposition nor sought expedited relief from the court); *Natural Organics, Inc. v. Proteins Plus, Inc.*, 724 F. Supp. 50 (E.D.N.Y. 1989) (allowing a deposition on one day's notice when an additional witness was located while counsel were abroad taking depositions); *Ramm Indus. Co. v. Chapman Performance Prods., Inc.* 18 Fed. R. Serv. 2d 1531, 1532 (N.D. Ill. 1974) (permitting a deposition on four days' notice, when the deposition was needed in connection with a preliminary injunction hearing); *Arizona v. Superior Court of Pima County*, 416 P.2d 435, 436 (Ariz. Ct. App. 1966) (noting, in a paternity action, that "[t]wenty-four hours notice is not necessarily unreasonable").

72. *See Brick v. Dominion Mortgage & Realty Trust*, 442 F. Supp. 283, 308 (W.D.N.Y. 1977).

a court would consider “reasonable notice.” Even after amended Rule 32,<sup>73</sup> the issue is not completely resolved, as the committee notes indicate that eleven days’ notice will not always constitute reasonable notice and that less than eleven days’ notice may in some instances be reasonable.<sup>74</sup>

Courts have also explained that when an attorney receives a deposition notice and realizes that she or her client cannot appear on the scheduled date, the attorney must — if opposing counsel will not reschedule the deposition — file a motion for protective order under Federal Rule of Civil Procedure 26(c)(2).<sup>75</sup> If the notice was served less than eleven days before the scheduled deposition, then the deponent need not appear at the deposition, even if the court has not yet ruled on the motion.<sup>76</sup> Otherwise, counsel must also ensure that the court rules on the motion<sup>77</sup> — which typically requires a request for expedited consideration.

#### d. Ethical Codes

Neither the *Model Rules of Professional Conduct* nor the *Model Code of Professional Responsibility* expressly addresses deposition scheduling. The codes do, however, contain general provisions that might guide attorneys when scheduling all types of discovery.

The *Model Rules of Professional Conduct*<sup>78</sup> indicate that “[a] lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others.”<sup>79</sup> Accordingly, an attorney noticing a deposition could run afoul of this provision if she had an improper motive. The *Model Rules* also contain a “catch all” provision that indicates an attorney commits “professional misconduct” if she “engage[s] in conduct that is prejudicial to the administration of justice.”<sup>80</sup> Unfortunately, the comments do not further define what types of

73. See *supra* note 44 and accompanying text (discussing Federal Rule of Civil Procedure 32(a)(3), which permits a deponent who, having received less than 11 days’ notice of a deposition, may promptly, upon receiving such notice, file a motion for a protective order under Rule 26(c)(2) requesting that the deposition be postponed).

74. See text accompanying *supra* note 47 (explaining what was required of the deponent when given short notice before the 1993 amendment to Federal Rule of Civil Procedure Rules 32(a)).

75. See *supra* note 44 and *infra* notes 127–30 and accompanying text (discussing the criteria under Federal Rules of Civil Procedure Rule 26(c), which criteria require the movant to show “good cause” before the court will postpone the deposition).

76. See FED. R. CIV. P. 32(a)(3) (“[N]or shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.”); see also *supra* notes 44–48 and accompanying text (discussing Rule 32(a)(3)).

77. See *supra* notes 46–47 and accompanying text (discussing the procedure both before and after the 1993 amendments).

78. For a list of jurisdictions that have adopted the *Model Rules of Professional Conduct*, visit Legal Ethics.com, *EthicSites, States* (visited June 13, 1998) <<http://www.legalethics.com/states.htm>>.

79. MODEL RULES OF PROFESSIONAL CONDUCT pblm. (1996) [hereinafter MODEL RULES].

80. *Id.* Rule 8.4(d).

conduct “prejudice” the administration of justice. However, failing to cooperate in discovery and forcing an adversary to seek judicial intervention — which increases the cost of the lawsuit and exhausts precious judicial resources — should fall into this category.<sup>81</sup> Without more specific rules, however, attorneys and judges are hard pressed to seek disciplinary action against those who engage in such vexatious scheduling.

The *Model Code of Professional Responsibility*<sup>82</sup> is hardly more illuminating. Like its counterpart, the *Model Code* cautions attorneys not to “[e]ngage in conduct that is prejudicial to the administration of justice.”<sup>83</sup> Ethical Consideration (EC) 7–10 explains that “[t]he duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.”<sup>84</sup> This EC might apply if noticing a deposition on short notice and then refusing to reschedule a deposition can be considered “infliction of needless harm.” In addition, EC, 7–25 urges lawyers to abide by all applicable procedural rules.<sup>85</sup> This EC, therefore, can be used only when an attorney consciously violates some other rule. And of course, Ethical Considerations are merely aspirational.<sup>86</sup> Like civility codes, they cannot be enforced in disciplinary actions.<sup>87</sup>

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81. In *Florida Bar v. Martocci*, 699 So. 2d 1357 (Fla. 1997), an attorney noticed a deposition for a Monday by faxing written notice to his opponent’s closed office on a Saturday. *Id.* at 1358. The same attorney then used obscene and demeaning language either during or immediately after another deposition. *Id.* at 1359. The attorney was charged with violating Rules 4–8.4(c) and 4–8.4(d) of the *Florida Rules of Professional Conduct*. *Id.* at 1358. Although both the referee and the Florida Supreme Court found that the attorney was not guilty of the alleged formal ethics violations — primarily because the State Bar failed to carry its burden of proof — the court characterized the attorney’s conduct as “patently unprofessional.” See *id.* at 1360. The court then stated:

We would be naive if we did not acknowledge that the conduct involved herein occurs far too often. We should be and are embarrassed and ashamed for all bar members that such childish and demeaning conduct takes place in the justice system.

*Id.*

82. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter MODEL CODE]. For a list of jurisdictions that have adopted the *Model Code of Professional Responsibility*, visit LegalEthics.com, *Ethics Sites, States* (visited June 13, 1998) <<http://www.legalethics.com/states.htm>>.

83. MODEL CODE DR 1–102(A)(5).

84. *Id.* EC 7–10.

85. *Id.* EC 7–25. This Ethical Consideration provides in pertinent part:

Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus while a lawyer may take steps in good faith and within the framework of the law to test the validity of the rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them.

*Id.*

86. *Id.* prelim. statement (indicating that “Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive”).

87. See *Thompto v. Coborn’s Inc.*, 871 F. Supp. 1097, 1119 n.14 (N.D. Iowa 1994) (stating that “the Ethical Considerations will . . . be treated as aspirational”); *United States v. Brothers*, 856 F. Supp. 370, 377 n.15 (M.D. Tenn. 1992) (asserting that “the Bar cannot take disciplinary action against violations of ethical consider-

Somewhat more helpful — although still merely aspirational in character — is EC 7–38, which implores attorneys to act courteously toward each other and to “accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of [their] client[s].”<sup>88</sup> The relevant mandatory rule within the *Model Code* provides that an attorney “shall not” take any action “when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.”<sup>89</sup> No published cases have interpreted this section in connection with vexatious deposition scheduling, nor are such cases likely in the future, given the rule’s vague and general nature.

## 2. Analysis and Alternatives

In an Edenic world, attorneys would abide by the Golden Rule<sup>90</sup> — do unto others as you would have them do unto you — and would always cooperate in scheduling depositions. Depositions would be noticed only after opposing counsel had communicated and agreed on the date, would be held only on dates convenient for the attorneys, the parties, and the deponent, and would be held only after adequate written notice to all involved. But, thanks to the apple and the serpent,<sup>91</sup> Eden is gone forever. Therefore, most litigators, at some point during their careers, will have to deal with a situation similar to that faced by Ms. Hopkins — a deposition is scheduled with little advance notice by an opponent anxious to gain a perceived advantage.

Ms. Newman’s scheduling tactics could certainly be described as “hardball.” But did she run afoul of any procedural rules or mandatory ethics rules? She sent a written notice, so she complied with that component of Federal Rule of Civil Procedure 30(b)(1).<sup>92</sup> She did not consult opposing counsel before she selected a date and mailed the notice, but the federal rules do not require such advance coordination.<sup>93</sup> She sent the notice by regular mail five days before the scheduled

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ations”); Gary M. Hoffman & Lauren A. Degnan, *Responding to Hardball Tactics and Questionable Ethics in Litigation: Limits on Advocacy*, INSIDE LITIG., Mar. 1996, at 7, 8, available in WL, TP-ALL Database, 3 INLIT 7 (explaining that “the Bar cannot take disciplinary action against violations of ethical considerations or creeds of professionalism”).

88. MODEL CODE EC 7–38 (noting that an attorney “[s]hould follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so”); see also *id.* EC 7–37 (commenting that “[h]arassing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system”).

89. *Id.* DR 7–102(A)(2); see also *id.* DR 7–101(A)(1) (indicating that a lawyer does not violate his duty of zealous representation by “acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, . . . [or] by avoiding offensive tactics”).

90. See *Leviticus* 19:18 (commanding that “thou shalt love thy neighbor as thyself”).

91. See generally *Genesis* 3:1–24.

92. See *supra* note 35 (citing works to explain the import of Federal Rule of Civil Procedure 30(b)).

93. FED. R. CIV. P. 30(b); see also text accompanying *supra* note 35 (discussing the procedure for scheduling depositions and the meaning of “reasonable notice” in this context).

deposition. But because the federal rules do not explicitly define what constitutes “reasonable notice,” she did not technically violate their dictates in this regard.

Ms. Newman apparently sent the early notice so that she could depose Peter Wallace before others were deposed. In light of the “no priority” rule articulated in Rule 26(d), this goal was not illogical. Had she given more notice, the defense could have noticed other depositions to occur before the Wallace deposition.

Since Ms. Newman gave less than eleven days’ notice of the deposition, she did run the risk that the defense could stop the deposition, or at least render the deposition unusable at trial, merely by filing a motion for protective order.<sup>94</sup> However, the burden to halt the deposition falls on the noticed party. To take advantage of rule 32(a), the deponent, at a minimum, must file a motion for a protective order.<sup>95</sup> If the motion is not timely filed, then the deposition can proceed and be used against the noticed party. Yet, the rules do not prohibit less than eleven days’ notice; indeed, the committee notes state that less than eleven days’ notice might be reasonable in some circumstances.<sup>96</sup>

Accordingly, the actual circumstances surrounding the notice become extremely significant. If the defense can show that Ms. Newman had an improper motive when giving such short notice, then a court might find that she violated the Rule 26(g) certification provision.<sup>97</sup> Some indicia of improper motive are evident: Ms. Newman did not consult the opposing counsel, gave less than one week’s notice when the case was still in its infancy, sent the notice by regular mail, as opposed to a quicker method such as fax or hand-delivery, and refused to consider rescheduling the deposition. Since Wallace is a significant witness, a court might infer that Ms. Newman’s purpose was not simply to gain a “priority,” but was to catch the defense off guard and to prevent Ms. Hopkins from preparing properly for the deposition.<sup>98</sup> Therefore, a court might sanction Ms. Newman for her conduct on grounds that the notice was unreasonable under the circumstances.<sup>99</sup> Many judges, however, are hesitant to sanction attorneys and tend to give at least one warning, especially when the sanctions depend on ascertaining someone’s intent.<sup>100</sup>

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94. FED. R. CIV. P. 32(a)(3); *see also supra* notes 44–48 and accompanying text (discussing “reasonable notice” under the Federal Rules of Civil Procedure).

95. *See supra* note 47 (indicating that a party cannot simply fail to appear for a deposition, but must seek protection from the court); *see also infra* note 170 (identifying cases in which the court dismissed lawsuits after the plaintiff failed to appear for deposition).

96. *See* text accompanying *supra* note 48 (discussing the 11 days’ minimum advance notice provision in Rule 32(a)).

97. *See supra* notes 49–53 and accompanying text (discussing Federal Rule of Civil Procedure 26(g)(2), which requires the attorney to certify that the discovery request is not being “interposed for any improper purposes”).

98. *See supra* note 70 and accompanying text (discussing an attorney who was sanctioned for providing only one day’s notice for a deposition).

99. *See supra* notes 52–53 and accompanying text (discussing how a court may sanction an attorney who violates Federal Rule of Civil Procedure 26(g)).

100. *See, e.g.,* Keilitz et al., *supra* note 23, at 36–37 (reporting attorneys’ perception that judges are



Furthermore, although Ms. Newman arguably might have violated ethical rules directing attorneys not to engage in conduct prejudicial to the administration of justice,<sup>101</sup> given the broad nature of those rules, few disciplinary commissions would be inclined to prosecute an attorney for what many would be consider mere "bad manners."

In several jurisdictions, however, Ms. Newman's conduct definitely breached established codes of professionalism. Civility codes frequently contain provisions encouraging counsel to consult with opposing counsel before scheduling depositions and to schedule depositions on dates convenient to all counsel, the parties, and the deponent.<sup>102</sup> Ms. Newman clearly failed to do this. She consulted only with her client and mailed the notice without first attempting to schedule the deposition by mutual agreement. She then refused to reschedule the deposition, violating the provisions of many civility codes.<sup>103</sup> Unfortunately, most civility codes are merely aspirational.<sup>104</sup> They set a ceiling, not a floor; thus, they suggest standards attorneys should strive to meet, not standards attorneys must meet.<sup>105</sup> Accordingly, unless an individual attorney wants to "play nice," the civility does will do little to prevent unprofessional conduct that does not rise to the level of a legal or ethical violation.<sup>106</sup>

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unwilling to resolve discovery disputes and impose sanctions); Florrie Young Roberts, *Pre-Trial Sanctions: An Empirical Study*, 23 PAC. L.J. 1, 82 (1991) (concluding, based on a study of California state cases, that "judges may not be using their power to sanction to the full extent possible in order to prevent discovery and other pre-trial abuse"); see also *Harp v. City*, 161 F.R.D. 398, 402 (E.D. Ark. 1995) (explaining that when a judge "simply orders the offending party to produce the requested information (oftimes scolding both parties for not cooperating), the obstructive party loses nothing, but defeats spontaneity and gains attorney's fees. Courts should meet obstructive tactics with stern measures if they expect to deter such conduct."); *supra* note 21 (citing commentaries regarding courts' apparent reluctance to enforce professional and ethical rules). As Professor Charles Yablon explained:

These days . . . only the most disgusting and despicable litigation conduct tends to get sanctioned. By letting the little stuff slide, judges eventually are confronted with conduct so abusive, it requires a really big, dramatic, atomic bomb of a response . . . .

This approach to sanctions has a number of unfortunate consequences. Because only the worst abuses get sanctioned, lawyers assume (generally correctly) that they can get away with conduct that is boorish and wasteful so long as it is less repulsive than the stuff they read about in the sanctions opinions . . . .

Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618, 1641 (1996).

101. See text accompanying *supra* notes 80–81 (arguing that failing to cooperate in discovery should constitute a violation of *Model Rule* 8.4(d), which deals with "conduct that is prejudicial to the administration of justice").

102. See *supra* notes 54–55 and accompanying text (discussing how some local rules and civility codes instruct attorneys about deposition scheduling).

103. See *infra* notes 139–41 and accompanying text (discussing how some local rules and civility codes guide attorneys when facing deposition rescheduling dilemmas).

104. See *supra* note 20 and accompanying text (noting that civility codes addressing deposition conduct often lack enforcement mechanisms).

105. See Dickerson, *supra* note 7, at 303–04 (observing that "civility codes are merely aspirational and have no formal enforcement mechanism").

106. See Tripoli, *supra* note 17, at \*16 (noting that "while formalized civility standards might be well and

What then, is the defense counsel, Ms. Hopkins, to do? Her first step was the correct one: Immediately upon receiving the notice, she contacted Ms. Newman and attempted to resolve the matter informally. This is what courts expect.<sup>107</sup> This is what attorneys should do.

Since Ms. Newman refused to reschedule the deposition, Ms. Newman's next step must be to file a motion for protective order under Rule 26(c).<sup>108</sup> If she does not, and if she merely fails to appear or advises the deponent not to appear, she would violate her ethical duties of competent and diligent representation.<sup>109</sup>

She would violate these duties in at least two ways. First, the actual notice she received did not give her time to prepare adequately an important witness for deposition.<sup>110</sup> Competent, diligent attorneys prepare their clients for important events, such as depositions. Further, competent, diligent attorneys take steps to prevent their clients from being sanctioned. Here, merely failing to appear for deposition could subject Ms. Hopkins and her client to sanctions under Federal Rule of Civil Procedure 37.<sup>111</sup> Ms. Hopkins, however, can easily fulfill her ethical

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good, some litigators scoff that 'be nice' entreaties are just rubbertipped arrows. They might stick; they might not.'").

107. See *supra* notes 65–66 and accompanying text (attributing the lack of case law concerning problems with deposition rescheduling to courts' insistence that attorneys resolve scheduling disputes without judicial assistance).

108. For a discussion of this rule, see *infra* notes 127–30 and accompanying text.

109. See MODEL RULES Rule 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); *id.* Rule 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); MODEL CODE DR 6–101(A)(2) (requiring "preparation adequate in the circumstances"); *id.* DR 6–101(A)(3) (prohibiting the "neglect of a legal matter"); *id.* DR 7–101(A)(1) (providing that a lawyer "shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by the law"); *id.* EC 6–4 (stating that a lawyer should "give appropriate attention to his legal work"); see also *In re Baker*, 568 N.W.2d 647, 649 (Wis. 1997) (holding that an attorney's failure to appear at a scheduled deposition and to have client appear at a deposition violated the attorney's duty to act with reasonable diligence and promptness).

110. See Briscoe R. Smith & Edward D. Cavanaugh, *Preparing a Witness to Testify in a Commercial Case*, LITIG., Summer 1992, at 36, 36 (opining that "[o]ften a lawyer will rely on a quick meeting with a witness in the adversary's waiting room before a deposition, expecting to control damage during the deposition with a barrage of speaking objections, directions not to answer, off-the-record conferences, and other diversions. Even with the doubtful assumption that as a result the witness will survive the deposition without wounds, this approach excludes an opportunity for counseling and advocacy of a most important kind."); see also ROBERTO ARON & JONATHAN L. ROSNER, HOW TO PREPARE WITNESSES FOR TRIAL 9 (1985) (commenting that "the very essence of the advocate's ethical obligation to the client . . . is adequate preparation at each stage of the process"); Larry G. Johnson, *The 10 Deadly Deposition Sins*, A.B.A. J., Sept. 1984, at 62, 64 (listing "[l]etting your witness go in cold and blind" as a "deadly" deposition sin).

111. See FED. R. CIV. P. 37(a)(2)(A) (stating, in pertinent part, that "[i]f a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions"). As a practical matter, if the plaintiff filed a motion for Rule 37 sanctions under these circumstances, a judge would probably reprimand both counsel for their conduct and decide not to impose sanctions against the defense on grounds that their failure to appear on such notice was "substantially justified." See *id.* 37(d) ("In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failures, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.").

duties. Because Ms. Hopkins received the notice less than eleven days before the scheduled deposition date, she merely has to file the motion for protective order,<sup>112</sup> she does not have to obtain a ruling.<sup>113</sup>

What will likely occur in this case? As a preliminary matter, because Peter Wallace is a director of the defendant, and presumably will cooperate with the defense and not appear at the deposition, the deposition simply will not occur.<sup>114</sup> However, if the deponent had appeared for the noticed deposition, Rule 32(a)(3) would prohibit the plaintiff from using that deposition, provided that the defendant filed a timely motion for protective order.<sup>115</sup> When the court does address the defense motion, it will likely conclude that two days' actual notice was not reasonable since there was no urgency that the deposition be completed so quickly.<sup>116</sup>

As part of her motion for protective order, or as a separate motion, Ms. Hopkins might seek sanctions against Ms. Newman under Rule 26(g).<sup>117</sup> As explained above, Ms. Hopkins has a good faith basis to argue that Ms. Hopkins had an improper motive when noticing the deposition on such short notice.<sup>118</sup> Even if sanctions are not imposed, the motion itself may facilitate two additional purposes: it might sufficiently embarrass Ms. Newman so that she does not repeat the offensive conduct and it will serve as a record of misconduct that Ms. Hopkins can "replay" if Ms. Newman's antics continue.

A final step Ms. Hopkins should take is to request a Rule 16 conference. Federal Rule of Civil Procedure 16 authorizes the court to meet with the parties to address various matters, including scheduling discovery.<sup>119</sup> At this conference,

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112. Before filing a motion for protective order under Rule 26(c), counsel must certify that she "has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." FED R. CIV. P. 26(c). Her call to Ms. Newman should satisfy this requirement.

113. See *supra* notes 44–48 and accompanying text (discussing rule 32(a)(3) and relevant committee notes to the 1993 amendments). Had she received at least 11 days' notice, she would have to secure a ruling on the motion. See *supra* note 47 (citing cases that discuss the burdens on parties facing deposition scheduling dilemmas).

114. The noticing party could, however, show up with the court reporter and note the witness's nonappearance on the record.

115. See *supra* text accompanying note 44 (providing the language of Rule 32(a)(3)).

116. See *supra* notes 69–72 and accompanying text (discussing case law relying on individual circumstances to assess the reasonableness of notice for depositions); see also SCHWARZER ET. AL., *supra* 49, § 3[B][1], at 3–6 (explaining that "[i]n the absence of need, notice allowing insufficient time to prepare will not be deemed reasonable").

117. For a discussion of Rule 26(g), see *supra* notes 49–53 and accompanying text.

118. See *supra* text following note 98 (indicating some indicia of improper motive in providing inadequate notice for deposition).

119. See FED. R. CIV. P. 16(a) (providing that the court may call a conference to "establish[] early and continuing control so that the case will not be protracted because of lack of management" and to "discourag[e] wasteful pretrial activities"); *id.* 16(c) (listing "the control and scheduling of discovery" as an appropriate topic for a pretrial conference); see also *Mader v. Motorola Inc.*, No. 92 C 8089, 1994 U.S. Dist. LEXIS 13937, at \*6 (N.D. Ill. Sept. 30, 1994) (calling a Rule 16 scheduling conference since "it has become apparent to this court that necessary deposition in this case may never go forward unless they are ordered to be taken on particular dates").

she should address Ms. Newman's scheduling "techniques" and request an order that all future depositions be scheduled either by mutual agreement, or, if agreement cannot be reached, on not less than eleven days' written notice.<sup>120</sup> An astute judge will take this opportunity to express displeasure with Ms. Newman's tactics and to enter the requested order. Should these events occur, hopefully Ms. Newman will take the judge's rebuke to heart;<sup>121</sup> at a minimum, hopefully she will abide by the scheduling order.

Thinking on a more systemic level, similar problems could be avoided in the future if the drafters of the federal rules adopt specific, mandatory rules concerning deposition scheduling. It is well and good for bar associations and local courts to implore attorneys to act professionally. However, these admonition, without an accompanying enforcement mechanism, amount to little more than "preaching to the choir." Many attorneys will act civilly and will cooperate with opposing counsel without any prompting. Some percentage of attorneys, however, will not "play nice" unless the rules of the game require them to do so.<sup>122</sup> They scoff at civility codes and seek to take advantage of those who abide by aspirational standards. In their opinion, if there's not rule against it, it must be okay. To control these, and to validate the conduct of attorneys who routinely cooperate in scheduling, the drafters should consider amending Rule 30 as follows:<sup>123</sup>

(A) A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45.<sup>124</sup>

(B) Before issuing a deposition notice, the attorney for the noticing party shall contact all counsel of record and in good faith attempt to agree on a schedule for the proposed deposition. Once an agreement is reached, all

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120. Cf. *C&F Packing Co. v. Dorskocil Cos.*, 126 F.R.D. 662, 678, 680–81 (N.D. Ill. 1989) (entering a scheduling order — at the request of a party who had received extremely short notice of a deposition — requiring each party to give at least seven calendar days' written notice of future depositions). For additional information on 11 days' notice, see *infra* note 125.

121. Cf. Yablon, *supra* note 100, at 1619 ("I submit that the best solution for lawyer misconduct in discovery proceedings is the same one parents use when their kids act up on long car trips — tell them to 'shut up and knock it off,' preferably in a really loud voice.")

122. See Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 684 (1994) (commenting that civility codes "are premised upon a too generous view of human nature"); see also Keeling, *supra* note 23, at 38 (noting that "[hardball litigators] believe that they are paid to advance the interests of their clients and, therefore, that they would be derelict in their duties if they subordinated client interests to the vague goals of 'professionalism.'" (footnote omitted)).

123. Cf. David H. Taylor, *Rambo as Potted Plant: Local Rulemaking's Preemptive Strike Against Witness-Coaching During Depositions*, 40 VILL. L. REV. 1057, 1104 n. 246 (1995) (quoting Report of Committee on Deposition Practice, Jan. 18, 1995, at 24–25, which states, in the context of private conferences during depositions: "One purpose of rules is to let honest, conscientious lawyers know what is permissible and what is impermissible conduct in the promotion of their clients' interests. A related purpose is to control the conduct of less scrupulous lawyers, but that purpose is served only if the rule is enforceable.").

124. This subsection is currently Federal Rule of Civil Procedure 30(a)(1).

attorneys and parties should attempt in good faith to abide by any agreement reached.

(C) Should the attorneys not be able to reach an agreement, or should the noticing attorney not be able reach all counsel of record, despite a good-faith effort to do so, then written notice should be served to give counsel, the parties, and the deponent at least eleven days' notice of the deposition. Notice is served in time to give at least eleven days' advance notice will be presumptively reasonable.<sup>125</sup>

In addition, Rule 30(b)(1) should be amended to require the noticing party to include in the deposition notice a signed certificate indicating that he has coordinated, or in good faith attempted to coordinate, with all other counsel of record to schedule the deposition on a mutually convenient date.

This proposed amendment will increase the number of depositions scheduled by agreement, which will in turn decrease the number of Rule 268 motions for protective order. Thus, the amendment will promote civility and lower litigation costs. In addition, the proposed amendment provides a more concrete definition of what constitutes reasonable notice. Although reasonableness is a relative concept, and must retain some degree of flexibility, settings a presumption will help guide attorneys and help extinguish some abusive conduct. Finally, the proposed amendment touches on another significant problem — rescheduling canceled deposition.

## B. SCENARIO TWO: RESCHEDULING DEPOSITIONS

Even when attorneys cooperate in initially scheduling depositions, events frequently arise that prevent the deposition from proceeding as originally planned. Invariably, in almost every lawsuit, an attorney or witness falls ill, has another, more pressing (or seemingly more pressing) engagement that conflicts with a scheduled deposition, or decides that the originally-selected date is simply not as convenient as it was when the deposition was more of a thought than a reality. To illustrate various rescheduling dilemmas, consider the following scenario from this Article's Hypothetical, *Johnson v. Maxwell, Taylor & Robertson*, which many litigators will find all too familiar.

Ms. Newman, the plaintiff's attorney, called Ms. Hopkins, counsel for the firm, to schedule the deposition of Paul Ferguson, a member of the branch executive committee and the partner who delivered many of Ms. Johnson's annual performance reviews. The attorneys agreed to take the deposition on July 8, 1998. Two days before the deposition, Ms. Hopkins called Ms. Newman and indicated that Mr. Ferguson's deposition would have to be rescheduled because he was under

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125. This means that the noticing attorney should either have to hand-deliver the notice 11 days in advance or serve the notice by slower means more than 11 days in advance. The purpose is to give 11 days' notice, not for an attorney to be able to deposit the notice in the mail 11 days in advance.

subpoena to testify as an expert witness in another trial. Ms. Hopkins offered to fax Ms. Newman a copy of the subpoena. Ms. Newman agreed to postpone the deposition for one week. The next week, again two days before the rescheduled deposition, Ms. Hopkins called Ms. Newman and indicated that Mr. Ferguson's deposition needed to be rescheduled again because Mr. Ferguson was ill with the flu. Ms. Hopkins agreed to another postponement. The earliest available date that everyone was available was in another two weeks. A day before this new date, Ms. Hopkins again call Ms. Newman and asked for another postponement because Mr. Ferguson had an important business meeting. Losing patience, Ms. Newman agreed to what she characterized as "one final postponement." The attorneys selected a date another two weeks down the road. The day before the deposition, Ms. Hopkins sent Ms. Newman a fax indicating that Mr. Ferguson was again ill and could not attend the deposition. Ms. Newman replied, by fax, that she would postpone the deposition only if Ms. Hopkins could send a doctor's note indicating that Mr. Ferguson was too ill to give a deposition.

Though routine in many respects, rescheduling depositions can implicate serious legal, ethical, and professionalism issues. For example, the *Johnson* scenario raises at least the following questions: (1) What are valid reasons for rescheduling a deposition? (2) When should a party agree to a requested postponement? (3) What should counsel do if they cannot amicably reschedule a deposition? The analysis of these issues, and of the attorneys' conduct, again begins with a review of applicable legal authorities.

## 1. Applicable Authorities

### a. *Federal Rules of Civil Procedure*

The Federal Rules of Civil Procedure provide two mechanisms for parties to reschedule depositions. First, Rule 29 permits parties to reschedule depositions by stipulation and without leave of court.<sup>126</sup> Thus, Rule 29 supplies a quick and effective rescheduling mechanism — provided the attorneys cooperate.

Second, under Rule 26(c), a party may seek a protective order to change the time for the deposition.<sup>127</sup> To take advantage of this rule, the movant must certify

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126. See FED. R. CIV. P. 29 (stating in pertinent part that, "[u]nless otherwise directed by the court, the parties may by written stipulation (1) provide that depositions may be taken . . . at any time"); see also SCHWARZER ET AL., *supra* note 49, § 3[B][1], at 3–6 (instructing "[g]ood practice requires that the deposing party consult with all counsel and unrepresented parties and witnesses before noticing any deposition. Reasonable efforts should be made to accommodate others. If it is necessary to schedule a deposition without prior consultation and the deponent, reasonably requests for a change of the scheduled time, date, or place should be accommodated by stipulation.").

127. See FED. R. CIV. P. 26(c)(2) (requiring "that the disclosure of discovery may be had only on specified terms and conditions, including a designation of the time or place"); see also *Sears v. American Entertainment Group, Inc.*, No. 94 C 0165, 1995 WL 66411, at \*1 (N.D. Ill. Feb. 13, 1995) (reminding attorneys that "[t]he court has very broad discretion under Rule 26(c)(2) to alter the place and time of deposition").

that it has "in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action" and must show "good cause" why protection is warranted.<sup>128</sup> "Good cause" under this rule is one that will prevent the party from being subjected to "annoyance, embarrassment, oppression, or undue burden or expense."<sup>129</sup> Courts typically do not find "good cause" when a party merely shows that it would be inconvenienced by the proposed discovery.<sup>130</sup>

The mirror-image of Rule 26(C) is Rule 37, which provides a mechanism to compel a deponent's attendance at a scheduled deposition and to sanction a deponent who does not appear for a properly noticed deposition.<sup>131</sup> Specifically, Rule 37(a)(2) provides that a party may file a motion to compel when "a deponent fails to answer a question propounded. . . under Rule 30."<sup>132</sup> Further, Rule 37(d) authorizes the court to "make such orders in regard to the failure as are just,"<sup>133</sup> and to impose a wide-range of sanctions if a party-deponent fails to appear for a properly noticed deposition.<sup>134</sup>

Finally, Rule 1 of the Federal Rules of Civil Procedure, an under-utilized rule,<sup>135</sup> emphasizes that the rules "shall be construed and administered to secure

128. FED. R. CIV. P. 26(c). *See generally* 8 Wright et al., *supra* note 38 § 2036 (discussing reasons why a court will grant a protective order).

129. FED. R. CIV. P. 26(c).

130. *See, e.g.,* Isaac v. Shell Oil Co., 83 F.R.D. 428, 431 (E.D. Mich. 1979) (holding that good cause is not established "solely by showing that discovery may involve inconvenience and expense"). *See generally* 8 Wright et al., *supra* note 38 § 2036 (2d ed. 1994) (discussing what constitutes "good cause" under Rule 26(c)).

131. *See* FED. R. CIV. P. 36(a), (d) (describing the sanctions a court may impose on an attorney who fails to attend a deposition).

132. FED. R. CIV. P. 37(a)(2).

133. *Id.* 37(d). Rule 37(d) applies only to parties and to "parties' officers, directors, and managing agents." *Id.* If a non-party deponent disobeys a subpoena and fails to appear for deposition "without reasonable cause," Federal Rule of Civil Procedure Rule 45(e) provides that the court may hold the deponent in contempt of court. *See* FED. R. CIV. P. 45(e) ("Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of court from which the subpoena issued.").

134. Possible sanctions include, but are not limited to:

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

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

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

FED. R. CIV. P. 37(b)(2)(a)-(c); *see also id.* 37(d) (indicating that a court can impose sanctions listed under Rule 37(b)(2)(a)-(c) when a party or a party's officer, director, or managing agent fails to appear for a properly noticed deposition).

135. *See* Harp v. City, 161 F.R.D. 398, 401 (E.D. Ark. 1995) ("All too often nowadays discovery has become an industry unto itself, and unfortunately, the admonition in Rule 1 is forgotten.").

the just, speedy, and inexpensive determination of every action.”<sup>136</sup> Courts have cited Rule 1 in connection with discovery motions concerning depositions.<sup>137</sup> Indeed, one court, when issuing a Rule 26(C) protective order, indicated that it Ahas the power to oversee the management and scheduling of litigation to achieve [the] salutary goal” of Rule 1.<sup>138</sup> Thus, courts can and do use Rule 1 in connection with other rules to help resolve deposition scheduling disputes.

### b. Local Rules and Civility Codes

As with original scheduling concerns, local rules and civility codes provide more specific guidance for attorneys faced with rescheduling dilemmas. Many local rules and civility codes indicate that attorneys should honor previously scheduled depositions dates,<sup>139</sup> but also direct attorneys to cooperate in necessary rescheduling<sup>140</sup> and to give prompt notice if a deposition needs to be canceled.<sup>141</sup>

136. FED. R. CIV. P. 1.

137. See, e.g., *Weeks v. Samsung Heavy Indus., Ltd.*, No. 93 C 4899, 1996 WL 288773, at \*2 (N.D. Ill. May 29, 1996); *Armstrong v. Hussmann corp.*, 163 F.R.D. 299, 301 (E.D. Mo. 1995).

138. *Interdigital Tech. Corp. V. Oki Am., Inc.*, Civ. A. No. 93-2004, 1994 WL 114917, at \*1 (E.D. Pa. Mar. 31, 1994).

139. See, e.g., *Standards for Professional Conduct Within the Seventh Federal Judicial Circuit § 15* (“Lawyers’ Duties to Other Counsel”), reprinted in ILL. COMP. STAT. ANN., 7th Cir. Ct. App., App. IV (1997) and in IND. STAT. ANN., 7TH CIR. CT. APPEALS RULE 60 (1998) (“We will endeavor to accommodate previously scheduled dates for . . . depositions . . . that produce good faith calendar conflicts on the part of other counsel. If we have been given an accommodation because of a calendar conflict, we will notify those who have accommodated us as soon as the conflict has been removed.”); D. MD. DISCOVERY GUIDELINES, guideline 4(c) (“An agreed-upon date is presumptively binding. An attorney seeking to change an agreed-upon date should coordinate a new date before changing the agreed date.”); N.D. OHIO LOC. R. RULE 30.1(b)(1) (prohibiting counsel for the deponent from canceling the deposition “without stipulation of the examining counsel or order of the Court”); R.I. SUP. CT. R. B(14) (“I will endeavor to accommodate previously scheduled dates for . . . depositions. . . .”); W. VA. PROF. COND. Standard B(6) (stating that lawyers “should endeavor to accommodate previously scheduled dates for . . . depositions”).

140. See, e.g., *Standards for Professional Conduct Within the Seventh Federal Judicial Circuit § 17* (“Lawyers’ Duties to Other Counsel”), reprinted in ILL. COMP. STAT. ANN., 7th Cir. Ct. App., App. IV (1997) and in IND. STAT. ANN., 7TH CIR. CT. APPEALS RULE 60 (1998) (“We will agree to reasonable requests for extension . . . .”); M.D. ALA., GUIDELINES TO CIVIL DISCOVERY, guideline II (stating that attorneys should indicate “a willingness to be reasonable about any necessary rescheduling”); S.D. FLA. LOC. R. II(A)(1) (stating that attorneys should agree to necessary rescheduling); M.D. PA. LOC. R. 3, App. D (“A reasonable request for scheduling accommodation should never be unreasonably refused.”); W.D. TEX. LOC. R., App. M, III(6) (adopting the aspirational *Texas Lawyer’s Creed*, stating that “I will agree to reasonable requests for extensions of time . . . provided legitimate objectives of my client will not be adversely affected.”); E.D. WASH. LOC. R. 83.1(k)(2)(c) (adopting a civility code that provides: “I will agree with reasonable requests for extension. . . .”); IOWA STANDARDS FOR PROFESSIONAL CONDUCT 19 (“We will agree to reasonable requests for extensions of time . . . .”); N.M. R. CT., *A Lawyer’s Creed of Professionalism of the State Bar of New Mexico* C(4) (“I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested.”); OHIO SUPREME COURT COMMISSION ON PROFESSIONALISM, *A Lawyer’s Aspirational Ideals*, available in LEXIS, Allrul Library (stating that attorneys should “[g]rant reasonable requests for extension or scheduling changes”); W. VA. R. CT. PROF. COND. B(8) (“A lawyer should agree to reasonable requests for extensions of time . . . Provided the clients’ legitimate rights will not be materially or adversely affected.”).

141. See, e.g., *STANDARDS FOR PROFESSIONAL CONDUCT WITHIN THE SEVENTH FEDERAL JUDICIAL CIRCUIT § 16*



With regard to requests for extensions and continuances, some jurisdictions, such as the United States District Court for the Middle District of Georgia, give detailed guidance:

(a) First requests for reasonable extensions of time to respond to litigation deadlines . . . should ordinarily be consented to as a matter of courtesy unless time is of the essence. First extension should be consented to even if the lawyer requesting it has previously refused to consent to an extension.

(b) After a first extension, any additional requests for time should be dealt with by balancing the need for expedition against the deference one should ordinarily give to an opponent's schedule of professional and personal engagements, the reasonableness of the length of extension requested, the opponent's willingness to consent to reciprocal extensions, the time actually needed for the task, and whether it is likely a court would grant the extension if asked to do so.<sup>142</sup>

In addition, many courts and bar associations caution lawyers against seeking extensions or continuances merely for purposes of harassing the opponent or prolonging the litigation.<sup>143</sup> Some explain that the decision whether to agree to an

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("Lawyers' duties to Other Counsel"), reprinted in ILL. COMP. STAT. ANN., 7th Cir. Ct. App., App. IV (1997) and in IND. STAT. ANN., 7th Cir. Ct. Appeal Rule 60 (1998) ("We will notify other counsel. . . at the earliest possible time when . . . depositions . . . are to be canceled or postponed. Early notice avoids unnecessary travel and expense of counsel and may enable the court to use the previously reserved time for other matters."); S.D. CAL. LOC. R. 83.4(a)(1)(g) (directing attorneys "[w]hen possible, [to] confer with opposing counsel before . . . rescheduling depositions, . . . and notify all parties . . . as early as possible, when . . . depositions must be canceled"); W.D. TEX. LOC. R., App. M, III(5) (adopting the aspirational *Texas Lawyer's Creed*, stating: "I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are canceled."); WIS. INTERPROFESSIONAL CODE "Depositions" C(1) (informing attorneys that "[i]f it is necessary to cancel or reschedule deposition, mutual courtesy and respect requires you to notify the physician and the parties as soon as practicable. Cancellations are very inconvenient for everyone. When the physician does not have a reasonable opportunity to fill the time, it is reasonable to expect that the physician will charge for the lost time."); See generally GA. CT. R., *Aspirational Statement of Professionalism*; W. VA. PROF. COND. STANDARD B(7) (instructing lawyers to notify other counsel and the court at the "earliest possible time" when depositions or other hearings have to be canceled or postponed).

142. M.D. GA. LOC. R. B (1)(a), (b); GA. CT. R., *Aspirational Statement of Professionalism* (indicating that attorneys should "[g]rant reasonable requests for extensions or scheduling changes); accord L.A. COUNTY SUPERIOR CT. R. 7.12(a)(1), (2) (employing identical language).

143. See, e.g., STANDARDS FOR PROFESSIONAL CONDUCT WITHIN THE SEVENTH FEDERAL JUDICIAL CIRCUIT § 10 ("Lawyers' duties to Other Counsel"), reprinted in ILL. COMP. STAT. ANN., 7th Cir. Ct. App., App. IV (1997) and in IND. STAT. ANN., 7TH CIR. CT. APPEALS RULE 60 (1998) ("We will not use any form of discovery or discovery scheduling as a means of harassment."); id. § 13 ("We will request an extension of time solely for the purpose of unjustified delay or to obtain a tactical advantage."); M.D. GA. LOC. R. B(1)(d) ("A lawyer should not seek extensions or continuances for the purpose of harassment or prolonging litigation."); E.D. WASH. LOC. R. 83.1(k)(2)(e) ("I will not ask colleagues for the rescheduling of . . . court proceedings unless a legitimate need exists; nor will I unreasonably withhold consent for scheduling accommodations."); N.M.R. CT. C(5) ("I will refrain from utilizing litigation, delaying tactics, or any other course of conduct to harass the opposing party."); W. VA. PROF. COND. Standard B(2) ("A lawyer should not use any form of discovery or discovery scheduling as a means of harassment or to increase litigation expenses."); id. B(5) ("Requests for an extension of time should not be made solely for the purpose of unjustified delay or to obtain a tactical advantage."); L.A.

extension belongs to the attorney, not the client.<sup>144</sup> Other local provisions insist that attorneys act honestly and in good faith.<sup>145</sup> Finally, some explicitly indicate that a lawyer should “be truthful about his or her own schedule.”<sup>146</sup>

### c. Case Law

Deponents and their attorneys have advanced a wide range of excuses to reschedule depositions. As one might imagine, courts are more receptive to some excuses than to others. For example, courts reject excuses when they perceive the proposed delay in for an improper purpose, such as to restrict an opponent’s access to evidence.

In *Motorola, Inc. v. Tener*,<sup>147</sup> for example, a federal district court sanctioned the deponent’s attorney when he canceled a deposition because his client had filed for bankruptcy.<sup>148</sup> However, when the attorney canceled the deposition, he knew that the bankruptcy filing had not been perfected, and that the bankruptcy court had dismissed his client’s petition.<sup>149</sup> The court characterized the attorney’s conduct as “an abuse of the legal system” and “an attempt to hinder and delay schedule depositions,” and imposed a \$3000 sanction.<sup>150</sup>

More recently, a court rejected another attorney’s efforts to avoid the plaintiff’s deposition. As part of the *In re Orthopedic Bone Screw Product Liability Litigation*<sup>151</sup> multi-district litigation case, one plaintiff’s attorney requested that his client’s deposition be rescheduled to accommodate other trials and depositions he needed to attend.<sup>152</sup> The deposition was then noticed for a date after the discovery deadline.<sup>153</sup> Plaintiff’s counsel later objected to the deposition on grounds that it was being taken after the discovery deadline.<sup>154</sup> The court permitted the deposition to proceed, since “[t]he record plainly shows the

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COUNTY SUPERIOR CT. R. 7.12(e)(4) (“Counsel should not attempt to delay a deposition for dilatory purposes but only if necessary to meet real scheduling problems.”).

144. See, e.g., M.D. GA. LOC. R., *Standards of Conduct*, Rule B(1)(c) (“A lawyer should inform clients that the decision to whether to consent to extensions of time belongs to the lawyer and not to the client.”).

145. See, e.g., *id.* Rule A(6); GA. CT. R., *Aspirational Statement of Professionalism* (indicating that lawyers should “[a]ct with complete honesty”); Tenn. (Davidson County) Loc. R. 5.04(f)(9), available in LEXIS, Allrul Library (“A lawyers should never intentionally mislead or deceive an adversary and should honor promises or commitments made.”).

146. M.D. GA. LOC. R., *Standards of Conduct*, rule A(3) (“Accordingly, a lawyer should respect the schedule of opposing lawyers and be truthful about his or her own schedule.”)

147. No. 92-5669, 1993 U.S. Dist. LEXIS 19683, at \*1 (E.D. Pa. Mar. 30, 1994).

148. *Id.* At \*1.

149. *Id.*

150. *Id.* at \*\*1,2.

151. Decision and Recommendation No. 31 of Special Discovery Master (As to Lori Lynch Deposition), MDL Docket No. 1014 (E.D. Pa. July 24, 1997) (copy on file with Author).

152. See *id.* Slip op. at 1 (“Plaintiff’s counsel, in the form of a letter dated June 18, 1997, requested that this deposition be postponed until August because of his upcoming trials and previously scheduled depositions.”).

153. *Id.* (“[P]laintiff’s counsel objects to the conduct of the deposition after the discovery deadline.”).

154. *Id.*

deposition was timely noticed and scheduled, that it was postponed at the request of plaintiff's counsel."<sup>155</sup>

Courts recognize, however, that not every deposition can proceed as originally scheduled. Therefore, when an attorney can provide a legitimate excuse for canceling a deposition, sanctions will not be imposed against the canceling attorney. Indeed, if the excuse is good enough, and the other attorney will not cooperate in rescheduling, that attorney may be sanctioned. *Williams v. General Motors Corp.*<sup>156</sup> illustrates this point. Counsel from Atlanta were in Albany, Georgia to take several depositions.<sup>157</sup> The night before the first deposition, plaintiff's counsel received an emergency phone call that his father was gravely ill and that he should immediately travel to Charlotte, North Carolina.<sup>158</sup> He left that evening and, first thing the next morning, contacted defense counsel, who promptly returned to Atlanta.<sup>159</sup> The depositions were later rescheduled and taken by agreement.<sup>160</sup> Defense counsel then sought sanctions against plaintiff's counsel, arguing that, had he known that the depositions would not have been taken as originally scheduled, he would have returned to Atlanta earlier and would not have prepared for the canceled depositions.<sup>161</sup> The defense motion angered the court. Noting that the only reason sanctions were sought was because the client so demanded, the court emphasized, "Life is uncertain and lawyers have to be as ready as other ordinary citizens to cope with emergencies without immediately seeking someone to blame."<sup>162</sup> The court denied the motion and then, *sua sponte*, sanctioned defense counsel for filing a frivolous sanctions motion.<sup>163</sup>

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155. *Id.*

156. 158 F.R.D. 510 (M.D. Ga. 1993).

157. *Id.* at 511.

158. *Id.*

159. *Id.* (indicating that the plaintiff's counsel instructed his paralegal to explain the reasons for his departure to defendant's counsel first thing the next morning).

160. *Id.* (noting that the plaintiff's counsel stayed with this father for a few days and then returned to Georgia and that the plaintiff's father died of terminal cancer less than three month's later).

161. *Id.*

162. *Id.* The court continued:

The law has reached a sad state when one lawyer will take advantage of the personal crisis of his brother lawyer merely because his client tells him to do it . . . For years we have heard the charges that the practice of law is fast becoming a business and that those intangibles that set it apart as a learned profession are slowly ebbing away. This motion is evidence that those charges have some basis in fact. Traditionally, at least in smaller towns and cities of this state the reaction of a lawyer to his opponent's personal crisis would be one of concern, but here, the reaction was solely one of greed — who will pay me for my lost time? Sanctions are not appropriate for a situation where a lawyer is called to the bedside of his ill father and this court will not impose them.

*Id.* at 511–12.

163. *See id.* At 512 (admonishing that "[i]f all courtesy, goodwill, and decency should finally be bled out of the practice of law it will be a sad and bitter calling that remains; I cannot imagine a more unpleasant way to earn a living than to be a lawyer in a profession devoid of any semblance of kindness, courtesy[,] or humanity.").

On a similar note, courts typically will defer a deposition when the deponent is ill.<sup>164</sup> However, to obtain protection in this situation, the deponent must furnish a doctor's certificate that explains the illness, states that the deponent is unable to testify, and provides a timetable within which the deponent should be able to appear.<sup>165</sup> Saying "I'm sick" probably is not enough.

On the other hand, business trips and other "routine" conflicts are frequently rejected as excuses for delaying a deposition.<sup>166</sup> Yet, an attorney's service in the state legislature can provide the basis for delaying depositions, provided that the attorney requesting the delay make a good-faith effort to negotiate a discovery schedule with opposing counsel.<sup>167</sup> Moreover, when a party fails to attend a deposition,<sup>168</sup> or to reschedule a deposition with adequate notice, courts are apt to

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164. See, e.g., *Motsinger v. Flynt*, 119 F.R.D. 373, 378 (M.D.N.C. 1988) (continuing a deposition when the deponent submitted a short doctor's note indicating that the deponent suffered from a congestive heart condition and that the deposition should be delayed about six weeks); *Walsh v. Pullman Co.*, 10 F.R.D. 77, 79 (S.D.N.Y. 1948) (deferring witness's deposition when her doctor provided a certificate indicating that the witness was suffering from a severe form of influenza and would need six to eight weeks to recover).

165. In *Motsinger*, the court explained:

A doctor's certificate setting out plaintiff's illness and the basis for requesting exemption from a deposition will often justify a short stay in the taking of the deposition. The request for an extended stay of a deposition requires more than a conclusory statement by a physician. For such requests, the plaintiff will have to come forward with detailed information supporting the opinion and, if necessary, be willing to submit his physician for examination by the Court or by defendant on behalf of the court.

119 F.R.D. at 378 (citing *Medlin v. Andrew*, 113 F.R.D. 650 (M.d.N.C. 1987); *accord Woodson v. Surgitek, Inc.*, 57 F.3d 1406, 1410 (5th Cir. 1995) (recounting that the U.S. Magistrate Judge would not excuse the deponent's nonappearance unless his treating physician would confirm the severity of his illness by affidavit). *But cf.* *Miles v. Sapt*, 139 F.3d 912 (10th Cir. 1998), *available in* 1998 WL 45494; *Gocolay v. New Mexico Fed. Sav. & Loan Ass'n*, 968 F.2d 1017, 1021 (10th Cir. 1992) (both reversing lower courts' dismissals of lawsuits based on failure to comply with discovery requests on grounds that the medical evidence, while not as complete as it could have been, suggested that the parties did not fabricate health problems to avoid the deposition).

166. See, e.g., *Ehrenhaus v. Reynolds*, 965 F.2d 916, 919 (10th Cir. 1992) (reflecting that the lower court refused to issue a protective order to delay a deposition for the plaintiff to attend a business meeting "to save his business from bankruptcy"); *Halperin v. Berlandi*, 114 F.R.D. 8, 1 (D. Mass. 1986) (refusing to delay a deposition when "the kinds of scheduling problems [claimed] . . . are part and parcel of any litigation" and when deponent's counsel failed to notify opposing counsel of the conflict until two days before the deposition); *Geor v. Cutler*, 332 A.2d 593, 595 (N.J. 1975) (indicating that a doctor's schedule as a treating physician in many cases should not have been used to prevent the plaintiff from depositing the doctor). *But cf.* *Thompson v. Ziebarth*, 334 N.W.2d 192, 194-95 (N.D. 1983) (reversing lower court's dismissal of lawsuit when the deponent failed to appear for deposition after notice of the rescheduled deposition was sent to the deponent's attorney while the attorney was on vacation and concluding that the deponent's failure to appear was not "the result of deliberate abuse of or flagrant bad faith disregard for the rules of discovery which would warrant a dismissal").

167. See, e.g., *Rhodeman v. Robertson & Penn, Inc.*, 141 F.R.D. 514, 515 (D. Kan. 1992) (finding that good cause was shown to quash depositions when plaintiff's counsel made a good faith effort to schedule depositions and defendant's counsel refused to make any accommodation).

168. See, e.g., *Copper State Bank v. Saggio*, 679 P.2d 84, 87 (ariz. Ct. App. 1983) (holding that the trial court did not abuse its discretion by entering a default judgment against the defendants, who received notice of the deposition by mail four days in advance, who made no effort to reschedule the deposition, and whose only excuse for not appearing was that the deposition was scheduled on election day); *Robert Billet Promotions, Inc. v. IMI Cornelius, Inc.*, No. CIV A.95, 1995 WL 672385 (E.D. Pa. Nov. 8, 1995).

In *Robert Billet Productions, Inc. v. IMI Cornelius, Inc.*, plaintiff's counsel, in July, noticed the defendants'

impose sanctions.<sup>169</sup> These sanctions may be severe and include dismissal of the lawsuit or entry of a default judgment.<sup>170</sup>

#### d. *Ethical Codes*

The ethical codes do not mention deposition rescheduling problems. This omission is not surprising, given the broad nature and general language of the codes. However, rescheduling problems can raise ethical concerns.

For example, some attorneys might attempt to reschedule depositions to delay the proceeding or restrict an opponent's access to a witness, and thus, discoverable information. Such a motive would trigger *Model Rule 3.4* or *Model Code DR-109*. *Model Rule 3.4* states in pertinent part that "[a] lawyer shall not . . . (a) unlawfully obstruct another party's access to evidence . . . [or] (d) . . . fail to make reasonably diligent effort to comply with a legally proper discovery request."<sup>171</sup> The *Model Code* counterpart prohibits lawyers from suppressing evidence that they have a duty to reveal and from advising or causing a person to make himself unavailable as a witness.<sup>172</sup>

Moreover, an attorney may violate his duties of diligence<sup>173</sup> and competence<sup>174</sup> to the client if he mishandles a rescheduling situation. For instance, if the attorney's client fails to appear at a deposition because of a scheduling dispute, and the attorney did not take proper steps to secure a protective order, the court may sanction the attorney, the client, or both.<sup>175</sup> Sanctions can include striking

deposition for September 6 and 7. *Id.* at \*1. Defendants' counsel requested that the depositions be rescheduled due to scheduling conflicts, including counsel's vacation. *Id.* Defense counsel then purportedly provided alternative dates, which plaintiff's counsel claim they never received. *Id.* However, plaintiff's counsel then sent a letter stating they would reschedule the depositions once they received alternate dates. *Id.* The letter also indicated they had twice attempted to reach defense counsel by phone, without any success. *Id.* The letter concluded that, if defense counsel did not respond, plaintiffs would proceed with the depositions on September 6 and 7. *Id.* Defense counsel did not respond to the letter; they called plaintiff's counsel one hour before the depositions were to begin to indicate they would not attend. *Id.* Plaintiff's counsel then moved to compel the depositions and for sanctions. *Id.* The court granted these motions, construing defendants' conduct "as a bad-faith dilatory tactic" and ordering the depositions to occur within 10 days. *Id.* \*2, \*3.

169. *See, e.g., Ogletree v. Keebler Co.*, 78 F.R.D. 661 662 (N.D. Ga. 1978) (sanctioning client for canceling a deposition three times, twice within two hours of the designated commencement).

170. *See, e.g., Soroori v. City of Berkeley*, 133 F.3d 929 (9th Cir. 1997) (dismissal); *Stars' Desert Inn Hotel & Country Club, Inc. v. Hwang*, 105 F.3d 521 (9th Cir. 1997) (default); *Allen v. Stuart-Ironsides, Inv.*, 70 F.3d 1274 (7th Cir. 1995) (dismissal); *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992) (dismissal); *Cole v. BJ's Wholesale Club, No. Civ A 97-7186*, 1998 WL 195638, at \*2 (E.D. Pa. Apr. 1, 1998) (dismissal).

171. *Model Rules Rule 3.4(a), (d); see also id.* cmt. 1 (indicating that "[f]air competition in the adversary system is secured by prohibiting against . . . obstructive tactics in discovery procedure").

172. *Model Code DR 7-109(A), (B); accord id.* EC 7-27.

173. *Model Rules rule 1.3* ("A lawyer shall act with reasonable diligence and promptness in representing a client."); *Model Code DR 6-101(A)* (requiring that a lawyer not "[n]eglect a legal matter entrusted to him"); *id.* Canon 7 (requiring a lawyer to "represent a client zealously within the bounds of the law").

174. *Model Rules Rule 1.1* ("A lawyer shall provide competent representation to a client."); *Model Code DR 6-101(A)* (indicating that a lawyer should handle only matters in which he is competent).

175. *See supra* notes 169-70 and accompanying text (discussing a court's willingness to sanction).

the client's pleadings and dismissing the lawsuit.<sup>176</sup> In addition, at least one state court disciplined an attorney under the "diligence" rule for failing to secure his client's attendance at a rescheduled deposition.<sup>177</sup>

## 2. Analysis and Alternatives

As an initial matter, counsel did schedule the Ferguson deposition by agreement, which, in and of itself, is an improvement over how the Wallace deposition was scheduled.<sup>178</sup> However, the scheduled deposition did not commence when originally designated. First, Mr. Ferguson needed to delay the deposition because he was under subpoena to testify as an expert witness in another trial. Mr. Ferguson could not attend the rescheduled deposition because he had the flu. The deposition was again postponed when Mr. Ferguson needed to attend "an important business meeting." Mr. Ferguson then sought to reschedule a fourth time, claiming he was too ill to proceed. Except for the last situation, plaintiff's counsel, Ms. Newman, agreed to reschedule the deposition. The first questions to explore, then, are whether she should have agreed to the delays and what would have happened had she not.

Many courts expect counsel to grant at least one delay as a matter of professional courtesy, assuming that time is not of the essence.<sup>179</sup> The first delay resulted from Mr. Ferguson's expert testimony subpoena. Ms. Newman acted correctly in rescheduling this deposition date. Not only was it the courteous thing to do, but a court probably would have granted a defense motion for protective order had it been filed, as most judges would probably consider missing a deposition to comply with a court order in another case "good cause" under rule 26.<sup>180</sup>

The next delay resulted from Mr. Ferguson's illness. Some local rules and codes indicate that

[a]fter a first extension, any additional requests for time should be dealt with by balancing the need for expedition against the deference one should ordinarily give to an opponent's schedule of professional and personal engagements, the reasonableness of the length of extension requested, the opponent's willingness

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176. See *supra* note 170 and accompanying text (discussing the severity of court-imposed sanction).

177. See *In re Baker*, 568 N.W.2d 647, 649 (Wis. 1997) (holding that an attorney's failure to appear at a scheduled deposition and to have client appear at a deposition violated the attorney's duty to act with reasonable diligence and promptness).

178. See *supra* Part III(A) (discussing the Wallace deposition).

179. See *supra* note 142 and accompanying text (outlining a local rule from the Middle District of Georgia that provides specific rescheduling guidance).

180. The one, somewhat bothersome fact is that the defense gave the plaintiff only two days' notice that the deposition had to be rescheduled. Although Mr. Ferguson might not have received his subpoena until then, or may not have known the exact date on which his testimony was needed, as an expert witness, he probably had some sense of this conflicting obligation and might have been able to give more notice of the conflict.

to consent to reciprocal extensions, the time actually needed for the task, and whether it is likely a court would grant the extension if asked to do so.<sup>181</sup>

Again, Ms. Newman probably acted correctly by rescheduling the deposition due to the deponent's illness. If the matter had been presented to the court, the court probably would have granted protection because an illness is typically outside of the deponent's control.<sup>182</sup> One condition plaintiff's counsel might have placed on rescheduling was to request a doctor's certificate verifying Mr. Ferguson's illness. Such a request would not be unreasonable, as the defendant would have to provide the same information in support of a motion for protective order.<sup>183</sup>

The third postponement was triggered by "an important business meeting" that Mr. Ferguson needed to attend. Although Ms. Newman also honored this request, she probably did not need to. This was the third time that the deposition needed to be postponed due to the witness's schedule. Moreover, courts typically do not consider business meetings — no matter how important — "good cause" under Rule 26 for delaying a deposition.<sup>184</sup> Also, by allowing the defense to again delay an important deposition, Ms. Newman may not be guarding her client's interest adequately.<sup>185</sup>

The final rescheduling problem involved Mr. Ferguson indicating, after the deposition had already been rescheduled three times, that he was too ill to proceed. Although the scenario does not indicate how Ms. Newman chose to handle this situation, she had at least two options from which to choose: agree to another extension or file a motion to compel, and possibly for sanctions, against the defense. The first step Ms. Newman should take when deciding how to proceed is to request a signed doctor's certification or affidavit that explains the illness, states that the illness prevents Mr. Ferguson from appearing at the deposition, and indicates an approximate date on which Mr. Ferguson would be able to appear.<sup>186</sup> Ms. Hopkins was willing to send evidence of the trial subpoena when the deposition was canceled the first time. Hesitation now might signal that Mr. Ferguson is not as ill as he claims and is merely trying to avoid being deposed. If the defense provides the requested medical information, and that information supports Mr. Ferguson's contention, then Ms. Newman should

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181. M.D. Ga. Loc. R., Standards of Conduct B(1).

182. See *supra* note 164 and accompanying text (indicating a court's willingness to defer a deposition when the deponent is ill).

183. See *supra* notes 165 and accompanying text (outlining the requirements for a deferred deposition due to illness).

184. See *supra* note 166 (noting a court's unwillingness to defer depositions for business-related reasons).

185. See *supra* notes 173–74 and accompanying text (discussing an attorney's duty to handle rescheduling matters properly).

186. See *supra* note 165 and accompanying text (outlining the requirements for a deferred deposition due to illness).

probably reschedule the deposition one more time — primarily because a court would probably grant protection when an illness is verified.<sup>187</sup>

However, if the defense does not provide the requested medical information, or if the requested information is incomplete, then Ms. Newman should file a Rule 37 motion to compel.<sup>188</sup> Mr. Ferguson is an important witness, and the plaintiff is entitled to his testimony. Ms. Newman cooperated with opposing counsel in scheduling the deposition and in rescheduling the deposition three different times. Ms. Newman's good-faith efforts to accommodate Mr. Ferguson's schedule, coupled with the number of delays, and the pattern of relatively short notice given before each cancellation, gives the impression that the defense is stalling. Thus, a court would likely order Mr. Ferguson to appear for deposition without further delay.<sup>189</sup>

Even if Ms. Newman agrees to this extension and again reschedules the deposition, she might consider seeking a motion from the court that orders the Ferguson deposition to occur on a date certain. With such an order, she should be able to avoid having to contend with yet another cancellation.

Finally, one practical matter Ms. Newman should consider is her own credibility — both with the other side and with her own client. When Ms. Newman agreed to cancel the deposition to accommodate Mr. Ferguson's business meeting, she told opposing counsel that this the "final postponement." Ms. Newman, in effect, issued an ultimatum. Therefore, unless Ferguson can prove that he is too ill to proceed, she must proceed with the deposition or risk losing credibility with her client and enduring the possibly worse abuse from the opponent.<sup>190</sup>

Ms. Hopkins' conduct also merits consideration. Although defense counsel appears to be a mere conduit of information concerning Mr. Ferguson, Ms. Hopkins, as an attorney, still has an obligation to act legally, ethically, and professionally. When requesting that a deposition be rescheduled, Ms. Hopkins has a duty to do more than simply relate her client's desires to the other side. When a client initiates the cancellation, the attorney should probe the validity of the excuse. The attorney should think of what she would have to do to obtain a Rule 26 protective order. She should then request that information from the client. If the information does not rise to the level of "good cause,"<sup>191</sup> then the attorney must explain to the client the purpose and importance of depositions and the consequences of failing to appear. If the attorney does not take these steps,

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187. See *supra* notes 164–65 and accompanying text (indicating the court's willingness to defer a deposition due to deponent's illness, and outlining the requirements that must be satisfied).

188. See *supra* notes 131–34 and accompanying text (discussing the court's ability to compel a deponent's attendance at a scheduled deposition through a wide range of sanctions).

189. See *supra* notes 147–50 and accompanying text (providing an example of a court-imposed sanction for canceling a scheduled deposition in a manner that abuses the legal system).

190. See Imwinkelreid & Blumoff, *supra* note 35, § 5:41 (discussing an attorney's options when opposing counsel has instructed the deponent to refuse to answer a question).

191. For a discussion of "good cause" under rule 26(c), see text accompanying *supra* notes 128–30.



then she violates her duty of diligence and competence, violates the spirit, if not the letter, of the Federal Rules of Civil Procedure, and risks being sanctioned. In short, the attorney, not the client, controls the course of discovery; the attorney cannot abdicate that duty and expect to avoid the consequences.

One way to curb abuses associated with canceling and rescheduling depositions is to add a clear provision to the federal rules requiring attorneys to cooperate when rescheduling is necessary. Such a provision, which could be added to Federal rule of civil Procedure 26, should track the rule used in the United States District Court for the Middle District of Georgia and a few other jurisdictions:<sup>192</sup>

(a) Attorneys ordinarily should consent to first requests for reasonable extensions of time to respond to litigation deadlines, unless time is of the essence, the extension would fall outside the discovery deadline, or the court orders otherwise. A first extension should be consented to even if the lawyer requesting it has previously refused to consent to an extension.

(b) After a first extension, when considering any additional requests for extension, counsel should balance the need for expedition against the deference one should ordinarily give to an opponent's schedule of professional and personal engagements, the reasonableness of the length of extension requested, the opponent's willingness to consent to reciprocal extensions, the time actually needed for the task, and whether it is likely a court would grant the extension if asked to do so.

Although this rule is not a panacea for all rescheduling ills, it provides a good start. It emphasizes that most first requests for extension should be granted, and gives standards that will allow attorneys to better analyze whether subsequent extensions should be granted. Further, it leaves open the option of seeking court intervention through either Rule 268 or Rule 37.

### C. SCENARIO THREE: "APEX" DEPOSITIONS

Not all depositions scheduling disputes concern timing issues. Instead, some involve the deponent's identity. These disputes frequently concern the deposition, sometimes known as an "apex" deposition, of one party's top officer or of a high government official.<sup>193</sup> As with the following scenario from *Johnson*, the deponent's counsel typically claims that the noticed official lacks pertinent information, claims that the deposition was noticed merely to harass, and, as an alternative, often requests that other, less intrusive discovery occur before the official is deposed.

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192. See *supra* note 142 and accompanying text (outlining a local rule from the Middle District of Georgia that provides specific rescheduling guidance).

193. *Monsanto co. v. May*, 889 S.W.2d 274, 274 (Tex. 1994) (referring to depositions of top corporate officials as "apex" depositions).

Ms. Newman, plaintiff's counsel, noticed the deposition of Gregory Foxworth, CEO of Maxwell, Taylor & Robertson's national headquarters in New York City. Upon receiving the notice, Ms. Hopkins, defendant's counsel, called Ms. Newman and asked her to withdraw the notice. Ms. Newman explained that Mr. Foxworth did not really know anything about Ms. Johnson's situation and that what relevant knowledge Mr. Foxworth did have about the case was duplicative of knowledge possessed by lower-level employees. Ms. Newman refused to withdraw the deposition notice and Ms. Hopkins filed a motion for protective order, alleging that the plaintiff noticed the deposition merely to harass the defendant.

In this situation, the court must balance the official's right to be free from harassment against the other party's right to discover relevant information. Consequently, the critical questions are: (1) whether the official has personal knowledge about the subject-matter of the case, (2) whether less intrusive or alternative discovery will yield the same information, (3) whether the official's knowledge is merely duplicative of that possessed by others, and (4) whether the noticing party has an improper motive in attempting to depose of the top official.<sup>194</sup>

## 1. Applicable Authorities

### a. *Federal Rules of Civil Procedure*

Rule 30(a)(1) states that "[a] party may take the testimony of 'any person.'"<sup>195</sup> Within the Federal Rules of Civil Procedure, this broad rule is limited by the provisions of Rule 26.<sup>196</sup>

Federal Rule of Civil Procedure 26(b)(1) defines the scope of permissible discovery and provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."<sup>197</sup> The key words in this rule are "privileged" and "relevant."<sup>198</sup> For purposes of this discussion, privilege is not at issue, but relevancy is.

At trial, relevant information is that evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action

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194. Charles F. Preuss & Erika C. Collins, *How to Avoid, Control or Limit Depositions of Top Executives*, 63 Def. Counsel J. 213 (1996) (identifying the factors to be considered when determining whether there is "good cause" to proceed with a deposition).

195. FED. R. CIV. P. 30(a)(1).

196. See *id.* Rule 26(b), (c) (discussing the scope and limits of discovery and protective orders). Rule 30(a)(2) requires leave of court if a proposed deposition would result in more than ten depositions or if the person to be examined already has been deposed in the case. *Id.* 30(a)(2)(A), (B). In addition, discovery requests must comply with Rule 26(g), which is discussed at *supra* notes 149-53 and accompanying text.

197. FED. R. CIV. P. 26(b)(1).

198. Monroe Inker, *Abusive Discovery Tactics in Depositions*, 26 FAM. L.Q. 27, 29 (1992).

more probable or less probable than it would be without the evidence.”<sup>199</sup> Relevance is the discovery context, however, is very broad.<sup>200</sup> Under the federal rules, “relevance” does not mean that the information will be admissible at trial; instead, the information need only appear “reasonably calculated to lead to the discovery of admissible evidence.”<sup>201</sup> Further, by linking relevancy to the “subject matter” of the case,<sup>202</sup> the rule does not restrict inquiry to the issues alleged in the pleadings.<sup>203</sup> As one treatise explains, the breadth of discovery relevance is reflected by courts ruling that discovery should be permitted on matters that “ ‘might conceivably have a bearing’ ” on the subject matter.<sup>204</sup>

Rule 26(b)(2) further limits the general scope of discovery articulated in Rule 26(b)(1). Among other things, Rule 26(b)(2) permits a court to curb discovery if the information sought is “unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive,”<sup>205</sup> or if “the proposed discovery outweighs its likely benefit.”<sup>206</sup>

If a party believes that rule 26(b)(2) limit applies, it should move for a

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199. Fed. R. Evid. 401. However, “Rule 401 is silent as to what factors the court must consider in determining whether an item of evidence is relevant. Thus, the determination of relevance is not automatic or mechanical.” 2 Weinstein’s Federal Evidence § 401.04 (Joseph M. McLaughlin ed., 2d ed. 1997).

200. See, e.g., *Liew v. Breen*, 640 F.2d 1046, 1049 (9th Cir. 1981) (“For discovery purposes ‘relevancy’ is a broad term.”); *Liz Claiborne, Inc. v. Mademoiselle Knitwear, Inc.*, No. 96 Civ. 2064 (RWS), 1997 U.S. Dist. LEXIS 1272, at \*15 n.4 (S.D.N.Y. Feb. 7, 1997) (indicating that the standard for discoverability of information under the Federal rules of Civil Procedure is lower than the standard for admissibility of evidence under the Federal Rules of Evidence); *Schaap v. Executive Indus.*, 130 F.R.D. 384, 386 (N.D. Ill. 1990) (“The Federal Rules of Civil Procedure only provide for the discovery of relevant material.”); see also *Eggleston v. Chicago Journeymen Plumbers’ Local Union*, 657 F.2d 890, 903 (7th Cir. 1981) (indicating that “[a]dmissibility at trial is not the test”); *Cox v. E.I. Dupont de Nemours & Co.*, 38 F.R.D. 396, 398 (D.S.C. 1965) (noting that “[f]ortunately, in the search for the ultimate, TRUTH, the Federal Courts, blessed with the rules of discovery, are not shackled with strict interpretation of relevancy”). See generally 8 Wright et al., *supra* note 38, § 2008.

201. Fed. R. Civ. P. 26(b)(1); see, e.g., *Chubb Integrated Sys. v. National Bank*, 103 F.R.D. 52, 59 (D.D.C. 1984) (“Admissibility at trial is not the yardstick of permissible discovery.”).

202. See text accompanying *supra* note 197 (discussing Federal Rule 26(b)(1)). In June 1998, the National Judicial Conference’s Standing Committee on Rules of Practice and Procedure approved for publication and comment an amendment of Rule 26(b)(1) that would limit the scope of relevant discovery to claims and defenses asserted in the case. See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, \_\_\_ F.R.D. \_\_\_ (1998) (draft copy on file with Author).

203. See FRANCIS H. HARE, JR. ET AL., FULL DISCLOSURE: COMBATING STONEWALLING AND OTHER DISCOVERY ABUSES 7 (1995) (citing *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1187 (D.S.C. 1974); *United States v. IBM Corp.*, 66 F.R.D. 180, 182 (S.D.N.Y. 1974); *La Chemise Lacoste v. Alligator Co.*, 60 F.R.D. 164, 170–71 (D. Del. 1973); *Triangle Mfg. v. Paramount Bag Mfg.*, 35 F.R.D. 540, 542 (E.D.N.Y. 1964)). Relevant subject matter includes affirmative defenses as well as claims. See *id.* (citing Fed. R. Civ. P. 26(b)(1)).

204. See Hare et al., *supra* note 203, at 9 (footnote omitted, quoting *United Nuclear Corp. v. Gen. Atomic Co.*, 629 F.2d 231, 250 (N.M. 1980)); see also *Rolscreen Co. v. Pella Prod. Of St. Louis, Inc.*, 145 F.R.D. 92, 94 (indicating that “[i]t is not too strong to say that a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action” (quoting 8 Wright et al., *supra* note 38, § 2008)).

205. Fed. R. Civ. P. 26(b)(2)(i).

206. *Id.* Rule 26(b)(2)(iii). In weighing the benefit and burden, the court considers “the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.” *Id.*

protective order under Rule 26(c).<sup>207</sup> This rule authorizes a court to order that “discovery not be had”<sup>208</sup> or to limit the proposed discovery in various ways, including “that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery,”<sup>209</sup> and “that certain matters not be inquired into, or that the scope of the . . . discovery be limited to certain matters.”<sup>210</sup>

Therefore, if counsel for the noticed official believes that the deposition should not proceed, she will have to satisfy the standards of Rule 26. However, if such standards are met, counsel might be able to prevent the deposition, limit the scope of the deposition, or require that other discovery be taken before a decision is made whether the official must testify.<sup>211</sup>

### b. *Local Rules and Civility Codes*

Local rules and civility codes do not cover the issue of who may be deposed in the same detail that they address other scheduling conflicts. Instead, the codes and rules that touch on this issue state merely that counsel should not use any discovery device as a means of harassment<sup>212</sup> and should take depositions only when necessary to ascertain facts and perpetuate testimony.<sup>213</sup> Consequently, the courts have had to address the appropriateness of apex depositions on a case-by-case basis.

### c. *Case Law*

When a top corporate executive or government official is noticed for deposition, that person’s counsel frequently seeks to prohibit or limit the deposition.<sup>214</sup>

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207. See *supra* notes 127–30 (providing additional information on Rule 26(c) protective orders).

208. FED. R. CIV. P. 26(c)(1).

209. *Id.* Rule 26(c)(3).

210. *Id.* Rule 26(c)(4). If the deponent fails to appear at deposition, the noticing party may file a motion to compel or for sanctions under Rule 37. See *supra* notes 131–34 (providing additional information on Rule 37).

211. See *supra* notes 205–10 (discussing Federal rule of civil Procedure 26).

212. See, e.g., N.D. IND. LOC. R. APP. B. (“We will not use any form of discovery or discovery scheduling as a form of harassment.”); DEL. SUP. CT. R. 71(b)(ii)(C) (“No pretrial procedure should be used to harass an opponent or delay a case.”); N.Y. SUP. CT. R., Part. 1200, App. A, No. VI; Los Angeles county SUP. CT. R. 7.12(e)(1) (“Depositions should be taken only where actually needed to ascertain facts or information to perpetuate testimony. They should never be used as a means of harassment or to generate expense.”).

213. N.D. GA. LOC. R. (5)(a); E.D. MICH. LOC. R. 19; R.I. SUP. CT. R., art. V, B.17 (“I will take depositions only when actually needed.”).

214. See, e.g., *Court Denies Motion to Limit Deposition of American Home CEO*, MEALEY’S LITIG. REPORTS: DRUG & MED. DEVICES, July 30, 1996, at 8, available in WL 1 No. 14 MLRDMD 8; *D.C. Circuit Court Orders FDA Commissioner to Appear for Deposition*, MEALEY’S LITIG. REPORTS: DRUG & MED. DEVICES, Dec. 4, 1996, at 16, available in WL 1 No. 23 MLRDMD 16; *Philip Morris Objects to Deposition of CEO in Texas Medicaid Case*, MEALEY’S LITIG. REPORTS: TOBACCO, Oct. 9, 1997, at 4, available in WL 11 No. 11 MLRTOBAC4; *Protective Order Urged for 2 Sofamor Executives*, MEALEY’S LITIG. REPORTS: PEDICLE SCREWS, Aug. 12, 1996, at 9, available in WL 2 No. 9 MLRPEDS 9. Not all officials resist deposition. As two authors explained, producing a top official for deposition can reap certain benefits:

Accordingly, many courts have addressed the issue of whether and under what circumstances such officials can be deposed. Courts in recent years have been fairly sympathetic to motions for protective orders filed by top corporate and government official, because they realize that parties may seek to depose top officials merely to harass the other side or to try to force a quick settlement.<sup>215</sup> Courts realize that if they do not afford some protection to top officials, then those officials may spend a great part of the working day dealing with discovery, instead of their company's or agency's business.<sup>216</sup> However, as noted earlier, the court must balance the right of a top official to be free from undue harassment against the other party's right to discover relevant information.<sup>217</sup>

The threshold question courts address when determining whether to permit a deposition is whether the official has personal knowledge of the matters at issue in the lawsuit. The official typically must establish his or her lack of knowledge by submitting an affidavit.<sup>218</sup> The party seeking to depose the official must then

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Personal knowledge of witness skills may enable the executive to deliver the case themes persuasively at an early stage of the litigation when the opposing counsel is not fully prepared to ask tough questions. If the company's message is effectively communicated, the other side may be discouraged and pursue the suit with less vigor. There may also be situations in which you need to depose your adversary's executives, an option that could be more difficult if you resist.

Pruess & Collins, *supra* note 194, at 213.

215. See William B. Fitzgerald, *The Perils of CEO Depositions*, NAT'L L.J., Feb. 6, 1995, at B9. The author explained:

In discovery, a party may seek to depose the chief executive officer or other senior executives of a company without having a legitimate need for such testimony.

The purpose of the strategy may be to harass the company into settlement; to find a weak, marginal witness who somehow can be linked to the case and exploited at trial . . . ; to pursue extraneous but embarrassing issues as part of a smear campaign; or to conduct a fishing expedition.

*Id.*

216. As one court explained:

[T]his court does not encourage the procedure of taking the oral deposition of the head of an agency of the United States Government, and under normal circumstances would not allow such procedure. The Court recognizes that such an official's time and the exigencies of his everyday business would be severely impeded if every plaintiff filing a complaint against an agency head, in his official capacity, were allowed to take his oral deposition. Such procedure would be contrary to public interest, plus the fact that ordinarily the head of an agency has little or no knowledge of the facts in the case.

Union Sav. Bank of Patchogue v. Saxon, 209 F. Supp. 319, 319-20 (D.D.C. 1962); *accord In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995); Kyle Eng'g Co. v. Kleppe, 600 F.2d 226, 231 (9th Cir. 1979) (concluding, without explanation, that "[h]eads of government agencies are not normally subject to deposition"); Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586 (D.C. Cir. 1985); Warzon v. Drew, 155 F.R.D. 183, 185 (E.D. Wis. 1994); United States v. Miracle Recreation Equip. Co., 118 F.R.D. 100, 104 (S.D. Iowa 1987); Sykes v. Brown, 90 F.R.D. 77, 78 (E.D. Pa. 1981); Capitol Vending Co. v. Baker, 36 F.R.D. 45, 46 (D.D.C. 1964). *But see* RTC v. Diamond, 137 F.R.D. 634, 644-45 (S.D.N.Y. 1991) (permitting deposition of the RTC Executive Director on policies issues). See generally 8 WRIGHT ET AL., *supra* note 38, at § 2037 (2d ed. 1994).

217. Monsanto Co. v. May, 889 S.W.2d 274, 277 (Tex. 1994).

218. Mulvey v. Chrysler Corp., 106 F.R.D. 364, 366 (D.R.I. 1985); Broadband Communications, Inc. v. Home Box Office, Inc., 549 N.Y.S.2d 402, 402 (N.Y. App. Div. 1990); Boutique Fabrice, Inc. v. Bergdorf Goodman, Inc., 129 A.D.2d 529, 530 (N.Y. App. Div. 1987); *In re El Paso Healthcare Sys.*, 969 S.W.2d 68 (Tex.

point to some evidence establishing that the official actually possesses personal knowledge.<sup>219</sup> Indeed, some courts require the party seeking to depose the official to establish that the proposed deponent has “unique personal knowledge” of the issues.”<sup>220</sup> However, a mere claim of “no knowledge” will not always suffice, as some courts have held that the other side is “allowed to test this claim by deposing the witness.”<sup>221</sup> If the official lacks personal knowledge, then the court typically will issue a protective order either prohibiting or conditioning the deposition.<sup>222</sup>

Personal knowledge, however, is but the first factor in this inquiry. Even if the

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App. 1998). *But cf.* *Amherst Leasing Corp. v. Emhart Corp.*, 65 F.R.D. 121, 123 (D. Conn. 1974) (holding that since the party seeking to depose the CEO had already deposed a lower-level employee, who indicated he lacked knowledge of some relevant facts, that the party was entitled to depose the CEO, even though the CEO claimed he lacked personal knowledge, and stating that, given the circumstances, the CEO “should have to establish his ignorance at the deposition rather than through affidavit”). *See generally* Preuss & Collins, *supra* note 194, at 214–15 (explaining that lack of personal knowledge should be established through an affidavit).

219. *See, e.g.*, *Mader v. Motorola, Inc.*, No. 92-C8089, 1994 U.S. Dist. LEXIS 13937, at \*7 (N.D. Ill. Sept. 30, 1994) (noting that the plaintiff failed to point to “documents, depositions[,] or witness statements to the effect that [the new CEO] has knowledge of the events surrounding his termination”); *Broadband Communications, Inc. v. Home Box Office, Inc.*, 157 A.D.2d 479, 479 (N.Y. App. Div. 1990) (using CEO’s affidavit as sufficient to rule that the CEO possessed personal knowledge).

220. *Community Fed. Sav. & Loan Ass’n v. Federal Home Loan Bank Bd.*, 96 F.R.D. 619, 621 (D.D.C. 1983); *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995).

221. *Amherst Leasing Corp. v. Emhart Corp.*, 65 F.R.D. 121, 122 (D. Conn. 1974); *accord* *Rolscreen Co. v. Pella Prods. of St. Louis, Inc.*, 145 F.R.D. 92, 97 (S.D. Iowa 1992) (explaining that the company’s “mere incantation of [the company president’s] status of president and his claim of limited knowledge cannot be a basis for insulating [the president] from appropriate discovery”); *Less v. Taber Instrument Corp.*, 53 F.R.D. 645, 647 (W.D.N.Y. 1971) (stating that “[a] claim that [the Chairman of the Board of Directors] has no knowledge of any relevant facts should not be allowed to prevent his examination, since plaintiff is entitled to test his lack of knowledge”); *Transcontinental Motors, Inc. v. NSU Motorenwerke Aktiengesellschaft*, 45 F.R.D. 37, 37 (S.D.N.Y. 1968) (commenting that a mere allegation that the proposed deponent lacks personal knowledge will not justify a protective order); *Parkhurst v. Kling*, 266 F. Supp. 780, 781 (E.D. Pa. 1967) (indicating that “good cause” for a protective order cannot be established merely with an ex parte affidavit claiming the deponent lacks personal knowledge); *Overseas Exch. Corp. v. Inwood Motors, Inc.*, 20 F.R.D. 228, 229 (S.D.N.Y. 1956) (“The mere fact that the officers of the defendant state by affidavit that they have no knowledge of the facts is no reason why they should not be examined as to any knowledge they may have or what the books and records of the corporation disclose concerning the transactions in suit. The examining parties are entitled to explore these subjects and test the truth of the statements of complete lack of knowledge so as to be in the position to bar the officers from testifying at the trial if the facts so indicate.”).

222. *Thomas v. IBM*, 48 F.3d 478, 483–84 (10th Cir. 1995); *Elvis Presley Enters., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 894 (6th Cir. 1991); *Lewelling v. Farmers Ins. of Columbus, Inc.*, 879 F.2d 212, 218 (6th Cir. 1989); *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979); *Mader*, 1994 U.S. Dist. LEXIS 13937, at \*7; *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364, 366 (D.R.I. 1985); *Armstrong Cork Co. v. Niagra Mohawk Power Corp.*, 16 F.R.D. 389, 390 (S.D.N.Y. 1954); *Liberty Mut. Ins. Co. v. Superior Court of San Mateo County*, 13 Cal. Rptr. 2d 363, 367 (Cal. Ct. App. 1992); *Broadband Communications, Inc. v. Home Box Office, Inc.*, 549 N.Y.S.2d 402, 402 (N.Y. App. Div. 1990); *Boutique Fabrice, Inc. v. Bergdorf Goodman, Inc.*, 514 N.Y.S.2d 380, 381–82 (N.Y. App. Div. 1987); *cf.* *Nalco Chem. Co. v. Hydro Tech., Inc.*, 149 F.R.D. 686, 695–96 (E.D. Wis. 1993) (denying protective order because the official had personal knowledge of the events); *CBS, Inc. v. Ahern*, 102 F.R.D. 820, 822 (S.D.N.Y. 1984) (ordering that the deposition of CBS Record Group’s president be permitted to continue since he had personal knowledge of the facts relevant to the lawsuit and did not establish “good cause” for a protective order limiting deposition to four hours).

official has personal knowledge, courts will examine whether the party seeking the deposition can obtain the same information through another form of discovery — such as interrogatories<sup>223</sup> — or by deposing lower-level employees.<sup>224</sup> If the information can be obtained through an alternative source, then the court may prohibit the top official's deposition or postpone the deposition until the other discovery has been completed and the discovering party can demonstrate that it did not receive the requested information.<sup>225</sup>

A frequently-cited case in this area is *Mulvey v. Chrysler Corp.*,<sup>226</sup> in which Chrysler sought a protective order to prevent its Chairman of the Board, Lee Iacocca, from being deposed in a products liability case.<sup>227</sup> The plaintiffs contended that Iacocca's published biography contained damaging statements regarding Chrysler's potential liability and that the plaintiffs should be allowed to explore Iacocca's knowledge about the alleged defect.<sup>228</sup> Iacocca signed an

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223. *First Fidelity Bancorporation v. National Union Fire Ins. Co. of Pittsburgh*, No. 90-1866, 1992 WL 46881, at \*4 (E.D. Pa. Mar. 5, 1992); *Stone City Music v. Thunderbird, Inc.*, 116 F.R.D. 473, 474 (N.D. Miss. 1987); *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364, 366 (D.R.I. 1985); *Buryan v. Max Factor & Co.*, 41 F.R.D. 330, 332 (S.D.N.Y. 1967); *Colonial Capital Co. v. General Motors, Corp.*, 29 F.R.D. 514 (D. Conn. 1961); *Greenspun v. County of Clark*, 533 P.2d 482, 482 n.5 (Nev. 1975). *But see* *Scotch Whiskey Ass'n v. Majestic Distilling Co.*, No. HAR-88-808, 1988 U.S. Dist. LEXIS 16531, at \*15 (D. Md. Nov. 30, 1988) (denying request that interrogatories be served before top official was deposed, because official lived in London, and the request would possibly require counsel to make two overseas trips to complete depositions); *Matarazzi v. Economic Forms Corp.*, No. 87-5373, 1988 U.S. Dist. LEXIS 8706, at \*2 (E.D. Pa. Aug. 10, 1988) (denying request for protective order that discovering party had to submit interrogatories before deposing the defendant's CEO, because the deposition did not appear to be overly burdensome and "because oral testimony seems particularly appropriate for the type of questions that are likely to be presented"); *Alliance to End Repression v. Rochford*, 75 F.R.D. 428, 429 (N.D. Ill. 1976) (denying request that a governmental official be permitted to answer interrogatories in lieu of a deposition because "oral deposition[s] are] preferable to written interrogatories when dealing with a recalcitrant or hostile witness").

224. *See, e.g., Salter*, 593 F.2d at 651; *Baine v. General Motors Corp.*, 141 F.R.D. 332 (M.D. Ala. 1991); *United States v. Miracle Recreation Equip. Co.*, 118 F.R.D. 100, 104 (S.D. Iowa 1987); *M.A. Porazzi v. Mormaclark*, 16 F.R.D. 383, 383 (S.D.N.Y. 1951); *see also* *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995) (holding that "[i]f the party seeking the deposition cannot show that the official has any unique or superior knowledge of discoverable information, the trial court should grant the . . . protective order and first require the party . . . to attempt to obtain the discovery through less intrusive methods," such as depositions of lower level employees, a corporate representative deposition, interrogatories, and requests for production); *Monsanto Co. v. May*, 889 S.W.2d 274, 277 (Tex. 1994) (explaining that "[w]hen top-echelon officers of large corporations do not have knowledge of a specific incident or case handled several levels down the corporate pyramid, it is sensible to prevent a plaintiff from 'leap-frogging' to the apex of the corporate hierarchy in the first instance, without the intermediate steps of seeking discovery from lower-level employees more involved with everyday corporate operations"). *But cf. Travelers Rental Co. v. Ford Motor Co.*, 116 F.R.D. 140 (D. Mass. 1987) (permitting plaintiffs to depose four high-ranking Ford officials after five middle managers had already been deposed, because the express reason for the apex depositions were to determine motivation, a required element in the case, and because only the top officials could provide evidence of motivation, or lack thereof).

225. *Cf. Fitzgerald*, *supra* note 215 (suggesting that the CEO's attorney use Rule 26(d) to request that the executive's deposition be taken last in the case).

226. 106 F.R.D. 364 (D.R.I. 1985).

227. *Id.* at 365 (stating that the plaintiffs were injured by an alleged defect in the fuel system of a 1975 Dodge van).

228. *Id.*

affidavit "professing ignorance" about the information the plaintiffs sought.<sup>229</sup> Recognizing that Rule 26 permits a court to limit discovery if it determines that the requested discovery is available from other sources that are less burdensome, the court balanced Mr. Iacocca's role as an important officer within Chrysler, his affidavit indicating he did not know about the specific case, and the defendant's need for discovery and to probe the extent of Mr. Iacocca's knowledge, and ruled that the plaintiffs should first serve Iacocca interrogatories.<sup>230</sup> information, then the plaintiffs could seek leave or court to depose Iacocca.<sup>231</sup>

In addition to considering the official's personal knowledge and alternative discovery devices, courts faced with the apex deposition dilemma often address whether the official's deposition is merely duplicative or cumulative. If others have testified on the same topics about which the official purportedly has knowledge, then the court may prohibit the official's deposition.<sup>232</sup> Thus, for the party seeking to depose a top official, deposing lower-level employees first might prove a double-edged sword: On one hand, those depositions might help show that the party employed less intrusive means before noticing the CEO. On the other hand, those depositions might provide the CEO with evidence that his deposition is cumulative, and thus unnecessary. On a related topic, if the court permits the deposition, it must then determine whether the deposition should be limited either in time<sup>233</sup> or in scope.<sup>234</sup>

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229. *Id.* at 366.

230. *Id.* The court specifically stated:

Now, the seriousness of this case must be kept in mind, and if Mr. Iacocca has any information, albeit inadmissible as evidence reasonably calculated to lead to the discovery of admissible evidence, he must be required to reveal the same. His prestigious position is an unimpressive paper barrier shielding him from the judicial process, and, I hastily add, I do not believe the defendants are attempting to use Mr. Iacocca's position in support of this position. The fact remains he is a singularly unique and important individual who can be easily subjected to unwarranted harassment and abuse. He has a right to be protected, and the courts have a duty to recognize his vulnerability. In this case, he signed an affidavit professing ignorance to the information the plaintiffs seek; juxtaposed are the generalized damaging statements concerning Chrysler's former practices which warrant refining through discovery inquiry. Therefore, it seems to me the plaintiff's rights will be fully protected as well as those of Mr. Iacocca, and that an orderly discovery process will be best served by resorting to interrogatories at this time, without prejudice to a subsequent oral deposition if the answers to interrogatories so warrant.

*Id.* at 366.

231. *See id.* (including a court warning that if the interrogatory answers were incomplete or evasive, the court would permit plaintiffs to depose Iacocca).

232. *FED. R. Civ. P.* 26(b)(2); Preuss & Collins, *supra* note 194, at 215.

233. *See, e.g.,* Liz Claiborne, Inc. v. Mademoiselle Knitwear, Inc., No. 96 Civ. 2906 (RWS, 1997 WL 53184, at \*6 (S.D.N.Y. Feb. 10, 1997) (limiting depositions of top corporate officials to one half-day and directing counsel to schedule the depositions "so as to minimize the disruption of [the CEO's] schedule"); Rolscreen Co. v. Pella Prods. of St. Louis, Inc., 145 F.R.D. 92, 98 (S.D. Iowa 1992); Martin v. Valley Nat'l Bank of Ariz., 140 F.R.D. 291, 314 (S.D.N.Y. 1991). *But see* American Broad. Cos. v. United States Info. Agency, 599 F. Supp. 765 (D.D.C.1984) (refusing to limit to one hour the deposition of a government official who had personal knowledge of relevant facts).

234. *See, e.g.,* Williams v. Kopco, Inc., 162 F.R.D. 670 (D. Kan. 1995); Amherst Leasing Corp. v. Emhart



Finally, some courts examine the discovering party's motive in requesting the deposition. If the party seeking the deposition cannot articulate why other employees cannot provide the desired information, then the court may conclude that the primary purpose of the deposition is to harass.<sup>235</sup> Counsel seeking the deposition must also be careful not to expressly state an improper motive. For example, in *Digital Equipment Corp. v. System Industries, Inc.*,<sup>236</sup> the judge granted a protective order that prohibited the defendant from deposing the plaintiff's president when defense counsel stated on the record that he was going to "waste" one of the president's afternoons in deposition.<sup>237</sup>

#### d. *Ethical Codes*

As expected, the ethical codes do not address who can or should be deposed. Instead, the codes contain general provisions indicating that attorneys should not delay the proceedings and should not obstruct access to relevant information. As these provisions were addressed above,<sup>238</sup> they will not be repeated here.

## 2. Application and Alternatives

Plaintiff's counsel noticed the deposition of Gregory Foxworth, CEO of the defendant's national headquarters. The defense, desiring to stop the deposition, called plaintiff's counsel and explained that Mr. Foxworth lacked personal knowledge about Ms. Johnson's situation, and that what relevant information he did have about the case could be obtained from lower-level employees. When plaintiff's counsel refused to cancel the deposition, the defense filed a motion for protective order, alleging that the deposition was noticed merely to harass the defendant. Have counsel proceeded legally, ethically, and professionally? And how will the court rule on the defense motion?

As noted above, courts faced with the apex deposition dilemma first consider whether the proposed deponent has personal knowledge about the facts of the

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Corp., 65 F.R.D. 121 (D. Conn. 1974); *Union Savs. Bank of Patchogue v. Saxon*, 209 F. Supp. 319 (D.D.C. 1962) (limiting scope of official's deposition, even though the official had personal knowledge about facts at issue in the case). See generally Fitzgerald, *supra* note 215 ("Often a CEO's deposition is proper only on a limited subject. Orders limiting scope, however, generally are ineffective unless a discovery referee is present. Even then, colloquy and arguments still may occur. A much more effective way to keep a deposition on track is to obtain an order limiting the time for the entire deposition.").

235. Preuss & Collins, *supra* note 194, at 216 & n. 11.

236. 108 F.R.D. 742 (D. Mass. 1986).

237. *Id.* at 744; see also John Stuart, *Civility in the Courtroom*, N.Y. St. B.J., May/June 1991, at 28, 28 (recounting a situation in which "[o]ne lawyer spent seven hours at a deposition asking a top corporate executive to authenticate undisputed documents so that the witness would be tired and hostile when the substantive questions were asked").

238. See *supra* notes 171-72 and accompanying text (stating that the *Model Code* and *Model Rules* both prohibit obstructive tactics by attorneys in the discovery process).

case.<sup>239</sup> Here, defense counsel informally notified plaintiff's counsel that the CEO lacked personal knowledge. Such a bald, unsupported statement is not sufficient to prohibit or even limit the CEO's deposition. Instead, the CEO must submit an affidavit with concrete, detailed information about what he knows and does not know.<sup>240</sup> A generalize denial, or statements that the CEO "does not remember" typically will not suffice. Indeed, in such situations, the other party may be allowed to test the CEO's memory through a deposition.<sup>241</sup>

Unfortunately, defense counsel did not offer such an affidavit to plaintiff's counsel when requesting the cancellation. Such an affidavit, if supported with detailed information, might have led plaintiff's counsel withdraw the deposition notice or voluntarily to limit the scope of the deposition to certain, defined topics. Therefore, the better approach would have been for defense counsel to prepare the affidavit and submit it to plaintiff's counsel before the motion was filed. Such an approach might have avoided a trip to the courthouse, as well as the associated costs.

Here, given the known facts, Mr. Foxworth is going to be hard pressed to claim no personal knowledge relevant to the lawsuit. As the CEO, he is certainly familiar with partnership selection procedures, and the plaintiff, Ms. Johnson, appealed her denial of partnership to the national level. It is therefore likely that, while Mr. Foxworth may not know Ms. Johnson, he is familiar with her situation and with policies at issue in the lawsuit. Accordingly, defense counsel must be careful to probe the CEO's knowledge before representing to the court and opposing counsel that Mr. Foxworth lacks personal knowledge. Such an unsupported statement might subject counsel to disciplinary action<sup>242</sup> or sanctions.<sup>243</sup> Further, according to federal law, preparing an affidavit that contains false information would constitute perjury<sup>244</sup> on behalf of Mr. Foxworth and subornation of perjury on behalf of Ms. Hopkins.<sup>245</sup>

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239. See *supra* notes 218–22 and accompanying text (discussing depositions of high ranking officials).

240. See *supra* note 218 (requiring high ranking officials to submit affidavits establishing lack of knowledge).

241. See Preuss & Collins, *supra* note 194, at 214–15 ("Avoiding an executive's deposition becomes more difficult when the executive had personal knowledge at one time but lacks present recollection of the relevant facts. Again, it will be necessary to obtain a supporting affidavit, which should include a statement that the executive has diligently attempted to refresh memory. Many courts, nevertheless, have concluded that a deposing party is entitled to test a claim of lack of knowledge or recollection and have permitted the deposition to proceed. At least one court has noted that the opportunity to question a claim of no recollection is more important than the opportunity to explore a claim of no knowledge, because a lack of recollection "frequently can be refreshed during an examination.").

242. See *infra* notes 289 and 293 and accompanying text (stating that attorneys may not counsel clients to present false evidence).

243. See *supra* note 52 (discussing Rule 26 sanctions).

244. 18 U.S.C.A. § 1621(2) (West 1994 & Supp. 1998).

245. See *id.* § 1622 (1998) (stating that "[w]hoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both"); see also *In re McCarthy*, 623 N.E.2d 473 (Mas. 1993) (holding that an attorney who elicits false testimony from a client should be suspended from practice for one year); *In re Kerr*, 548 P.2d 297 (Wash. 1976) (en banc) (finding that knowingly participating in attempt to suborn perjury warrants disbarment).

Assuming that Mr. Foxworth has some personal knowledge relevant to the case, a court would probably consider whether the deposition should be postponed until other, less intrusive means of discovery could be conducted and whether Mr. Ferguson's knowledge merely duplicates that of lower-level employees. Here, the plaintiff has deposed at least two branch partners (Wallace and Ferguson), but has not deposed anyone from the national headquarters. Accordingly, a court might order that Mr. Foxworth's deposition be delayed until a corporate representative or another New York executive is deposed. Alternatively, the court might indicate that the plaintiff should serve Mr. Foxworth with interrogatories before a deposition is permitted to proceed. However, before any such limitations or conditions are imposed, the defense must show "good cause" under Rule 26(c). In other words, the defense must demonstrate that the proposed deposition will be annoying, embarrassing, oppressive, or unduly burdensome or expensive.<sup>246</sup>

The court may also examine the plaintiff's motive in noticing the deposition. If the court finds an improper motive, not only will the defense be entitled to a protective order, but plaintiff's counsel may be found to have violated controlling local rules, or ethical codes for harassing the other party and increasing litigation costs.<sup>247</sup> To avoid these potential problems, plaintiff's counsel need not cancel the deposition. She might, however, consider limiting the scope of the deposition or agreeing to limit the deposition to a certain length. She must also be able to articulate why the CEO, as opposed to some lower-level employee, possesses the needed information and why that information cannot be obtained through another discovery device.

Given the limited information currently available, a court faced with a defense motion for protective order probably would not prohibit the deposition — as Mr. Foxworth does possess personal knowledge. However, the court might well require the plaintiff to conduct other, preliminary discovery before deposing the CEO.

A new rule or rule amendment is not needed to effectively handle the apex deposition dilemma. Indeed, given the varying nature of CEOs and their knowledge, a single rule would be impractical. Instead, when a top official's deposition is noticed and subsequently challenged, courts should review the proposed deposition on a case-by-case basis. Personal knowledge should be the initial, and primary, factor in determining whether the deposition should proceed. However, the court must also consider the proposed scope of the deposition, whether the official's knowledge is duplicative, the existence and effectiveness of

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246. FED.R. CIV. P. 26(C).

247. See *supra* notes 54, 79, 88, 139, 143 (discussing requirements of the Federal Rules that attorneys make good faith efforts to coordinate deposition with opposing counsel before sending an unexpected notice, and that they avoid harassing, intimidating, or otherwise engaging in conduct that is prejudicial to the administration of justice or that prolongs litigation).

less intrusive discovery devices, and the noticing party's motive in noticing the deposition. In addition, the court must remember the noticing party is entitled to depose those with relevant information, and that courts should not attempt to micro-manage cases. Further, the court should require detailed affidavits from both sides addressing the relevant factors. Conclusory statements concerning the official's knowledge, or lack thereof, should not be accepted as proof. If the court requires competent evidence and balances the listed factors, then most challenges should be fairly resolved.

Counsel, however, should strive to avoid judicial intervention. The noticing party might be able to avoid a court battle if she first discusses the official's deposition with the other party, deposes some lower-level employees before "escalating" to the top officer,<sup>248</sup> and expressly limits the scope of the deposition to areas specifically outlined in the deposition notice (using a method akin to a Rule 20(b)(6) corporate representative deposition notice). Further accommodations, such as noticing the deposition for a city in which the officer resides, and possibly even in the building in which the officer works, may also help the deposition move forward.

Moreover, the noticing party must consider the psychology and dynamics of noticing the opponent's CEO. When the notice arrives, even though the company's attorney might be amendable to proceeding, that attorney will probably receive great pressure from within the corporate client to stop the deposition at all costs. Thus, to the extent that the noticing attorney can "assist" opposing counsel in assuring her client that the deposition has a legitimate purpose, is not meant to harass, and would probably be permitted by the court, the more probable it is that the deposition will occur, and will occur without the expense and antagonism associated with a motion fight.

For her part, counsel for the noticed CEO must explain to the CEO and others within the company the opponent's entitlement to discover relevant information. She should try to negotiate accommodations — such as time and scope limits<sup>249</sup> — that will ensure the CEO is not harassed. As noted above, limits on the scope of the deposition, and limits on the amount of time allotted for the deposition, may help ease concerns about the opponent's motives. Noticed counsel, if possible, should try to put a positive spin on the deposition. For example, many CEOs, because they have good presence and are articulate, can make great witnesses and can therefore help advance, or settle, the case.<sup>250</sup> Further, counsel might explain that a CEO out of subpoena range might not have to appear at trial

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248. However, deposing lower-level employees first might also hurt the noticing party's position. *See supra* text following note 232 (stating that deposing lower-level employees first might provide the CEO with evidence that his deposition is cumulative and therefore unnecessary).

249. *See supra* notes 233–34 and accompanying text (stating that the court must determine whether permitted depositions should be limited in either time or scope).

250. *See supra* note 214 (describing how an executive may effectively communicate the company's message).

in the foreign forum, if he submits to a deposition to be held on a mutually-convenient date.<sup>251</sup>

### III. CHANGING DEPOSITION TESTIMONY THROUGH ERRATA SHEETS

Just as deposition abuse can precede the witness being sworn in, so can it continue after the session adjourns. Under Federal Rule of Civil Procedure (30(e)), the witness can request to review a copy of the deposition transcript and can then change the “form or substance” of his deposition testimony.<sup>252</sup> Although many deponents use this opportunity merely to correct “form” errors, such as typographical errors, some manipulate the rule to completely change their sworn testimony.<sup>253</sup> They use it — as some courts have stated — as a “take home examination.”<sup>254</sup> In addition, some attorneys encourage the deponent to change damaging testimony. Such conduct raises serious legal and ethical questions, because directing a witness to change his testimony is equivalent to witness coaching.

Printed below are excerpts from a deposition transcript in the *Johnson* case; specifically, the deposition of Paul Ferguson, a branch director of the defendant. Although Rule 30(e) currently directs witnesses to make changes on a separate sheet<sup>255</sup> — typically known as an errata sheet — for purposes of reader ease, Ferguson’s post-deposition changes are reflected in “redline” format. Strike-throughs represent Ferguson’s deletions. Material that is double-underlined

251. FED. R. CIV. P. 45.

252. *Id.* Rule 30(e).

253. See *infra* notes 275–88 (citing cases in which substantive changes to deposition transcripts were made); see also *Reynolds v. City of N.Y.*, No. 52300966 (N.Y. Sup. Ct.), reprinted in N.Y.L.J., June 29, 1998, at 25. In *Reynolds*, the defendant filed a motion for summary judgment. The plaintiff then requested a copy of her deposition, which had been taken many months earlier, but never transcribed. When she received the transcript, the deponent made many substantive changes, including the following:

EBT Question: At the time when you felt your left ankle turn, was your foot on the ground, was it in the process of you’re (sic) putting it down on the sidewalk or something else?

Answer: I don’t remember.

Correction: My answer should be changed because I now do remember what happened at the time in question. “My foot was on the sidewalk.”

EBT Question: Do you know why your left ankle turned?

Answer: No.

Correction: My answer should be changed, because I do know why my left ankle turned. “Yes, my left ankle turned because of the unevenness of the sidewalk and the heel of my left shoe caught on the raised portion of the cracked sidewalk.”

The deponent also changed answers to five other, similar questions. Calling the changes “feigned,” the court granted defendant’s motion for summary judgment based on the deponent’s original answers. *Id.*

254. *Duff v. Lobdell-Emerly Mfg. Co.*, 926 F. Sup. 699, 803 (N.D. Ind. 1996); *Rios v. Welch*, 856 F. Supp. 1499, 1502 (D. Kan. 1994); *Greenway v. International Paper Co.*, 144 F.R.D. 32, 325 (W.D. La. 1992).

255. See FED. R. CIV. P., 30(e) (indicating that the deponent should “sign a statement reciting such changes and the reasons given by the deponent for making them”).

reflects his additions. Assume that the changes were timely made and signed by Ferguson.<sup>256</sup>

*(The witness was sworn. The witness was represented at the deposition by Kathleen Hopkins, Esq. The plaintiff was present, along with her attorney, Janice Newman, Esq.).*

\* \* \* \*

Q. [BY MS. NEWMAN]: Mr. Ferguson, please identify each member of the branch's executive committee who was involved in making partnership recommendations during the year Ms. Johnson was considered for partner.

A. Jeremy Canon, ~~Ivonne Greenfeld~~, Yvonne Greenfield, Preston Holloway, myself, and Peter Wallace.<sup>257</sup>

\* \* \* \*

Q. Were the branch partners upset that Ms. Johnson was going to take a second maternity leave so soon after her first leave?

A. Some were. They didn't think she should be considered for partnership since she would have missed almost six months of work within such a short time. However, the executive committee did not consider this in its decision concerning partnership.<sup>258</sup>

\* \* \* \*

Q. Why did you first mention the possibility of Ms. Johnson taking senior associate status only after she had her first child?

A. ~~Well, that's where her hours dropped. Some doubted her commitment to the firm.~~ The fact that we mentioned it after her first maternity leave was merely coincidental. Ms. Johnson was within one year of partnership and had not demonstrated an ability to generate business.<sup>259</sup>

Q. But she was still making the minimum monthly billables, correct?

A. ~~No. Yes.~~ (I re-researched this issue after the deposition and discovered that she had met her quota each month.)<sup>260</sup>

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256. See *id.* (stating that the deponent "shall have 30 days after being notified by the officer that the transcript or recording is available" and requiring that the witness sign the statement that contains the changes).

257. This alteration will be referred to as the First Change.

258. This alteration will be referred to as the Second Change.

259. This alteration will be referred to as the Third Change.

260. This alteration will be referred to as the Fourth Change.

Q. Did you give Ms. Johnson any help in the area of business development?

A. No. Yes. (I misunderstood the question. I thought Ms. Newman asked whether I personally had helped with the Junior League contact, but after reading the transcript, I realized the question was broader than my original interpretation, and that others in the firm had given general assistance by putting on "rainmaking" and "networking" seminars for the associates.)<sup>261</sup>

\* \* \* \*

Q. Why did you think Ms. Johnson could not generate new business?

A. Well, she had not brought new business to the firm.

Q. But what about the business generated from her Junior league contact?

A. Well, one new client in seven years is not that great of an achievement.

Q. Had the males who were promoted to partnership generated significantly more business for the firm?

A. I'm sure they did. Objection. Calls for confidential information and speculation.<sup>262</sup>

\* \* \* \*

## A. APPLICABLE AUTHORITIES

### 1. Federal Rules of Civil Procedure and Case Law

Federal rule of Civil Procedure 30(e), as amended in 1993,<sup>263</sup> explains when and how a deponent may alter his deposition testimony:

If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate . . . whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.<sup>264</sup>

In interpreting Rule 30(e), most courts agree that the deponent can, and indeed

261. This alteration will be referred to as the Fifth Change.

262. This alteration will be referred to as the Sixth Change.

263. The primary change in 1993 was procedural. Before 1993, the rule indicated that the deponent would automatically receive the transcript for review. The 1993 version states that the deponent must affirmatively request the right to review the transcript. See FED. R. CIV.P. 30(e) committee notes (1993) (stating new requirements).

264. FED. R. CIV. P. 30(e).

should, change all necessary form and transcription errors.<sup>265</sup> They also agree that Rule 30(e) cannot be used to raise objections that had to be raised at the deposition or otherwise waived.<sup>266</sup> Further, most courts are sticklers for strict adherence to the technical requirements of Rule 30(e). For example, courts have stricken corrections when the corrections were not timely submitted,<sup>267</sup> when the physical corrections were not made in the correct manner,<sup>268</sup> and when the deponent failed to provide a reason for each change.<sup>269</sup>

However, federal courts are split on the scope of substantive changes permitted under Rule 30(e). Some courts hold that the language of Rule 30(e) in no way limits the types of changes a witness should make and that a witness can make any changes he so desires.<sup>270</sup> Courts adopting this position point not only to the rule's language,<sup>271</sup> but also to the fact that the other party can ready into evidence both the original and corrected answers. Therefore, a witness may be impeached with his contradictory answers and, knowing this, has every reason to be careful when changing answers.<sup>272</sup> Therefore, a witness may be impeached with his contradictory answers and, knowing this, has every reason to be careful when changing answers.<sup>273</sup> Moreover, these courts state that if the changes made pursuant to Rule 30(e) render the deposition incomplete or useless, then the party

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265. See e.g., *Greenway w. International Paper Co.*, 144 F.R.D. 322, 325 (stating the purpose of Rule 30(e) is to permit the deponent to make corrections if the reporter makes a substantive error).

266. See *SEC v. Parkersburg Wireless Co.*, 156 F.R.D. 529, 536 (D.D.C. 1994) (stating Rule 30(e) may not be used at this stage to raise a Fifth Amendment argument with regard to statement made at deposition); see also *FED. R. CIV. P. 32(d)* (establishing that objections regarding depositions are waived if not timely made).

267. See *FED. R. CIV. P. 30(e)* (giving a deponent 30 days from receipt of the original transcript within which to make changes); *Willco Kuwait (Trading) S.A.K. v. deSavary*, 843 F.2d 618, 628 (1st Cir. 1988); *Northwest Airlines, Inc. v. American Airlines, Inc.*, 870 F. Supp. 1504, 1508-09 (D. Minn. 1994); *Hawthorne Partners v. American Tel. & Tel. Tech., Inc.*, 832 F. Supp. 1398, 1406-07 (N.D. Ill. 1993); *Workman v. Chinchinian*, 807 F. Supp. 634, 644-45 (E.D. Wash. 1992); *Calloway v. Marvel Entertainment Group*, 110 F.R.D. 45, 52 (S.D.N.Y. 1986).

268. See *Hawthorne*, 831 F. Supp. at 1407 (indicating that corrections were not mad on the correct form); *Baker v. Ace Advertisers' Serv., Inc.*, 134 F.R.D. 65, 73 (S.D.N.Y. 1991); *Barlow v. Esselte Pendaflax Corp.*, 111 F.R.D. 404, 406-07 (M.D.N.C. 1986); *Colin v. Thompson*, 16 F.R.D. 194, 195 (W.D. Mo. 1954).

269. See *Hawthorne*, 831 F. Supp. at 1407. However, many courts will not examine the sufficiency, reasonableness, or legitimacy of the reasons. See *Lugtig v. Thomas*, 89 F.R.D. 639, 652 (N.D. Ill. 1981); *Colin*, 16 F.R.D. at 195 (stating that whether the deponent's "reasons are good or not will not impair his right to make the changes"). One group of commentators has noted that very few deponents provide the reasons for each change. WILLIAM W. SCHWARZER ET AL., CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL 11:540 (1997), available in WL CAFEDCIV CH 11F.

270. *Hawthorne*, 831 F. Supp. at 1406; *United States v. Piqua Eng'g., Inc.*, 152 F.R.D. 565, 566-67 (S.D. Ohio 1993); *Lugtig v. Thomas*, 89 F.R.D. 639, 641 (N.D. Ill. 1981). A close reading of many "errata sheet" cases suggests that when courts who embrace this "plain language" reading of Rule 30(e) are upset with the type of extent of changes made by the deponent, they strike the offending changes based on the deponent's failure to comply with some technical aspect of Rule 30(e). See *supra* notes 267-69 and accompanying text (explaining that courts are sticklers for strict adherence to the technical requirements of Rule 30(e)).

271. See *supra* text accompanying note 264 (containing the text of Rule 30(e)).

272. *Usiak v. New York Tank Barge Co.*, 299 F.2d 808, 810 (2d. Cir. 1964); *Lugtig*, 89 F.R.D. at 642.

273. See *Lugtig*, 89 F.R.D. at 642 ("The Rule is less likely to be abused if the deponent knows that . . . the original answers as well as the changes and the reasons will be subject to examination by the trier of fact.")



who took the deposition can move to reopen the examination to ask about the changes.<sup>274</sup> For just these reasons, the court in *Lugtig v. Thomas*<sup>275</sup> refused to strike sixty-nine deposition changes, even though the changes were substantive,<sup>276</sup> but the court did allow the complaining party to reopen the deposition.<sup>277</sup>

On the other hand, some courts have stricken changes that have altered the substance of testimony given under oath.<sup>278</sup> The most frequently-cited case espousing this position is *Greenway v. International Paper Co.*<sup>279</sup>

In *Greenway*, the plaintiff made sixty-four changes to his deposition transcript.<sup>280</sup> Many of the changes affected the substance of the plaintiff's testimony. For example, the witness changed some "yes" answers to "no" answers, and vice versa, added many lengthy explanation, and changed one answer from fifteen feet to eight feet.<sup>281</sup> The court struck these changes, explaining:

The purpose of Rule 30(e) is obvious. Should the reporter make a substantive error, i.e., he reported "yes" but I said "no," or a formal error, i.e., he reported the name to be "Lawrence Smith" but the proper name is Laurence Smith," then the corrections by the deponent would be in order. *The Rule cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. Depositions differ from interrogatories in that regard. A deposition is not a take home examination.*<sup>282</sup>

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274. See *Piqua*, 152 F.R.D. at 567 (reopening deposition when deponent made a substantial number of substantive changes); *Perkasie Indus. Corp. v. Advance Transformer, Inc.*, No. 90-7359, 1992 WL 166042, at \*\*3-4 (E.D. Pa. June 11, 1992) (finding just one substantive change sufficient grounds to reopen the deposition); *Lugtig*, 89 F.R.D. at 642 (allowing counsel to reopen the deposition when the deponent made 69 changes to the deposition, many of which went to the heart of the case); cf. *Hawthorne*, 831 F. Supp. at 1407 (refusing to reopen the deposition when the deponent made 41 changes in a 500-page transcript and when those changes did not render the deposition "incomplete or useless without further testimony").

275. 89 F.R.D. 639 (N.D. Ill. 1981).

276. See *id.* The court explained:

[The deponent], after consultation with counsel, made sixty-nine changes in the deposition before signing the signature page. The changes were substantive not corrections of typographical or transcription errors. In thirty instances, when [the deponent] had originally given answers, he retracted those responses and instead states that he either did not know the answer, did not remember, or did not understand the question. At other points, an answer of "yes" was changed to "no" or an answer of "no" was changed to "yes." In other alterations, [the deponent] changed the figures given in the original answers: an answer of 6 feet, for example, was changed to read 8 to 10 feet; an answer of 3 minutes was changed to 10-20 seconds.

*Id.*

277. *Id.* at 642.

278. See *Rios v. Welch*, 856 F. Sup. 1499, 1502 (D. Kan. 1994) ("It is the court's belief that a plaintiff is not permitted to virtually rewrite portions of a deposition, particularly after the defendant has filed a summary judgment motion simply by involving the benefits of Rule 30(e) . . . [A] deposition is not a 'take home examination' and an 'errata sheet' will not eradicate the import of previous testimony taken under oath.").

279. 144 F.R.D., 322 (W.D. La. 1992).

280. *Id.* at 322.

281. *Id.* at 323-25.

282. *Id.* at 325 (emphasis added).

Although not expressly stated, these courts seem to believe that deposition testimony should be treated more akin to trial testimony, which the witness cannot change at will.

The most disturbing case concerning transcript changes is *Combs v. Rockwell International Corp.*<sup>283</sup> In *Combs*, the plaintiff gave a deposition and received his deposition transcript for review. Although the plaintiff did not make any changes, and told his attorney that he was satisfied his testimony was correct, he also gave his attorney permission to alter his responses.<sup>284</sup> The attorney then proceeded “to make thirty-six changes, many of which materially altered the substance of [the plaintiff’s] testimony.”<sup>285</sup> The plaintiff never reviewed these alterations, a fact that surfaced during a second deposition.<sup>286</sup> The defendants then moved to dismiss the case on grounds that the plaintiff had violated Federal Rules of Civil procedure 11 and 30(e).<sup>287</sup> The trial court granted the motion and the Ninth Circuit affirmed, explaining that the conduct of the plaintiff and his attorney amounted to falsifying evidence.<sup>288</sup> This case is disturbing not only because of the conduct involved, but because the court skimmed over the attorney’s obviously unethical conduct of substantively changing answers the client had indicated were correct.

#### b. *Ethical Codes*

The ethics codes, of course, do not cover a client’s actions. However, the attorney’s conduct when advising the attorney about changes, or actually in assisting the client with changes, is covered by ethical mandates. Again, however, neither the *Model Rules* nor the *Model Code* expressly addresses changes to deposition transcripts. They do, however, address the serious topic of falsifying evidence.

The *Model Code* provides that an attorney may not present or counsel his witness to present false testimony or evidence or to suppress evidence that he or his client has a legal obligation to produce.<sup>289</sup> In addition, the *Model Code* clearly

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283. 927 F.2d 486 (9<sup>th</sup> Cir. 1991).

284. *Id.* at 488.

285. *Id.*

286. *Id.*

287. *Id.*

288. *See id.* (insinuating that the plaintiff’s conduct bordered on perjury).

289. *See* MODEL CODE DR 1-102(A)(5) & EC 7-26 (teaching that “[t]he law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline.”); *see also id.* EC 7-27 (noting that “[b]ecause it interferes with the proper administration of justice, a lawyer should not suppress evidence that the or his client has a legal obligation to reveal or produce.”); *see also id.* DR 1-102(A)(4) (providing that “[a] lawyer shall not: . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation”); *id.* DR 7-102(A)(3) & (7) (prohibiting a lawyer from “conceal[ing] or knowingly fail[ing] to disclose that which he is required by law to reveal” and from “[c]ounsel[ing] his client in conduct that the lawyer knows to be illegal or fraudulent”); *cf. id.* EC 8-5 (explaining that “[f]raudulent, deceptive, or otherwise illegal conduct by a

indicates that while attorneys have a duty to represent each client with zeal,<sup>290</sup> this duty is not violated by complying with procedural rules or treating adversaries with civility.<sup>291</sup>

Similarly, the *Model Rules* also require an attorney to “demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.”<sup>292</sup> Also, as under the *Model Rules*, an attorney may not knowingly offer or assist her client to offer false evidence.<sup>293</sup>

## B. ANALYSIS AND ALTERNATIVES

The excerpts to Mr. Ferguson’s deposition reflect six changes. This analysis will begin by discussing whether a court would likely uphold the changes in the face of a motion to strike filed by the opposing party. The analysis will then shift to defense counsel’s conduct, and will conclude with a proposal to amend Rule 30(e).

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participant in a proceeding before a tribunal . . . is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers. Unless constrained by his obligation to preserve the confidences and secrets of his client, a lawyer should reveal to appropriate authorities any knowledge he may have of such improper conduct.”).

290. See *id.* DR7–101(A)(1) (directing that “[a] lawyer shall not intentionally: . . . Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7–101(B). A lawyer does not violate this Disciplinary Rule, however, by . . . avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process”); see also *id.* EC 7–1 (explaining that “[t]he duty of a lawyer, both to this client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations”).

291. See *id.* EC7–19 (providing that “[t]he duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law”); *id.* EC7–20 (observing that “[n]ot only must there be competent, adverse presentation of evidence and issues, but a tribunal must be aided by rules appropriate to an effective and dignified process”); *id.* EC 7–25 (explaining that “[r]ules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus while a lawyer may take steps in good faith and within the framework of the law to test the validity of the rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them.”); *id.* EC 7–36 (emphasizing that “[a]lthough a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of [judicial] proceedings”); *id.* EC 7–38 (stating that “[a] lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client”); *id.* EC 7–39 (concluding that “[i]n the final analysis, proper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will preserve the impartiality of tribunals and make their decisional processes prompt and just, without impinging upon the obligation of lawyers to represent their clients zealously within the framework of the law”).

292. MODEL RULES pmbl. [4]; see also *id.* Rule 8.4(d) (providing that “[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice”).

293. See *id.* Rule 3.3(a)(4) (stating that “[a] lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false”); *id.* Rule 3.4 (directing that “[a] lawyer shall note: (a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy[,] or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; (b) . . . counsel or assist a witness to testify falsely . . . ; (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.”).

In the First Change,<sup>294</sup> Mr. Ferguson corrected a spelling error. Virtually every court would permit this type of change, which merely corrects a form error.<sup>295</sup> Technically, however, the change, as made, is improper, because Mr. Ferguson failed to state the reason for the change.<sup>296</sup> However, given the helpful and non-prejudicial nature of the change, plaintiff's counsel would be wise not to waste her client's money or the court's time by complaining.

In his Second Change,<sup>297</sup> Mr. Ferguson expounded on an answer; in his Third Change,<sup>298</sup> he completely changed an answer. As with the first change, he failed to give a reason for each change. For this failure alone, a court might grant a motion to strike these answers.<sup>299</sup> Since these changes affect the substance of his testimony, and are extremely self-serving, plaintiff's counsel should consider filing a motion to strike the changes based on the defense's failure to adhere to the requirements of Rule 30(e).<sup>300</sup> Again, however, she should also consider whether it would be more effective not to challenge the changes, but simply to read the contradictory statements to the jury at trial. Indeed, such a tactic might prove more beneficial in the long-run, as it might destroy Ferguson's credibility.

In the Fourth Change<sup>301</sup> and in the Fifth Change,<sup>302</sup> Mr. Ferguson changed answers substantively, but he also provided explanations for each change. Accordingly, with these changes, he complied with the technical requirements of Rule 30(e).<sup>303</sup> Whether the changes would stand, however, depends on the attitude of the forum court. Some courts would permit the changes, but might reopen the deposition so the opposing party could ask questions about the changes, and would permit the opposing party to read both the original and amended answers, with any explanation, to the jury at trial.<sup>304</sup> Other courts would strike the changes on grounds that the witness changed the substance of sworn testimony.<sup>305</sup> Still others would look for some technical reason to strike the

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294. See text accompanying *supra* note 257 (referring to the "First Change").

295. See text accompanying *supra* note 252 (discussing which changes to the deposition transcript changes are appropriate under Federal Rule of Civil procedure 30(e)).

296. See FED. R. CIV. P. 30(e) stating that the deponent must state the reason for any change made in the deposition transcript).

297. See text accompanying *supra* note 258 (referring to the "Second Change").

298. See text accompanying *supra* note 259 (referring to the "Third Change").

299. See *supra* note 269 (referring to instances in which courts have struck some changed deposition answers).

300. As an alternative, the plaintiff might seek to reopen the deposition to question the witness about his changes. See *supra* note 274 (referring to grounds some courts have used to justify reopening a deposition).

301. See text accompanying *supra* note 260 (referring to the "Fourth Change").

302. See accompanying *supra* note 261 (referring to the Fifth Change").

303. See *supra* notes 267-69 and accompanying text (referring to the text and judicial interpretation of Federal Rule of Civil Procedure 30(e)).

304. See *supra* notes 270-77 (describing the variety of actions a court may take when a deponent changes his or her answers in a deposition).

305. See *supra* notes 278-82 (describing instances in which courts have struck certain changes made in a deposition).

changes;<sup>306</sup> however, in this case, all technicalities have been satisfied. As Rule 30(e) is currently written, the most logical approach, which is based on the plain language of the rule,<sup>307</sup> would be for the court to permit the changes but to allow opposing counsel, at her choosing, to introduce both versions to the jury and possibly to permit the deposition to be reopened so opposing counsel could probe the reasons for the changes.

In the Sixth Change,<sup>308</sup> Mr. Ferguson struck a substantive answer and inserted an objection based on speculation and confidentiality concerns. Courts do not permit this type of change, as the objection, even if it were proper, was waived when counsel failed to raise it during the actual deposition.<sup>309</sup> Thus, a court would likely strike the change and reinstate the original answer. Again, however, plaintiff's counsel might consider whether it is better strategically to have only the original answer, or to have the jury see both the original answer and the evasive change from an answer to an objection.

Having addressed the legal consequences of the client's changes, it is also important to address his attorney's role in this process. We do not know what role, if any, Ms. Hopkins played in the transcript "corrections." For purposes of discussion, however, let us assume that she suggested at least some of the substantive changes to her client. Assume also that she suggested the actual substance of the changes, and did not merely indicate that the client might want to review his testimony carefully.

Although no court has made the analogy, when an attorney advises a client to make specific changes to his deposition transcript, the attorney is, in effect, coaching the witness. Because witness coaching would not be allowed during the actual deposition,<sup>310</sup> it should not be allowed after the deposition. Not only would allowing attorneys substantive input into their client's testimony after the deposition diminish one advantage of a deposition — receiving information from a witness largely unfiltered by opposing counsel — but it might also be unethical. For instance, if an attorney suggests a change that is false, then she violates ethical — and possibly even criminal — codes.<sup>311</sup>

To further explore the analogy between attorney input into transcript changes and coaching during the actual deposition, consider the case of *Hall v. Clifton*

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306. See *supra* note 270 (describing instances in which courts embracing the "plain language" interpretation of Rule 30(e) sometimes strike offending changes based on the deponent's failure to comply with some technical aspect of Rule 30(e)).

307. See FED. R. CIV. P. 30(e) (permitting changes "in form or substance").

308. See *supra* note 262 (referring to the "Sixth Change").

309. FED. R. CIV. P. 30(d); see *Securities & Exch. Comm'n v. Parkersburg*, 156 F.R.D. 529, 536 (D.D.C. 1994) (supporting the notion that objections that could have been made at the deposition are waived if not made at that time).

310. See Dickerson, *supra* note 7 (discussing private conferences during depositions); see also FED. R. CIV. P. 30(d) (discussing changes to the deposition transcript).

311. See *supra* notes 289–93 (discussing applicable ethical rules); see also *supra* notes 244–45 (discussing possible criminal violations).

*Precision*.<sup>312</sup> During his client's deposition, plaintiff's counsel stated that, "at any time if you want to stop and talk to me, all you have to do is indicate that to me."<sup>313</sup> Later, the deponent asked to confer with his attorney about "the meaning of the word 'document.'" <sup>314</sup> The deposition was recessed, but when questioning resumed, the deponent asked opposing counsel to define "document."<sup>315</sup> Soon thereafter, defense counsel showed the plaintiff-deponent a document and started to ask questions about it.<sup>316</sup> However, before defense counsel completed his question, plaintiff's counsel interjected that "I've got to review it with my client."<sup>317</sup> Defense counsel objected to this tactic, and the attorneys contacted the court, which ordered them to adjourn the deposition and appear for a discovery conference.<sup>318</sup>

At the conference, plaintiff's counsel argued that an attorney has a right to confer with his client at any time.<sup>319</sup> Judge Gawthrop disagreed. In a frequently-quoted section of his opinion,<sup>320</sup> Judge Gawthrop stated:

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 lawyer coaching or bending the witness's words to mold a legally convenient record. It is the witness — not the lawyer — who is the witness. . . .<sup>321</sup>

Judge Gawthrop also explained that although a lawyer has a right to prepare a client for deposition, once the depositions begins, the right "is somewhat tempered by the underlying goal of our discovery rules: getting to the truth."<sup>322</sup> Judge Gawthrop recognized that pretrial depositions should be conducted like a trial. "During a civil trial, a witness and his or her lawyer are not permitted to confer at their pleasure during the witness's testimony. Once a witness has been

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312. 150 F.R.D. 525 (E.D. Pa. 1993).

313. *Id.* at 526.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. The exact or substantially similar language appears in the following cases: *Armstrong v. Hussmann Corp.*, 163 F.R.D. 299, 303 n.15 (E.D. Mo. 1995); *Frazier v. Southeastern Pa. Transp. Auth.*, 161 F.R.D. 39, 315 (E.D. Pa. 1994); *Applied Telematics, Inc. v. Spring Corp.*, Nol 94 CV 4603, 1994 WL 567436, at \*5 (E.D. Pa. Sept. 21, 1994); *Meehan v. Town Lyne House Restaurant*, No. 925584C, 1994 WL 902907, at \*1 (Mass. Aug. 29, 1994); *Van Pilsum v. Iowa State Univ.*, 152 F.R.D. 179, 180 (S.D. Iowa 1993).

321. *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993) (emphasis added and footnote omitted).

322. *Id.*

prepared and has taken the stand, that witness is on his or her own.<sup>323</sup> Judge Gawthrop also held that this rule would hold true even if the witness, not the attorney, initiated the conference.<sup>324</sup> In addition, Judge Gawthrop decided that these rules concerning private conferences should apply during breaks agreed to by both counsel, such as coffee breaks, lunch breaks, and evening recesses.<sup>325</sup> He reasoned that once the deposition begins, preparation ends.<sup>326</sup>

Given the *Hall* analysis, what, then, is the real difference between coaching a witness during a deposition — typically in a private conference — and urging the witness to change answers after the deposition? The only difference is timing, and that difference is not material to the analysis. Bluntly put, other than informing the client about his right and ability to change his testimony, and the consequences of any changes — such as possible impeachment at trial — an attorney should not suggest substantive changes to the witness, even if the change would “correct” the testimony.

Such a prohibition is appropriate for three reasons. First, the testimony is that of the client, not the attorney. This premise does not end with the actual deposition session. The opposing counsel’s absence should not give the deponent’s attorney carte blanc to substantively influence the testimony. In addition, Rule 30(e) specifically states that the “deponent” — not the deponent and his

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323. *Id.* Judge Gawthrop continued:

The same is true at a deposition. The fact there is no judge in the room to prevent private conferences does not mean that such conferences should or may occur. The underlying reason for preventing private conferences is still present: they tend, at the very least, to give the appearance of the truth.

*Id.*

324. *Id.*

325. *Id.* at 529. At a bench-bar conference held in June 1994, Gawthrop clarified his position on prohibition conferences. When asked about talking to clients during a lengthy hiatus in the deposition, Gawthrop acknowledge that, in *Hall*, he had not contemplated a break stretching on for weeks or months. In that type of situation, Gawthrop responded that “I’m not going to leave the hapless client floating around without a lawyer.” Shannon P. Duffy, *Discovery Ruling Comes Under Fire; Merits of Gawthrop’s Opinion Debated by Bench-Bar Panel*, LEGAL INTELLIGENCER (Phila.), June 28, 1994, at 1.

326. *Id.* Otherwise, stated Judge Gawthrop, “A clever lawyer or witness who finds that a deposition is going in an undesired or unanticipated direction could simply insist on a short recess to discuss the unanticipated yet desired answers, thereby circumventing prohibition on private conferences.” *Id.* the judge also noted that to the extent improper conferences did occur during a deposition, the matters discussed between attorney and deponent would not be privileged. Therefore, opposing counsel could rightly inquire about what was discussed during the conference. *Id.* at 529 n. 7. Specifically, Judge Gawthrop stated, “Therefore, any such conferences are fair game for inquiry by the deposing attorney to ascertain whether there has been any coaching and, if so, what.” *Id.*

Judge Gawthrop, however, did recognize one exception to the no conference rule. During a deposition, an attorney or witness may request a recess to discuss privately whether to assert a privilege. *Id.* at 529. The judge explained that a break to discuss a possible privilege was proper because the attorney-client privilege is an important objection about which a client is entitled to counsel. *Id.* When a conference occurs for the purpose of discussing privilege, the conferring attorney should state for the record the fact that a conference occurred, the subject of the conference, and the decision about whether to assert a privilege. *Id.* at 530.

attorney or the deponent's attorney — may make changes.<sup>327</sup> Thus, the rule's plain language supports prohibiting attorney input.

Second, if an attorney suggests a change, many clients might be influenced to make the change, even if they believe that the change is unnecessary. Especially with unsophisticated clients, attorneys and their opinions carry great weight with clients — particularly concerning procedures, such as depositions, with which clients are not well acquainted. To avoid such improper influence, a complete ban on substantive changes by attorneys should be enforced.

Finally, attorneys should not do surreptitiously what they cannot do in the open. If the attorney believes that the witness's testimony is incorrect or unclear, she should proceed by examining the witness on the record. That way, the client is still the one testifying and everyone is aware of what is happening. If attorneys can provide substantive input after deposition, no one will actually know whether the changes are those of the client or those of the attorney. Therefore, an attorney attempting to influence substantively the witness's testimony after the deposition is in many ways worse than an attorney attempting to influence the witness during the deposition, because after the deposition, the influence is essentially "secret."

This secrecy presents a stumbling block to ensuring that attorneys do not attempt to impact substantively errata sheet changes. Absent rather extraordinary circumstances, as occurred in *Combs*,<sup>328</sup> an attorney's communication with her client is typically privileged, if the communication concerns legal advice. Thus, attorneys may attempt to hide their misconduct concerning transcript changes under the cloak of that privilege.

One solution to this secrecy dilemma is for courts to allow the opposing attorney to reopen a deposition when the deponent submits significant substantive changes. As part of the reopened deposition, the opposing counsel should be permitted to ask the witness whether he conferred with his attorney about the substance of his testimony. If the answer is yes, then the attorney can inquire whether the attorney suggested any of the substantive changes — as opposed to whether substantive changes were allowed or the reasons a client wanted to make a substantive change. If the deponent's attorney did suggest the substance, the questioning attorney could inquire into the nature of the change and whether the client agrees with the change.

Some may worry that such a solution will erode the attorney-client privilege. However, if witness coaching is inappropriate,<sup>329</sup> it should be deemed inappropriate at all stages of the deposition. And if an attorney has coached her witness

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327. FED. R. CIV. P. 30(e).

328. 927 F.2d 486 (9th Cir. 1991). For a discussion of *Combs*, see text accompanying *supra* notes 283–88.

329. Some believe that attorneys have a duty to coach their witnesses. See Taylor, *supra* note 123, at 1057.



inappropriately, then her misconduct should not be shielded by the attorney-client privilege.<sup>330</sup>

Critics may further argue that a ban on substantive attorney input is not warranted because most counsel do not try to change the substance of their client's testimony and because those who do try are typically foiled, since opposing counsel can read both answers into evidence to demonstrate that the witness contradicted himself and thus should not be believed.<sup>331</sup> They may also argue that some substantive changes are valuable, either because they correct inaccuracies or because they give advance notice of position changes, thus allowing for more effective cross-examination.<sup>332</sup>

These arguments should not be accepted as excused to permit attorneys to change a client's testimony substantively. If the deponent gave inaccurate testimony, the deponent can make the correction. After all, isn't it the client who typically is more familiar with the facts, since he or she actually "lived" them? Further, the attorney has other opportunities to help "correct" supposed inaccuracies, such as examining the witness on the record.

Regarding the argument that Rule 30(e) has a built-in deterrent against making substantive changes, that argument is not entirely accurate. Rule 30(e) says nothing about reading both the original and amended answers to the jury. That practice was developed by courts and may not always be followed. Moreover, the deterrent works only if the attorney believes that the risks associated with changing the answer outweigh the benefits of providing a "better" answer. If the attorney can develop a logical reason for the change — such as stating that the client did not understand the question — then the risks may look relatively small when compared to the potential benefits at trial.

One way to avoid the problems with merely suggesting that it is improper for attorneys to give substantive input into errata sheet changes is to amend Rule 30(e) to prohibit most substantive changes. In Illinois, the courts became so disenchanted with the abuse arising from errata sheet changes<sup>333</sup> that in 1995, the state supreme court amended the Illinois equivalent to Rule 30(e) to permit a

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330. See Dickerson, *supra* note 7, at 322–23 (analogizing to the crime-fraud exception to the attorney-client privilege).

331. See *supra* notes 272–73 (supporting a broad interpretation of Rule 30(e), which interpretation would allow deponents to change deposition testimony in any way they wish.)

332. See Taylor, *supra* note 123, at 1074 (indicating that an attorney's input — during the deposition — that corrects inaccurate information should be allowed, because, "[w]ithout the consultation occurring, the party conducting the deposition proceeds on the basis of inaccurate information. The mistake may never become apparent, in which case the discovery process is subverted in the absence of consultation.").

333. See *LaSalle Nat'l Bank v. 53rd-Elis Currency Exch. Inc.*, 618 N.E.2d 1103, 1116–18 (Ill. App. Ct. 1993) (noting that the potential for testimonial abuse has become increasingly evident as witnesses submit lengthy errata sheets in which their testimony is drastically altered, including changing affirmative responses to negative and the reverse).

deponent to change a deposition transcript only to correct transcription errors.<sup>334</sup> Federal Rule 30(e) could be similarly amended to read in pertinent part:

If requested by the deponent or a party before the completion of the deposition, the deponent will have 30 days after being notified by the officer that the transcript or recording is available within which to review the transcript or recording and to correct mistakes caused by errors in reporting or transcription. A deponent should not make substantive changes to the deposition unless he or she can, in good faith, demonstrate that the change is necessary because of a reporting or transcription error.

With this type of rule, neither the deponent nor his attorney could change the substance of the testimony simply to bolster the deponent's position. Instead, most changes would be limited to "form" changes, such as correcting spelling errors or other mechanical errors.<sup>335</sup> The rule would also resolve the conflict<sup>336</sup> that currently exists concerning when substantive changes are permitted, thus providing more uniformity and certainty in this important area.

### CONCLUSION

Abusive pre- and post-deposition conduct, such as vexatious scheduling and improper errata sheet changes, must be stopped. Such misconduct increases the costs of litigation, often bestows an unfair litigation advantage on attorneys who snub concepts of courtesy and professionalism, and gives all attorneys a bad reputation. To solve these dilemmas, however, courts must enact more specific

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334. See ILL. SUP. R. 207(a) (providing in pertinent part that "[u]nless signature is waived by the deponent, the officer shall instruct the deponent that if the testimony is transcribed the deponent will be afforded an opportunity to examine the deposition . . . and that corrections based on errors in reporting or transcription which the deponent desires to make will be entered upon the deposition with a statement by the deponent that the reporter erred in reporting or transcribing the answer or answers involved. The deponent may not otherwise change either the form or substance of his or her answers. . . . After the deponent has examined the deposition, the officer shall enter upon it any changes the deponent desires to make, with the reasons the deponent gives for making them."); see also Steven F. Pflaum & Faustin A. Pipal, Jr., *Successful Practice Under the New Illinois Civil Discovery Rules*, 9 CHI. B. ASS'N REC. 20, 23 (1995) (commenting that "[t]his revision is intended to prevent abuses involving deponents who use errata sheets to make radical changes in their testimony" and explaining that "if a deponent realizes before a deposition is concluded that some prior testimony is inaccurate, it is particularly important to correct that testimony during the deposition").

In 1990, the Federal Bar Council's Committee on Second Circuit Courts proposed the following rule concerning changing deposition transcripts: "Deposition transcripts may be changed (1) when the transcript in an incorrect reporting of what was said or (2) when, although the transcript is correct, the witness's current recollection is different from what was said during the deposition. . . . The original transcript remains part of the record of the litigation." *Deposition Report*, *supra* note 7, at 624. This rule, however, retains the possibility of substantive changes, and thus, does not go far enough to prevent the most common form of errata sheet abuse.

335. Attorneys who still fear that their opponents might attempt to make substantive changes and attempt to blame the changes on the court reporter can either videotape or audiotape the deposition, which could then be used to determine exactly what the deponent said.

336. See *supra* notes 270-83 (referring to the conflict that arises when deponents make substantial changes to their deposition answers).

rules concerning these aspects of deposition procedure.<sup>337</sup> The new rules should require attorneys to coordinate before unilaterally noticing depositions, to cooperate in rescheduling depositions when necessary, and should limit substantive changes made after the actual deposition. Although some attorneys will try — and may indeed find — loopholes in these proposed rules, the proposed rules will promote civility by providing additional guidance about what conduct is and is not acceptable and will help depositions remain an effective discovery tool by curbing the games attorneys will be able to play.

The proposals will also help promote ethics and civility by better integrating ethics and civility into controlling procedural rules.<sup>338</sup> Such integration is important, as it demonstrates to attorneys that law and ethics are not two distinct concepts, but are related concepts that cannot, and indeed, should not be separated.<sup>339</sup> If attorneys read the procedural rules through the lenses of ethical and civility codes, then many deposition dilemmas — and other similar problems — would evaporate. But again, although some argue that we already have too many rules, and that attorneys will always find a way around any given rule, rules are important, as they give notice to all about the required standards, help support attorneys who want to act legally and ethically, and restrain other lawyers who would act unprofessionally unless told not to do so.

Finally, although the proposed rules will help resolve certain deposition dilemmas, no rule could, or even should attempt, to address every possible scenario. Accordingly, courts, bar associations, law schools, and individual attorneys should continue to promote the benefits of acting ethically and professionally, even when a specific rule does not so require.

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337. See e.g., *supra* notes 125 and 335 and text following *supra* note 192 (referring to examples of more specific rules).

338. Cf. James M. Harvey, Exploring the Benefits of Civility, 181 N.J. LAW 24 (1996) (“‘Civility’ and ‘courtesy’ — I suspect that these words will not be found in the rules of civil procedure governing pretrial motions and discovery.”)

339. See Cooper Humphreys, *supra* note 18, at 938 (arguing that “standards of civility and ethics must be better integrated with each other, or made to better complement each other”)