Setting the Record Straight

How to Save a Deposition When Defending Counsel Fights Dirty

By Emily Albrecht and Christopher Tompkins

"Never argue with a fool—onlookers may not be able to tell the difference."

—Mark Twain

Depositions are one of the most powerful discovery tools in litigation. The deposition setting can also be one of the most intimidating environments that we encounter early in our legal careers. Not only is the judge absent from deposition proceedings, but as young lawyers we are often up against opposing counsel who may be several decades our senior. This age gap inevitably creates a disparity in the perceived power dynamic between counsel in the eyes of deponents, court reporters, and at times, even the attorneys themselves.

For young lawyers, depositions can be especially intimidating when dealing with more experienced attorneys who have a tendency to engage in dirty deposition tactics. This is particularly problematic when the severity of the seasoned attorney's misconduct may not rise to a level that would justify suspending the deposition to seek judicial intervention, or when doing so may be detrimental to a client's best interest—not to mention the consequence of affording opposing counsel more time to prepare for a "do-over" deposition (not only personally, but with the deponent him- or herself).

This is not going to be another article about the oft-cited handful of notorious court opinions condemning the most abhorrent examples of astonishingly flagrant discovery abuse. Rather, this is intended to be a fairly general discussion about the types of bad behavior that we, as litigators, encounter on any given day—the types of misconduct that folks are all too often able to get away with, and the momentum gained when abusive tactics go unchallenged by less experienced attorneys who may lack the confidence to speak up about such transgressions. By providing practical tips and advice in the context of the typical situations that litigators encounter every day, this article will empower attorneys of all ages and levels of experience to confront and to curtail dirty deposition tactics out in the real world. This article focuses on the misconduct often used to frustrate the deposing attorney's effort to obtain information; the use of improper tactics by the questioning attorney, while equally problematic, is beyond the scope of this discussion.

A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness, without

■ Emily Ann Albrecht is an associate with Betts Patterson & Mines, P.S., where she focuses her practice on insurance defense, product liability, and asbestos litigation. Christopher Tompkins is a shareholder of Betts Patterson & Mines, P.S., where he focuses his practice on the defense of product, professional, and general liability claims.

the defending attorney acting as an intermediary. Unfortunately, many attorneys choose to interject themselves during depositions to ask questions, make improper objections, direct deponents not to answer proper questions, or even to offer their own testimony on substantive issues in an effort to influence the testimony being offered. Aggressive lawyers may go so far as to make repetitive objections, use long-winded speaking objections, and harangue deposing counsel as tactics to fluster and to intimidate opposing counsel and signal to the deponent that the questioning attorney has lost control of the proceedings.

The terms "zealously" and "zeal" now appear only in the Preamble to the Model Rules and in the comment to Model Rule 1.3, where the idea of zealous advocacy is nevertheless tempered with caution.

This discussion is tailored to the American Bar Association Model Rules of Professional Conduct and the Federal Rules of Civil Procedure. Readers should be mindful of the potential for deviation in state rules and be aware of the particular rules of civil procedure and rules of professional conduct for the states in which they practice.

The Rules of Professional Conduct

The American Bar Association Model Rules of Professional Conduct (Model Rules) and their state counterparts impose a plethora of ethical obligations on attorneys to behave professionally, even—and especially—when passionately advocating on behalf of their clients. Fortunately, the Federal Rules of Civil Procedure and their state counterparts also provide mechanisms for dealing with counsel whose litigation style drifts outside the bounds of ethical and fair practice.

It is a common misconception in the legal profession that the Model Rules still contain an express duty for attorneys to *advocate zealously* on behalf of their clients. Some attorneys go so far as to interpret this misconceived notion of "zealous advocacy" as carte blanche for the use of abrasive, bullying, hardball lawyering with a win-at-all-costs attitude. However, over 20 years ago the Model Rules were revised, *eliminating* the express duty to advocate zealously and replacing it instead with a duty to represent one's client with "reasonable diligence." *See* ABA Model Rule 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."). As such, to justify the use of aggressive and improper litigation tactics as "zealous advocacy" is to stand on shaky ethical ground in willful ignorance of the fundamental requirements for professionalism and civility when dealing with others—attorneys or otherwise.

The terms "zealously" and "zeal" now appear only in the Preamble to the Model Rules and in the comment to Model Rule 1.3, where the idea of zealous advocacy is nevertheless tempered with caution. In the Preamble to the Model Rules, the drafters advise: "a lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law" must include "a professional, courteous, and civil attitude toward all persons involved in the legal system." *See* ABA Model Rules Preamble and Scope at ¶ 9. In the comment to Model Rule 1.3, the drafters note that while lawyers must act "with zeal in advocacy upon the client's behalf… [they are] not bound, however, to press for every advantage that might be realized for a client." *See* Model Rule 1.3 cmt., at ¶ 1.

Model Rule 3.4 generally imposes on an attorney a duty of fairness to an opposing party and his or her counsel. *See* ABA Model Rule 3.4. Model Rule 4.4 extends this duty to third parties as well, providing that "in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." *See* ABA Model Rule 4.4(a). Accordingly, actions meant to harass, intimidate, or embarrass opposing counsel, parties to the litigation, or third-party deponents are unethical and in direct violation of the ABA Model Rules of Professional Conduct and their state counterparts.

With an eye toward discovery in particular, Model Rule 3.4 dictates fairness to opposing counsel and parties to the litigation, requiring that "[a] lawyer shall not… unlawfully obstruct another party's access to evidence," "falsify evidence," or "knowingly disobey an obligation under the rules of a tribunal." *See* ABA Model Rule 3.4(a)–(c). Speaking objections and impermissible directions to a witness not to answer impede access to evidence and can leave the wrong impression about the answer to a fact question, in violation of Model Rule 3.4's prohibition against obstructing another party's access to or falsifying evidence. *See id.* Model Rule 3.2 also discourages obstructionist tactics, instead requiring that "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the efforts of the client." *See* ABA Model Rule 3.2.

It is worth noting that under the section entitled "Maintaining the Integrity of the Profession," the Model Rules make clear that even attempts to violate the rules are actionable instances of professional misconduct:

> **Rule 8.4 Misconduct**
>
> It is professional misconduct for a lawyer to:
>
> (a) violate or *attempt to violate* the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) *engage in conduct involving dishonesty, fraud, deceit or misrepresentation*;
>
> (d) *engage in conduct that is prejudicial to the administration of justice*;
>
> (e) state or imply an ability to influence improperly a government agency or official to achieve results by means that violate the Rules of Professional Conduct or other law; or
>
> (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

ABA Model Rule 8.4 (emphases added).

Moreover, attorneys who practice in federal courts are bound by the constraints of the Federal Rules of Civil Procedure, and if an attorney disregards these rules by improperly objecting to a line of questioning, by instructing a deponent to not answer a question, by inappropriately commenting on the record, or by bickering or interfering with the attorney taking the deposition, that attorney has also disobeyed an obligation that is specifically mandated by Model Rule 3.4(c). *See* ABA Model Rule 3.4(c).

The Federal Rules

Federal Rule of Civil Procedure 30 sets forth a detailed protocol governing the conduct of parties, counsel, and deponents (including non-parties) during depositions. *See* Fed. R. Civ. P. 30. Specifically, Federal Rule 30 provides that "examination and cross examination of a deponent [shall] proceed as they would at trial under the Federal Rules of Evidence." Fed. R. Civ. P. 30(c)(1). Federal Rule 30 further provides that all objections must be "noted on the record" and "stated concisely in a nonargumentative and nonsuggestive manner," and a deponent must answer all questions unless counsel expressly instructs otherwise or moves to suspend the deposition. Fed. R. Civ. P. 30(c)(2).

Typical misconduct during depositions will include such tactics as making frivolous objections, including speaking objections expressly prohibited by the court rules, making repetitive objections to throw off the questioning counsel, and improperly instructing a deponent not to answer a question in the absence of privilege. Particularly problematic among these deceptive and misleading practices are the acts of directing a deponent not to answer proper questions, attempting to offer the attorney's own testimony on the deponent's behalf by commenting about substantive issues on the record, or even quoting deposition testimony in a way that grossly mischaracterizes the deponent's statements in an attempt to confuse the record.

Objections

Generally, in federal court there are 11 grounds upon which objections may be made to the form of a question posed during a deposition: (1) compound; (2) asked and answered; (3) overbroad or calls for a narrative; (4) calls for speculation; (5) argumentative; (6) vague or unintelligible; (7) assumes facts not in evidence; (8) misstates the record; (9) calls for an opinion from an unqualified witness; (10) leading where not permitted; and (11) lack of foundation. *Boyd v. Univ. of Maryland Med. Sys.,* 173 F.R.D. 143, 147 n.8 (D. Md. 1997). Relevance is generally not regarded as a valid deposition objection. *See Resolution Trust Corp. v. Dabney,* 73 F.3d 262, 266 (10th Cir. 1995). On the other hand, "the making of [an] excessive number of unnecessary objections may itself constitute sanctionable conduct…." Fed. R. Civ. P. 30 advisory committee's note (1993 Amendment Subdivision (d)(3)).

Instructions Not to Answer

The Federal Rules of Civil Procedure also limit an attorney's ability to instruct a witness not to answer a question: "A person may instruct a witness not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4)." Fed. R. Civ. P. 30. Efforts to obstruct the disclosure of relevant information, including "detailed objections, private consultations with the witness, instructions not to answer, instructions how to answer, colloquies, interruptions, [and] ad hominem attacks," are violations of Rule 30 and may invoke sanctions. *Morales v. Zondo, Inc.,* 204 F.R.D. 50, 54 (S.D.N.Y. 2001) (noting sanctioned counsel appeared on 85 percent of deposition transcript with statements other than objections to form or requests for the court reporter to read back questions).

Aggressive Behavior

Aggressive behavior in the deposition setting is particularly despicable and hurtful when abusive rhetoric is targeted at members of groups that are marginalized in the profession, including (but not limited to) new lawyers, women, people of color, people with disabilities, and LBGT lawyers. In the Preamble to the Model Rules, the charge to behave professionally, courteously, and civilly forbids name calling and insulting opposing counsel, yet this type of behavior continues to plague our profession. *See, e.g., Florida Bar v. Martocci*, 791 So. 2d 1074, 1074–76 (Fla. 2001) (Florida Bar sanctioned an attorney with a public reprimand, two-year probation, and costs for demeaning a Puerto Rican female opponent by telling her that her depositions were not conducted according to "girl's rules," by calling her a "stupid idiot" and a "bush leaguer," and by referring to her client as "crazy" and a "nut case"); *Principe v. Assay Partners*, 586 N.Y.S.2d 182, 184–186 (N.Y. App. Div. 1992) (sanctioning attorney $1,000 for misconduct including comments to opposing counsel such as "[t]ell that little mouse to pipe down" and "[g]o away little girl," with the court adding that "[o]bstructionist tactics may merit sanctions" and "[s]anctions are also appropriate when an attorney egregiously fails to conform to accepted notions of conduct").

In the Preamble to the Model Rules, the charge to behave professionally, courteously, and civilly forbids name calling and insulting opposing counsel, yet this type of behavior continues to plague our profession.

Sanctions

Under Federal Rule of Civil Procedure 37(a)(5)(A), the attorney advising the witness either not to answer a question or to provide an evasive or incomplete answer can be subject to sanctions. Fed. R. Civ. P. 37(a)(5)(A). *See, e.g., GMAC Bank,* 248 F.R.D. 182, 194 (E.D. Pa. 2008). An attorney may also be sanctioned under Federal Rule 30(d)(2) for engaging in conduct that "impedes, delays, or frustrates the fair examination of the deponent). *Id. See also Redwood v. Dobson*, 476 F.3d 462, 469–70 (applying Rule 30(d)(2) sanctions to an attorney for failing to adjourn a futile deposition and improperly instructing his client not to respond to questions).

Federal Rule 30(d) empowers a court to "impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party…." Fed. R. Civ. P. 30(d)(2). Since Rule 30(d)(2) does not define "appropriate sanction," it is within the court's discretion to fashion a remedy under the circumstances. *See, e.g., Bioval Labs., Inc. v. Anchen Pharm., Inc.,* 233 F.R.D. 648, 654 (C.D. Cal. 2006) (requiring payment of costs and attorney's fees incurred in preparing a discovery motion, costs incurred in first deposition, and costs attendant to resetting the deposition, including travel costs for defense counsel); *Morales v. Zondo, Inc.,* 204 F.R.D. 50, 57–58 (S.D.N.Y. 2001) (requiring payment of the deposition transcript cost, counsel's normal hourly rate multiplied by the number of hours during which he questioned the deponent and a $1,500 fine to the Clerk of Court).

Witness coaching, in particular, has long been a subject of debate among courts and commentators.

Ultimately, abusive, disruptive and dilatory behavior during depositions such as constant interruptions, silencing witnesses and demands for explanations from the examiner almost always render the deposition worthless for everyone involved. Such misconduct is unquestionably undertaken in bad faith and rises to the level appropriate for sanctions, including the court ordering counsel personally to pay for the costs of the deposition, imposing a fine, or both. *See Unique Concepts, Inc. v. Brown,* 115 F.R.D. 292 (S.D.N.Y. 1987).

However a finding of bad faith is *not* required for a court to impose sanctions under Federal Rules 30(d)(2) and 37(a)(5)(A). *See, e.g., GMAC Bank,* 248 F.R.D. at 196 (rejecting the notion of a bad-faith requirement). Rather, the imposition of sanctions under Rule 30(d)(2) requires only a showing that the attorney's conduct frustrated the fair examination of the deponent. *Id.* Sanctions against counsel may also be warranted for engaging in improper deposition conduct, as well as failing to prevent the deponent from doing the same. *Id.* at 195–99. *See also* ABA Model Rules of Professional Conduct 8.4 (a) ("It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.").

Witness Coaching

Witness coaching, in particular, has long been a subject of debate among courts and commentators. The seminal case on the issue is *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993), in which the plaintiff's counsel constantly interrupted his client's deposition to confer privately with the plaintiff. *Hall,* 150 F.R.D. at 526. Eventually, defense counsel adjourned the deposition and sought intervention from the court. *Id.* Judge Robert S. Gawthrop, III, of the United States District Court for the Eastern District of Pennsylvania reasoned that a deposition was meant to be a question-and-answer conversation between the deposing lawyer and the witness, and when the defending attorney acted as an intermediary, the answers of the witness could be colored. *Id.* Because of this concern, Judge Gawthrop prohibited conferences between the witness and counsel both during the deposition and any recesses, further ruling that (1) a lawyer and a client do not have an absolute right to confer during the course of the client's deposition and that neither the lawyer nor the client may initiate private conversations once the deposition is underway, whether in the course of the deposition or upon a recess; (2) a lawyer may prepare a client for his or her deposition, but once it commences, the witness is to answer all questions without the intervention or advice of counsel; and (3) a witness should ask the deposing attorney—rather than his or her own—to clarify or explain further if the witness does not understand a question. *Id.* at 528.

The Effect of *Hall*

It was not long before other courts across the nation began recognizing the importance of the *Hall* decision, which not only advocated for establishing bright-line rules regarding objections and conferences, but also for extending the general reach of a court's oversight to proceedings beyond those taking place in the courtroom and "explained why it was so important for lawyers to conduct themselves professionally during depositions." *Mruz v. Caring, Inc.,* 107 F. Supp. 2d 596, 606 (D. N.J. 2000).

Several jurisdictions have cited *Hall* as the basis for expanding judicial supervision of attorney conduct during depositions—in particular, Delaware, New Jersey, New York, Pennsylvania, and South Carolina. Citing *Hall*, a New York Court of Appeals instructed that a "lawyer's duty to refrain from uncivil and abusive behavior is not diminished because the site of the proceeding is a deposition room, or law office, rather than a courtroom." *Corsini v. U-Haul Int'l.*, 212 A.D.2d 288, 291 (N.Y. App. Div. 2000). In South Carolina, the state's rules of civil procedure adopted the "*Hall* approach" in favor of strict oversight of attorney conduct during depositions. *See* S.C. R. Civ. P. 30(j)(1). *See, e.g., In re Anonymous Member of S.C. Bar,* 552 S.E.2d 10, 16 (S.C. 2001) ("Having adopted the *Hall* approach, our Court requires attorneys in South Carolina to operate under one of the most sweeping and comprehensive rules on deposition conduct in the nation."). Quoting Judge Gawthrop's opinion in *Hall*, the South Carolina Supreme Court's opinion in *Anonymous Member of S.C. Bar* reasoned, "the rules of evidence 'contain no provision allowing lawyers to interrupt the trial testimony of a witness to make a statement.'" *Id.* (citing *Hall,* 150 F.R.D. at 530)). Therefore, the court added, interjections during a deposition by the witness's attorney such as "if you remember" and "don't speculate" are improper because they suggest to the witness how to answer the question when attorneys can easily make these admonitions to their client before a deposition begins. *Id.*

In fact, several states have adopted the language from *Hall* in their respective rules of civil procedure. *See, e.g.,* Alaska R. Civ. P. 30(d)(1) ("Continual and unwarranted off the record conferences between the deponent and counsel following the propounding of questions and prior to the answer or at any time during the deposition are prohibited."); Del. Super. Ct. R. Civ. P. 30(d)(1) ("From the commencement until the conclusion of a deposition, including any re-

cesses or continuances thereof of less than five calendar days, the attorney (s) for the deponent shall not consult or confer with the deponent regarding the substance of the testimony already given or anticipated to be given except for the purpose of conferring on whether or not to assert a privilege against testifying or on how to comply with a court order or suggest to the deponent the manner in which any question could be answered."); N.J. Ct. R. 4:14-3(f) ("Once the deponent has been sworn there shall be no communication between the deponent and counsel during the course of the deposition while testimony is being taken except with regard to the assertion of a claim of privilege, a right of confidentiality or a limitation pursuant to a previously entered court order."); S.C. R. Civ. P. 30(j)(5)–(6) ("Counsel and a witness shall not engage in private, off-the-record conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order. Any conferences which occur pursuant to, or in violation of… this rule are proper subjects for inquiry by deposing counsel to ascertain whether there has been any witness coaching and, if so, to what extent and nature.").

Some—but not all—federal judges in the Eastern District of Pennsylvania, as well as other jurisdictions, have also adopted the *Hall* guidelines in their entirety. *See, e.g., Frazier v. SEPTA,* 161 F.R.D. 309, 315 (E.D. Pa. 1995); *O'Brien v. Amtrak,* 163 F.R.D. 232 (E.D. Pa. 1995); *Plaisted v. Geisinger Med. Ctr.,* 210 F.R.D. 57 (M.D. Pa. 2002).

On the other hand, several courts have adopted only a limited form of the *Hall* guidelines. *See, e.g., Birdine v. City of Coatesville,* 225 F.R.D. 157, 158 (E.D. Pa. 2004) (citing *Hall* in setting down guidelines, although refusing to impose the full range of *Hall* restrictions); *United States v. Phillip Morris Inc.,* 212 F.R.D. 418 (D. D.C. 2002) (prohibiting all attorney-deponent conferences at breaks and during overnight recesses when the deposition was held on consecutive days).

Other courts have outright refused to adopt any of the *Hall* guidelines over ethical concerns and the potential unintended consequence of abuse by deposing attorneys. *See, e.g., Circle Group Internet, Inc. v. Atlas, Pearlman, Trop & Borkson, P.A.*, No. 03-C-9004, 2004 WL 406988 (N.D. Ill. Mar. 2, 2004) (court "knows of no rule that prohibits a witness from consulting with counsel before the witness answers a question"). The *Circle Group Internet* decision goes on to explain that if a break is requested when there is no question pending, it is unlikely that the proponent of the break would seek to influence the deponent's testimony during the break. *Id.* at *2.

Capturing Misconduct

Because of the lack of uniformity among jurisdictions over deposition conduct rules and procedures, the most effective way to deal with improper conduct during a deposition ultimately depends on the manner by which the deposition is to be recorded. Unfortunately, nonverbal cues or signals during a deposition, which may be as significant if not more so than those communicated verbally, are generally not recorded by the court reporter. As such, when faced with counsel who is using signals or cues during a deposition, it is crucial to ensure that the record clearly reflects all such inappropriate conduct. Specifically, any nonverbal conduct that could amount to sanctionable behavior must be described contemporaneously on the record. In addition to "reading" nonverbal conduct into the record, one should also consider obtaining verification from a witness (*e.g.*, the deponent or another lawyer who is present) as to the misconduct, for future reference.

Videotaping Depositions

If it is known ahead of time that opposing counsel has a reputation for engaging in sharp practices or bullying, it may be worthwhile to consider noticing a videotaped deposition as a precaution to discourage any such misbehavior. Federal Rule of Civil Procedure 30 allows videotape recording without the stipulation of counsel or court order as within a party's general right to depose witnesses absent a protection order. *See Gillen v. Nissan Motor Corp.*, 156 F.R.D. 120, 122 (E.D. Pa. 1994); Fed. R. Civ. P. 30(b)(5)(B); Fed. R. Civ. P. 30 1993 advisory committee's note. *See also Weiss v. Wayes*, 132 F.R.D. 152, 155 (M.D. Pa. 1990) ("the use of videotaped testimony should be encouraged and not impeded because it permits the jury to make credibility evaluations not available when a transcript is read by another"); *Drake v. Benedek Broad. Corp.*, No. Civ. A. 99-2227, 2000 U.S. Dist. Lexis 1418, at *2 (D. Kan., Feb. 9, 2000) (a party "has no burden to justify the decision to videotape [a] deposition.").

The reasons for freely permitting videotaped depositions are obvious: "Unlike a transcript, a videotape addresses important credibility concerns, such as demeanor and appearance of the witness." *Fanelli v. Centenary College*, 211 F.R.D. 268, 270 (D. N.J. 2002) (internal citations omitted). In addition, "[a]cknowledging that words themselves may carry only a limited meaning, courts have also held that facial expressions, voice inflection and intonation, gestures [and] body language… may all express a message.…" *Id.* (internal citations omitted). Moreover, in the context of abusive conduct, a videotaped deposition undoubtedly provides the court a clearer picture of what transpired when potential sanctions are at issue. *See, e.g., GMAC Bank,* 248 F.R.D. at 182.

Conclusion

At the end of the day, the most important thing for a lawyer to keep in mind when walking into a deposition, regardless of how long he or she has been practicing law, is that he or she is perfectly capable of being an effective advocate on behalf of his or her client, irrespective of the age or experience of counsel sitting across the table. With a solid command of the applicable rules and a firm grasp of the facts and issues of the case, every attorney, regardless of age, gender or experience, can be empowered with the most effective strategies and techniques for dealing with—and curtailing—these types of bad behavior during depositions.

Practical Tips

Here's how to manage your opposing counsel's bad behavior, or the temptation to exhibit some yourself, during depositions. In short, know your case; do not be afraid to speak up; create a record of improper behavior; and stay focused and remain calm.

Know Your Case

More often than not, bad behavior during depositions is indicative of an attorney's insecurity about a case or counsel's lack of proficiency, in general. By knowing the

Deposition, continued on page 76

Deposition, from page 27
facts of the case, the controlling law, the applicable court rules, the relevant documents, and what the witnesses will say under oath, you can avoid the temptation to mask your own insecurities by escalating the level of incivility.

Do Not Be Afraid to Speak Up

In the event that an opponent raises speaking objections or overuses objections, it is important to ask the attorney to clearly and concisely state the reason or reasons for the objection on the record, after which you should remind counsel of the appropriate parameters for objections and politely ask that all future objections be made only in conformity therewith. If the problem persists, it may be worth offering to give counsel a standing objection on the record to the particular line of questioning at issue to avoid any further distraction to the questioning counsel or the witness.

Create a Record of Improper Behavior

In the event that defending counsel instructs the deponent not to answer a question, you should again ask the attorney to clearly state the reason or reasons for his or her instruction on the record, after which you should then recite the rule governing the proper use of instructions not to answer and ask for the instruction to be reconsidered. If objecting counsel refuses, confirm with the witness on the record that he or she is following the attorney's instruction not to answer. If the instruction is based on privilege, ask the witness a follow up question to confirm the basis of privilege or its waiver before moving on.

Stay Focused and Remain Calm

Dirty deposition tactics may also be used to distract, frustrate, or anger deposing counsel to avoid the uncovering of all relevant information. The most important thing that you can do in response to such misconduct is to remain calm and stay focused on the deponent. If opposing counsel is not cooperating, do not get into an argument. Instead, stay focused on discovering all relevant information from the witness and come back to the record at a later time to address the misconduct with the judge, if need be. FD