United States Court of Appeals for the Eighth Circuit

NO. 14-3006

THE SECURITY NATIONAL BANK OF SIOUX CITY, IOWA,
as Conservator for J.M.K., a Minor,
Plaintiff-Appellee,

v.

JONES DAY and JUNE K. GHEZZI,
Appellants,

v.

ABBOTT LABORATORIES,
Defendant

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA – SIOUX CITY

BRIEF FOR THE AMERICAN BOARD OF TRIAL ADVOCATES
AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*

The American Board of Trial Advocates (ABOTA) is a national association of experienced trial lawyers[1] and judges, founded in 1958, dedicated to the preservation and promotion of the right to a civil jury trial guaranteed by the Seventh Amendment to the U.S. Constitution. ABOTA promotes civility and professionalism among the bar both to improve the profession and to promote the rights of citizens to have disputes tried efficiently and expeditiously by a jury of their peers. Thus, the first specific purpose set forth in ABOTA's Constitution is to "elevate the standards of integrity, honor and courtesy in the legal profession." Constitution of the American Board of Trial Advocates, Art. II, § 2, available at https://www.abota.org/index.cfm?pg=Bylaws (last visited 12.10.2014). To that end, ABOTA created a program to promote civility and professionalism through presentations at legal professional programs and in law schools throughout the country.

ABOTA's *Principles of Civility, Integrity and Professionalism*, a copy of which is attached as an Addendum hereto, specifically provide that members of ABOTA, during depositions, shall "never engage in conduct which would not be appropriate in the presence of a judge" and shall "never obstruct the interrogator or

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[1] Membership in ABOTA, which is by invitation only, is limited to lawyers who have tried ten or more civil jury trials to a jury verdict or hung jury as lead counsel. See ABOTA Constitution, Art. III, § 2(1), available at https://www.abota.org/index.cfm?pg=Bylaws (last visited 12.10.2014).

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object to questions unless reasonably necessary to preserve an objection or privilege for resolution by the court." *Id.* at 4, ¶¶ 20-21. ABOTA believes that these principles apply to all who participate in the judicial process.

This appeal raises issues that go to the heart of ABOTA's focus upon elevating the standards of integrity, honor, ethics, civility and courtesy in the legal profession, as well as promoting access to the courts. The authority of trial judges to impose appropriate sanctions for deposition misconduct is of the utmost importance to the integrity and validity of the civil jury trial system.[2]

ARGUMENT

THE DISTRICT COURT'S IMPOSITION, *SUA SPONTE*, OF SANCTIONS FOR VIOLATIONS OF THE RULES GOVERNING DEPOSITION CONDUCT WAS WITHIN ITS AUTHORITY AND WAS NOT AN ABUSE OF DISCRETION.

In arguing that the District Court erred in imposing any sanction at all upon Counsel[3] or the law firm in which she is a partner, App. Br., Arg. Part I, appellants commingle (1) the suggestion that the district courts have no authority to impose

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[2] No counsel for a party authored this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amicus curiae*, its members or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

[3] The District Court referred to the lawyer involved as "Counsel," *see Security Nat'l Bank of Sioux City Iowa v. Abbot Laboratories, SNB*, 299 F.R.D. 595, 597 (S.D. Ia. 2014), and this brief adopts that convention.

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sanctions for deposition misconduct *sua sponte* with (2) the claim that the District Court erred in finding that defense counsel violated the civil rules governing the conduct of depositions (or at least that any sanction is inappropriate because plaintiff's counsel agreed to, or at least acquiesced without objection in, such misconduct). This brief will address those arguments in turn.[4]

I. DISTRICT COURTS HAVE THE AUTHORITY TO IMPOSE SANCTIONS FOR DEPOSITION MISCONDUCT *SUA SPONTE*.

The authority to impose an appropriate sanction for deposition misconduct is an important tool in the courts' continuing efforts to implement a legal culture of civility and professionalism within, and respect for, the civil justice system and to foster the availability of civil jury trials to all. Neither the language nor the purpose of Federal Rule of Civil Procedure 30 (the "Rule") supports the suggestion that the courts may only enforce the Rule's provisions governing the conduct of depositions if one of the parties makes a motion pursuant thereto. Moreover, the courts' inherent authority to impose a sanction *sua sponte* in response to abusive litigation practices is well established.

[4] The arguments in App. Br., Arg. Part II, regarding the appropriateness of the particular sanction that the District Court imposed are beyond the scope of this brief.

A. The courts have the authority to impose sanctions under Rule 30(d)(2) *sua sponte* for violations of the civil rules governing the conduct of depositions.

Rule 30(d)(2) of the Federal Rules of Civil Procedure provides as follows:

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

Fed. R. Civ. P. 30(d)(2). This language, by its plain terms, recognizes the courts' authority to impose an appropriate sanction whenever a person has impeded, delayed, or frustrated the fair examination of a deponent. The rule contains no language whatsoever limiting the courts' enforcement authority to situations where an examining party has first gone to the considerable time and expense of preparing and pursuing a motion for sanctions under Rule 30(d)(2).

This provision should be read in conjunction with the contemporaneous addition to the rule of substantive standards governing the conduct of depositions. The 1993 amendments to Rule 30 added new provisions specifically requiring that "objections during a deposition must be made concisely and in a non-argumentative and non-suggestive manner" and prohibiting instructions to a deponent not to answer except in three limited circumstances. As the Advisory Committee Notes to the 1993 amendments to Rule 30 stated: "In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer."

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These provisions, including the express recognition of the courts' authority to impose sanctions for impeding, frustrating or delaying the fair examination of deponents, are part of a broader effort to reign in abuses of the discovery process by encouraging "forceful judicial management," Advisory Committee Notes to the 1983 amendments to Rule 16(f), and "more aggressive judicial control and supervision," Advisory Committee Notes on the 1983 amendments to Rule 26(g), of the discovery process. The purposes of the Rule would be undermined, not furthered, by conditioning the courts' authority to impose appropriate sanctions for deposition misconduct upon a party bringing a motion for sanctions invoking the rule.

Appellants nevertheless flatly took the position below that: "**THE COURT CANNOT ISSUE SANCTIONS, *SUA SPONTE,* UNDER RULE 30(d)(2).**" Brief In Response To Supplemental Order … To Show Cause, Dkt. # 200 (July 9, 2014) at 4, Heading I. They maintained that "rule 30(d)(2) leaves it to the deposition participants, if they believe court intervention or some sanction is warranted, to bring the matter to the court for resolution. *That is the adversarial process at work*, and Rule 30(d) contemplates that a court will only get involved if one of the parties so requests." *Id.* at 5 (emphasis added).

The District Court was correct to reject that no-holds-barred kind of approach. The courts must have the authority to exercise judicial control and

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supervision over the discovery process, including the conduct of depositions, precisely in order to guard against situations where an overly "adversarial approach" to discovery results in deposition misconduct that opposing counsel may be too inexperienced, timid, distracted, or overwhelmed to take the initiative, time, effort and expense to seek sanctions for under the Rule.

In support of their position that the District Court "improperly invoked Rule 30(d)(2) and its inherent powers *sua sponte*," App. Br. at 30,[5] Appellants appear to make two arguments, neither of which has merit.

First, Appellants propose that the absence of language in Rule 30(d)(2) expressly recognizing the courts' authority to impose sanctions for deposition misconduct upon its own initiative presents a legally significant contrast to provisions for sanctions elsewhere, in Rules 11(c)(3), 16(f)(1), and 26(g)(3). App. Br. 31. But the comparisons are inapt. Rule 30 contains no counterpart to Rule 11(c)(2), which authorizes a *party* to bring a motion for sanctions; and there is no

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[5] It is not entirely clear whether Appellants intend to present to this Court the same aggressive, unqualified position – that the courts have *no* authority to impose sanctions for deposition misconduct *sua sponte* – that they took below. The full sentence just excerpted in the text from App. Br. at 30 could be read narrowly as claiming only that the District Court abused its discretion in imposing sanctions under the particular circumstances of this case. However, Appellants' Brief then proceeds to present textual and precedential arguments that (if they had merit, which they do not, *see infra*) would support the proposition that the courts do lack the authority to address deposition misconduct *sua sponte*, App. Br. at 31-32; and its closing words on this subject – "regardless of whether a court should *ever* invoke Rule 30(d)(2) or its inherent powers *sua sponte* to address deposition misconduct," *id.* – certainly do not clearly concede the legal point.

reason to believe that the provision in Rules 16(f)(1) and 26(g)(3) for the court to impose sanctions "on motion or on its own" is intended to be different in any practical or significant way from Rule 30(d)(2)'s provision for the imposition of sanctions upon "a person who impedes, delays, or frustrates the fair examination of the deponent." Clearly any court imposing a sanction under Rule 30 must be acting "on motion or on its own," and nothing in the rule limits it to acting "on motion." The language of Rule 30 is, instead, broad and unqualified by any suggested limitation to cases where a party has the motivation, energy, time and resources to move for such relief.[6]

Moreover, the Advisory Committee's Notes make clear that none of those other provisions was thought, at the time of their adoption, to create judicial authority where it did not already exist. Thus, for example, the Advisory Committee Notes to the 1983 amendments to Rule 11 pointed out that:

> Courts currently appear to believe that they may impose sanctions on their own motion. Authority to do so has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties. <u>The detection and punishment of a violation of the signing requirement, encouraged by the amended rule, is part of the court's responsibility for securing the system's effective operation.</u> [emphasis added; internal citation omitted].

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[6] Indeed, as the District Court noted, *SNB*, 299 F.R.D. at 599, the Advisory Committee Notes to the 1993 amendments to Rule 30 state that apart from its potential application to non-party witnesses, Rule 30's provision for sanctions is "congruent with Rule 26(g)," under which, of course, the courts expressly have the authority to impose sanctions upon their own initiative without a motion.

The 1983 Notes to Rule 16 likewise noted that "the courts have not hesitated to enforce [Rule 16] by appropriate measures" and stated that "[t]o reflect that existing practice," Rule 16(f) –

> expressly provides for imposing sanctions on disobedient or recalcitrant parties, their attorneys, or both in four types of situations. . . . Furthermore, explicit reference to sanctions reinforces the rule's intention to encourage forceful judicial management. [emphasis added].

Finally, the Advisory Committee Notes to the 1983 amendment to Rule 26(g) emphasized that:

> Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision. . . . Because of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules, . . . Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. [emphasis added].

Thus, in each of these three provisions cited for comparison by Appellants, the Advisory Committee made clear not only that the express provision for the imposition of sanctions *sua sponte* was intended to recognize, not confer, judicial authority, but also that its purpose was to encourage – indeed, in Rule 26(g)(3), to require – the courts to take more responsibility to counter such abuses. Appellants' suggestion that the courts may not sanction deposition discovery misconduct (alone) unless a party makes a motion invoking Rule 30(d)(2) is contrary both to the Advisory Committee's express acknowledgement of the courts' pre-existing authority to take corrective action whenever litigation misconduct comes to their

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attention and to the drafters' expressed purpose of encouraging (and in some circumstances requiring) the courts to take a more forceful, active role and to exercise greater responsibility for obstructionist discovery tactics whenever they are confronted with them.

Second, Appellants restate that their review of more than 600 Rule 30(d)(2) decisions found no instance of a court entering sanctions under Rule 30(d)(2) without a party raising the issue with the Court "either formally or informally." App. Br. 31-32.[7] Of course, nobody would expect there to be many such reported decisions. As Appellants point out, in the ordinary course improper deposition conduct rarely comes to the Court's attention unless raised by a party. But that is a far cry from the proposition that deposition misconduct is none of the Courts' business unless the party on the receiving end of the misconduct has sufficient reasons and resources to initiate and engage in discovery sanctions motions practice. Even so, there *are* at least three other cases, two of which are cited in Appellants' Brief, in which a federal district court *has* imposed sanctions under Rule 30(d)(2) on its own initiative.

[7] The fuzzy qualifier, "either formally or informally," would appear to permit the exclusion of some decisions (not identified by the appellants) in which no party moved for sanctions under Rule 30(d)(2) but the district court imposed sanctions under that rule *sua sponte,* thereby drawing into question the solidity of the "no instance" assertion in Appellants' Brief.

First, Appellants cite *Craig v. St. Anthony's Med. Ctr.,* 384 F. App'x 531, 532 (8th Cir. 2010), but deny that it was an instance in which a court imposed a Rule 30(d)(2) sanction *sua sponte*, pointing out that the defendant in that case had moved for sanctions. App. Br. at 31-32. But while that motion may have been what brought the misconduct to the court's attention, the district court's exercise of its sanctioning authority clearly was not based upon any such motion. According to the Court's statement of the case, the parties settled the lawsuit and the court, accordingly, "entered an order denying all pending motions" without prejudice. It was not until the "following day" that "the district court entered a separate order directing [plaintiff's counsel] to show cause why the court should not sanction him for his actions during discovery." 384 F. App'x at 532. That exercise of the district court's enforcement authority was not founded upon any pending motion under Rule 30(d)(2), because all pending motions had been denied. The Court nevertheless held that the district court's imposition of a sanction for violating Rule 30(c)(2) (through argumentative and suggestive objections, as well as unjustified instructions to the witness not to answer) "was proper under Rule 30(d)(2)." *Id.* at 533.

Appellants also cite, *Jurczenko v. Fast Property Solutions, Inc.,* 2010 WL 2891584 (N.D. Ohio, July 20, 2010). App. Br. at 39. Once again, Appellants simply ignore the fact that the *Jurczenko* court also imposed sanctions under Rule

30(d)(2) upon its own initiative. In that case, the Court addressed separately the questions of (1) sanctions relating to the depositions of Plaintiffs Marjorie and Larissa Jurczenko, 2010 WL 2891584 at *2-4 (Part B(1)), and (2) sanctions relating to the deposition of Alexander Jurczenko, *id.* at *4-5 (Part B(2)). The motions relating to the depositions of plaintiffs Marjorie and Larissa were brought under Rule 37(d), *id.* at *2-3, but the district court, on its own initiative, held that "sanctions are also appropriate under Rule 30(d)." *Id.* at *3. The court based this ruling not only upon the initial last-minute cancellations of their depositions, but also upon their obstructionist conduct during their depositions when they eventually were taken in the courthouse. *Id.* at *4. Defendants separately moved for sanctions against Alexander Jurczenko (for his obstructionist conduct at his deposition before he became a party) under Rule 30(d)(2) and 37(a)(5), which the court denied. *Id.* at *4-5. Thus, *Jurczenko* clearly is another example of a case in which a federal district court has imposed sanctions under Rule 30(d)(2) upon its own initiative.

Additionally, on September 4, 2014, a federal district court in Texas, expressly acting upon its own initiative (and citing the District Court's sanctions order in this case), issued an order to show cause why it should not impose a sanction under Rule 30(d)(2) for, *inter alia,* unnecessarily asserting objections to numerous questions and refusing to answer questions due to objections that did not

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assert privilege. *Nieman v. Hale*, 2014 WL 4375669, at *6 (N.D.TX, September 4, 2014); *see also Nieman v. Hale,* 3:12-cv-2433-L-BN; Dkt #151 (N.D.TX, Sept. 25, 2014) (order imposing sanctions).

Perhaps even more telling, however, is the fact that despite searching through "more than 600 Rule 30(d)(2) sanctions opinions," App. Br. at 31, Appellants have been unable to identify even one opinion even arguably standing for the proposition that the courts do not have the authority to impose sanctions for deposition misconduct under Rule 30(d)(2) upon their own initiative. While obviously most reported Rule 30(d)(2) sanctions opinions will result from a party's motion under Rule 30(d)(2) that brings the misconduct to the court's attention, it is essential to the integrity of the discovery process and the civil jury trial system that courts have the authority to enforce the substantive rules governing the conduct of depositions whenever violations of those rules come to their attention.

There are many reasons that may discourage attorneys from moving for sanctions under Rule 30(d)(2), even in some clear cases of serious misconduct. Such reasons may include very real practical considerations of time, cost, expense and distraction; timidity of examining counsel, from inexperience or lack of self-confidence; and the perceived advantage (and cost savings) of maintaining

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reasonably good relations with offending counsel.[8] None of those reasons, however, justifies such misconduct. Of course the parties should always "attempt to resolve any disputes themselves in the first instance." App. Br. at 32. But when those efforts fail to prevent deposition misconduct and that misconduct comes to the attention of the court, with or without a Rule 30(d)(2) motion, the court should and does have the authority – indeed, the responsibility – to enforce the Rule's standards of conduct in order to promote professionalism and further the integrity of the civil justice system.

B. The courts also have the inherent authority to impose sanctions for deposition misconduct *sua sponte*.

In its sanctions order, the District Court also relied upon the courts' "'well-acknowledged' inherent power to levy sanctions in response to abusive litigation practices." *Security Nat'l Bank of Sioux City, Iowa v. Abbot Laboratories,* 299 F.R.D. at 599, quoting *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 765 (1980).[9]

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[8] The District Court surmised that this last consideration may have affected plaintiff's counsel in this case. *See SNB*, 299 F.R.D. at n.9.

[9] *Roadway Express* in turn was quoting *Link v. Wabash R. Co.,* 370 U.S. 626, 632 (1962), in which a district court, on its own initiative, had dismissed an action for failure to prosecute. The plaintiff argued that Rule 41(b)'s express authorization of such dismissals *upon a defense motion* served, by negative implication, to prohibit such dismissals *in the absence of* such a motion, but the Supreme Court disagreed, holding that the "authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to

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The District Court further noted that "the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct," *id.,* quoting *Chambers v. NASCO, Inc.,* 501 U.S. 32, 49 (1991),[10] and that "[s]anctions may also be awarded *sua sponte* under the court's inherent power." *Id.,* quoting *In re Itel Sec. Litig.,* 791 F.2d 672, 675 (9th Cir. 1986) (which in turn cited *Roadway Express, supra,* 447 U.S. at 765).[11]

Appellants Brief does not challenge any of those legal conclusions, arguing only that "inherent powers must be exercised with restraint and discretion," App. Br. at 32 n.11 (quoting *Chambers, supra,* 501 U.S. at 44), while conceding that "all courts have inherent authority to 'manage their own affairs so as to achieve the orderly and expeditious disposition of cases,'" and that this power extends "to managing [a court's] bar and disciplining attorneys that appear before it." *Id.* at 53, quoting *Zerger & Mauer LLP v. City of Greenwood*, 751 F.3d 928, 931 (8th Cir.

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manage their own affairs so as to achieve the orderly and expeditious disposition of cases." 370 U.S. at 630.

[10] *Chambers* rejected the argument that "the various sanctioning provisions in the Federal Rules of Civil Procedure reflect a legislative intent to displace the inherent power." 501 U.S. at 42-43 (footnote omitted).

[11] The District Court also held that a finding of bad faith was not required for imposing sanctions under either Rule 30(d)(2) or its inherent power, *SNB*, 299 F.R.D. at 599-600 (citing *GMAC Bank v. HTFC Corp.,* 248 F.R.D. 182, 196 (E.D. Pa. 2008), *Stevenson v. Union Pac. R. Co.,* 354 F.3d 739, 745 (8th Cir. 2004), and *Harlan v. Lewis,* 982 F.2d 1255, 1260 (8th Cir. 1993), while stating that it was "difficult to believe that Counsel could, in good faith, engage in the conduct outlined in this opinion." *Id.* at 600.

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2014), and *Chambers, supra,* 501 U.S. at 43. *See also Paramount Communications, Inc. v. QVC Network, Inc.,* 637 A.2d 34, 52 (Del. 1994), where the Delaware Supreme Court, noting that "[t]he issue of discovery abuse, including lack of civility and professional misconduct during depositions, is a matter of considerable concern to . . . courts around the nation," *id.* at 52, raised the issue of deposition misconduct "*sua sponte* as part of our exclusive supervisory responsibility to regulate and enforce appropriate conduct of lawyers appearing in Delaware proceedings." *Id.* at 52, n. 23; *see id.* at 51-57 (Addendum).[12]

The District Court's conclusion that it had the inherent authority in this case to impose sanctions for deposition misconduct *sua sponte* is, thus, essentially uncontested. The notion that a courts' inherent powers can be exercised only upon the motion of a party would be illogical at best. The Court's inherent power does not rest upon the decisions of the parties before it.

[12] Another case in which the court imposed sanctions for deposition misconduct *sua sponte* under its inherent authority is *Freeman v. Schointuck,* 192 F.R.D. 187, 190 (D. Md. 2000). In *Freeman*, defense counsel moved to exclude plaintiff's expert from testifying on the basis that the expert's deposition testimony had been non-responsive; the court not only denied that motion but also imposed sanctions against defense counsel for unprofessional and discourteous conduct while taking the deposition, citing its Local Rule 606 (which required professional and courteous conduct) and not Rule 30(d)(2).

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II. THE DISTRICT COURT'S OPINION JUSTIFIES THE IMPOSITION OF SANCTIONS.

The District Court explained that it decided to impose sanctions for two reasons: Counsel's frequent use of objections and commentary to coach the witnesses and Counsel's excessive interruptions of the depositions, which the Court concluded impeded the fair examination of the deponents in violation of Rule 30(d)(2). *SNB*, 299 F.R.D. at 598. Both reasons support the imposition of sanctions. *Hall v. Clifton Precision*, 150 F.R.D. 525, 530-531 (E.D.Pa. 1993) (witness-coaching objections defeat the purpose of depositions and violate Rule 30); *Craig,* 384 Fed. App'x at 533 (sanctions justified where the "record reflects ample support for the district court's finding that [counsel] impeded, delayed, or frustrated the deposition").[13]

The District Court outlined numerous instances of witness coaching in its opinion. *SNB*, 299 F.R.D. at 604-609. It pointed to several instances where seemingly clear questions were met with speaking objections that strongly implied a desired answer – all of which were, unsurprisingly, followed by the answer implied in the objection. This tactic violates the plain dictates of the Rule 30(c)(2), which states plainly that objections "must be stated concisely in a

[13] The District Court's opinion focuses on the depositions of two Abbott Laboratories employees, Sharon Smith Bottock and Bridget Barrett-Reis. The transcripts were impounded and therefore not available to *amicus* counsel. *See* November 5, 2014, Order, Entry ID 4213701. Therefore, the argument is based upon the facts and conclusions set forth in Judge Bennett's opinion below.

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nonargumentative and nonsuggestive manner." As the District Court noted, the fact that the witness's answers almost parroted the objections made in several instances, demonstrates how suggestive the speaking or coaching objections were. *SNB*, 299 F.R.D. at 604-609. *See McDonough v. Keniston*, 188 F.R.D. 22, 24 (D.N.H. 1998) ("the effectiveness of this coaching is clearly demonstrated when the plaintiff subsequently adopts his lawyer's coaching").

This approach to defending depositions has been decried by courts and commentators for years. *Van Pilsum v. Iowa State Univ. of Science and Technology,* 152 F.R.D. 179, 180 (S.D. Iowa 1993) (condemning "Rambo Litigation" tactics in deposition by counsel); *see also,* Brian Miller, *Lawyers Gone Wild: Are Depositions Still a "Civil" Procedure?,* Conn. 42 Law Rev. 1527, 1534-1535 (2010). The problems created by witness coaching at depositions are myriad and many are obvious. The tactic impedes, rather than enhances the exchange of information. *Van Pilsum,* 152 F.R.D. at 181. Depositions become a cat and mouse game rather than a discovery tool. *Hall*, 150 F.R.D. at 528 ("The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy"). Litigation costs are driven up for litigants and courts alike.

In turn, the skyrocketing costs of discovery have the effect of reducing still further the number of civil cases that actually get tried. Perhaps this is one reason behind the pervasive use of obstructionist tactics. Litigators may seek to drive up

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the cost of litigation to force settlement rather that have cases tried on the merits. Paul W. Grimm & David Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C.L.Rev. 495, 525-26 (2013). At a time when less than 2% of all civil cases filed are tried, we can ill afford to raise more impediments to the exercise of this Constitutional right. John D. Bates, Judicial Business of the United States Courts: 2013 Annual Report of the Director (5,027 trials out of the 255,260 civil cases that were terminated in the U.S. District Courts in 2013) http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-district-courts.aspx (last visited 12.10.14).

Appellants argue that the District Court unfairly criticized Counsel by first critiquing the ubiquitous use of "form" objections" (115 over the course of just two transcripts) and then basing its sanctions order on Counsel's use of improper speaking objections and witness coaching. App. Br. at 24-25. Appellant attempts to create a conflict that does not in fact exist. The rules delineate what an attorney may, and may not, do when raising objections at a deposition, and the District Court described the difference in detail. *Fondren v. Republic American Life Ins. Co.,* 190 F.R.D. 597, 602 (N.D.Okla. 1999) (the provisions of Rule 30(d)(2) are clear without the need for judicial gloss).

First, the only objections that ordinarily should be made, are those that otherwise are waived if not raised during the deposition under Rule 32(d)(3). Here, the District Court found that most, if not all of the objections raised by counsel did not fall into this category. *SNB*, 299 F.R.D. at 601. As for objections that are properly raised, Rule 30(d)(2) states "An objection must be stated concisely in a nonargumentative and nonsuggestive manner." The District Court likewise found, a number of instances where Counsel violated this rule either to coach the witness or throw the examiner off track – both of which are improper under the Rule.

The District Court delineated the difference between the two extremes of mere "form" objections on one hand and improper speaking objections on the other. The purpose of a proper objection under Rule 30(d)(2) is to alert the examiner to a defect in the proceeding or the question and allow for immediate correction. *SNB*, 299 F.R.D. at 602. Therefore, Rule 30(d)(2) states that the objection "must be stated concisely in a nonargumentative and nonsuggestive manner." This is mandatory, not optional. The objecting party must give the examiner notice of the defect that may be corrected and not leave the questioner (or the judge later) to guess. The District Court lists exactly the types of objections that fall into this category "'[F]orm' objections refer to a category of objections, which includes objections to leading questions, lack or foundation, assuming facts

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not in evidence, mischaracterization or misleading question, non-responsive answer, lack of personal knowledge, testimony by counsel, speculation, asked and answered, argumentative question, and witness' answers that were beyond the scope of the question.'" *SNB*, 299 F.R.D. at 601, quoting *NGM Ins. Co. v. Walker Const. & Dev., LLC*, No.:1:11-CV-146, 2012 WL 6553272 at *2 (E.D. Tenn. Dec. 13, 2012).

The difference between these simple and plainly stated objections, required by Rule 30(d)(2), and the prohibited speaking and coaching objections is stark. Judge Bennett illustrated the prohibited conduct by specific references to the Bottock and Barrett-Reis transcripts. Statements by counsel that suggest to the witness the answer the lawyer wishes to hear are not appropriate and are not allowed. It is the witness, not the lawyer, who is giving testimony. *Hall,* 150 F.R.D. at 582.

The District Court ruled that it found that Counsel had violated Rule 30(d)(2) both by making repeated, unsupported "form" objections and by improperly coaching the witness and interfering with the flow of the depositions through the transcripts. The District Court was clear, however, that its sanctions order was not based upon the particular wording of the 115 "form" objections, even though "the making of an excessive number of unnecessary objections may itself constitute sanctionable conduct," Advisory Committee Notes to the 1993

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amendments to Rule 30; *Craig, supra,* 384 Fed. App'x at 533, it was the District Court's finding that Counsel had improperly manipulated the substance of the testimony, by coaching the witnesses, at times suggesting substantive answers, or otherwise interfering with the question-and-answer format, upon which the District Court's Order was grounded. *SNB*, 299 F.R.D. at 603-604, 609.

The District Court's ruling came after it had presided over pretrial motions and a full trial on the merits. Before issuing its Opinion and Order, the District Court read and analyzed the Barrett-Reis and Bottock depositions, and two memoranda submitted by the Appellants, and heard oral argument on the Show-Cause Order. Because the trial judge is in the best position to determine whether discovery sanctions are warranted, an order will stand unless the trial court is found to have abused its discretion. *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384 (1990) (affirming sanctions under Rule 11).

The District Court's decision is well grounded as outlined in his memorandum. This opinion will send a clear message to all that the rules must be followed to allow for just, speedy and inexpensive determination of civil actions. Fed. R. Civ. P. 1.

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III. PLAINTIFF'S SILENCE DURING THE DEPOSITIONS DOES NOT IMPLY ACCEPTANCE OF DEPOSITION MISCONDUCT NOR DO CHOICES MADE BY LAWYERS IN DEPOSITIONS RELIEVE THE COURT OF THE AUTHORITY OR THE OBLIGATION TO ENFORCE THE RULES OF CIVIL PROCEDURE.

Appellants contend that the approach taken by Plaintiff's counsel, in the face of improper deposition conduct by an opponent, somehow justifies what is otherwise sanctionable conduct. The argument, essentially, is that, because the Plaintiff's lawyer at all times conducted himself professionally and within the boundaries of the Federal Rules, Counsel was given carte blanche to avoid them. To accept that proposition would be to defeat the plain dictates of Rule 30. Worse still, it would create the odd result of rewarding improper deposition conduct and penalizing those who follow the rules.

Appellants make three points. First, they claim that Plaintiff's lawyer failed to object to Counsel's conduct during the depositions. App. Br. at 34-35. Second, Appellants note that Plaintiff's lawyer did not move for sanctions himself. App. Br. 31, 34. Finally, they point out that Plaintiff's lawyer did not participate in the lower court's sanction hearing, has and did not participate in this appeal. App. Br. at 45. None of this justifies deposition conduct that is proscribed by the rules.

As an initial matter, it appears from the record that Plaintiff's lawyer did, in fact, object to Counsel's deposition tactics during at least two depositions of other Abbott Laboratories employees, Pamela Anderson and Karl Olson. In response to

Appellants' Memorandum filed before Judge Bennett as part of the Show Cause proceeding, Plaintiff's lawyer submitted a single page Memorandum that states, in pertinent part:

> Plaintiff submits this Memorandum for the sole purpose of pointing out errors in Abbott's recent filing concerning the Court's Order to Show Cause (ECF #200). Numerous times in its Memorandum, Abbott states that Plaintiff's counsel "never made any objection in any deposition to defense counsel's objections or conduct" (e.g. Abbott Memorandum at 1). That statement is not accurate.
>
> In 2011, depositions occurred of former Abbott employees Pamela Anderson and Karlo Olson in Burks v. Abbott which were made part of the record in this case. Attached are excerpts from those depositions (Exhibit A, Anderson Depo. At 123-25; Exhibit B, Olson Depo. At 17-25). In particular, the statement I made at page 23, lines 1-4 was my opinion then and is my opinion now.[14]

Plaintiff's Brief Regarding Abbott's Response to the Court's Supplemental Order, Dkt. # 201 (July 14, 2014).

The referenced exhibits (Dkt. # 201-1), like the Bottock and Barrett-Reis deposition transcripts, were filed under seal and therefore are not available to *amicus* counsel. However, Plaintiff's counsel clearly stated to the District Court that he did object to the improper conduct of Counsel, on the record, in these two depositions. Further, Plaintiff's counsel felt compelled to challenge the assertion

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[14] Plaintiff's filing in the Show-Cause proceeding contradicts the assertion in Appellants' brief that there was some sort of agreement to tolerate impermissible conduct in deposition. See App. Br. at 23-24. In any event, parties cannot by agreement rob a court of its authority and obligation to supervise conformity with the Federal Rules.

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that he consented to improper deposition behavior, and he brought his concern to the District Court's attention in the show cause proceeding. In short, there was no agreement on deposition interruptions.

Nor can any inference be drawn from Plaintiff's decision not to participate in this appeal. The Plaintiff lost the underlying case after a long trial. Plaintiff's lawyer has nothing to gain from investing further time and treasure in this matter. Likewise, Security National Bank of Sioux City, the Conservator of the Minor, has no stake in the outcome of this appeal. This Court should not take Plaintiff's lack of participation in this appeal as agreement with Appellants' "Statement of the Case," or their assertions that Counsel's deposition conduct was in accordance with a claimed "working convention," App. Br. at 23, or an "agreement" between the parties, App. Br. at 24. Moreover, the Court's authority to sanction should not be dependent on whether such an agreement existed.

Further, nowhere do the rules state that the trial court is deprived of its ability, or relieved of its duty, to enforce discovery rules by the failure of a party to object. The reason is perfectly illustrated by this case.

Plaintiff's counsel was engaged in two complex and costly cases against Abbott Laboratories challenging the manufacture and distribution of powdered

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infant formula, which allegedly resulted in serious injuries to two infants.[15] Even in the best of circumstances, cases of this nature necessarily become very costly and time consuming. In the face of tactics such as those outlined in the District Court's opinion, the opposing lawyer might well conclude his time and money are better focused on the issues in the case rather than being diverted into motions directed at opposing counsel. See, Moore's Federal Practice (3d ed. 2014), § 30.42[2] at 30-85 ("despite the 1993 amendment to Rule 30(d)(2) and increasing impatience with conduct that obstructs elicitation of witness testimony, counsel defending depositions frequently create significant impediments to developing, memorializing, or distilling information. Although the opposition conduct may be improper, examining counsel will often find it impractical to seek court intervention at every turn"). Such a reasonable decision certainly does not divest the court of its obligation to act when it finds a pattern of discovery abuses that defeats the aim of the rules and impedes the parties in their effort to gain a day in court.

Likewise, when faced with improper speaking objections or other interruptions, the examining lawyer may well conclude that he or she is better off

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[15] The companion case, *Rockland Burks, et. al v. Abbott Laboratories, et al.*, Civil No. 08-3414 (D. Minn) (JRT/JSM) was ongoing at the time of the SNB litigation. The parties agreed that depositions in the Burks litigation could be used in the SNB case rather than having the same depositions retaken. The Olson and Anderson depositions were taken in the *Burks* case.

ignoring that conduct to the extent possible and focusing on the task at hand rather than engaging in unproductive colloquy with opposing counsel. Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 Hofstra L. Rev. 561, 595 (1996). The Federal Rules restrict all depositions to seven hours, and the time taken for exchanges between counsel on non-testimonial remarks is included in this limit. Fed. R. Civ. P. 30(d)(1) (limiting the duration of a deposition to 1 day of 7 hours). The questioning attorney might well decide not to disrupt the deposition further and deplete the allotted time to engage in a verbal joust with an opposing lawyer. Toleration of otherwise objectionable conduct should not immunize the conduct from examination by the court.

Finally, motions for sanctions are disfavored and rightfully so. Professionals should be able to resolve legitimate discovery disputes amicably within the rules in the vast majority of cases. Indeed his Opinion, Judge Bennett remarked on how infrequently he has imposed discovery sanctions throughout its long career of the bench. *SNB*, 299 F.R.D. at 597. Discovery sanctions are seldom requested and even more rarely granted.

This is consistent with the experience of many trial lawyers. A survey by the National Employment Lawyers Association found that an overwhelming majority of respondents agreed that sanctions allowed by the discovery rules are seldom imposed. Rebecca M. Hamburg & Matthew C. Koski, National

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Employment Lawyers Association, *Summary of Results of Federal Judicial Center Survey of NELA Members*, *Fall 2009*, at 6 (Mar. 26, 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/NELA,%20Summary%20of%20Results%20of%20FJC%20Survey%20of%20NELA%20Members.pdf (last visited 12.10.14). Specific examples from the respondents noted that "Courts need to be more diligent in sanctioning the obstructionist lawyer who interferes with one's ability to conduct a deposition," *see id.* at 77, and "Courts typically don't sanction parties for making frivolous objections, so there is little incentive to cooperate in discovery," *id.* at 81. This belief is shared by respondents to a survey by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System. *See* Matthew L. Jarvey, *Boilerplate Discovery Objections: How Are They Used, Why They Are Wrong, And What We Can Do About* Them, 61 Drake L. Rev 914, 929 (2013) (citing the survey wherein 86% of respondents said that discovery sanctions are rarely imposed). If a discovery sanction is unlikely to be imposed, and a motion for sanctions will simply raise the ire of opposing counsel, attorneys are unlikely to waste their time and resources moving for sanctions.

"Sanctions proceedings can be disruptive, costly, and may create personal antagonism inimical to an atmosphere of cooperation." Federal Judicial Center, *Manual for Complex Litigation, Fourth*, § 10.151. Sanctions for deposition

misconduct "will do little to cure the damage that has already occurred and may further poison relations between counsel." *Id.* § 11.461.

For all these reasons, trial lawyers are often reluctant to seek sanctions even in the face of clear deposition misconduct. If anything, however, that makes it all the more important for the courts retain the right and duty to impose sanctions where necessary. Otherwise, the rules will be too easily flouted by the few who will do so for tactical or personal gain. Ultimately, the supervision of discovery, including depositions, must rest with the discretion of the trial judge as set forth in Rule 30(d)(2).

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CONCLUSION

For these reasons, this Court should affirm the District Court's Memorandum Opinion and Order Regarding Sanctions.

Respectfully submitted,

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Dated: December 10, 2014

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ADDENDUM

ADDENDUM TABLE OF CONTENTS

American Board of Trial Advocates – Principles of Civility, Integrity, and Professionalism....................1

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American Board of Trial Advocates

PRINCIPLES OF CIVILITY, INTEGRITY, AND PROFESSIONALISM

Preamble

These Principles supplement the precepts set forth in ABOTA's Code of Professionalism and are a guide to the proper conduct of litigation. Civility, integrity, and professionalism are the hallmarks of our learned calling, dedicated to the administration of justice for all. Counsel adhering to these principles will further the truth-seeking process so that disputes will be resolved in a just, dignified, courteous, and efficient manner.

These principles are not intended to inhibit vigorous advocacy or detract from an attorney's duty to represent a client's cause with faithful dedication to the best of counsel's ability. Rather, they are intended to discourage conduct that demeans, hampers, or obstructs our system of justice.

These Principles apply to attorneys and judges, who have mutual obligations to one another to enhance and preserve the dignity and integrity of our system of justice. As lawyers must practice these Principles when appearing in court, it is not presumptuous of them to expect judges to observe them in kind. The Principles as to the conduct of judges set forth herein are derived from judiciary codes and standards.

These Principles are not intended to be a basis for imposing sanctions, penalties, or liability, nor can they supersede or detract from the professional, ethical, or disciplinary codes of conduct adopted by regulatory boards.

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As a member of the American Board of Trial Advocates, I will adhere to the following Principles:

1. Advance the legitimate interests of my clients, without reflecting any ill will they may have for their adversaries, even if called on to do so, and treat all other counsel, parties, and witnesses in a courteous manner.

2. Never encourage or knowingly authorize a person under my direction or supervision to engage in conduct proscribed by these principles.

3. Never, without good cause, attribute to other counsel bad motives or improprieties.

4. Never seek court sanctions unless they are fully justified by the circumstances and necessary to protect a client's legitimate interests and then only after a good faith effort to informally resolve the issue with counsel.

5. Adhere to all express promises and agreements, whether oral or written, and, in good faith, to all commitments implied by the circumstances or local custom.

6. When called on to do so, commit oral understandings to writing accurately and completely, provide other counsel with a copy for review, and never include matters on which there has been no agreement without explicitly advising other counsel.

7. Timely confer with other counsel to explore settlement possibilities and never falsely hold out the potential of settlement for the purpose of foreclosing discovery or delaying trial.

8. Always stipulate to undisputed relevant matters when it is obvious that they can be proved and where there is no good faith basis for not doing so.

9. Never initiate communication with a judge without the knowledge or presence of opposing counsel concerning a matter at issue before the court.

10. Never use any form of discovery scheduling as a means of harassment.

11. Make good faith efforts to resolve disputes concerning pleadings and discovery.

12. Never file or serve motions or pleadings at a time calculated to unfairly limit opposing counsel's opportunity to respond.

13. Never request an extension of time solely for the purpose of unjustified delay or to obtain a tactical advantage.

14. Consult other counsel on scheduling matters in a good faith effort to avoid conflicts.

15. When calendar conflicts occur, accommodate counsel by rescheduling dates for hearings, depositions, meetings, and other events.

16. When hearings, depositions, meetings, or other events are to be canceled or postponed, notify as early as possible other counsel, the court, or other persons as appropriate, so as to avoid unnecessary inconvenience, wasted time and expense, and to enable the court to use previously-reserved time for other matters.

17. Agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect my client's legitimate rights.

18. Never cause the entry of a default or dismissal without first notifying opposing counsel, unless material prejuedice has been suffered by my client.

19. Never take depositions for the purpose of harassment or to burden an opponent with increased litigation expenses.

20. During a deposition, never engage in conduct which would not be appropriate in the presence of a judge.

21. During a deposition, never obstruct the interrogator or object to questions unless reasonably necessary to preserve an objection or privilege for resolution by the court.

22. During depositions, ask only those questions reasonably necessary for the prosecution or defense of an action.

23. Draft document production requests and interrogatories limited to those reasonably necessary for the prosecution or defense of an action, and never design them to place an undue burden or expense on a party.

24. Make reasonable responses to document requests and interrogatories and not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and nonprivileged documents.

25. Never produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

26. Base discovery objections on a good faith belief in their merit, and not for the purpose of withholding or delaying the disclosure of relevant and nonprivileged information.

27. When called on, draft orders that accurately and completely reflect a court's ruling, submit them to other counsel for review, and attempt to reconcile any differences before presenting them to the court.

28. During argument, never attribute to other counsel a position or claim not taken, or seek to create such an unjustified inference.

29. Unless specifically permitted or invited, never send to the court copies of correspondence between counsel.

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When In Court I Will:

1. Always uphold the dignity of the court and never be disrespectful.
2. Never publicly criticize a judge for his or her rulings or a jury for its verdict. Criticism should be reserved for appellate court briefs.
3. Be punctual and prepared for all court appearances, and, if unavoidably delayed, notify the court and counsel as soon as possible.
4. Never engage in conduct that brings disorder or disruption to the courtroom.
5. Advise clients and witnesses of the proper courtroom conduct expected and required.
6. Never misrepresent or misquote facts or authorities.
7. Verify the availability of clients and witnesses, if possible, before dates for hearings or trials are scheduled, or immediately thereafter, and promptly notify the court and counsel if their attendance cannot be assured.
8. Be respectful and courteous to court marshals or bailiffs, clerks, reporters, secretaries, and law clerks.

Conduct Expected of Judges

A lawyer is entitled to expect judges to observe the following Principles:

1. Be courteous and respectful to lawyers, parties, witnesses, and court personnel.
2. Control courtroom decorum and proceedings so as to ensure that all litigation is conducted in a civil and efficient manner.
3. Abstain from hostile, demeaning, or humiliating language in written opinions or oral communications with lawyers, parties, or witnesses.
4. Be punctual in convening all hearings and conferences, and, if unavoidably delayed, notify counsel, if possible.
5. Be considerate of time schedules of lawyers, parties, and witnesses in setting dates for hearings, meetings, and conferences. When possible, avoid scheduling matters for a time that conflicts with counsel's required appearance before another judge.
6. Make all reasonable efforts to promptly decide matters under submission.
7. Give issues in controversy deliberate, impartial, and studied analysis before rendering a decision.
8. Be considerate of the time constraints and pressures imposed on lawyers by the demands of litigation practice, while endeavoring to resolve disputes efficiently.
9. Be mindful that a lawyer has a right and duty to present a case fully, make a complete record, and argue the facts and law vigorously.
10. Never impugn the integrity or professionalism of a lawyer based solely on the clients or causes he represents.
11. Require court personnel to be respectful and courteous toward lawyers, parties, and witnesses.
12. Abstain from adopting procedures that needlessly increase litigation time and expense.
13. Promptly bring to counsel's attention uncivil conduct on the part of clients, witnesses, or counsel.

Ever wonder what happened to the ideals of civility, integrity, and professionalism to which you aspired in law school? They are alive and well in the American Board of Trial Advocates. Admittedly, these principles are difficult to define. Nevertheless, the legal profession as a whole and each individual lawyer and judge must adopt and practice these concepts so that the members of our profession will again be looked upon as the greatest protectors of our life, liberty, and property.

Please join ABOTA in making these principles a reality once again.

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