"Rambo In Ruins"

Gary L. Stuart

Phoenix, Arizona

Lexis.Nexis Exchange Article

Are you one of America's "Rambo Litigators?" You know, someone who plays "hardball," advertises himself as an "aggressive attorney" and believes that the lawyer of the nineties needs more marketing and less scholarship. If so, the following little homily by an English solicitor will warm your heart:

> An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty: and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.[1]

Sadly, Rambo lawyers take their cue from Sylvester Stallone's character instead of the stalwart Atticus Finch so elegantly played by Gregory Peck. But, hope is on the horizon for those who believe the law is still a profession, not just a job of work. The new rules of discovery go a long way in combating raging ramboism. Limits on the number of interrogatories, the number of document requests, the length of depositions, and the disclosure statement, chill exorbitant discovery charges being passed on to the client.

---

[1]Lord Brougham in 2 Trial of Queen Caroline 8 (J. Nightingale ed. 1821), as reprinted in Andrew L. Kaufman, Problems in Professional Responsibility 153, 155 (Little, Brown and Company 1989).

Oral depositions are a heavily utilized and expensive tool in the formal discovery process. Oral depositions enable the trial lawyer to question the deponent face to face, to judge his demeanor as a witness and to obtain information not filtered or edited by opposing counsel. Many attorneys regard the oral deposition as the most valuable and productive of all the discovery devices. However, because deposition procedures can usually be invoked without leave of court, and because most depositions are taken without a judge or other judicial officer present, the oral deposition has proven vulnerable to egregious abuse. Contentious and abusive trial lawyers have seen the deposition as an opportunity to drive up litigation costs by deposing an endless list of witnesses and asking burdensome, mundane and repetitive questions. Aggressive defenders of depositions have perceived it as their duty to disrupt the deposition, to obstruct or delay the taker's access to information, and to impress their clients by protracted objections and arguments with opposing counsel. Oppressive deposition tactics have been used to force settlement because the opposing party, not wanting to face such an arduous process, finds settlement a simpler and more attractive alternative.

Such hardball tactics test the limits of attorney professionalism and blur the distinction between permissible ethical advocacy and impermissible unethical conduct. Supporters of such tactics justify them as "zealous advocacy." They cite Canon 7 of the Model Code of Professional Responsibility which requires that a "lawyer should represent a client zealously within the bounds of the law" and accompanying Ethical Considerations. EC 7-2 states that "the bounds of the law in a given case are often difficult to ascertain." To support this position, Rambo litigators cite to Justice Holmes' opinion in *Superior Oil Co. v. Mississippi*,[2] wherein he says "the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it. It is a matter of proximity and degree as to which minds will differ." EC 7-3 provides further ammunition for the aggressive lawyer by indicating that "where the bounds of the law are uncertain. [w]hile serving as an advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law."

[2]280 U.S. 390, 395-6 (1930).

The use of such noble statements to justify hardball deposition tactics is misplaced. Abusive discovery tactics and overly aggressive deposition arguments, have produced an overwhelming judicial, legislative and professional backlash. The clear trend in the law is to disapprove of what is now characterized as "Rambo" litigation. The trend is well illustrated by an opinion from the Southern District of Iowa[3] in which the district court first chastised the defending lawyer for improper coaching objections, and then lambasted both attorneys for their argumentative behavior:

> Counsel for both parties engaged in extensive colloquy which interrupted the flow of the deposition, and made for inefficient use of everyone's time. Mr. Barrett repeatedly objected to the form of Mr. Young's questions. He also engaged in *ad hominem* attacks on Mr. Young's ethics, litigation experience, and honesty. In fact, of the 4025 lines of transcript, only seventy percent contain questions by Mr. Young and answers by Ms. Van Pilsum. The balance is discussion, argument, bickering, haranguing, and general interference by Mr. Barrett (818 lines) and response by Mr. Young (340 lines); there are numerous instances where the reporter is required to read back a question due to the length of time between the question and the witness' opportunity to answer. The style adopted by Mr. Barrett, and responded to in kind by Mr. Young, has become known as "Rambo Litigation." It does not promote the "just, speedy and inexpensive determination of every action," as is required by Fed.R.Civ.P. 1. This style, which may prove effective out of the presence of the court, and may be impressive to clients as well as ego-gratifying to those who practice it, will not be tolerated by this court. Merely because depositions do not take place in the presence of a judge does not mean lawyers can forget their responsibilities as officers of the court. They should conduct themselves accordingly. The use of a discovery master is rare in this district. However the acrimony which exists between these counsel does not serve their clients or the justice system. It necessitates the provision of day care for counsel who, like small children, cannot get along and require adult supervision.[4]

Limitations on such overzealous advocacy take numerous forms. The Model Rules and the Model Code's Disciplinary rules prohibit some behaviors. Numerous bar associations have issued aspirational ethical considerations and creeds of professionalism which offer specific guidance on how depositions should be conducted. The federal system has been particularly proactive in

[3]Van Pilsum v. Iowa State Univ. Of Science and Technology, 152 F.R.D. 179 (S.D. Iowa, 1993)
[4]*Id*. at 179-80.

limiting abuses. In 1990, Congress passed the Civil Justice Reform Act[5] which implicitly directed federal district courts to experiment during the study period with differing procedures to reduce the time and expense of litigation. The Civil Justice Delay and Expense Reduction Plans adopted by the courts under the act differ on the type, form, and timing of discovery, but many set limits on the number and length of depositions which could be taken or required the individual courts in the district to adopt guidelines for deposition practice at an Initial Case Management Conference.[6]

A report to Congress on the result of the experiments was due on December 31, 1996,[7] but in the interim period Rule 26 of the Federal Rules of Civil Procedure was amended to provide for compulsory disclosure of specific information and to require greater early judicial involvement in the discovery process.[8] Simultaneously, Rule 30 was changed to limit to 10 the number of depositions which may be taken without leave of court[9] and to provide that objections during a deposition must be made concisely and in a non-argumentative and non-suggestive manner. The Advisory Committee Notes to the new Rule 30 specifically note that: "Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond. Paragraph (2) is added to this subdivision to dispel any doubts regarding the power of the court by order or local rule to establish limits on the length of depositions. This rule also explicitly authorizes the court to impose the cost resulting from obstructive tactics that unreasonably prolong a deposition on the person engaged in such obstruction. This sanction may be imposed on a non-party witness as well as a party or attorneys. Paragraph (3) authorizes appropriate sanctions not only when a deposition is unreasonably prolonged, but also when an attorney engages in other practices that improperly frustrate the fair examination of the deponent, such as making improper objections or giving directions not to answer prohibited by paragraph (1). In general, counsel should not engage in any conduct during a

---

[5]28 U.S.C. sec. 471.

[6]*See, e.g.*, Civil Justice Expense and Delay Reduction Plan adopted by the Board of Judges of the Southern District of New York on December 12, 1991, sections 11 and 12, Civil Justice Expense and Delay Reduction Plan adopted by the Board of Judges of the Eastern District of New York on December 17, 1991, section II C (2). *See also* Local Court Rules of the United States District court for the Eastern District of Texas, Civil Justice Expense and Delay Reduction Plan, Article Six (depositions must be taken on weekdays and may not last longer than six hours, unless otherwise authorized by the court) (1996).

[7]S. 464 (April 3, 1995) (extending reporting deadline of 28 U.S.C. 471 by one year).

[8]FED. R. CIV. PROC. 26 (as amended 1993).

[9]FED. R. CIV. PROC. 30(2) (A) (as amended 1993).

deposition that would not be allowed in the presence of a judicial officer. The making of an excessive number of unnecessary objections may itself constitute sanctionable conduct, as may the refusal of an attorney to agree with other counsel on a fair apportionment of the time allowed for examination of a deponent or a refusal to agree to a reasonable request for some additional time to complete a deposition, when that is permitted by the local rule or order."[10]

Long before the Civil Justice Reform Act, federal courts did not shrink from using their inherent powers to sanction frivolous or abusive litigation behavior[11] and to draft local rules and standing discovery orders containing limitations on attorney conduct during depositions.[12] In addition to their inherent powers, federal district courts relied upon Federal Rules of Civil Procedure 11, 26(g), and 37, as well as 28 USCA § 1927 as principal sources of enforcement power to curb discovery abuse.[13] The strength of the federal reaction to hardball deposition tactics arose in part out of a perceived inadequacy of ethical and disciplinary rules to curb abuses. Although the ethical rules imposed a duty of candor to the court[14], prohibited attorneys from destroying or concealing physical evidence[15], and from offering erroneous facts or law[16], the kind of misconduct prevalent at depositions seldom fell into these extreme categories of disciplinable ethical violations. At most, typical deposition misconduct was seen as merely unprofessional, and in violation of aspirational ethical limits such as those of Ethical Consideration 7-38 which states 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 his client." Codes and creeds of professionalism were viewed as similarly aspirational and non-binding. Neither the ABA Lawyers' Creed of Professionalism, nor Lawyers' Pledge of Professionalism was perceived as providing a basis for attorney discipline.[17]

---

[10]Advisory Committee Notes to FED. R. CIV. PROC. 30(d) (as amended 1993).

[11]*See, e.g.*, Thomas v. Hoffman La Roche, Inc., 126 F.R.D. 522 (N.D. Miss. 1989) (imposing sanctions for improper instructions not to answer under inherent power).

[12]*See, e.g.*, United States District Court for the Eastern District of New York, Standing Orders of the Court on Effective Discovery in Civil Cases, Rules 11, 12, and 13 (effective March 1, 1987)

[13]*See generally* 430 PLI/Lit 263, 316-351.

[14]MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.3

[15]MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.4

[16]MODEL RULES PROFESSIONAL CONDUCT, Rule 3.3 provides that a "lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." *See also* Model Code DR 7-106(B) (1).

[17]*See* ABA Lawyers' Creed of Professionalism, and Lawyers' Pledge of Professionalism (1988), reproduced in Steven

Courts have reacted in a variety of ways to the perceived inadequacy of such guidelines to deter hardball tactics. Since the Bar has not taken disciplinary action against violations of ethical considerations or creeds of professionalism, courts have taken it upon themselves to impose appropriate discipline. Using the Rules of Civil, Criminal and Appellate Procedure, other statutes, and their inherent powers, federal courts sanction abusive litigation behavior. These sources of power enable the federal courts to levy a variety of sanctions. "Discipline may take the form of disbarment, suspension from practice, probation with conditions, monetary sanctions, public reprimand, or private reprimand."[18] The inherent powers of the federal courts extends to a full range of litigation abuses, not merely violations of procedural rules or statutes, and includes assessment of attorneys' fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, or shows bad faith by delaying or disrupting litigation or hampering enforcement of a court order, of if the court finds that a fraud has been practiced upon it, or that the "very temple of justice has been defiled."[19] Dismissing the cause of action is another inherent power.[20]

In addition to the inherent disciplinary powers, Federal Rule of Civil Procedure 37 has long authorized the imposition of a variety of sanctions including:

1. An order specifying that designated facts be taken as established for purposes of the action;
2. An order precluding the litigation of certain issues;
3. An order precluding the introduction of certain evidence;
4. An order striking out pleadings or part thereof;
5. An order staying further proceedings pending compliance with an order that has not been obeyed;
6. Dismissal of the action in full or in part;
7. Entry of a default judgment on some or all claims;

Tillers and Roy D. Simon Jr., Regulation of Lawyers, 662-63 and 665-66 (1995). The former provides in pertinent part "I will advise my client against pursuing litigation (or any other course of action) that is without merit and against insisting on tactics which are intended to delay resolution of the matter or to harass or drain financial resources of the opposing party will advise my client that civility and courtesy are not to be equated with weakness." Id. at 662.

[18]Guerrero v. Board of Educ. Of the Emery Unified Sch. Dist., 1994 U.S. Dist. LEXIS 9259, *37 (Caulfield, J.) (N.D. Cal.)(Suspending attorney from practice before the Northern District of California for two years as discipline for a pattern of egregious conduct including ad hominem attacks and obscene, abusive language directed at opposing counsel in depositions). *See also* ABA/BNA Lawyer's Manual on Professional Conduct sec. 101.3001 (1986).

[19]Chambers v. NASCO, Inc., 501 U.S.32, 46, 11 S. Ct. 2123, 2133 (1991).

[20]Roadway Express, Inc v. Piper, 447 U.S. 752, 765, 100 S. Ct. 2455 (1980)

8. An order treating as a contempt of court the failure to obey any discovery order except an order to submit to a physical or mental examination;
9. An award of reasonable expenses, including attorneys' fees.

Title 28 U.S.C. § 1927 has proven another important tool in curbing of discovery abuse. Misconduct at depositions is one area singled out for sanctions under section 1927. For example, in *Brignoli v. Balch Hardy & Scheinman, Inc.*[21] the Southern District of New York sanctioned counsel under section 1927 for prolonging a non-technical deposition to more than eight full days by filling the record with improper objections and directions not to answer, and interposing testimony and substantive issues on behalf of his clients. In *Matter of Yagman*[22], the Ninth Circuit held that a section 1927 award of attorney's fees and costs is an appropriate remedy for discovery abuse "where there is no obvious violation of the technical rules, but where, within the rules, the proceeding is conducted in bad faith for the purpose of delaying or increasing costs."[23] In *Yagman* the court confirmed the propriety of section 1927 sanctions where plaintiffs' counsel committed several discovery abuses, such as failure to produce and refusal to answer deposition questions for dilatory and harassing purposes.

To supplement the powers conferred upon them by statute or rule, federal courts have used their inherent powers to police discovery practice in other ways. In *Dondi Properties Corp. v. Commerce Savings and Loan Ass'n*,[24] the Northern District of Texas adopted a mandatory creed of professionalism. Standards of litigation conduct are enforceable through, "a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances." [25] Sanctions for violating this creed have included denying a motion because it was filed in violation of the creed, removing an Assistant Attorney General from the case because of her "combative and improper conduct", and granting reasonable attorneys' fees.[26]

---

[21]126 F.R.D. 462, 466 (S.D.N.Y. 1989)
[22]796 F.2d 1165 (9th Cir. 1986)
[23]*Id*. at 1187.
[24]121 F.R.D. 284 (N.D. Tex 1988) (en banc).
[25]*Id*. at 288 (quoting Thomas v. Capital Sec. Servs. Inc.., 836 F.2d 866, 878 (5th Cir. 1988).
[26]Lelsz v. Kavanagh, 137 F.R.D. 646, 649, 655 (N.D. Tex. 1991); Federal Sav. & Loan Ins. V. Village Creek, 130 F.R.D. 357, 3369 (N.D. Tex 1989) (also using Rule 37 as authority for sanctions).

Texas federal courts are not alone in making professional guidelines mandatory. The Eastern District of Washington has also adopted a Civility code as one of its local rules.[27] Decisional law in the Eastern District of Pennsylvania has detailed guidelines for deposition conduct. In *Hall v. Clifton Precision*[28], the court forbid attorneys from making objections or statements which might suggest an answer to the witness, engaging in off-the-record conferences, and from directing a witness not to answer a question except on grounds of privilege. Parties in several Pennsylvania cases have been ordered to follow the *Hall v. Clifton Precision* guidelines.[29] The *Hall* decision is a landmark because it is one of the few cases to consider to what extent a lawyer may confer with a client, off the record and outside the earshot of the other lawyers, during a deposition of the client. Citing the Standing Order of the Court on Effective Discovery in Civil Cases from the Eastern District of New York,[30] the *Hall* court held that private conferences between deponents and their attorneys during a deposition are improper unless the conferences are to determine whether a privilege should be asserted.

> 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 question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to the deposition to testify not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness--not the lawyer—who is the witness. As an advocate, the lawyer is free to frame those facts in a manner favorable to the client, and also to make favorable and creative arguments of law. But the lawyer is not entitled to be creative with the facts. Rather, a lawyer must accept the facts as they develop. Therefore, I hold that a lawyer and client do not have an absolute right to confer during the course of the client's deposition.

---

[27]E.D. Wash. Local Rule 100(k).

[28]150 F.R.D. 525 (E.D. Pa. 1993).

[29]*E.g.*, O'Brien v. Amtrack, 163 F.R.D. 232, 236 (E.D. Pa. 1995); Frazier v. S.E. Pa. Transp. Authority, 161 F.R.D. 309, 317 n.9 (E.D. Pa. 1995); Christy v. Pennsylvania Turnpike Comm'n, 160 F.R.D. 51, 53 (E.D. Pa. 1995); Johnson v. Wayne Manor Apts., 152 F.R.D. 56 (E.D. Pa. 1993).

[30]Standing Orders of the Court on Effective Discovery in Civil Cases, 1102 F.R.D. 339, 351, no. 13 (E.D.N.Y. 1984).

> Concern has been expressed as to the client's right to counsel and to due process. A lawyer, of course, has the right, if not the duty, to prepare a client for deposition. But once a deposition begins, the right to counsel is somewhat tempered by the underlying goal of our discovery rules: getting to the truth. Under Rule 30(c), depositions generally are to be conducted under the same testimonial rules as are trials. During a civil trial, a witness and his or her lawyer are not permitted to confer at their pleasure during a witness's testimony. Once a witness has been prepared and has taken the stand, that witness is on his or her own.
>
> The same is true at a deposition. The fact that 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 obstructing the truth.[31]

State courts and legislatures have followed the lead of the federal courts. In 1992, Arizona changed its discovery rules to discourage abuse. Only depositions of parties, expert witnesses, and document custodians may be taken without leave of court or stipulation of the parties.[32] In addition, the length of depositions is limited to four hours unless the parties agree otherwise or more time is allocated by court order.[33] Finally, "speaking objections" are prohibited,[34] a party may only object to the form of a question. The rule seeks to prohibit the coloring of a deponent's testimony by argumentative objections which suggest an answer to the represented party. Non-cooperation at depositions is not tolerated and subjects a party and the representing lawyer to sanctions under Arizona Rule of Civil Procedure 37.[35] In California, state courts have incorporated professional guidelines into their local rules and subjected counsel who fail to follow these principles to sanctions. Los Angeles County Superior Court Rule 7.12 is specific in prescribing appropriate conduct for depositions:

> 1. Depositions should be taken only where actually needed to ascertain facts or information or to perpetuate testimony. They should never be used as a means of harassment or to generate expense.

---

[31] 150 F.R.D. at 528.

[32] Ariz. R. Civ. P. 30(a).

[33] Ariz. R. Civ. P. 30(d).

[34] Ariz. R. Civ. P. 32(d) (3) (D).

[35] *E.g.*, Gulf Homes, Inc. v. Beron, 141 Ariz. 624, 688 P.2d 632 (1984); Lewis R. Pyle Memorial Hospital v. Superior Court, 149 Ariz. 193, 717 P.2d 872 (1986).

2. In scheduling depositions, reasonable consideration should be given to accommodating schedules of opposing counsel and of the deponent, where it is possible to do so without prejudicing the client's rights.
3. When a deposition is noticed by another party in the reasonably near future, counsel should ordinarily not notice another deposition for an earlier date without the agreement of opposing counsel.
4. Counsel should not attempt to delay a deposition for dilatory purposes, but only if necessary to meet real scheduling problems.
5. Counsel should not inquire into a deponent's personal affairs or question a deponent's integrity where such inquiry is irrelevant to the subject matter of the deposition.
6. Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment.
7. Counsel defending a deposition should limit objections to those that are well founded and necessary for the protection of a client's interest. Counsel should bear in mind that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought.
8. While a question is pending, counsel should not, through objections or otherwise, coach the deponent or suggest answers.
9. Counsel should not direct a deponent to refuse to answer questions unless they seek privileged information or are manifestly irrelevant or calculated to harass
10. Counsel for all parties should refrain from self-serving speeches during depositions.
11. Counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer.[36]

Illinois practice distinguishes between discovery depositions and evidence depositions, the latter being depositions which are necessary to perpetuate testimony for trial.[37] In 1995 Illinois amended its Supreme Court rules to provide that no discovery deposition shall exceed three hours, except by stipulation or order.[38] The rules were also redrafted to impose extensive disclosure requirements and to further limit discovery in cases involving less than $50,000.[39] At the same time, the discovery rules were amended to caution against duplication of discovery measures,[40] to

[36]West's California Rules of Court, Los Angeles County Superior Court, Rule 7.12(e) (adopting as Court rule guidelines adopted by the Los Angeles County Bar Association) (1996); Compare with id., Rules of the Superior Court of the County of Contra Costa, Appendix B. Standards of Professional Courtesy, Standard II. (1994).

[37]Illinois Sup. Ct. Rule 202.

[38]Illinois Sup. Ct. Rule 206(d) (as amended June 1995).

[39]*Id.*, Rule 222.

[40]*Id*., Rule 201(a).

provide additional authority for terminating or requiring court supervision of depositions being conducted in bad faith[41], and to provide for initial case management conferences in which the number and duration of depositions can be limited.[42] The existing sanction rule was amended to include the entry of default judgment in the range of potential consequences of a refusal to comply with court rules or discovery orders.[43] A new subparagraph was added to the rules extending sanctions provided for in the new rule to "general abuse of discovery rules."[44]

In 1989 the Supreme Court of Texas adopted a mandatory code of professionalism. The order adopting The Texas Lawyer's Creed contains the following statement:

> The Supreme Court of Texas and the Court of Criminal Appeals are committed to eliminating a practice in our State by a minority of lawyers of abusive tactics which have surfaced in many parts of our country. We believe such tactics are a disservice to our citizens, harmful to clients, and demeaning to our profession.
> The abusive tactics range from lack of civility to outright hostility and obstructionism. Such behavior does not serve justice but tends to delay and often deny justice. The lawyers who use abusive tactics instead of being part of the solution have become part of the problem.[45]

In addition to general duties of civility regarding discovery, the Texas Lawyer's Creed specifically prohibits counsel from arbitrarily scheduling a deposition until a good faith effort has been made to schedule it by agreement.[46] Texas lawyers must neither make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process, and have an affirmative duty to encourage witnesses to respond to all deposition questions which are reasonably understandable. Texas lawyers can neither encourage nor permit their witnesses to quibble about words where their meaning is reasonably clear.[47] Finally, in late 1996 Florida amended Rule 1.310(c) of its Rules of Civil Procedure to state existing law which limits the ability

---

[41]*Id*., Rule 206(d) and (e).
[42]*Id*., Rule 218.
[43]*Id*., Rule 219.
[44]Committee Comments to Illinois Sup. Ct. Rule 219(d) (1995).
[45]The Texas Lawyer's Creed--A Mandate for Professionalism, Order of Adoption, November 7, 1989.
[46]*Id*. Article III, sec. 14.
[47]*Id*. Article III, sec. 17.

of a lawyer to instruct deponents not to answer questions. The amendment is intended to be an instruction for conduct during a deposition and is derived from the new Federal Rule of Civil Procedure 30(d).[48]

In summary, the overwhelming trend in the law suggests that attorneys who attempt to invoke the shibboleth of zealous advocacy to justify overly aggressive deposition behavior may be in for a rude shock. They are likely to encounter responses not unlike that articulated by Cook County Circuit Judge Richard Curry in a recent court order:

> Zealous advocacy is the buzz word which is squeezing decency and civility out of the law profession. Zealous advocacy is the doctrine which excuses, without apology, outrageous and unconscionable conduct so long as it is done ostensibly for a client, and, of course, for a price. Zealous advocacy is the modern day plague which infects and weakens the truth-finding process and which makes a mockery of the lawyers' claim to officer-of-the-court status.[49]

This quote symbolizes the increasingly prevalent view that the primary roles of an attorney should be to learn the truth and to protect the integrity of the court. In a recent article on "Rediscovering Discovery Ethics" W. Bradley Wendel summed up the trend in the law as follows:

> Lawyers have an obligation to be advocates for their clients but this duty does not apply with full force to discovery. The function of discovery within the litigation system requires that lawyers assist the court in adjudicating the dispute on the merits by disclosing the facts necessary for the court to make an informed decision. With limited exceptions, advocacy comes into play only after the facts are fully disclosed. Courts are beginning to recognize that the discovery system is designed to facilitate truth-finding, and they are involving lawyers in this search for the truth. They are imposing public duties upon lawyers in discovery that are not merely rhetorical fluff, but have content and carry severe sanctions for their violation.[50]

---

[48]Order of the Florida Supreme Court 96-47, effective January 1, 1997.
[49]Quoted in 77 Marq. L. Rev. 751 at 767 (Summer 1996).
[50]W. Bradley Wendel, Rediscovering Discovery Ethics, 79 Marq. L. Rev. 895 (1996).

Finally, as Mr. Wendel points out, if the threat of sanctions cannot deter obstreperous conduct, there is a more pragmatic reason for ethical lawyering. Citing a speech by U.S. District Judge William Dwyer, Wendel argues that:

> Civility, collegiality, and adherence to the highest ethics make you a more effective lawyer. They help you win. In litigation, you cannot be a first-rate lawyer without them. Lawyers should not be milquetoasts or doormats in litigation, but they should recognize that the inevitable result of obstreperousness is to create a "not-one-dime-for-that-s.o.b. mentality." Settling a case on favorable terms becomes vastly more difficult if ill-will prevails among counsel. [H]ardball tactics are not welcome—and unlikely to produce good results for the obnoxious lawyer—in [the] courtroom. Fanaticism and obstructionism are very unpopular with judges. A lawyer who obstructs, who breaks or bends the rules, who treats his opponent uncivilly, is sending a message to the judge's subconscious: "Rule against me when you can."[51]

I, for one, am very much in favor of Judge Dwyer's argument. But I fear for its impact. A man noted for his wit and his cynical views of our profession said: "Arguments are to be avoided: they are always vulgar and often convincing.[52]

It seems appropriate to end this discourse with the observation that, for lawyers, arguments cannot be avoided. Consequently, to avoid the label of vulgarity, we should strive to for ethical arguments and ethical discovery conduct. Let Rambo become a ruin.

---

[51] *Id*. at 941, citing U.S. District Court Judge William L. Dwyer, The Practical Value of Ethics, Address to the Federal Bar Association of the Western District of Washington (Dec. 8, 1993).

[52] Oscar Wilde (1854-1900).