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Refusals to Answer at Oral Deposition: A "Relevant" Inquiry?

The Federal Rules of Civil Procedure were designed "to secure the just, speedy, and inexpensive determination of every action,"¹ with a minimum of judicial intervention in the discovery process. Nevertheless, many participants have found the vision of unsupervised yet efficient discovery to be a fleeting mirage in oral depositions. Much of this problem is caused by attorneys, who often instruct deponents not to answer questions the lawyers consider irrelevant to the lawsuit.² This Comment outlines the Federal Rules and corresponding judicial interpretations that govern the taking of depositions, with particular attention on refusals to answer based on irrelevance, bad faith questioning, and privilege. The Comment then discusses the proper procedure to be followed in each instance, and concludes with an admonition that lawyers and judges strictly comply with the Rules in promoting the efficient use of oral depositions in discovery.

I. THE FEDERAL RULES

A. *The Standard for Relevance*

The Federal Rules of Civil Procedure do not clearly indicate whether an attorney may without sanction instruct a deponent not to answer questions deemed irrelevant by the attorney. Rule 26(b) defines discoverable information in general:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.³

Allowing discovery of "relevant" information sets up a standard similar to that used in trial for evidentiary purposes,⁴ although

1. FED. R. CIV. P. 1. See C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 84, at 420 (3d ed. 1976).

2. See *Ralston Purina Co. v. McFarland*, 550 F.2d 967 (4th Cir. 1977). According to the court, "[C]ounsel for Purina effectively stopped the examination" by repeatedly objecting to questions asked and instructing the witness not to answer. *Id.* at 972 & n.10.

3. FED. R. CIV. P. 26(b)(1). There are special provisions in Rule 26(b) regarding insurance agreements and trial preparations. They are, however, beyond the scope of this Comment.

4. See FED. R. EVID. 401.

the last sentence in Rule 26(b)(1) appears specifically to disclaim that standard. What is seemingly a contradiction is actually the imposition of two standards, one for discovery and another for trial. The difference between the two is only a matter of degree. The Advisory Committee on Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery explained: "Since decisions as to relevance to the subject matter of the action are made for discovery purposes well in advance of trial, a flexible treatment of relevance is required and the making of discovery . . . is not a concession or determination of relevance for purposes of trial."⁵

The flexible treatment accorded evidence in discovery is well illustrated by the mandate in Rule 30 that "[e]vidence objected to shall be taken subject to the objections."⁶ It is not clear, however, to whom the mandate is directed. Because Rule 30(c) specifies the manner for the recording of depositions, the mandate may be intended to direct the *officer present to record* all evidence given despite a formal objection. On the other hand, it may be interpreted to direct the *witness to answer* all questions, even though a formal objection is made. The courts have recognized the latter interpretation.

B. Protective Orders

If either a party or a deponent anticipates that a deposition may involve the party or deponent in "annoyance, embarrassment, oppression, or undue burden or expense," he may, under Rule 26(c), move to limit the scope of discovery.⁷ Upon this motion, the court may issue a protective order limiting the matters subject to inquiry in the forthcoming deposition.⁸ If a party or deponent encounters similar annoyance or bad faith once the deposition has begun, he may, pursuant to Rule 30(d), move to limit or terminate the deposition.⁹

Both Rule 30(d) and Rule 26(c) incorporate Rule 37(a)(4),

5. *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules*, 48 F.R.D. 487, 498 (1970) (citation omitted) [hereinafter cited as *Advisory Committee Statement*].

6. FED. R. CIV. P. 30(c).

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

8. *Id.*

9. FED. R. CIV. P. 30(d). As in a Rule 26(c) motion, to prevail the moving party must show "that the examination is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the deponent or party." *Id.*

which provides that a party seeking a protective order may be required to pay the expenses, including attorneys' fees, of the opposing party unless the motion was substantially justified. On the other hand, the party whose actions necessitated the motion must pay the expenses of the moving party unless his conduct was substantially justified.¹⁰ A strict reading of the Rule forces the party contemplating the protective order to balance his need for the order against the possibility that he may be required to pay for the other party's opposition to the motion.

C. *Motion to Compel Answers*

If a deponent refuses to answer a question, either on his own initiative or upon instruction from counsel, the party seeking discovery may move under Rule 37(a)(2) for an order compelling an answer. If the motion is denied, the court may issue a protective order.¹¹

Not only may a deponent be ordered to answer certain questions, he may also be required to pay the expenses of the motion, including attorneys' fees.¹² On the other hand, if the moving party loses, he may be required to pay the expenses of opposing the motion.¹³ Like a motion for a protective order, Rule 37(a)(4) provides that the court *shall* award expenses for the motion to compel answers or opposition thereto "unless the court finds that the opposition to [or making of] the motion was substantially justified or that other circumstances make an award of expenses unjust."¹⁴

Although the rules have long provided for the awarding of expenses, awards have been relatively rare.¹⁵ The Advisory Committee for the 1970 changes in the discovery rules expressed hope that the changes would remedy the judicial reluctance to award expenses, stating that "expenses should ordinarily be awarded unless a court finds that the losing party acted justifiably in carrying his point to court."¹⁶ Although the Advisory Committee expressly stated that awards of expenses should deter further

10. FED. R. CIV. P. 37(a)(4).

11. FED. R. CIV. P. 37(a)(2). For a general discussion of the necessary procedure in seeking an order to compel discovery, see Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033, 1037-38 (1978) [hereinafter cited as *Discovery Sanctions*].

12. FED. R. CIV. P. 37(a)(4).

13. *Id.*

14. *Id.*

15. *Advisory Committee Statement*, *supra* note 5, at 540.

16. *Id.*

abuses,¹⁷ one commentator has noted judicial lenity in the application of discovery sanctions.¹⁸ There is, however, an increasing tendency to recognize the need for deterring future discovery abuses, and an emerging emphasis on Rule 37(a)(4) as the means of accomplishing that end.¹⁹

II. REFUSALS TO ANSWER

Generally, attorneys have advanced three justifications for instructing deponents not to answer questions propounded at oral depositions: irrelevance, bad faith, and privilege.

A. Irrelevance

Questions eliciting irrelevant testimony have been more liberally allowed in depositions than at trial.²⁰ At trial, irrelevant evidence is inadmissible.²¹ By contrast, irrelevance is not generally a proper basis for refusing to answer questions propounded at oral depositions.²²

A leading, recent case in support of the proposition that counsel may not properly instruct a deponent not to answer a question on grounds of irrelevance is *Ralston Purina Co. v. McFarland*.²³ The case involved the alleged breach of several contracts for delivery of soybeans. On deposition of the principal witness for the Ralston Purina Co., McFarland's attorney sought information that would establish a pattern of performance in the contracts. Counsel for Ralston Purina permitted the witness to answer partially one question, and then "effectively stopped the examination" by continually objecting to the questions asked and instructing the witness not to answer.²⁴ The trial court denied McFarland's motion to compel answers under Rule 37(a). Vacating that decision, the Fourth Circuit declared:

Since we cannot guess what answers might have been elicited from Mr. Wagon but for counsel's thwarting of the purpose of

17. *Id.*

18. *See Discovery Sanctions, supra* note 11, at 1033-34.

19. *Id.*

20. "Basically the propriety of probing any matter within the knowledge of [a] deponent is dependent upon relevancy—and relevancy, especially at the pre-trial stage, is very liberally construed." *Banco Nacional de Credito Ejidal v. Bank of America Nat'l Trust and Sav. Ass'n*, 11 F.R.D. 497, 499 (N.D. Cal. 1951).

21. FED. R. EVID. 402.

22. *See* FED. R. CIV. P. 26(b)(1).

23. 550 F.2d 967 (4th Cir. 1977).

24. *Id.* at 972 & n.10.

the deposition, we must assume that his answers would have been beneficial and, if not themselves constituting relevant evidence, might have led to the procuring of such evidence.

The action of plaintiff's counsel in directing Wagnon not to answer the questions posed to him was indefensible and utterly at variance with the discovery provisions of the Federal Rules of Civil Procedure. . . . The questions put to Wagnon were germane to the subject matter of the pending action and therefore properly within the scope of discovery. They should have been answered and, in any event, the action of plaintiff's counsel in directing the deponent not to answer was highly improper. The Rule itself says "Evidence objected to shall be taken subject to the objections" If plaintiff's counsel had any objection to the questions, under Rule 30(c) he should have placed it on the record and the evidence would have been taken subject to such objection. If counsel felt that the discovery procedures were being conducted in bad faith or abused in any manner, the appropriate action was to present the matter to the court by motion under Rule 30(d).²⁵

In another leading case, *Shapiro v. Freeman*,²⁶ a small girl allegedly suffered permanent psychiatric shock when a private airplane crashed into the home of her parents. While deposing the plaintiff's school teachers, defendants sought information regarding her psychological adjustment to school. The plaintiff's attorney objected to nearly all of the questions and instructed the witness not to answer. Ruling on a motion to compel answers to the questions, the court found the conduct of the plaintiff's attorney to be wholly improper. Noting the Rule 30(c) mandate that "[e]vidence objected to shall be taken subject to the objections," the court cautioned: "It is not the prerogative of counsel, but of the court, to rule on objections. Indeed, if counsel were to rule on the propriety of questions, oral examinations would be quickly reduced to an exasperating cycle of answerless inquiries and court orders."²⁷ The court then held that "[counsel] had no right whatever to impose silence or to instruct the witnesses not to answer."²⁸ The crucial consideration is not that discovery of irrele-

25. *Id.* at 973-74 (footnote omitted). See also *Drew v. International Bhd. of Sulphite & Paper Mill Workers*, 37 F.R.D. 446, 450 (D.D.C. 1965) (although objection on ground of relevancy is proper, instruction not to answer is improper).

26. 38 F.R.D. 308 (S.D.N.Y. 1965).

27. *Id.* at 311.

28. *Id.* at 312. The court went on to express its displeasure with what it obviously viewed as abuse of discovery:

The Federal Rules of Civil Procedure were designed as an affirmative aid to substantive justice, and those who choose to read them restrictively do so at

vant testimony impedes the judicial process, but rather that "[t]he harm caused by being required to take additional depositions of a witness who fails to answer a question based on an improperly asserted objection far exceeds the mere inconvenience of a witness having to answer a question which may not be admissible at the trial of the action."²⁹

B. The "Bad Faith" Exception

Although the Federal Rules provide that "[e]vidence objected to shall be taken subject to the objections," the Rules and the judicial interpretations recognize an important exception. An instruction not to answer may be justified in response to questions asked in bad faith or with intent to annoy, embarrass, or oppress the deponent or other party.

An argument may be made that despite the liberal construction of "relevancy" for discovery purposes, questions "unquestionably beyond the scope of the issues of the lawsuit" should not be answered.³⁰ These questions may be viewed as nothing more than one example of conducting the examination "in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party."³¹ At least one court has indicated that an instruction not to answer is proper in the bad faith context.³² However, another court has held that, when confronted with bad faith questioning, it is not proper for counsel to instruct the deponent not to answer. Rather, counsel should stop the deposition and apply for a protective order pursuant to Rule 30(d), which is designed to prevent examinations "conducted in bad faith."³³

their peril. It is time that depositions be conducted by members of the bar in a cooperative manner, in accordance with both the letter and spirit of the rules, without petty bickering and without intervention by busy courts with more important matters pressing for attention. It is clear to us that plaintiffs' attorney has no conception of his obligation to observe the rules "as an officer of the court" or otherwise. Rather, he appears to be bent on concealing vital facts or, at best, waging a war of delay, expense, harassment and frustration. There is no justification for his conduct, no basis at all for his instructing the deponents not to answer. As a result, the cooperative atmosphere envisaged by the federal rules has been poisoned by antagonism. *Id.*

29. *W.R. Grace & Co. v. Pullman, Inc.*, 74 F.R.D. 80, 84 (W.D. Okla. 1977). The court also noted, "This seems to be the very purpose of the provisions of Rule 30(c) . . ." *Id.*

30. *Amco Eng'r Co. v. Bud Radio, Inc.*, 38 F.R.D. 51, 53 (N.D. Ohio 1965).

31. *FED. R. CIV. P.* 30(d).

32. *See Amco Eng'r Co. v. Bud Radio, Inc.*, 38 F.R.D. 51, 53 (N.D. Ohio 1965).

33. *See Shapiro v. Freeman*, 38 F.R.D. 308, 311-12 (S.D.N.Y. 1965). Interestingly, the *Shapiro* court noted in dictum that the same procedure should be followed in response to questions seeking to elicit privileged information. *Id.*

Actually, a combination of both approaches will best produce the result contemplated by the Federal Rules. If a party or deponent feels that the questioning does demonstrate the requisite bad faith, refusing to answer the questions is simply a convenient means of halting the deposition and applying to the court for a protective order. The party seeking discovery may utilize the hiatus to move to compel an answer. Thus, where the question is asked to annoy, embarrass, or oppress, a deponent arguably may refuse to answer, especially if he subsequently applies for a protective order.

C. *Privilege*

Deponents may often be instructed not to answer because the information sought is privileged. The privilege protection was explicitly extended to depositions in the 1972 amendment to Rule 30(c), which expressly incorporated the Federal Rules of Evidence.³⁴ Explaining that change, the notes of the Advisory Committee on the Rules observe that "many pertinent topics included in the Rules of Evidence are not mentioned in Rule 43(b), e.g. privilege."³⁵

Although the Advisory Committee notes indicate that the discovery rules should include the evidentiary protections given privileged testimony at trial, there is no language in the Federal Rules expressly authorizing a deponent to refuse to answer a question on the basis of privilege. Indeed, such a refusal would apparently contravene the effect of the Rule 30(c) mandate that "[e]vidence objected to shall be taken subject to the objections."³⁶ Several judicial determinations, however, have focused on a different approach to questions involving privilege.

In *Preyer v. United States Lines, Inc.*,³⁷ the court in dicta specified a different treatment for questions eliciting privileged testimony than for those potentially discovering irrelevant information. Relying on Rule 30(c), the court explained: "When the objection involves a claim of privilege, a strict application of this

34. Prior to its 1972 amendment, Rule 30(c) of the Federal Rules of Civil Procedure began: "Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of Rule 43(b)." FED. R. CIV. P. 30(c), 48 F.R.D. 459, 466 (1970). The amended Rule reads: "Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence." FED. R. CIV. P. 30(c).

35. 28 U.S.C. app. Rule 30(c) note (1976) (Advisory Committee—1972 Amendment).

36. FED. R. CIV. P. 30(c).

37. 64 F.R.D. 430 (E.D. Pa. 1973), *aff'd*, 546 F.2d 418 (3d Cir. 1976).

rule would undermine the values thereby protected."³⁸ The court found, however, that the controverted questions involved "no real claim of privilege" and held that "[w]here, as here, the objection is merely based on assertions of irrelevance, the rule should be strictly applied."³⁹

Similarly, in *W.R. Grace & Co. v. Pullman, Inc.*,⁴⁰ the court explained that "disclosure would undermine the protections afforded by the privilege" and that "the general rules as to the scope of discovery as set out heretofore excludes [sic] discovery of privileged matter."⁴¹

Because privileged matter has been judicially exempted from the provisions of Rule 30(c), courts have approved refusals to answer questions seeking privileged information. In *Perrignon v. Bergen Brunswig Corp.*,⁴² the court stated that the party seeking to prevent disclosure of a privileged communication could have either sought a Rule 26(c) protective order prior to the deposition, or terminated the existing deposition and sought a protective order pursuant to Rule 30(d).⁴³ Since the party seeking to prevent the disclosure had not applied for either type of protective order, the court suggested that "[a]t the very least, [counsel] should have advised [the deponent] not to answer the questions."⁴⁴

Perrignon is not a new application of the discovery rules to privileged testimony. More than twenty-five years ago, the plaintiff in a libel action moved to limit the scope of a deposition, asserting that many of the questions asked infringed upon her constitutional immunity as a United States Senator. The court ruled that one may properly refuse to answer questions seeking privileged information:

As a matter of general principle, it is most difficult for the court to rule on the question of privilege in the abstract. The normal procedure, and, the court feels, the proper one to be followed in this case, is for the examination to proceed, the plaintiff to refuse to answer those questions for which refusals

38. *Id.* at 431.

39. *Id.*

40. 74 F.R.D. 80 (W.D. Okla. 1977).

41. *Id.* at 85.

42. 77 F.R.D. 455 (N.D. Cal. 1978).

43. *Id.* at 460-61.

44. *Id.* at 461. Although the party objected to the questions asked, the court found that it had failed to take "reasonable and available steps to prevent disclosure, [which] constituted a voluntary consent to disclosure of part of the privileged communication." *Id.* at 460. The court emphasized, however, that there is no per se rule that a party waives a privilege by failing to seek a protective order. *Id.* at 461.

she asserts privilege, and then for the matter to be submitted to a court for ruling on the specific questions disputed.⁴⁵

The distinction between treatment of irrelevant testimony and privileged information is sound. The general function of privilege is to prevent disclosure of certain protected communications and thereby promote complete candor in certain necessary or intimate communications.⁴⁶ Once disclosure occurs, the policy behind the privilege is thwarted. Special protections at the deposition stage are necessary to the maintenance of the privilege. On the other hand, the policy behind the relevance standard exists primarily to encourage economy in the trial process and to avoid confusing the trier of fact. Although the discovery of irrelevant testimony may result in some wasted time during the deposition for both parties, simply answering the questions is more efficient than seeking or defending a Rule 37(a) motion to compel answers. Moreover, there is little danger of confusing the trier of fact by the presentation of irrelevant testimony because the trier of fact is not present at the deposition. In other words, the policy underlying a relevance standard is adequately safeguarded by the inadmissibility of irrelevant evidence at trial, without the need to enforce the standard during the taking of depositions.

III. PROCEDURAL GUIDELINES

A. Noting Objections

The proper procedure for noting objections to questions asked at oral deposition was outlined more than twenty-five years ago in *Banco Nacional de Credito Ejidal v. Bank of America National Trust & Savings Association*.⁴⁷ After pointing out that the discovery rules contemplate a liberal construction of "relevancy," the court dictated the procedure for recording objections:

If deponent objects to the questions asked, the proper procedure is for him to answer and note his objections in the deposition. . . . At any time during the taking of the deposition the deponent or any party, upon a showing that the examination is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass or oppress, may move the court to terminate or limit the examination. Rule 30(d). These safe-

45. *Smith v. Crown Publishers, Inc.*, 14 F.R.D. 514, 515 (S.D.N.Y. 1953).

46. See generally 8 J. WIGMORE, EVIDENCE § 2285 (rev. 1961).

47. 11 F.R.D. 497 (N.D. Cal. 1951).

guards, the first of logic, the others of procedure should suffice to protect a party who is objecting in good faith.⁴⁸

The procedure outlined in *Banco Nacional* has consistently been recognized as the proper way to object to deposition questions.⁴⁹ As explained by Professor Wright, "If there is objection to a question, the reporter will simply note the objection in the transcript and the witness will answer the question despite the objection."⁵⁰

The requirement that a deponent answer questions despite objection stems from the sound policy favoring judicial economy. As explained by one court, "This approach conserves the parties or witnesses' time and money, as well as judicial resources, and expedites the trial of the lawsuit."⁵¹ Moreover, by simply recognizing that objections on relevancy or other grounds will be preserved in the record for consideration at trial, counsel can obviate the need for repeated depositions of the same witness or time-consuming and expensive rulings by the court on matters that can easily be resolved at trial.

Strict adherence to the Federal Rules thereby eliminates the use of refusals to answer questions as a dilatory tactic during discovery, while providing adequate protection against the prejudicial impact of inadmissible evidence at trial. This protection is complemented by the economic protections provided in Rule 37(a).

B. Award of Costs and Fees

In addition to motions to compel answers, the Federal Rules and corresponding judicial interpretations provide a collateral enforcement mechanism. Rule 37(a)(4) provides that upon the granting of a motion to compel an answer, "the party or deponent

48. *Id.* at 499 (citation omitted).

49. See, e.g., *Ralston Purina Co. v. McFarland*, 550 F.2d 967 (4th Cir. 1977); *W.R. Grace & Co. v. Pullman, Inc.*, 74 F.R.D. 80 (W.D. Okla. 1977); *Preyer v. United States Lines, Inc.*, 64 F.R.D. 430 (E.D. Pa. 1973), *aff'd*, 546 F.2d 418 (3d Cir. 1976); *Shapiro v. Freeman*, 38 F.R.D. 308 (S.D.N.Y. 1965); *Drew v. International Bhd. of Sulphite & Paper Mill Workers*, 37 F.R.D. 446 (D.D.C. 1965).

50. C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 84, at 420 (3d ed. 1976) (footnote omitted). Professor Wright comments that this procedure is an "important exception" to the general rule that at depositions the examination and cross-examination proceeds "in the same fashion as at a trial." *Id.* See also *Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518, 520 (E.D. Tenn. 1977) (quoting Professor Wright); *Dellefield v. Blockdel Realty Co.*, 40 F. Supp. 212, 213 (S.D.N.Y. 1941).

51. *Drew v. International Bhd. of Sulphite & Paper Mill Workers*, 37 F.R.D. 446, 449 (D.D.C. 1965).

whose conduct necessitated the motion or the party or attorney advising such conduct or both of them" may be required to pay the costs of bringing the motion, including attorneys' fees, unless there is substantial justification for the conduct.⁵² Thus, one whose conduct "impose[s] unnecessary and unreasonable expense upon the adverse party and . . . delay[s] the proceedings" must pay those expenses.⁵³

Adequate protection is given the deponent who refuses to answer the question in the good faith belief that the question seeks privileged information or is asked in bad faith. Expenses are not awarded if the party or deponent's opposition to or filing of a motion to compel an answer is "substantially justified" or the court finds "that other circumstances make an award of expenses unjust."⁵⁴ If, however, the filing of or opposition to the motion is without substantial justification,⁵⁵ the Rule provides that the court *shall* award costs of the motion.⁵⁶ One court held that this "rule imposes a mandatory duty upon the Court to impose the sanctions therein provided."⁵⁷ On the other hand, at least one court has viewed these sanctions as discretionary. That court ordered each party to bear its own costs of the motion, despite a finding that one party acted without substantial justification.⁵⁸ The better interpretation of the Rule is the former—expenses should always be awarded absent a showing of substantial justification. This interpretation advances the emerging trend to utilize Rule 37 sanctions as a deterrent to discovery abuses,⁵⁹ and recognizes the ineffectiveness of withholding sanctions in the hope that the parties will comply with the discovery rules in the future.⁶⁰ In either event, however, the award of expenses is occasioned only in response to a motion to compel answers or a protective order under Rules 26(c) or 30(d), both of which incorporate the costs and fees provisions of Rule 37(a)(4).⁶¹ Regardless of whether costs

52. FED. R. Civ. P. 37(a)(4).

53. *Braziller v. Lind*, 32 F.R.D. 367, 368 (S.D.N.Y. 1963).

54. FED. R. Civ. P. 37(a)(4). *See also* *Braziller v. Lind*, 32 F.R.D. 367, 368 (S.D.N.Y. 1963).

55. The courts have applied the substantial justification standard on a case-by-case basis without attempting to define the term.

56. FED. R. Civ. P. 37(a)(4).

57. *Palma v. Luke Waukomis Dev. Co.*, 48 F.R.D. 366, 369 (W.D. Mo. 1970).

58. *Drew v. International Bhd. of Sulphite & Paper Mill Workers*, 37 F.R.D. 446, 449-50 (D.D.C. 1965).

59. *See Discovery Sanctions*, *supra* note 11, at 1044-54.

60. *Id.* at 1040-41.

61. *Cf. Gibbs v. Blackwelder*, 346 F.2d 943, 947 (4th Cir. 1965) (expenses not awarded where no order was sought, focusing on the remedial rather than the deterrent effect of the sanctions).

and fees awards are imposed as a remedy or a deterrent, their effectiveness is enhanced by the judge's discretion to impose them upon the party at fault, whether that be the deponent, the party himself, or one or more of the attorneys involved.

IV. CONCLUSION

The practice of instructing a deponent not to answer certain questions in a deposition needs no further proscription in the Federal Rules. The Rules and decisions interpreting them provide adequate protections from abuses of the discovery process. If a question is asked in bad faith or with a purpose to "annoy, embarrass, or oppress" the deponent or opposing party, the deponent may refuse to answer the question and apply for a protective order. Adequate protection is given against an award of costs and fees by the "substantial justification" provision of Rule 37(a)(4). Similar protections are afforded privileged information. This approach minimizes judicial interference. A sound reading of the Rules suggests that courts should be involved in the taking of depositions only to issue protective orders or compel answers.⁶² The taking of oral depositions is designed to be a cooperative, self-regulating discovery tool.⁶³ The scope of the deposition is limited only by the rules of privilege and the standards for the issuance of a protective order. Questions objected to on grounds of relevancy are not within these exceptions, and should be answered, subject to recording the objection in the transcript. Express provision is made for the preservation of objections made during the deposition, and the resulting exclusion, if appropriate, of the question or answer at trial. Both the courts and the litigators must become aware of and implement the procedures and sanctions provided by the Rules to insure efficient discovery of information with minimal use of dilatory tactics and judicial intervention.

Kent E. Cammack

62. Cf. *Russo v. Merck & Co.*, 21 F.R.D. 237, 240 (D.R.I. 1957) (court may not exercise its power to limit the deposition absent a "showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress").

63. See *Perrignon v. Bergen Brunswick Corp.*, 77 F.R.D. 455, 460 n.4 (N.D. Cal. 1978) ("Rule 30(d) is the only authority allowing the interruption of a deposition.").