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CIVIL PROCEDURE

Fourth Edition

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2. Sanctions as a Remedy

For the second kind of problem presented by an imbalance in resources — can the rich litigant simply wear out the poor party by either stonewalling or overwhelming him? — the Rules have, in theory, a more adequate response. Their answer is no: In theory, Rules 11, 26(c) and (g), 30(d), and 37 will prevent such outrages. The gap between theory and practice can, however, be distressingly large; discovery conferences and sanctions will not actually prevent such abuses. The following cases suggest some issues that arise in applying the sanction provisions of the discovery Rules.

Consider first the obstructionist adversary. Nothing but exposure to such an opponent will provide the entire flavor, but the following excerpt from a deposition may suggest some of the tactics employed. The underlying suit was an employment discrimination action in which the plaintiff alleged he was fired because of his race and age. Plaintiff noticed a deposition asking defendant to produce a witness who could testify to “employment of consultants, employees, and ‘Temps’ in defendant’s Network Services Department.” Portions of that transcript follow. Before reading it, read Rule 30(d), governing the conduct of depositions.

Phillips v. Manufacturers Hanover Trust Company*Deposition Transcript*

- Q. What is your current position?
 A. I am vice president within the data center department.
 Q. As V.P. of data processing — is that correct or did I miss —
 A. No, it is vice president, and I am working within that division, technical infrastructure division, and the area is data center area.
 Q. Data center?
 A. Data center, right, data processing.
 Q. Do positions at the bank have a written job description?
 [DEFENDANT'S COUNSEL]: Objection to the form.[*]
 [PLAINTIFF'S COUNSEL]: I don't understand.
 Q. Mr. Szejnberg, do you understand the question?
 A. Not entirely. Maybe you can narrow it for me.
 Q. Let me see if I can try it another way.
 Does your current position have a written job description? . . .
 A. There is a job description, generic job description, which would encompass positions including my own, but currently I am working on a special project. So I would say within the broader sense there is one that covers that area as well.
 Q. There is none that covers the specific tasks that you do at the bank?
 A. You can interpret it as following under that job description.
 Q. Interpret what?
 A. My current responsibilities as falling under a job description.
 Q. Just to clarify or finalize this position, is there some criteria whereby which the bank decides which positions are to be described in writing or —
 [DEFENDANT'S COUNSEL]: Objection as to form.
 [PLAINTIFF'S COUNSEL]: [Defendant's Counsel], do you understand the question?
 [DEFENDANT'S COUNSEL]: No, I don't.
 [PLAINTIFF'S COUNSEL]: Well, I am not asking you the question.
 [DEFENDANT'S COUNSEL]: Well, I am objecting to the form. It is my right to do so as Mr. Szejnberg's counsel.

* [An objection as to form is an evidentiary objection that challenges not the substance of the question asked but the way the question is put. The common objections as to form are that the question is repetitive ("asked and answered"), that it assumes facts not in evidence, that it is argumentative, that it is compound (i.e., asks simultaneously about several things while inviting a yes-no answer), that it leads the witness (permitted only for hostile witnesses), that it is misleading, that it calls for speculation or conjecture by the witness rather than for facts, or that it is ambiguous, uncertain, and unintelligible. — ED.]

- Q. Mr. Szejnberg, if you do not understand any question, you can let me know and I will try my best to clarify it for you.
 Do you understand the question?
 A. Repeat it, please, one more time.
 Q. I want to know whether the bank has a criteria by or through which it decides which positions are going to be described in writing, for example, a position of — I am just giving an example — a position of teller, or the position of engineer, or the position of whatever it is, is there —
 [DEFENDANT'S COUNSEL]: Objection.
 [PLAINTIFF'S COUNSEL]: What is your objection, [Defendant's Counsel]?
 [DEFENDANT'S COUNSEL]: Finish the question.
 Well, you are asking him about tellers and this and that. You are directing him to knowledge throughout the bank and that is something that I believe is beyond the scope of this whole inquiry.
 [PLAINTIFF'S COUNSEL]: [Defendant's Counsel], the witness said he did not understand and I am trying to clarify the question by way of example. Now, maybe you could allow the witness to answer and not interrupt.
 [DEFENDANT'S COUNSEL]: I am only trying to clarify what it is you are asking because I don't understand myself, and Mr. Szejnberg himself said he was not sure.
 [PLAINTIFF'S COUNSEL]: [Defendant's Counsel], that is why I was trying to clarify the question by way of example.
 [DEFENDANT'S COUNSEL]: Okay, but I object to your form of using examples by saying tellers when Mr. Szejnberg is talking about how he works in a data center. Go ahead. He is not the personnel director of the bank, [Plaintiff's Counsel].
 Q. Could you describe for us Mr. Phillips' job functions?
 A. Not any closer than I already did. That is the extent of my current recollection — not recollection, but understanding of the job functions of that department of which Mr. Phillips [the plaintiff] was a member.
 Q. Could you tell us again, please.
 A. It involved installation of telecommunication hardware equipment.
 Q. Is that all or is that just all you can recall?
 A. That is all I can recall just now.
 Q. Have you ever heard of the words "cost center"?
 A. Yes.
 Q. What are cost centers?
 A. It is another word for department, another name for department.

Q. You say it is another name for a department. Let me ask you this: are you saying that there are discrete areas of the bank which would be called a cost center; is that your testimony?

[DEFENDANT'S COUNSEL]: Objection as to form. You are characterizing his testimony.

[PLAINTIFF'S COUNSEL]: He testified. I am asking him a question, [Defendant's Counsel].

[DEFENDANT'S COUNSEL]: No. You are characterizing his testimony as if you are cross-examining him. Just ask the questions.

Q. Do you understand the question, Mr. Szejnberg?

A. One more time. Would you repeat it.

[PLAINTIFF'S COUNSEL]: Ms. Manning, could you repeat the question again, please.

(Reporter read requested portion of the record.)

A. I wouldn't describe it that way. Cost center is a mechanism for budgeting, primarily, so there are hundreds and hundreds of cost centers within the bank. So depending on how you aggregate your budgets. So it is primarily more a financial type of mechanism.

Q. Thank you, Mr. Szejnberg.

Now let me ask you this: the bank maintains employees by cost center?

[DEFENDANT'S COUNSEL]: Objection as to form.

[PLAINTIFF'S COUNSEL]: Are you directing the witness not to answer?

[DEFENDANT'S COUNSEL]: Not at all. If he is not to answer, believe me, it will be very clear.

Q. Can you answer the question, Mr. Szejnberg?

A. I am not sure what you mean by "maintains employees." Employees are — Each employee has an individual employee ID, and each employee belongs to a cost center, but by "maintains," I am not sure what you mean by "maintains."

Q. [So] who would determine whether someone should be hired?

A. Depending on the level of the hire.

Q. Tell me the different levels of hiring.

[DEFENDANT'S COUNSEL]: Objection as to form. We are talking about a very large organization and you are asking him to talk about every level.

[PLAINTIFF'S COUNSEL]: [Defendant's Counsel], the witness just stated it varies depending on the level. I am asking the witness to tell us the differences as per level.

[DEFENDANT'S COUNSEL]: If you know.

A. Again, it has been at least, I hate to think how long, but at least six

or seven years since hiring, major hiring was done by the corporation in the area that I was in.

[DEFENDANT'S COUNSEL]: He does not know.

A. I am not sure what you are driving at. Maybe you can clear it up, I will be more helpful.

Q. What I am trying to get at is how a new employee gets hired by the bank and assigned to a particular cost center. I am asking you who initiates the process?

[DEFENDANT'S COUNSEL]: Objection as to form. You are asking Mr. Szejnberg to talk locally about a system which only he has a particular role in.

A. I don't even know if there is a process right now, from my standpoint, since I really have not done any hiring in many, many years. . . .

Q. Does the bank keep a record of consultants employed at any given time?

[DEFENDANT'S COUNSEL]: Objection. Asked and answered. I believe we covered this.

A. The same answer, pretty much.

Q. What would that answer be?

[DEFENDANT'S COUNSEL]: We covered this a while back. You mean the same answer as the answer you just gave?

A. Yes, yes, as the temps. I don't know of any specific method of keeping track of consultants, although there may be, but I am not aware of it. It was not my area of expertise in the bank.

Q. If the bank had a method of keeping track of consultants, who would know this information? Who would be aware of this information?

[DEFENDANT'S COUNSEL]: Objection. It is hypothetical. He says he does not even know if it exists. How would he know it does not?

THE WITNESS: Right.

[PLAINTIFF'S COUNSEL]: If you interrupt this deposition, I am going to adjourn it and go to the court.

[DEFENDANT'S COUNSEL]: On what basis?

[PLAINTIFF'S COUNSEL]: On the basis your constant interruption is improper.

[DEFENDANT'S COUNSEL]: On what basis is it improper? I am objecting to the forms of your questions. That is an allowable objection, and if you want to waste your time going to the court, go ahead.

BY [PLAINTIFF'S COUNSEL]:

Q. Mr. Szejnberg, if you do not understand any question I ask, please let me know and I will rephrase the question.

A. I will.

Q. Mr. Szejnberg, what happened to the network services department?

[DEFENDANT'S COUNSEL]: Objection as to form.

Q. Let me put it this way. Does network services department still exist?

A. Yes, it does.

Q. By that name?

A. No.

Q. What happened to it?

[DEFENDANT'S COUNSEL]: I object to the form.

A. By "what happened to it," what do you mean?

Q. You say, Mr. Szejnberg, it does not exist. I am asking you what happened to it.

[DEFENDANT'S COUNSEL]: Objection as to form.

[PLAINTIFF'S COUNSEL]: Are you directing the witness not to answer?

[DEFENDANT'S COUNSEL]: No. I don't believe he understands the question.

[PLAINTIFF'S COUNSEL]: Why don't you allow the witness to answer?

[DEFENDANT'S COUNSEL]: He said he does not understand the question. Maybe you can rephrase it.

BY [PLAINTIFF'S COUNSEL]:

Q. Mr. Szejnberg, if you do not understand the question, you can tell me and I will rephrase the question.

Do you understand the question I asked?

A. Sure. I just don't want to guess at what you mean exactly.

Q. If you don't know, you don't know.

A. Okay. Rephrase it then.

Q. Does network services department hardware group still exist in the form it did in 1990, 1991?

A. No, it does not.

Q. What happened to that network services department?

[DEFENDANT'S COUNSEL]: Objection as to form.

Do you understand the question?

A. Do you mean what — I don't want to read into your mind. Is it what happened to the people that were in that department since? What happened to the functions?

Q. Why don't you just answer the question and —

[PLAINTIFF'S COUNSEL]: [Defendant's Counsel], please allow the witness to answer. If you interrupt again, I am going to adjourn the deposition and go to the court.

[DEFENDANT'S COUNSEL]: Fine.

[PLAINTIFF'S COUNSEL]: Maybe we could cut through all of this if we allow the witness to answer. The question is quite clear.

[DEFENDANT'S COUNSEL]: To him it is not.

Q. Mr. Szejnberg, all I am asking you is this: you have said a network services department no longer exists; is that correct?

A. Correct.

Q. I am asking you what happened to the department, that is all I am asking you.

A. The functions that I described that were performed by that department, as I said, in the middle to late '91, were moved to another area.

Q. What area was that?

A. Corporate telecommunications area.

Q. When network hardware went to corporate telecommunications in the middle of 1991, did the group maintain its name? Do you understand the question? I can rephrase it if you don't.

A. Did the group retain the name. To tell you the truth, I don't know.

Q. I am sorry?

A. I don't know whether they are known by the same name or whether they took on a new name of the combined organization. I really don't know.

Q. You don't know that?

A. No. But they are doing the same functions. The important thing of getting the job done is the function and the name, department numbers it is not as important, to management.

Q. I want to leave a space in the record and we are going to ask that you insert the name, the new name by which network services hardware now goes by or is now known as.

[DEFENDANT'S COUNSEL]: Objection. Mr. Szejnberg said he does not know and he does not have a basis for knowing. So again I would object that that question is not appropriately directed to Mr. Szejnberg.

[PLAINTIFF'S COUNSEL]: I am going to adjourn this deposition because I am tired of this.

[DEFENDANT'S COUNSEL]: On what basis? Are you concluded?

[PLAINTIFF'S COUNSEL]: Mr. Szejnberg, thank you very much.

[DEFENDANT'S COUNSEL]: Are you concluded with Mr. Szejnberg, [Plaintiff's Counsel]? Are you concluded with Mr. Szejnberg?

[PLAINTIFF'S COUNSEL]: [Defendant's Counsel], I mean, you are not the deponent. I am sick and tired of interruptions. Maybe we need to go to the court to get some sort of relief.

[DEFENDANT'S COUNSEL]: No. I produced Mr. Szejnberg.

[PLAINTIFF'S COUNSEL]: Do you want to cross-examine Mr. Szejnberg? You can go ahead. I will sit here.

- [DEFENDANT'S COUNSEL]: [Plaintiff's Counsel], will you please sit down.
- [PLAINTIFF'S COUNSEL]: If you are going to cross-examine, I will sit. If not, I am leaving.
- [DEFENDANT'S COUNSEL]: I want to know if you are done deposing Mr. Szejnberg.
- [PLAINTIFF'S COUNSEL]: I am adjourning this deposition.
- [DEFENDANT'S COUNSEL]: On what basis?
- [PLAINTIFF'S COUNSEL]: On the basis of your constant interruption. We can sort it out before the Court. I think I have had enough.
- [DEFENDANT'S COUNSEL]: I am not preventing Mr. Szejnberg from answering any questions. I want to know if you are done with this deposition, please. Mr. Szejnberg came here at significant expense.
- [PLAINTIFF'S COUNSEL]: [Defendant's Counsel], you don't have to plead your case with me. You can plead it with the Court.
- [DEFENDANT'S COUNSEL]: I just want you to finish your questions.
- [PLAINTIFF'S COUNSEL]: My position is clear. Ms. Manning, send over the usual, please.
- [DEFENDANT'S COUNSEL]: Would you tell me if you are done with Mr. Szejnberg?
- [PLAINTIFF'S COUNSEL]: Do you have any cross-examination, if you don't, then I will leave.
- [DEFENDANT'S COUNSEL]: I may if you tell me you are adjourning.
- [PLAINTIFF'S COUNSEL]: I am adjourning this deposition today. Obviously, if we re-notice Mr. Szejnberg, you can go to the court. Obviously, you can say whatever you want to say to the court.
- [DEFENDANT'S COUNSEL]: Do you want to ask Mr. Szejnberg any more questions? Could you please let me know.
- Thank you very much, Mr. Szejnberg.
Can I talk to you off the record?
- [PLAINTIFF'S COUNSEL]: No.
- [DEFENDANT'S COUNSEL]: Well, I am going to.
Please, [Plaintiff's Counsel].
- (Discussion off the record.)
(Time noted: 3:35 p.m.)

NOTES AND PROBLEMS

1. The defendant's lawyer has clearly made it very difficult for the plaintiff's lawyer to conduct the deposition. You are not in a position

to judge whether the numerous "objections as to form" were well justified.

a. Assume they were not justified. Read Rule 26(d)(2). What sanctions would be appropriate?

b. Assume they were justified. Read Rules 30(d)(1) and 30(d)(2). What sanctions would be appropriate?

2. The plaintiff's lawyer adjourned the deposition with the statement that he was going to "go to the court to get some sort of relief." What relief should he have sought, and by what authority should he have sought it?

a. Read Rule 26(g) and be prepared to explain why a court could not use that provision to sanction defendant's lawyer for unjustified objections during the deposition.

b. Read Rule 37(a); would it justify sanctions on defendant's lawyer for unjustified objections?

3. The next case reveals the outcome of plaintiff's motion for sanctions.

Phillips v. Manufacturers Hanover Trust Co.

1994 U.S. Dist. LEXIS 3748 (S.D.N.Y. 1994)

James C. FRANCIS IV, Magistrate Judge.

In this employment discrimination action, plaintiff Arthur Phillips contends his employment was terminated by the Manufacturers Hanover Trust Company ("Manufacturers Hanover") on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. ("Title VII"), as well as 42 U.S.C. §1981. He further claims that he was fired because of his age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 et seq. . . . Mr. Phillips, who is a 52-year-old African American man, alleges that the defendant fired him from his position as a programmer in its Network Services Department as part of a reduction in force, while it retained younger, white employees who were not as qualified. . . .

Mr. Phillips now moves for sanctions, costs, and attorneys' fees against the defendant and defense counsel . . . for allegedly abusive, unreasonable, and dilatory behavior during the deposition of Michael Szejnberg. That deposition was conducted on December 9, 1993, by the plaintiff's attorney. . . . The plaintiff also seeks sanctions on the grounds that the defendant should have produced a witness other than Mr. Szejnberg, who was purportedly unable to testify meaningfully about the subject matter of the deposition. As bases for sanctions, the plaintiff invokes Rule 37 of the Federal Rules of Civil Procedure, 28 U.S.C. §1927, and the

Court's inherent power. As will be discussed below, however, a more appropriate basis for sanctions in the instant case would be Rule 30, as recently amended. See Fed. R. Civ. P. 30(d)(1)-(2).

Discussion

I. Authority for Sanctions

A. Rule 37

Rule 37 provides for an award of expenses in connection with a deposition in three circumstances. Under Rule 37(a), a party may seek an award of expenses, including attorneys' fees, incurred in connection with a motion to compel. Fed. R. Civ. P. 37(a)(4). Rule 37(b) authorizes the imposition of sanctions where a party fails to comply with court-ordered discovery. Fed. R. Civ. P. 37(b)(2)(E). Finally, sanctions may be awarded under Rule 37(d) against a party who fails to attend his or her own deposition. Fed. R. Civ. P. 37(d)(1). Thus, on its face, Rule 37 cannot be a basis for sanctions in this instance because there is no motion to compel, no violation of a previously issued court order, and no allegation that any representative of Manufacturers Hanover failed to appear at a scheduled deposition.

B. 28 U.S.C. §1927

The plaintiff also relies on 28 U.S.C. §1927, under which sanctions may be imposed against any attorney "who so multiplies the proceedings in any case to increase costs unreasonably and vexatiously. . . ." 28 U.S.C. §1927. An attorney who engages in such conduct may be personally liable for excess costs, expenses, and attorneys' fees. Imposition of sanctions under §1927 requires a clear showing of bad faith: "an award . . . is proper when the attorney's actions are so completely without merit as to require the conclusion that they must have been taken for some improper purpose such as delay." *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986), cert. denied, 480 U.S. 918 (1987). . . .

C. Inherent Power

The plaintiff also invokes this Court's inherent power as a basis for his motion for sanctions. Courts have the inherent power "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (quoting *Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962)). This power embraces the authority to impose costs and attorneys' fees against a party or his or her

attorney where a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975) (quoting *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116 (1974)). . . .

D. Rule 30

Under Rule 30, any objection during a deposition is to be stated "concisely and in a non-argumentative and non-suggestive manner." Fed. R. Civ. P. 30(d)(1). Sanctions, including costs and attorneys' fees, may be awarded under Rule 30 for conduct which a court finds has "frustrated the fair examination of the deponent." Fed. R. Civ. P. 30(d)(2). . . .

II. Conduct at the Deposition

During the deposition of Michael Szejnberg, [defendant's counsel] objected or otherwise interjected during [plaintiff's counsel]'s questioning of the deponent at least 49 times though the deposition lasted only an hour and a half. Indeed, approximately 60 percent of the pages of the transcript contain such interruptions. Many of these were objections as to form, which are waived if not made at the deposition, Fed. R. Civ. P. 32(d)(3)(B), but on numerous occasions [defendant's counsel]'s objections appeared to have no basis. These objections frequently mushroomed into improper speaking objections where [defendant's counsel] elaborated on her reasons for objecting, rather than simply stating her objections concisely as required by Rule 30(d)(1). Moreover, after 21 of [defendant's counsel]'s objections as to form, the deponent asked for clarification or claimed he did not understand the question. . . .

The plaintiff urges that such exchanges evidence a prearranged strategy designed to frustrate the deposition. Such interplay clearly did hamper the free flow of the deposition. Rather than answer [plaintiff's counsel]'s questions to the best of his ability, the deponent hesitated, asking for clarification of apparently unambiguous questions. I fail to see what is unclear, for example, about the term "formal job title," particularly given the expertise of the witness. In addition, the deponent asked for such clarifications almost exclusively after [defendant's counsel] objected or interrupted in some fashion.

Although [defendant's counsel]'s conduct at Mr. Szejnberg's deposition was inappropriate and at times even obnoxious, it does not rise to the level of sanctionable conduct. First, as made clear above, sanctions are not available here under Rule 37. Second, [defendant's counsel]'s conduct was not so egregious as to evince the bad faith required for sanctions under either §1927 or the court's inherent power. Her interrup-

tions were not so outrageous as to destroy the deposition, nor was the character of her interjections so blatantly vituperative as to indicate that she was acting "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline*, 421 U.S. at 240 (internal quotations omitted).

Whether her conduct is sanctionable under Rule 30 is a closer question. Without doubt, she often ignored Rule 30(d)(1)'s mandate; her objections were rarely concise and frequently argumentative. The sheer volume of unwarranted objections was such that it interfered substantially with [plaintiff's counsel]'s ability to obtain information from Mr. Szejnberg.⁵ Measured solely by the language of the rule, [defendant's counsel]'s conduct did indeed verge on frustrating the fair examination of Mr. Szejnberg. See Rule 30(d)(2). However, due to the newness of the amendment to Rule 30 and the fact that the plaintiff's counsel was not prevented from completing the deposition, I will exercise my discretion and deny an award of sanctions.⁶

However, defense counsel is on notice that a repeat performance will result in sanctions. Since [defendant's counsel] may have acted under a misapprehension as to her role at the deposition, I emphasize that it is not counsel's place to interrupt if a question is perceived to be potentially unclear to the witness. Rather, the witness should make the determination as to whether a question is clear and answer to the best of his or her ability.

III. Designation of Witness

The plaintiff also seeks sanctions on the ground that Mr. Szejnberg was an inappropriate witness to produce in response to the notice of deposition, which sought testimony about "The employment of consultants, employees, and 'Temps' in defendant's Network Services Department, or any successor department, from 1990 to date." The plaintiff contends that the defendant produced Mr. Szejnberg in a deliberate

5. Indeed, the advisory committee notes to the 1993 amendment of Rule 30(d) of the Federal Rules of Civil Procedure make clear that "the making of an excessive number of unnecessary objections [at a deposition] may itself constitute sanctionable conduct. . . ." Fed. R. Civ. P. 30(d) advisory committee note.

6. [Defendant's counsel's] conduct falls just short of that which has been sanctioned in similar cases under Rule 37(a). See *Johnson v. Wayne Manor Apartments*, 152 F.R.D. 56 (E.D. Pa. 1993) (attorney's interjections such that "what plaintiff's counsel . . . effectively 'discovered' is the opinion and concomitant testimony of the defendant's attorney"; counsel unilaterally terminated deposition before questioning was complete and refused to allow deposition of another witness to go forward); *Van Pilsun v. Iowa State University of Science and Technology*, 152 F.R.D. 179 (S.D. Iowa 1993) (counsel for deponent monopolized 20 percent of deposition with repeated and groundless objections as to form and attacks on his adversary's ethics, litigation experience, and honesty).

attempt to thwart discovery, as evidenced by Mr. Szejnberg's inability to testify about Mr. Phillips' job functions or about the hiring of consultants in the plaintiff's department. He was also unable to answer questions about the current cost center designation of the department, or whether the defendant kept a list of consultants by cost center. Finally, the plaintiff complains that Mr. Szejnberg worked in the department where the plaintiff was employed only through mid-1991 and had no information about its operation after that time. . . .

I am unpersuaded that the defendant's production of Mr. Szejnberg was so wholly without merit that its sole purpose was delay. . . .

Conclusion

For the reasons set forth above, the plaintiff's motion for discovery sanctions is denied.

SO ORDERED.

NOTES AND PROBLEMS

1. The court finds that defendant's counsel's behavior during the deposition was "inappropriate and at times even obnoxious" but also finds that it did "not rise to the level of sanctionable conduct."

a. Is that an appropriate reading of Rule 30(d)?

b. What effect will such a ruling have on the behavior of defendant's counsel in future cases?

c. What effect will it have on the behavior of plaintiff's counsel in future cases?

2. Suppose the plaintiff's lawyer disagrees with the magistrate judge's ruling. Can he appeal? The answer to that question requires one to understand the judicial office of the person who makes discovery rulings.

a. If the ruling in *Phillips* were made by a district judge, the answer to the question would be easy: no. A nonfinal order cannot be appealed. 28 U.S.C. §1291.

b. The ruling in *Phillips*, however, was made by a magistrate judge, whose jurisdiction is defined by 28 U.S.C. §636 et seq. One of the provisions of that jurisdiction is that a magistrate judge may hear non-dispositive motions. 28 U.S.C. §636(b)(1)(A). (A dispositive motion is a motion that has the potential to end the case — for example, a Rule 12(b)(6) motion.) Discovery orders serve as a prime example of non-dispositive motion. Consequently many magistrates hear most or all discovery matters in many cases.

c. The section defining the magistrate's jurisdiction also provides for limited review of the magistrate's orders by *the district court judge*: "A judge of the [district] court may reconsider any pretrial matter under this subparagraph [providing for magistrate judges' jurisdiction over non-dispositive motions] where it has been shown that the magistrate's order is clearly erroneous or contrary to law."

d. Assume now that you are the plaintiff's lawyer in *Phillips*. Your reading of the authorities and sense of prevailing deposition practice suggests that most judges would have found that the defendant's lawyer did violate Rule 30(d) and would have imposed sanctions. Does that mean you will prevail if you invoke the mechanism to have the district court reconsider Magistrate Judge Francis's ruling?