Misbehaving

ERIK A. CHRISTIANSEN

The author is with Parsons Behle & Latimer, in Salt Lake City.

Clients often find lawyers who match their own personalities. Nefarious clients hire obstreperous lawyers, and aggressive litigants seek out so-called "bulldog" counsel. Misbehaving clients find lawyers that let them take the low road, and courts, litigants, and opposing counsel pay the price for their bad-faith behavior. Such behavior often shows up in depositions where deponents and their counsel engage in abusive deposition tactics. Deponents engage in evasive or belligerent behavior, while their lawyers sit idly by and passively observe their clients make a mockery of the process. Lawyers use speaking objections to coach clients, and deponents treat the entire deposition process as a farce to be shirked and gamed. Perhaps we abide it because it's more trouble than it's worth to deal with, and most depositions are relegated to the dustbin of litigation anyway.

But lawyers, as officers of the court, have special duties to avoid conduct that undermines the integrity of the adjudicative process. While a lawyer has a duty to be a persuasive advocate, that duty is qualified by the lawyer's duty of candor to the tribunal. The duty of candor requires that a lawyer not mislead a tribunal with false statements of law or fact, but it also applies when a lawyer is representing a client in an ancillary proceeding such as a deposition.

What should you do when a lawyer is not knowingly offering evidence or testimony that the lawyer believes to be false; instead the lawyer countenances a deponent frustrating the deposition process or perhaps, worse still, the lawyer herself is hindering the deposition?

Some deponents, with encouragement from counsel, treat depositions as a game of hide-and-seek designed to avoid answering questions and engage in semantic gymnastics. Frustrating enough on its own, this conduct is often little constrained as it occurs outside of the immediate sight of the tribunal and the only evidence for the court to review is often an ambiguous or confusing deposition transcript. Private practice is rife with real-world examples. Simple questions like "How many times did you meet with counsel to prepare for your deposition?" are met with incomprehensible answers like the following:

> The Witness: Well, see, I think of time as a continuum. So I think I met with them from the beginning to the end. And the beginning was the start, and then there was the rehearsal, and then there was the preview, and now it's what I think of as the performance. So, in my mind, I'm answering what you're asking.

In re Shorenstein Hays-Nederlander Theatres LLC Appeals, 213 A.3d 39, 71 (Del. 2019).

If a client has found the "right" lawyer, one who matches up with his or her personality or one who is cowed by the client,

Published in *Litigation,* Volume 46, Number 2, Winter 2020.

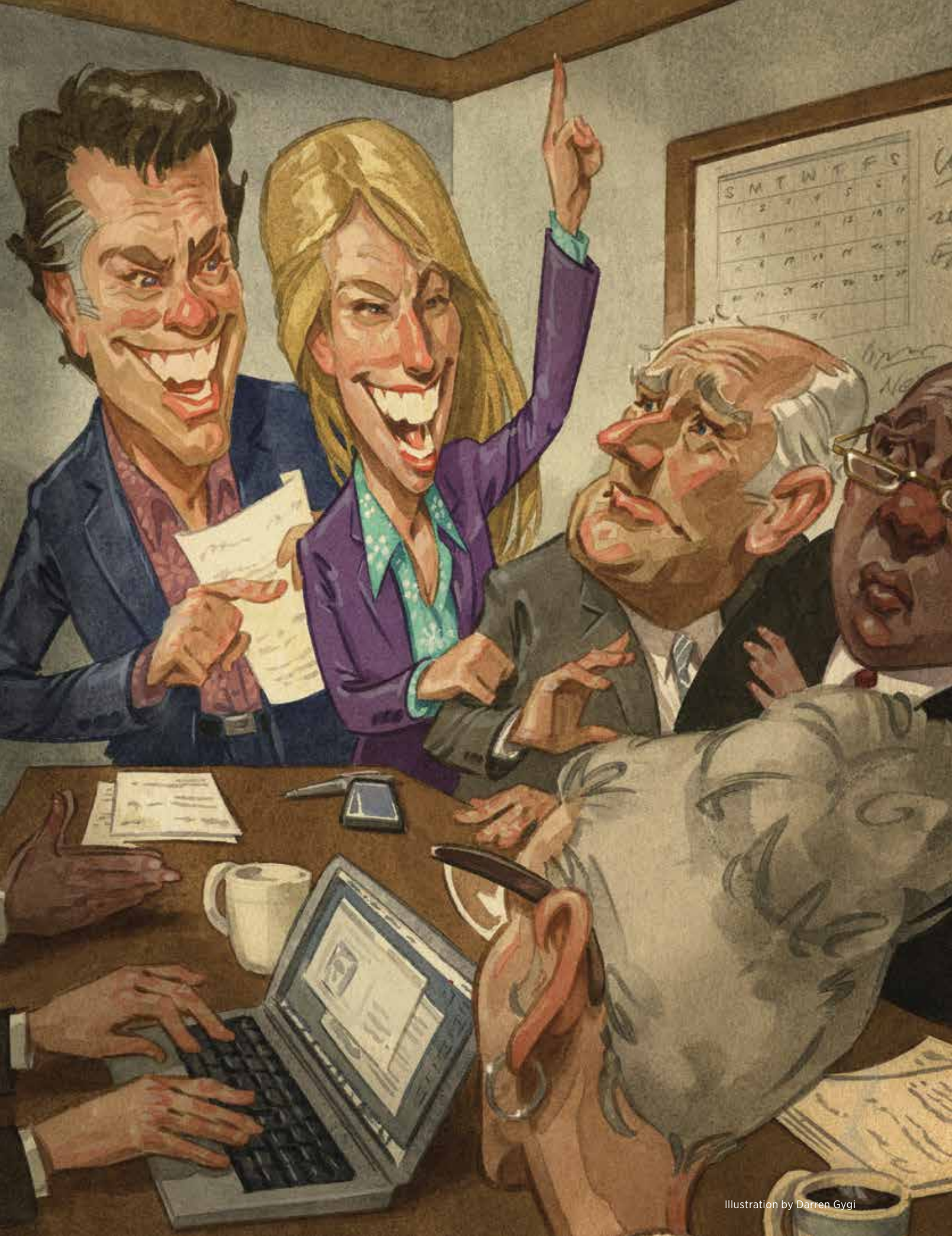

Illustration by Darren Gygi

the lawyer defending the deposition will not only sit idly by and take no action in the face of such a flippant and evasive answer, but also will object "asked and answered" when the deponent is pushed on follow-up for a real answer or will advise the lawyer taking the deposition to "move along." But we reasonable lawyers shouldn't have to put up with this.

Rule 30(d)(2) of the Federal Rules of Civil Procedure permits a court to impose sanctions "on a person who impedes, delays, or frustrates the fair examination of the deponent." The plain language of the text is not limited to "counsel" or "lawyers"; it includes any "*person*." (Most lawyers are people too.) Courts possess supervisory powers as well to regulate and enforce appropriate conduct of lawyers, litigants, and witnesses. Yet, despite these rules and inherent powers, lawyers encounter such behavior with all too much frequency.

An opposing party I once deposed, for example, brought with him a written script and, in response to every question, read the exact same answer from the script. His lawyer remained silent and passive throughout the process. Eventually, after motions that caused unneeded expense, the deponent was deposed again in open court before a discovery referee where he finally answered the questions, months after the original deposition. What did it get him? Nothing except delay, expense, and sanctions. And how did that advance his case?

An acquaintance whom I did not represent once bragged to me at a dinner party that he outsmarted the lawyer questioning him at a deposition because when asked "what documents supported his claim," he requested the stack of *all* the documents he produced in the case and then proceeded to read each and every document page by page out loud into the record. Then, after a long pause after each document he read into the record, he would say, "Yes, this one" or "No, not this one." The lawyer representing him did not intervene as he glibly poked fun at the seriousness of the process. His lawyer simply let him try the patience of the deposing lawyer and ultimately the court.

Fed up with such behavior by deponents, some courts have emphasized that lawyers have an affirmative obligation to intercede in a deposition when a client engages in misconduct. Not that you should, anyway, but counsel *cannot* sit idly by and do nothing when their own client impedes or frustrates a fair examination. Lawyers have a duty under the rules to curb their clients' deposition misconduct.

The Delaware Supreme Court recently took up this issue, even though, strictly speaking, it was not relevant to the appeal before the court. In *Shorenstein*, the court expounded on the duty of defense counsel to prepare witnesses to testify in good faith.

This was not the Delaware Supreme Court's first rodeo, however. It had previously and somewhat famously addressed Joe Jamail's conduct at a deposition—in that case too, even though it wasn't relevant to the issues appealed in the case. Jamail, a colorful person who used colorful language, left us with gems like the following:

> Q: Do you have any idea why Mr. Oresman was calling that material to your attention?
> Mr. Jamail: Don't answer that. How would he know what was going on in Mr. Oresman's mind? Don't answer it. Go on to your next question.
> Mr. Johnston: No. Joe, Joe . . .
> Mr. Jamail: Don't "Joe" me, asshole. You can ask some questions but get off of that. I'm tired of you. You could gag a maggot off a meat wagon. Now we've helped you every way we can.
> Mr. Johnston: Let's just take it easy.
> Mr. Jamail: No, we're not going to take it easy. Get done with this.

Paramount Commcn's v. QVC Network, 637 A.2d 34, 53–54 (Del. 1994).

The Delaware Supreme Court thought that lawyers should know better—although it's very likely that Jamail knew exactly what he was doing. In any event, the Delaware Supreme Court was pretty clear that it did not want to be "Joe'd" either.

But lawyers aren't the only ones misbehaving at depositions. The witness in *Shorenstein* "answered" simple, preliminary questions like this:

> Q: Did you review any documents to prepare for the deposition?
> A: Oh, certainly.
> Q: What documents did you review?
> A: The ones that were put in front of me.
> Q: What were they?
> A: Documents.
> Q: Can you recall any of them?
> A: Yes.
> Q: Tell me which ones.
> A: Many.
> Q: Great. Tell me.
> A: Many, many, many.
> Q: Tell me about them.
> A: Well, they were full of words and communications and—

Shorenstein, 213 A.3d at 72.
Someone was certainly full of something.

On education:

> Q: Did you go to college?
> A: Well, yes.
> Q: Where?
> A: I mean tuition was paid.

Q: Where did you go?
A: Oh, I had books from a lot of different places.
Q: Did you enroll at any of those places?
A: Oh, sure.
Q: Where did you enroll?
A: Many, many universities—not that many—a few.
Q: So you enrolled in a few universities?
A: Throughout my years, sure.
Q: Which universities?
A: Well, one was here, NYU.
Q: Any others?
A: Stanford. I don't recall.
Q: Did you graduate from NYU?
A: No.
Q: Did you—
A: Well, maybe. It's unclear.
Q: You're not sure?
A: You mean do I have a diploma? No. Did I receive enough credits to graduate, is that your question?
Q: That's a question, that's fine.
A: Is that your question?
Q: Sure.
A: You know, it's been said that I have—

* * *

Q: Did you complete the coursework and earn enough degrees [sic] to earn a degree? I don't care if you have a piece of paper on your wall. I want to know, did you earn a degree?
A: I don't recall.
Q: You don't recall whether you have a degree from NYU?
A: Correct.

Id. at 71–72. An education indeed.

On working:

Q: Since you completed your studies at NYU, have you had employment anywhere?
A: How do you define "employment"?
Q: You've never used the word employment in your life?
A: I'm just wondering how you define it.
Q: Have you used the word employment in your life, ever?
A: I'm asking you.
Q: You don't get to ask the questions. I get to ask the questions.
A: Oh, sorry.
Q: Have you ever used the word employment in your life?
A: I've used many words.
Q: Have you used the word employment in your life?
A: It's a word I'm familiar with.
Q: What is your understanding of the word employment?
A: Well, I think it has to do with—I'm not sure.
Q: You're not sure what the word employment means?
A: Yeah.

Id. at 72.

What does any of this mean, really?

The deponent's conduct was bad enough, but that wasn't the only thing that caught the court's attention: "From our reading of the record (the transcript), it appears that [the defending lawyer] made no attempt to put an end to Hays's flagrantly evasive, nonresponsive and flippant answers." *Id.* at 77. Justice Valihura castigated the lawyer for his silence and held that under such circumstances, counsel attending a deposition have "an obligation to ensure the integrity of the proceeding." *Id.* at 70.

To make matters worse, the court also noted that the examining lawyer implored defense counsel to control his own client but was rebuffed:

[Examining Counsel]: I just want to know for the record, [counsel], I don't want his deposition to go multiple days. It will. I'm getting non-responsive answers and now I'm getting speeches. I'm trying not to be rude. I think you recognize what I'm going through here.
[Defense Counsel]: I think you frankly deserve that one, but we'll go on.
[Examining Counsel]: I asked her where she was employed.

Id. at 77–78.

Based on the record, and even though no party appealed the sanctions award from the trial court, the Delaware Supreme Court held that the trial court appropriately awarded attorney fees and costs for the witness's "willful bad faith litigation tactics":

The deposition appears to have been a colossal waste of time and resources due to her behavior, which made a mockery of the entire deposition proceeding. Although this award of fees and costs is not challenged on appeal, we write to remind counsel that they have a responsibility to intercede and not sit idly by as their client engages in abusive deposition misconduct. Depositions are court proceedings, and counsel defending the deposition have an obligation to prevent their deponent from impeding or frustrating a fair examination. Although counsel can be caught off guard by a client's unexpected, sanctionable outburst, that is not what happened here. Rather, Hays's flippant, evasive, ridiculous answers and speech-making continued throughout the entirety of the deposition, which began at 9:30 a.m. and concluded at 7:13 p.m. An attorney representing a client who engages in such behavior during the course of a deposition cannot simply be a spectator and do

nothing. Here, Hays's counsel made no apparent effort to curb her misconduct.

Id.

In another case in which the deponent went off the rails while his counsel sat on his hands and watched, the court counted 73 occasions where the witness used the word "fuck," leaving the unavoidable impression "that such abusive language was chosen solely to intimidate and demean opposing counsel." *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 187 (E.D. Pa. 2008). One example:

> Q: [T]his is your loan file, what do Mr. and Mrs. Fitzgerald do for a living?
> A: I don't know. Open it up and find it.
> Q: Look at your loan file and tell me.
> A: Open it up and find it. I'm not your fucking bitch.
> Q: Take a look at your loan application.
> A: Do it yourself. Do it yourself. You want to do this in front of a judge. Would you prefer to [do] this in front of a judge? Then, shut the fuck up.
> Q: Sir, take a look—
> A: I'm taking a break. Fuck him. You open up the document. You want me to look at something, you get the document out. Earn your fucking money asshole. Isn't the law wonderful. Better get used to it. You'll retire when I'm done.

Id. at 186.

The witness also "proudly expressed his intent to frustrate his examination," as the court put it, such as here:

> Q: Are you done?
> A: No, I'm not. I'm going to keep going. I'll have you flying in and out of New York City every single month and this will go on for years. And, by the way, along the way GMAC will be bankrupt along the way and I will laugh at you.

Id. at 187.

Inventing dubious legal grounds for refusing to answer questions accomplished the same goal:

> Q: Going back to the deed between yourself and the Sacaro Trust on April 29, 2005, what was the purpose of that transaction?
> A: That's confidential. You know the laws of Trusts.
> Q: It's not confidential.
> A: Yes, it is.
> Q: What was the purpose of that transaction?
> A: None of your business. That's the law.

Id. at 189.

Then there were the old-fashioned runarounds:

> Q: Sir, were you involved in flipping that property?
> A: You tell me.
> Q: Sir, I'm going to ask the questions. You're going to answer the question.
> A: I just responded with a question.
> Q: Were you involved in flipping the property at 207 North Rutherford?
> A: You tell me. And you provide that evidence to the court.
> Q: It doesn't work that way, sir.
> A: Yes, it does. That's my answer. Listen, we can go around in circles and you'll end up with the same answer. You tell me. You're that good. You're hired by GMAC.
> Q: Sir, my question is, and I expect an answer.
> A: I can't recall.
> Q: Were you involved in flipping 207 North Rutherford?
> A: I can't recall. I'm involved in flipping you.

Id. at 190.

Not surprisingly, this performance earned sanctions for counsel "defending" the deposition, too. The lawyer claimed he tried, off the record, to get his client under control, but that excuse wasn't good enough. "It is true that any attorney can be blindsided by a recalcitrant client who engages in unexpected sanctionable conduct at a deposition," the court wrote. "An attorney faced with such a client cannot, however, simply sit back, allow the deposition to proceed, and then blame the client when the deposition process breaks down." *Id.* at 195. At a minimum, the court pointed out, the deponent's lawyer should have suggested or eventually insisted that the deposition be adjourned and rescheduled so he would have had the necessary time to educate his client on what the legal process and deposition rules require.

How to avoid this unhappy fate? Prudence and professional ethics dictate that counsel should spend some time before every deposition educating their clients about their duty not only to provide honest testimony but also to more affirmatively cooperate in the discovery process without undue interference, flippancy, or gamesmanship. Counsel should instruct clients in preparing for depositions that they should answer the questions asked, avoid playing games, and act with integrity throughout.

True, a client may feel justified, even righteous, in being evasive or flippant because the client is contemptuous of the other side and sees the lawsuit as unfair. In these cases, appeals to the integrity of the process or notions of fair play and justice might fall flat. But appeals to self-interest probably won't. The hyper-evasive deponent faces a monetary sanction or, at the very least, the expense of briefing a sanctions motion. Perhaps not of great concern to a deep-pocketed witness, but the evasion will also likely make the deposition longer than necessary (a strategy a

witness might adopt to try to run out the clock). The possibility of doing it all over again in a second deposition ordered by a disappointed and even angry jurist, this time overseen by a wary magistrate judge, should be enough to help get even the most disgruntled clients back in line.

Of course, a more important consideration, perhaps the most important one, is what effect will a deposition like the ones in *Shorenstein* and *GMAC Bank* have on the case? It won't be good.

Credibility is one of the most important commodities a witness possesses, and a lengthy deposition transcript full of evasions and too-cute-by-half answers will give most trial lawyers plenty of fodder at trial when the once-confused witness who needed simple words defined suddenly gives clear, concise answers.

For example, a witness who is evasive or plays games in a deposition will find himself held to that evasive testimony at trial. When facing the same question at trial that was dodged at deposition, if the witness attempts to play it straight in front of the jury, he'll likely be impeached with his earlier testimony. After a few instances of this, the jury may very well come to the conclusion that the witness can't be trusted. A simple example excerpted from the case above, *GMAC Bank*, illustrates the point. The recalcitrant witness there testified:

> Q: Going back to the deed between yourself and the Sacaro Trust on April 29, 2005, what was the purpose of that transaction?
> A: That's confidential. You know the laws of Trusts.
> Q: It's not confidential.
> A: Yes, it is.
> Q: What was the purpose of that transaction?
> A: None of your business. That's the law.

At trial, on cross-examination, it might go differently:

> Q: Going back to the deed between yourself and the Sacaro Trust on April 29, 2005, what was the purpose of that transaction?
> A: To secure the property for the benefit of the Trust.
> Q: Is there anything confidential about the deed for the benefit of the Trust?
> A: No. It is a matter of public record.

The lawyer on cross could then use the earlier deposition answers to remind the jury of the witness's obstructive and contradictory deposition testimony. This type of impeachment could be used to undermine the credibility of the witness at trial—to say nothing of hammering home the basic point that he's a jerk. The original evasive testimony won't play well with the jury, and jurors might hammer the litigant represented by that witness as a result.

Even before the case comes to trial, if such behavior is raised with the court, that too risks losing witness credibility. And once credibility with the court is lost, it is not easily regained. There is nothing worse for a party than to go to trial with a presiding judge who does not trust the party. The Delaware Supreme Court recognized that "a lawyer who engages in the type of behavior exemplified by Mr. Jamail is not properly representing his client, and the client's cause is not advanced by a lawyer who engaged in unprofessional conduct of this nature." *Paramount*, 637 A.3d at 54.

If you are on the other side of the table, however, push through your frustration—pick up the phone and call the magistrate if it gets really bad—and think of the ways that your opponents' tactics can be used against them. For example, if you call the court or magistrate during an evasive deposition, you can have the court reporter read back the transcript to the judge in real time. Not many judges are sympathetic to obstreperous behavior in a deposition. More often than not, the judge will be offended and will instruct the witness directly in the deposition and on the record to answer the questions and to stop playing games. The direction by the court also can be captured by the court reporter during the deposition, and if the witness goes back to being evasive after the judge finishes the call, the transcript can be used to file a motion for sanctions with the court. Judges don't like having their instructions ignored, and building a record during the deposition will pay dividends down the road. In such instances, it is critical not to lose your own temper, but to systematically and politely build a solid and deliberate record to bring the issue to the court, including during a court call in a deposition or by pretrial motion.

In one case, when faced a particularly uncooperative witness, I moved to have the witness deposed in open court before the judge, and I attached the deposition transcript to the motion. After reading the transcript, the court granted the motion and ordered the witness to fly from New York to Texas to be deposed in the courtroom. In court, the judge castigated the witness at the start of the deposition and then said on the record: "[I]f the witness does not cooperate and answer the questions, please have the court clerk come and get me in chambers, and I will sit through the rest of the deposition." The witness got the point and cooperated for the rest of the deposition. Worse for the witness, he lost credibility with the judge and was viewed as a miscreant for the remainder of the case.

In the end, obstreperous behavior in depositions does not advance a client's case and, more often than not, backfires and increases the risks for the misbehaving witness before the court and, ultimately, before a jury. Lawyers have an ethical obligation to police their clients, and to make sure that clients do not attempt to make a mockery of the judicial system. While it might seem fun and even advantageous to play games in a deposition, eventually such behavior will undermine the credibility of the witness and might ultimately cost a party a case. ■