V I R G I N I A :

IN THE CIRCUIT COURT OF

Plaintiff,

v. **Case No.:**

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL DEFENDANT DOE TO ANSWER DEPOSITION QUESTIONS

I. Introduction

On April 28, 1995, plaintiff's counsel attempted to depose the defendant Dr. Doe. During the deposition, Robert W. Hardy, Esquire, counsel for defendant Doe, commenced the tactic of interposing statements under the guise of objections which could have the effect of influencing the witness's testimony. Hardy interrupted the deposition, making suggestions as to what was the testimony of the witness, interjecting his own testimony into the record, attempting to clarify clear terms, and engaging in colloquy which impeded the deposition. Hardy further escalated his efforts to obstruct the deposition by instructing the witness not to answer questions posed to him. Salient portions of the-deposition are attached to this Memorandum as Exhibit A. The above described tactics of defense counsel have prevented plaintiff from expeditiously and fully deposing defendant Doe on the salient issues in this action.

II. Counsel is not entitled to prompt deponent, suggest answers or otherwise interrupt or impede the deposition.

The purpose of a deposition as contemplated by the Rules of the Supreme Court of Virginia is to enable a party to discover in an expeditious manner the candid, unprompted testimony of witnesses including adverse parties. The successful taking of a deposition is dependent upon the good faith adherence of counsel to the letter and spirit of the rules of discovery.

Objections and colloquy by lawyers tend to disrupt the question-and-answer rhythm of a deposition and obstruct the witness' testimony. Since most objections are preserved for trial, they need not be made during the deposition. Objections which would be waived if not made immediately should be stated pithily.

The conduct of Hardy violated the clear letter and the spirit of the Rules of the Supreme Court of Virginia. Examination and cross examination of witnesses at a deposition is to proceed as permitted at a trial. Va. Sup. Ct. Rule 4:5(c). At trial, lawyers are not allowed to interrupt the testimony of witnesses to interject lengthy objections into the testimony. Likewise, such behavior is prohibited at depositions since it tends to obstruct the taking of the witness' testimony. Hall v. Cliff on Precision, 150 F.R.D. 525,530 (E.D. Pa. 1993).

Lawyers are strictly prohibited from making any comments which might suggest or limit a witness' answer to an unobjectionable question. Hall, at 530-31; Langston Corp. v .Standard Register Co., 553 F. Supp 632 (N.D. Ga. 1982); Griego v. Greico, 561 P.2d 40 (N.M. 197 This kind of "speaking objection in which a lawyer

makes a lengthy objection which contains information suggestive of an answer to a pending question impermissibly taints the witness' answers and violates Rule 4:5(c). Such speaking objections" would not be countenanced at trial and should not be allowed at a deposition. Aetna Casualty & Surety Co. v. Corroon & Black of Ohio, Inc., 10 Va. Cir. 207 (Richmond 1987); Hall, at 530.

Similarly, it is impermissible for counsel to interrupt the orderly flow of the deposition by interjecting inquiries into the meaning of the interrogator's questions when the witness has given no indication that the question is unclear to him. Wright v. Firestone Tire & Rubber Co., 93 F.R.D. 491 (W.D. Ky. 1982). Explanations of a lay person's use of such terms is generally a matter for counsel to explore with the witness on cross examination rather than a basis for objecting to the questions. Id. at 493.

III. Counsel is not authorized to instruct deponent not to answer question which calls for relevant, non-privileged information.

Rule 4:5 is quite specific in its prohibition of Hardy's instruction to Doe not to answer a posed question. "Evidence objected to shall be taken subject to the objections." VA. Sup. Ct. Rule 4:5(c). Although the Supreme Court of Virginia has not had an occasion to apply this provision of Rule 4:5(c), published opinions of the Virginia Circuit Courts and federal courts applying Rule 30(c), the identical federal counterpart of 4:5(c), made clear the impropriety of Hardy's refusal to permit the witness to answer the questions. Absent a valid claim of privilege, counsel does not

have the right to instruct a client not to answer deposition questions. Kerr Contracting Corp. v. George Mason University, 25 Va. Cir. 403, 405-406 (Fairfax 1991); In Re Sampson, 3 Va. Cir. 246 (Alexandria 1984); and In re Air Crash Disaster at Detroit Metro Airport, 130 F.R.D. 627, 629 (E.D. Mich. 1989).

If opposing counsel objects to a question posed at a deposition, the proper course of action is to state the objection on the record and then allow the deponent to answer the question or affirmatively act to terminate or limit the examination. Kerr, supra; Aetna Casualty, supra; Layne v. Christie, 1 Va. Cir. 504 (Richmond 1984); and In re Air Crash, at 629. Furthermore, if Hardy believed the deposition was being conducted in bad faith, or that the deponent was being unreasonably annoyed, embarrassed or harassed, he should have suspended the deposition, stated his: complaints on the record, and applied immediately for a court order under Rule 4:5(d). Hearst/ABC-Viacom v. Good way Marketing, 145 F.R.D. 59, 63 (E.D. Pa. 1992).

Deposition questions must be answered, even if an objection is made unless a claim of evidentiary privilege is raised. Alexander v. Cannon Mills Co., 112 F.R.D. 405 (M.D. N.C. 1986). The practice of directing a witness not to answer a question posed to him has been deemed to be indefensible and utterly at variance with the-rules of discovery. Ralston Purina Co. v. McFarland, 550 F.2d 967, 973-7-4 (4th Cir. 1977). In a strongly worded opinion concerning the, type of behavior indulged in by Hardy, the Fourth Circuit Court of Appeals declared:

> "Counsel for party had no right to impose silence or instruct witnesses not to answer and if he believed questions to be without scope of orders he should have done nothing more than state his

> objections." Wright & Miller Federal Practice and Procedure: Civil §2113 at 419 n. 22 (1970). We agree. 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 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). (Footnote omitted.).

550 F.2d at 973-74.

In Shapiro v. Freeman, 38 F.R.D. 308 (S.D. N.Y. 1965), the District Judge confronting counsel's refusal to permit his client to answer depositions articulated the harm engendered by this tactic:

> 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. . . . 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.

38 F.R.D. at 311-12.

The questions posed to Doe implicate no claim of privilege. The relevancy of the inquiry is unquestioned. Compelling defense counsel to adhere to the well established procedure of permitting a witness to answer a question over objection will cause no prejudice to defendant. Assuming Hardy's objection had any arguable merit, the Court at trial will sustain the objection thus preventing its admission in evidence. Therefore, no prejudice would have befallen the defendants if the question had been answered.

In contrast, plaintiff's counsel and the Court have been prejudiced by Hardy's conduct. Unnecessary time and resources have been devoted to seeking an Order which seeks merely to require Hardy to conform his conduct to the clear letter of Rule 4:5(c). "The 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 trial.. W.R. Grace & Co. v. Pullman, Inc., 74 F.R.D. 80, 84 (W.D. Okl. 1977).

IV. An award of sanctions is required under Rule 4:12.

Rule 4:12(a)(4) of the Rules of the Supreme Court of Virginia requires the Court, if it grants Plaintiff's Motion to Compel l to require Hardy to pay the plaintiff the reasonable expenses incurred in obtaining an Order unless the Court finds the opposition of Hardy to be substantially justified or other circumstances make an award unjust. The verbatim transcript of the deposition contains no facts justifying Hardy's conduct.

Under similar circumstances Virginia circuit court judges have not wavered from impositions of sanctions upon counsel. In Katyal v. Katyal, 17 Va. Cir. 18 (1988), the court, after reviewing the deposition transcript, found the invocation of privilege in response to deposition questions to have been unnecessary and frivolous. Accordingly, the offending party was ordered to pay all costs and counsel fees incurred for the deposition. Under Federal Rule of Civil Procedure 37(a)(4), the

source of Virginia Rule 4:12 (a)(4), reasonable attorneys fees and costs have been awarded against the attorney who instructed the deponent not to answer and against the deponent. Rockwell International, Inc. v. Pos-A Traction Industries, Inc., 712 F.2d 1324, 1326 (9th Cir. 1983); Carey v. Rudseal, 112 F.R.D. 95, 99 (N,D. Ga. 1986); Langston, 95 F.R.D. at 390; Wright, 93 F.R.D. at 493; and Shapiro, 38 F.R.D. at 312-13.

Hardy is not unfamiliar with the discovery rules in Virginia pertaining to conduct at a deposition. In a similar case, Hardy's co-counsel engaged in the same tactics of obstructing the deposition by suggesting answers, injecting his own testimony into the testimony of the witness under the guise of making an objection, and instructing the witness not to answer certain quest questions. Upon plaintiff's motion for a protective order, Judge Oast of the Circuit Court of the City of Portsmouth entered an order forbidding counsel from in any way suggesting to a deponent how to answer a question posed to the deponent by opposing counsel. Judge Oast also required the deponent to answer questions in the deposition subject to any objections made by Hardy's co-counsel. Phippins v. Winston, Law No. L-85-25 (Cir. Ct. City of Pourtsmouth 9/12/85), attached hereto as Exhibit B. Hardy and his co-counsel then filed an application for a Writ of Mandamus to the Supreme Court of Virginia seeking to overturn the circuit court order. The Supreme Court denied the writ. In re: William O. Winston, M.D., Record No. 850753 (1985), attached hereto as Exhibit C.

In the instant action, plaintiff's course' will have expended significant time and expense hours in attending a deposition, preparing a Motion to Compel, and attending a hearing on the Motion to Compel, and incurred costs associated with a court reporter attending a second deposition of defendant Doe. All of these costs are directly caused by the willful refusal of Hardy to abide by Rule 4:5(c). Rule 4:12(a)(4) mandates these costs should fall upon his shoulders.

V. Conclusion

Based upon the facts and applicable principles of law, this Court should enter an Order directing the defendant Doe to answer the posed questions and which requires Hardy to refrain from instructing the deponent not to answer questions unless the answer would breach a privilege available to the deponent, to refrain from prompting the deponent under the guise of objecting to a question and to pay the plaintiff the costs incurred in suspending the deposition and bringing the Motion to Compel before the Court.

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