No. 14-3006

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THE SECURITY NATIONAL BANK OF SIOUX CITY, IOWA, as conservator for J.M.K., a minor,

Appellee,

v.

JONES DAY and JUNE K. GHEZZI,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

REPLY BRIEF OF APPELLANTS

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The district court—ignoring the undisputed deposition convention of the parties—imposed a sanction requested by no one, based on conduct about which the lawyers involved had *never* complained. The court's *sua sponte* eagerness to impose a sanction continues to bedevil this appeal. With Plaintiff making no complaint, this Court is left only with Amici, who freely admit their ignorance of the facts of this case beyond what is already provided in the district court's order.[1] *See, e.g.*, ABOTA 16 n.13. It is no surprise, therefore, that their arguments are generic, repetitive, and uninformative on the issues involved. For the reasons described below and in Appellants' opening brief, the court's sanction order should be reversed.

I. THE PARTIES' CONVENTION AND THE COURT'S INTERACTIONS WITH APPELLANTS

As explained at length in Appellants' opening brief, the parties in this case followed a working deposition convention to efficiently navigate the complex scientific topics involved, as they had done previously. *See* Br. 3-5, 32-41. Under that convention, it was "standard procedure" at depositions for either side to assist

[1] The Amici filings are cited as follows: American Board of Trial Advocates, ABOTA__, American Association of Justice, AAJ__, Iowa Association of Justice, IAJ__, and Stephen D. Susman and Thomas M. Melsheimer, SM__. Appellants opening brief is cited as Br. __, and citations to the required Addendum to the Brief and the Separate and Sealed Appendices are as noted there. *See* Br. 3 n.1.

in clarifying the "highly technical [topics being discussed] where we had a lot of documents on the table. A176:12-16. In fact, at trial the court itself commented that it "didn't see anything remotely improper," A184:10, when presented with an example of the parties' convention at work, *see* Br. 32-34, and in other infant formula manufacturing cases against a completely different defendant represented by another firm, Plaintiff's counsel acceded to the same procedures. *See* SA32-34 (Declaration of Anthony J. Anscombe). As a result, it is unsurprising that the district court order in this case cites no statement indicating any concern by Plaintiff's counsel regarding any of the deposition transcripts at issue here.

But the parties' convention tells only part of the story of what was a highly efficient and non-contentious jury trial. SA5. Among other things, there were no contested discovery motions, Br. 5, 31, Appellants took few depositions and allowed Plaintiff to use other depositions taken in prior cases, Br. 36-37, and even the trial court recognized that both sides "were very, very professional in working with each other and very, very professional in working with me." A193:25-194:3.

At the same time, the sanction in this case was entered against the backdrop of the trial court's frequently expressed negative views about out-of-state lawyers, particularly from large law firms, as illustrated by the court's own statements. *See, e.g.*, Br. 6 (quoting A33) (court's "experience with out of state large firms is that the trial waste [sic] tons of jurors [sic] time . . . unless the lawyers are on the time

clock"); *see also* Br. 6-10 (citing related examples). Nor were these barbs unconnected to the sanction here. The court's sanction order itself emphasized that "[v]irtually all" of the sanctions that the court had ever imposed "have been imposed on (or threatened to be imposed on) lawyers from out-of-state law firms," in contrast with what it viewed as the "long and storied tradition and culture of civility" in Iowa, where "stinkers" are "few and far between." Br. 17 (quoting RA5 and RA5 n.8).

While some of the Amici conveniently ignore these problems, others surprisingly embrace them. Thus, while it never mentions First Amendment or due process problems, IAJ asserts that the court's order "is absolutely necessary, especially when the sanctioned attorney is a member of a large firm that represents even larger corporate clients." IAJ 23-24. It bases this conclusion in part on the remarkable assertion that the court's training video order is proper because "[w]hen big firms, representing big corporations, are handed drop-in-the-bucket monetary sanctions for obstructing the discovery of relevant evidence, it is far more likely that the attorney gets a pat on the back than a slap on the wrist." IAJ 25; *see also* IAJ 24 (referring to monetary sanctions against "big-firm lawyers" as a "badge of honor for the attorney rather than a professional demerit").

AAJ tries a different tack, terming the court's statements in this case "irrelevant." AAJ 3. Yet it follows that assertion with generalizations about the

court's record on the bench over the past twenty years. AAJ 3-5. No one disputes the court's general reputation or record in wholly unrelated cases, which are not at issue and were never raised or impugned by Appellants.

The same Amicus also as much as accuses Appellants of making inaccurate factual assertions in hopes that no one would contradict them. AAJ 3, 8. That accusation is wrong and irresponsible. At the time of Appellants' filing, Plaintiff's counsel had filed an appearance in this Court, and while Plaintiff had declined to participate in the hearing below, it did not file its letter indicating that it would not be filing a brief in this Court until the day before it was due—twenty-nine days after Appellants filed their opening brief. *See* Doc. 4221948 (Dec. 3, 2014). More importantly, Appellants had no way of knowing whether the district court would seek to participate in the proceedings. Instead, they highlighted the specific and unique problems that arose in the context of the court's *sua sponte* decision to impose a sanction in this case and illustrated them through specific, direct quotations to emails and transcripts attached in their appendix. Indeed, it is AAJ who chose to characterize the district court's decision as the result of a "rogue judge's ire, antipathy, and criticisms." AAJ 3.

II. STANDARD OF REVIEW

In their opening brief, Appellants explained that this Court should apply a searching standard of review to the district court's order for any of three independent reasons. *See* Br. 28-30. Amici's counterarguments are incorrect.

First, *Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 143 (2d Cir. 2012), and related cases cited in Appellants' opening brief explained that a heightened standard of review is proper when the trial court stands as accuser, fact finder, and sentencer all in one. Br. 28. AAJ is simply wrong in urging this Court to disregard that persuasive rationale for a heightened standard of review based on asserted distinctions in underlying substantive law. *See* AAJ 10-11. What a court must find as a substantive matter has no bearing on the standard for an appellate court's review of that decision once it is made, and *Enmon* explains that a heightened standard is appropriate here.

Second, Appellants explained that this Court need not defer to the district court's order where the entire basis for the decision was two typed transcripts from depositions taken nine months before the court was even assigned to the case and sixteen months before it *sua sponte* raised the issue of sanctions. Br. 28-29. Far from undermining this argument, IAJ's citation to a case involving resolution of credibility determinations based on *live* testimony instead highlights that this Court is positioned identically to the district court in conducting its review in this case.

IAJ 21-22 (citing *United States v. Hernandez*, 569 F.3d 893, 897 (8th Cir. 2009) (referring to live testimony and "credibility of witnesses")). Similarly, this case does *not* involve a trial court that spent months or years building familiarity with the parties through discovery to which a court of appeals might defer. *See* AAJ 11-12 (claiming the court's relative newness to case "irrelevant"). The district court had no advantage in its review that would warrant a deferential standard.

AAJ is also incorrect to argue that this Court's pronouncement that "the district court's discretion narrows as the severity of the sanction or remedy it elects increases," *Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 898 (8th Cir. 2009), is limited to situations "when dismissal is used as a sanction for discovery abuses." AAJ 9. Although *Sentis Group* did involve dismissal, there is no reason to limit its commonsense holding that more severe sanctions should be reviewed more searchingly than minor ones to that context, nor does AAJ suggest any. The district court entered a highly unusual order that damaged Appellants' good reputation in the legal community. A heightened standard of review is warranted.[2]

[2] Ironically, other Amici cannot even agree whether the sanction imposed is more or less severe than a monetary sanction. One argues in favor of the training video sanction by asserting that monetary sanctions are inadequate, "especially when the sanctioned attorney is a member of a large firm that represents even larger corporate clients," IAJ 23-24, while another asserts that the non-monetary sanction is "a minimal burden." SM 12; *see also* SM 11 ("district court did not impose a severe sanction that involved attorney's fees, a fine, or one that would affect the merits of the case"). The sanction had nothing to do with the case in any

Finally, Appellants continue to maintain that the propriety of an order to write and produce a training video presents questions of law implicating the First Amendment and due process, warranting a heightened standard. Br. 29. Amici do not dispute that these questions are reviewed de novo.

III. THE DISTRICT COURT ERRED BY IMPOSING A SANCTION

A. A sanction was inappropriate in light of the parties' own deposition convention and collaborative conduct in general throughout the underlying litigation

As already explained, the parties to this litigation worked well together, with no suggestion of disagreements in the deposition transcripts at issue and with numerous examples of accommodation, civility, and cooperation. *See* Br. 30-41. Instead, the court should have left the parties as it found them—litigating but working out their differences successfully without requiring court intervention. Under the facts of this case, the court erred in imposing a sanction, whether under Rule 30(d)(2) or its inherent power.

In response, Amici often appear to be addressing an entirely different case than the one actually at issue. *See, e.g.*, IAJ 1-6; SM 1-9.[3] To take a particularly

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event, as it was entered post-trial after a defense victory and after the court had overruled every deposition objection *en masse.*

[3] Amicus AAJ offers no discussion of the court's *sua sponte* authority to impose sanctions. AAJ 12 & 12 n.10.

telling example, while Susman and Melsheimer spend nearly their entire brief promoting their preferred mode of litigation, which they term "Trial by Agreement," Appellants in fact acted consistently with many of the specific suggestions that Amici offer, including "limiting the number and length of depositions," avoiding discovery disputes, and agreeing with Plaintiff's counsel to the "quick entry of a protective order." SM 6-7.

Similarly, ABOTA bemoans the declining number of civil cases actually tried across the United States and speculates that "[l]itigators may seek to drive up the costs of litigation to force settlement rather that [sic] have cases tried on the merits." ABOTA 17-18. ABOTA ignores that *this case in fact was tried to a jury in a nine-day trial*, with Appellants prevailing after presenting their case in only three of those nine days.

Amici also attempt to blunt the complete lack of any controversy between the parties by reiterating the district court's speculation about Plaintiff's possible motivations for never raising concerns about the depositions in this case, even when offered the opportunity to do so. *See, e.g.*, ABOTA 12-13, 22-28; SM 10.[4] It

[4] The attempt of one Amicus to turn a two-paragraph filing by Plaintiff's counsel into a dispute actually once again highlights the absence of disagreement in this case or in the depositions at issue. *See* ABOTA 22-23 & 23 n.14. As Appellants explained in their opening brief, Br. 16 n.7, and as Amicus later appears to acknowledge, *see* ABOTA 25 n.15, the depositions cited were from a different

is not even always clear which way Amici's speculation points. For instance, ABOTA spends several pages speculating that Plaintiff's counsel may not have raised discovery concerns because he "was engaged in two complex and costly cases" against defendant at the time and may have concluded efforts were better spent on other unstated, imaginary issues. ABOTA 24-25; *see also* ABOTA 24-28 (same). And given that assertion of complexity and expense, it is at least as reasonable to believe that Plaintiff's counsel would have been even more attuned than usual to any conduct that he believed to be detrimental. This Court should not adopt Amici's (or the district court's) unsupported surmises as truth.

Turning from Amici's speculation, the substantive arguments of ABOTA, the primary Amicus to address the court's *sua sponte* authority to impose sanctions, largely re-hash arguments already raised in the court's order. Each argument is incorrect as a matter of law.

First, ABOTA claims that because there is no specific requirement in Rule 30(d)(2) that sanctions be imposed on a party's motion, no such requirement exists. *See* ABOTA 6-7. But its purported distinction of Rules 11(c)(3), 16(f)(1), and 26(g)(3) provides no reasoning; instead, Amicus asserts that "there is no reason to

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case in a different jurisdiction in 2011, which was not even pending when the pretrial conference or trial in this case occurred.

believe" the rules are "intended to be different" because Rule 30(d)(2) is "broad and unqualified." ABOTA 6-7. Appellants explained that there *is* in fact reason to believe Rules 11(c)(3), 16(f)(1), and 26(g)(3) are different—each has express language authorizing a court to impose sanctions "on its own" that is absent in Rule 30(d)(2). *See* Br. 31 n.10.

ABOTA's appeals to various advisory notes fare no better, for the very passages quoted again do not comport with its characterizations. *See* ABOTA 7-8. The 1983 Advisory Committee Notes to Rule 11 state that the amendment was added "to overcome the traditional reluctance of courts to intervene unless requested by one of the parties." Similar comments to the 1983 Advisory Committee Notes to Rule 16(f) do not even address *sua sponte* authority, instead referencing a desire to "encourage forceful judicial management," whatever that means. And the 1983 Advisory Committee Notes to Rule 26(g) mirror Rule 11, referring to the need to "make[] explicit the authority judges now have to impose sanctions" in light of "asserted reluctance to impose sanctions on attorneys." If those notes have any relevance to this case, it is that there is no corresponding language in Rule 30(d)(2).[5]

[5] ABOTA relegates to a footnote the district court's out-of-context claim that Rule 30 is "congruent with Rule 26(g)." ABOTA 7 n.6 (quoting 1993 Advisory Committee Notes to Rule 30). ABOTA never bothers to mention, much less refute, Appellants' showing that the full context of that phrase refers to the type of

Similarly, ABOTA fails to undermine Appellants' review of hundreds of Rule 30(d)(2) cases without finding even one that supported the district court's order. ABOTA 9-12. Appellants explained that they were aware of no case in which a Rule 30(d)(2) sanction was entered without a party bringing the alleged misconduct to the court's attention in some fashion. Br. 31-32. The cases ABOTA cites in opposition to that statement cannot bear the weight placed on them. *See* ABOTA 9-12.

Most tellingly, the district court docket from ABOTA's main case, *Craig v. St. Anthony's Medical Center*, 384 Fed. App'x 531 (8th Cir. 2010) (per curiam), conclusively demonstrates that the sanctions order there was *not* the *sua sponte* order that Amicus claims. *See* ABOTA 10. In *Craig*, the defendant filed a motion expressly requesting sanctions against the plaintiff under, *inter alia*, Rule 30(d)(2) and the court's inherent power. *See Craig v. St. Anthony's Med. Ctr.*, No. 08-cv-00492 (ERW), Doc. 23 (E.D. Mo. Mar. 11, 2009). The court granted that motion. *Id.* Doc. 27 (Mar. 12, 2009). At that point, the plaintiff requested reconsideration, *see id.* Doc. 28 (Mar. 13, 2009), followed by motions practice by both sides. *Id.*

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sanction and individual against whom sanctions may be imposed, rather than who must raise the issue in the first place. *See* Br. 37-38.

Doc. 30 (Mar. 20, 2009) (opposition); Doc. 38 (Mar. 26, 2009) (reply).[6] Importantly, the district court next entered an order holding the motion to reconsider in abeyance. *Id.* Doc. 46 (Apr. 2, 2009).

That was the status of the sanctions motion when the parties settled and the court entered the language ABOTA references noting that all pending motions were denied without prejudice. *See* ABOTA 10. However, the court's own sanctions order, entered only days later, states that "[t]he Parties recently notified the Court that this action has been settled, and requested guidance on this unresolved issue. *Plaintiff's Motion to Reconsider Sanctions [doc. #28] is the only Motion that remains pending before the Court*." *Craig*, No. 08-cv-00492 (ERW), Doc. 50 at 4 (June 19, 2009) (emphasis added). The court then proceeded to grant in part and deny in part the reconsideration motion. *Id.* In other words, *Craig* actually supports Appellants' position entirely. The district court there was acting directly on a sanctions motion filed by a party. ABOTA has identified nothing more than a clerical error on a docket sheet, which the court and all parties at the time clearly understood not to refer to the still-pending sanctions issue. *Craig* provides no authority for a *sua sponte* imposition of sanctions.

[6] There was also an earlier-filed motion for reconsideration, *id.* Doc. 26 (Mar. 12, 2009), which the court eventually dismissed as moot in light of the second reconsideration motion. *See id.* Doc. 50 at 4 (June 19, 2009).

Nor does *Jurczenko v. Fast Property Solutions, Inc.* provide any such support. *See* No. 09-cv-1127, 2010 WL 2891584 (N.D. Ohio July 20, 2010). Appellants' reference to "informal" requests for sanctions, which ABOTA dismisses as a "fuzzy qualifier," ABOTA 9 n.7, was intended to refer to this single, highly technical example that is the *only* case of which Appellants are aware other than the order under appeal that does not expressly involve a party's invocation of Rule 30(d)(2). As Appellants explained in their opening brief, the defendants in *Jurczenko* requested sanctions under Rule 37(d), which the court granted with the additional reference that Rule 30(d) was also an appropriate basis for sanctions. *See* Br. 39. *Jurczenko* provides no support for what occurred in this case—the pure *sua sponte* imposition of sanctions without any suggestion from a party that sanctions were warranted. Instead, *Jurczenko* is nothing more than an example of a court adding an additional ground for an action the parties themselves initiated.

Similarly, the decision in *Nieman v. Hale* is at best an example of a court imposing sanctions after a party brings a problem to its attention but mislabels its request. *See* No. 12-cv-2433, 2014 WL 4375669, at *4-6 (N.D. Tex. Sept. 4, 2014). In *Nieman*, the plaintiff demanded sanctions based on a purported violation of a court order, Rule 37(d), or the court's inherent power. The court rejected the request, explaining that none of the grounds invoked was proper under the facts. *See Id.* at *4-5 (plaintiff's motion "invokes legal authority for sanctions that does

not apply"). It further *refused* to impose sanctions under its inherent authority, quoting the warning of *Chambers v. Nasco* that a "Court must 'exercise caution' in invoking its inherent powers" and "'ordinarily should rely on the Rules rather than the inherent power.'" *Nieman*, 2014 WL 4375669, at *5 (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991)); *see also* Br. 32 n.11 (same, discussing *Chambers* to explain the limits on inherent power that apply in this case).

Only then did the court explain that there was, in fact, a rule that could have covered the conduct of which the plaintiff complained, Rule 30(d)(2), but noted that *plaintiff never invoked it*. *Nieman*, 2014 WL 4375669, at *5-6 ("there is a rule that contemplates sanctions for the kind of deposition conduct" of which plaintiff complains, but "*Plaintiff has not actually invoked Rule 30(d)(2)*" and "*did not put Defendants on notice of the rule's possible application to*" the deposition conduct at issue) (emphasis added). Of course, that is Appellants' entire point. Plaintiff in this case never raised concerns about deposition conduct in any form, much less invoked Rule 30(d)(2). Whether or not the *Nieman* court's subsequent conclusion that it could *sua sponte* invoke Rule 30(d)(2) where the plaintiff had done all but apply the correct label was correct, the case provides no support for a sanction under the very different facts of this case. Further, even if it did, the *only* basis for the *Nieman* court's belief that it had *sua sponte* authority was a citation to the very order appealed in this case. *See* 2014 WL 4375669, at *5 (citing *Security Nat'l*

Bank of Sioux City, Iowa v. Abbott Labs, 299 F.R.D. 595, 599 (N.D. Iowa 2014)). It would be entirely circular for this court to rely on *Nieman* to uphold the very order that *Nieman* cited as its sole rationale.[7]

ABOTA also attempts to buttress its weak substantive arguments by setting up a straw man, asserting that "[i]t is not entirely clear" whether Appellants argue that *sua sponte* sanctions are never appropriate under any circumstances or merely under the facts of this case. ABOTA 5-6 & 6 n.5. Appellants have been entirely clear in this appeal. While they believe that *sua sponte* sanctions under Rule 30(d)(2) or a court's inherent power are inappropriate, this Court need not decide that issue to reverse the order. That is because the district court erred in imposing a sanction under the facts here for conduct that the parties themselves considered acceptable at the time it occurred for the reasons explained above,[8] and that the plaintiff *never* argued had delayed or impeded the depositions.

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[7] ABOTA recognizes that the only other two cases it cites involved Delaware law and a District of Maryland local rule. *See* ABOTA 15 and 15 n.12 (citing *Paramount Comm's, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 52 (Del. 1994) (Delaware law); *Freeman v. Schointuck*, 192 F.R.D. 187, 190 (D. Md. 2000) (Local Rule 606)). These cases are not applicable here.

[8] This explanation also demonstrates why ABOTA is incorrect in asserting that the court's imposition of sanctions pursuant to its inherent power was "essentially uncontested." ABOTA 15. The district court erred by disregarding the repeated showing that the parties litigated well together and the plaintiff never objected to any conduct, rendering its sanctions decision improper and completely unnecessary.

ABOTA itself effectively admits that it understood this to be Appellants' position, referencing language from Appellants' opening brief arguing that "regardless of whether a court should *ever* invoke Rule 30(d)(2) or its inherent powers *sua sponte* to address deposition conduct, the district court erred in doing so here." Br. 32; *see also* ABOTA 6 n.5 (quoting same but eliding the final phrase regarding the district court's error). ABOTA's confusion also ignores the very first sentence of Appellants' argument, which explained that "[t]he court erred by imposing sanctions *sua sponte* where the parties themselves had worked out their own conventions in conducting depositions," Br. 30, as well as fully nine pages explaining the court's error in ignoring that convention as applied in this case. Br. 32-41. Whether as a matter of law or on the facts of this case, the district court erred in imposing *sua sponte* sanctions and should be reversed.

B. The internal inconsistencies of the district court's order likewise demonstrate that it is improper

Appellants also explained that the district court's order is improper because it presents a "damned if you do, damned if you don't" approach to objections that counsel in future cases will be unable to obey. Br. 41-46. While the court asserted that is was not imposing a sanction on unexplained objections "to form," it nevertheless condemned them as subject to sanctions "if lawyers choose to use them in the future." RA18. Yet in imposing its sanction it then cited example after example of objections that *were* explained as purported witness coaching. *See* Br.

44-46. Amici do not seriously respond to the fundamental problem with this approach, which is that the court's legal rule sets out an impossible Catch-22 standard for any attorney defending a deposition. Objections "to form" are sanctionable, yet any attorney who provides an explanation risks sanctions, particularly if the attorney is unfortunate enough for the witness to respond in a "seeming Pavlovian" fashion by asking for the question to be rephrased. *See* RA21. The court's order should be reversed to avoid this unfair and untenable result as well.

IV. THE SANCTION ITSELF MUST ALSO BE REVERSED

In addition to being imposed improperly, the sanction the district court chose to impose is itself improper. Appellants had no notice of the highly unusual training video sanction imposed until the order was handed down. This violates due process, which requires knowledge of the penalties under consideration so parties can respond to them intelligently. Had Appellants received that notice, they could have explained the second flaw with the order, its violation of the First Amendment through government compulsion of speech and association. And even if the order were not legally flawed in these two critical ways, it nevertheless exceeds any reasonable scope by requiring transmission to thousands of Jones Day lawyers across the United States and beyond. For these reasons, the sanction itself must also be reversed.

A. The district court violated due process by entering its order without notice of the unusual sanction contemplated—or any sanction at all against Jones Day

There is no question as a factual matter that the court imposed what even it termed an "outside-the-box" sanction without any notice whatsoever of the sanction it was considering. RA31; *see also* Br. 50-53. The very first notice of the type of sanction that Appellants received was the court's order. Due process requires more. Lawyers facing sanctions must be informed not only of the factual and legal basis on which sanctions are contemplated but must also have an understanding of the possible consequences so they can defend themselves appropriately, as numerous courts have held. *See, e.g.*, *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 278 F.3d 175, 191-93 (3d Cir. 2002) (attorney ordered to attach sanctions order to all subsequent pro hac vice applications in District of New Jersey never "afforded the kind of 'particularized' notice and opportunity to defend against this unique sanction that due process requires"); *In re Tutu Wells Contamination Litig.*, 120 F.3d 368, 380 (3d Cir. 1997), *abrogated on other grounds as recognized by Comuso v. Nat'l R.R. Passenger Corp.*, 267 F.3d 331, 339 (3d Cir. 2001) (same).

The only Amicus to address this constitutional error in the district court's order asserts that due process is satisfied so long as an attorney knows that sanctions of *some* kind are being considered and is provided a hearing. *See* AAJ

13-20. But courts have correctly recognized that without notice of "the *form* of potential sanctions[,] . . . the opportunity to be heard would be meaningless" because "a party cannot adequately defend himself against the imposition of sanctions unless he or she is aware of the issues that must be addressed." *In re Tutu Wells*, 120 F.3d at 379. AAJ's response is to incorrectly accuse Appellants of "neglect[ing] to share" with this Court that *In re Tutu Wells* involved attorney suspensions. AAJ 17. But Appellants in fact *did* acknowledge the facts of *In re Tutu Wells*, *see* Br. 51 ("*In re Tutu Wells* reversed a discovery sanctions order *that suspended attorneys from practicing law*") (emphasis added), and this Court should ignore Amicus' unfounded accusations.[9]

From that inaccuracy, AAJ segues into the unsupported assertion that *In re Tutu Wells* and its companion case, *In re Prudential* (which Appellants explained

[9] AAJ's other attempts at distinguishing Appellants' cases also fail, primarily because Amicus similarly mischaracterizes the propositions for which Appellants cited them. *Isaacson v. Manty* was cited to emphasize that this Court has referenced the Third Circuit's *In re Tutu Wells* line of cases favorably and that the sanctioned individual in *Isaacson* had as a factual matter received notice of the sanction contemplated, not that *Isaacson* definitively resolved the issue of particularized notice of the sanction under consideration in this Circuit. *Compare* AAJ 16 n.11, *with* Br. 51-52 (citing 721 F.3d 533 (8th Cir. 2013). Nor is AAJ correct regarding *Fisher v. Marubeni Cotton Corp.*, which Appellants cited in passing not for the factual underpinnings Amicus discusses, *see* AAJ 19 n.12, but instead for its legal recognition that due process requires "adequate notice" of contemplated sanctions, including an understanding of "the probable consequences" of any failure to comply with a court's order. 526 F.2d 1338, 1342-43 (8th Cir. 1975); Br. 30, 50.

involved a requirement that an attorney attach "a discovery sanctions order each time an attorney applied to be admitted pro hac vice in the District of New Jersey," Br. 51) are distinguishable because the sanction imposed here was different. AAJ 18-19. The sanctions may be different, but the legal rule that due process requires notice of the sanction contemplated remains the same. The detrimental impact of the court's video order is precisely why *In re Tutu Wells* and *In re Prudential* are on point. They hold that an attorney is entitled to know the type of sanction under consideration so he or she can respond properly. That the order itself does not name Appellants or command the appearance of any particular lawyer in the video and is limited to circulation within dozens of Jones Day offices, AAJ 18-19, is beside the point. The press coverage that the court must have known would follow its highly unusual order—as indeed suggested by the court's statement during trial, long before the Appellant had a chance to respond to the sanctions threat or be heard at any proceeding, that it was going to *publish* an opinion regarding the use of objections to form—has long since disclosed the identity of the parties involved. *See, e.g.*, IAJ 13-14 (discussing initial press coverage of court's order); *cf. also* AAJ 21 (discussing both Appellants by name).

AAJ finally attempts to argue that the court's failure to comply with due process is immaterial because Appellants do not explain how they were prejudiced by the court's failure. AAJ 19-20. Quite the contrary. Had Appellants known that

the court intended to violate their First Amendment rights through its sanctions order (which no Amicus disputes occurred, *see infra* Part IV.C) or that it intended to impose a sanction impacting Jones Day attorneys nationwide and beyond, *see infra* Part IV.B, they would have explained the shortcomings of the sanction. Lacking the notice that due process requires, they were deprived of the opportunity to do so. Perhaps this is why a different Amicus recognizes, apparently unintentionally, that "[d]iscovery sanctions cannot be random and unpredictable; sanctions must be reliable and consistent." IAJ 22. Appellants agree. This "out-of-the-box" sanction should not have been imposed without the notice that due process requires.

B. The sanction's scope exceeds the district court's authority

There is also no factual dispute that the court's order compels a training video to be sent to thousands of Jones Day lawyers across the country and beyond. Br. 53-55. That aspect of the order far exceeds any connection with managing a court's bar or the attorneys appearing before it, extending into other jurisdictions and even countries. The order should be reversed on this ground as well.

Again only AAJ even attempts a response, on the assertion that the court's order does not expressly say that it is directed at Appellant Jones Day. AAJ 7-8, 21. But that argument is not even responsive to the underlying flaw in the order, which is that an order demanding the production and distribution of training

materials to lawyers in each of Jones Day's offices in the United States (and likely most, if not all, abroad) far exceeds the court's authority, regardless whether AAJ is correct in suggesting that none of the attorneys who must receive the video need "actually watch it." AAJ 22. Nevertheless, IAJ again undercuts AAJ's argument entirely, asserting elsewhere that the court's order should be upheld because "the attorneys in the firm who receive the video will be educated on [the court's view of] proper deposition conduct" and "will be on notice." IAJ 26; *see also* IAJ 24 (arguing that video sanction is particularly appropriate at "one of the largest firms in our country" to ensure that "other attorneys who are not involved in a particular case" will "hear about those sanctions").

In any event, it is incorrect to suggest that Jones Day is not impacted by the court's order. Amici cannot dispute that the order commands Jones Day to make one of its partners appear in the court's training video, nor can it dispute that the completed video must be sent worldwide to thousands of Jones Day employees given the structure of Jones Day's practice groups. *See* Br. 54. And any such compliance with the court's order would require the use of Jones Day equipment, networks, infrastructure, and personnel contact information—none of which can be used without Jones Day approval.

C. The sanction impermissibly compels speech

Finally, the court's order violates Appellants' First Amendment rights by impermissibly compelling speech and association with speech. Br. 55-58. No government entity—and particularly no court charged with protecting such fundamental freedoms—may dictate an individual's "choice to speak" or their "choice of what not to say." *Pac. Gas & Elec. Co. v. Pub. Utils. Com.*, 475 U.S. 1, 16 (1985) (plurality op.); *see also Great Rivers Coop. v. Farmland Indus.*, 59 F.3d 764, 766 (8th Cir. 1995) (enforced speech "rarely, if ever, appropriate").

Incredibly, none of the Amici so much as mentions the fatal First Amendment problems with the court's impermissible compulsion of speech and association with speech. Two of the Amici disclaim any discussion of the sanction entered at all. *See* AAJ 12-13 ("AAJ takes no position on the specific sanction imposed"); ABOTA 3 n.4 ("appropriateness of the particular sanction . . . beyond the scope of this brief"). The other two Amici do not even mention the words "First Amendment." *See generally* IAJ iii-vi (Table of Authorities); SM ii-iii (same). Instead, they argue—with no apparent recognition of irony—that the sanction "was tailored . . . to force the sanctioned attorney to invest the time necessary to truly appreciate the misconduct and how it should be corrected" because "attorneys in the firm who receive the video will be educated on proper deposition conduct." IAJ 26; *see also* SM 12 (sanction "has the benefit of teaching

attorneys" how to conduct depositions according to the court's views). In other words, Amici *like* the sanction because they agree with its message and think that Appellants should be forced to communicate it to others. That is a clear admission that the court's order compels speech and association and should be reversed.

CONCLUSION

The district court's imposition of sanctions against Appellants should be reversed.

March 10, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because it contains 5,815 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted using the word-count function on Microsoft Word 2007 software.

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March 10, 2015

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March 10, 2015

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CERTIFICATE OF SERVICE

The undersigned certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system on this 10th day of March, 2015.

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