

# Lights! Camera! Objection!

How the **wrong** deposition objections  
could make **YOU** a movie star

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# Objections at Depositions

Most litigators have either made objections or had to meet objections made by the defending attorney.

BUT...

Were those objections proper?

Were they necessary?

Were they **sanctionable conduct**?

# Deposition Objection - Basic Rule

## In Simple Terms –

**During a deposition**, testimony is usually taken subject to objections made by defending attorney, and those objections placed on the record for later review of the court as needed.

Objections DURING the deposition are NOT (usually) grounds for deponent's refusal to answer. The testimony will be taken subject to the objections made.

# Deposition Objection - Basic Rule

The Court Rules as to process of taking objections

## Missouri Rules

**MoRCP 57.03 (d)** Deposition Upon Oral Examination; Objections

**“All objections made at the time** of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or any other objection to the proceedings **shall be noted** by the officer upon the deposition. **Evidence objected to shall be taken subject to the objections.”**

## Federal Rules

**FRCP 30 (c)** Deposition Upon Oral Examination

**“All objections made at the time** of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings **shall be noted** by the officer upon the record of the deposition; but the examination shall proceed, with the **testimony being taken subject to the objections.”**

# Depo Objections: Da Rules

Q: What aspects of the deposition can be objected to at all?

## Missouri Rules

**MoRCP 57.07(b)** Objections - Effect of Errors and Irregularities in Depositions.

- (1) Regarding the Notice
- (2) Regarding the Officer
- (3) Regarding the Competency of the Deponent or Competency, Relevancy, or Materiality of Testimony
- (4) Regarding Conduct During the Deposition.
- (5) Regarding Irregularities in Transcription.

## Federal Rules

**FRCP 32(d)1-4** Effect of Errors and Irregularities as to Taking Depositions.

- (1) As to Notice;
- (2) As to Disqualification of Officer;
- (3) As to Taking of Deposition.
  - (3)A Competency of deponent or or Competency, Relevancy, or Materiality of Testimony
  - (3)B Manner of taking
- (4) As to Completion and Return of Deposition

# Depo Objections: Da Rules

## 1 Notice of Deposition

### Missouri Rules

**MoRCP 57.07(b)** Objections - Effect of Errors and Irregularities in Depositions.

**(1) Regarding the Notice.** . . . shall be *made promptly by written notice served* . . . otherwise, the objection is **waived**.

### Federal Rules

**FRCP 32(d)1-4** Effect of Errors and Irregularities as to Taking Depositions.

**(1) As to Notice;** . . . *waived* unless written objection is *promptly served* upon the party giving the notice.

Example: What if the deposition notice does not provide precise time or place of deposition? This defect is waived if not objected to prior to deposition.

# Depo Objections: Da Rules

## 2 Officer / The Court Reporter

### Missouri Rules

**MoRCP 57.07(b)** Objections - Effect of Errors and Irregularities in Depositions.

(2) **Regarding the Officer.** . . shall be *made before the deposition begins* or as soon thereafter as [it] . . .*becomes known or could have been discovered.* . . ; otherwise, the objection is **waived**.

### Federal Rules

**FRCP 32(d)1-4** Effect of Errors and Irregularities as to Taking Depositions.

(2) **As to Disqualification of Officer;** . . . **waived** unless *made before the taking* of the deposition begins or as soon thereafter as the disqualification *becomes known or could be discovered* with reasonable diligence.

Example: What if the court reporter is not a certified court reporter licensed to administer oaths? If known prior, this would be waived. If not known prior, but discovered later, then still time to object “as soon thereafter” as possible.

# Depo Objections: Da Rules

## 3 Competency of Witness

### Missouri Rules

**MoRCP 57.07(b)** Objections - Effect of Errors and Irregularities in Depositions.

**(3) Regarding the Competency of the Deponent. . . not waived . . . unless the basis for the objection could have been removed . . . before or during the deposition.**

### Federal Rules

**FRCP 32(d)1-4** Effect of Errors and Irregularities as to Taking Depositions.

**(3) As to Taking of Deposition.**

(A) Objections to the competency of a witness . . . [is] **not waived** by failure to make [objection] before or during the taking of the deposition, **unless the ground of the objection** is one which **might have been obviated or removed** if presented **at that time**.

Example: Eliciting expert testimony from a lay witness should be objected to because testimony could have been prevented, or witness's bona fides could be verified at the time of the deposition.



# Depo Objections: Da Rules

## 4 Competency, Relevancy or Materiality of Testimony

### Missouri Rules

**MoRCP 57.07(b)** Objections - Effect of Errors and Irregularities in Depositions.

**(4) Regarding Conduct During the Deposition.** An objection to the *competency, relevancy, or materiality* of testimony **is not waived** by failure to object before or during the deposition. . . .

### Federal Rules

**FRCP 32(d)1-4** Effect of Errors and Irregularities as to Taking Depositions.

**(3)As to Taking of Deposition.**

(A) Objections to . . . the *competency, relevancy, or materiality* of testimony **are not waived** by failure to make them before or during the taking of the deposition, **unless the ground of the objection** is one which might have been **obviated or removed** if presented at that time.

Example: This is the classic objection to relevance – “*Objection. This line of questioning is irrelevant.*” No need for this in depositions, because the objection is not waived for trial.

# Depo Objections: Da Rules

## 5 Manner of Taking / Form / Oath / Conduct / Curable

### Missouri Rules

**MoRCP 57.07(b)** Objections - Effect of Errors and Irregularities in Depositions.

**(4) Regarding Conduct During the Deposition.** . . . Errors and irregularities in the *manner of taking* the deposition, in the *form of the questions or answers*, in the *oath or affirmation*, or in the *conduct of parties* and *errors of any kind that might be cured* if promptly presented **are waived** unless seasonable objection thereto is made during the deposition. . . .

### Federal Rules

**FRCP 32(d)1-4** Effect of Errors and Irregularities as to Taking Depositions.  
**(3)As to Taking of Deposition.**

(B) Errors and irregularities occurring at the oral examination in the *manner of taking* the deposition, in the *form of the questions or answers*, in the *oath or affirmation*, or in the *conduct of parties*, and *errors of any kind* which might be *obviated, removed, or cured if promptly presented*, **are waived** unless seasonable objection thereto is made at the taking of the deposition.

# Depo Objections: Da Rules

## 5 Manner of Taking / Form / Oath / Conduct / Curable

### Missouri Rules

**MoRCP 57.07(b)** Objections - Effect of Errors and Irregularities in Depositions.

### Federal Rules

**FRCP 32(d)3** Effect of Errors and Irregularities as to Taking Depositions.  
**(3)As to Taking of Deposition.**

### As to conduct or taking of the deposition

5 types of objections are waived if not made immediately:

1. Manner of taking;
2. Form of the questions or answers;
3. Oath or affirmation;
4. Conduct of parties;
5. Errors of any kind that are curable at the time.

# Depo Objections: Da Rules

## 6 Transcription / Completion and Return

### Missouri Rules

**MoRCP 57.07(b)** Objections - Effect of Errors and Irregularities in Depositions.

**(5) Regarding Irregularities in Transcription. . .**waived unless *a motion to suppress the deposition* or some party thereof *is made with reasonable promptness* after such defect is, or with due diligence might have been discovered.

### Federal Rules

**FRCP 32(d)1-4** Effect of Errors and Irregularities as to Taking Depositions.

**(4) As to Completion and Return of Deposition. . .**waived unless a *motion to suppress the deposition* or some part thereof is made with *reasonable promptness* after such defect is, or with due diligence might have been, ascertained.

Example: Transcription is inaccurate or not complete record of the deposition

# Depo Objections: Da Rules Whoa! That's a lot of rules!

To Summarize:

MoRCP 57.07(b) and FRCP 32(d) contain **six** major types of deposition objections.

# Table of Errors and Objections

<b>Error or Irregularity</b>	<b>Method / Time to Object</b>	<b>Waived</b>
<b>1. Notice</b> Deposition notice is faulty	Written notice “promptly served” prior to deposition	If no written notice served timely
<b>2. Officer</b> Officer taking deposition	Before deposition or as soon as problem arises if during	After problem becomes known or was discoverable
<b>3. Competency of deponent</b>	After deposition OK, except	If problem could have been fixed at depo
<b>4. Conduct during deposition</b> Competency, Relevancy, Materiality of testimony	After deposition OK	Never waived at deposition
<b>5. Conduct during deposition</b> 1. Manner of taking 2. Form of questions or answers 3. Oath or affirmation 4. Conduct of parties 5. All other curable errors	Seasonable objection made at the time of error or irregularity	If no seasonable objection is made at the time the curable error occurs, then waived
<b>6. Transcription</b>	Motion to suppress the deposition or a party, made with reasonable promptness	If no reasonably prompt motion, then waived.

# So...What Objections Are Proper During Depositions?

## State rule:

**Not proper** as to the competency of the witness *unless it could be cured*.

**Not proper** as to competency, relevancy or materiality of the testimony *ever*.

**Always proper** as to objections to the oath, manner of taking deposition, conduct, form of questions or answers, errors that might be cured if promptly presented.

## Federal rule:

**Not proper** as to the competency of the witness or

**Not proper** as to competency, relevancy or materiality of testimony

**unless** the grounds for the objection

**can be obviated or removed if presented at that time.**

**Always proper** as to manner of taking, form of questions or answers, oath, conduct of parties, errors of any kind that can be obviated, removed or cured.

# General Rules for Deposition Objections

- Objections should be made:
  - On the record
  - Be concise
  - Be non-argumentative FRCP 30(c)(2)
- Testimony should continue despite objections. Instructions not to answer should only occur when necessary to:
  - Preserve privilege
  - Enforce a limitation imposed by the court (*protective order or similar*)
  - Present a motion under 57.03(e) or FRCP 30(d)(3) (*motion for sanctions*)
- Objections as to **form of the question** are almost always allowed, but not always appropriate / practical / useful.



# Common Form Objections

## Some of the “good” ones

- **Compound question (FRE 403, 611)**
  - Ex. “*You hit the car and drove away?*”
  - Witness can’t truthfully answer yes or no if only one of the two things happened.
- **Argumentative (FRE 611)**
  - Ex. “*You planned to be as stubborn as a mule when you came to this deposition this morning, didn’t you?*”
  - Serves no legitimate evidentiary purpose.
  - Can be more subtle, such as “*You saw a horribly tragic car crash that day didn’t you?*” This is a set up to get the witness who saw a crash (the fact) agree with an opinion about the crash (horribly tragic).

# Common Form Objections

## Some of the “good” ones

- **Calls for narrative answer (FRE 611)**
  - The dangers of the narrative are many
  - Results in poor record
  - Facts elicited that are not specifically asked for
  - Makes objections during the flow of the deponent’s response more difficult to make
- **Vague, ambiguous, confusing, unintelligible (FRE 611)**
  - Either has two or more meanings, or the answer will create an unclear or misleading record.
  - Ex. *“Did you check the headlight fluid on your car?”* confusing, because no car has headlight fluid. OR *“When the three cars collided, was the car speeding?”* This is vague / ambiguous because we don’t know which car is being identified.
  - Not just what the LAWYER thinks is vague/confusing but the DEPONENT

# Common Form Objections

Some of the “good” ones

**Other Common Objections likely to be (properly) used:**

- Misstates prior testimony (FRE 403, 611)
- Duplicative or redundant (a/k/a “asked and answered”) (FRE 403)
- Calls for testimony the witness cannot competently provide (FRE 601, 602, 603, 604, 701, 702)
- Mischaracterizes prior testimony ((FRE 403, 611)

# Common Form Objections

## The “not so good” ones

Common Objections likely to be improperly used:

- **Leading (FRE 611c)**
  - Generally allowed with adverse parties, witnesses that are associated with a party or hostile.
  - Why make the deposition painfully slow?
  - **“Mr. Smith you work as a greeter at the Smithville Wal-Mart, right?”** becomes:
    - **Mr. Smith do you work?** *YES.*
    - **Where do you work?** *Wal-Mart.*
    - **And where is that Wal-Mart?** *Smithville.*
    - **What position do you hold at Wal-Mart?** *I am a greeter.*

# Common Form Objections

## The “not so good” ones

- **Calls for speculation (FRE 611)**
  - Ex. “*What do you think the driver planned to do next?*”
    - This witness must speculate about how the driver was thinking.
  - Not really an effective deposition objection.
  - Usually used more to coach a witness improperly.
  - If you need to use it, be VERY careful not to turn it into a speaking objection.

# Common Form Objections

## The “not so good” ones

### Hearsay

- Has a million holes and exceptions.
- May lead to discovery of other admissible evidence, so it is always going to be “fair game” for discovery.
- Better to obtain stipulation that hearsay objections (or even all objections except as to form) are reserved for trial. This speeds things along immensely.

# Common Form Objections

## The “not so good” ones

- **“Objection”**
- **“Objection to form”**
- **“Objection no / improper foundation”**
  - Usually made only to break up the flow of the deposing lawyer.
  - Since the opportunity to cure is not given because the reason for objection is unknown, these are likely waived objections.
  - Good solution – force the objecting lawyer to state grounds of objection specifically.

Hint: Keep this problem in mind when we talk about Judge Bennett’s opinion in the Jones Day sanctions case later.

# Beware Speaking Objections

Even subtle ones can be sanctionable

**Speaking Objections** are those that are not a concise statement of the grounds of the objection, but are posed to argue the position of the objector or cue the witness to provide certain testimony.

**Remember:**

**Objection + Grounds = Good Objection**

**Objection + Opinion + witness hint = Bad Objection**



# Beware Speaking Objections

Even subtle ones can be sanctionable

## Example:

*Plaintiffs' counsel:* And how would gaining access cause a branch of the femoral artery to be sheared off? What mechanically would have to happen?

*Defense counsel:* I am going to object. This is completely hypothetical. Are we talking about in this case, under a particular set of circumstances?

*Plaintiffs' counsel:* In the process of gaining access to a femoral artery.

*Defense counsel:* I just think that is beyond what-Dr. Driesman didn't perform that part of the procedure. He wasn't there when that part of the procedure was performed.

**Result? Defense counsel was sanctioned. *Faile v. Zarich*, 2008 WL 2967405 (Conn. Super. 2008)** “By her interjection of her statement of evidence, that Dr. Driesman did not perform that part of the procedure and was not present when it was performed, defense counsel was . . . suggesting to the witness what she wanted him to say in response to plaintiff’s counsel’s question.”

# What Does Bad Deposition Conduct Look Like, In THE REAL WORLD?

## TO THE VIDEO ...

Worse than you could imagine!

# C'Mon! That's Crazy. What About REAL LAWYERS?

How about the lawyers of **Jones Day**?

- The **THIRD** largest firm in the world
- 2,400 lawyers, 41 offices worldwide
- A case right here in the Midwest



*See The Security National Bank of Sioux City, Iowa, as conservator for J.M.K., a minor v. Abbott Laboratories, No. 11-4017-MWB (N.D. Iowa July 28, 2014).*

# Jones Day Sanctions

## Introduction

- Case brought by Conservator of a minor against baby formula manufacturer Abbott Labs
- Multiple products liability claims. Huge money. Went to trial and Abbott Labs **won!**
- Judge Bennett (ND Iowa) so upset at Defendant counsel's "obstructionist" deposition tactics that he sanctioned Defendant's counsel, *sua sponte*, **after** the trial.

# Jones Day Sanctions

## Introduction

- Judge levied...shall we say, unique?...sanctions directly against the law firm, Jones Day
- Sanctions order is on appeal, and numerous amicus briefs filed by trial lawyer groups.
- 8<sup>th</sup> Cir. heard oral arguments:  
Tuesday, April 14, 2015

# Jones Day Sanctions

## Introduction

- All following quotes taken from Judge Bennett's sanction order from last year
- “COUNSEL” means Defendant's counsel, the unfortunate unnamed partner of Jones Day who defended the depositions and caused the sanctions order to be issued
- Some emphasis added and portions condensed for ease of reading

# Jones Day Sanctions

## Opening Salvo

**The Judge expressed his frustration with the current state of litigation tactics:**

“Discovery is . . . now too often mired in obstructionism. . . born of a *warped view of zealous advocacy*, often *formed by insecurities and fear of the truth*.”

“Obstructionist litigators, like Ivan Pavlov’s dogs, salivate when they see discovery requests and are *conditioned to unleash their treasure chest of obstructive weaponry*.”

# Jones Day Sanctions

Three Major Problems:

Form Objections, Coaching, & Excessive Interruptions

**The Judge turned his focus to Defendant's counsel, finding fault with:**

- (1) Counsel's excessive use of "form" objections;
- (2) Counsel's numerous attempts to coach witnesses; and
- (3) Counsel's ubiquitous interruptions and attempts to clarify questions posed by opposing counsel



# Jones Day Sanctions

## 1. “Form” Objections

**Judge Bennett’s problems with Counsel’s “form” objections included:**

- Counsel at Jones Day was a profligate objector
- “**In two depositions. . . [Defendant’s] Counsel objected to the ‘form’ of the examiner’s question at least 115 times.**”
- Counsel’s name was on nearly every page of the transcript with an objection.

# Jones Day Sanctions

## 1. “Form” Objections

**Why are these “form” objections so bad? Per Judge Bennett:**

“Counsel used ‘form’ objections to quibble with the questioner’s word choice (for no apparent reason, other than, perhaps, to coach the witness to give a desired answer):

**Ex. 1**

Q. Would it be fair to say that in your career, work with human milk fortifier has been a significant part of your job?

COUNSEL: Object to the form of the question. ‘Significant,’ it’s vague and ambiguous. You can answer it.

A. Yeah, I can’t really say it’s been a significant part. It’s been a part of my job, but “significant” is rather difficult because I have a wide range of things that I do there.”

# Jones Day Sanctions

## 1. “Form” Objections

EX 2

“Q. Are there certain levels that one can get, that have catwalks or some similar apparatus so I can get to the dryer?”

A. The dryer is totally enclosed. You cannot get into the dryer from any of the levels.

Q. Can I get on the outside of the dryer?

COUNSEL: Object to the form of the question; outside of the dryer? Everything is—I mean, outside of the dryer is a huge expanse of space; anything that’s not inside the dryer is outside the dryer, so I object to it as vague and ambiguous. Object to the form of the question.

A. Rephrase the question.”

***Notice here, the deponent asks for a rephrase because of the objection, not because the question was confusing, vague or ambiguous.***

# Jones Day Sanctions

## 1. “Form” Objections

### Ex. 3

***“inventing novel objections not grounded in the rules of evidence or common law:***

Q. Are you familiar with the term ‘immunocompromised’?

A. Yes.

Q. And that would include premature babies?

COUNSEL: Object to the form of the question, ‘that would include premature babies?’ It’s a non sequitur.

***[. . .](In case there is any doubt, “non sequitur” is not a proper objection.)”***

# Jones Day Sanctions

## 1. “Form” Objections

**As to why Defendant’s Counsel’s objections were improper:**

“[The] rules do *not* endorse the notion that ‘form’ is a freestanding objection.

Nothing about the text of Rules 30 or 32 suggests that a lawyer preserves the universe of ‘form’ objections simply by objecting to ‘form.’ . . .

Moreover, ‘form’ objections are inefficient and frustrate the goals underlying the Federal Rules. . . . **objections should be concise and afford the examiner the opportunity to cure the objection.”**

# Jones Day Sanctions

## 1. “Form” Objections

**As to the purpose of prohibiting objections purely to “form”:**

**Stating “form” only causes further problems**

**For the deposing attorney:** “the examiner must ask the objector to clarify, which takes *more* time and *increases* the amount of objection banter between the lawyers.”

**For Judges:** “When called upon to rule on an unspecified ‘form’ objection, *a judge either must be clairvoyant or must guess as to the objection’s basis. Neither option is particularly realistic or satisfying.* This is reason enough to require a specific objection.”

# Jones Day Sanctions

## 1. “Form” Objections

**A few courts allow “form” only objections, so this let Counsel off the hook:**

“[B]ecause there is [some] authority validating ‘form’ objections, I do not impose sanctions based on the fact that Counsel used these objections while defending depositions. Counsel’s ‘form’ objections, however, ***amplified two other issues: witness coaching and excessive interruptions.*** . . . I impose sanctions related to Counsel’s ‘form’ objections only to the extent that those objections facilitated the coaching and interruptions.”

**A WARNING to all who overuse “form” objections:**

“Although I do not impose sanctions based on Counsel’s ‘form’ objections in this case, lawyers should consider themselves warned: ***Unspecified ‘form’ objections are improper and will invite sanctions if lawyers choose to use them in the future.***”

# Jones Day Sanctions

## 2. Witness Coaching

**The Judge next addressed the “witness coaching” that Defendant’s counsel engaged in:**

- “The Federal Rules of Evidence contain no provision allowing lawyers to interrupt the trial testimony of a witness to make a statement.
- Such behavior should likewise be prohibited at depositions, since it tends to obstruct the taking of the witness’s testimony.
- Lawyers are **strictly prohibited** from making any comments, either on or off the record, **which might suggest or limit** a witness’s answer to an unobjectionable question.

*Hall v. Clifton Precision*, 150 F.R.D. 525, 530-31 (E.D. Pa. 1993)[.]”



# Jones Day Sanctions

## 2. Witness Coaching

- “Counsel’s *repeated interjections frequently prompted witnesses to give particular, desired answers to the examiner’s questions*
- Counsel often made ‘**clarification-inducing**’ prompting deponent to request that the examiner clarify otherwise cogent questions.
- For example, Counsel regularly objected that questions were ‘vague,’ called for ‘speculation,’ were ‘ambiguous,’ or were ‘hypothetical.’
- These objections usually followed completely reasonable questions. But, after hearing these objections, the witness would usually ask for clarification, or even refuse to answer the question[.]”

# Jones Day Sanctions

## 2. Witness Coaching

### Ex. 1

“Q. Is there—do you believe that there’s—if there’s any kind of a correlation that could be drawn from . . . samples to the quality of the finished product?”

***COUNSEL: Objection; vague and ambiguous.***

A. That would be speculation.

### Ex. 2

Q. Well, if there were high numbers of . . . samples in the factory, wouldn’t that be a cause for concern. . . ?

***COUNSEL: Object to the form of the question. It’s a hypothetical; lacks facts.***

A. Yeah, those are hypotheticals.”

# Jones Day Sanctions

## 2. Witness Coaching

**Ex3:**

“Q. Would that be a concern of yours?”

***COUNSEL: Same objection. [Speculation]***

A. Not going to answer.

Q. You’re not going to answer?

A. Yeah, I mean, it’s speculation. It would be guessing.

***COUNSEL: You don’t have to guess.”***

# Jones Day Sanctions

## 2. Witness Coaching

**Judge Bennett then said what everyone was thinking:**

“I find it inconceivable that the witnesses deposed in this case would so regularly request clarification were they not tipped-off by Counsel’s objections.”

**The Judge describes how rote the deponent’s responses became:**

- “Counsel lodged no fewer than **65 ‘form’ objections**, many of which did not specify any particular basis.
- Immediately after most of these ‘form’ objections, the witness gave the seemingly Pavlovian response, ‘Rephrase.’
- At times, the transcript feels like a tag-team match, with Counsel and witness delivering the ***one-two punch of ‘objection’– ‘rephrase’***[.]”

# Jones Day Sanctions

## 2. Witness Coaching

**An example of this “Pavlovian one-two punch”:**

“Q. . . . I’m wondering if you could perhaps in a . . . little bit less technical language explain to me what they’re talking about in that portion of the exhibit.

***COUNSEL: Object to the form of the question.***

A. So rephrase.

Q. Could you tell me what they’re saying here?

***COUNSEL: Same objection.***

A. Rephrase it again.”

# Jones Day Sanctions

## 2. Witness Coaching

**Why are these specific tactics so improper?**

“Lawyers may not object simply because *they* find a question to be vague, nor may they assume that the witness will not understand the question.”

# Jones Day Sanctions

## 2. Witness Coaching

- **Objections as suggestive as these amounted to witness coaching**
- **They encouraged the deponent to “stonewall”, in violation of Rule 30.**

# Jones Day Sanctions

## 2. Witness Coaching - Parroting

**PARROTING** in many cases, Defendant's counsel answers *before* the deponent and the deponent simply parrots counsel:

“Q. . . . Is that accurate or is there something that they, you know, just chose not to put—

**COUNSEL:** *If you know. She didn't write this.*

A. Yes, I didn't write this.

[. . .]

Q. Okay. The part that counsel just read, is that basically an accurate summary of the process?

**COUNSEL:** *In general.*

A. In general.”



# Jones Day Sanctions

## 2. Witness Coaching

**Counsel finished with a flourish, disagreeing with the deponent and forcing deponent to *change her answer*:**

“Q. My question is, was that a test—do you know if that test was performed in Casa Grande or Columbus?”

A. I don’t.

***COUNSEL: Yes, you do. Read it.***

A. Yes, the micro—the batch records show finished micro testing were acceptable for the batch in question.”

# Jones Day Sanctions

## 2. Witness Coaching

**Was there justification for the witness coaching?**

Jones Day argued in its show cause response that this was just because the deposing attorney was on the “wrong track” factually and hoped to “steer him to the correct ground.”

**Judge Bennett wasn't buying it!**

***“It defies common sense to suggest that Counsel’s omnipresent commentary sped up the depositions in this case. Moreover, most of Counsel’s commentary during depositions were objections, not benign attempts to clarify. Because this commentary coached witnesses to give particular answers, I find that sanctions are appropriate.”***

# Jones Day Sanctions

## 3. Excessive Interruption

**Judge Bennett was not done with Defendant's counsel, saying that the numerous interruptions were "*grossly excessive*" and noting the following:**

- Counsel spoke **92 times** in the transcript in the first deposition (about once per page)
- And **381 times** in the transcript of the second deposition (approaching three times per page)
- Notes on FRCP 30 provide that sanctions may be appropriate "when a deposition is unreasonably prolonged"

# Jones Day Sanctions

## 4. Let the Punishment Fit the Crime

**Judge Bennett noted that he easily could have levied money sanctions, but instead he chose a deterrent sanction:**

- “I am less interested in negatively affecting Counsel’s pocketbook than I am in positively affecting Counsel’s obstructive deposition practices. I am *also interested in deterring others* who might be inclined to comport themselves similarly to Counsel.”
- “Federal Rules. . .acknowledge that one function of discovery sanctions should be *deterrence*.” See FCRP 26 notes.
- “Deterrence is especially important given that so many litigators are *trained* to make obstructionist objections.”

# Jones Day Sanctions

## 4. Let the Punishment Fit the Crime

### So what was this unique sanction Judge Bennett crafted?

- Defendant's Counsel had to **write, produce, and star** in (or have another partner appear in) a video that summarizes Judge Bennett's sanctions order and explains the "impropriety" of "form" objections;
- File the video under seal for Judge Bennett's approval;
- After approval, send notice of the existence of the video and provide a link to it to *each attorney in the firm who litigates*—remember this is Jones Day, a multinational law firm with thousands of lawyers.
- All of this was supposed to have been done in ninety days.

# Jones Day Sanctions

## 4. Let the Punishment Fit the Crime

Will Jones Day have to make its lawyer a movie star, and produce the training video?

Will Judge Bennett be declared a curmudgeon by the 8<sup>th</sup> Circuit?

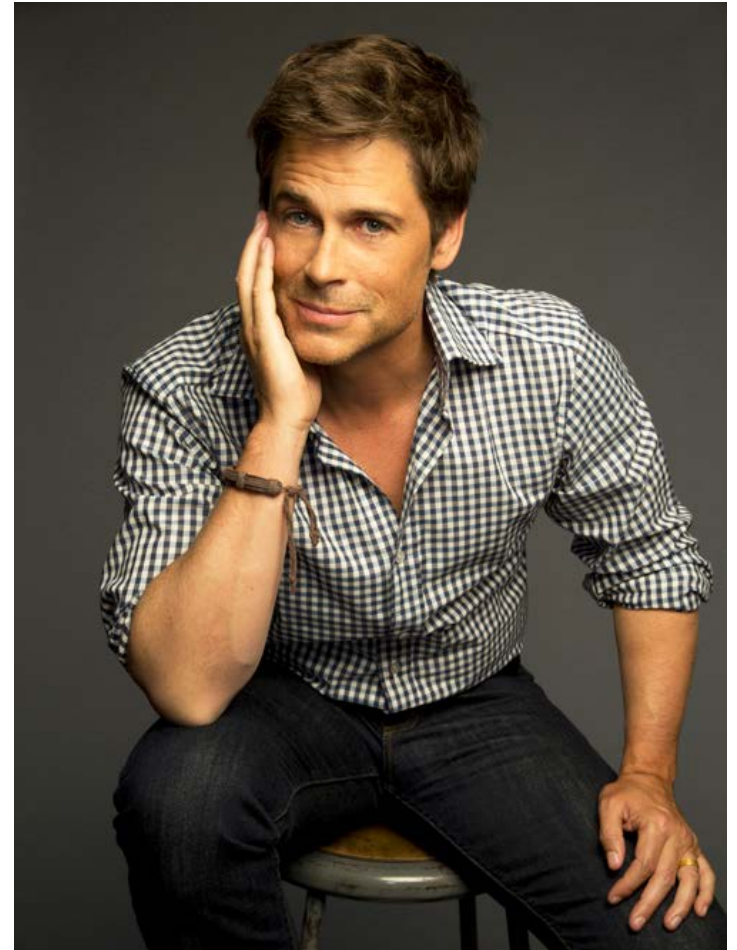
Stay tuned.....

# Parting Thoughts

This



Is Rob Lowe.

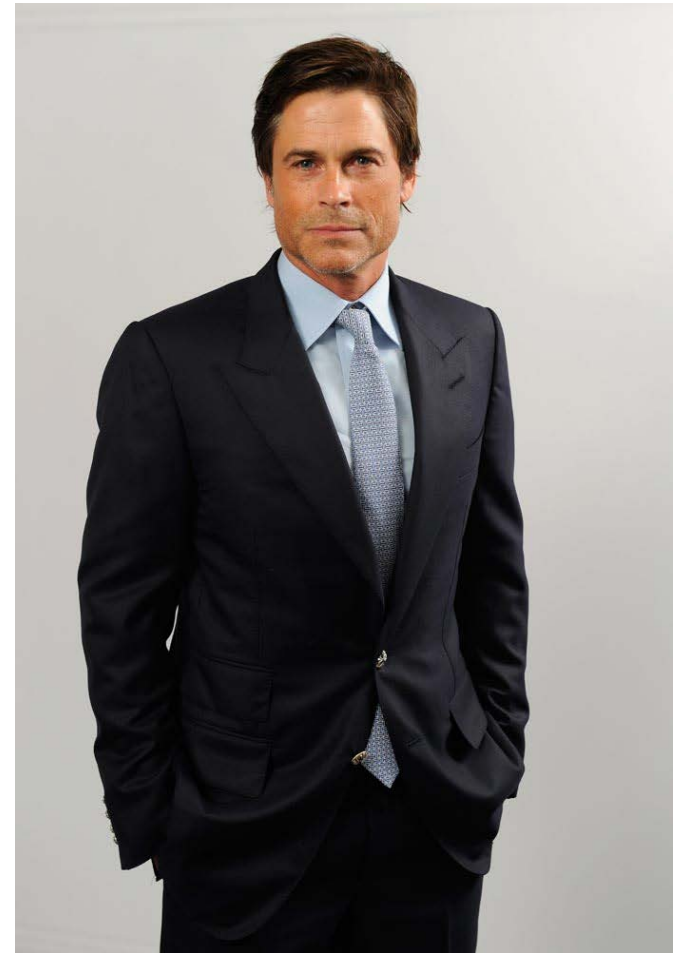


# Parting Thoughts

This



Is smarmy,  
over-objecting,  
coaching his witness,  
pain-in-the-ass  
Rob Lowe.





# Parting Thoughts

Don't be THIS  
Rob Lowe.



...**Unless** you want to be a  
YouTube sensation or the  
star of your own training  
video.



# The End

## Questions or Comments?

Complete materials available at:

[www.llckc.com/forlawyers](http://www.llckc.com/forlawyers)

- Entire Powerpoint, in PDF format;
- Judge Bennett's full order;
- Appellate briefs including amicus briefs;
- Audio of 8<sup>th</sup> Circuit Arguments

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