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,

vs.

JONES DAY and JUNE K. GHEZZI,

Appellants,

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

BRIEF OF *AMICUS CURIAE* ON BEHALF OF IOWA ASSOCIATION FOR JUSTICE, in support of Affirmance

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Thomas E. Willging, John Shapard, Donna Stienstra, Dean Miletch, *Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-based National Survey of Counsel in Closed Federal Civil Cases*, 21 (1997)..... 17-18

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INTEREST OF AMICUS CURIAE

In compliance with Federal Rule of Appellate Procedure 29(c)(4)(5), the Iowa Association for Justice hereby states that its interest in this case arises from its concern over discovery abuses which interfere with and impede the fair and efficient administration of justice and negatively impact public perception of lawyers and the civil justice system.

Headquartered in Des Moines, Iowa the Iowa Association for Justice is an organization of more than seven hundred Iowa attorneys who fight for justice in courtrooms and communities across the state. The Association serves the legal profession and the public through its efforts to strengthen our justice systems, promote injury prevention, and foster the disclosure of information critical to the health and safety of all Iowa families.

This Amicus Curiae brief was authored by the attorneys listed on the signature block and not by counsel for either party.

ARGUMENT

I. UNPROFESSIONAL CONDUCT BY LAWYERS DURING THE DISCOVERY PROCESS ERODES PUBLIC CONFIDENCE IN LAWYERS, JUDGES AND THE LEGAL SYSTEM.

A. Abusive discovery conduct contributes to the denigration of the legal profession.

Attorney misconduct denigrates the legal profession and erodes public confidence in the judicial process. This is true of attorneys who abuse the discovery system. This is not a new or unknown phenomenon. In fact, this proposition has been understood and well-accepted for several decades.

An introspective review of the legal profession, the conduct of lawyers, and the loss of professionalism can easily be traced back as far the 1980s. The actions and behavior of "Rambo litigators" within the profession are well known. *See* Robert N. Sayler, *Rambo Litigation, Why Hardball Tactics Don't Work*, A.B.A. J., Mar. 1, 1988, at 80. Besides exacerbating the costs and inefficiencies of litigation, this noted "crisis in professionalism" has also eroded public confidence in the legal profession. *See* Eugene A. Cook, *Professionalism and the Practice of Law*, 23 TEX. TECH L. REV. 955, 960-61 (1992); *see also* Byron C. Keeling, *A Prescription for Healing the Crisis in Professionalism: Shifting the Burden of Enforcing Professional Standards of Conduct*, 25 TEX. TECH L. REV. 31 (1993). As stated by Keeling:

> The public has perceived, correctly, that lawyers use unprofessional tactics to win lawsuits….. The National Law Journal reported that a large segment of the American public believed lawyers "manipulate the legal system without any concern for right or wrong." Throughout the nation, the public has seen procedural manipulation and uncivil conduct weaken the adversarial process. The public believes that the legal profession is responsible for the abuses, regardless of the percentage of lawyers who, in fact, practice hardball tactics. Until the profession takes active steps to eliminate these abuses, the public will continue to hold the legal profession in the same moral contempt that it reserves for used car salesmen.

Id. at 33.

Efforts to increase lawyer professionalism were renewed following a 1999 study and the position taken by the national Conference of Chief Justices in Williamsburg, Virginia. *See* Conference of Chief Justices, a National Action Plan on Lawyer Conduct and Professionalism (Jan. 21, 1999), *available at* http://ccj.ncsc.org/Resources/Reports/National-Action-Plan.aspx. This report concluded: "[T]he unprofessional and unethical conduct of a small, but highly visible, proportion of lawyers taints the image of the entire legal community and fuels the perception that lawyer professionalism has declined precipitously in recent decades." *Id.* The report also found that "[t]he implications of this behavior for the American justice system are extremely serious in that the behavior contributes to decreased public confidence in legal and judicial institutions as well as heightened stress and decreased professional satisfaction for those lawyers who endeavor to practice in a professional manner." *Id.*, *see also* Allen K. Harris, *The*

Professionalism Crisis – The 'Z' Words and Other Rambo Tactics: The Conference of Chief Justices' Solution, 53 S.C. L. REV. 549, 560 (Spring 2002).

It is essential to maintain high standards of lawyer conduct in order to foster public respect for the legal system and acceptance of judicial authority. *See* Catherine Therese Clark, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945, 964 (1991). One court aptly put the impact of the loss of lawyer professionalism in perspective:

> We address today a problem that, though of relatively recent origin, is so pernicious that is threatens to delay the administration of justice and to place litigation beyond the financial reach of litigants. With alarming frequency, we find that valuable judicial and attorney time is consumed in resolving unnecessary contention and sharp practices between lawyers…. Our system of justice can ill-afford to devote scarce resources to supervising matters that do not advance the resolution of the merits of a case; nor can justice long remain available to deserving litigants if the costs of litigation are fueled unnecessarily to the point of being prohibitive…. Whether the increased size of the bar has decreased collegiality, or the legal profession has become only a business, or experienced lawyers have ceased to teach new lawyers the standards to be observed, or because of other factors not readily categorized, we observe patterns of behavior that forebode ill for our system of justice.

Dondi Props. Corp. v. Commerce Sav. & Loan Ass'n, 121 F.R.D. 284, 286 (N.D. Tex. 1988).

Simply put, lawyer misconduct—including abusive discovery tactics—threatens the profession's usefulness to society and the ability of clients to bear the cost of our work. *See* Harris, *supra*, at 556. As summarized by Harris:

> We in the legal profession perhaps tend to lose sight of the impact of lawyer misconduct on not only clients and lawyers, but on the larger interests: (1) the influence of the law as an institution with a critical role in a democratic society; (2) the cost of administering the justice system; (3) the impact that the efficiency of the legal system has on society as a whole; and (4) the future of privilege, often taken for granted, of lawyer self-regulation.

See Harris, *supra*, at 560.

The public's interest in lawyer professionalism includes the orderly and efficient use of the discovery process. This extends to the deposition room. As one author noted, "[t]he John Rambos of the deposition room consume enormous amounts of time, energy, and money. Judges, lawyers, litigants, and the general public all pay the price of the obstreperous tactics used by these legal "warriors" during 'civil' discovery." *See* Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561, 572 (1996). As Ms. Cary describes in her article, because there is no judge present at the deposition to exercise immediate control over Rambo lawyers, deponents leave these depositions with the perception that whoever has the toughest lawyer and enough resources to wear the other side down will carry the day. The deponent, and any friends and family with whom she has shared the story, may never learn that the legal system has sought to control its own members, even if judicial sanctions are eventually imposed on the offending lawyer. *Id*. at 578-79.

Pointed criticism of Rambo tactics in a deposition even found its way into *The Washington Post* following the publication of particularly egregious behavior at a deposition:

> Depositions are supposed to be the law at its most courtly – meetings held before a trial and outside the presence of a judge, where lawyers try to elicit information from witnesses in a dignified manner. But critics say depositions increasingly have become the occasion for Rambo-like tactics, with lawyers vying to verbally bludgeon witnesses and intimidate opposing counsel.

See Benjamin Weiser, *Are Too! Am Not! Are Too! Am Not!: Judges Try to Impose a Civil Tone as Depositions Get Increasingly Down and Dirty*, Washington Post, Mar. 10, 1994, at B10 (discussing *Paramount Communications, Inc. v QVC Network Inc.*, 637 A.2d 34 (Del. 1994)).

In sum, "[t]he John Rambos of the deposition room harm the public's perception of the legal profession." *See* Cary, *supra*, at 578. District courts must issue meaningful sanctions to curb discovery abuse in order to protect the public's perception of our legal system.

B. Discovery abuse harms the public by obstructing the fair administration of justice.

The public relies upon the fair administration of justice. True justice can only be achieved when the discovery process is working as it was designed—to allow for the free-flow of information. The public is harmed when attorneys obstruct the free-flow of information in discovery. Fortunately, when properly

enforced, the Federal Rules of Civil Procedure and the Iowa Rules of Professional Conduct work in tandem to ensure the public is not harmed by discovery abuses.

1. The Federal Rules of Civil Procedure protect the public by prohibiting discovery abuse.

The Federal Rules of Civil Procedure are intended to assist the parties and the court in the search for the truth of a dispute, to promote its resolution, and to do so in an inexpensive manner and fashion. Rule 1 provides:

> These rules govern the procedure in all civil actions and proceedings in the United State district court, except as stated in Rule 81. They should be construed and administered to secure the *just, speedy, and inexpensive* determination of every action and proceeding.

FED. R. CIV. P. 1 (emphasis added). The court's power to sanction attorneys for discovery abuse is grounded in the notion that the public's interest is harmed when misconduct occurs. *In re Brooks*, 696 N.W.2d 84, 88 (Minn. 2005). It follows then, that sanctions for discovery abuse are imposed, in part, to guard the fair administration of justice in order to protect the public. *See Iowa S. Ct. Bd. of Prof'l Ethics v. Honken*, 688 N.W.2d 812, 820 (Iowa 2004); *In re Jensen*, 542 N.W2d. 627, 632 (Minn. 1996); *In re Dedefo*, 752 N.W.2d 523, 530 (Minn. 2008).

The discovery abuse which the district court addressed in the case at hand dealt with improper objections during a deposition, including "speaking objections." A speaking objection may be characterized as an amplification or

argument about the basis for an objection. *See Sec. Nat. Bank of Sioux City, Iowa v. Abbott Labs.*, 299 F.R.D. 595, 603 (N.D. Iowa 2014). A speaking objection suggests the answer to the witness or encourages the witness to incorporate the attorney's comments into her testimony. This type of activity is prohibited by Federal Rule of Civil Procedure 30(c)(2), which addresses the manner in which objections may be made during a deposition.

> An objection at the time of the examination – whether to evidence, to a party's conduct, to the officers' qualifications, to the manner of taking the deposition, or to any other aspect of the deposition – must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. *An objection must be stated concisely in a nonargumentative and nonsuggestive manner.* A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

FED. R. CIV. P. 30(c)(2) (emphasis added). The purpose of this rule is to ensure that the testimony obtained is that of the witness and not the thoughts and concepts of the attorney who is making the speaking objection. It is also intended to ensure that depositions proceed without excessive interruptions. Rule 30(d)(2) allows the court to impose a sanction for violation of Rule 30(c)(2):

> The court may impose an appropriate sanction – including the reasonable expenses and attorney's fees incurred by any party – on a person who *impedes, delays, or frustrates the fair examination of the deponent.*

FED. R. CIV. P. 30(c)(2) (emphasis added). An objection which is not stated concisely and in a nonargumentative and nonsuggestive manner impedes, delays

and frustrates the fair examination of a deponent. It adds costs and interferes with the just, speedy and inexpensive determination of a case.

The United States District Court for the Northern District of Iowa has observed that "the general practice in Iowa permits an objector to state in *a few words* the manner in which the question is defective as to form (*e.g.*, compound, vague as to time, misstates the record, *etc.*). This process alerts the questioner to the alleged defect, and affords an opportunity to cure the objection. *Care must be taken by the objector, however, to not attempt to suggest an answer, or to influence or 'coach' the witness*." *Rakes v. Life Investors Ins. Co. of Am.*, No. C06-0099, 2008 WL 429060, at *5 (N.D. Iowa Feb. 14, 2008) (emphasis added).

In *Van Pilsum v. Iowa State University of Science and Technology*, the United States District Court for the Southern District of Iowa was presented with a motion to compel based upon the manner in which objections were made during the deposition of Joyce Van Pilsum, by her attorney. 152 F.R.D. 179 (S.D. Iowa 1993). The magistrate who considered the matter observed that Ms. Van Pilsum was a 68-year-old woman. She had a master's degree. She had been an assistant to the president of Iowa State University. Her salary in 1992 was $60,500.00. She had no apparent difficulties understanding the English language.

> However, her counsel, Mr. Barrett repeatedly took it upon himself to restate Defendants' counsel's questions in order to 'clarify' them for the Plaintiff. Mr. Barrett consistently interrupted Mr. Young and the witness, interposing "objections" which were thinly veiled instructions to the witness, who would

> then incorporate Mr. Barrett's language into her answer. *'The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness—not the lawyer—who is the witness.' Hall v. Clifton Precision*, 150 F.R.D. 525, 527 (E.D.Pa.1993).

Id. at 180 (emphasis added). The Magistrate Judge described the tactics of Attorney Barrett as "Rambo Litigation."

> It does not promote the "just, speedy and inexpensive determination of every action," as is required by Fed. R. Civ. P. 1. This style, which may prove effective out of the presence of the court, and may be impressive to clients as well as ego-gratifying to those who practice it, will not be tolerated by this court. *Merely because depositions do not take place in the presence of a judge does not mean lawyers can forget their responsibilities as officers of the court. They should conduct themselves accordingly.*

Id. at 181 (emphasis added). The district court also appointed a discovery master to supervise another deposition of Ms. Van Pilsum and other deponents.

> The use of a discovery master is rare in this district. However, the acrimony which exists between these counsel does not serve their clients or the justice system. It necessitates the provision of day care for counsel who, like small children, cannot get along and require adult supervision. Although this is an added expense to the clients it will save time and money in the long run by the more efficient progress of discovery and the elimination of time spent in motions to compel.

Id. The *Van Pilsum* decision is well known amongst Iowa lawyers. It clearly and concisely stated the long-standing rule that "Rambo Litigation" is not condoned in the State of Iowa, and in fact violates the Federal Rules of Civil Procedure.

2. The Iowa Rules of Professional Conduct protect the public by prohibiting attorney behavior that leads to discovery abuse.

The Iowa Rules of Professional Conduct prevent discovery abuse because they are premised upon the basic concept that the justice system should be just, speedy, and inexpensive and that all persons involved should be treated with equity and fairness. Primarily, lawyers are charged with maintaining public confidence in the legal profession, and the court has a duty to uphold the integrity of the profession in the eyes of the public. *See Committee on Prof'l Ethics & Conduct v. Gill*, 479 N.W.2d 303, 306 (Iowa 1991); *Iowa S. Ct. Bd. of Prof'l Ethics & Conduct v. Hohenadel*, 634 N.W.2d 652, 655 (Iowa 2001). "Public confidence in the legal profession is a critical facet to the proper administration of justice and conduct that negatively impacts the public's image or the perception of the courts or the legal profession" violates that rule. *Attorney Grievance v. Whitehead*, 950 A.2d 798, 810 (Md. 2008); *see also Attorney Grievance v. O'Leary*, Misc. Docket AG No. 20 (Md. App. 2013), *available at http://caselaw.findlaw.com/md-court-of-appeals/1638143.html*.

Further, the rules prohibit conduct that is prejudicial to the administration of justice. "The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." I. R. PROF. CONDUCT 32.1.3, Comment [1].

> A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling our duty to represent a client vigorously as lawyers, *we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful and efficient manner.*

Rule 33.1(1) (emphasis added); *see also* I. R. PROF. CONDUCT 33.1(4) (twin goals of civility and professionalism); Rule 33.1(5) (improve administration of justice); Rule 33.2(11) ("We will not use any form of discovery or discovery scheduling as a means of harassment."); Rule 33.2(22) ("We will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge."); Rule 33.2(23) ("We will not obstruct questioning during a deposition or object to deposition questions unless necessary under the applicable rules to preserve an objection or privilege for resolution by the court."); and Rule 33.2(24) ("During depositions we will ask only those questions we reasonably believe are necessary for the prosecution or defense of an action.").

In this case, the out-of-state counsel had been admitted to practice *pro hac vice*. Similarly, in *Rakes*, United States Magistrate Judge John Stuart Scoles reminded out-of-state counsel that they were obligated to practice as Iowa lawyers and to follow the proscriptions of the Rules of Professional Conduct and Standards for Professional Conduct that apply in Iowa. Judge Scoles stated:

> Counsel are reminded that by asking to be admitted *pro hac vice* to the Northern District of Iowa, they agreed to "comply with all provisions and requirements of the Iowa Rules of Professional Conduct." *Among other*

> *things, the Standards for Professional Conduct adopted in Iowa provide that '[a] lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms.' Lawyers pledge that '[w]e will treat all other counsel, parties and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications.'* The Court believes that counsel's conduct in the deposition of Janet Soppe fails to meet that standard. Counsel are admonished that they are required to act professionally and treat one another with courtesy and respect at all times.

Rakes, 2008 WL 429060 at *5 (internal citations omitted) (emphasis added).

In the order being challenged, Judge Bennett stated that one goal was to deter the conduct which was found to violate the rules and increase the costs of litigation. *See Sec. Nat. Bank of Sioux City, Iowa*, 299 F.R.D. at 609-10. The court's decision has had its intended impact. It has been the topic of continuing legal education presentations, blog posts, national legal publications, and popular legal websites. *See e.g.* http://www.critellilaw.com/news-flash-warning-from-judge-bennett-uspecified-form-objections-will-invite-sanctions (discussing recent webinar regarding order); Debra C. Weiss, *Judge Orders Jones Day to Make Training Video on Impropriety of Frequent Deposition Interruptions* A.B.A. J., July 21, 2014, *available at* http://www.abajournal.com/news/article/judge_orders_jones_day_to_make_training_video_on_impropriety_of_frequent_de; Joe Patrice, *Big Law Firm Ordered to Make a Video Apologizing for Discovery Abuses*, Above the Law, July 20, 2014, http://abovethelaw.com/2014/07/biglaw-firm-ordered-to-make-a-video-

apologizing-for-discovery-abuses/; Jeremy Heallen, *Jones Day Video Sanction Shows Attys Can Go Too Far*, Law 360, July 31, 2014, http://www.law360.com/articles/562927/jones-day-video-sanction-shows-attys-can-go-too-far; Joan Rogers, *Court Orders 'Outside the Box' Sanction: Attorney Must Create Instructional Video*, Bloomberg BNA, August 13, 2014, http://www.bna.com/court-orders-outside-n17179899203/.

The rules of procedure and conduct prohibit discovery abuse—but the rules must be enforced. Judge Bennett's ruling issuing a sanction enforced the rules of procedure and set forth the expectation that attorneys who practice in Iowa must adhere to our rules of professional conduct. When judges enforce these rules, they protect the public and the public's perception of our legal system.

II. THE FAIR ADMINISTRATION OF CIVIL JUSTICE THAT REQUIRES DISTRICT COURT JUDGES IMPOSE MEANINGFUL SANCTIONS FOR DISCOVERY ABUSES.

A. Judges must be willing to impose sanctions.

The discovery process sits as the cornerstone of our civil justice system. It is through the free exchange of information that the fact-finder is ultimately able to uncover the truth. The system is only fair when the fact-finder hears the entire story—not just an attorney's version. Unfortunately, a culture has come to exist amongst civil litigators that allows for and even rewards obstructive discovery tactics. *See* John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84

MINN. L. REV. 505, 522 (2000) ("The ordinary ethos of litigation—that of attack, battle and siege—is thus diametrically and, if the stakes are high enough, fatally antagonistic to discovery's ideal of cooperation."); *see also* RALPH NADER AND WESLEY J. SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA 102 (Random House 1998) ("Winning the discovery war is often the key to winning the lawsuit. . . ."). Boilerplate objections, "dump truck discovery" and speaking objections are not the exception—they have become the norm. Beckerman, *supra,* at 524-23.

A mountain of law review articles, treatises, blogs, and other commentary acknowledge that a culture of discovery abuse exists and offer suggestions on how to change it. *See e.g.* Matthew L. Jarvey, Note, *Boilerplate Discovery Objections: How They are Used, Why They are Wrong, and What We Can Do About Them*, 61 Drake L. Rev. 913 (2013); James E. Butler, Jr. and Keith A. Pittman, *Civil Discovery and Corporate Defendant: Why Some of the Latter Would do Away with the Former*, http://www.butlerwooten.com/Articles/Civil-Discovery-and-Corporate-Defendants.pdf; Brendan Faulkner and Michael A. D'Amico, *Courts Should Curb Discovery Abuse* (September 13, 2013) http://www.dgplaw.com/Scholarly-Articles/Courts-Should-Curb-Discovery-Abuse.shtml; Beckerman, *supra*, at 505; Virginia E. Hench, *Mandatory Disclosure and Equal Access to Justice: The 1993 Federal Discovery Rules Amendments and*

the Just, Speedy and Inexpensive Determination of Every Action, 67 TEMP. L. REV. 180 (1994); Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a) - "Much Ado About Nothing?"*, 46 Hastings L.J. 679 (1995); Richard W. Sherwood, *Curbing Discovery Abuse: Sanctions Under the Federal Rules of Civil Procedure and the California Code of Civil Procedure*, 21 SANTA CLARA L. REV. 567, 570 (1981); Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579.

Articles aside, any attorney who regularly practices in civil litigation has been on the receiving end of evasive discovery tactics. The stories from these civil litigators are similar: "I received incomplete discovery responses. I sent letters and made phone calls to the other attorney asking for the discovery. I filed a motion to compel and for sanctions. The court ordered the defendant to produce the discovery, but denied my motion for sanctions, instead giving a hollow warning that sanctions would be issued 'the next time.' The discovery abuse continued. The next time came. The sanction never did." *See e.g.* Beckerman, *supra*, at 575-83 (citing three examples of cases in which judges issued "last chance" warnings that sanctions would come "the next time.").

Often, the above-described process is repeated over and over until the party seeking the discovery is out of time and resources to continue the fight for what is rightfully hers. The requesting attorney has no choice but to turn her focus to

presenting the case based on the evidence that was produced, instead of the evidence withheld—the evidence that is actually needed for a fair resolution of the case. At that point, the obstructionist party has "won" but the civil justice system has lost. Cases get decided not on the facts, but on which side hired the most obstructionist attorney or firm.

Plaintiffs are often at a distinct disadvantage in the discovery process because defendants are in possession and control of the very information on which the case depends. Plaintiffs' disadvantage is especially apparent in cases against corporate defendants, including products liability cases like the one here, where defendants have an even stronger than normal financial incentive to hide discoverable information so that future plaintiffs cannot use it against the defendant in future cases. *See* Thomas E. Willging, John Shapard, Donna Stienstra, Dean Miletch, *Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-based National Survey of Counsel in Closed Federal Civil Cases*, 21 (1997) (Stating that "[w]here a lot of money is at stake, where the issues involve personal injury or matters of participle, where the relationships are contentions and the issues complex, here we see more discovery and more problems with discovery" but also acknowledging this may be due to a greater amount of discovery being conducted in complex cases, rather than the nature of the cases themselves). Plaintiffs may settle for less, win smaller verdicts,

or even lose cases they should have won, simply because they do not have all the relevant evidence, but the defendant does.

Discovery abuse must be curbed. Ultimately, the buck must stop with the courts. Courts simply cannot be passive observers of the discovery process. Joe E. Estes, *Discovery*, 29 F.R.D. 280, 297 (1962) ("If the judge fails to forcibly curb counsel who violate the letter and spirit of the rules of discovery, the entire process will break down. As every trial lawyer knows, the great abuse of discovery occurs in the court whose judge is unwilling to enforce the powerful sanctions available. There are few lawyers who fail to heed the considered suggestion of a firm judge.").

While the original discovery rules may have been designed to allow judges to sit on the sidelines—that is not the case anymore. *See* Willging, et. al., *supra*, at 44 ("The change most likely to reduce discovery expenses, in the view of our sample of attorneys, is to increase the availability of judges to resolve discovery disputes. Eighteen percent (18%) said that would have helped in the specific case and 54% expect it would help in civil cases generally.").

Litigants have very few effective tools at their disposal to stop discovery abuse. Letters and phone calls to opposing counsel are commonly ignored—unless the obstructing party believes the court will actually step in and referee the dispute. Even when the court does step in, orders compelling production are often met with

a lackluster response. With obstructive discovery tactics pervading the process, a party seeking discovery is at the mercy of the court's willingness to impose sanctions. If district courts are willing to issue meaningful sanctions, and appellate courts are willing to uphold them, an attorney and her colleagues will be much less likely to engage in discovery abuses in a given case, and in cases going forward.

Allegations of discovery abuse during a deposition are not put before a district court often. The very nature of the deposition process is particularly prone to escaping review by a district court, making repeat abuse during this phase of discovery an even greater likelihood than in the context of written discovery. This occurs, in part, because of the difficulty that arises in scheduling depositions. When the stars align to schedule a deposition at a time that works for all the attorneys, their clients, and the witness, the parties are unlikely to stop the proceeding and interrupt a district court judge to make an on-the-spot ruling on whether the obstructionist tactics being employed can continue. Once a deposition is taken and the parties move on to the next phase of litigation, it is unlikely that a party will revisit the obstructionist deposition tactics in front of a judge.

If an attorney succeeds in getting sanctions after an obstructive deposition, that remedy effectively has no impact in the moment it is most needed: in the hour of the deposition. Sanctions in this instance can only serve as a proscriptive remedy against future abuses. Failures to issue sanctions, or reversal of sanctions

actually imposed, only serves to further undermine the deterrence of future obstruction.

Right or wrong, many attorneys have become complacent with regard to discovery abuse, often due to other litigation deadlines. There comes a time when the parties have to move forward with the case they have. Therefore, when a judge has the rare opportunity to consider the kind of deposition discovery abuse at play here, it is vital that the judge exercise her discretion to curb the abuse. This is what Judge Bennett did in the case at hand. He saw a discovery abuse, correctly determined that it should not be tolerated, and used his discretion to issue a meaningful and appropriate sanction. This is what should happen and is exactly what needs to happen in order to change the culture of discovery abuse; getting the wheels of the civil justice system back on track.

Not only do district court judges have the *discretion* under the rules of civil procedure to issue a sanction for discovery abuse, arguably, judges have a *duty* to do so as well. Under the federal judicial canons, judges must "dispose promptly of the business of the court." CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3: A Judge Should Perform the Duties of The Office Fairly, Impartially, and Diligently, R. 3A(5). In order to fulfill that duty, the judge must "monitor and supervise cases to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs." *Id.* Cmt. to Canon 3A(5). It necessarily follows that in order to

add real world meaning to this canon, judges must inject themselves in the process of discovery in order to dispose of the business of the court—the administration of justice—promptly. If judges sit on the sidelines and allow obstructionist discovery tactics to continue, they allow dilatory practices, delays, and unnecessary costs.

Based on a reading of the transcript pages cited in the ruling, Judge Bennett's opinion that the defense attorney's deposition conduct warrants sanctions was correct. The portions of the transcript cited clearly demonstrate excessive interruptions and witness coaching through speaking objections and improper commentary. All of these practices are specifically forbidden by Federal Rule of Civil Procedure 30(c) and (d). And yet, as civil litigators we see that kind of conduct during depositions frequently. Regardless of the reason why the plaintiffs' attorneys did not affirmatively challenge this conduct on their own, it was ultimately only Judge Bennett who had the power to put a stop to the conduct by issuing a meaningful sanction.

A judge's decision to issue sanctions is reviewed for abuse of discretion—an error of law. *See Sentis Grp., Inc. v. Shell Oil Co.*, 559 F.3d 888, 898 (8th Cir. 2009). Here, the sanctioned attorney asks this Court to inject itself in the discovery process—a dangerous precedent. Sanctions are reviewed for abuse of discretion because the district courts are in the best position to make these determinations. Similar to credibility determinations, district court judges who are familiar with the

attorneys in the case and the history of the litigation are in a better position to fully understand the nature and extent of the discovery abuse alleged. *United States v. Hernandez*, 569 F.3d 893, 897 (8th Cir. Neb. 2009) ("It is the function of the [trier of fact], not an appellate court, to resolve conflicts in testimony or judge the credibility of witnesses." (internal citation omitted)).

By affirming Judge Bennett's decision, this Court will send an important and necessary message to both attorneys and district court judges. Attorneys will receive the message that, whether you practice in or out of the state, for a large or small law firm, this kind of obstructive conduct will not be tolerated. District court judges will receive the message that they will have the backing of the appellate court when they fulfill their duty to "dispose promptly of the business of the court" by "monitor[ing] and supervis[ing] cases to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs." CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3: A Judge Should Perform the Duties of The Office Fairly, Impartially, and Diligently, R. 3A(5), Cmt. to Canon 3A(5). By upholding Judge Bennett's sanction, this Court will lend guidance to the district courts that they do not have to be passive observers of the discovery process. Rather, they are empowered to use the tools at their disposal—including meaningful sanctions.

Discovery sanctions cannot be random and unpredictable; sanctions must be reliable and consistent. District court judges who regularly punish discovery

abuses with meaningful sanctions, and appellate courts who consistently affirm the district court's exercise of discretion, take great strides toward making the discovery system work as intended—an unobstructed, free flow of information that leads to the truth.

B. In order to be meaningful, a sanction must deter future misconduct.

The courts' willingness to issue and uphold sanctions is just one step toward shifting the culture of discovery abuse. Not only must judges issue sanctions—the sanctions must be meaningful. They must not only punish, but also deter. Beckerman, *supra*, at 518 ("[M]any courts tend to treat discovery problems with inappropriate leniency even when they involve egregious instances of obstruction, evasion or suppression. The result is not only that clients and lawyers inclined to pursue or retain informational advantage by violating discovery rules lack adequate incentives to compel their compliance, but also that bad actors rarely are disciplined sufficiently either to remove them from the arena or to deter similar behavior by themselves or others in the future.").

Judge Bennett's sanction—an instructional video on proper deposition conduct, written and produced by the sanctioned attorney—contemplates a greater purpose beyond just the punishment of an individual attorney. It is designed to deter other attorneys from engaging in the same misconduct. This is absolutely necessary, especially when the sanctioned attorney is a member of a large firm that

represents even larger corporate clients, standing to gain from obstructing discovery in repeated cases over time.

The sanctioned lawyer is the member of the Jones Day law firm. Based on its website, the firm employs 2,400 lawyers on five continents. http://www.jonesday.com. The firm describes itself as "a legal institution." Its current slogan is, "One Firm Worldwide." By all accounts, Jones Day is one of the largest firms in our country. Therefore, it stands to reason that it is unlikely that other attorneys who are not involved in a particular case where monetary sanctions are issued will ever hear about those sanctions—let alone be deterred by them.

Moreover, corporate defendants (and so too their attorneys) have strong financial incentives to hide information during the discovery process. This is especially true in products liability cases like the one here, where potential plaintiffs down the road stand to gain from the discovery obtained in one case. In these situations, some big-firm lawyers may be more likely to fall on their sword and accept the sanction in an effort to appease their corporate clients and keep their business. A meager monetary sanction may be viewed more as badge of honor for the attorney rather than a professional demerit. *See* Beckerman, *supra*, at 550. ("Motions to compel discovery and motions for protective orders result in sanctions for losers too paltry to provide sufficient inducements in complex or

high-stakes cases to make the discovery process cooperative or truly self-regulating.").

For large, national or international firms, if the only possible sanctions are monetary sanctions, then the cost-benefit analysis of engaging in obstructive discovery practices will always weigh in favor of being obstructionist. *See id.* at 552 ("Whenever the stakes involved in litigation are great enough for a party to risk incurring all or part of the expenses of a discovery motion—including paying the opponent's attorney's fees if the court's ruling on the motion is adverse—there is little to lose and potentially much to gain from dilatory, evasive or obstructive behavior by discovery respondents or from overreaching discovery by discovery proponents."). When 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. After all, he has done his job at minimizing the corporation's exposure in a given case, and more importantly in potential cases to come.

Sanctions like the one Judge Bennett issued against the defense attorney in this case, are precisely the kind of sanction that is necessary to deter future discovery abuse. As he stated, "[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." 299 F.R.D. at 609. Judge Bennett's goal will be met if the sanction stands.

The sanction itself was reasonable, without going overboard. It was tailored to address the specific type of misconduct at issue and to force the sanctioned attorney to invest the time necessary to truly appreciate the misconduct and how it should be corrected. Judge Bennett did not require the video contain information that would identify the sanctioned attorney, nor did he require the video to be circulated outside of the sanctioned attorney's own law firm.

Most importantly, the circulation of the video will have a much greater reach than a monetary sanction—the attorneys in the firm who receive the video will be educated on proper deposition conduct. The attorneys will be on notice that in future depositions, this conduct will not be tolerated—at least not in the Eighth Circuit. Every attorney who sees the video will be less likely to engage in the type of misconduct being sanctioned. Moreover, attorneys who engage in obstructionist tactics due to force of habit or training will be presented with accurate information regarding proper deposition conduct.

When it comes down to it, an attorney facing the potential sanction of creating an educational video explaining her misconduct and how to fix it, as opposed to a financial penalty that is meager in relation to the possible expense that could follow by producing harmful discovery, will think twice about abusing

the discovery system. If district court judges are willing to issue meaningful sanctions, like the one here, and appellate courts are willing to uphold the sanctions on review, then the discovery process, the public's perception of lawyers and the civil justice system as a whole will receive a much needed shot in the arm.

CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully requests that this Court affirm the District Court's Memorandum Opinion and Order Regarding Sanctions.

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The undersigned certifies that on December 5, 2014, he electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system:

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1. This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,454 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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