Encouraging Attorney Civility During Depositions: The Enduring Impact Of *Hall* v. *Clifton Precision*

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"Someone must teach that good manners, disciplined behavior, and civility—by whatever name—are the lubricants that prevent lawsuits from turning into combat. More than that, civility is really the very glue that keeps an organized society from flying into pieces. . . . I submit that lawyers who know how to think but have not learned to behave are a menace and a liability, not an asset, to the administration of justice."

— Chief Justice Warren E. Burger, 1971[2]

INTRODUCTION

Litigation is, by its very nature, adversarial. That, of course, has not stopped the vast majority of the nation's best lawyers from lawyering in a civil manner. While riding the circuit, Abraham Lincoln—who was America's longest practicing lawyer to become President—frequently pursued opportunities for settlement or mediation, recognizing that it was often more productive for his clients to approach their opponents with professionalism and open-mindedness, and that such an approach could strengthen the lawyer's reputation and that of his or her profession.[3] With much of the attention these days focused on the country's sixteenth President as such, there still endures the wisdom of the country lawyer who once admonished his colleagues that "[a]s a peacemaker the lawyer has a superior opportunity of be-

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2. Warren E. Burger, Delivery Of Justice 175 (1990) (reprinted in *In re Appl'n of McLaughlin for Admission to the Bar of New Jersey*, 675 A.2d 1101, 1112 n. 9 (1996)). *See also Saldana* v. *Kmart Corp*., 84 F.Supp. 2d 629, 639 n.15 (D.V.I. 1999), *rev'd*, 260 F. 3d 228 (3d Cir. 2000).

3. Judith D. Fischer, I*ncivility in Lawyers' Writing: Judicial Handling of Rambo Run Amok*, 51 Washburn L.J. 366, 369 (2011).

ing a good man [or woman]."[4] Unfortunately, not all lawyers heed this guidance, and instead resort to hostility and incivility, whether out of "anger, laziness, a proclivity for conflict, personal insecurity, poor listening skills, [or] the inability to reason, discuss, and argue well."[5]

For decades, lawyers have had to grapple with their professional duty to represent their clients zealously,[6] and the requirement that they conduct themselves as officers of the court, in a way that is courteous and professional to opposing counsel and parties.[7] Without a doubt, some attorneys "feel a need to be tough and at the far end of aggressiveness" and "consciously cultivate their hard nosed reputation, catering to a clientele that wants a mean SOB litigator."[8] Often, such behavior is not discouraged, and in some cases even rewarded, by clients and law firms aiming for a win. This is compounded by the confusion engendered by the fact that "the lines between zealous advocacy, incivility, and punishable misconduct are often unclear."[9]

Civil litigation is not an oxymoron.

On the other hand, advocates have a clear duty to act civilly. Those advocating for increased civility often point to the ABA's Model Rules of Professional Conduct as enforcing a lawyer's ethical obligation to act in a civil manner, such as Rule 4.4(a) ("lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person") and Rule 8.4(d) ("It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice"). There is an emerging consensus that a lawyer's duty to his or her client is not incompatible with his or her ability to be civil and professional. "[T]here is no disconnect—it may be a bit too tidy to say no tension—between civility and aggressive advocacy."[10] Or, as one Judge has put it: "Civil litigation is not an oxymoron."[11]

As commentators have noted, "[t]his tension between duties to client and court is nowhere more obvious than in the deposition setting."[12] A deposition is a unique opportunity for a lawyer in a hotly litigated case. It is the only time he or she can speak directly to an opposing party, asking questions that the party's attorney is not able to prescreen. As such, it holds tremendous potential to derive valuable fact information that can be used against an adversary. Lawyers taking the deposition may want to pepper the deponent with excessive, irritating or provocative questions in

4. Mark E. Steiner, *The Lawyer as Peacemaker: Law and Community in Abraham Lincoln's Slander Cases*, Journal of the Abraham Lincoln Association, Vol. 16, Is. 2 (1995).

5. Myles Martel, *Civility, By and For the People*, The Philadelphia Inquirer, February 12, 2013.

6. Out of concern that the term "zealous" was perhaps taken too literally by some, it was excised from the black letter of ABA Model Rule of Professional Conduct 1.1 in 1983, though remains in the Preamble.

7. Like many states, Pennsylvania adopted an aspirational Code of Civility that was later supplemented to include lawyer's duties to other lawyers. These duties include: 2. "A lawyer should speak and write in a civil and respectful manner in all communications with the court, court personnel, and other lawyers:' and 5. "A lawyer should abstain from making disparaging remarks or engaging in acrimonious speech or conduct toward opposing counsel or any participants in the legal process and shall treat everyone involved with fair consideration." 204 Pa. Code §99.3.

8. Kenneth R. Berman, *One Step Over the Line: From Civility to Hardball and Beyond*, ABA Annual Meeting, ABA Section of Litigation, August 5, 2010 at 1.

9. Joseph J. Ortega and Brian C. Avello, *The Thin Lines Between Zealous Advocacy, Incivility, and Punishable Misconduct*, The Brief, Tort Trial & Insurance Practice Section (Fall 2012) at 57.

10. Lawrence J. Morris, *The Case for Aggressive Civility*, The Bencher (July/August 2010) at 12.

11. Hon. Jack Zouhary, *Civil Litigation is Not an Oxymoron*, The Bencher (July/August 2010) at 21.

12. A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 Md. L. Rev. 273, 275 (1998).

hopes of eliciting an unguarded response. Meanwhile, a lawyer defending the deponent may, in turn, ratchet up the rhetoric as well, employing excessive or obstructionist objections to questions or otherwise fostering an atmosphere that interferes with the deposing lawyer's examination of the witness. And of course, some displays of incivility may not be so strategic, but instead the result of strong personalities confined for long days in windowless conference rooms painstakingly rehashing every detail of the events in dispute.

The problem of incivility during depositions, though, is compounded by the steadying influence that is not there—the Judge. "Civil discovery, including depositions, occur largely outside the judge's supervision."[13] While under supervision of the black-robed Judge in the courtroom, lawyers are often better able to curb their more aggressive tactics, cognizant that even minor infractions could incur reprimand and even contempt sanctions.[14] However, in the context of depositions outside the Judge's direct supervision, "self-regulation can be difficult in a system that expects lawyers to represent their clients' interests zealously while serving as quasi-judicial officers."[15] As professional ethics committees, attorney professional organizations, courts and legislators grapple with the problems of attorney incivility, conduct within the courtroom, presided over by a Judge who demands a higher level of decorum from the counsel before the court, is one thing. But how can the same regulation effectively address conduct that takes place away from the courtroom, in distant conference rooms, with no overseeing officer, during a deposition?

CURTAILING DEPOSITION MISCONDUCT?

For guidance on this question, those seeking to regulate attorney deposition conduct have increasingly turned to *Hall* v. *Clifton Precision* (1993), a now-seminal decision issued by the late Judge Robert S. Gawthrop III of the United States District Court for the Eastern District of Pennsylvania—this year marks its twentieth anniversary.[16] In that case, the deponent's attorney frequently interrupted the deposing counsel's questioning and insisted on conferring with his client to discuss the meaning of counsel's questions. Judge Gawthrop was called upon to pass judgment on the propriety of such conferences. As a threshold matter, Judge Gawthrop determined that the Federal Rules of Civil Procedure vest the court with "broad authority and discretion to control discovery, including the conduct of depositions."[17] Expressing concern that such deposition objections like the one before him may

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13. *Id*.

14. In one recent example, an attorney in Chicago was held in contempt of court when he exclaimed that the Judge's bond ruling was "ridiculous." The lawyer then called the sanction "ridiculous," and the Judge responded by doubling the attorney's fine. According to a newspaper account, the lawyer proceeded to take off his tie and throw it on the deputy's desk while raising his voice and flailing his arms, conduct the Judge found "disrespectful." *See* Martha Neil, *'Disrespectful' lawyer held in contempt after calling judge's bond ruling 'ridiculous,'* ABA Journal, February 20, 2013.

15. *Id*. The National Judicial College (NJC) recognized the timeliness and importance of these issues at its 50th Annual Symposium entitled *Civility in the American Justice System: Promoting Public Trust & Confidence*. The NJC symposium was held at the National Constitution Center in April 2013.

16. 150 F.R.D. 525 (E.D. Pa. 1993). Judge Gawthrop was well known in the Philadelphia area legal community as the "singing judge," because of his passion for performing in Gilbert & Sullivan operettas with local a cappella groups. He did not suffer fools gladly, and expected attorneys to be civil in the courtroom. Judge Gawthrop mentored budding trial lawyers through service on the faculty of trial advocacy programs, and would even conduct impromptu dramatic readings of his favorite Gilbert & Sullivan roles to demonstrate the effective use of the diaphragm when making speeches to the jury. He had previously served as a judge for the Court of Common Pleas of Chester County. Sadly, Judge Gawthrop lost a long battle with cancer at the age of 56.

17. *Id*. at 527 (*citing* Fed. R. Civ. P. 26(f), 30, 37(a) & 16).

"suggest or limit a witness's answer to an unobjectionable question," or be used for strategic purposes to delay or "disrupt the question-and-answer rhythm of a deposition," Judge Gawthrop issued stringent guidelines for conduct during depositions.[18] Most of these guidelines, including all but abolishing witness-attorney conferences during a deposition, were meant to prohibit witness coaching, and to limit the type and manner of objections during depositions to those that sought to preserve privileges that would otherwise be lost.[19]

These proscriptions limiting the types of objections and conferences that a lawyer may hold with the witness have been adopted in many jurisdictions.[20] The Federal Rules of Civil Procedure, meanwhile, have been amended to limit the types of objections a lawyer may make during a deposition and have prescribed the lawyer's method for doing so.[21] Some courts, however, have opined that the *Hall* opinion went too far, and have continued to permit a lawyer to confer with the witness for purposes of ensuring that the witness understands the deposing counsel's question.[22] These courts have reasoned that the witness' "right to counsel" does not dissipate "once the client has been sworn to testify," and as long as the lawyer does not say or suggest "how to answer a specific question," the witness coaching with which *Hall* was concerned can still be prevented.[23] As Judge R. Stanton Wettick, Jr., the longstanding discovery judge in the Court of Common Pleas of Allegheny County, has remarked, "[w]e need not turn the lawyer for the deponent into a fly on the wall in order to protect litigants' rights to obtain information."[24]

Hall's specific demarcation of what is and is not acceptable with respect to objections and witness conferences has been characterized as "the most restrictive" decision on the topic.[25] Yet beyond these particular rules, the decision has resonated with courts and other rule makers struggling to rein in the offensive tactics during what one commentator has termed "Rambo Depositions."[26] While lawyers are supposed to act as officers of the court in their practice of law, the difficulty of such self-regulation, especially in the competitive context of litigation and in the oversight vacuum of a deposition, requires an additional mechanism to ensure that lawyers conduct themselves civilly and otherwise in conformity with the Rules of Profes-

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18. *Id*. at 530-31.

19. *Id*. at 531-32. For a practice-oriented guide to the *Hall* decision, *see Hall v. Clifton Precision - Alive, Dead or Quietly Slipping Away, available at* http://www.vairariley.com/CM/Custom/Hallv.Clifton Precision.html. *See also* Daniel P. Dain, *Limits on Deponent's Right to Confer with Counsel During a Deposition*, Boston Bar Journal (2004).

20. *See, e.g., State Farm Mutual Automobile Insurance Company* v. *Dowdy*, 445 F.Supp. 2d 1289, 1293 (N.D. Ok. 2006); *Musto* v. *Transport Workers Union of America, AFL-CIO*, 2009 U.S. Dist. LEXIS 3174, at *4 (E.D.N.Y. 2009); *Cordova* v. *United States*, 2006 U.S. Dist. LEXIS 98226 at *10 (D.N.M. 2006).

21. *See* Fed. R. Civ. P. 30(c)(2) ("A person may instruct a deponent not to answer only when necessary to enforce a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).").

22. *See, e.g., In re Stratosphere Corp. Securities Litigation*, 182 F.R.D. 614, 621 (D.Nev.1998); *State Ex. Rel. Means* v. *King*, 520 S.E.2d 875, 882 (W.Va. 1999).

23. *In re Stratosphere*, 182 F.R.D. at 621.

24. *Acri* v. *Golden Triangle Mgmt. Acceptance Co*., 1994 Pa. Dist. & Cnty. Dec. LEXIS 150, at *17 (Pa. Ct. Com. Pl. 1994). *See also Heller* v. *Consolidated Rail Corp*., 1995 U.S. Dist. LEXIS 11615, *9 n.2 (E.D. Pa. 1995) ("Counsel not only has a right to be [at a deposition], but the right—and duty—to interrupt to protect his client from overreaching and abuse by an opponent, provided it is done within the rules."). Likewise, in *Birdine* v. *City of Coatesville*, 225 F.R.D. 157, 158 (E.D. Pa. 2004), Judge Dalzell admonished an attorney for suggesting answers to a witness contrary to *Hall*, but commented in dicta that Judge Gawthrop's decision "goes too far in forbidding an attorney who defends a deposition (a "defending attorney") from making most objections and from instructing the witness not to answer an objectionable question."

25. *Murray* v. *Nationwide Better Health*, 2012 U.S. Dist. LEXIS 120592, *10 (S.D. Ill. 2012).

26. Jean M. Cary, *Rambo Depositions: Controlling An Ethical Cancer In Civil Litigation*, 25 Hofstra L. Rev. 561 (1996).

sional Conduct. Indeed, Judge Gawthrop, aside from signaling out certain forms of objections and conferences, also gave a compelling justification for judicial oversight of deposition conduct in general, and suggested means for such oversight to be enforced. "Counsel should never forget," he stated, [E]ven though the deposition may be taking place far from a real courtroom, with no black-robed overseer peering down upon them, as long as the deposition is conducted under the caption of this court and proceeding under the authority of the rules of this court, counsel are operating as officers of this court. They should comport themselves accordingly; should they be tempted to stray, they should remember that this judge is but a phone call away.[27]

It was not long before courts began recognizing the importance of Judge Gawthrop's proclamation. With this language, *Hall* not only established bright line rules regarding objections and conferences. *Hall* also extended the general reach of the court's oversight to proceedings outside the courtroom. In this way, *Hall* "explained why it was so important for lawyers to conduct themselves professionally during depositions."[28]

HALL AND THE REGULATION OF DEPOSITION CIVILITY

Several jurisdictions have employed *Hall* as a basis for expanding judicial supervision of lawyer conduct during depositions, and in particular Delaware, New Jersey, New York, Pennsylvania and South Carolina. Citing *Hall*, these courts make clear that a "lawyer's duty to refrain from uncivil and abusive behavior is not diminished because the site of the proceeding is a deposition room, or law office, rather than a courtroom."[29] One commentator has noted that many of the problems of lawyer incivility during deposition "would be far less pervasive if more judges demonstrated Judge Gawthrop's willingness to become involved."[30]

And for good measure—the cases citing *Hall* and mandating civility during depositions often involve conduct that is not merely aggressive or annoying, but invective, demeaning and otherwise intolerable. In South Carolina, for example, the state's rules of civil procedure "adopted the Hall approach" in favor of strict oversight of attorney conduct during depositions.[31] In one particularly egregious case, a "prominent and productive member of [the state's] bar for over four decades" was charged with violating the Rules of Professional Conduct.[32] The disciplinary panel concluded that the lawyer's conduct during depositions "exemplifie[d] the worst stereotype of an arrogant, rude and overbearing attorney" and that such conduct went "far beyond tactical aggressiveness to a level of gratuitous insult, intimidation and degradation of the witness."[33] The record contained seventeen instances of the attorney's uncivil behavior. "You are coming across as an absolutely ridiculous person" was a typical rejoinder to a deponent's response, as was, "I am not going to argue with you. You are not smart enough to argue with." When the witness explained that he had acted as his own lawyer during his first divorce, the deposing lawyer asked: "Was that because you are cheap or you think you are smart enough to be

27. *Hall*, 150 F.R.D. at 531.
28. *Mruz* v. *Caring, Inc.*, 107 F.Supp. 2d 596, 606 (D.N.J. 2000).
29. *Corsini* v. *U-Haul Int'l*, 212 A.D.2d 288, 291 (N.Y. App. Div. 1995).
30. Eric B. Miller, Note, *Lawyers Gone Wild: Are Depositions Still a "Civil" Procedure?*, 42 Conn. L. Rev. 1527, 1558 (2010).
31. *In re Anonymous Member of S.C. Bar*, 552 S.E.2d 10, 16 (S.C. 2011) (citing S.C.R.C.P. 30(j)).
32. *In re Golden*, 496 S.E.2d 619, 623 (S.C. 1998).
33. *Id.* at 623.

your own lawyer?" The dumbfounded witness could only respond with "What kind of question is that?" To which the deposing lawyer responded "It's a good question."[34]

Evidently, the state's disciplinary board, and the Supreme Court, which ultimately affirmed the board's sanctions, did not agree. Ruling that such conduct was "prejudicial to the administration of justice" and thus in violation of Rule 8.4 of the Rules of Professional Conduct, the Court approved a public reprimand of the attorney. "We remind the Bar," the Court wrote, echoing the sentiment of Judge Gawthrop, "that although a deposition is not conducted in a courtroom in the presence of a judge, it is nonetheless a judicial setting. Because there is no presiding authority, it is even more incumbent upon attorneys to conduct themselves in a professional and civil manner during a deposition."[35]

Similarly, in a New Jersey District Court case, the court determined that the lawyer's deposition conduct "crosse[d] over the line from zealous advocacy to abusive, boorish, and disrespectful behavior that obstruct[ed] the administration of justice and disserve[d] his profession and the interests of his clients."[36] The court began its evaluation of the attorney's conduct by noting New Jersey Rule of Professional Conduct 3.2, which requires attorneys to "treat with courtesy and consideration all persons involved in the legal process." The court observed that "New Jersey courts treat their disciplinary rule RPC 3.2 and the civility and professionalism of lawyers which it addresses as more than just aspirational."[37] The court rejected the lawyer's contention that he did not know that his behavior was unacceptable, stating that, first of all, his "performance offend[ed] common principles of decency and courtesy." Beyond that, though, the court also cited *Hall*, a decision which "explained why it is so important for lawyers to conduct themselves professionally during depositions." It was "hard to believe that [the lawyer] would be unaware of this well-publicized opinion issued by the late Judge Gawthrop in the Eastern District of Pennsylvania."[38]

During the deposition in this case, the lawyer "was venomous, abusive, outrageous and personal."[39] "He used sarcasm to such a degree as to render the fact-finding process of a deposition virtually meaningless and his legal briefs incredible."[40] Finding that under the circumstances a sanction was warranted, the court opted to revoke the attorney's *pro hac vice* admission. "The single most often expressed complaint that this court hears from longstanding members of the New Jersey bar" the Judge wrote, "is about the uncivil behavior of lawyers towards others."[41] The court concluded on a hopeful note: "This Opinion and Order will not solve these problems of deteriorating professionalism, but perhaps it will give some comfort to those concerned about the future of this wonderful profession."[42]

Delaware courts have likewise observed that "lack of civility and professional misconduct during depositions is a matter of considerable concern to Delaware courts and courts around the nation."[43] In one oft-cited case, the Delaware Supreme Court admonished a lawyer for conduct which "demonstrate[d] such an astonishing lack

34. *Id*. at 620.
35. *Id*. at 623.
36. Mruz, 107 F.Supp. 2d at 606.
37. *Id*. at 605.
38. *Id*. at 606.
39. *Id*. at 606.
40. *Id*. at 614.
41. *Id*.at 615.
42. *Id*. at 615.
43. *Paramount Communications Inc.* v. *QVC Network Inc*., 637 A.2d 34, 52 (Del. 1994).

of professionalism and civility that [was] worthy of special note here as a lesson for the future—a lesson of conduct not to be tolerated or repeated."[44] A review of the deposition transcript helps the reader understand what the court was referring to:

> "Q. (By Mr. Johnston [Delaware counsel for QVC]) Okay. Do you have any idea why Mr. Oresman was calling that material to your attention?
> MR. JAMAIL: Don't answer that. How would he know what was going on in Mr. Oresman's mind? Don't answer it. Go on to your next question.
> MR. JOHNSTON: No, Joe —
> MR. JAMAIL: He's not going to answer that. Certify it. I'm going to shut it down if you don't go to your next question.
> MR. JOHNSTON: No. Joe, Joe —
> MR. JAMAIL: Don't "Joe" me, ***hole. You can ask some questions, but get off of that. I'm tired of you. You could gag a maggot off a meat wagon. Now, we've helped you every way we can.
> MR. JOHNSTON: Let's just take it easy.
> MR. JAMAIL: No, we're not going to take it easy. Get done with this.
> MR. JOHNSTON: We will go on to the next question.
> MR. JAMAIL: Do it now."

Although the court found that there was "no clear mechanism . . . to deal with this matter in terms of sanctions or disciplinary remedies at this time in the context of this case," it nonetheless issued an addendum to its opinion to express the view that such "outrageous and unacceptable" conduct is not to be tolerated.[45] Under the proper circumstances, a court could bar the "obstreperous counsel" from attending depositions, order the deposition be recessed and reconvened, or appoint a master to preside at the deposition, the costs being born by the offending party.[46] Under certain circumstances, it may even be proper for the court to invoke its summary contempt powers. Invoking the language of *Hall*, the Court reminded counsel that, though they are at a deposition, they are not alone and without recourse should their opposing counsel descend into uncivil behavior. "Although busy and overburdened, Delaware trial courts are 'but a phone call away' and would be responsive to the plight of a party and its counsel bearing the brunt of such misconduct."[47]

In the most extreme of circumstances, courts have even found that a sanction of dismissal is warranted.[48] In one New York case, the Appellate Division, citing *Hall*, reversed the trial court's order denying the defendant's motion to dismiss where the plaintiff, an attorney, acted as his own counsel *pro se*. "[P]laintiff's behavior, preceding and during a pretrial deposition, was so lacking in professionalism and civility," the court held, "that dismissal is the only appropriate remedy."[49] During the deposition in this case, the plaintiff "repeatedly refused to answer, evaded, and gave improper responses to defendant's question" and made personal attacks against the defense counsel.[50] Such attacks included the likes of:

> You're so scummy and so slimy and such a perversion of ethics or decency because you're such a scared little man, you're so insecure and so frightened and

44. *Id*.
45. *Id*. at 55-56.
46. *Id*. at 55.
47. 637 A.2d at 55 (quoting *Hall* v. *Clifton*, 150 F.R.D. at 531). *See also id*. at 55 n.34.
48. *Id*. at 291-92.
49. *Id*. at 291.
50. *Id*.

> the only way you can impress your client is by being nasty, mean-spirited and ugly little man, and that's what you are. That's the kind of prostitution you are in.[51]

With the stringent sanction of dismissal, the Appellate Division's message was clear: "[I]ncivility by an attorney with respect to an adversary, prior to and during a deposition, is not to be tolerated."[52]

In another New York case, the Appellate Division addressed a topic of increasing concern for new lawyers: the prevalence of sexist or racist language used to intimidate opposing counsel, especially those who may be young or less experienced fending off such unacceptable treatment. Whereas such conduct may have been tolerated—or perhaps overlooked—in days past, courts are increasingly willing to sanction lawyers for such misconduct inside the courtroom and beyond. In this New York case, the attorney, a twenty-eight year-old, "directed vulgar, obscene and sexist epithets toward [the opposing counsel's] anatomy and gender."[53] Although the exact conduct was apparently too shocking for the Appellate Division to reprint, the conduct was obviously reprehensible. The attorney was fired from his law firm and sanctioned monetarily by the trial court. Considering his already stiff punishment and his profuse apologies, the Disciplinary Committee recommended a public censure "instead of a more serious sanction," which the Appellate Division affirmed.[54]

Additionally, the lawyer's duty to behave civilly may also require a lawyer to police his or her uncivil client. In one recent Eastern District of Pennsylvania case, Judge Eduardo Robreno imposed a nearly $30,000 sanction on both an abusive client-deponent and his lawyer "jointly and severally."[55] During the key deposition in this case, the lawyer's client directed the "F-word" some 73 times at the deposing lawyer and his client. Throughout the course of the deponent's "hostile, uncivil, and vulgar conduct," the deposing lawyer remained calm, simply asking the deponent to "control your language" and "be a little more courteous."[56] The defending lawyer's liability for such conduct arose from the fact that "notwithstanding the severe and repeated nature of [the client's] misconduct, [the lawyer] persistently failed to intercede and correct [his client's] violations of the Federal Rules."[57] The court concluded that such failure to intercede to reign in the client's gross incivility amounted to the lawyer's "endorsement and ratification" of his client's misconduct.[58]

Some judges have been reticent to enforce civility outside the courtroom, fearing that such oversight simply invites bickering counsel to burden the court with their inter-personal conflicts. The Third Circuit itself has expressed skepticism that the trial court judge should play "kindergarten cop" by refereeing "petty" disputes between the parties' counsel, even if such disputes involve crude language and other offensive behavior.[59] The Court of Appeals' refusal to uphold the trial court's sanc-

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51. *Id*. at 289.
52. *Id*. at 290-91.
53. *Matter of Schiff*, 190 A.D.2d 293 (N.Y. App. Div. 1993).
54. *Id*. at 294.
55. *GMAC Bank* v. *HTFC Corp*., 248 F.R.D. 182, 198 (E.D. Pa. 2008). This decision also highlights the desirability of videotaping depositions when dealing with obstreperous counsel or difficult witnesses. Judge Robreno was in a better position to assess and reject counsel's argument that he was provoked because the videotape revealed that the opposing lawyer had instead been courteous and respectful. *See id*. at 191.
56. *Id*. at 187.
57. *Id*. at 194-95.
58. *Id*. at 197.
59. *Saldana* v. *Kmart Corp*., 260 F. 3d 228, 237 (3d Cir. 2001). After finding that plaintiff's counsel had used the 'F' word four times in communications with opposing counsel, the trial court ordered counsel to pay

tions, in that case, should not necessarily be read as a repudiation of Judge Gawthrop's directives or as undermining the salutary objective to encourage lawyers to act professionally. However, the court did stress that the conduct complained of "did not occur in the presence of the Court."[60] In so doing, the Third Circuit seems to caution that the scope of the trial judge's supervisory powers over lawyer comportment is more circumscribed when the conduct at issue occurs at a deposition or other ancillary proceeding.

CONCLUSION

The *Hall* decision issued two decades ago, but has had a clear and lasting impact on lawyers, courts and other civil procedural rule-makers around the country. Although the late Judge Gawthrop's specific direction concerning permissible conduct of counsel representing deponents has not been met with universal acceptance, its call for closer court scrutiny of deposition conduct that interferes with the interrogation of a witness has resonated thoroughly with those seeking a mechanism to enforce attorney civility outside the confines of the courthouse. As long as courts remain "but a phone call away," lawyers may think twice before crossing the line from zealous advocate on behalf of a client to the realm of the uncivil and unprofessional, and the aspirational guidance offered by President Lincoln, Chief Justice Burger, and many fine lawyers, jurists and commentators throughout the country—may come closer to reality.

Kmart's costs of bringing the motion for sanctions, to attend a continuing legal education seminar on civility, and to write letters of apology to all whom "she demeaned and insulted by her vulgarity and abusive conduct".

60. *Id.* The Third Circuit's reversal of the sanctions order was accompanied by its affirmance of the district court's entry of summary judgment for the defendant, so its response might fairly be viewed as either a pyrrhic victory for the plaintiff's counsel or perhaps a merciful means to avoid piling on.