Strategies and Tips for Dealing with Dirty Litigation Tactics by Opposing Counsel

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Table of Contents

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I. Introduction

There are primarily two fictional characters that epitomize people's perceptions of civil trial lawyers. Arguing legal points on their merits with civility, professionalism and respect for all, including opposing counsel, the fictional character Atticus Finch as portrayed by Gregory Peck represents what is considered to be the "perfect" civil trial lawyer. *See* Clifford E. Haines, *Calling All Atticus Finches*, 31 Pa. Law. 2, 2 (2009) ("Deep inside, each of us [lawyers] longs to be that perfect lawyer, Atticus Finch ..."). On the other hand, the fictional character John Rambo, as portrayed by Sylvester Stallone, has been used to describe the civil trial lawyer who engages in all manners of adversarial excess, including personal attacks on other lawyers, hostility, boorish and insulting behavior, rudeness, and obstructionist conduct. *See* Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 Hofstra L. Rev. 561, 563 (1996) ("In law offices across the country, the John Rambos of the legal world are invading deposition rooms, yelling obscenities at opposing counsel, and attempting to mow down their "enemies" with nasty verbal invectives.").

For years, concerns have been raised over the fact that Rambo tactics are becoming more prevalent in civil litigation. *See, e.g.*, Thomas P. Sukowicz & Thomas P. McGarry, *Feathers May Fly for Using Foul Language*, Chi. Law., Dec. 2002, at 14 ("For many years now, there has been a perception that incivility, rudeness and the use of offensive tactics among lawyers are on the rise"); 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, 551 (2002) (noting a recent increase in uncivil litigation tactics); Marvin E. Aspen, A Response to the Civility Naysayers, 28 Stetson L. Rev. 253, 253 (1998) (civility is the "current hot topic of the legal lecture circuit"); Bruce A. Green, The Ten Most Common Ethical Violations, 24 Litig. 48, 48 (1998) (noting that "leaders of the organized bar now see [incivility] as the most worrisome ethical problem"); Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 St. Thomas L. Rev. 113, 114 (1995) (noting a "current crisis in civility"). Judges have objected to the tactics, finding them to be unprofessional and unethical. *See, e.g.,* Hon. Sandra Day O'Connor, *Professionalism,* 76 Wash. U. L. Q. 5 (1998) ("[m]ore civility and greater professionalism" is needed in today's practice); Hon. Warren E. Burger, *The Decline of Professionalism*, 63 Fordham L. Rev. 949, 949, 953 (1995) (decrying a "broad decline in professionalism" and stating that lawyers should be "harmonizers[] and peacemakers"); The Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 146 F.R.D. 205, 216 (1992) (Chief Judge Helen Wilson Nies commented that "uncivil conduct in litigation has become commonplace"); Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441, 445 (1992) (discovery is the area where uncivil conduct is most likely to arise). Now, clients are realizing that engaging in Rambo litigation can be quite expensive and unprofitable. *See* Judith S. Kaye, *Lawyering for a New Age*, 67 Fordham L. Rev. 1, 8 (1998) ("Clients are now realizing that arms manufacturers and lawyers are probably the only ones who gain by policies of mutually assured destruction. It is very expensive to scorch the earth.").

So, what should one do to effectively deal with dirty litigation tactics by opposing counsel? Unfortunately, there is no "one-size-fits-all" answer to this question. However, this article will identify some of the most popular Rambo civil litigation tactics that have been used by opposing counsel and provide suggested ways to combat them. Also, this article will outline some practical advice or tips that you should employ to keep a Rambo civil lawyer in check. But, before we get to these topics, it is important to understand who is a Rambo civil litigator.

II. Who Is a Rambo Lawyer?

A Rambo lawyer has been defined to be "a litigator who uses aggressive, unethical or illegal tactics in representing a client and who lacks courtesy and professionalism in dealing with other lawyers." US Legal.com, *Rambo Lawyer Law & Legal Definition* (http://definitions.uslegal.com/r/rambo-lawyer/). Generally, a Rambo lawyer has one or more of the following traits or characteristics:

- ✓ A mindset that litigation is war and that describes trial practice in military terms.
- ✓ A conviction that it is invariably in your interest to make life miserable for your opponent.
- ✓ A disdain for common courtesy and civility, assuming that they ill befit the true warrior.
- ✓ A wondrous facility for manipulating facts and engaging in revisionist history.
- ✓ A hair-trigger willingness to fire off unnecessary motions and to use discovery for intimidation rather than fact-finding.
- ✓ An urge to put the trial lawyer on center stage rather than the client or his [or her] cause.

Robert N. Sayler, *Why Hardball Tactics Don't Work,* 74 A.B.A. J. 78, 79 (Mar. 1988).

Examples of tactics employed by Rambo lawyers include the following:

- Writing letters to opposing counsel and others using words such as "fool, idiot, punk, boy, honey, sweetheart, sweetie pie and baby cakes" or stating to recipients that they can place their letters "in that bodily orifice into which no sun shines." Sukowicz & McGarry, *supra.,* at 14 (Illinois lawyer).
- At an attorneys' discovery conference, throwing darts at a board containing pictures of opposing counsel and placing in front of her plastic dolls identified as the parties' respective lead counsel urinating on each other. *Grider v. Keystone Health Plan Cent.,* C.A. No. 2001-CV-05641, 2004 U.S. Dist. LEXIS 9014, (E.D. Pa. Apr. 26, 2004), *motion denied by, sanctions allowed by Grider v. Keystone Health Plan Cent.*, 2006 U.S. Dist. LEXIS 20368 (E.D. Pa. Mar. 30, 2006).
- Refusing to disclose information necessary to determine a corporation's citizenship and insisting on the entry of a protective order before producing documents that were publicly available. *Albert Trostel & Sons Co. v. Vanlente*, No. 1:93:CV:108, 1993 U.S. Dist. LEXIS 16184 (W.D. Mich., filed Sept. 15, 1993).
- Serving general rather than specific objections to legitimate written interrogatories and document requests. *McLeod, Alexander, Powell and Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990); *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 511-512 (N.D. Ia. 2000).
- During a deposition, engaging in conduct such as constantly fighting with opposing counsel, being "snide, rude and nasty," wrongly charging opposing counsel with criminal and unethical conduct, making anti-Semitic remarks and improperly instructing witnesses not to answer questions. *Luangisa v. Interface Operations*, C.A. No. 2:11-cv-00951-RCJ-CWH, 2011 U.S. Dist. LEXIS 139700 (D. Nev., filed Dec. 5, 2011); *Ross v. Kansas City Power & Light Co.*, 197 F.R.D. 646, 663 (W.D. Mo. 2000); *Applied Telematics, Inc. v. Sprint Corp.*, C.A. No. 94-CV-4603, 1995 U.S. Dist. LEXIS 2191 (E.D. Pa. 1995); *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 53-54 (Del. 1994); *Pilsum v. Iowa State Univ. of Science and Tech.*, 152 F.R.D. 179 (S.D. Ia. 1993); *In re Williams*, 414 N.W.2d 393, 397 (Minn. 1987) (The lawyer told his Jewish adversary "[d]on't use your little sheeny Hebrew tricks on me ... .").

- Exchanging profanity and shouting at opposing counsel while standing chest-to-chest in the courtroom. *Cuyahoga County Bar Ass'n v. Gonzales*, 733 N.E.2d 587, 587 (Oh. 2000) ("During a heated discussion, respondent Gonzales called respondent Stafford 'a piece of shit,' and Stafford responded by calling Gonzales 'a total asshole.'"); *In re Moore*, 665 N.E.2d 40, 41 (Ind. 1996) (the lawyers' exchanged profanity which led to a fist fight).
- Being abusive and profane in and out of court, disrupting the trial, and lying to the court about counsel's misconduct that was alleged to have occurred out of the judge's presence. *Lee v. American Eagle Airlines, Inc.,* 93 F. Supp. 2d 1322, 1324-29 (S.D. Fla. 2000) (despite the fact that the plaintiff was the prevailing party in a race discrimination lawsuit, the court reduced the fee award by $358,423.20 as a sanction for the unwarranted conduct by plaintiff's counsel); *McEnrue v. N.J. Transit Rail Ops.*, C.A. No. 90-4728, at 17-27, 1993 U.S. Dist. LEXIS 15528 (D. N.J. Sept. 30, 1993) (court granted a new trial for defendants based, in part, on the fact that plaintiff's counsel cursed and verbally attacked defense counsel before the jury); *Comuso v. Nat'l R.R. Passenger Corp.*, C.A. No. 97-7891, 2000 U.S. Dist. LEXIS 5427 (E.D. Pa. Apr., 25, 2000) (court declared a mistrial when the same plaintiff's counsel from the *McEnrue* case threatened to "kill" opposing counsel during trial and called his adversary a "fat pig" four times in the same outburst).
- Shouting and screaming at witnesses or opposing parties. *See*, *e.g., Toledo Bar Ass'n v. Batt*, 677 N.E.2d 349, 351 (Oh. 1997) (lawyer shouted and screamed at witnesses); *In re Kalil's Case*, 773 A.2d 647, 648 (N.H. 2001) (lawyer told a pro se litigant that he would "rip his face off" if he carried through with his plan to violate a court order); *Kimzey v. Wal-Mart Stores, Inc.*, 907 F. Supp. 1309, 1316 (W.D. Mo. 1995) (when cross-examining the plaintiff, defense counsel "waived 'the finger' in her face, and rudely shouted, 'fuck you'").
- Making improper opening statements, egregious leading witness during their direct examination, coaching witnesses during cross-examination by opposing counsel, and addressing the jury while in sidebar. *Spruill v. Nat'l R.R. Passenger Corp.*, C.A. No. 93-4706, 1995 U.S. Dist. LEXIS 12868, *9 (E.D. Pa., Sept. 5, 1995).
- Insulting the judge, courtroom staff and/or the jurors. *City of Grand Forks*, 552 N.W.2d at 70; *In re Hillis*, 858 A.2d 317 (Del.), *reaffirmed at* 858 A.2d 325 (Del. 2004) (insulting judge); *City of Grand Forks v. Dohman*, 552 N.W.2d 69, 69 (N.D. 1996) (insulting jurors); Sukowicz & McGarry, *supra.,* at 14 (citing a case where an attorney was suspended for 18 months after referring to courtroom deputies as "honkies" and "white pigs").
- Making *ad hominem* attacks against the court or opposing counsel. *In re Cmty. Bank of N. Va. & Guar. Bank Second Mortg. Litig.*, C.A. Nos. 02-1201, 03-425, 03-1380, 05-589, 05-590, 05-688, 05-1386 & 06-768, 2007 U.S. Dist. LEXIS 48585, at *9 n. 3 (W.D. Pa. Jul. 5, 2007), *reopening granted by, motion granted by, remanded by Bumpers v. Cmty. Bank of N. Va.*, C.A. No. 03-1380, 2008 U.S. Dist. LEXIS 5107 (W.D. Pa. Jan. 22, 2008), *class certification granted by, Motion denied by In re Cmty. Bank of N. Va.*, MDL No. 1674, Case No. 03-425, 2008 U.S. Dist. LEXIS 5681 (W.D. Pa., Jan. 25, 2008); *Conklin v. Warrington Twp.*, C.A. No. 1:05-CV-1707, 2006 U.S. Dist. LEXIS 48643, at *7-8 nn. 7-10 (M.D. Pa. Jun. 30, 2006), *sanctions allowed by Conklin v. Warrington Twp.*, 2006 U.S. Dist. LEXIS 54292 (M.D. Pa., Aug. 4, 2006).
- Hiding or destroying documents and lying about their existence. *Maggette v. BL Dev. Corp.,* No. 2:07CV181-M-A, 2010 U.S. Dist. LEXIS 91647 (N.D. Miss., filed Sept. 2, 2010); *Metro. Opera Ass'n v. Local 100, Hotel Emples. & Rest. Emples. Int'l Union*, 212 F.R.D. 178 (S.D. N.Y. 2003).

- Calling a female attorney "babe" or when asked to refrain from using that term, responding "At least I didn't call you a bimbo." *See Mullaney v. Aude*, 126 Md. App. 639, 654-659, 730 A.2d 759, 766-770 (1999).
- Saying to an opposing female attorney statements such as: "I don't have to talk to you, little lady"; "Tell that little mouse over there to pipe down"; "What do you know, young girl"; "Be quiet, little girl"; and "Go away, little girl. *Principe v. Assay Partners,* 154 Misc. 2d 702, 586 N.Y.S.2d 182, 186 (1992).
- Being courteous and civil, but nonetheless deceptive. *See Gainer v. Koewler*, 200 Wis. 2d 113, 122, 546 N.W.2d 474, 478 (Ct. App. 1996). *But see Brundage v. Estate of Carambio*, 195 N.J. 575, 951 A.2d 947 (2008) (although counsel's failure to disclose contrary authority was neither applauded nor encouraged, the attorney did not exceed the bounds of acceptable behavior identified by the New Jersey ethical rules; thus, setting aside the parties' settlement as a litigation sanction was reversed).

A zealous advocate is not the same as a Rambo litigator. It is well established that all lawyers have a duty to zealously represent their clients. *See, e.g., Peavy v. State*, 766 So. 2d 1120, 1125 (Fla. Dist. Ct. App. 2000) ("Zealous advocacy is applaudable."); *Miller v. Ryan*, 706 N.E.2d 244, 252 (Ind. Ct. App. 1999) ("There is no question that an attorney has the duty to zealously represent his or her client."); *Toledo Bar Ass'n v. Batt*, 677 N.E.2d 349, 352 (Ohio 1997) (recognizing that "an attorney must zealously represent his client"); *In re Muriel K.*, 633 N.W.2d 222, 225 n.2 (Wis. Ct. App. 2001) (stating that a lawyer must represent an incompetent client "'zealously within the bounds of the law'") (citations omitted). Indeed, Comment 1 to Rule 1.3 of the Model Rules of Professional Conduct states that: "A lawyer should act with commitment and dedication to the interests of the client and with *zeal in advocacy* upon the client's behalf." *See* Model Rules of Prof'l Conduct R.1.3 (2012), cmt. 1 (emphasis added). *See also* Model Code of Prof'l Responsibility, Canon 7 (1969) ("A Lawyer Should Represent a Client Zealously within the Bounds of the Law").

However, when a lawyer engages in incivility, abusive advocacy and intemperate conduct in the courtroom and elsewhere, he or she becomes a Rambo litigator. As the Honorable Paul L. Friedman of the United States District Court for the District of Columbia noted years ago:

> Although the 'modern age' of the legal profession has witnessed progress in opening its doors wider to women and minorities and others who were previously excluded, this age has also opened its doors to the 'Rambo litigator' which has spawned a generation of lawyers, too many of whom think they are more effective when they are more abrasive. ...
>
> 'Scorched earth' strategies and so-called 'take no prisoners' litigators are in vogue. ... Judges have an obligation to step in and say it is unacceptable; it will not be tolerated. We see it even more frequently in depositions, a forum in which there is no referee, no umpire, no judge to call a halt to the *ad hominem* attacks, the harassment, the abuse that too many lawyers today think is required in the service of their clients.

Hon. Paul L. Friedman, *Fostering Civility: A Professional Obligation* (Mar. 13, 1998) (remarks given at an American Bar Association meeting).

III. Common Dirty Litigation Tactics and Strategies to Deal with Them

Now that you know who a Rambo civil litigator is, what are some of the common dirty litigation tactics that they use and how should you deal with them? Unfortunately, these two questions are not easy to

answer. However, some of the most common Rambo tactics occur during discovery and the pre-trial process. So, this article will focus on those tactics: namely, the "Scorched Earth" litigation practice; hiding or failing to produce relevant documents; frivolous objections to discovery; and witness coaching and other improper deposition conduct.

A. "Scorched Earth" Litigation Tactic

One of the most common Rambo litigation tactics is the "Scorched Earth" practice. This practice entails the inundation of a one's adversary with tons of motions, interrogatories, document requests, deposition notices and other pre-trial disputes as a way to run up the costs of litigation, so that eventually the opposing party will want to settle the dispute for relatively little money or go broke trying the case.

To combat the rise in "Scorched Earth" tactics, many courts, both federal and state alike, have adopted rules to create "presumptive ... limits" on the number of interrogatories, the length and number of depositions, and the frequency and scope of other discovery and pre-trial matters that parties may serve. Fed.R.Civ.P. 26, Advisory Committee Note (2000 Amendment, Subdivision (b)(2)). *See also* Fed.R.Civ.P. 26(b)(2)(A) ("By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36."). For example, Federal Rule of Civil Procedure 33 provides that "[u]nless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts." Fed.R.Civ.P. 33(a)(1). Further, absent a stipulation or court order to the contrary, Rule 30 limits a party to no more than 10 seven (7) hour depositions. Fed.R.Civ.P. 30(a)(2)(A)(i) & (d)(1).

These type of pre-trial limitations are premised on the general recognition that "[w]hile a party is generally free to choose its method of discovery, it does not have absolute right so to do and upon a showing of good cause court may alter manner or place of discovery as it deems appropriate." *Colonial Capital Co. v General Motors Corp.,* 29 F.R.D. 514, 518 (D.Conn.1961). Indeed, Federal Rule of Civil Procedure 26(c) permits a court "to amend the traditional method of discovery in the interest of justice where good cause is shown." *See Molinaro v. Lafayette Radio Electronics*, 62 F.R.D. 464, 465 (E.D. Pa. 1973).

Moreover, Rule 26(b)(2)(C) expressly provides that a court "must limit the frequency or extent of discovery" if it determines that:

> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Fed.R.Civ.P. 26(b)(2)(C).

Further, Rule 26(c), titled "Protective Orders," provides that:

> A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending–or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an

order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

Fed.R.Civ.P. 26(c)(1).

Rule 26(c) was enacted as safeguard for protection of parties and witnesses in view of the broad discovery rights authorized in Rule 26(b). *United States v Columbia Broadcasting System, Inc.* 666 F.2d 364, 369 (9th Cir.), *cert. denied* 457 U.S. 1118, 102 S. Ct. 2929, 73 L. Ed. 2d 1329 (1982). The principle underlying Rule 26(c) is that "there is no absolute right to unlimited discovery." *Wilk v American Medical Assoc.,* 27 F.R. Serv. 2d 802, 1979 U.S. Dist. LEXIS 12204, at *5 (N.D. Ill. 1979). As such, Rule 26(c) authorizes the issuance of protective orders controlling disposition of discovery materials after party has acquired materials, as well as fixing and controlling conditions under which discovery may be obtained in first case. *Krause v Rhodes* 535 F. Supp. 338, 347 (N.D. Oh. 1979), *aff'd* 671 F.2d 212 (6th Cir.), *cert. denied sub. nom. Attorney Gen. of Ohio v. Krause,* 459 U.S. 823, 103 S. Ct. 54,74 L. Ed. 2d 59 (1982).

Consequently, to stop a Rambo litigator's use of "scorched earth" tactics, Rule 26 empowers a court to bar a party from engaging in discovery when it is apparent the party is not acting in good faith, *see, e.g.*, *Knox v. Anderson*, 21 F.R.D. 97, 98-100 (D. Haw. 1975); *Snap Lite Corp. v Stewart Warner Corp.*, 40 F. Supp. 776 (S.D. N.Y. 1941), or when the sole purpose of a federal suit is to aid discovery for a state suit or other proceeding. *Beard v. New York C. R. Co.,* 20 F.R.D. 607, 609-610 (N.D. Oh. 1957). Also, Rule 26 authorizes a court to cut-off the opportunity to take further discovery when more than sufficient time has lapsed to complete the discovery. *Goldboss v Reimann* 55 F. Supp. 811, 820 (S.D. N.Y. 1943), *aff'd* 143 F.2d 594 (2d Cir. 1944). Additionally, Rule 26 authorizes a court to prevent a party from serving over 60 interrogatories upon various absent class members when it is apparent that the interrogatories are outrageous and a needless invasion of privacy and are calculated effort to harass and discourage class members. *Bachman v. Collier,* C.A. No. 76-0079, 1977 U.S. Dist. LEXIS 17007, at *4-6 (D. D.C. 1977). Finally, "[d]iscovery will not be compelled if the information sought to be discovered is irrelevant or burdensome." *Adelman v. Brady*, C.A. No. 89-4714, 1990 U.S. Dist. LEXIS 3603, at *6 (E.D. Pa. 1990).

However, Rule 26 is not without boundaries. For example, "[Rule 26(c)] does not authorize protective orders to regulate the conduct of parties and counsel in their collateral investigations independent of discovery and disclosure." *Turnbull v Topeka State Hosp.,* 185 F.R.D. 645, 651 (D. Kan. 1999), *sub. app., remanded* 255 F3d 1238 (10th Cir. 2001), *cert. denied* 535 U.S. 970, 122 S. Ct. 1435, 152 L. Ed. 2d 380 (2002). As a result, "Rule 26 does not authorize a district court to issue protective orders with respect to documents obtained through means other than the court's discovery processes." *In re Shell Oil Refinery*, 143 F.R.D. 105, 109 (E.D.

La. 1992), *amended by* 144 F.R.D. 73, (E.D. La. 1992)(*citing Kirshner v. Uniden Corp.*, 842 F.2d 1074, 1080 (9th Cir. 1988)). *See also Fayemi v Hambrecht & Quist, Inc.,* 174 F.R.D. 319, 324 (S.D. N.Y. 1997). Instead, the court's power to regulate such conduct is premised solely upon its inherent power to prevent abuses, oppression and injustices. *Turnbull,* 185 F.R.D. at 651; *Fayemi,* 174 F.R.D. at 324; *In re Shell Oil Refinery*, 143 F.R.D. at 109. *See also In re Cendant Corp.,* 260 F.3d 183, 199 (3d Cir. 2001) ("This Court ... has recognized the authority of district courts to wield sanctioning power, in the form of the court's 'inherent authority,' where necessary to preserve the integrity of the judicial process.").

Moreover, "a Rule 26(c) motion is appropriate only before a deposition commences, whereas a Rule 30(d) motion is appropriate only during taking of deposition." *Coates v Johnson & Johnson*, 85 F.R.D. 731, 733 (N.D. Ill. 1980). *See also GMAC Bank v HTFC Corp.*, 248 F.R.D. 182, 191 n. 11 (E.D. Pa. 2008). Furthermore, by its very language, Rule 26(c) limits who may move for a protective order to "a party or ... the person from whom discovery is sought." Fed.R.Civ.P. 26(c)(1). Consequently, a third party may not move for a Rule 26(c) protective order when the movant is not a party to the underlying action, has not intervened, and is not the party from whom discovery is sought. *See, e.g.*, *SEC v. Tucker*, 130 F.R.D. 461, 462 (S.D. Fla. 1990); *In re Yassai*, 225 B.R. 478, 484 (Bankr. C.D. Cal. 1998).

Rule 26(c) provides that "Rule 37(a)(5) applies to the award of expenses." Fed.R.Civ.P. 26(c)(3). Titled "Payment of Expenses; Protective Order," Rule 37(a)(5) provides as follows:

> (A) If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing). If the motion is granted--or if the disclosure or requested discovery is provided after the motion was filed -- the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:
>
> > (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
> >
> > (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
> >
> > (iii) other circumstances make an award of expenses unjust.
>
> (B) If the Motion Is Denied. If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.
>
> (C) If the Motion Is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

Fed.R.Civ.P. 37(a)(5).

As written, Rule 37(a)(5) presumptively requires every loser to make good the winning party's costs. *Rickels v. City of South Bend*, 33 F.3d 785, 786 (7th Cir. 1994). *See also* Charles Alan Wright & Arthur R. Miller, 8 *Federal Practice and Procedure: Civil,* §2288 at 787 (1970) ("The great operative principle of Rule 37(a)([5]) is that the loser pays."). This loser pays provision is seen as the most effective way to combat Rambo litigation tactics like the "Scorched Earth" practice. As the Seventh Circuit explained in *Rickels*:

> Fee shifting when the judge must rule on discovery disputes encourages their voluntary resolution and curtails the ability of litigants to use legal processes to heap detriments on adversaries (or third parties) without regard to the merits of the claims.

Rickels, 33 F.3d at 786.

The purpose of Rule 37(a)(5), as well as the other provisions of Rule 37, is "to protect the court and opposing parties from dilatory or unwarranted motions and to promote the expeditious hearing of cases." *Eastern Maico Distributors, Inc. v Maico-Fahrzeugfabrik, G.m.b.H.*, 658 F2d 944, 949 (3d Cir. 1981). As the Third Circuit Court of Appeals explained years ago:

> Control of discovery proceedings is important so just and speedy determination of lawsuit can be reached; Rule 37 provides trial courts with means and power to enforce compliance with rules of discovery by imposing sanctions for failure to comply with order compelling discovery.

In re Professional Hockey Antitrust Litigation, 531 F2d 1188, 1192 (3d Cir.), *rev'd on other grounds* 427 U.S. 639, 96 S. Ct. 2778, 49 L. Ed. 2d 747, *reh'g denied* 429 U.S. 874, 97 S. Ct. 196, 97 S. Ct. 197, 50 L. Ed. 2d 158 (1976).

Although it has been described as being "the mechanism by which Rules 26 to 36 can be made effective," Rule 37 has limitations. *Fisher v Marubeni Cotton Corp.,* 526 F.2d 1338, 1341 (8th Cir. 1975). In particular, Rule 37 "is of limited application when applied to non-parties." *Fisher*, 526 F.2d at 1341. As the Eighth Circuit noted:

> It can only be used to order a non-party to answer written and oral questions under Rules 30 and 31. It has no application to a non-party's refusal to produce documents.
>
> > *If a deponent* fails to answer a question propounded or submitted under Rules 30 or 31, . . . or *a party* fails to answer an interrogatory submitted under Rule 33, or if *a party*, in response to a request for inspection submitted under Rule 34, fails to respond . . . the discovering party may move for an order compelling an answer . . . or an order compelling inspection in accordance with the request ... . *Fed. R. Civ. P.* 37(a)(2) [(emphasis added).]
>
> The omission of any reference to a non-party's production of documents is important to Rule 37(b)'s application in the instant case. Without such a reference in Rule 37(a), Rule 37(b) sanctions have no application to the appellant. *See Application of Johnson & Johnson*, 59 F.R.D. 174 (D. Del. 1973).

Id.

Although Rule 37 has limited application when applied to non-parties, Federal Rule of Civil Procedure 45 addresses subpoenas in general, including their issuance, service, the protection of persons subject to subpoenas, duties in responding to subpoenas, and contempt. Fed.R.Civ.P. 45. Moreover, Rule 45 authorizes a district court to quash a subpoena if it subjects a person, including a non-party, to an undue burden, fails to allow for a reasonable time for compliance, or requires disclosure of confidential information. Fed.R.Civ.P. 45(c)(3); *Ciarlone v City of Reading,* 263 F.R.D. 198, 201 (E.D. Pa. 2009) (*citing Composition Roofers Union Local 30 Welfare Trust Fund v. Graveley Roofing Enter.*, 160 F.R.D. 70, 72 (E.D. Pa. 1995); *Small v. Provident Life & Accident Ins. Co.*, No. 98-2934, 1999 U.S. Dist. LEXIS 18930, 1999 WL 1128945, at *1 (E.D. Pa. Dec. 8, 1999); *Barnes Found. v. Township of Lower Merion*, No. 96-372, 1997 U.S. Dist. LEXIS 4444, 1997 WL 169442, at *4 (E.D. Pa. Apr. 7, 1997)). As such, Rule 45 is the tool that one would use to address "Scorched earth" tactics involving non-parties.

Federal and state civil procedure rules provide many of the tools that one needs to combat a Rambo lawyer's use of "Scorched Earth" tactics. However, one should make certain that the court enters a case management order that expressly incorporates into the order the rules' presumptive limits on the number of inter-

rogatories, depositions, etc. Also, because the rules' presumptive limits do not apply to document requests, including requests for electronically stored information, Rambo litigators will seek to use "Scorched Earth" tactics with respect to this type of discovery unless a case management order is entered limiting the scope of such discovery. Using case management orders and obtaining appropriate relief under the civil procedure rules have been found to be the most effective way to deal with the "Scorched Earth" practice

B. Hiding or Failing to Produce Relevant Documents and Other Discovery

"[T]here is no absolute right to unlimited discovery." *Wilk v American Medical Assoc.,* 27 F.R. Serv. 2d 802, 1979 U.S. Dist. LEXIS 12204, at *5 (N.D. Ill. 1979). Nevertheless, it is well established that parties are entitled to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Fed.R.Civ.P. 26(b)(1). Moreover, "the scope of discovery as provided for in Federal Rules of Civil Procedure, Rules 26 through 37, is to be liberally construed so as to provide the litigants with information essential to the expeditious and proper litigation of each of the facts in dispute ... [and] ... that the various methods of discovery as provided for in the Rules are clearly intended to be cumulative, as opposed to alternative or mutually exclusive." *Richlin v. Sigma Design West, Ltd.,* 88 F.R.D. 634, 637 (E.D. Cal. 1980) (citations omitted). Thus, if you believe that your opposing counsel is hiding or failing to produce documents, then you should consider other avenues of discovery to get the missing information, including the use of subpoenas to gather documents and obtain deposition testimony of third parties. *See* Fed.R.Civ.P. 30, 31 & 45. *See also* Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, 8 *Federal Practice and Procedure: Civil 3d*, §2012, p. 275 (2010) ("A party may inquire at a deposition or through interrogatories about the existence and location of documents and things and use this information to obtain production or inspection of the document or thing, if it is subject to discovery, by request under Rule 34 or subpoena under Rule 45").

Furthermore, Rule 26(a)(1)(A) provides that "without awaiting a discovery request," a party must provide one's opponent with the following "initial disclosures":

> (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
>
> (ii) a copy—or a description by category and location—of all documents, electrically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
>
> (iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and
>
> (iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Fed.R.Civ.P. 26(a)(1)(A). Also, Rule 26(e) states that a party must supplement its initial disclosures, as well as any written discovery responses, "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed.R.Civ.P. 26(e)(1)(A).

Because Rule 26(a)(1)(A)'s language limits initial disclosures of witnesses and documents to those which the party "may use to support its claims or defenses," some commentators have noted that "there is no requirement to disclose anything that the disclosing party will not use, which may include much that is harmful to its case." Wright, Miller & Marcus, *supra.*, 8A *Federal Practice and Procedure: Civil 3d*, §2053, p. 365. *See also id.* at p. 366 ("the narrowed scope of initial disclosure means that a party is not required to disclose material that will solely aid its opponent"). However, these same commentators have opined that Rule 26(a)(1)(A) is "not toothless." *Id.* Instead, for those that see Rule 26(a)(1)(A) as an invitation to hide or fail to produce documents or other discovery, the consequences can be severe.

For example, Rule 37 provides that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed.R.Civ.P. 37(c)(1). *See also Andrew Smith Co. v. Paul's Pak, Inc.,* 754 F. Supp. 2d 1120, 1129-30 (N.D. Cal. 2010) (because party failed to produce alleged subordination agreement either as part of its required initial disclosures under Fed. R. Civ. P. 26(a) or in response to discovery requests, party was precluded from relying upon subordination agreement in opposing motion for summary judgment); *Dry Dock, L.L.C. v. Godfrey Conveyor Co.,* 717 F. Supp. 2d 825, 829 (W.D. Wis. 2010) (same). Moreover, sanctions can be imposed for a party's failure to provide information or identify documents as part of its initial disclosures or supplemental responses, and those sanctions may include the assessment of attorneys' fees, preclusion of claims or defenses, and/or dismissal of an action. *Afreedi v. Bennett,* 517 F. Supp. 2d 521, 526-527 (D. Mass. 2007) (attorneys' fees); *Maggette,* 2010 U.S. Dist. LEXIS 91647, at *11-60 (precluded raising defense of lack of agency relationship); *Blue Cross & Blue Shield of N.C. v. Jemsek Clinic, P.A. (In re Jemsek Clinic, P.A.),* 441 B.R. 756 (Bankr. W.D. N.C. 2010) (dismissed adversary proceeding and disallowed claims in bankruptcy). However, sanctions will not be issued if the failure to disclose the information or documents was substantially justified or harmless. *See Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1066 (2d Cir. 1979); *Lavigna v. State Farm Mut. Auto. Ins. Co.,* 736 F. Supp. 2d 504, 511-512 (N.D. N.Y. 2010).

The Rambo tactic of hiding documents or discovery includes when "critical documents [are mixed] with others in the hope of obscuring significance." *See* Fed.R.Civ.P. 34, Advisory Committee Note (1980 Amendment, Subdivision (b)). In reply to this concern, Federal Rule of Civil Procedure 34 was amended in 1980 to require a producing party to produce its documents "as they are kept in the usual course of business or shall organize and label them to correspond with the categories of the request." *Id.* Further, because a producing party may mix critical documents in its business records, the courts have held that "the option afforded by Rule 34(b) as amended no longer belongs exclusively to [the producing party] is beyond serious doubt. Otherwise the very purpose of the 1980 amendment would be thwarted." *Board of Education v. Admiral Heating & Ventilating, Inc.*, 104 F.R.D. 23, 36, n. 20 (N.D. Ill. 1984)(*citing* Sherman & Kinnard, *Federal Court Discovery in the 80's-- Making the Rules Work*, 95 F.R.D. 245, 255-58 (1982)).

Consequently, if you want to ensure that your opposing counsel will not be successful in hiding or failing to produce documents and other discovery, you must be certain to disclose to the other side all your pertinent theories and discoverable information by writing more specific pleadings. *See* Wright, Miller & Marcus, *supra.*, 8A *Federal Practice and Procedure: Civil 3d*, §2053, p. 366 ("more particularity from the outset may expedite disclosure"). Also, you need to make specific document and information requests and avoid the temptation to use form interrogatories and document requests. Further, when your Rambo opponent says that a particular document doesn't exists, do not take "no" for answer; instead, validate or confirm that representation through questions at depositions regarding the existence or non-existence of that document. *See, e.g., Maggette,* 2010 U.S. Dist. LEXIS 91647, at *11-60. Moreover, you should be certain to document the many

opportunities that opposing counsel and his or her client have had to properly disclose the relevant information both as part of the party's Rule 26(a)(1) initial disclosures, its responses to written discovery requests or deposition questions, and/or as a supplement to its initial disclosures or written discovery responses, and use that documentation to support the appointment of a special master. *Id.* Additionally, you should consider "going around" the Rambo litigator and getting the documents or information from third-parties, such as former employees, competitors, consultants, suppliers, etc. Finally, you should inspect the opposing parties' original records as opposed to copies, and ask the court to compel the opposing party to segregate and organize its documents to correspond to the categories set forth in the document request. *See, e.g.*, *Admiral Heating & Ventilating,* 104 F.R.D. at 36, n. 20 ("the burden to a stranger of rummaging through what may be massive job files to find the 'smoking gun,' coupled with the inculpatory nature of the documents covered by the request, justifies placing the burden on the discovered rather than the discovering party"). Using these strategies generally proves effective in dealing with a Rambo lawyer that hides or fails to produce documents and other relevant information.

C. Frivolous Objections to Discovery

Under the Federal Rules of Civil Procedure, discovery is allowed "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1); *Josephs v. Harris Corp.,* 677 F.2d 985, 991 (3d Cir. 1982). As a result, courts have held that relevance, in the realm of discovery, must be broadly and liberally construed. *See Herbert v. Lando*, 441 U.S. 153, 177, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978); *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S. Ct. 385, 91 L. Ed. 451 (1947).

Moreover, this liberal construction of relevance exists under Rule 26. Following the 2000 amendments to Rule 26, relevance "requires the courts and the parties to focus on the actual claims and defenses involved in the action." 6 Moore's Federal Practice §26.43 (Matthew Bender 3d ed.) (*citing* Fed.R.Civ.P. 26(b)(1) advisory committee's note (2000)). Prior to 2000, Rule 26 merely required that discovery be relevant to the "subject matter involved in the pending action." *Id.* at §26.41[2][a] (*quoting* Fed.R.Civ.P. 26(b)(1) (1983)). However, there is no indication that the change in focus from relevance in relation to the "subject matter" versus "claims and defenses" "marks a substantial departure from the traditional liberal construction of the term, which is designed to assure access to the information necessary for the achievement of justice and fair trials." *Id.* at §26.41[3][c]. Thus, relevancy continues to be "broadly construed, and a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the claim or defense of any party." *Favale v. Roman Catholic Diocese of Bridgeport*, 233 F.R.D. 243, 246 (D. Conn. 2005) (*quoting Merrill v. Waffle House, Inc.,* 227 F.R.D. 467, 470 (N.D. Tex. 2005)).

Therefore, in order to prevent frivolous objections to your discovery, you initially must make certain that your interrogatories, document requests, admission requests and other discovery seeks relevant information. Currently, there exists a debate among the courts over who has the burden to prove that a particular discovery request is relevant. *Cf. Josephs v. Harris Corp.,* 677 F.2d 985, 992 (3d Cir. 1982) ("the party resisting discovery 'must show specifically ... how each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive.'"); *Dockery v. Legget*, C.A. No. 09-732, 2012 U.S. Dist. LEXIS 2248, at *9, n. 3 (W.D. Pa. Jan. 9, 2012) (same); *McLeod, Alexander, Powell and Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990) (same); *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 511-512 (N.D. Ia. 2000) (same); *Oleson v. Kmart Corp.*, 175 F.R.D. 560, 565 (D. Kan. 1997) (same); *G-69 v. Degnan*, 130 F.R.D. 326, 331 (D. N.J. 1990) (same); *Flora v. Hamilton*, 81 F.R.D. 576, 578 (M.D. N.C. 1978) (same) *with Carnes v. Crete Carrier Corp.,* 244 F.R.D. 694, 696 (N.D. Ga. 2007) ("The party seeking the discovery has the burden of showing

that the requested material is relevant."); *Hunter's Ridge Golf Co. v. Georgia-Pacific Corp.,* 233 F.R.D. 678, 680 (M.D. Fla. 2006) (same); *Etienne v. Wolverine Tube, Inc.,* 185 F.R.D. 653, 656 (D. Kan. 1999) (same); *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.,* 174 F.R.D. 609, 631 (M.D. Pa. 1997) (same); *Corrigan v. Methodist Hosp.,* 158 F.R.D. 54, 56 (E.D. Pa. 1994) (same). Nevertheless, if the information sought is irrelevant, a party cannot be compelled to produce it during discovery. *See*, *e.g., Carnes,* 244 F.R.D. at 698.

It is generally recognized that "general objections to discovery are, at the very least, disfavored." *Phoenix Drilling, Inc. v. East Res., Inc.*, C.A. No. 1:11CV08, 2012 U.S. Dist. LEXIS 33093, at *8-9 (N.D. W.Va., Mar, 13, 2012)(*citing PLX, Inc. v. Prosystems, Inc.,* 220 F.R.D. 291 (N.D. W.Va. 2004); *Momah*, 164 F.R.D. 412; *Josephs*, 677 F.2d 985). Moreover, the use of general objections can support the imposition of sanctions on the basis that they constitute a violation of Rule 26(g) which mandates the signature of the attorney certifies that the objection is "not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." Fed.R.Civ.P. 26(g)(1)(B)(ii); *St. Paul Reinsurance*, 198 F.R.D. 515-518. As the Honorable Mark W. Bennett, Chief Judge of the United States District Court of Northern Iowa, explained in *St. Paul Reinsurance*:

> ... This court will not tolerate these type of objections because not only do they disrespect the judicial process, but such objections thwart discovery's purpose of providing both parties with "information essential to the proper litigation of all relevant facts, to eliminate surprise, and to promote settlement". *Jochims[v. Isuzu Motors, LTD.]*, 145 F.R.D. 507[,] 509[(S.D. Iowa 1992)]. The ability to conduct full, fair and thorough discovery goes to the heart and soul of our civil justice system. "Rambo" style obstructionist discovery tactics like those employed here, if not stopped dead in their tracks by appropriate sanctions, have a virus like potential to corrupt the fairness of our civil justice system.
>
> In this light, abuse of the discovery process is a very serious matter. Indeed, these objections are some of the most obstructionist, frivolous objections to discovery that the undersigned has seen either in the practice of law, as a United States Magistrate Judge or as a United States District Court Judge. Because of the obstructionist nature of these objections, the court is obligated to impose sanctions. *See* Fed.R.Civ.P. 26(g)(3) (providing that if without substantial justification a certification is made in violation of Rule 26, the court shall impose an appropriate sanction) (emphasis added).

St. Paul Reinsurance, 198 F.R.D. at 517.

In the *St. Paul Reinsurance* case, the sanction imposed by Chief Judge Bennett was a not a fine or other monetary sanction. Rather, Chief Judge Bennett required plaintiff's outside counsel to "write an article explaining why it was improper to assert the objections that he asserted" and "submit the article to both a New York and Iowa bar journal ... [within] 120 days from December 1, 2000," as well as "an affidavit stating that he alone researched, wrote, and submitted the article for publication, indicating which journals he submitted the article to, as well as submitting a copy of the article to the [Iowa federal] court." *St. Paul Reinsurance*, 198 F.R.D. at 518. However, what is important to note about the case is that upon becoming aware of the plaintiffs' discovery objections, Chief Judge Bennett took up this matter "*sua sponte* pursuant to Rule 26(g) of the Federal Rules of Civil Procedure" "in order to curb the abuse of discovery" that had occurred. *Id.* at 511.

The *St. Paul Reinsurance* case and others like it should be a wake-up call to the bar that the Rambo tactic of general discovery objections will not be tolerated. Moreover, bringing such objections to the Court's attention by an appropriate motion to compel is the most effective way to deal with such tactic. However, to be effective, one must make certain that your interrogatories, document requests and other admission requests are properly drafted to seek only relevant information.

D. Improper Deposition Conduct: Coaching the Witness and Instructing a Witness Not to Answer a Question

Depositions are considered to be the cornerstone of our civil justice system here in the United States. As the Honorable Eduardo C. Robreno of the United States District Court for the Eastern District of Pennsylvania recently noted:

> More than 98 percent of all civil cases filed in the federal courts result in disposition by way of settlement or pre-trial adjudication. Very often, these results turn on evidence obtained during depositions. Thus, depositions play an extremely important role in the American system of justice.
>
> Although the Federal Rules of Civil Procedure inform the procedures to be followed and the duties and rights of parties, witnesses, and counsel during and in connection with depositions, the rules are largely self-executing. Depositions usually occur at a lawyer's office, outside the view of the public and without judicial super-vision. Although, in appearance, more informal than a court proceeding, they are an integral part of the Court's procedures and the staple of modern litigation. For the process to succeed, it is essential that the parties, attorneys, and witnesses participating in depositions conduct themselves with civility and decency.

GMAC Bank, 248 F.R.D. at 185.

Unfortunately, depositions have become fertile ground for Rambo litigators. Generally speaking, Rambo lawyers do not prepare their witnesses or believe that their witnesses' testimony will not be favorable. As a result, Rambo litigators make speaking objections in order to coach their witnesses on how to respond to questions or distract opposing counsel from getting answers to his or her questions. Also, Rambo lawyers instruct their witnesses not to answer questions at all, even though no privilege issues exist. Both of these deposition tactics are considered to be the most common of the Rambo-style litigation tactics and have emerged as a "serious concern" to the courts and commentators alike. *See* Wright, Miller & Marcus, *supra.,* 8A *Federal Practice and Procedure: Civil 3d*, §2113, p. 547 & n. 19, and the cases cited therein.

Federal Rule of Civil Procedure 30 governs depositions by oral examination and sets forth a detailed protocol governing the conduct of parties, counsel, and deponents (including non-parties) at depositions. Fed.R.Civ.P. 30. Rule 30 provides that "examination and cross-examination of a deponent [shall] proceed as they would at trial under the Federal Rules of Evidence." Fed.R.Civ.P. 30(c)(1). Further, Rule 30 provides that all objections must be "noted on the record" and "stated concisely in a nonargumentative and nonsuggestive manner," and that a deponent must answer all questions unless counsel expressly instructs the deponent not to answer or moves to suspend the deposition. Fed.R.Civ.P. 30(c)(2).

Under Rule 30, a deponent is not allowed to interpose objections himself. *GMAC Bank*, 248 F.R.D. at 191. Also, Rule 30 does not allow a deponent to provide evasive or uncooperative answers. *Id.* Additionally, Rule 30 bars a witness or its counsel from intentionally prolonging a deposition to further burden the litigation. *Id.*

As written, Rule 30 of the Federal Rules of Civil Procedure provides counsel with three choices when faced with improper questions or other Rambo litigation tactics at a deposition. First, counsel may object to the question and allow the deposition to proceed while preserving the objection. Fed.R.Civ.P. 30(c)(2). Second, counsel may instruct the witness not to answer, generally to preserve a privilege or enforce a court-ordered limitation. *Id.* Third, counsel may suspend the proceedings and bring a motion to terminate or limit the deposition if the deposition is being conducted in bad faith or in order to unreasonably annoy, embarrass, or oppress the deponent or a party. Fed.R.Civ.P. 30(d)(3)(A).

Rule 30 speaks in absolute terms, permitting counsel to instruct the witness not to answer "only" 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). However, some courts have interpreted the rule to provide greater flexibility. *Cf. Hall v. Clifton Precision*, 150 F.R.D. 525, 531 (E.D. Pa. 1993) ("Counsel shall not direct or request a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court."), *with Birdine v. City of Coatesville*, 225 F.R.D. 157, 158 (E.D. Pa. 2004) ("we believe that *Hall* 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"); *Prudential-LMI Commercial Ins. Co. v. Windmere Corp.*, No. 94-0197, 1995 U.S. Dist. LEXIS 678, 1995 WL 37635, at *2 (E.D. Pa. Jan. 23, 1995) (certain courts "take the view that a deponent need not answer if the objection is that the question is irrelevant, argumentative, or misleading"). *See also Acri v. Golden Triangle Mgmt. Acceptance Co.*, No. 93-12188, 142 Pitt. L. J. 225 (C.C.P. Allegheny 1994) (comparing the two approaches); *Resolution Trust Corp. v. Dabney*, 73 F.3d 262 (10th Cir. 1995) (it is inappropriate for an attorney to instruct a witness not to answer questions on grounds of relevance); Fed.R.Civ.P. 32(d)(3)(B) (relevance is one of the objections that is not waived by failure to assert it at during a deposition).

Generally, there are eleven grounds upon which a party or its counsel may state an objection to the form of a question posed at a deposition. Those grounds are: (1) compound; (2) asked and answered; (3) overbroad/calls for a narrative; (4) calls for speculation; (5) argumentative; (6) vague or unintelligible; (7) assumes facts not in evidence; (8) misstates the record; (9) calls for an opinion from an unqualified witness; (10) leading where not permitted; and (11) lack of foundation. Bus. & Com. Litig. Fed. Cts. §20:59 (2d ed. 2005) (*citing Boyd v. Univ. of Maryland Med. Sys.*, 173 F.R.D. 143, 147 n. 8 (D. Md. 1997)). Relevancy is generally regarded as "not a valid objection under Rule 30(d)(1)." *In re BWP Gas, LLC*, 2006 Bankr. LEXIS 2800, at *4 (*citing Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995)).

Further, "the making of excessive number of unnecessary objections may itself constitute sanctionable conduct ... ." Fed.R.Civ.P. 30, Adv. Com. Note (1993 Amendment (Subdivision 30(d)(3)). *See, e.g.*, *Phillips v. Manufacturers Hanover Trust Co.,* No. 92 Civ. 8527 (KTD), 1994 U.S. Dist. LEXIS 3748 (S.D. N.Y. Mar. 29, 1994); *In re BWP Gas, LLC*, 2006 Bankr. LEXIS 2800, at *4. Consequently, if opposing counsel asserts objections beyond the eleven recognized grounds and refuses to stop such conduct after you discuss the matter with him or her, then you need to stop the deposition, make a telephone call to the court or special master, and/or file an appropriate motion to compel, as permitted by Rule 30(d)(3)(A). Fed.R.Civ.P. 30(d)(3)(A).

Similarly, absent some court ordered limitation, instructions not to answer particular questions are *per se* improper unless interposed on the basis of privilege (*i.e.*, attorney-client privilege, work product privilege, spousal privilege, etc.). *See, e.g., Quantachrome Corp. v. Micromeritics Instrument Corp.*, 189 F.R.D. 697, 700 (S.D. Fla. 1999) ("it is improper to instruct a witness not to answer a question based on form and relevancy objections"); *Standard Chlorine of Del., Inc. v. Sinibaldi*, No. 91-188-SLR, 1994 U.S. Dist. LEXIS 3388 (D. Del. Mar. 21, 1994) (instruction not to answer based on relevance is a "direct violation of Rule 30(d)(1)"). If a Rambo litigator instructs his or her witness not to answer, you should do the following:

- Ask the Rambo litigator to clearly state that the reasons for the instruction.
- If the reason given for the instruction is other than privilege, remind the attorney of the law governing the proper use of instructions not to answer and ask him or her to reconsider his instruction.
- Confirm with the witness that he or she is following the attorney's instruction not to answer.
- If the instruction is based on privilege, ask the witness follow-up questions to confirm the basis for privilege and/or its waiver.
- Preserve your right to seek judicial relief.

Witness coaching has been the subject of much debate among the courts and commentators. *See* Current Development 2007-2008: *Muzzling Rambo Attorneys: Preventing Abusive Witness Coaching by Banning Attorney-Initiated Consultations with Deponents*, 21 Geo. J. Legal Ethics 1129 (2008). The seminal case on the issue is the opinion of the Honorable Robert S. Gawthrop, III, of the United States District Court for the Eastern District of Pennsylvania, in *Hall*. In *Hall*, plaintiff's counsel constantly interrupted the deposition to privately confer with his client and to review documents with him before the plaintiff answered questions regarding the documents. *Hall*, 150 F.R.D. at 526. Eventually, defense counsel adjourned the deposition and counsel's conduct to the court's attention. *Id*. Judge Gawthrop reasoned that a deposition was meant to be a question-and-answer conversation between the deposing lawyer and the witness, and that where the witness' own lawyer acted as an intermediary, the answers of the witness could be colored. *Id*. Because of this concern, Judge Gawthrop prohibited conferences between the witness and counsel both during the deposition and during recesses. *Id*. Further, Judge Gawthrop ruled that: (1) a lawyer and client do not have an absolute right to confer during the course of the client's deposition and that neither lawyer nor client may initiate private conferences once the deposition is underway, whether in the course of the deposition or upon a recess; (2) a lawyer may prepare a client for his/her deposition, but that once that deposition commences, the witness is to answer all questions without intervention or advice by the lawyer; and (3) the witness should ask the deposing lawyer, and not his or her own, to clarify or further explain if the witness does not understand the question. *Id*. at 528.

The *Hall* decision has received mixed reaction from other courts, judges and the states. For example, several states have adopted the language from *Hall* in their respective rules of civil procedure. *See, e.g.,* Alaska R. Civ. P. 30 (d)(1) ("Continual and unwarranted off the record conferences between the deponent and counsel following the propounding of questions and prior to the answer or at any time during the deposition are prohibited."); Del. Super. Ct. R. Civ. P. 30(d)(1) ("From the commencement until the conclusion of a deposition, including any recesses or continuances thereof of less than five calendar days, the attorney (s) for the deponent shall not consult or confer with the deponent regarding the substance of the testimony already given or anticipated to be given except for the purpose of conferring on whether to assert a privilege against testifying or on how to comply with a court order or suggest to the deponent the manner in which any question should be answered); N.J. CT R. 4:14-3(f) ("Once the deponent has been sworn, there shall be no communication between the deponent and counsel during the course of the deposition while testimony is being taken except with regard to the assertion of a claim of privilege, a right of confidentiality or a limitation pursuant to a previously entered court order.); S.C. R. CIV. P. 30(j)(5)-(6) ("(5) Counsel and a witness shall not engage in private, off-the-record conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order. (6) Any conferences which occur pursuant to, or in violation of, section (5) of this rule are proper subjects for inquiry by deposing counsel to ascertain whether there has been any witness coaching and, if so, to what extent and nature.). Additionally, some but not all judges from the Eastern District of Pennsylvania and other jurisdictions have adopted the *Hall* guidelines in their entirety. *See Abu Dhabi Commer. Bank v. Morgan Stanley & Co.,* Case No. 08 Civ. 7508 (SAS), 2011 U.S. Dist. LEXIS 116840, at *25-26 (S.D. N.Y., Sept. 21, 2011); *Frazier v. SEPTA*, 161 F.R.D. 309, 315 (E.D. Pa. 1995); *O'Brien v. Amtrak*, 163 F.R.D. 232 (E.D. Pa. 1995); *Plaisted v. Geisinger Med. Ctr.*, 210 F.R.D. 527 (M.D. Pa. 2002).

On the other hand, several courts, including other Eastern District of Pennsylvania judges, have adopted only a limited form of the *Hall* guidelines. *See, e.g., Birdine*, 225 F.R.D. at 158 (citing *Hall* in setting down guidelines, although refusing to impose the full range of *Hall* restrictions); *Prudential Ins. Co. of Am. v. Nelson*, 11 F. Supp. 2d 572 (D. N.J. 1998) (same); *Damaj v. Farmers Ins. Co.*, 164 F.R.D. 559 (N.D. Okla. 1995) (same); *United States v. Phillip Morris Inc.*, 212 F.R.D. 418, 420 (D. D.C. 2002) (prohibiting all attorney-deponent

conferences at breaks and overnight recesses when the deposition is held on consecutive days); *Okoumou v. Safe Horizon*, 2004 U.S. Dist. LEXIS 19120 (S.D. N.Y. 2004) (prohibiting attorney-deponent conferences when initiated by the defending attorney); *McKinley Infuser, Inc. v. Zdeb*, 200 F.R.D. 648, 650 (D. Colo. 2001) (prohibiting attorney-deponent conferences while a question is pending); *In re Stratosphere Corp. Sec. Litig*., 182 F.R.D. 614 (D. Nev. 1998) (same); *Collins v. International Dairy Queen, Inc.*, 1998 U.S. Dist. LEXIS 8254 (M.D. Ga. 1998) (restricting attorney-deponent conferences only when documents are shown to the deponent). Moreover, other courts have refused to adopt any of the *Hall* guidelines over ethical concerns and the unintended consequence of potential abuse by Rambo litigators who are asking questions at depositions. *Acri*, 142 Pitts. L. J. at 225 (refused to follow the *Hall* guidelines finding that the adversarial application of the *Hall* rules could have unintended consequences on the deponent such as the unethical deposition interrogator using the rules against the witness); *Circle Group Internet, Inc. v. Atlas, Pearlman, Trop & Borkson, P.A.*, No. 03-C-9004, 2004 WL 406988, at *2-3 (N.D. Ill. March 2, 2004) (same); *AmerisourceBergen Drug Corp. v. CuraScript, Inc.,* 83 Pa. D. & C.4th 362 (C.C.P. Phila. 2007) ("In Pennsylvania, we do not have a 'no conference' rule.").

Because of the lack of uniformity among jurisdictions over deposition conduct rules and procedures, a more effective way to deal with improper deposition conduct lies in the manner in which the deposition is to be recorded. Federal Rule of Civil Procedure 30(b)(3) provides as follows:

> (3) Method of Recording.
>
> > (A) Method Stated in the Notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.
> >
> > (B) Additional Method. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

Fed.R.Civ.P. 30(b)(3)(A) & (B).

As written, Rule 30 explicitly provides that depositions can be videotaped. Fed.R.Civ.P. 30(b)(3)(A) ("Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. "). Moreover, parties no longer need a court order or opposing counsel's stipulated consent to take a videotape deposition. *See Gillen v. Nissan Motor Corp.,* 156 F.R.D. 120, 122 (E.D. Pa. 1994). Instead, Rule 30(b)(3)(A) provides that "[a]ny party may arrange to transcribe a deposition," and Ruler 30(b)(3)(B) states that "[w]ith prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice," provided that the designating party bears the expense of any additional record or transcript absent a contrary court order. Fed.R.Civ.P. 30(b)(3)(A) & (B). As such, by no longer requiring either stipulation of counsel or court order for nonstenographic recording, Rule 30 allows for videotape recording and incorporates such recording within a party's general right to take depositions of other parties absent a protective order. *Gillen*, 156 F.R.D. at 122. *See also Weiss v. Wayes*, 132 F.R.D. 152, 155 (M.D. Pa. 1990) (courts have long held that "the use of videotaped testimony should be encouraged and not impeded because it permits the jury to make credibility evaluations not available when a transcript is read by another"); *Drake v. Benedek Broad. Corp.,* No. Civ. A. 99-2227, 2000 U.S. Dist. LEXIS 1418, at *2 (D. Kan., Feb. 9, 2000) (A party "has no burden to justify the decision to videotape the deposition").

The reasons why videotape recording of depositions is permissible are fairly obvious. "Unlike a transcript, a videotape addresses important credibility concerns, such as 'demeanor and appearance of the wit-

ness.' Acknowledging that words themselves may carry only a limited meaning, courts have also held that 'facial expressions, voice inflection and intonation, gestures, 'body language' … may all express a message ….'" *Fanelli v. Centenary College*, 211 F.R.D. 268, 270 (D. N.J. 2002) (citations omitted). Moreover, in the context of abusive conduct, a videotape deposition provides the court or special master with a clearer picture of what occurred. *See, e.g., GMAC Bank, supra.* As such, videotaping depositions is considered one of the best ways to combat abusive conduct at depositions. Shartel*, supra.,* Inside Litig.

Another option that should be considered is the appointment of a special master. Under Federal Rule of Civil Procedure 53, a special. master appointment is the exception not the rule. *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550, 559 (W.D. Tenn. 2003). However, where the parties' conduct prior to the appointment of a special master demonstrates that they are unable to proceed with discovery without impartial supervision, then a special master appointment is proper. *See Ruiz v. Estelle*, 679 F.2d 1115, 1159-63 (5th Cir.), *modified on other grounds*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042, 75 L. Ed. 2d 795, 103 S. Ct. 1438 (1983); *Gary W. v. Louisiana*, 601 F.2d 240, 244-45 (5th Cir. 1979); *First Iowa Hydro Elec. Coop. v. Iowa-Illinois Gas & Elec. Co.*, 245 F.2d 613 (8th Cir.), *cert. denied*, 355 U.S. 871, 2 L. Ed. 2d 76, 78 S. Ct. 122 (1957); *Harmston v. City & County of San Francisco*, No. C 07-01186 SI, 2007 U.S. Dist. LEXIS 87144, at *29 (N.D. Cal., Nov. 6, 2007); *In re Sunrise Sec. Litigation*, 124 F.R.D. 99, 100 (E.D. Pa. 1999). *See also* Wright & Miller*, Federal Practice and Procedure: Civil §2605,* at 790-791 ("use of a special master to supervise discovery may still be appropriate and useful in unusual cases"). Indeed, "[d]iscovery is an area where special masters are frequently appointed either because the problems are complicated or the parties are recalcitrant." *Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 560-561 (N.D. Cal. 1987)(*citing United States v. American Tel. & Tel. Co.*, 461 F. Supp. 1314, 1348-49 (D. D.C. 1978); *Fisher v. Harris, Upham & Co.*, 61 F.R.D. 447, 449 (S.D. N.Y. 1973), *appeal dismissed mem.*, 516 F.2d 896 (2d Cir. 1975)). Moreover, when appointing a master, the court has the authority under Federal Rules of Civil Procedure 11 and 26(g), as well as its inherent powers, to apportion the special master's fees and costs upon the party whose abusive conduct led to the master's appointment. *Nat'l Ass'n of Radiation Survivors*, 115 F.R.D. at 562.

Nonverbal cues or signals by lawyers at a deposition may be as significant as those communicated verbally. *See, generally,* Paul M. Lisnak & Eric Oliver*, Courtroom Power: Communication Strategies for Trial Lawyers*, Professional Education Systems, Inc. (Colorado Springs, CO) 2001. Unfortunately, lawyers' nonverbal cues or signals are generally not recorded by the court reporter or videographer. As such, if you are faced with a Rambo lawyer who is using signals or cues at a deposition, then you need to put that inappropriate conduct on the record in a clear and neutral way. *See* Maureen B. Collins, *Defending the Deposition*, Ill. B.J. (July 2002), at p. 379.

Sanctions for violating Rule 30 are governed by Rule 37(a) and Rule 30(d). As for Rule 37(a), if "a deponent fails to answer a question asked under Rule 30," or provides an answer that is "evasive or incomplete," then a motion to compel the deposition testimony may be filed. Fed.R.Civ.P. 37(a)(3)(B)(i) & (a)(4). Further, upon the granting of a motion to compel, "the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed.R.Civ.P. 37(a)(5)(A). Sanctions under Rule 37(a)(5)(A) serve a compensatory, not punitive, purpose. *See Hutto v. Finney*, 437 U.S. 678, 690 n.14, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978) ("The award . . . makes the prevailing party whole for expenses caused by his opponent's obstinacy."). As a result, Rule 37(a) sanctions are not appropriate if "the movant filed the motion before attempting in good faith to obtain the ... discovery without court action," "the opposing party's nondisclosure ... was substantially justified," or "other circumstances make an award of expenses unjust." *GMAC Bank*, 248 F.R.D. at 193 (*citing* Fed.R.Civ.P. 37(a)(5)(A)(i)-(iii)).

In contrast, if a person's conduct is so egregious that it "impedes, delays, or frustrates the fair examination of the deponent," then Rule 30(d) empowers the court to impose an "appropriate sanction" on that person, "including the reasonable expenses and attorney's fees incurred by any party." Fed.R.Civ.P. 30(d)(2). Rule 30(d)(2) does not define "appropriate sanction" or "reasonable expenses and attorney's fees." However, courts have found that an award of costs and fees under Rule 30(d)(2) may be used to compensate the party aggrieved by the frustration of the deposition. *GMAC Bank*, 248 F.R.D. at 193; *Plump v. Kraft Foods N. Am., Inc.*, No. 02-7754, 2003 U.S. Dist. LEXIS 23112, 2003 WL 23019166, at *1 (N.D. Ill. Dec. 23, 2003) ("[C]osts and attorneys' fees awarded are those incurred as a result of the frustration of fair deposition examination. Thus, time that may have been appropriately spent in order to represent the client might not necessarily qualify as time that can be reimbursed as a sanction." (emphasis added)). Accordingly, using their discretion, courts have fashioned a variety of remedies under Rule 30(d)(2). *See, e.g., Biovail Labs., Inc. v. Anchen Pharm., Inc.*, 233 F.R.D. 648, 654 (C.D. Cal. 2006) (requiring payment of costs and attorney's fees incurred "in preparing this discovery motion, as well as . . . costs incurred in the first deposition" and also "costs attendant to resetting Dr. Seth's deposition, including travel costs for defendant's counsel"); *Plump*, 2003 U.S. Dist. LEXIS 23112, 2003 WL 23019166, at *1 (requiring plaintiff to "pay the costs and fees incurred by defendant . . . in preparing, filing and arguing [the] Motion for Sanctions . . . and in taking the second session of [plaintiff's] deposition"); *Morales v. Zondo, Inc.*, 204 F.R.D. 50, 57-58 (S.D.N.Y. 2001) (requiring payment of "the transcript cost of [the] deposition," "[counsel]'s normal hourly rate multiplied by the number of hours during which he questioned [the deponent]," and "$1,500 to the Clerk of the Court.").

Under Rule 37(a)(5)(A), the attorney advising the party to either not answer a question or provide an evasive or incomplete answer can be subject to sanctions. Fed.R.Civ.P. 37(a)(5)(A); *GMAC Bank*, 248 F.R.D. at 194. In addition, an attorney may be sanctioned under Rule 30(d)(2) for engaging in conduct that "impedes, delays, or frustrates the fair examination of the deponent." *GMAC Bank*, 248 F.R.D. at 194. *See also In re BWP Gas*, 2006 Bankr. LEXIS 2800, at *2-4 (Bankr. E.D. Pa. 2006) (noting that Rule 30(d)(2) can apply to "any . . . person involved in the deposition"); *Redwood v. Dobson*, 476 F.3d 462, 469-70 (7th Cir. 2007) (applying Rule 30(d)(2) sanctions to an attorney for failing to adjourn a futile deposition and improperly instructing his client not to respond to questions). The imposition of sanctions under Rules 30(d)(2) and 37(a)(5)(A) does not require a finding of bad faith on the part of counsel. *GMAC*, 248 F.R.D. at 196 (rejecting "the notion of a bad faith requirement" under Rule 37(a)(5)(A)); *Sicurelli v. Jeneric/Pentron, Inc.*, No. 03-4934, 2005 U.S. Dist. LEXIS 42227 (E.D. N.Y. Dec. 30, 2005) ("[F]or purposes of Rule [30(d)(2)], a clear showing of bad faith on the part of the attorney against whom sanctions are sought is not required. Instead, the imposition of sanctions under Rule [30(d)(2)] requires only that the attorney's conduct frustrated the fair examination of the deponent."); *Pucket v. Hot Springs Sch. Dist. No. 23-2*, 239 F.R.D. 572, 588 (D. S.D. 2006) (same)). Moreover, sanctions against counsel may be warranted for engaging in improper deposition conduct, as well as failing to prevent the deponent from doing the same. *GMAC*, 248 F.R.D. at 195-199.

IV. Practical Tips on How to Deal with a Rambo Litigator

A. The Lack of the Courts' Tolerance with Dirty Litigation Tricks

Over the years, courts have become more vocal in expressing their disapproval of incivility among counsel. For example, the Honorable Jose A. Gonzalez, Jr., United States District Court for the Southern District of Florida, made the following statement in his opinion addressing certain discovery motions that were before him:

> In closing, the primary purpose of the Rules of Civil Procedure is to "secure the just, speedy, and inexpensive determination of every action." Fed.R.Civ.P. 1. The constant sniping and bickering

> between the instant parties have operated to draw out this action and increase the expense at every turn, effectively defeating the very purpose for which we have the Rules and a liberal discovery process.
>
> The Court has previously noted that there is no love loss between these parties. That said, the Court refuses to believe that it must actually issue an order for the parties to play nice. The Court understands that the parties are competitors in their field. Nonetheless, if counsel for both parties will attempt to inject a little more civility into this civil action, perhaps the litigation will flow more smoothly and expeditiously toward resolution.

Quantachrome Corp., 189 F.R.D. at 701-702. Further, to ensure that counsel practiced "civility," Judge Gonzalez included in the order the following:

> At the December 2, 1999, Status/Scheduling Conference, counsel for Quantachrome and counsel for Micromeritics are ORDERED to commence the conference by smiling and bidding each other "Good Morning" in open court.

Id. at 702.

B. Practical Tips

Obviously, counsel should not have to be ordered by a court to practice "civility." However, what should one do when faced with a Rambo litigator? Here are nine tips to keep in mind when dealing with a Rambo lawyer.

1. Know Your Case

As one commentator has noted:

> Incivility often masks a lawyer's insecurity or lack of proficiency. For example, if one's witnesses are adequately prepared to testify, there is no need in a deposition to 'coach' them improperly or obstruct them from answering unobjectionable questions.

Green, *supra*, 24 No. 4 Litig. at 48-49. As such, the best way to deal with a Rambo litigator is to know the facts of your case and the controlling legal principles. Also, you should know the relevant documents and understand what witnesses will say under oath. That way, when you are confronted with a Rambo litigator, you will not be tempted to mask your own insecurities by escalating the level of incivility.

2. Stay Focused and Remain Calm

Many litigators use Rambo tactics to get their opposing counsel distracted, frustrated or angry, so that their opponents fail to uncover all relevant information. Consequently, it is always important to remain calm and stay focused when dealing with a Rambo litigator. If opposing counsel is not cooperating in the production of documents or other discovery that you believe is relevant, don't get into unnecessary arguments with opposing counsel. Instead, find other ways to gather the information, such as from third-parties and witnesses, and stay focused on what's important: that is, discovering all relevant information and witnesses.

3. Do Not Use Rambo Tactics

A corollary to staying focused and calm is avoid responding with or otherwise using Rambo tactics. Naturally, when someone insults you, you are inclined to insult them back. Similarly, when opposing counsel yells at you, you feel compelled to do the same. However, responding with those tactics is not the best way to handle a Rambo lawyer. Instead, by returning the insult or getting into a shouting match, you are engaging in the same tactics as the Rambo lawyer and are likely to be sanctioned for such conduct. *See, e.g.*, *Gonzales*, 733

N.E.2d at 587 (after one attorney called opposing counsel "a piece of shit," and opposing counsel responded by calling that attorney "a total asshole," both were publicly reprimanded for their unprofessional conduct before a magistrate judge).

4. Don't Turn Every Dispute into a Battle

In civil litigation, every lawyer has numerous tasks that must be completed in order to prove one's case and meet case management deadlines and client demands. However, contrary to the mind-set of a Rambo lawyer, not every extension request or location of a deposition needs to turn into a major battle. In other words, there are some issues that should never become a dispute. Pick your battles carefully and don't turn every issue into a dispute that must be resolved by the court.

5. Know Your Judge and His or Her Rules and Procedures

In addition to the federal and state civil procedure rules, many courts and judges have their own rules, procedures and preferences that must be followed, especially with regard to discovery and other pre-trial matters. Indeed, many judges have published their own standard case management orders which adopt the same or more restrictive discovery limitations that appear in the federal and state civil procedure rules. It is important that you know what the particular requirements, procedures and preferences are of the court and judge where your litigation matter is pending, so that you can tailor the presentation of your issues and not have your motions to compel denied summarily. Knowing and following the judge's rules, procedures and preferences will place you in a better position with the court and will more often than not defeat many of the tactics employed by a Rambo litigator.

6. Maintain a Rambo Litigation File

When dealing with a Rambo lawyer, you should document all communications in writing. This is not to say that you should insult or make *ad hominem* attacks against opposing counsel. Instead, you should routinely confirm in writing your communications with a Rambo litigator, including any abusive or inappropriate language or conduct that he or she has displayed, and respectfully ask that the Rambo litigator stop such behavior. In extreme cases where the Rambo litigator insists on continuing to engage in such inappropriate conduct, you may need to limit your communications with opposing counsel outside the courtroom to strictly written ones. In either case, documenting the Rambo lawyer's tactics is important, so that if you need to seek the assistance of the court or others, you'll have something more than your word of what transpired. *See* Jean M. Cary, *supra.,* 25 Hofstra L. Rev. at 595-96 (suggests maintaining a "Rambo file" which could be used at fee hearings to impose sanctions and penalties).

7. Involve the Court and the Disciplinary Committee

There may come times when you'll need to involve the judge or the court to address certain Rambo litigation tactics. However, be judicious in filing motions with the court. Not every Rambo act should be resolved by way of a motion to compel or for sanction. Moreover, repeatedly filing motions can, in and of itself, constitute Rambo litigation tactics. In extreme cases, you may need to report the Rambo lawyer to your local disciplinary committee. *See* Cary, *supra*., 25 Hofstra L. Rev. at 596 ("Lawyers must stop their passivity about Rambo depositions. Not only should they report name-calling, demeaning gestures, and personal threats occurring during depositions to judges and bar disciplinary committees, but they should create an atmosphere in their firm where young associates will feel comfortable to complain about their mistreatment by opposing attorneys in depositions.").

8. Be Honest and Don't Exaggerate

Whenever you present a dispute or issue to the judge or court, you must stay true to the facts and never exaggerate. Otherwise, you'll never obtain the court's trust. Leave it up to the Rambo litigate to engage in exaggeration and make *ad hominem* attacks against you and others. In the end, you must always remain civil and professional and let the Rambo litigator's own tactics expose his or her dishonesty and incivility.

9. Educate Your Client

Often times, as lawyers, we think about engaging in Rambo civil litigation tactics, and many times we have clients who insist that we use such tactics as part of our overall litigation strategy. However, it is important for you to educate your client as to your opposing counsel's Rambo tactics and explain why those tactics will not impede your ability to zealously represent the client's interests. Also, you should explain to your client why ethically you will not be responding in kind to such tactics, including the fact that you and your client may face sanctions or other discipline. Additionally, you should advise your client that Rambo tactics merely increase the cost of litigation and generally result in unfavorable consequences for those attorneys and parties who use them. *See* O'Connor, *supra*., 76 Wash. U. L. Q. at 9; Kaye, *supra.*, 67 Fordham L. Rev. at 8. If, after such consultation, your client still insists that you use Rambo tactics, you have to be prepared to terminate the attorney-client relationship. *See* Model Rule of Professional Conduct 1.16(b)(4) & (7) ("(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: … (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; … or (7) other good cause for withdrawal exists."). In the end, the more your client is educated on the risks and other negative consequences of using Rambo tactics and why your opposing counsel's use of such tactics is not going to impede your ability to zealously represent the client's interests, the less likely you're going to feel compelled to engage in Rambo tactics yourself.

V. Conclusion

Although many of us aspire to be Atticus Finch, an equal number of lawyers believe that being a Rambo lawyer is equally important, especially when representing clients who are perceived to be at a disadvantage to larger, well-financed clients such as corporations and insurance companies. However, with more judges willing to discipline counsel and parties for engaging in unprofessional conduct and with clients realizing that engaging Rambo lawyers to "scorch the earth" can be quite expensive and unprofitable, the rise of Rambo litigators may have peaked. However, the next time you are forced to deal with a Rambo lawyer, keep this article in mind and you will definitely come out ahead.