SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DANIEL COHEN, *et al.*	:	
	:	
Plaintiffs,	:	
	:	
v.	:	**Civil Action No.: 2018 CA 006284 M**
	:	**Judge Florence Y. Pan**
MEDSTAR WASHINGTON HOSPITAL CENTER	:	**Next Event: December 20, 2019, 11:00am Close of Discovery and Status Conference**
	:	
Defendant.	:	
	:	

PLAINTIFFS' OPPOSED MOTION FOR SANCTIONS RELATING TO DEFENDANT'S RULE 30(B)(6) DEPOSITION

Pursuant to Superior Court Civil Rules 30(d)(2)[1] and 37(b), the plaintiffs move for sanctions against the defendant Medstar Washington Hospital Center (MWHC) and its counsel for repeated misconduct by defense counsel and the witness at the deposition of the hospital's corporate spokesperson that flouted the court's ruling denying the defendant's motion for protective order and that frustrated the search for the truth in this case.

In the course of a little over two hours, defense counsel issued speaking objections more than three dozen times and directed the witness not to answer questions some two dozen times. She committed many other acts of deposition obstruction in violation of the rules of procedure. She baselessly accused plaintiff's counsel of falsifying evidence and trying to trick the witness by allegedly showing him someone else's MRI study. She was told her conduct was improper but kept doing it. This is an experienced, seasoned attorney who has to know that the rules don't

[1] Superior Court Civil Rule 30(d)(2) provides: "(2) *Sanction*. The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent."

countenance what she did. For his part, the defendant's spokesperson played along with the obstruction and joined in the efforts of his counsel to frustrate the deposition on the topics approved by this Court.

In 34 years of practice, undersigned plaintiff's counsel has experienced nothing like this before at a deposition, and therefore plaintiffs feel they have no choice but to seek serious sanctions against both the defendant and its counsel, a remedy never sought before in the undersigned's career.

BACKGROUND

A key issue in this medical negligence case focuses on an informal "curbside" consultation that urological surgeon Jonathan Hwang claims he had with a radiologist at MWHC that allegedly confirmed Dr. Hwang's impression that a mass in Mr. Cohen's pelvis emanated from a seminal vesicle and thus was appropriate for surgical removal by a urologist like Dr. Hwang. The official report, from a radiologist outside MWHC, found that the mass was not growing from the seminal vesicle and in fact was likely "neurogenic," *i.e.*, growing out of a nerve. Plaintiffs' outside experts reviewed the pre-operative pelvic MRI study and agreed with the official reader. This was a nerve sheath tumor that needed to be removed by a neurosurgeon using special techniques to preserve the nerves entangled with the tumor. Dr. Hwang maintained that he never saw the official report but that he did have a quick confirmation from a radiologist at MWHC confirming his impression of a seminal vesicle mass.

From the first day this lawsuit was filed, plaintiffs have tried to learn the identity of the unknown radiologist and to ask that person questions about the interaction with Dr. Hwang. If the identity could not be determined, plaintiffs sought to reconstruct from a hospital

spokesperson what the original radiologist's interpretation of Mr. Cohen's pelvic MRI would have been.

In March 2019, after MWHC served its first interrogatory responses with an evasive answer to the identity question, stating only that the surgeon Dr. Hwang could not recall who it was and further singling him out as the only person consulted by counsel before submitting the answers,[2] plaintiffs served a notice of deposition requiring the defendant MWHC to identify a spokesperson to testify on several topics, all related to the alleged radiologist consultation.[3] The defendant served objections to sitting for any corporate designee deposition, and then after plaintiffs amended their notice to refine the topics, the defendant moved for a protective order on June 11, 2019. The motion contended that the deposition would be such a waste of time that the court should either preclude it entirely or make plaintiffs pay for the cost of defense counsel's preparing the witnesses.[4]

At the hearing on the motion on August 12, the defendant dropped most of its objections to the deposition but raised some new ones, such as a privilege objection on the audit trail. The court overruled that and other objections and denied the defendant's motion in all respects, allowing all the topics in the amended deposition notice to go forward, with one small caveat that

[2] Excerpts of MWHC's answers, which were served on March 11, 2019, on the two relevant questions, Nos. 4 and 14, are attached as exhibit 3.

[3] The original notice was served on March 19, 2019 (attached as exhibit 4).

[4] For example, on p. 9, the motion stated:

> Plaintiffs' counsel will spend a fraction of the time conducting depositions to gain duplicative and cumulative information, compared to MWHC's preparation of multiple witnesses. MWHC complains not simply about the exorbitant amount of time it will take to prepare for these depositions, but also that its supervisors will be unable to complete their regular duties if required.

the defendant could put off the deposition until after identifying its expert witnesses on topics 6 and 7 (seeking the hospital's position on how its radiologist would have interpreted the pelvic MRI for Dr. Hwang and the hospital's current position on what the MRI shows).

Grounds for the brief delay – and the hospital identified its experts four days after the hearing, so the deposition could have taken place at any time on or after August 16 – were that these topics were in the nature of "contention interrogatories" and thus should properly come after expert disclosures. See tr. 28-30 (attached as exhibit 5). The court made it clear, on a question from defense counsel at the very end of the hearing, that there was no limitation on the questions that plaintiff's counsel could ask at the 30(b)(6) deposition on topic 7. Tr. 34.

On the issue of sanctions, the court said: "I rigorously enforce the rule 37 sanctions fee shifting provisions because I have an institutional interest in doing so. … the idea is to discourage people from coming to the Court unless they really need to be here and that is because I do have 400 civil cases and I can't be holding discovery hearings on every little discovery dispute that comes up…." Tr. 30-31. Plaintiff's counsel suggested that the issue of sanctions be postponed until after the deposition, to "see if they come up with a good faith, a 30(b)(6) witness. Hopefully we don't have to keep coming back here and because 30(b)(6) also imposes a very closely related burden on a corporate defendant which is you have to conduct a reasonable investigation." Tr. 31. The court ruled that it would wait to decide on sanctions until the plaintiff decided after the deposition whether they would be appropriate. Tr. 33-34.

The deposition was scheduled for October 3, 2019, the first date offered by the defense, and took place six and one-half months after it was first noticed. On numerous occasions as detailed below, defense counsel blocked questions, testified for the witness, coached the witness in what to say, hurled baseless accusations against plaintiff's counsel, and otherwise made it

impossible to obtain full and complete testimony. These are detailed below and in the attached annotated transcript.

ARGUMENT

A. MWHC and its counsel violated their duties to reasonably prepare to answer key deposition topics.

1. The hospital did nothing to seek the radiologist's identity.

Topic No. 5 of the 2nd amended Rule 30(b)(6) deposition notice required the hospital to produce a witness on the following:

> 5. The identity and employment status of the radiologist whom Dr. Hwang purportedly consulted with about Mr. Cohen's February 2017 MRI study, and all activities taken by the defendant in response to this notice to determine the information sought. With respect to the radiologist's employment status, please be prepared to discuss whether MWHC contracted with an independent contractor to provide radiologists who reviewed and interpreted imaging studies at the hospital in April/May 2017, and if so, the identity of any such independent contractors.

Plaintiff's counsel has sought testimony on this issue since March 2019. That was when we received defendant's belated responses to the interrogatories that had been served with the complaint in August 2018. Interrogatory answer No. 4, which asked the hospital (not Dr. Hwang) to identify the radiologist, said only that "Dr. Hwang does not recall" who it was. In answer to the related interrogatory No. 14 about who at the hospital had participated in preparing the interrogatory answers, the answer was "Dr. Hwang." (See the full text of these interrogatories in exhibit 3 attached.) The answers to interrogatories were then sworn to by someone else at the hospital whose named appears to be Kevin McGraw. (exhibit 3 at p. 15.)

Thus, according to the hospital's sworn interrogatory answers, all it had done as of March 2019 to determine the identity of the curbside radiologist was to ask the surgeon Dr. Hwang, who said he didn't recall. A prime impetus of the Rule 30(b)(6) deposition notice, filed a few days

later, was to spur the radiology department to determine such identity, or at least to make a reasonable effort to determine it.

It became plain in the deposition that the hospital itself has done nothing to determine who the radiologist was. Here is the testimony from the spokesman:

> Q. Okay. My topic number five asks you to identify the radiologist who Dr. Hwang purportedly consulted with about Mr. Cohen's February 27, 2017, MRI study and all activities taken by Washington Hospital Center to determine the information. What have you done to address that topic?
>
> A. I have no idea who he spoke to. I don't know where he was or what room he was in. It could have been anybody who had privileges.
>
> Q. Well, did you do anything to try to narrow down the universe of radiologists that this could apply to?
>
> A. No. I just have no idea. I mean, other than I can give you all the radiologists who had privileges. But that's about all I can do.
>
> Q. Well, do you know who was on duty on May 1, 2017?
>
> A. I don't. But there are times when we were off and we come in. I frequently do that. Even that wouldn't necessarily tell you who he spoke to.
>
> Q. Well, did you do anything to look up who was on duty on May 1, 2017, for radiology?
>
> A. I mean, I can pull it up. But you are going to get me whatever number of names who were on the clinical schedule. But, again, you know, people -- people actually like what they do. And they do come in on their off days.
>
> Q. Well, did you ask anybody at Washington Hospital Center in your Radiology Department, hey, take a look at this study and see if it looks familiar to you?
>
> A. So ordinarily with legal cases, I normally don't go around showing people case. I think that's discouraged. And because we typically look at somewhere between 5 and 10 outside studies a day, nobody would remember that.

Dep. 52.12-54.4.

Dr. Jelinek, the 30(b)(6) spokesman and chair of the MWHC radiology department, further testified that the audit trail document (Jelinek Ex. 3) showed that Mr. Cohen's MRI study had been opened during the relevant time (April, May and June 2017) only by Dr. Michael Schwartz, on June 26, 2017. He was asked:

Q. Do you know -- have you interviewed Dr. Schwartz about this?

A. I have not.

Q. Do you know why he was looking at Mr. Cohen's imaging on June 26 of 2017?

A. So Dr. Schwartz can be in multiple locations in the department. My assumption would be one of the physicians came down and asked him to look at it with him.

Q. Okay. But you haven't asked Dr. Schwartz?

A. I have not.

Dep. 25.3-25.14. And later the witness was asked:

Q. Okay. So you never asked Dr. Schwartz are you the guy who did this curbside consult with Dr. Hwang?

A. I did not ask him.

Q. Does he still work here?

A. He does.

Q. Okay. And is he a body radiologist or what?

A. He is a body radiologist who reads MRI of the abdomen or pelvis.

Q. And in terms of what else you did for our deposition exhibit -- I am sorry – deposition notice number 5, which is identity and employment status of the radiologist whom Dr. Hwang reportedly consulted. In terms of your investigation of that, you did not interview Dr. Hwang personally, I take it?

A. I did not.

Q. Or on the telephone?

A. I did no.

Q. You did not -- I guess we already established -- interview Dr. Schwartz about that?

A. I did not.

Q. You did not ask any radiologist in your department if they could have been the radiologist who did the curbside?

A. I did not.

Q. You did not look to see if Dr. Schwartz was working on May 1 or May 2, 2017, and could have been one of the people who read the study with Dr. Hwang?

A. For which date?

Q. May 1 and May 2, 2017.

A. So there is no record that one of our radiologists looked at that study other than Dr. Hwang said it. So I don't know -- no, I did not check to see who was actually working and where they were working.

(Dep. 96.15—98.8)

As for trying to pin it down from Dr. Hwang's end, the witness was asked (102.5-102.9):

Q. All right. So did you do anything to review Dr. Hwang's schedule to see what dates he was in the hospital that he would have been available to sit down with one of your radiologists?

A. No.

Thus, the hospital through its counsel has been asserting throughout this case that the identity of the radiologist is "unknowable," but now has been exposed as having done nothing to find out except to ask the surgeon. The more accurate answer is, "We don't want to know, so we're not going to try."

2. **MWHC violated its duty to make a reasonable inquiry about the deposition topic of the radiologist's identity**

A party to a lawsuit has a duty to make a reasonable inquiry before it says "unknown," and certainly before it makes the more aggressive assertion that the answer is "unknowable."[5] A long line of cases establishes this with no wiggle room. Rule 30(b)(6) itself makes this duty plain:

> In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. *The persons designated must testify about information known or reasonably available to the organization.* Rule 30(b)(6) does not preclude a deposition by any other procedure allowed by these rules.

Superior Court Civil Rule 30(b)(6) (emphasis added). (We set out the entire text of the rule to provide relevant context.)

Among the many cases describing the duty of a corporation served with a Rule 30(b)(6) subpoena to prepare its spokesperson ahead of time to give complete and knowledgeable answers are: *Rainey v. American Forest and Paper Ass'n Inc.*, 26 F. Supp. 2d 82, 94-95 (D. D.C. 1998); *Poole v. Textron Inc.*, 192 F.R.D. 494, 504 (D. Md. 2000); *Quantachrome Corp. v. Micromeritics Instrument Corp.* 189 F.R.D. 697, 699 (S.D. Fla. 1999) ("[W]hen producing a corporate representative for deposition, Micromeritics' duty extends beyond the mere act of presenting a human body to speak on the corporation's behalf. Micromeritics has the additional duty to prepare the deponent. Micromeritics must designate persons who have knowledge of the

[5] MWHC has been asserting that its radiologist's identity is "unknowable" for many months in this case, long before anyone in its radiology department was asked. See, for example, its opposition to the motion for leave to amend the complaint, filed April 22, 2019, at p. 4: "The radiologist's identity is not known or knowable." See also motion to dismiss amended complaint, filed on May 24, 2019, at p. 5.

matters sought by Quantachrome *and* must also prepare those persons so that they are able to give complete and knowledgeable answers.") (emphasis in original); *United States v. Taylor,* 166 F.R.D. 356, 361 (M.D. N.C. 1996); *Dravo Corp. v. Liberty Mutual Ins. Co.*, 164 F.R.D. 70, 75 (D.Neb. 1995). The corporation's duty to prepare the witness extends even to the situation where no current employee has knowledge of the events at issue. *United States v. Taylor, supra*.

In *Wilson v. Lakner*, 228 F.R.D. 524 (D. Md. 2005), another case where a hospital was trying to avoid a Rule 30(b)(6) deposition, Judge Messitte wrote:

> While the rule may not require absolute perfection in preparation -- it speaks after all of matters known or "reasonably available to the organization" -- it nevertheless certainly requires a good faith effort on the party of the designate to find out the relevant facts -- to collect information, review documents, and interview employees with personal knowledge just as a corporate party is expected to do in answering interrogatories.

228 F.RD. at 528-29.

There are no reported decisions that plaintiffs could find which say it's okay for a corporation to give up on the effort to obtain an answer to a question without making any effort whatsoever. Such non-effort cannot meet the "good faith effort" requirement of *Wilson v. Lakner* and the other cases.

The duty to make a reasonable effort falls on both the corporate defendant and its counsel. D.C. Rule of Professional Conduct 3.4(d) states: "*A lawyer shall not* (d) In pretrial procedure, make a frivolous discovery request or *fail to make reasonably diligent efforts to comply with a legally proper discovery request* by an opposing party[.]" (Emphasis added.)

The hospital's chair of radiology said he was never asked about this case until a month or two before his Rule 30(b)(6) deposition. Here is the relevant testimony at p. 127.3-127.21:

> Q. When did you first realize that there was an issue about who was the radiologist, if there was one, that Dr. Hwang consulted with in May 2017? When did you first realize that that was an issue?

A. It would have been the last couple months after they notified me whether I would be a corporate designee.

Q. Okay. Sometime in August or September of this year?

A. That would be probably correct.

Q. Before that time, you knew nothing about this case of Mr. Cohen?

A. Not that I remembered, no.

Q. Okay. Well, when you started looking at the materials recently, this was all news to you. This wasn't a patient whose information you had looked at before, I take it?

A. Correct.

Bear in mind that hospital's counsel continued to assert the identity was "unknowable" even at the hearing on its motion, when counsel asserted that the radiologist could turn out to be an independent contractor. Hearing tr. 15-16. *All these assertions were made before anyone in the radiology department was asked.* The only person counsel had asked was the surgeon Dr. Hwang, who had every interest in not remembering the identity. (See interrogatory answers Nos. 4 and 14.)

Thus it is apparent that the "unknowability" of the identity is a mere litigation strategy, a decision made by counsel and then imposed on the corporation's employees.

By slow-walking all the responses to basic discovery requests in this case, defense counsel has helped to assure that the passage of time will erode any memories of the hospital's employees and thus work to the defendant's advantage. The chronology can be boiled down this way:

1. August 2018: Plaintiffs send interrogatory asking for the radiologist's identity.

2. March 2019: Defendant responds that Dr. Hwang doesn't recall and asks no one else.

3. March 2019: Plaintiffs seek further identity information *via* 30(b)(6) deposition notice.

4. April-May-June 2019: Defendant files series of pleadings asserting the possibility of independent contractor, and that the radiologist's identity is "unknown and unknowable."

5. August 2019: Defendant loses motion for protective order against the 30(b)(6) deposition on all issues.

6. August-September 2019: Defense counsel finally inquires with the radiology department chair about the topics in the deposition notice.

7. October 2019: Plaintiffs get their first chance to sit down with someone from the radiology department for a deposition. The witness confirms that all radiologists are employees of a practice group called Medstar Medical Group, and that there are no independent contractors, see deposition at 15.12-17.12, but otherwise did nothing to investigate the radiologist's identity.

B. Defense counsel repeatedly and improperly blocked the corporate spokesperson from testifying about the MRI study

MWHC designated Dr. James Jelinek, chair of its department of radiology for nearly 20 years and a board-certified radiologist with special certification in neuroradiology, as its spokesperson for all topics of the deposition. See dep. 6.15-10.2. Among other things, Dr. Jelinek testified that he had reviewed the MRI study at issue. Dep. at 10.20-11.1. He said he had reviewed "thousands" of pelvic MRI's over his career. Dep. 11.5-12.6. He also revealed that the

study had been loaded into the radiology network at the hospital and that it could be readily called up on the large monitors in the same room as where the hospital had decided to hold the deposition. Dep. at 74.20-75.6.[6]

But then when plaintiff's counsel tried to show the witness the imaging study and ask questions about it, defense counsel blocked the questions at numerous points and coached Dr. Jelinek to deflect the questions.

Dr. Jelinek, at defense counsel's urging, maintained that he was there as a corporate spokesperson and not to provide his own expertise in reading the imaging study. Dep. 73.6-73.11. He also asserted that "you would have to spend hours" looking at the study to be able to answer questions about it. Dep. 58.2-58.10. He said he had only spent 30-40 minutes reviewing it. Dep. 54.15.

The problem with this position is fourfold:

First, District of Columbia law does not allow a medical defendant to claim some privilege from answering questions that the witness is competent to answer by virtue of his professional training and expertise.

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[6] The relevant testimony:

> Q. Okay. All right. The -- so just so we have it on the record about what you have available to review today, do you have Mr. Cohen's MRI study here somewhere in your office suite?
>
> A. So the images are on the PACS system.
>
> Q. Okay. And you could call it up on that screen right over there to your left if you wanted to?
>
> A. We could.

Second, MWHC had raised this very objection in its motion for protective order, and then it lost the motion in its entirety at the hearing.

Third, as with any deposition, a corporate spokesperson is not allowed to pick and choose what questions he will answer. Nor is counsel permitted to instruct a witness – it does not matter if the witness is an individual or a corporation appearing through a spokesperson – not to answer a question.

Fourth, on his preparation or lack thereof to testify about the imaging study, those topics were listed on the deposition notice, and he testified at the start of the deposition that he was ready to speak on each of them as the hospital's spokesperson, having reviewed, among other things, the imaging study. Dep. 9.18-11.1. He was not entitled to bail out when the questioning on the study got to specifics.

Each of these points is elaborated in the subsections below.

1. D.C. law does not allow physician witnesses to refuse to testify in answer to questions calling on their expertise.

In *Abbey v. Jackson*, 483 A.2d 330 (D.C. 1984), the D.C. Court of Appeals reversed a summary judgment for a defendant in a malpractice case, holding that the plaintiff could make out a prima facie case through adverse testimony of the defendant physician. The Court observed:

> The adverse witness statute of the District of Columbia states that a party or a party's witness in a civil suit may be called as a witness by his adversary and questioned as to matters relevant to the dispute at issue. The statute makes no exception for information acquired by special training or rendering professional services.

483 A.2d at 333.

The court quoted the statute as follows:

> The adverse witness rule in the District of Columbia states: "Except as otherwise provided by law, a person is not incompetent to testify in a civil action . . . by reason of his being a party thereto or interested in the result thereof. If otherwise competent to testify, he is competent to give evidence on his own behalf and competent and compellable to give evidence on behalf of any other party to the action . . . ."

D.C. Code § 14-301 (1981). 483 A.2d at 333 n.1.

The court also observed:

> Whatever may be the validity generally (or lack thereof) of the argument that a lawyer or his client has unfairly avoided the bother and expense of using his own independent experts, this argument has no merit where the witness is not an expert hired by the adversary but is the adversary himself or defense witnesses actually involved in the events from which the claim arose. [Citation omitted.] Defendants in a civil suit, unlike a criminal case, have no inherent right to remain silent or to answer only those inquiries which will have no adverse effect on their case.

483 A.2d at 333-34.

MWHC may try to contend that Dr. Jelinek is not himself a defendant and was not personally involved in the underlying events of Mr. Cohen's treatment. But MWHC made Dr. Jelinek, its radiology chairman, its spokesperson for the deposition, and in so doing made his testimony compellable, even as to "opinions," on topics within the deposition notice.

We laid out the caselaw supporting this view in our opposition to the motion for protective order, where among other cases cited, we quoted *Brazos River Authority v. GE Ionics Inc.*, 469 F.3d 416 (5th Cir. 2006): "When a corporation produces an employee pursuant to a rule 30(b)(6) notice, it represents that the employee has the authority to speak on behalf of the corporation with respect to the areas within the notice of deposition. *This extends not only to facts, but also to subjective beliefs and opinions*." 469 F.3d at 433. (Emphasis added.)

2. In its protective order motion, Defendant specifically raised the contention that the 30(b)(6) notice improperly called for expert testimony, and it lost.

This issue of the scope of the deposition and the hospital's duty to provide a responsive witness even on expert opinions had already been litigated in this case before the deposition. In its motion trying to avoid being deposed on topics 6 and 7, the hospital's counsel wrote: "To the extent the requests seek opinions on the interpretation of the films, that is expert testimony, not corporate designee material." Motion at p. 8. At the hearing, the hospital's counsel made the same objection, transcript pp. 19-20, but under questioning from the court, dropped this as an objection to substance and shifted to an objection only as to the timing of the deposition. Here was the relevant back-and-forth at transcript p. 26:

> Plaintiff's counsel: … We can wait a few more weeks and see what their expert reports say, but we are still entitled to ask someone who works for Washington Hospital Center what do you say this imaging study shows. It is a relevant fact in the case.
>
> THE COURT: But are you objecting, Ms. Diedrich, to the timing of this as opposed to the substance of the question?
>
> MS. DIEDRICH: I am objecting to the timing. Also you know what the way it reads is the hospital's position on how its radiologist would interpret the film. So, what he is asking is for, the way I read this for the hospital to pick a radiologist to review the films and interpret it and that the hospital has to therefore use that as their position in the case as opposed to their position being what our expert witnesses say is our position.
>
> THE COURT: So, it seems like the objection is as to timing and wording basically–
>
> MS. DIEDRICH: Correct.
>
> THE COURT: -- but there is not a dispute at this point about whether you can ask the question.

In the middle of the deposition, after telling plaintiff's counsel that Dr. Jelinek was there only to repeat what the expert witnesses had said but not to answer questions,[7] Ms. Deese started quoting

[7] Among other places in the deposition where this was discussed, see p. 77:

from an earlier passage of the hearing transcript, as if the court had agreed with her position and had ruled in the hospital's favor and had imposed a substantive restriction on the deposition. In reality, as is obvious from the transcript, the court was merely restating the hospital's position. See Jelinek deposition at p. 78.6—78.16:

> MS. DEESE: No. I think that Judge Pan and Ms. Deidrick talk about this at the end of the hearing. And she -- the court said on page 25, line 17 to 22, she being Ms. Deidrick is saying the corporate designee shouldn't have to answer this right now before their experts have formulated their position on this issue, meaning Dr. Jelinek is going to tell you what our experts are going to testify to, if that's what you want. But he is not here as an independent expert. He is not here for that. All he can tell you is what our experts will say.

There was no such ruling at the hearing as Ms. Deese was trying to maintain. The defendant lost the entire motion. Plaintiff's counsel made very clear that he intended to ask the corporate designee direct questions: "what do you say it shows." Hearing tr. 28.16. The court's last word on this at the hearing was: (tr. 29.1-29.4) "I don't think it is unreasonable for them to

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> MS. DEESE: If you have precise questions on what the hospital's position is on specific sections of the MRI and if our expert reports don't address that, the Hospital Center's position will be what our experts' opinions are. And to the extent it is not addressed in the report that we previously provided, Dr. Jelinek is not able to answer that today. Again, if you want to tell me the questions, we will put it to the expert. I will have Dr. Jelinek consult with them. And if you want to learn the opinions through him, instead of through them, I will certainly make that available to you, Mr. Malone.
>
> MR. MALONE: I want to ask what Dr. Jelinek concluded from looking at the T2 axial sequence. And that's what I want to show Dr. Jelinek right now.
>
> MS. DEESE: Unfortunately, he is just here as a corporate designee. He is not here to give you his expert witness.
>
> MR. MALONE: Well, the line between expert opinion and corporate designee is something you are drawing that I don't think is valid. I think when we asked these topics six and seven of what the hospital's position is on what the imaging shows, I think I am entitled to ask him questions about what the imaging shows.

say we don't want to tell you what our position is on this extremely important issue until after we have consulted with our experts."

3. Defense counsel repeatedly blocked cross-examination questions in the deposition on topics 6 and 7 in violation of the rules of deposition conduct.

At the deposition, immediately after the witness agreed that he could call up Mr. Cohen's imaging study on the large monitors in the deposition room, the following occurred: (dep. 75.12-76.11)

> Q. Okay. The -- so what I would like you to do now -- and this is my request -- is to call up the T2 axial sequence on Mr. Cohen. And I will just prove to you that it's the same images that I was showing you on this laptop. And then I will ask a set of questions. Is that okay?
>
> MS. DEESE: It is not okay, because our position on the interpretation of those images is what our experts will say. And you have already established that the report [from the defense expert] doesn't go into the level of detail you need. If you want to tell what the questions are, we can consult with our experts. And then Dr. Jelinek can come back, and he can answer that question at that point. But at this point in time, you don't have the imaging. This notice doesn't call for him to bring the imaging. And we have established that the expert reports haven't addressed that particular question that you want. So if you want that, we will come back on a different day. But I need you tell me exactly what questions you want the experts to address.[8]

This tactic, which is not countenanced by any rules or caselaw, could only have been intended to frustrate any effective cross-examination of this witness. To catalog the impropriety:

- Washington Hospital Center was required by this court's order to produce a witness to provide responsive testimony to all aspects of topics 6 and 7 of the deposition notice. The court at the end of the August hearing made it clear that the only limitation was "timing." Counsel's blocking of the questions at the deposition was a

[8] See similar comment by defense counsel at dep. 77.1-77.13.

blatant attempt to rewrite the outcome of the motion to grant the hospital a substantive restriction on the 30(b)(6) deposition that it did not win at the hearing.

- The spokesperson selected by MWHC was its chair of radiology. He testified that he had looked at the relevant imaging study for about 30-40 minutes. Dep 54.15. He also produced a list of things he had reviewed that included the depositions of plaintiff's two radiology experts and the reports of the two defense radiology experts. Jelinek dep. Ex. 5. At first he said he had read "thousands" of pelvic MRIs (dep. 12.1) but then later tried to downplay his expertise (dep. 79.22-80.2: "I don't normally read pelvis MRI's"); defense counsel blocked a followup question on whether he considered himself competent to interpret a pelvic MRI.

> Q. Are you competent individually to read MRI's of the pelvis?
>
> MS. DEESE: I am going to direct him not to answer that. We are done with this, Mr. Malone. I am directing him not to answer.

Dep. 80.19-81.1.

- The problem with disclaiming his own expertise is that would mean that MWHC brought the wrong person to the 30(b)(6) deposition. The hospital knew from the hearing and from the notice itself that questions about the imaging would be on the agenda.
- In any case, the hospital chose to bring a radiologist to the deposition who had prepared himself by looking at the imaging study. At the start of the deposition, he said he was ready to address all the topics in the deposition notice. Dep. 9.18-10.2. Once the questions got to specifics, it was not for the witness and defending counsel to start refusing to answer questions and deferring them to the hired expert witnesses.

If the hospital wanted one of its experts to serve as its corporate designee, it should have done so.

- Defense counsel's demand that plaintiff provide specific questions on the imaging to relay to the experts, and then back to the 30(b)(6) witness for testifying, is unprecedented in the experience of plaintiff's counsel and a plain violation of Superior Court Civil Rule 30(c)(1),[9] which requires that deposition examination and cross-examination proceed as they would at trial. Can anyone imagine a normal trial cross-examination proceeding with the defending counsel being able to declare a timeout at will, take the cross-examiner's question outside the courtroom, huddle with other witnesses not on the witness stand, and then return to the courtroom with the answer? Rule 30(c)(1) says in essence that if it's not proper at trial, it's not proper in a deposition.
- All other applicable rules of deposition conduct – no coaching, no instructions not to answer, etc., as detailed below – bar the tactics used here.

In short, the defense counsel's attempt to turn defeat into victory on the motion for protective order was improper at multiple levels. But as we detail below, defense counsel committed numerous other acts of misconduct at the deposition on this topic of what the MRI imaging study shows, as well as other related topics.

C. Defense counsel blocked testimony about the MRI study in multiple other improper ways and engaged in flagrant witness coaching

The Rule 30(b)(6) deposition lasted only a little over two hours. Yet there were so many improper and frivolous objections and instructions not to answer that plaintiff's counsel has

[9] We further discuss this rule and its caselaw in the next section.

prepared an appendix to this brief to catalog all of them.[10] By our tally, as described in more detail below, there were thirty-eight separate instances of improper speaking objections and/or witness coaching, and twenty-five occasions when defense counsel instructed the witness not to answer a question or refused on his behalf. (We did not count some of the smaller bits of coaching such as "asked and answered.") In addition to the annotated transcript attached as Exhibit 1, we are sending to chambers as Exhibit 2 a CD with the video of the deposition.

First, however, a quick review of the rules for depositions is in order.

1. The rules for deposition conduct are very clear and prohibit conduct repeatedly engaged in here.

a. Instructing the witness not to answer a question is improper

The rule is basic and long-standing that a lawyer defending a deposition cannot order questions off limits on grounds other than three narrow ones set out in Rule 30, none of which were invoked by counsel defending the MWHC 30(b)(6) deposition. Here is the rule as amended

[10] The appendix is attached as Exhibit 1. It annotates the transcript with numbers in the margin to refer to the specific rule violated by defense counsel. Here is the key:

1. Violation of Civil Rule 30(c)(1): "The examination and cross-examination of a deponent proceed as they would at trial under the provisions of Rule 43(c)."
2. Violation of Civil Rule 30(c)(2): "An objection must be stated concisely in a nonargumentative and nonsuggestive manner."
3. Violation of Civil Rule 30(c)(2): "An objection at the time of the examination … must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. … A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)."
4. Violation of Civil Rule 30(d)(2) (providing for sanctions against any person "who impedes, delays, or frustrates the fair examination of the deponent;" and violation of the following ethics rules against abusive and harassing conduct: Rules of Professional Conduct Rule 3.4(a) (obstructing another party's access to evidence); Rule 3.5(d) (disruptive conduct in a deposition); Rule 8.4(d) (offensive, abusive or harassing conduct).

by the federal courts in 1993 and adopted in 1997 by the D.C. Superior Court for its own Rules of Civil Procedure:

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

Superior Court Civil Rule 30(c)(2).[11] (Emphasis added.)

The Advisory Committee note on the federal 1993 amendment says: "Directions to a deponent not to answer a question can be even more disruptive than objections. The second sentence of new paragraph (1)[12] prohibits such directions except in the three circumstances indicated: to claim a privilege or protection against disclosure (*e.g.*, as work product), to enforce a court directive limiting the scope or length of permissible discovery, or to suspend a deposition to enable presentation of a motion under paragraph (3).

MWHC's counsel invoked none of these three grounds for her numerous instructions not to answer questions put by plaintiff's counsel. "Beyond the scope of the 30(b)(6) notice" is not one of the three Rule 30(c)(2) permissible reasons for instructing a witness not to answer (even without considering the extensive caselaw starting with *King v. Pratt & Whitney*, as discussed below). Courts have long held instructions not to answer are sanctionable unless they are based on one of the three permitted reasons.[13]

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[11] The two sentences at the end were at first placed into Superior Court Civil Rule 30(d)(1) but later moved to 30(c)(2) with no substantive changes.

[12] The paragraphs have since been renumbered by other amendments, so the relevant rule is now 30(c)(2), but the language is the same as from 1993.

[13] *Ralston Purina Co. v. McFarland*, 550 F.2d 967, 973 (4th Cir. 1977); *Detoy v. City & Cty. of S.F.*, 196 F.R.D. 362, 365–66 (N.D. Cal. 2000); *Boyd v. Univ. of Md. Med. Sys.*, 173 F.R.D. 143,

b. The rule requires deposition Q&A to be conducted "as at trial"

Another basic rule of deposition conduct is contained in the first sentence of Rule 30(c):

> (1) *Examination and Cross-Examination.* The examination and cross-examination of a deponent proceed as they would at trial under the provisions of Rule 43(c).[14]

(Superior Court Civil Rule 30(c)(1).

Courts interpreting the nearly identical federal Rule 30(c) point out that conduct that would be obviously off-limits at trial is also improper at a deposition. Thus, even before one reads the specific ban on "suggestive" objections in Rule 30(c)(2) – "An objection must be stated concisely in a nonargumentative and nonsuggestive manner" – it is plain from Rule 30(c)(1) that a lawyer is not permitted in the middle of a deposition to coach a witness, suggest answers, or rule on her own objections.

The seminal case is *Hall v. Clifton Precision,* 150 F.R.D. 525 (E.D.Pa.1993), which said:

> The Federal Rules of Evidence contain no provision allowing lawyers to interrupt the trial testimony of a witness to make a statement. Such behavior should likewise be prohibited at depositions, since it tends to obstruct the taking of the witness's testimony. **It should go without saying that lawyers are strictly prohibited from making any comments, either on or off the record, which might suggest or limit a witness's answer to an unobjectionable question.**

150 F.R.D. at 530–31 (emphasis added).

c. The rule expressly bars coaching the witness and other comments on the questions.

As set out above, the text of Rule 30(c)(2) is plain: "An objection must be stated concisely in a nonargumentative and nonsuggestive manner." In the leading case of *Hall v.*

144–47 (D. Md. 1997); *Int'l Union of Elec., Radio & Mach. Workers AFL-CIO v. Westinghouse Elec. Corp.*, 91 F.R.D. 277, 279–80 (D.D.C. 1981); *Preyer v. U.S. Lines, Inc.*, 64 F.R.D. 430, 431 (E.D. Pa. 1973).

[14] Rule 43(c) incorporates by reference Fed. R. Evid. 611, which sets the familiar ground rules for examination and cross-examination at trial.

Clifton Precision, supra, Judge Robert Gawthrop precisely summarized why witness coaching is antithetical to the purpose of depositions:

> The underlying purpose of a deposition is to find out what a witness saw, heard, or did—what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness—not the lawyer—who is the witness.

150 R.D. at 528.

2. Rules were repeatedly violated by defense counsel to block the witness from looking at the MRI study.

It would have been bad enough, and contrary to the plain mandate of Superior Court Civil Rule 30(c)(2), that defense counsel instructed the witness not to answer various questions about Mr. Cohen's MRI study. But worse than that, defense counsel prevented the witness from looking at Mr. Cohen's MRI study at the deposition with a variety of false and even inflammatory statements on the record.

a. Defense counsel falsely stated that the imaging study was not available in the hospital's own system and that it had not been requested to be brought to the deposition.

Defense counsel stated at 76.4-76.6: "But at this point in time, you don't have the imaging. This notice doesn't call for him to bring the imaging." The notice did in fact call for the witness to bring anything reviewed in preparation for testifying to the deposition, as plaintiff's counsel pointed out. (Dep. 76.12-76.22) And in fact the witness had just testified that the imaging was there in the room available to be called up on the screen just off camera. (The deposition occurred in the hospital's radiology conference room, a venue designated by defense counsel.)

A. So the images are on the PACS system.

Q. Okay. And you could call it up on that screen right over there to your left if you wanted to?

A. We could.

Dep. 75.2-75.6. When the objection about the imaging not being available and not being called for by the notice was shown to be frivolous, defense counsel moved to other objections and improper testimony-blocking instructions.

Plaintiff's counsel said: "I want to ask what Dr. Jelinek concluded from looking at the T2 axial sequence. And that's what I want to show Dr. Jelinek right now." Defense counsel responded: "Unfortunately, he is just here as a corporate designee. He is not here to give you his expert witness." Dep. 77.14-77.20. As noted above, there is no such valid objection under D.C. law to asking opinions of a medical witness. *See Abbey v. Jackson*, 483 A.2d at 333-34.

b. Defense counsel falsely accused plaintiff's counsel in front of her client of altering MRI images and trying to show the witness some other patient's imaging.

The deposition of Dr. Jelinek reached its absurd bottom when defense counsel issued a series of blocking instructions and coaching objections that (1) accused plaintiff's counsel of trying to show the witness someone else's MRI study, (2) repeatedly interfered with plaintiff's counsel's showing the witness that it was in fact Mr. Cohen's MRI, (3) repeatedly accused plaintiff's counsel of "altering images" shown to Dr. Hwang at his deposition seven months prior, and (4) accused plaintiff's counsel of violating the federal privacy statute known as HIPAA.

Here is how the issue of altering images was raised by defense counsel:

Q. Did you -- well, let me just show you one of the images I brought with me.

MR. MALONE: We will mark this as exhibit 7 for your deposition. It was also Dr. Hwang's deposition exhibit nine.

MS. DEESE: Were those the images that you brought to Dr. Hwang's deposition –

MR. MALONE: Yes, ma'am.

MS. DEESE: -- or the ones that he brought? Yeah, so I am going to object to the use of those because they were altered.

MR. MALONE: You may say so, but they weren't.

Dep. 64.7-64.19.

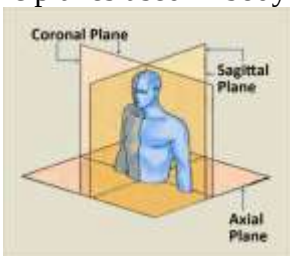
At that point there was some back-and-forth about the two images on the poster board in front of the witness, and then plaintiff's counsel suggested that instead of merely looking at the two images that had been printed out, the witness could review the entire T2 sequence of axial plane[15] images up and down the patient's pelvis, so he could see the two printed images in context:

Q. Okay. I am looking for L5 nerve roots. Can you see that on here? And I can show you the whole sequence. I don't want to just pluck out –

A. Sometimes it is pretty difficult to pick out an invisible [individual] nerve root, especially after they have exited, because they branch and then they form a plexus.

Q. Why don't I show you the whole sequence so -- just so you see the whole thing.

[15] Axial images are cross-sections of the body from front to back; if one visualizes the body laying flat on a table, axial images would be vertical slices as if the body was a loaf of bread. Here is an illustration of the three basic planes used in body imaging:



MS. DEESE: And, again, I just note my objection to this. This witness is here to say what our official position. And that's coming from our experts. And all of this testimony about what he sees is not relevant and not what -- and not admissible.

BY MR. MALONE:

Q. Okay. All right. So I think -- I think this is the T2 sequence, Dr. Jelinek. And you see how the image numbers you can rotate them here. Here is 1 of 30, and you can just go like this.

A. Uh-huh.

MS. DEESE: I just --

BY MR. MALONE:

Q. So take a look at the whole thing.

MS. DEESE: I just need to object. I don't see anywhere on here that it says Mr. Cohen. We have done nothing to establish that this is the study from February of 2017. I do see 2/10/17 on the bottom right. And it says --

MR. MALONE: Okay. Well, I'm –

MS. DEESE: No, no. This actually says female pelvis. It says female pelvis on the top right. What are you showing him?

MR. MALONE: It is Mr. Cohen's study.

MS. DEESE: Well, he doesn't have a female pelvis, does he?

MR. MALONE: Counsel, that's some metadata that was put in there that I have no knowledge about.

Dep. 66.4-67.20.

One has only to look at the individual images of this pelvic MRI, which show male sexual organs in cross-section, to realize that this was not a “female pelvis.” Yet defense counsel persisted in accusing plaintiff’s counsel of doing something shady, while plaintiff’s counsel tried to document that this was in fact Mr. Cohen’s study, and the words “female pelvis” were a bit of technical metadata placed onto the screen by the imaging software.

Defense counsel continued to testify in front of her radiologist client that plaintiff's counsel had improperly altered or manipulated the images, including: dep. 67.21-67.22, dep. 69.2-69.10; dep. 79.16-79.18: "And as I mentioned earlier, that exhibit that you showed Dr. Hwang was manipulated." That is untrue, and counsel had no basis for flinging out such a serious accusation, especially in the middle of a witness's testimony.

Medical imaging follows a format called DICOM, and there are multiple software programs that allow one to view DICOM imaging studies (whether MRI, CT or plain x-rays). When displaying an individual image from a study, any DICOM viewer will populate the four corners of the image with various items of technical data. Each DICOM viewer program has its own settings for the data that are displayed in the four corners of a particular image, but variations from viewer to viewer in the metadata display have no bearing on the images themselves, which remain identical from viewer to viewer. That is why the term "female pelvis" could come up on one display of Mr. Cohen's imaging but not on others, since the term is embedded in the metadata as the name of the protocol of his study.

Defense counsel already knows the variability of DICOM metadata displays from her own client's printout of images. At. Dr. Hwang's deposition on March 22, 2019, he produced printouts of four images which he said were from Mr. Cohen's February 2017 MRI study. See Exhibits 3, 4, 5 and 6 of his deposition, and transcript at 31.10-32.8, attached hereto as exhibit 7 (all four images are bundled as a single exhibit here) and exhibit 8 (Hwang Dep. transcript excerpts). The court will notice that Dr. Hwang stripped off of the printouts ALL patient-identifying data: No patient name, no age, no study date, nothing except some non-patient-specific technical data in the lower left. So when Ms. Deese and the 30(b)(6) witness started to complain about Mr. Cohen's name not appearing on the individual images on plaintiff's

counsel's laptop (which did display the correct study date and the correct patient age, among other things), they had no basis for asserting that this was something unusual or improper, since they had done the very thing.

Even if the objection had been in good faith, it was not defense counsel's right to convert her authenticity objection into an instruction not to answer. The testimony should have been taken subject to the objection. That is the plain requirement of Rule 30(c)(2).

Defense counsel later in the deposition improperly blocked the witness from looking at the same imaging study on his own PACS network, with a variety of frivolous objections already addressed in this motion (among other things, after plaintiff established that the witness had the imaging study on the hospital's PACS network and had the ability to call it up on the monitors just to his left in the deposition room, defense counsel said that plaintiff had failed to ask him to bring the study to the deposition.) See dep. 72.14-77.20.

After the deposition, plaintiff's counsel confirmed that the term "female pelvis" appears in the metadata as the name of the protocol by which the imaging center conducted Mr. Cohen's MRI. The attached exhibit 9 consists of a printout of all the metadata attached to Mr. Cohen's study. One can see "female pelvis" listed among many other items of metadata under protocol name. The fact that MRI imaging centers use "female pelvis" as a name for their protocols is also confirmed by the attached exhibit 10 from Oregon Health and Science University describing all the technical parameters for the protocol that OHSU titles "MR Female Pelvis w/wo Body Protocol."[16] The protocol gives instructions to technicians on how thick to make the individual

[16] The document can be found at https://www.ohsu.edu/school-of-medicine/diagnostic-radiology/mr-adult-female-pelvis-wwo-body-protocol

slices, the FOV (field of view, *i.e.*, how far up and down the body to scan), "Fat Sat" (fat saturation), and other details.

Even more absurdly, the witness caught the spirit of Ms. Deese's obstructive tactics by claiming, with Ms. Deese's prompting, that when plaintiff's counsel showed the witness a database list of imaging study patient names on plaintiff's counsel's laptop, in order to confirm that Mr. Cohen's study was the one being displayed, that that was a federal privacy law (HIPAA) violation. Plaintiff's counsel never called the witness's attention to any patient names in the list other than Mr. Cohen's; two other names happened to be included in the alphabetical list. See transcript at 70.9-71.9. The idea that a non-health care provider like an attorney showing a witness a database list of patient names, all of whom the attorney represents, thereby violates HIPAA is frivolous. The statute does not even apply to attorneys. It protects the release of "protected health information" only by health care providers, health plans and health care clearinghouses. See the U.S. Dept. of Health and Human Services official website on the statute, especially the page, "Who must comply with HIPAA privacy standards?" https://www.hhs.gov/hipaa/for-professionals/faq/190/who-must-comply-with-hipaa-privacy-standards/index.html Plaintiff's counsel did nothing remotely resembling a violation of the law's privacy protections. Every personal injury client signs an authorization under HIPAA for their counsel to obtain their medical records and imaging studies. Defense counsel knows that that is the uniform practice. Yet Ms. Deese instructed the witness: "Turn away. You [plaintiff's counsel] are actively violating HIPAA right now, and we are not going to be a part of that." Dep. 70.21-71.1. Later she said that counsel's clients "could be his [Dr. Jelinek's] other patients." Dep. 71.16. Of course, she had no basis for saying that, and she was factually wrong, and even if

by some coincidence these clients were patients of Dr. Jelinek, their names on the laptop in no way violated HIPAA.

Shortly after this exchange, defense counsel made it clear that her authenticity objection to the witness reviewing the images was not even the real reason why she was instructing the witness not to review the images. The following occurred at dep. 81.3-81.12:

> Q. Okay. So let me just prove to you that the images I was showing you on that laptop are the same as these images that have Mr. Cohen's name on him over here.
>
> MS. DEESE: Can I just tell you there is no point in that. He is not going to interpret that for you today. If it is addressed by our expert reports, he is happy to tell you about that. But he is not going to interpret that. And it doesn't matter whether you think you can prove it or not.

So there was no valid basis for the instruction barring the witness from looking at the imaging study, whether through the copy of the study brought by plaintiff's counsel to the deposition or his own copy on the official hospital PACS system.

It bears repeating that the multiple acts of misconduct and frustration of testimony occurred at the 30(b)(6) deposition *after* the hospital had lost its motion to avoid having to sit for the deposition. All the caselaw requiring reasonable inquiry had been laid out for the defendant in the plaintiff's opposition to the motion for protective order. There can be no excuse for violating the court's order in such a brazen way.

D. Other frivolous objections and improper instructions not to answer occurred early and often in the 30(b)(6) deposition

Among the many additional instances of rule-breaking conduct at this deposition, one early example is set out here to give the court a flavor for the obstructive tone set at the start which continued throughout much of the deposition.

The witness Dr. Jelinek testified that he had been chair of the radiology department since 2000. The following colloquy took place within five minutes of the start of the proceedings, pp. 12-14:

> Q. How many radiologists are on staff here?
>
> MS. DEESE: Today?
>
> BY MR. MALONE:
>
> Q. Diagnostic?
>
> MS. DEESE: Today?
>
> BY MR. MALONE:
>
> Q. Approximately?
>
> MS. DEESE: Today.
>
> MR. MALONE: Please. It doesn't matter today, yesterday. Just give me a ballpark of the current number of employees.
>
> MS. DEESE: With all due respect, it does matter. And if you are suggesting that they are employees of the Medstar Washington Hospital Center, that's not actually accurate. So I think your question needs to be limited to the point in time where this care is at issue, because it is a corporate designee notice. And that's what he is here to address.
>
> MR. MALONE: Well, I will ask my question, and then I will ask your question.
>
> BY MR. MALONE:
>
> Q. So currently what are the number of radiologists on staff here ballpark?
>
> MS. DEESE: Objection. I am going to direct you not to answer that.
>
> MR. MALONE: You are allowed to -- Counsel -- to instruct a witness not to answer only if it is a matter of privilege.
>
> MS. DEESE: I don't agree. This is a corporate designee deposition notice. He is supposed to address these topics in that. If you can tell me where in this notice it says he is supposed to testify about 2019 data, I am happy to reconsider. But I don't

see anywhere in here that anything about 2019 is what this witness is here to address.

MR. MALONE: Well, 2019 helps us inform what happened in 2017.

MS. DEESE: Then you should have put that in your notice so I could prepare him. He is not prepared to talk about 2019.

BY MR. MALONE:

Q. You don't know the number of employees you currently have –

MS. DEESE: Don't answer.

BY MR. MALONE:

Q. -- working as radiologists here at the Hospital Center?

MS. DEESE: I am going to direct the witness not to answer. Do you have any more questions, Mr. Malone?

This entire colloquy was an utter waste of time. Defense counsel seemed bent on rewriting and controlling the questions that she deemed relevant and along the way to give her own unsolicited testimony ("And if you are suggesting that they are employees of the Medstar Washington Hospital Center, that's not actually accurate.") and then to rule on her own objections ("Don't answer... I am going to direct the witness not to answer.") And note the aggressive tone at the end of the back-and-forth: "Do you have any more questions, Mr. Malone?" (The deposition had barely begun.)

Plaintiff's counsel, in the interest of moving the deposition along, then asked a question specifically focused on 2017. The witness responded to the 2017 question with a series of answers all based on the current situation, not specific to 2017. See deposition at 14.20-17.12.

All the premises of the defense counsel's line of attack were wrong.

First, the idea that the chair of the department was not prepared to say how many radiologists were currently employed in his department was silly. The witness himself eventually made it clear that he did know the current number of radiologists.

Second, the relevance of the question was obvious. Although it is not the defending counsel's job to be a gatekeeper over what questions meet defending counsel's definition of relevance, still, one way to get to the issue of the number of employees at the relevant time two years ago is to start with the number of current employees. Most supervisors have a better handle on current numbers, and then can be led back to the past, once the knowledge of the current situation has been established. The witness proved that by answering 2017-focused questions with current information.

Third, there is no special rule for 30(b)(6) depositions that lets defending counsel issue rulings on what questions will or will not be permitted as being within defense counsel's view of the purview of the notice. This was explained to defense counsel a short time later when she issued another ruling blocking the witness from answering a question:

> Q. … Now, if there is a disagreement about how to interpret a particular study, do you ever get involved in helping resolve the disagreement?
>
> MS. DEESE: Objection. I direct the witness not to answer. That's not within the purview of this 30(b)(6) notice.
>
> MR. MALONE: Counsel, the rule in 30(b)(6) is very clear that if you think a question is outside the bounds of the notice, you are certainly entitled to object. And we can resolve later whether or not the question was within the fair bounds of it. If it is not, then the witness answers the question in his own personal capacity, not as the hospital spokesman. But that way, we don't have to come back a second time. That's the case law that's very clear that I know of. You are not allowed to carve out what you say are the boundaries of this deposition.
>
> MS. DEESE: Mr. Malone, can you tell me where in your notice it asks this witness about his personal experience, because that's what your question was about? I have presented this witness not as a fact witness, not as an expert witness. He is simply

> here as 30(b)(6) designee. And what he does in his personal experience has no bearing on that. My instruction to the witness not to answer stands.

Dep. 17.13-18.18. Defense counsel thereby proved herself unwilling to be bound by the applicable rules and the caselaw.

The basic rule was established in the caselaw two decades ago. The leading case is *King v. Pratt & Whitney*, 161 F.R.D. 475 (S.D. Fla. 1995).[17]

> Rule 30(b)(6) cannot be used to limit what is asked of a designated witness at a deposition. Rather, the Rule simply defines a corporation's obligations regarding whom they are obligated to produce for such a deposition and what that witness is obligated to be able to answer. … Rule 30(b)(6) should not be read to confer some special privilege on a corporate deponent responding to this type of notice. Clearly, Plaintiff could simply re-notice a deponent under the regular notice provisions and ask him the same questions that were objected to.

161 F.R.D. at 476. Besides the pragmatic reason noted by the *King* court, the other reason why counsel defending the deposition is not allowed to issue rulings on what is inside or outside the scope of the deposition notice is that Rule 30 carves out no special status for 30(b)(6) depositions conferring such authority on defending counsel. A leading treatise describes the rule enunciated in *King* as "the overwhelming majority rule" and cites a number of cases that follow it.[18] The

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[17] *King v. Pratt & Whitney, a Div. of United Technologies Corp.*, 161 F.R.D. 475 (S.D. Fla. 1995) aff'd sub nom. *King v. Pratt & Whitney*, 213 F.3d 646 (11th Cir. 2000) and aff'd sub nom. *King v. Pratt & Whitney*, 213 F.3d 647 (11th Cir. 2000).

[18] Mark Kosieradzki, *(30(b)(6): Deposing Corporations, Organizations and the Government* (Trial Guides 2016) at 294 & n.4. Cases cited by the treatise as supporting this rule are: *Detoy v. City & Cnty. of San Francisco*, 196 F.R.D. 362, 366 (N.D. Cal. 2000); *New World Network Ltd. v. M/V NORWEGIAN SEA*, No. 05-22916 CIV, 2007 WL 1068124, at *3 (S.D. Fla. Apr. 6, 2007); *U.S. E.E.O.C. v. Caesars Entm't, Inc.*, 237 F.R.D. 428, 432 (D. Nev. 2006); *Bracco Diagnostics Inc. v. Amersham Health Inc.*, No. CIV.A. 03-6025 SRC, 2005 WL 6714281, at *2 (D. N.J. Nov. 7, 2005); *Edison Corp. v. Secaucus Town*, 17 N.J. Tax 178, 182 (1998); *Whiting v. Hogan*, No. 12-CV-08039-PHX-GMS, 2013 WL 1047012, at *2 (D. Ariz. Mar. 14, 2013); *Alsabur v. Autozone, Inc.*, No. 13-CV-01689- KAW, 2014 WL 2772486, at *2 (N.D. Cal. June 18, 2014); *Norman v. State Farm Fire & Cas. Co.*, No. 13-CV-01643-PAB-CBS, 2014 WL 6478046, at *6 (D. Colo. Nov. 19, 2014); *Crawford v. George & Lynch, Inc.*, 19 F. Supp. 3d 546, 554 (D. Del. 2013); *F.D.I.C. v. Brudnicki*, No. 5:12-CV-00398-RS-GRJ, 2013 WL 5814494, at *1 (N.D. Fla. Oct. 29, 2013).

treatise notes that even the one case, now in the small minority, that says a 30(b)(6) deposition should be confined to the topics set out in the notice, also said: "Only the Court, not counsel, can order that a deposition be limited or that certain questions not be answered." *Paparelli v. Prudential Ins. Co. of America*, 108 F.R.D. 727, 731 (D. Mass 1985). In short, there is *no basis in the caselaw or the rule* for defense counsel to direct the witness not to answer questions on the ground that they fall outside the scope of the noticed topics. When defense counsel was told about the rule and the caselaw and nonetheless responded, "My instruction to the witness not to answer stands," dep. 18.17-18.18, her conduct was way over the line.

In the appendix to this motion, we have documented 38 occasions when the defending counsel made suggestive objections or simply started testifying on her own.[19] There are too

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[19] This is only the second deposition in this case of a fact witness from MWHC. The first was Dr. Hwang, the surgeon. At that deposition, too, aggressive speaking objections were repeatedly made by defense counsel, who refused to acknowledge any impropriety in doing so. For example:

> Q. In this case the big point of dispute is whether or not this man had a seminal vesicle mass coming into the surgery or did he have something growing off of the nerves. You understand that as the point of disagreement in this case, right?
>
> MS. DEESE: That completely misstates what the point of disagreement is from our point of view. It might be what you think the issue is. But I don't know that he can answer that question as to what the defense thinks the –
>
> MR. MALONE: Excuse me, Counsel. I'm asking questions of the witness. That wasn't a proper objection. You can object to the form of questions. You cannot coach the witness about what he should or should not be able to answer. So please lay off.
>
> MS. DEESE: So, Mr. Malone, it was a proper objection. If you're going to ask a question that improperly describes my defensive theme and then ask him to vote on that, I need to tell him that you haven't gotten it quite right. If you will ask your questions that don't misstate the facts or my defensive theme, I won't have very many words at all.

many to go through all of them in this brief. One other especially egregious example is worth discussing. At page 108 of the deposition, plaintiff's counsel asked a core question for this case, as follows:

> Q. Okay. Assume Dr. Hwang sat down with one of your radiologists to look at Mr. Cohen's February 2017 MRI. And assume his question was where the mass seemed to originate from. My question to you is, wouldn't you expect your radiologist to spend an adequate amount of time to be able to answer that question accurately?
>
> MS. DEESE: Same objections as before. And now also asked and answered. Go ahead, Dr. Jelinek.
>
> THE WITNESS: So it is a left-sided pelvic mass. And I don't know how much time, either, the radiologist had, whether they had other things going on or whether Dr. Hwang had other things going on. So I can't answer how diligent they could be if I didn't know what constraints both the radiologists as well as Dr. Hwang had.
>
> MS. DEESE: Also, I would note, for the record, that at his deposition at page 41 said –Dr. Hwang said, at line 8, "I would ask them to typically load the images and give a quick impression of what they see," which was not the hypothetical that you posed to this witness. And therefore, it was inappropriate. And that should all be strickened.

Dep. 108.4-109.6. Counsel held in her hand and was quoting from Dr. Hwang's deposition given in March 2019. The improper coaching/testifying got even worse when plaintiff's counsel tried to ask another question about the same subject by referring the witness – not to the deposition transcript years later from the surgeon that defense counsel was trying to coach the witness about – to what Dr. Hwang had said contemporaneously as documented in an email.

> MR. MALONE: All right. Let me mark as Exhibit 7 to the deposition, the email from Dr. Hwang to Mr. Cohen on May 2, 2018, at 12:18 in the afternoon. "Dear

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Hwang dep. 10.11-11.12 (excerpts attached as exhibit 8). Other examples occur at Hwang 20.6-21.15, 49.13-50.10, 56.16-56.18, 74.7-74.15, 106.17-106.18, 135.21-136.2, 140.7-141.1, and 144.20-145.13. All of these violated Rule 30(c) in various respects. We did not file a motion about counsel's conduct at Dr. Hwang's deposition because it wasn't quite as egregious as her behavior at the Rule 30(b)(6) deposition. However, we have now learned that two important documents existed before his deposition and should have been provided, so we will be asking to reopen Dr. Hwang's deposition to discuss those.

> Mr. Cohen, I had a chance to review the MRI with our Radiology Team, who concurs with the diagnosis of an abnormal left seminal vesicle." Do you see that?
>
> A. I do.
>
> Q. Okay. Isn't it fair to assume from that, that he asked the question of someone in radiology where does this -- what is the diagnosis for this mass in Mr. Cohen's pelvis?
>
> MS. DEESE: Objection. Same objection as before about deposition page 41 where he said what he asked.
>
> MR. MALONE: You are trying to show the witness and coach the witness by showing a transcript.
>
> MS. DEESE: I am not trying to coach the witness. I am trying to –
>
> THE WITNESS: So I don't know what transpired between Dr. Hwang and the radiologist. I don't know what was said. I can only say that I agree with our expert witnesses that there was a left pelvic mass that needed to come out. I don't know whether there was a discussion thereafter or whether he could have said, "could this be arising from." I don't know whether -- the person might have said, "Well, you know, it could be anything." So I don't know how it was framed. I do see his sentence.

Dep. 111.20-113.6. As the transcript reflects, plaintiff's counsel was trying to ask the witness about a document that Dr. Hwang wrote before he did the surgery on Mr. Cohen, and defense counsel successfully deflected the witness onto the broader topic of what Dr. Hwang might or might not have told the radiologist as reflected by Dr. Hwang's deposition testimony.

In any case, defense counsel kept pushing the transcript in front of the witness during plaintiff's counsel's questioning, a wildly improper tactic. Rule 30(c)(1) says depositions are taken as "at trial," and no one outside of Hollywood could imagine a defending counsel jumping into the middle of a witness's cross-examination by an opposing counsel and shoving a document in front of the witness while quoting from it. As this court says in its supplement to the general order, in the section on courtroom protocol at p.4, "Speaking objections are prohibited." This was a speaking objection on steroids.

E. The deposition revealed additional discovery misconduct by the defense

A document disclosed by defense counsel a few days before the deposition revealed that defense counsel had tried to lure plaintiff's counsel into a seemingly innocent compromise on the scope of the deposition notice, which would have proven fatal to our efforts to learn even one name of a radiologist who had looked at Mr. Cohen's MRI study. The court may recall that plaintiffs had listed as topic No. 1 for the deposition:

> All data/metadata from the Washington Hospital Center PACS system[20] showing all activity regarding Mr. Cohen's February 2017 MRI, including all information concerning who uploaded the study into the system and when, as well as the identities of all persons who opened and/or viewed the study in April, May and June 2017, along with dates, times, and durations of viewing for each instance.

On August 7, 2019, a few days before the hearing on the protective order motion, defense counsel proposed to allow the response to audit trail on No. 1 but only for one week post-operatively. Then she added in the same message, " If 2 weeks or even a month post-op will resolve this issue, I will recommend my client accept that." One month after the May 22, 2017 operation would have taken the disclosure to June 22, only a week less than what we were seeking. (See email from Ms. Deese dated August 7, 2019, attached as exhibit 11.) At that point, the hospital had still not produced the "audit trail" document showing who opened the study and when.

When that document was finally produced a few days before the deposition in October, it showed that if plaintiff's counsel had bitten on the proposed "compromise," defense counsel

[20] The PACS system is a computer network inside the hospital which provides access to imaging studies at numerous work stations and tracks every time any imaging study is opened and who has done so. PACS stands for Picture Archiving and Communication System.

would have been able to redact the one name of a MWHC radiologist who did look at the MRI study, a few days after her proposed cutoff date. Sneaky!

In addition, the belatedly produced audit trail document shows in combination with another document revealed a month after Dr. Hwang's deposition that the defense withheld key documentary information that plaintiffs needed to properly depose Dr. Hwang on exactly what he did with the imaging CD he obtained from Mr. Cohen. We will ask the court to allow us to redepose Dr. Hwang on those issues. We also ask to see the complete unredacted audit trail document.

F. Repeated violations of the rules for deposition conduct can also violate the Rules of Professional Conduct

At least three ethical rules governing attorney conduct in the District of Columbia apply to depositions. They are excerpted below with relevant portions and official comments highlighted in boldface.

D.C. Rules of Professional Conduct Rule 3.4 Fairness to Opposing Party and Counsel:

A lawyer shall not:

> **(a) Obstruct another party's access to evidence** or alter, destroy, or conceal evidence, or counsel or assist another person to do so, if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding. …
>
> **(c) Knowingly disobey an obligation under the rules of a tribunal** except for an open refusal based on an assertion that no valid obligation exists;

Comment 1: [1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. **Fair competition in the adversary system is secured by prohibitions against** destruction or concealment of evidence, improperly influencing witnesses, **obstructive tactics in discovery procedure,** and the like.

> **Rule 3.5(d): A lawyer shall not (d) Engage in conduct intended to disrupt any proceeding of a tribunal, including a deposition.**

> Comment 4 of Rule 3.5: [4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. **Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants.**
>
> > Rule 8.4: **It is professional misconduct for a lawyer to: (d) Engage in conduct that seriously interferes with the administration of justice;**
>
> Comment 1 to Rule 8.4 says in part: "**A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation."** And Comment 3 to Rule 8.4 says: "[3] **A lawyer violates paragraph (d) by offensive, abusive, or harassing conduct that seriously interferes with the administration of justice."** (Emphasis added.)

Plaintiffs do not seek a specific ruling that the conduct here violated the rules of professional conduct, but we believe these rules are relevant all the same (along with the failure to make "reasonably diligent efforts" to comply with our discovery requests on the identity of the radiologist, as required by Rule of Professional Conduct 3.4(d) and as discussed above at p. 10).

G. Sanctions must be meaningful to deter the type of conduct that happened here

This court does not have the time to police every line of questions in every deposition in real time. That is why we have what amounts to an honor system requiring attorneys to follow the letter of Rule 30(c) as well as its spirit. And that is why – when there is a pattern of abusive, obstructive deposition conduct -- meaningful sanctions must be imposed to deter such conduct in the future.

This court said as much when it observed at the hearing on August 12: "I rigorously enforce the rule 37 sanctions fee shifting provisions because I have an institutional interest in doing so. … the idea is to discourage people from coming to the Court unless they really need to be here and that is because I do have 400 civil cases and I can't be holding discovery hearings on every little discovery dispute that comes up…." Tr. 30-31.

Along the same lines, 7th Circuit Chief Judge Frank Easterbrook, in *Redwood v. Dobson*, 476 F.3d 462, 469-70 (7th Cir. 2007), highlighted the critical importance of the Rules of Civil Procedure governing depositions:

> It is precisely when animosity runs high that playing by the rules is vital. Rules of legal procedure are designed to defuse, or at least channel into set forms, the heated feelings that accompany much litigation. Because depositions take place in law offices rather than courtrooms, adherence to professional standards is vital, for the judge has no direct means of control.

Two rules apply here:

- Superior Court Civil Rule 30(d)(2) provides: (2) *Sanction*. The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent.

- Superior Court Civil Rule 37(b)(2) *Sanctions Sought in This Court*.
(A) *For Not Obeying a Discovery Order*. If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(e), 35, or 37(a), the court may issue further just orders.

Rule 37(b)(2) goes on to itemize a non-exclusive list of seven types of sanctions that are among those this court can impose. Those include personal monetary sanctions against the counsel responsible for discovery violations. *See Edwards v. Climate Conditioning Corp.,* 942 A.2d 1148 (D.C. 2008), where the court affirmed sanctions against a party's attorney and said:

> Discovery sanctions under Rule 37 (b) are intended to be punitive as well as compensatory and to serve as a general, as well as a specific, deterrent. Sanctions are levied to penalize the offending party, to prevent it from profiting by its misconduct, and to enforce compliance, as well as to compensate the injured party. Sanctions also are meant to deter other litigants from engaging in discovery abuses in other cases.

Id. at 1154.

The situation that confronts this Court today is far worse than what it was in August, when the defendant had filed an unnecessary protective order motion, and yet the only harm that

had occurred at that point was wasting everyone's time and dragging out discovery far longer than necessary. Now, the search for the truth has been actively obstructed. We submit that monetary sanctions are a necessary but not sufficient part of the sanctions that are now appropriate.

1. The court should allow plaintiffs to reopen the deposition on the topics 6 and 7 as to which discovery was blocked, and on all questions where answers were blocked.

It goes without saying that plaintiff's counsel wants to reconvene the 30(b)(6) deposition on topics 6 and 7 about the MRI study. We suggest the court's order should as a baseline instruct the defendant that it must give its position on the two topics through a witness competent to answer questions about the imaging study and that the only objections that counsel may make are to form and for privilege, and must be stated in compliance with Rule 30(c)(2). We also have a right to ask any question, whether within those topics or not, where the witness was directed not to answer.

2. Defense counsel should be personally admonished.

The many dozens of violations of the discovery rules in the deposition here warrant a specific admonition to defense counsel. The rules have been in place for a long time. It is not within the bounds of zealous advocacy to repeatedly break the rules especially when the rules have been called to counsel's attention. Only an admonition that makes findings of fact about the impropriety of the conduct and that cites to the rules violated will help ensure this doesn't happen again.

3. The court should impose monetary sanctions.

The extent of such sanctions is up to the court's view. Since the defendant MWHC followed its counsel's lead on obstructing answers in the deposition, the court could find

sanctions against both to be appropriate. On the other hand, counsel is the one who knows the rules for depositions. The court already suggested that sanctions would be appropriate for the unnecessary motion for protective order, a remedy we declined at the time hoping we could get a good-faith corporate designee deposition. Now, a sanction for plaintiff's counsel's time spent and costs incurred is appropriate in the following categories: (1) responding to the motion for protective order, (2) attending the original corporate deposition, (3) preparing and arguing this motion for sanctions, (4) attending the reopened corporate deposition.

4. The court should allow Dr. Hwang to be redeposed.

There are two key documents (request to import images and audit trail) that should have been provided to plaintiffs before Dr. Hwang's deposition, which in combination shed light on what he did to obtain the alleged "curbside" consultation. The second of these, the audit trail, was only provided shortly before the 30(b)(6) deposition. We ask for leave to redepose him on that subject. See Civil Rule 30(a)(2)(A)(ii). We also ask to see the complete unredacted audit trail document. The court already ruled at the motion hearing that the list of names on the document would not itself be privileged. We also ask to be allowed to question him about his employment status in 2017, an issue made relevant by the recent revelation of the existence of the Medstar Medical Group and made further relevant by defendant's refusal to agree that the radiologists employed by this group are in effect also employed by the defendant MWHC (a stipulation it previously consented to for Dr. Hwang). See plaintiffs' accompanying motion for leave to file a second amended complaint on the subject of the Medstar Medical Group.

CONCLUSION

The rules of deposition conduct that were broken here have been black-letter law for more than 20 years. No one expects perfection, but the extent and nature of the repeated violations here require serious sanctions.

Respectfully submitted,

/s/ Patrick A. Malone
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Counsel for Plaintiffs

LIST OF EXHIBITS

Exhibit 1	Appendix annotated transcript
Exhibit 2	Video
Exhibit 3	MWHC answers to interrogatories, which were served on March 11, 2019
Exhibit 4	Original notice served on March 19, 2019
Exhibit 5	August 12, 2019 Hearing Transcript
Exhibit 6	"Reserved"
Exhibit 7	Dr. Hwang's deposition exhibits #3, #4, #5, and #6
Exhibit 8	Dr. Hwang's transcript of deposition
Exhibit 9	Cohen MRI metadata printout
Exhibit 10	Female Pelvis Protocol – Oregon Health & Science University
Exhibit 11	Email from Crystal Deese dated August 7, 2019
Exhibit 12	Second Amended Notice of Deposition – Jelinek Exhibit 1
Exhibit 13	Audit trail report – Jelinek Exhibit 3
Exhibit 14	Request to import images – Jelinek Exhibit 2

CERTIFICATE PURSUANT TO RULE 12-I

I certify that I sought consent of opposing counsel to the relief sought in this motion, and consent was not obtained. I did not seek a "meet and confer" meeting under Rule 37(a) because this motion is brought under Rule 37(b) which does not require such conference. *See Edwards v. Climate Conditioning Corp.,* 942 A.2d 1148, 1152-53 (D.C. 2008).

/s/ Patrick A. Malone
Patrick A. Malone

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of October 2019, the foregoing was served on the following *via* the Court's electronic filing system:

Crystal S. Deese, Esq.
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Counsel for Defendant

/s/ Patrick A. Malone
Patrick A. Malone

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DANIEL COHEN, *et al.*	:	
	:	
Plaintiffs,	:	
	:	
v.	:	**Civil Action No.: 2018 CA 006284 M**
	:	**Judge Florence Y. Pan**
MEDSTAR WASHINGTON HOSPITAL CENTER	:	**Next Event: December 20, 2019, 11:00am Close of Discovery and Status Conference**
	:	
Defendant.	:	
	:	

PROPOSED ORDER

Upon consideration of plaintiff's motion for sanctions related to the corporate designee deposition, and the opposition thereto and the entire record herein, it is hereby

ORDERED that the motion is granted, and the court orders the following in sanctions:

1. The defendant MWHC shall make a designee available within 30 days after this order to respond to topics 6 and 7 of the 2nd amended notice of Rule 30b6 deposition; the designee shall be prepared to answer all questions about the imaging study. Plaintiffs are also allowed to re-ask any line of questions that the witness was instructed not to answer at the first session.
2. Defense counsel Ms. Deese is hereby admonished for violating the rules of civil procedure which bar suggestive and argumentative objections and which also prohibit defending counsel from directing the witness not to answer questions except on three specific grounds set out in Rule 30(c)(2) which do not apply here.
3. An appropriate monetary sanction against the defendant and its counsel will be issued for fees and costs after plaintiff's counsel provides its time and costs spent at: (1) responding to the motion for protective order, (2) attending the original corporate deposition, (3)

preparing and arguing the motion for sanctions, (4) attending the reopened corporate deposition.

4. The defendant MWHC shall make Dr. Hwang available for redeposition on the two documents (audit trail and request to import images) that were not provided before his first deposition, and on who was his employer in May 2017.

5. The defendant shall provide a full and unredacted audit trail report for Mr. Cohen's MRI study from February 2017.

_____

Judge Florence Y. Pan