

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA  
Civil Division

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WINFRED L. STANLEY, <u>et al.</u>	)	
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Plaintiffs,	)	
	)	
v.	)	C.A. 98 CV-02780 (SS)
	)	
DISTRICT OF COLUMBIA, <u>et al.</u>	)	
	)	
Defendants.	)	

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**MEMORANDUM OF POINTS AND AUTHORITIES**  
**SUPPORTING PLAINTIFFS' MOTION TO RESUME DEPOSITION**

This memorandum supports Plaintiffs' motion to compel Defendant Sonya Proctor to resume her deposition and answer deposition questions.

**Preliminary Statement**

When the Court ordered Ms. Proctor to appear for her deposition it probably expected the former Interim Chief of the Metropolitan Police Department ("MPD") would appear, answer questions candidly, allow Plaintiffs to ascertain her position on the underlying events, and depart after four hours. Indeed, on its face, the case seems simple enough: Plaintiffs say they were given two hours notice to elect Hobson's Choice options of whether to retire or be fired; they were afforded no due process after 27 years of service with the MPD; and the press reported that Proctor had assailed their performance. Proctor has maintained that each Plaintiff voluntarily retired.

And so, eighteen months after Friday, February 13, 1998, the date on which Plaintiffs' careers ended, they looked forward to hearing Proctor's views regarding their terminations, even within the constraints of a four hour initial time limit on her deposition. In retrospect, this expectation was unrealistic. The District of Columbia and its clients have had to be "drag[ged] ... kicking and screaming through discovery"<sup>1</sup> in this case, as others have in cases that have come to light recently.<sup>2</sup> The Proctor deposition proved no exception.

Ms. Proctor took undue advantage of the Court's expectations. She did everything in her power to twist, obfuscate, and stall in order to fritter away the limited time Plaintiffs had to depose her. Because no one was there to supervise the process, she frustrated Plaintiffs' ability to obtain her perspective on the events at issue and to find out her explanation for what she did, always a fundamental objective of discovery in employment litigation.<sup>3</sup>

The colloquies and testimony quoted below demonstrate the extent to which Ms. Proctor failed to uphold the Court's trust

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<sup>1</sup> In re Air Crash Disaster, 130 F.R.D. 627, 630 (E.D.Mich. 1989).

<sup>2</sup> E.g., Webb v. D.C., \_\_\_ F.Supp.2d \_\_\_, 1999 WL 728095, \*6-\*7, \*14 (D.D.C.) (Lamberth, J.) (citing and quoting Barton-Smith v. D.C., CA 98-3026 (D.D.C. June 1, 1999) & Blackman v. D.C., 1999 WL 503544 (D.D.C. July 9, 1999) (Friedman, J.) and Green v. D.C., 134 F.Supp. 1 (D.D.C. 1991) (Hogan, J.)).

<sup>3</sup> Sotabina v. Hotel Lombardy, 173 F.R.D. 5, 6-7 (D.D.C. 1997).

that she would provide an answer for her actions and state whether she made the derogatory statements complained of. Regrettably - although not unsurprisingly<sup>4</sup> - the Assistant Corporation Counsel joined in Ms. Proctor's strategy. Instructions not to answer questions, coaching, frivolous objections, conferring while questions were pending, and demanding Plaintiffs include within the four hours allotted them the extensive time counsel and Ms. Proctor spent conferring outside the deposition, proved par for the course.<sup>5</sup>

For the reasons set forth below, Plaintiffs now seek an order directing Proctor to appear for her renewed deposition before a judicial officer or a special master, whose fees should be assumed by Defendants.<sup>6</sup> In addition, because Proctor and her counsel could not have engaged in their behavior with a clean heart, let alone an empty head, Plaintiffs seek an order directing Proctor and her lawyer to pay the costs of the

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<sup>4</sup> E.g., Monroe v. Ridley, 135 F.R.D. 1 (D.D.C. 1990) (sanctioning D.C. for discovery abuse by Corporation Counsel); Jackson v. D.C., 1990 WL 174943 (D.D.C. 1990) (same) (cited in Webb v. D.C., \_\_ F.Supp.2d at \_\_, 1999 WL 728095, \*6 (same)).

<sup>5</sup> See Deposition of Sonya Proctor, Stanley, et al. v. District of Columbia, et al., CA 98-02780 (October 19, 1999) (hereinafter "Tr. \_\_\_"), at pp. 5-7 (Ex. 1).

<sup>6</sup> See, e.g., Van Pilsum v. Iowa State Univ., 152 F.R.D. 179, 181 (S.D.Ia. 1993); Shapiro v. Freeman, 38 F.R.D. 308, 311-12 (S.D.N.Y. 1965) (counsel "willfully torpedo[ed]" deposition).

deposition transcript and attorneys' fees associated with this motion.<sup>7</sup>

### **Statement of Facts**

Plaintiffs review the Proctor deposition by beginning with the most important person-the deponent. After showing her lamentable willingness to waste time, Plaintiffs turn to her counsel's deviation from accepted standards of professional deportment.

#### **A. Proctor Sought To Stall From The Outset.**

Proctor appeared for her deposition 7 minutes late. She quickly engaged in a fencing contest over how many times she had been deposed before, professing not to know if she had been deposed more than ten times, more than fifty times, less than a hundred times, and so on.<sup>8</sup>

Proctor bickered extensively and consumed valuable time pretending that a material difference existed over whether certain MPD officers had been "terminated" or "removed."<sup>9</sup> An example of her hypertechnical views and ability to stall is

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<sup>7</sup> See, e.g., American Directory Service Agency v. Beam, 131 F.R.D. 635, 644-45 (D.D.C. 1990) (sanctioning counsel for deposition misconduct); International Union of Electrical, Radio and Machine Workers v. Westinghouse Electric Corp., 91 F.R.D. 277, 279-81 (D.D.C. 1991) (same). See also Nutmeg Ins. Co. v. Atwell, Vogel & Sterling, 120 F.R.D. 504, 508 (W.D.La. 1988) (awarding sanctions and costs of resumed deposition); Record Data, Inc. v. Schoolcraft, 1989 W.L. 2071 (N.D.Ill. 1989) (sanctions for costs of continuing depositions).

<sup>8</sup> Tr. 5-7 (Ex. 1).

<sup>9</sup> Tr. 47-62.

reflected by the following brief excerpt from a colloquy that extends, in full, over 15 pages of transcript:

Q: Let's try it this way. I'm going to use the term "terminate," and I'm going to define "terminate" as removing from employment with the Metropolitan Police Department.

Did Chief Soulsby ever tell you that he believed that this section, paragraph 2 on page 3 of Proctor Exhibit 3, gave him the power to terminate MPD employees above the rank of captain?

A: I do not believe I ever heard Soulsby use the term "terminate."

Q: What specifically did he say in these meetings that gave you the understanding that this section gave him the power to terminate MPD employees above the rank of captain?

A: "Terminate" is your word. I have said that I never recalled him using the term "terminate." I believe that he used the term "remove."<sup>10</sup>

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<sup>10</sup> Tr. p. 49 line 15 - p. 50 line 9 (Ex. 1).

Q.: Do you recall if you were told that these four individuals were informed that they would be terminated if they didn't elect to retire?

A: I do not recall the word "terminated" being used at any point.

Q: Terminated or anything which meant termination. I don't want you to quibble with me on the specific word. I want the concept of termination as I described it to you before, "removed from employment with the Metropolitan Police Department."

A: The word is very important. I never heard the word "terminate" used in referring to what would happen with those individuals. My recollection is that Soulsby's comments were that they would be removed, not terminated.<sup>11</sup>

**B. Proctor's Efforts To Quibble Over Commonly Understood Terms At Key Junctures In The Deposition.**

Proctor also pretended she did not understand terms commonly used by English-speaking persons. While that would be bad enough in an ordinary case, its adverse impact is heightened when the time for questioning is limited to four hours and

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<sup>11</sup> Tr. p. 53 line 9 - p. 54 line 1 (Ex. 1).

increases exponentially when the witness is trying to avoid being pinned down about key issues in the case.<sup>12</sup>

A trenchant example is demonstrated by Proctor's testimony about the news each Plaintiff received as they were taken one after the other into a room to be confronted by Assistant Chiefs R.C. White ("White") and A.L. Broadbent ("Broadbent"), who delivered the news that Plaintiffs were being separated from the MPD. A key issue in that regard is what information White and Broadbent conveyed to Plaintiffs, who contend that they were given 2 hours to decide whether to retire or be fired.

Proctor asserted under oath that she consulted with MPD's General Counsel, Terrence Ryan ("Ryan") and, rather than advising her that she could terminate persons at Plaintiffs' rank of Commander, he allegedly counseled that she could only tell such persons that if they did not retire she would recommend to the District of Columbia Financial Responsibility and Management Assistance Authority ("Control Board") that they be terminated.<sup>13</sup>

We will put aside Ryan's contradictory testimony the very next day that he had warned Proctor she needed to give Plaintiffs their due process rights under D.C. Code §4-104 and

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<sup>12</sup> See, e.g., Tr. 76-78 and 133-135 (Ex. 1).

<sup>13</sup> Tr. 91-93 (Ex. 1).

other statutory provisions, which she ignored.<sup>14</sup> Of immediate importance are Proctor's transparent efforts (aided by her lawyer's coaching with "If you know" interjections) to consume time by dodging and weaving a line of questioning wherein she was asked whether White's statements, if made, were authorized by her or had departed from her expectations:

Q.: If Chief White represented to Stanley that you told him that he had to retire immediately or he would be fired by you, that would have been unauthorized actions [sic] on the part of White?

A: I do not believe that Robert White would misrepresent anything that I said. I did not tell him to say anything about the Control Board. Robert White was very well aware of my intentions in terms of going forward with the removal. I did not discuss with Robert White the mechanism for that.

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Q: If Robert White told Stanley that he could retire or he would be fired that day, was that unauthorized?

A: You're asking me to assume that that was said and I don't believe that.

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<sup>14</sup> T. Ryan Dep., Stanley v. D.C., (Oct. 20, 1999) (being transcribed).

Q: I'm asking you to assume that that was said.  
If that was said, for purposes of my questions, was it unauthorized to tell Stanley that he had the option of retiring that day or being terminated that day?

A: If that comment was said, I believe that Robert White misunderstood what my next step would be.

Q: Is your position that if Robert White said you have the option to Stanley, that Stanley had the option of retiring that day or being terminated, was that statement unauthorized?

A: I need to consult with my attorney for a second.

Q: Hold on. There's a question pending. I want an answer to my question before you consult with your attorney as to your answer.

A: I need to consult with my attorney about an issue that may affect the answer.

Q: There's a pending question.

A: Can you state the question again?

Q: Sure. If Robert White told Stanley that he had the option of retiring that day or being terminated that day, was that communication by White to Stanley unauthorized?

MR. ANDERSON: Well, I'm going to object. It's speculative. It doesn't go to evidence in this case. I think we should talk about the facts.

Q: Let me make my record on this deposition in the face of that objection. The allegations of the complaint are essentially a paraphrase of what I just said. And if you want me to introduce the complaint into the record, I will do so. That is a fundamental allegation in this complaint and your objection is not well taken, and I would like an answer to my question.

MR. ANDERSON: I don't think she has to answer questions [sic] about speculation. You can say whatever you would like in the complaint and she can tell you the facts that she remembers; and she's told you what she told White.

Q: Are you directing her not to answer this question?

MR. ANDERSON: Not at this point, but -

Q: Please answer the question. Your counsel made his objection for the record.

A: I have a great deal of difficulty with this hypothetical situation. The information that I am aware of is that no such conversation

occurred, and I feel it's inappropriate for me to be in a position to respond to that when what I believe is completely different.

Q. Are you refusing to answer my question, Ms. Proctor?

A. I'm not refusing to answer your question.

Q. I'm going to ask it to you again and I'm going to ask that you answer it. If you do not answer it this time, I'm going to seek intervention from the court on it and we're going to be right back here again and you're going to be directed to answer this question.

MR. ANDERSON: Well, you know, he says that. That may or may not happen.

Q: I would like to hear, Mr. Anderson, your objection on the record to this question.

MR. ANDERSON: You're going to say the question?

Q: The question has been asked at least three times now and I'll ask it again. Chief Proctor, if Robert White told Winfred Stanley that he had the option of, one, retiring that day or, two, being terminated, was that communication from Robert White to Winfred Stanley unauthorized by you?

MR. ANDERSON: Okay. I think that it is speculative because it involves facts which were unknown to her. I think the question of whether or not it's authorized is a legal question, and I don't object to her talking about facts, things that she knows. But for her to give you her legal opinion about whether it was authorized or not I think is speculation, especially because we don't know if [sic] that actually happened. I think she can tell you about things that she has firsthand knowledge about, what she said, what she told people to do. This question about whether it was unauthorized or not, I don't think is proper.

Q: Are you directing her not to answer the question?

MR. ANDERSON: Well, no, I don't see any particular harm in -- if you can. If you can.

A: Maybe this would help me understand the question better. Are you saying that that was said? I can respond to a factual. [sic]

Q: That's a factual allegation from the complaint. For purposes of this deposition and my question, I'm asking you to assume that that was a fact.

MR. ANDERSON: And I don't think that's proper.

A: Based on your question, you state that that is a fact. I do not believe it to be a fact; but if that were true, it would not be consistent with the actions that I intended to take.

Q: Would it have been not authorized -- let me ask that a different way. Is it true that you did not authorize Robert White to tell Winfred Stanley that he had the option of retiring that day or being terminated that day?

A. I will repeat again that I informed Robert White that it was my intention to refer these cases -- to resolve them with the Control Board if the individuals did not retire that day.

Q. One last time and then we're going to take it to the judge.

A. That's fine.

Q. One last time. I'm going to try and ask it in a different way and I want you to listen very carefully and consider before you give another answer like the last three you've just given. If you want to consult with your attorney before answering this, I suggest that you do so because we'll be seeking sanctions on this. Did you authorize Robert White to give the following

options to Winfred Stanley: option one, retire that day; option two, be terminated by the chief of police.

MR. ANDERSON: Let's take the chance to consult that he gives us.

(Recess from 2:20 p.m. to 2:25 p.m.)

Q: Ms. Proctor, you've had a substantial opportunity to consult with your counsel on this question. Would you like to share an answer with us at this point?

A: In response to the question, I can tell you what I told Robert White. I cannot, I can't speak to what he told anyone else and I can't really render a legal opinion as to what was authorized and what was not. I can tell you what I told him.

Q: I'm not asking you that and I'm not asking you to render a legal opinion. I'm asking you in the standard -- do you know what the word "authorized" means? Do you know what the word "authorized" means? Can you define it for me?

A: To give permission to.

Q: If we're dealing with that and now we put an "un" in front of it, do you know what unauthorized means?

A: I think I can figure that out.

Q: Can you define it for me, since you seem to be having a problem with it?

A: It would be not giving permission to.

Q: Okay. Now the question is if Robert White told Winfred Stanley that he had the option, he, Winfred Stanley, had the option of, one, retiring immediately or, two, being fired by the chief, was that communication by Robert White to Winfred Stanley unauthorized?

A: If such a communication occurred, I believe it was a misunderstanding on the part of Robert White as to what the next step in the process would be.

Q: Was it unauthorized?

MR. ANDERSON: I object.

A: I've done my best to answer the question.

MR. ANDERSON: I think so, too.

Q: Are you directing her not to answer my question, Mr. Anderson?

MR. ANDERSON: I think she's done her best to answer your question several times.

Q: Did you authorize such a communication?

MR. ANDERSON: Can you add anything more to what you said?

A: I don't have anything to add to my previous answer.

Q: I'm asking you a question. Did you authorize a communication such as the one as I described. And I'll state it for you again, if you would like.

A: I don't need it stated again. I have answered the question to the best of my ability.

Q: Yes or no. Did you tell Robert White that he could say to Winfred Stanley you have the option of, one, retiring or, two, being terminated? Did you tell White he could say that?

A: I have answered the question to the best of my ability.

Q: What part of that question can't you answer as yes or no? What can I define for you that's giving you such trouble?

MR. ANDERSON: Well, it's your conclusion, authorized. She has told you what she remembers telling White.

Q: I'm entitled to an answer to my question, Mr. Anderson, and I guess we're going to have to go back to court on this one and I'm going to seek sanctions. I gave you approximately ten minutes [sic] to discuss this with your client.

MR. ANDERSON: You may do whatever you like.

Q: Are you directing her not to answer my question?

MR. ANDERSON: You keep asking me that and I keep telling you she's answered your question and you can do what you want. You can file whatever you like.

Q: I guess we'll be doing that, because this is going to come up two more times, Ms. Proctor, because we have two more plaintiffs that we'll be talking about. You've cut into a lot of my time being evasive as to this particular question. If we have to come back and do it again, that's fine with me.<sup>15</sup>

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<sup>15</sup> Tr. 121-132 (Ex. 1). See also Tr. 148-149 (similar colloquy with respect to Plaintiff Smith) (Ex. 1).

Plainly, the former Interim Chief of Police of the District of Columbia did not want to admit anything that might undercut her litigation position that everything that was to be expressed to Plaintiffs was to be precatory, rather than mandatory.

While Ms. Proctor is entitled to stake out such a claim and hope a jury accepts it, she had no license to waste many minutes of precious deposition time quibbling over semantics and deciding she would not answer questions which directly challenged her credibility.

**C. The Assistant Corporation Counsel's Concurrent Efforts To Stall and Consume Time.**

The Assistant Corporation Counsel also elected to help further Proctor's objectives of buying as much time as possible and avoiding giving answers in sensitive areas. For instance, he consulted with Proctor while a question was pending and then insisted that the time spent consulting, which had been given to them as a matter of courtesy, be counted against the four-hour limit.<sup>16</sup>

Counsel also made speaking objections that were transparent ploys to alert and/or coach the witness, such as the following exchange:

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<sup>16</sup> Tr. 5, 128, 154-155 (Ex. 1).

Q: Did you ever ask him what authority he was operating under with regard to [former Inspector Jacqueline] Simms?

A: I didn't ask him what authority he was operating under because what he was seeking at that time was her retirement in an optional status. He was asking her to retire.

Q: What does optional mean in this context? It wasn't optional to her, was it?

MR. ANDERSON: I object. If you know what she's thinking - are you asking her what she was thinking?

Q: No, I'm not asking. Was it optional to her to retire or not?

MR. ANDERSON: Do you know what Simms was thinking?

Q: That's not what I'm asking. I'm asking was it optional from the MPD chief's authority, was it optional to Simms whether to retire or not?<sup>17</sup>

Counsel instructed the witness not to answer questions even though Plaintiffs were not seeking privileged or manifestly

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<sup>17</sup> Tr. 70-71 (Ex. 1). See also, Tr. 55-56 (counsel told witness she didn't have to answer "yes or no" after Proctor quibbled over use of word "termination"), 126 (counsel told witness she could answer "if you can") and 131-132 (counsel interrupted when witness claimed she couldn't understand simple question of whether she had told Assistant Chief White he could tell Plaintiff Stanley that Stanley could retire or be fired).

irrelevant information.<sup>18</sup> The denouement was Proctor's parting shot out the door. The colloquy reprinted below is typical, for it shows the witness' efforts to avoid answering questions and the lawyer's concurrent efforts to help his client at any cost, regardless of Plaintiffs' rights to discovery:

Q: ... My question is since those two options are not the options that you have testified you told White to provide Smith, what did you do in response to being informed by Smith in this memo [from Plaintiff Smith] that those were the options he was provided? What did you do?

A: This memo probably reached me at least a week later. I believe within a day or two of the action I responded to a meeting out of the city for the major city chiefs.

Q: You went to Vegas?

A: That's where the meeting happened to be located. So I did not receive this immediately.

Q: But what did you do when you got it?

A: When I received it, I would review the information in this memo as the perception of a person who was unhappy with being asked to retire on short notice.

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<sup>18</sup> See, e.g., Tr. 4-5 (Ex. 1).

MR. ANDERSON: Have you finished your answer?

A: Yes.

MR. ANDERSON: Okay.

Q: She did not answer my question, Steve, as to what she did. I still want an answer to my question. You said you gave me one more question. I would like to know what you did.

MR. ANDERSON: She said she finished her answer.

Is that correct or did you have anymore [sic] to add?

A: I did answer the question.

Q: You said you confirmed -

MR. ANDERSON: Let's not get in an argument with this.

Q: You gave me one more question -

MR. ANDERSON: You can tell Judge Morgan [sic] that she was unresponsive to you last question when you have your other complaints.

Q: Are you directing her not to answer the last question?

MR. ANDERSON: Yes, because we -

Q: Let me finish my objection and then you can speak.

MR. ANDERSON: No, we don't have to let him finish his objection. Let's just go. Lets' see if our next

witness is here. You've gone way over your time and you're wasting our time.

You're free to go, as the police sometimes say.<sup>19</sup>

By stalling, nit-picking, and specious objections from counsel, Ms. Proctor managed to avoid answering important questions about her reasons for terminating Plaintiffs and the choices she had told her henchmen to offer them. Moreover, she entirely prevented Plaintiffs from asking questions pertinent to the defamation count.

**D. Defendants' Refusal To Compromise.**

In an effort to avoid judicial interposition, Plaintiffs asked opposing counsel on the record to consent to an additional thirty minutes of questioning because of the behavior highlighted above. He refused that and a follow-up letter.<sup>20</sup>

**Argument**

It has been stated that "depositions are to be limited to what they were and are intended to be: question-and-answer sessions between a lawyer and a witness aimed at uncovering the facts in a lawsuit."<sup>21</sup> The law has identified recurring types of

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<sup>19</sup> Tr. 165-167 (Ex. 1).

<sup>20</sup> Tr. 152-159 (Ex. 1).

<sup>21</sup> Hall v. Clifton Precision, a Division of Litton, Inc., 150 F.R.D. 525, 531 (E.D.Pa. 1993).

department that are inconsistent with that vision. Many of those problems were present here.

**A. Deponents' Responsibilities.**

A party, especially one like Proctor who occupied a lofty position to which persons reasonably could aspire, has no right to engage in "evading the questions, giving unresponsive answers, and stonewalling" which are "aimed at stymieing ... efforts to find out through discovery what the ... case was about."<sup>22</sup> In the words of Judge Learned Hand: "a court ought not to be put off by transparent sham, and the fact that the witness gives some answer cannot be an absolute test."<sup>23</sup>

**B. Counsel's Responsibilities.**

A lawyer defending a deposition cannot succumb to the temptation to join - or lead - the client in stonewalling. Counsel may not run amuck during the deposition process by interposing "obstructive interruptions, questions to opposing counsel, and demands for explanations [that render the deposition

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<sup>22</sup> Castillo v. St. Paul Fire & Marine Ins. Co., 938 F.2d 776, 778-79 (7<sup>th</sup> Cir. 1991)(affirming dismissal of lawsuit by doctor who joined counsel in abusive deposition conduct). See also Szilvassy v. United States, 82 F.R.D. 752, 755 (S.D.N.Y. 1979)("confirmed obstinacy" by litigant and counsel in deposition warranted severe sanctions); Snead v. Automation Industries, Inc., 102 F.R.D. 823, 827 (D.Md. 1984)(court sanctioned pattern of intentional delay).

<sup>23</sup> United States v. Appell, 211 F. 495 (S.D.N.Y. 1913)(quoted in Life Music Inc. v. Broadcast Music, Inc., 41 F.R.D. 16, 24 (S.D.N.Y. 1966)(pattern of evasive ("I don't recall") deposition testimony sanctioned)).

an exercise in futility]."<sup>24</sup> Frivolous "objections to the form of the question" are as impermissible<sup>25</sup> as private conferences between the lawyer and the witness while questions are pending or a document is being presented to the witness, except where it is clear the conference's purpose is to decide whether to assert a privilege.<sup>26</sup>

Examination and cross-examination of deposition witnesses should proceed as it does at trial.<sup>27</sup> Therefore it has long been the law in this District, even pre-dating the 1993 amendments to Rules 30(c)-(d)(1), F.R.Civ.P., that counsel are not permitted to instruct witnesses not to answer, absent a bona fide claim of privilege, invasion of trade secrets, or the like.<sup>28</sup>

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<sup>24</sup> American Directory Service Agency v. Beam, 131 F.R.D. at 644-45 (citing and quoting Unique Concepts, Inc. v. Brown, 115 F.R.D. 292, 292-93 (S.D.N.Y. 1987)). See also Jaen v. Coca-Cola Co., 157 F.R.D. 146, 152 (D.P.R. 1994)(sanctions against counsel "for their refusal to cease their inappropriate behavior during a deposition."); Wright v. Firestone Tire & Rubber Co., 93 F.R.D. 491, 493 (W.D.Ky. 1982)(sanctions for repeated transparent objections).

<sup>25</sup> Johnson v. Wayne Manor Apartments, 153 F.R.D. 56, 59 (E.D. Pa. 1993).

<sup>26</sup> Hall v. Clifton Precision, a Division of Litton, Inc., 150 F.R.D. at 529.

<sup>27</sup> Damaj v. Farmers Ins. Co., Inc., 164 F.R.D. 559, 560 (N.D.Okl. 1995).

<sup>28</sup> International Union of Electrical, Radio and Machine Workers v. Westinghouse Electric Corp., 91 F.R.D. at 279-80; Drew v. Int'l Bd. Of Sulphite & Paper Mill Wkrs., 37 F.R.D. 446, 449-50 (D.D.C. 1965). See also Ralston-Purina Co. v. McFarland, 550 F.2d 967, 972-73 & n. 10 (4<sup>th</sup> Cir. 1977)(counsel's instructions not to answer found "indefensible and utterly at variance with the discovery provisions of the Federal Rules of Civil Procedure."); Furniture World, Inc. v. D.A.V. Thrift Stores, 168 F.R.D. 61, 63 (D.N.M. 1996)(collecting cases)(granting motion to compel where counsel instructed witness not to answer on grounds of irrelevancy).

Nor are counsel allowed to "coach" witnesses by, for example, thinly-disguised speaking "objections" which witnesses then incorporate into their answer. "'The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness' words to mold a legally convenient record. It is the witness, not the lawyer, who is the witness.'"<sup>29</sup> Accordingly counsel cannot suggest to the witness what counsel believes to be the correct or desirable answer to a question being posed by an opposing counsel, or make such other transparencies as telling them to answer "if they know."<sup>30</sup>

Just as it is improper to drag out deposition proceedings by arguing, coaching and obstreperousness,<sup>31</sup> so, too, is it improper for defense counsel unilaterally to terminate a deposition prematurely and without good cause.<sup>32</sup>

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<sup>29</sup> Van Pilsum v. Iowa State Univ., 152 F.R.D. at 180 (quoting Hall v. Clifton Precision, 150 F.R.D. at 527).

<sup>30</sup> See, e.g., Frazier v. Southeastern Pa. Transportation Auth., 161 F.R.D. 309, 314 (E.D.Pa. 1995); Armstrong v. Hussman Co., 163 F.R.D. 299 (E.D.Mo. 1995); Johnson v. Wayne Manor Apartments, 152 F.R.D. at 59; Hall v. Clifton Precision, a Division of Litton, Inc., 150 F.R.D. at 530-31 ("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."); Phillips v. Manufacturers Hanover Trust Co., 1994 U.S. Dist. LEXIS 3748, at p. 5 (S.D.N.Y. Mar. 29, 1994) (sanctions appropriate where counsel's objections "frustrated the fair examination of an opponent").

<sup>31</sup> Oleson v. Kmart Corp., 175 F.R.D. 570, 572-73 (D.Kan. 1997).

<sup>32</sup> Johnson v. Wayne Manor Apartments, 152 F.R.D. at 58-60; Hearst/ABC-Viacom Entertainment Services v. Goodway Marketing, Inc., 145 F.R.D. 59, 62-64 (E.D.Pa. 1992) (sanctioning defending counsel).

**C. Special Role Of The District of Columbia and Office of the Corporation Counsel.**

Government agencies all too frequently resist discovery through sham tactics, instead of setting a model for other litigants.<sup>33</sup> In a prior filing, Plaintiffs observed that it has long been a dirty little secret among the litigation bar that the District of Columbia can be expected to mount a tooth-and-nails strategy of enervating delay, accentuated by an all-too-frequent penchant for slovenly tactics which no private lawyer could be expected to get away with - even if he or she were willing to do that.<sup>34</sup>

While Plaintiffs called the Court's attention to several representative decisions, we did not have the benefit of Webb v. District of Columbia, in which a member of this Court emphasized the time had come for the Office of Corporation Counsel, with its record of recalcitrance and litigation misconduct, to stop acting as if it occupies some elevated status.<sup>35</sup> That institutional attitude extends, unfortunately, to repeated

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<sup>33</sup> National Lawyers Guild v. Attorney General, 94 F.R.D. 600, 615 (S.D.N.Y. 1982) (sanctioning federal government for "dilatory, uncooperative, and obstructionist" conduct); Perry v. Golub, 74 F.R.D. 360, 361-63 (N.D.Ala. 1976) (same).

<sup>34</sup> Plaintiffs' Reply To Defendants' Opposition to Motion to Deem Unopposed at 20 (Sept. 7, 1999).

<sup>35</sup> Webb v. D.C., \_ F.Supp.2d at \_, 1999 WL 728095, \*6, \*10-\*11.

instances of ignoring court orders, as was effectively done here.<sup>36</sup>

**D. Applying The Law to the Facts.**

Ms. Proctor and her counsel rendered a substantial portion of her deposition useless. Plaintiffs have identified repeated instances of her evasiveness and willingness to stall for time. And we have shown how her lawyer pitched in through transparent and specious objections, lengthy diatribes and interruptions, coaching, instructions not to answer, insistence on an utterly inappropriate method of calculating who bore responsibility for his client's time-stalling maneuvers and his lengthy client conference, and so on.

Government agencies cannot be allowed to profit from their failure to provide discovery.<sup>37</sup> Agencies and other litigants who disregard their discovery obligations act in opposition to the courts' authority and, in this time of congested dockets, prejudice their opponents and other litigants who seek to use the courts as a truth-seeking mechanism.<sup>38</sup>

Ms. Proctor appeared pursuant to the Court's September 21, 1999 Order. She violated that order without any, let alone

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<sup>36</sup> Webb v. D.C., \_ F.Supp.2d at \_, 1999 WL 728095, \*6 (citing Monroe v. Ridley, 135 F.R.D. 1, 4-6 (D.D.C. 1990) (noting sanctions imposed on D.C. in prior litigation had not caused it to cease from violating court orders)).

<sup>37</sup> Dellums v. Powell, 566 F.2d 231, 236 (D.C.Cir. 1975).

<sup>38</sup> Perkinson v. Gilbert-Robinson, Inc., 821 F.2d 686, 691 (D.C.Cir. 1987).

substantial, justification. Ample authority exists under Rules 30(c)-(d), 37(a)(2)(B) and 37(a)(4), F.R.Civ.P.,<sup>39</sup> as well as Rule 37(b)(2)<sup>40</sup> and 28 U.S.C. § 1927,<sup>41</sup> to upbraid her for her behavior.

### Conclusion

Plaintiffs seek the following relief:

- (1) Ms. Proctor should be directed to appear to complete her deposition;
- (2) The deposition should be held before a judicial officer or special master; and
- (3) Ms. Proctor and counsel should be required to pay for the additional transcript and attorneys' fees incurred in submitting this motion.

Respectfully submitted,

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Stephen C. Leckar  
D.C. Bar # 281691  
Butera & Andrews  
1301 Pennsylvania Ave., NW  
Suite 500  
Washington, DC 20004  
(202) 347-6875

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John H. Jamnback  
D.C. Bar #418474  
Amy B. Levenson  
D.C. Bar #455864  
Garvey, Schubert & Barer  
1000 Potomac Street, NW  
Fifth Floor  
Washington, DC 20007  
(202) 965-7880

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<sup>39</sup> Johnson v. Wayne Manor Apartments, 152 F.R.D. at 60; VanPilsun v. Iowa State Univ., 152 F.R.D. at 181; American Directory Service Agency v. Beam, 131 F.R.D. at 645-46.

<sup>40</sup> Castillo v. St. Paul Fire & Marine Ins. Co., 938 F.2d at 779.

<sup>41</sup> E.g., Castillo v. St. Paul Fire & Marine Ins. Co., 938 F.2d at 779 (sanctions under Rule 37(b) & § 1927); Unique Concepts, Inc. v. Brown, 115 F.R.D. at 294.