UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

October 11, 1996

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. §1324c Proceeding
	)	OCAHO Case No. 96C00031
ROBERTO C. DAVILA,	)	
Respondent.	)	
	)	

ORDER RESPECTING DEPOSITION PROCEDURES

Complainant has filed a motion to compel with respect to certain objections based on privilege which were posed by Respondent's counsel during a deposition taken of Mr. Davila on August 22, 1996. Complainant attached a copy of the deposition to the motion. The issue of the objections based on privilege is the subject of a different order. However, in reviewing the deposition, I noticed that there were other areas of concern which need to be addressed. Those are covered in this Order.

On several occasions during the course of the deposition, Respondent's counsel and Respondent left the deposition to confer while there was a pending question. See Tr. 30, 36–37, 38, 52. At one point Complainant's counsel objected to this consultation, but Respondent and his counsel continued to consult. Tr. 38. In some instances after consultation Respondent then asserted a privilege and refused to answer the question, but that was not universally the case. See Tr. 30. Moreover, there were times when the Respondent refused to answer, and no privilege was asserted. For example, when he was asked whether his parents helped pay some of the mortgage on his house, he refused to answer on the ground that it was a personal question. Tr. 40–41.

There were numerous times when Respondent's counsel did not identify the basis for the objection when advising the witness not to answer, until Complainant's counsel pressed for clarification. See Tr. 18–19, 47–48, 56–57, 60. Moreover, in one instance when Complainant's counsel asked whether Respondent was arrested by the INS in September 1995, Respondent's counsel recited six different amendments to the United States Constitution, including the Second Amendment's guarantee of the right to bear arms. Tr. 61–62. Furthermore, even in instances where he did not advise his client to refuse to answer, Respondent's counsel stated numerous objections based on relevancy and other grounds. See Tr. 28, 31, 35–36, 39–40, 43, 45, 52–55.

There also were numerous instances in which Respondent's counsel made gratuitous and insulting comments during the course of the deposition. Examples of these are as follows:

> I guess you've never taken a deposition before." Tr. 6.
>
> "You haven't repealed the Seventh Amendment yet." Tr. 38.
>
> "We can stay here all day if Paul [Complainant's counsel] wants." Tr. 45.
>
> "Let the record reflect Mr. Hunker just left the room, went outside and came back with a stack of papers for God knows what *nefarious purpose*." (emphasis added) Tr. 47.
>
> [I]t's a trap of the sort to, have you quit beating your wife, and we haven't even established that he ever beat her." Tr. 57.
>
> Objection, fortunately we have a Fifth Amendment that guarantees *the Gestapo can't force anybody to testify against himself*, and I'm instructing him not to. (emphasis added). Tr. 59

Such gratuitous and insulting comments have no place in a judicial proceeding and will not be tolerated in the future, either in a courtroom or in a deposition. *See Van Pilsum v. Iowa State University of Science & Technology*, 152 F.R.D. 179, 180 (S.D. Iowa 1993). Counsel specifically are instructed to refrain from any such gratuitous and demeaning remarks in the future. Failure to do so may lead to imposition of sanctions, either upon motion of the opposing party or *sua sponte*.

With respect to the consultations which occurred between Respondent and his counsel during the deposition, the issue of whether and to what extent a lawyer may consult with a client, off the record and outside the hearing of the party taking the deposi-

tion, has been addressed in past decisions. Case authority holds that such conferences, while not absolutely forbidden, are strictly limited. In one recent case, *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993), the Court held that a party and his attorney may not confer during the course of the deposition unless the conference was for the purpose of determining whether a privilege should be asserted. Further, the Court held that a witness and counsel are not entitled to confer about a document shown to the witness during the deposition before the witness answers questions about it. In reaching that conclusion the Court noted as follows:

> 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.

Hall, 150 F.R.D. at 528; *accord, In re Domestic Air Transp. Antitrust Litig.,* 1992–1 Trade Cases ¶69, 731, 1990 WL 358009, *9 (N.D. Ga. 1990) (noting that private attorney-client conferences during the course of a deposition are improper except in cases where the existence of a privilege is to be determined); *In re San Juan Dupont Plaza Hotel Fire Litig.,* No. MDL 721, 1989 WL 168401, *38 (D.P.R. 1989).

Additionally, the following quotation is appropriate:

> As officers of the court, counsel are expected to conduct themselves in a professional manner during a deposition. . . . It is to be conducted in a manner that simulates the dignified and serious atmosphere of the courtroom. . . . Conduct that is not permissible in the courtroom during the questioning of a witness is ordinarily not permissible at a deposition. . . . Because a judge is not present to rule on legal disputes, arguing legal matters during a deposition serves no purpose. . . . Where irrelevant or repetitious questioning by interrogating counsel occurs, the appropriate course for opposing counsel is to enter an objection. The witness may then answer the question. . . . If authorized by law [i.e., a valid privilege exists], opposing counsel may instruct the witness not to answer the question.

Ethicon Endo-Surgery v. United States Surgical Corp., 160 F.R.D. 98, 99 (S.D. Ohio 1995); *see also Hall*, 150 F.R.D. at 531.

Also of note is *In re The One Bancorp Securities Litigation*, 134 F.R.D. 4 (D. Me. 1991). In *Bancorp Securities*, a plaintiff deponent re-

fused to answer ninety two questions at his deposition on the advice of counsel. The deponent's counsel objected on the basis of various privileges and relevancy. However, the bases for the privilege claims were not articulated "on the record [with] a fact-specific basis for any claim of privilege sufficient to permit the Court to determine the validity of the claim." The court noted that Fed. R. Civ. P. 30(c) provides that a party may instruct a deponent not to answer a question "only when necessary to preserve a privilege [or] to enforce a limitation on evidence directed by the court. . . . " Furthermore, under Rule 30(d)(3), a party may object to questions only on the basis that the examination is being conducted in bad faith or the questions are unreasonably annoying, embarrassing, or oppressive. In other cases, courts have repeatedly reminded attorneys that it is the attorney who is conducting the deposition to whom the witness should ask for clarifications, definitions, or explanations. *Johnson v. Wayne Manor Apartments*, 152 F.R.D. 56, 58 (E.D. Pa. 1993) (following *Hall*, supra); *see also* Judicial Conference, Federal Circuit, 146 F.R.D. 205, 216–32 (1992) (discussing the causes and solutions to the symptom of "Rambo Litigation").

Therefore, in any future depositions taken in this case, the following requirements will be observed by both parties:

1. At the beginning of the deposition, deposing counsel shall instruct the witness to ask deposing counsel, rather then the witness's own counsel, for clarifications, definitions, or explanations of any words, questions, or documents presented during the course of the deposition. The witness shall abide by these instructions.

2. Deposing counsel shall provide to the witness's counsel a copy of all documents shown to the witness during the deposition. The copies shall be provided either before the deposition begins or contemporaneously with the showing of each document to the witness. The witness and the witness's counsel do not have the right to discuss documents privately before the witness answers questions about them.

3. All objections, except those which would be waived if not made at the deposition under Federal Rules of Civil Procedure 32(d)(3)(B), and those necessary to assert a privilege, to enforce a limitation on evidence directed by the court, or to present a motion pursuant to Federal Rules of Civil Procedure 30(d), shall be preserved. Therefore, those objections need not be made during the course of depositions.[1]

[1] Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time. See Fed. R. Civ. P. 32(d)(3)(A).

180-203--890-909 5/12/98 10:16 AM Page 841

4. Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to a question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court.

5. Counsel shall not make objections or statements which might suggest an answer to a witness. Counsels' statements when making an objection shall be succinct and verbally economical, stating the basis of the objection and nothing more.

6. Counsel and their witness-clients shall not engage in private, off-the-record conferences during depositions or during breaks, or recesses, except for the purpose of deciding whether to assert a privilege.

7. Any conferences which occur pursuant to, or in violation of, guideline (6) may be noted on the record by deposing counsel.

Failure to comply with these requirements may be the basis for sanctions imposed on a party and/or counsel.

Finally, the parties are advised that all persons appearing in proceedings before an Administrative Law Judge are expected to act with integrity and in an ethical matter. 28 C.F.R. §68.35(a). As I have previously ruled, I expect counsel to act in accordance with the Guidelines of Professional Courtesy which have been adopted by the United States District Court for the Northern District of Texas. *See* Order Regarding Complainant's Motion for Protective Order dated September 30, 1996. Pursuant to the OCAHO Rules of Practice and Procedure, the Administrative Law Judge may exclude from proceedings parties or representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, or failure to act in good faith. 28 C.F.R. §68.35(b). Judgment may be entered against a party which repeatedly or willfully fails to comply with a Judge's Order. 28 C.F.R. §68.37(b); *United States v. Chaudry*, 4 OCAHO 666 (1994); *United States v. Hosung Cleaning Corp.,* 4 OCAHO 681 (1994).

ROBERT L. BARTON, JR.
Administrative Law Judge