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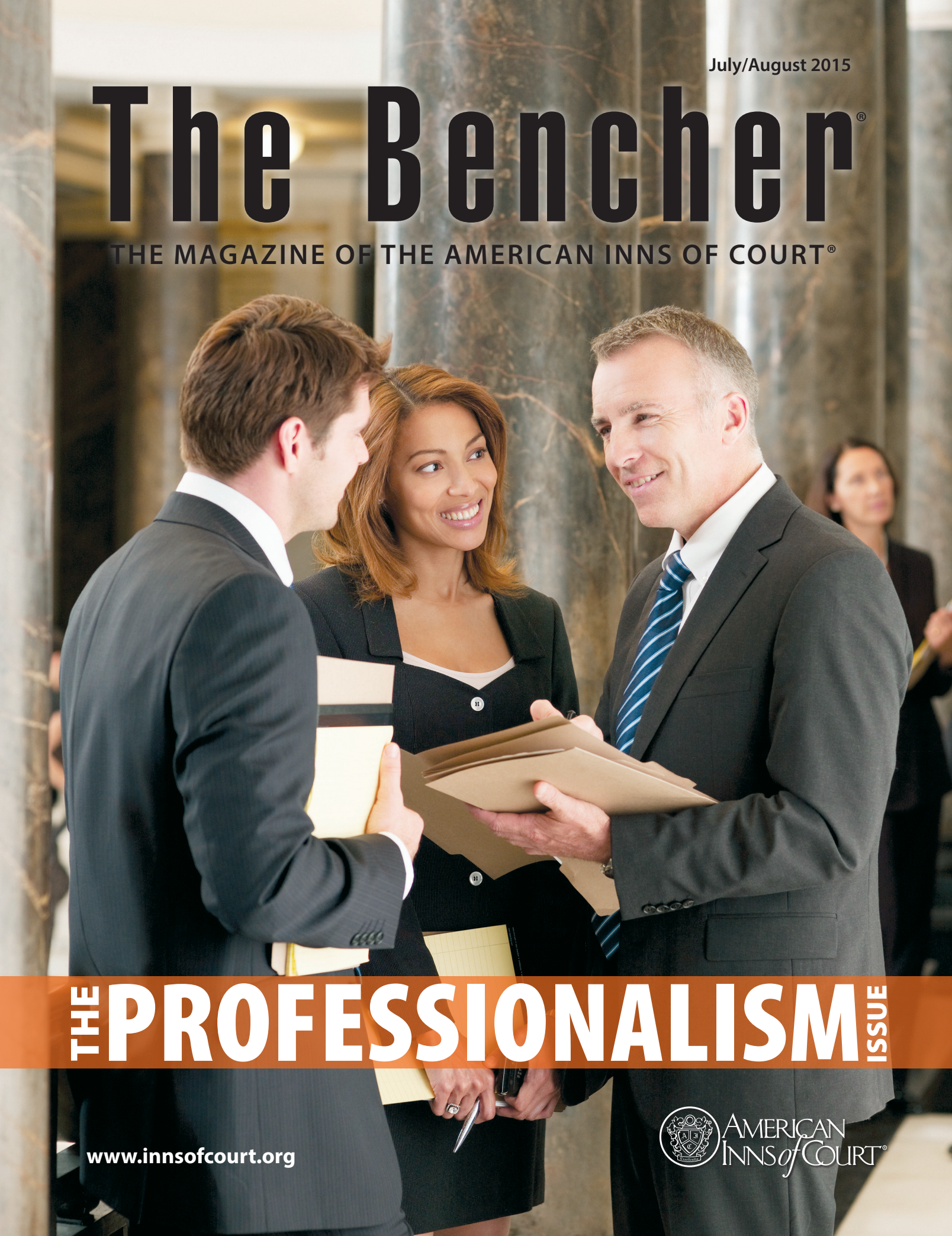

THE PROFESSIONALISM ISSUE

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Civility and Deposition Objections

By John G. Browning, Esquire

As a seasoned practitioner for more than 25 years, I've been around long enough to witness a number of changes in discovery, including the transition from speaking objections during depositions to simply asserting objections as to form. Like most lawyers, I've encountered my fair share of attorneys whose civility, when it comes to objecting during depositions, leaves much to be desired.

There are those lawyers who persist in making improper speaking objections, apparently oblivious to the fact that the time to coach a witness is while preparing him or her for the deposition, not during it. Then there are lawyers who seek to impede the search for the truth by making frivolous or inappropriate objections or by having the witness give evasive answers or profess a lack of understanding of common words. One can be a zealous advocate without engaging in such conduct, and lawyers should be able to recognize the distinction. On a practical level, such behavior can result in credibility problems, because judges and juries tend not to believe witnesses who appear to be hiding behind their lawyers or who refuse to answer questions that seem obvious.

So how should one deal with unprofessional conduct by opposing counsel during depositions? Seeking judicial intervention is often an unfortunate necessity. Two recent cases offer insight into judges' approaches to such behavior, and serve as teachable moments.

In a patent infringement case in the Central District of California in August 2014, U.S. Magistrate Judge Frederick Mumm declared the seven-hour

deposition of a B/E Aerospace employee a "train wreck." B/E Aerospace's attorney was "continually interposing inappropriate objections;" the deponent responded to "perfectly clear" questions by counsel for patent owner MAG Aerospace Industries by claiming not to understand common words like what and have. According to Mumm, B/E Aerospace's lawyer "hopped on the bandwagon" with his objections and the attorney and witness acted "like a tag team." As a result, the judge wrote, "The witness and his counsel may have taken some temporary pleasure in frustrating plaintiff's counsel's ability to obtain any information from the witness, but the judicial process and the public's perception of it suffers."

Mumm ordered B/E to reimburse MAG for the cost of the deposition and to tender a witness more willing to testify, and he ordered defense counsel not to object in the next deposition to "vague" questions. And what earth-shattering, all-important subject was at stake during the deposition in question, you might ask? The case was about B/E's allegedly infringing vacuum toilet bowls used in aircraft.

If you want to make sure legitimate depositions aren't flushed away because of unprofessional and obstructionist deposition conduct, perhaps another lesson is in order. This one came courtesy of U.S. District Judge Mark Bennett of the Northern District of Iowa in *Security National Bank of Sioux City v. Abbott Laboratories* in July 2014. The case involved a product liability case tried in January 2014 in which Security National Bank, acting as conservator for a minor, brought claims against Abbott Laboratories that the child had suffered permanent brain damage after consuming baby formula made by Abbott that allegedly contained dangerous bacteria. After a jury verdict in Abbott's favor, Bennett issued, *sua sponte*, an order to show cause why the "serious pattern of obstructionist conduct" displayed by Abbott's counsel while defending depositions should not be sanctioned. Specifically, the court identified three issues: counsel's excessive use of "form" objections, counsel's numerous attempts to coach witnesses, and counsel's repeated interruptions and attempts to "clarify" questions posed by opposing counsel.

Before he gets to the meat of the sanctionable conduct, however, Bennett serves up an appetizer as he laments the perpetuation of obstructionist behavior in discovery. Waxing Shakespearean, he observes that "something is rotten, but contrary to Marcellus' suggestion to Horatio, it's not in Denmark." Instead, he says, it's in discovery in modern federal civil litigation, where so-called "litigators" object "using boilerplate language containing every objection imaginable," and are "quick to dispute discovery requests, slow to produce information, and all too eager to object at every stage of the process." What's the reasoning behind such conduct, Bennett wonders? As he puts it, obstructionist behavior in discovery "is born of a warped view of zealous advocacy, often formed by insecurities and fear of the truth."

Those lawyers who engage in that behavior, he says, do it "to grandstand for their client, to intentionally obstruct the flow of clearly discoverable information, to try and win a war of attrition, or to intimidate and harass the opposing party. Others do it simply because it's how they were taught." Bennett goes on to note that obstructionist litigators are like Pavlov's dogs; they "salivate when they see discovery requests and are conditioned to unleash their treasure chest of obstructionist weaponry. Unlike Pavlov's dogs, their rewards are not food but successfully blocking or impeding the flow of discoverable information."

Focusing on the case itself, Bennett zeroed in on each of the three areas of obstructionist conduct during the depositions of defense witnesses. As to the use of "form" objections, he notes that on roughly half of the pages of the depositions defense counsel objected to "form"—objections which, as the judge points out, "rarely, if ever, followed a truly objectionable question." However, noting the considerable authority validating "form" objections, Bennett doesn't base his sanctions decision on this aspect of the lawyer's behavior, opting instead to use it as a springboard for discussing the other two areas of witness coaching and excessive interruption. To take just one illustrative example from the court's 34-page opinion, here's a typical exchange:

> **Q.** Well, if there were high numbers of OAL, Eb samples in the factory, wouldn't that be a cause for concern about the microbiological quality of the finished product?
>
> **COUNSEL:** Object to the form of the question. It's a hypothetical; lacks facts.
>
> **A:** Yeah, those are hypotheticals.

Bennett also took exception with counsel's "grossly excessive" interruptions, noting that the lawyer's name appears in one deposition transcript 381 times (about three times per page) to assert objections and interruptions the court found to be "unnecessary and unwarranted." Some of these border on the absurd. In one exchange, after the witness had testified that a dryer unit was enclosed and one cannot get into it, the

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deposing lawyer asked, "Can I get on the outside of the dryer?" That question drew the objection, "Everything is, I mean, outside of the dryer is a huge expanse of space; anything that's not inside the dryer is outside the dryer, so I object."

How did Bennett elect to sanction this unprofessional conduct? After all, he pointed out, judges often share in the blame for ignoring such behavior instead of imposing sanctions intended to "stop reinforcing winning through obstruction." Acknowledging that monetary sanctions were certainly warranted for the witness coaching and excessive interruptions, Bennett opted instead for a more outside-the-box approach. He ordered the offending lawyer to "write and produce a training video in which Counsel, or another partner in Counsel's firm, appears and explains the holding and rationale of this opinion, and provides specific steps lawyers must take to comply with its rationale in future depositions in any federal and state court." Moreover, the court said, the video must address the impropriety of unspecified "form" objections, witness coaching, and excessive interruptions. The video, upon completion, would have to be filed under seal for the judge's review and approval. Upon approval by the court, access to the video would have to be provided to "each lawyer at Counsel's firm—including its branch offices worldwide—who engages in federal or state litigation or who works in any practice group in which at least two of the lawyers have filed an appearance in any state or federal case in the United States."

There are lessons for all lawyers—not just the sanctioned ones discussed here—in the "teachable moments" used by Mumm and Bennett. Prepare your witness ahead of time for his deposition; a well-prepared witness doesn't need a lawyer to coach him. Objections, when asserted, should be raised for a valid reason that the attorney can actually articulate. If you can't think of a reason to object, you probably don't have one. And remember that both sides are engaged in the search for the truth that discovery represents; there's a lot to be said for the "do unto others" approach.

A lack of professionalism and civility during depositions can come back and haunt a lawyer in front of a judge and jury. No one wants to be the star of the training video "Civility 101"—coming soon to a conference room near you. ◆

John G. Browning, Esquire, is a shareholder with Passman & Jones in Dallas, Texas. He is a member of the William "Mac" Taylor AIC.