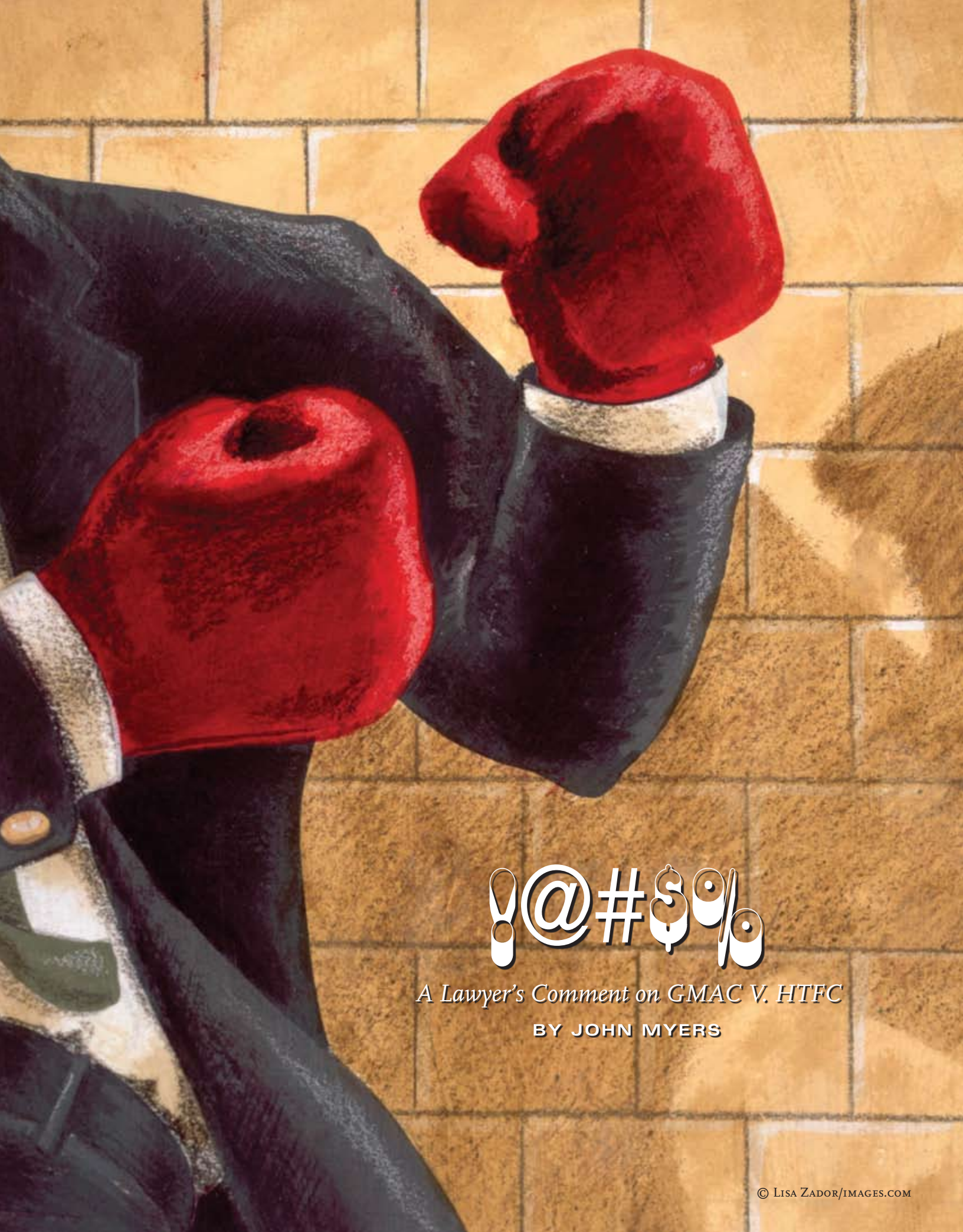


!@#$%

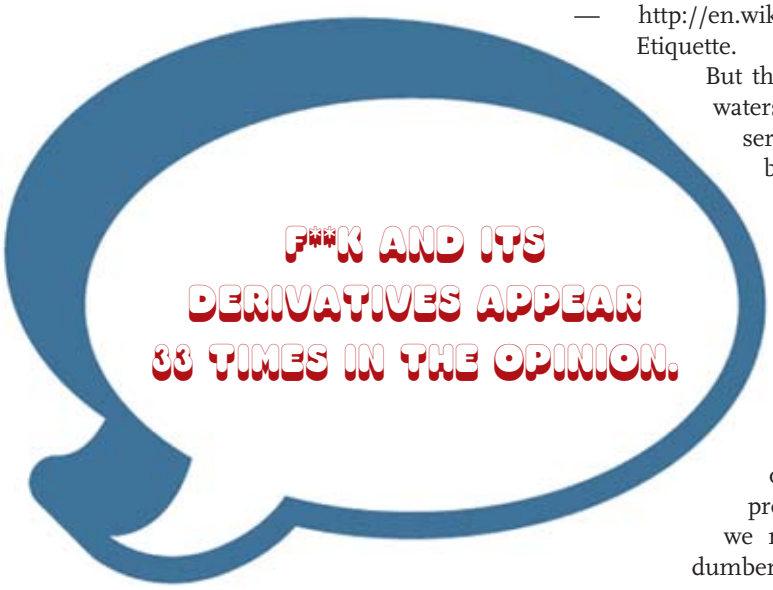
A Lawyer's Comment on GMAC V. HTFC

BY JOHN MYERS

In February 2008, Judge Eduardo C. Robreno filed an opinion in *GMAC v. HTFC* that drew a lot of interest in legal and other communities, largely because of its nominal subject — civility — and the judge's ample quotation from a most uncivil deposition, in which a dominant theme was the deponent's liberal use of the word "f**k" in various forms. The deponent and his lawyer were jointly sanctioned for both civility breaches and discovery violations, both of which are painfully obvious on reading the opinion (and watching the deposition makes it even more clear). In Robreno's words, "The issue of how to rein in incivility by counsel in depositions has been the subject of considerable interest in the legal profession for some time. Less discussed, perhaps because it is less frequent, but nevertheless just as pernicious, is what to do about uncivil conduct by a witness at a deposition. An important corollary to the issue is what is the duty of counsel who is confronted by uncivil conduct by his own witness."

Although the judge seems to focus on civility, in fact he has addressed a broader, even more important point for lawyers: defining our own obligations when our client is flouting well-established rules — here involving both civility and important discovery obligations.

It used to be pretty easy to write about matters of civility in a publication not meant for smoke-filled dens, saunas, hunting lodges or the privacy of one's own home. After all, Emily Post did it for my parents; you can still find etiquette books at Brooks Brothers; and the Web is full of advice: http://www.ehow.com/information_1058-etiquette.html, or http://www.aaaugh.com/jokes/legal_etiquette.html for a humorous approach. Likewise, Britannica's more modern replacement fully covers the field — http://en.wikipedia.org/wiki/Etiquette.



But these are troubled waters for legal observers now, simply because lawyers and their clients have continued to ramp themselves up on the brazenness scale; and we are not getting any smarter or better at our profession. In fact, we may actually be dumber when it comes to this question of civility.

While even a year ago I could write or speak on the topic of lawyer civility or its antithesis, obstreperosity, simply by quoting lawyers' boorish behavior, occasional mild obscenities, name-calling, or the rare threat, the Bar (along with its clients) has moved on. It feels like there are a lot of lawyers out there trying to make my job easy, at least in terms of finding material. Reporting on it in a civil manner, however, has become harder.

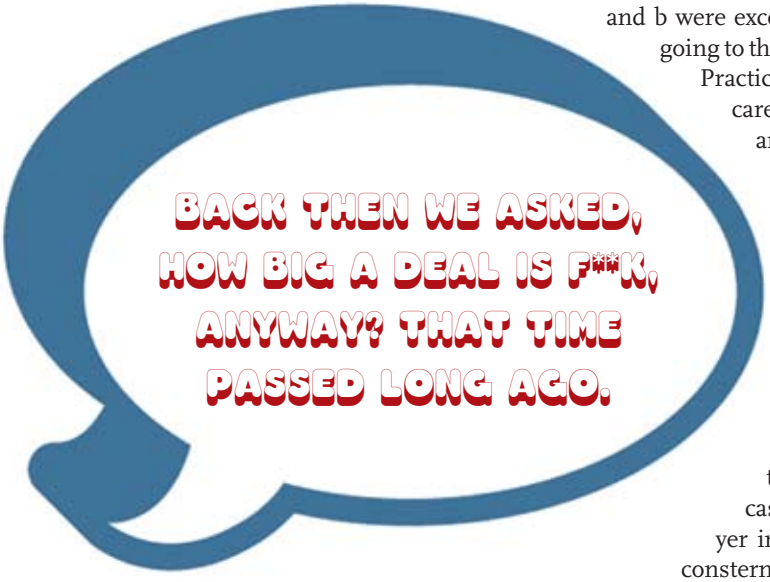
In any event, here's my effort to deal with the latest on this topic, found in *GMAC v. HTFC Corp.*, 2008 WL 542386 (2/29/08). Robreno has done his best here, in a long opinion explicit enough to not be meant for general audiences. For instance, f**k and its derivatives appear thirty-three times in the opinion (by contrast, Robreno's scorekeeping for the deposition itself has the f-word repetition at "no less than seventy-three"). From the opinion and the DVD of the deposition, which is also a matter of public record, I gather that my 2006 "Obstreperosity" article isn't being taken seriously in all corners of the profession. Certainly, it is evident that *clients* don't read the American Bar Association's *Litigation* magazine, where it was published. So I offer a supplemental approach, for lawyers and *clients*.

For the clients, it is short and sweet:

TEN MORE COMMANDMENTS YOU KNOW YOU OUGHT TO FOLLOW

1. Think before talking.
2. Think about what your mother would think.
3. Think about what the judge will think.
4. Listen to us (your lawyers).
5. Think about the videotape (or audiotape).
6. *Don't* lose your temper.
7. *Don't* curse.
8. *Don't* gesticulate (on camera).
9. *Don't* scream (on tape).
10. Just answer the ~~damn~~ questions (unless instructed otherwise).

For the lawyers, naturally, there is more. Although *GMAC* was covered with glee in *The Legal Intelligencer*, reported online by our Disciplinary Board (http://www.padisciplinaryboard.org/newsletters/index.php#story2), and commented upon in a wide range of legal blogs and other commentators (Googling "Robreno" and "f**k" lands about 100 hits), it is worth recounting what got the judge's attention in *GMAC*.



It was just another contract case, or so it seemed. And there they were, somewhere in North Jersey or New York (are they different?), taking the deposition of someone with a lot of properties and a lot of companies. From the first minute it was feisty, to say the least. And it was obvious to all that this would be a long day; the deponent's own lawyer called a timeout within the first ten minutes.

The deponent, for his part, could care less that there was a camera. He could also care less about instructions from his lawyer. If his conduct at this deposition was *tempered* because of the videographer's presence, then ... holy !@#$%.

Put another way, as the lawyer, you should know you are confronting trouble when your client, instead of answering the vanilla question as to what the corporate initials HTFC stand for (here, it is High Tech Finance Co.), you hear the response: "Hit That F**king Clown." That is the time to take your first break; but that didn't happen here.

For their part, the lawyers taking the deposition revealed early on that they had some warning as to what they were up against — and I am betting this was the reason for the videographer. Pick one, for what they must have thought:

a) with a videographer present, the deponent will know to temper his behavior and we can get this deposition done; or

b) we will get a clear record of the nonsense he has been engaged in, and at least his lawyer will be on our side — or neutralized in the process; or

c) Both

It doesn't matter which you pick; both a and b were excellent reasons for going to the trouble of video.

Practice point: Be very careful, when you are defending a deposition, when the notice includes video. There can be consequences beyond your wildest nightmare. Read on.

Shortly after the story of this case broke, a lawyer in town expressed consternation to me: Since this seems to have been the *client* going off, why sanction the lawyer? What is the *lawyer* supposed to do?

There is a pretty straightforward answer, but it is not an easy one. It is one thing to say that the lawyer's job is to prevent it; it's another to deal with the reality of that obligation, particularly when you see your strategy failing to achieve its desired result.

So, what do you do? Robreno doesn't exactly give us *that* advice. After all, it wasn't his job there (the judge's most wonderful understatment as to the plight of counsel: "It is true that any attorney can be blindsided by a recalcitrant client who engages in unexpected sanctionable conduct at a deposition.") But he does let us know, in very clear terms, that the defending lawyer didn't do enough. Obviously, then, we need to do more than the following, which according to the judge was *not* enough:

- The lawyer called an early timeout (and several more) to speak with his client and calm him down, to no avail.
- Several times, the lawyer cautioned his client to just answer the questions. He didn't.
- Several times the lawyer interposed objections but told the client he could answer. He wouldn't.
- The lawyer employed hand gestures in attempt to calm the client. It didn't.
- There were several off-the-record lawyer-client discussions. The conduct continued.

None of this, singly or *in toto*, was enough. Although this list makes it seem that the lawyer did plenty, he was not able — or willing — to stop the conduct, including but not limited to the incivility that got him and his client in trouble. In simple terms, the lawyer didn't try to stop the deposition, or distance himself enough from his client:

Lawyer: You can answer if you know.
Client: No, I'm not going to answer.
***
Lawyer: You can respond to the question.
Client: I'm not going to respond.

And that is what, according to the judge (who took a harsh view of the lawyer's involvement), made the lawyer jointly responsible for the sanction. After all, once we are no longer "blindsided" by the problem, we either stop it or become part of it.

THE LANGUAGE

Remember the way your parents reacted when you were an adolescent:

"Johnny, it's not what you are saying, it's how you are saying it. Really, do you have to use that language?"

Back then we asked, how big a deal is f**k, anyway? That time passed long ago. Many of us have grown up, whether before or after becoming lawyers (and maybe we have said the same thing to our adolescents, becoming — against our greatest fears — our parents). Do we need anyone to tell us that f**k has no place on the record of any legal proceeding? No, I hope; but here, the deponent wasn't coming around, despite the obvious (albeit mostly off the record) entreaties of his counsel. His language and hostility continued, and it continued with a vengeance.

REFUSAL TO ANSWER QUESTIONS

Although Robreno has cast his opinion as one dealing with civility, I believe the most important issues concern the deponent's responses — or non-responses — to legitimate questions. The civility is very important, of course, both in its own right and because, given the incivility here, one's view of the substantive issues is darkly covered in a non-washable taint. The language offenses headlined in *GMAC* make analysis of the other, more substantive conduct nearly superfluous. Because when I read the judge's statement of the facts, I knew something bad was going to happen. And, trust me, he didn't exaggerate the record. Although I didn't double-check the word count, the judge's count of seventy-three f**ks seems accurate and is not unfairly out of context, considering that, by contrast, the word *contract* was only uttered fourteen times.

But even if we can get by the language issues, we are confronted with the other, more substantive issues that are plain as day and, to my mind, more generally ap-

plicable to every lawyer at every deposition. This is recalcitrance defined, and inappropriate without question:

Deponent: No matter what you ask me, you are not getting an answer.

***

Deponent: I'm not here to tell you the facts.

Now what? We, the lawyers, do not have the right to be silent here. Most of us would answer: Take your client out in the hall and explain the facts of life, the obligations of discovery, and the availability of sanctions. The problem is, that seems to have been done here, to no apparent effect:

Deposer: Your attorney says you can answer the question.
Deponent: I won't.
Deponent's Atty: [silence]

WHAT'S A LAWYER TO DO?

It does not seem sufficient to say "more," but, in reality, that is what I think. The question is not *whether* but *when* to take a stand, and what the stand is. Whether the deponent is there to "tell you the facts" is simply not open to debate, nor is the deponent's obligation to answer questions when instructed by his own counsel (or in the absence of an objection from his counsel). There can't be much debate on whether the lawyer needs to take a stand when his or her client is flouting the court at so elemental a level. We have to take a stand. Period.

Maybe the stand is to find a defense for the conduct; in other words, maybe I need to interpose my own objection, but not without an arguable legal basis. I started my legal life as a public defender and learned pretty quickly that sometimes the best "defense" means something more than pleading not guilty and demanding a jury trial. It will often not be sufficient to act — or sit by — simply because your client/deponent wants you to.

The end game is easy to describe and very difficult to play out: I may need to fire my client — whether it is because I don't want to act unethically or in direct contravention of the rules, or because I simply don't want him to drag me down with him. I don't see much room for debate here, at least in the context presented in *GMAC*. The debate comes more in the discussion of *when* to do that, and when to decide that I have tried enough other things that I now know there is simply no option short of withdrawal. I am not suggesting that is what the lawyer in *GMAC* should have done. I find the whole idea of second-guessing the lawyer in this circumstance to be very difficult. And I can't give any fixed rule for deciding "when" the time has come. But there must be such a time. What I need to do is to be sure I have exhausted all other practical options, because there are not many things worse than firing a client; and none is less remunerative, except, as here, not firing the client when you should have.

STAY OUT OF TROUBLE (MAYBE) AND KEEP THE CLIENT (MAYBE)

So here's a guide, albeit an informal one, to increase the odds of staying out of trouble *and* keeping the client:

- First, avoid eye contact with your (enraged, or at least hyperemotional) client.
- Second, apologize for your entreaty, explaining that this is why practicing law can be such a pain in the (whatever).
- Third, tell the client in no uncertain terms (assuming you are ready for this) what she *should* do, and what she *must* do, if you are to remain her counsel.
- But, don't do this unless you are prepared to follow through.

Abstractly, this seems straightforward. You wouldn't think of holding her jacket or extra bullet clip while she goes for her gun. You would never just sit there while the client says he doesn't have the document or other item he just showed you before the deposition or trial, and which you therefore know is in his pocket. In the *GMAC* context, it may not be quite so clear, but some points are relatively easy:

When the client refuses to answer a question *you* have told him to answer, you must do something. The failure to do anything leaves you open to the same result as in *GMAC*.

But *what* do I do?

- Talk to your client again. (Useless, but we never give up hope.) Then,
- Call a colleague (or significant other — in my case, one and the same) for other suggestions. Then,
- Talk to your client again (still useless). Then,
- Suspend the deposition. If that fails (the client refuses to leave), you must,
- State your reasons on the record and leave, reminding the other lawyer of her obligations in dealing with an unrepresented party.

You can see the escalation, and I am sure readers can conjure up their own variations on this theme. However you do it, the escalation is necessary; to stop too soon is to risk even harsher sanction. It could be that I could get my opponent to agree to the suspension.

Regardless, I need the ability to talk to the client in calmer circumstances. But make no mistake, if the client insists on going forward in the same manner — "f**k plus," let's call it — I need to stop the deposition and/or withdraw, lest the failure to control my client be attributed to me.

What I propose is the same, really, as dealing with an obstreperous *lawyer* on the other side, or your adolescent child: avoid eye contact, say you are sorry, and do the right thing. It's not exactly Jiminy Cricket's advice, but it is close, and instructive if you substitute Judge Robreno for your conscience:

TAKE THE STRAIGHT AND NARROW PATH AND IF YOU START TO SLIDE GIVE A LITTLE WHISTLE, GIVE A LITTLE WHISTLE AND ALWAYS LET JUDGE ROBRENO BE YOUR GUIDE.

John M. Myers is of counsel at the law firm of Montgomery, McCracken, Walker & Rhoads, LLP. His e-mail address is jmyers@mmwr.com.