New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 246—NO. 32
TUESDAY, AUGUST 16, 2011

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Consulting With Your Client During Deposition

Your client's deposition is being taken in Manhattan in connection with a litigation pending in another jurisdiction. The attorney conducting the deposition has gotten your client to back away from a series of recollections by showing that she does not recall every detail of the event. You know that testimony about a key meeting is coming up after the lunch break, and that your client recalls some but not all of what took place at the meeting. During the lunch recess, are you permitted to refocus your client? Discuss with her how to respond more effectively to this attorney's particular questioning style and tactics? Run her through some mock "Q & A" to help her prepare for the critical line of examination ahead?

Surprisingly, the answer may depend on where the litigation is pending. If the case is in the U.S. District Court for the Southern District of New York, you would likely be on safe ground. But if this case is pending in the districts of New Jersey, Pennsylvania or Delaware—beware. Those jurisdictions (and others) restrict, to varying degrees, contact between a deposition witness and her attorney while the deposition is ongoing. Moreover, courts in some jurisdictions with such "no-consultation" rules have interpreted them to hold that private attorney-client conversations during breaks and recesses are not privileged, permitting examination of a witness on the content of such discussions to determine whether forbidden "witness coaching" has occurred.

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Federal and Local Rules

Federal Rule of Civil Procedure 30(c) sets out the basic rules governing attorney conduct in taking and defending depositions, providing in pertinent part that "[t]he examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence…"[1] and that objections "must be stated concisely in a nonargumentative and nonsuggestive manner."[2] Rule 30 expressly prohibits instructing a witness not to answer except "when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion" for a protective order.[3]

In some jurisdictions, conversations during breaks and recesses could be considered improper witness coaching.

Local rules reinforce and in some instances elaborate on the basic guidelines imposed by Rule 30. Recent revisions to the Local Rules for the U.S. District Courts for the Southern and Eastern Districts of New York, for example, illustrate and harmonize two potentially competing approaches governing conferences between attorney and client during a deposition—a subject not explicitly addressed by Rule 30.

Prior to July 11, 2011, when the revised Local Rules went into effect, Local Rule 30.6, which was applicable only in the Eastern District, prohibited the attorney for a deposition witness from initiating a private conference with the witness "during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted." That rule has now been replaced by new Rule 30.4, applicable in both the Southern and Eastern Districts, which provides that an attorney for a deponent may not initiate a private conference "while a deposition question is pending," except to determine whether a privilege should be asserted.

The only Eastern District case we have located that interpreted the former Eastern District rule did so narrowly, observing that consultation raises questions only when initiated by counsel because "'a witness is generally free to consult with counsel at any time during a deposition.'"[4] The restriction imposed by the new rule is even more limited, applying only to consultations, initiated by counsel, while a question is pending.

New Rule 30.4, by its own terms, sets a "minimum standard,"[5] which is consistent with, but somewhat less restrictive than common practice in the Southern District of New York under which the attorney conducting a deposition will generally insist, typically without much if any resistance, on finishing a line of questioning before taking a break requested by the deponent or the deponent's attorney. No local rule governs conduct during breaks or recess, and it is common during such periods for the parties to regroup with their attorneys to recap, fine-tune approach, and strategize on what is to come.

But the Southern and Eastern District Local Rules are not the only rules applicable to depositions conducted in those districts. Where litigation is pending in another jurisdiction, the

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local rules of that jurisdiction will govern the conduct of counsel who have appeared in the case, even at depositions conducted in New York. And in some jurisdictions, conversations during breaks and recesses could be considered improper witness coaching, potentially sanctionable, and subject to inquiry without the protective cloak of the attorney-client privilege. Thus, attorneys defending depositions in federal cases pending in nearby jurisdictions such as the districts of New Jersey, Pennsylvania and Delaware, must conform their practice to local rules and case law that prohibit or curtail witness/attorney communication during the entire pendency of the deposition.[6]

For example, the Local Rule in the District of Delaware provides that:

> From the commencement until the conclusion of deposition questioning by an opposing party, including any recesses or continuances, counsel for the deponent shall not consult or confer with the deponent regarding the substance of the testimony already given or anticipated to be given, except for the purpose of conferring on whether to assert a privilege or on how to comply with a court order.[7]

'Hall v. Clifton Precision'

Although their local rules do not address attorney/witness consultation, some federal courts in New Jersey and Pennsylvania have curtailed attorney/witness contact during depositions in similar fashion to the Delaware rule. These decisions adopt guidelines set forth in *Hall v. Clifton Precision*,[8] preventing a lawyer representing a deponent from consulting with his or her witness during the course of a deposition except under narrow circumstances, such as to explore whether to assert a privilege.[9]

Acknowledging the lawyer's important role in preparing a client for deposition, the *Hall* court, in the Eastern District of Pennsylvania, took the view that "once a deposition begins, the right to counsel is somewhat tempered by the underlying goal of our discovery rules: getting to the truth." Observing that private conferences between attorney and client during a deposition "tend, at the very least, to give the appearance of obstructing the truth," *Hall* announced a rule prohibiting such conferences even during recesses. "[T]he fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules…. A clever lawyer or witness who finds that a deposition is going in an undesired or unanticipated direction could simply insist on a short recess to discuss the unanticipated yet desired answers, thereby circumventing the prohibition on private conferences."[10]

Hall went on to hold that conferences occurring in violation of its order are not covered by the attorney-client privilege—at least with respect to what the attorney tells the witness—declaring such conferences "fair game" for inquiry by the deposing attorney to determine if witness coaching has occurred.[11]

'Hall' Rule Persists

Hall grounded its no-consultation rule on Federal Rule 30(c)'s instruction that "depositions generally are to be conducted under the same testimonial rules as are trials," postulating that "[d]uring a civil trial, a witness and his or her lawyer are not permitted to confer at their pleasure during the witness' testimony. Once a witness has been prepared and has taken the stand, that witness is on his or her own."[12]

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The *Hall* court's premise is flawed on at least two levels. First, although judges do, in some instances, enter orders prohibiting contact between a witness in a civil trial and his or her attorney, even during breaks and recesses, such orders are judge- or case-specific, and are not the general rule in most districts.[13] Certainly nothing in the Federal Rules of Evidence bars such contact.[14]

Second, the *Hall* no-consultation rule ignores one of the major distinctions between a trial and a deposition—the absence of a judge to act as referee and to impose limits on the conduct of the attorney conducting the questioning. A skillful, unchecked attorney can easily manipulate an inexperienced witness in ways that would not be tolerated under the watchful eye of a trial judge.[15] Helping a witness regain composure, be alert to misleading or loaded questions, or simply correct the record before it is used at trial is a legitimate, often necessary antidote to such tactics—a function that promotes, rather than impairs the truth-finding process, but that went unacknowledged by *Hall*.[16]

Nevertheless, courts in several jurisdictions look to *Hall* as the governing standard, and have permitted inquiry into the substance of attorney-client communication taking place during deposition. For example, in *Chassen v. Fidelity National Title Ins. Co.*,[17] District of New Jersey Magistrate Judge Esther Salas ordered the re-deposition of a plaintiff concerning the substance of a conversation she had had with her attorney during a break in her deposition. The plaintiff, a proposed class representative in a putative class action, had initially testified that she would not be available to testify at trial because of work commitments—a matter of direct relevance to her suitability as a class representative.

After a recess, she changed her testimony, stating that she could appear at trial provided she was given advanced notice.[18] The plaintiff acknowledged that she spoke to her counsel about her testimony during the break, and her lawyer admitted that during that conversation he "disclosed [his] mental impressions and opinions" about her testimony. Citing *Hall*, the Magistrate Judge found that by communicating with his client after she was sworn, the plaintiff's attorney had violated Rule 30(c).

Magistrate Judge Salas rejected the argument that "an attorney cannot be penalized for utilizing a recess that he did not request to learn whether his client misunderstood any deposition questions," observing that if the witness needed clarification, she should have sought it from the deposing attorney. She also rejected the plaintiff's argument that her conversations with her attorney were privileged, relying on *Ngai v. Old Navy*,[19] another recent decision from the District of New Jersey, for the proposition that "if an off-the-record conference occurs between the witness and her counsel about a topic other than to discuss asserting a privilege, then the discussion is not protected by the attorney-client privilege and a deposing attorney is entitled to inquire as to the content of the communication."[20] On that basis, Magistrate Judge Salas concluded that the defendants could explore "whether the discussions counsel had with the Plaintiff during the recess may have influenced her testimony, thus interfering with the fact-finding goal of the deposition process."[21]

Despite the no-consultation rules' apparently sweeping admonition against attorney-client conferences (other than for the purpose of determining whether to assert privilege), it is far from clear that a court, even in a strict no-consultation district, would permit inquiry into the substance of every conversation dur-

ing a break. The court in *Chassen* specifically declined to permit inquiry into the plaintiff's communication with her counsel during three additional breaks in her deposition testimony because the defendants had not demonstrated any "improper behavior" during any break other than the one that resulted in the plaintiff's change in testimony.[22] Moreover, *Ngai* involved patently improper misconduct by the attorney defending the deposition.

In that case the deposition was conducted by video-conference, with the witness, her lawyer, and the deposing attorney all in separate locations. The witness' attorney was sending her client text messages during the deposition—a fact not apparent on the video, but discovered by the deposing attorney when the witness' lawyer mistakenly sent the deposing attorney a text intended for her client, telling the client that she was "doing fine."[23] Thus, both recent District of New Jersey cases permitting inquiry into attorney-client communications involved instances where the circumstances strongly suggested the possibility of witness coaching.

Conclusion

Even without the specter that every discussion between an attorney and his or her client during a deposition recess or lunch break is unprivileged, lawyers defending depositions in cases pending in no-consultation jurisdictions should be mindful that local custom in those districts may vary markedly from practice in the Southern District of New York. Certain types of witness coaching are universally decried: the kick under the table, the text message from lawyer to witness during a video-conference deposition, or the "speaking objection" that telegraphs the answer to the client. When it comes to off-the-record conferences between attorneys and their clients once a deposition is under way, what is customary and proper in one district may be considered improper in another.

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1. Fed. R. Civ. P. 30(c)(1).

2. Fed. R. Civ. P. 30(c)(2).

3. Id.

4. *Musto v. Transport Workers Union of America, AFL-CIO*, 2009 WL 116960, at *2, n.3 (E.D.N.Y. Jan. 16, 2009) (quoting *Okoumou v. Horizon*, 2004 WL 2149118, at *2 (S.D.N.Y. Sept. 23, 2004)).

5. Committee Note to Local Civil Rule 30.4 of the U.S. District Courts for the Southern and Eastern Districts of New York.

6. See also Local Rule 30.3 of the U.S. District Court for the District of Colorado (prohibiting "off-the-record" conference during deposition examination except for purpose of determining privilege); Local Rule 30.1 of the U.S. District Court for the Southern District of Florida (labeling the interruption of deposition for an off-the-record conference between counsel and the witness "abusive conduct"); Discovery Guidelines of the U.S. District Court for the District of Maryland, Local Rule App. A, Guideline 5 (neither attorney nor deponent should initiate private conference while deposition is in progress); Local Civil Rule 30.04 of the U.S. District Court for the District of South Carolina (counsel and witness shall not engage in private conference regarding the substance of the testimony during deposition, breaks or recess).

7. U.S. District Court for the District of Delaware Local Rule of Practice and Procedure 30.6.

8. 150 F.R.D. 525 (E. D. Pa. 1993).

9. See, e.g., *Chassen v. Fidelity National Title Ins. Co.*, 2010 WL 5865977 (D.N.J. July 21, 2010), aff'd, 2011 WL 723128 (D.N.J. Jan. 13, 2011); *Ngai v. Old Navy*, 2009 WL 2391282 (D.N.J. July 31, 2009); *Plaisted v. Geisinger Med. Ctr.*, 210 F.R.D. 527 (M.D. Pa. 2002).

10. 150 F.R.D. at 529[0].

11. 150 F.R.D. at 529 n.7.

12. 150 F.R.D. at 528.

13. Jean M. Cary, "Rambo Depositions Revisited: Controlling Attorney-Client Consultations During Depositions," 19 Geo. J. Legal Ethics 367, 388-394 (2006) (observing that no-consultation orders during civil trials are the exception and discussing parameters of such orders). But see, U.S. District Court for the District of Delaware Local Rule of Practice and Procedure 43.1 (once direct examination is concluded, counsel offering witness shall not consult or confer with the witness regarding substance of testimony, except for purpose of determining privilege, until cross-examination is finished).

14. Court orders barring a criminal defendant from consulting counsel have been deemed unconstitutional. *Geders v. United States*, 425 U.S. 80 (1976) (defendant's Sixth Amendment right to the assistance of counsel violated where court order prevented consultation between defendant and counsel during a 17-hour overnight recess). Federal circuit courts are not in agreement as to whether such orders are permissible in the civil context. See *Potashnick v. Port City Const. Co.*, 609 F.2d 1101 (5th Cir.) (relying on *Geders* to find civil litigant's constitutional right to retain counsel was violated by court's order prohibiting him from consulting with his attorney during breaks and recesses in litigant's testimony), cert. denied, 101 S. Ct. 78 (1980); *Aiello v. City of Wilmington*, 623 F.2d 845 (3d Cir. 1980) (finding no error where trial court imposed no-consultation order during breaks in witness cross-examination).

15. See generally, Cary, "Rambo Depositions Revisited," 19 Geo. J. Legal Ethics at 386-87.

16. See *Odone v. Croda Int'l PLC*, 170 F.R.D. 66 (D.D.C. 1997) (discussing *Hall* but declining to impose sanctions or find waiver of privilege where witness corrected testimony based on confusion about contents of a document after consultation with attorney during recess).

17. 2010 WL 5865977.

18. 2011 WL 723128, at *1.

19. 2009 WL 2391282.

20. 2010 WL 5865977, at *1 (quoting *Ngai*, 2009 WL 2391282, at *4 (citing *Hall*, 150 F.R.D. at 529)).

21. 2010 WL 5865977, at *1. On appeal to the District Court, Judge Peter G. Sheridan, in an effort to avoid unnecessary intrusion into the attorney-client privilege, suggested that the plaintiff and her attorney participate in an in camera hearing before the Magistrate Judge as "the least onerous means of discovering whether the purpose of the conversation during the break was to 'coach' the client…." Interestingly, counsel for both the plaintiff and the defendant opposed this approach, preferring to proceed with the deposition as ordered. 2011 WL 723128, at *1.

22. 2010 WL 5865977, at *2.

23. 2009 WL 2391282, at *1.