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Discoverability of Deposition Breaks

By Raymond P. Ausrotas – June 13, 2012

An issue that practitioners often face is how to handle breaks when defending a client's deposition. Specifically, a recurring question confronted by courts and rulemaking bodies is whether and how much of the substance of testimony at deposition may be discussed with a client during a break without that conversation becoming a topic to be explored by opposing counsel when the proceeding resumes. The way that courts have most frequently analyzed this issue is illustrated by the competing views set forth in two leading cases on the subject: *Hall v. Clifton Precision*, 150 F.R.D. 525 (D. Pa.1993) and *In Re Stratosphere Corporation*, 182 F.R.D. 614 (D. Nev.1998).

In *Hall*, a defendant's lawyer noticed the plaintiff's deposition. Before the deposition started, the plaintiff's lawyer asked for copies of all of the exhibits that were going to be marked that day so that they could be reviewed in advance, together. Defense counsel refused. After the deposition started, defense counsel marked a document as an exhibit and started to ask the witness about it. Plaintiff's counsel interrupted and said "I've got to review it with my client." Defense counsel objected on the record, and the parties contacted the court. The court sought letter briefing on the issue of attorney-client discussions during deposition, which was provided. *Hall*, 150 F.R.D. at 526.

The court, under authority granted by Federal Rules of Civil Procedure 16, 26(f), 30, and 37(a), after extensive discussion, entered an opinion setting guidelines for the conduct of deposition in the case. First, the court noted that there was no support for the plaintiff's position that "an attorney and client may confer at their pleasure during the client's deposition." *Id.* at 527. In often-cited language, finding no absolute right to such conferences, the *Hall* court stated that:

> The underlying purpose of a deposition is to find out what a witness saw, heard, or did—what the witness thinks. 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.

Id. at 528. The court found no meaningful distinction between whether the witness, or his or her attorney, initiated a conference, nor whether the conferences took place during a recess, whether

at lunch or during an evening, and therefore explicitly prohibited such conferences and found them to be "fair game" for inquiry to determine whether any coaching had occurred. *Id.* at 529 n. 7. The court did recognize and acknowledge the need for conferences for the purpose of determining a privilege, but ordered that the fact of and determinations reached at any such conferences should be placed on the record. *Id.* at 530. In concluding, the court admonished the parties and counsel about the risk of "strategic interruption" impeding with the judicial system's goal "to find and fix the truth" by stating:

> Depositions are the factual battleground where the vast majority of litigation actually takes place. It may safely be said that Rule 30 has spawned a veritable cottage industry. The significance of depositions has grown geometrically over the years to the point where their pervasiveness now dwarfs both the time spent and the facts learned at the actual trial—assuming there is a trial, which there usually is not. The pretrial tail now wags the trial dog. Thus, it is particularly important that this discovery device not be abused.

Id. at 531. According to a Lexis Shepard's search at the time of this article going to print, *Hall* has been cited over 100 times, with several courts viewing the decision favorably (including in my home state of Massachusetts). *See, e.g.*, *Holland v. Fischer,* No. 92-3900, *reprinted at* 3 Mass. L. Rep. 167, 1994 Mass. Super. LEXIS 12, * 18-20 (Mass. Super. Ct., Dec. 21, 1994) (citing *Hall*, stating "[the] contention, that a lawyer and client have an absolute right to confer during a deposition, is absolutely incorrect").

Most criticism of *Hall* focuses on the impairment of free and open consultation in the attorney-client relationship created by its blanket prohibition on conferences during a deposition (which can, in practice, often be continued weeks or months). One of the most prominent decisions to criticize *Hall* is *In Re Stratosphere*, cited *supra*. In *Stratosphere*, a securities lawsuit, the plaintiff filed a motion to establish a deposition protocol in the case. By the time the motion was heard, the court noted that "the only significant area of disagreement between Plaintiffs and Defendants is over the 'right to confer with counsel during a deposition.'" *Stratosphere*, 182 F.R.D. at 617. The plaintiffs argued, citing *Hall*, that deponents should have no right to confer with counsel during breaks (even overnight), and that conversations with counsel during any breaks should be discoverable. *Id.* at 619. The *Stratosphere* court stated that although it "agrees with the underlying concern and essential purpose" of the procedures in *Hall*, the decision "goes too far and its strict adherence could violate the right to counsel." *Id.* at 620. After thoroughly reviewing the rationale in *Hall*, the *Stratosphere* court stated:

> It is this Court's opinion that the right of counsel does not need to be unnecessarily jeopardized absent a showing that counsel or a deponent is abusing the deposition process. This Court is not aware of any cases, at least in the Ninth Circuit, which precludes counsel from speaking to his or her client/witness during recesses called by the court during trial or during regularly scheduled recesses of depositions. Such breaks in the action are usually not taken when a question is pending and are usually not at the instigation of the deponent or counsel. If they

> are requested by the deponent or deponent's counsel, and the interrogating attorney is in the middle of a question, or is following a line of questions which should be completed, the break should be delayed until a question is answered or a line of questions has been given a reasonable time to be pursued. . . . The right to prepare a witness is not different before the questions begin than it is during (or after, since a witness may be recalled for rebuttal, etc., during trial). What this Court, and the Federal Rules of Procedure seek to prevent is coaching the witness by telling the witness what to say or how to answer a specific question. We all want the witness's answers, but not at the sacrifice of his or her right to the assistance of counsel.

Id. at 621. The court refused to prohibit conferences during recesses in depositions, even ones to "attempt to help rehabilitate the client," "[s]o long as attorneys do not demand a break in the questions, or demand a conference between questions and answers." The court found that as long as these interruptions did not occur, "the search for truth will adequately prevail." *Id.* The rationale of the *Stratosphere* court, too, has been subsequently criticized on the grounds that the deponent's right to counsel in a civil matter is not as "encompassing" as that to which a criminal defendant is entitled. *See State ex rel. Means v. King*, 520 S.E.2d 875, 882–83 (W. Va. 1999).

Some jurisdictions have passed procedural rules to govern this deposition conduct. For example, in Texas, Tex. R. Civ. P. 199.5(d) states "[t]he oral deposition must be conducted in the same manner as if the testimony were being obtained in court during trial. . . . Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments." Similarly, in New Jersey, N.J. Court Rule, R. 4:14-3(f) states, "[o]nce the deponent has been sworn, there shall be no communication between the deponent and counsel during the course of the deposition while testimony is being taken except with regard to the assertion of privilege, a right to confidentiality or a limitation pursuant to a previously entered court order." It should be noted that even these rules do not provide complete clarity: disputes have arisen in Texas over whether or not a break was "agreed" on, *see Eckels v. Davis*, 111 S.W.3d 687, 698 n. 5 (Tex. App. – Forth Worth, 2003), and in New Jersey over whether the prohibition in the rule itself governs conduct during breaks or merely formal testimony being taken on the record. *See In re PSE&G Shareholder Litig.*, 726 A.2d 994, 996–97 (N.J. Super. Ct. – Ch. Div. 1998).

Several extremely helpful and more detailed articles exist on this subject, which are readily available online and elsewhere. For example, in December 2002, the New York State Bar Association prepared a report titled "Should Deposition Witnesses Be Allowed to Confer with Their Counsel During a Deposition?," reflecting a lack of consensus by that group's Committee on Federal Procedure. For specific guidance on how this subject may be resolved in your jurisdiction, a great first starting point is the survey published in December 2005, currently available to members of the ABA, titled "Can We Talk? Nationwide Survey Reveals Wide Range of Practices Governing Communications with Witnesses While Defending Their Deposition," by Attorneys David Wachen and George Hovanec. More recently, the excellent

Drug and Device Law blog surveyed the case law in this area, setting forth guidelines for counsel, in an article published on February 10, 2011, titled "Depositions – When Can You Talk To Your Own Witness?"

Besides the clear direction that coaching witnesses is improper at all times, the above sources show that before defending any deposition, practitioners are well advised to review the applicable rules and any cases interpreting the discoverability of "deposition recess" discussions with their clients in the jurisdiction where their case is pending, to be certain that they do not inadvertently make any such conferences a part of the actual evidence in the lawsuit.

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