Things To Consider Before Counseling During Deposition

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by Marley Degner, Laura C. Hurtado and Stacie Kinser

Marley Degner
Litigation
+1.415.983.1186
marley.degner@pillsburylaw.com

Laura C. Hurtado
Litigation
+1.415.983.1082
laura.hurtado@pillsburylaw.com

Marley Degner is a senior associate and Laura Hurtado is an associate in the firm's San Francisco office. Stacie Kinser was a summer associate in the San Francisco office.

What should an attorney do in the middle of a deposition if her client answers in a way that suggests a misunderstanding of the question or a sudden loss of memory? She will likely want to confer with her client at the next available opportunity to get matters back on track, but her ability to do so without waiving privilege will depend, in part, on where the deposition is taking place.

Under the Federal Rules of Civil Procedure and Federal Rules of Evidence, courts have broad authority to control the discovery process, including depositions. Federal Rule of Civil Procedure 30(c) provides that the examination of a deponent must proceed as it would at trial. This rule, however, does not specifically address whether and when an attorney may confer with a client during a deposition.

It is generally accepted that an attorney may not initiate a break to confer with a client while a deposition question is pending, except to discuss privilege. However, there is a split of authority on whether an attorney may otherwise confer with a client during unscheduled or scheduled breaks, lunches and recesses on matters other than privilege, and to what extent those conferences are protected by the attorney-client privilege.

This article explores different approaches taken in case law and local rules and practices regarding consultations during deposition breaks. It focuses primarily on California and Delaware federal and state law, and provides a brief summary of issues to consider when determining which approach has been adopted in other jurisdictions.

The Seminal Cases: Hall and Stratosphere

The split of authority on consultations during depositions flows from opposing approaches adopted in two pivotal cases.

Hall v. Clifton Precision

In Hall v. Clifton Precision, the court held that private attorney-client conferences are prohibited during the deposition and during breaks, lunches and overnight recesses, unless for the purpose of determining privilege issues. 150 F.R.D. 525, 529-531 (E.D. Pa. 1993). Going one step further, the court ordered that any private conference that does occur is a proper

subject for inquiry by deposing counsel to ascertain whether there has been any witness coaching.

Underlying the court's decision was the assertion that the purpose of depositions is to uncover the truth and to find out what a witness saw, heard, did or thinks. Relying on F.R.C.P. 30(c), the court reasoned that during a deposition, as during trial, a witness may not confer at his or her pleasure with counsel during the witness' testimony.

Accordingly, the court held that it is improper for deponent's lawyer to act as an intermediary, interpret questions and help the witness formulate answers by discussing the substance of the testimony during a break. The court found no meaningful distinction between a conference initiated by the witness or by the attorney, or between a conference occurring during the deposition or during a break, because the same problem of potential witness coaching persists in either case.

While the court acknowledged the lawyer's duty to prepare a client for deposition, it concluded that once a deposition begins, the right to counsel is "somewhat tempered" by the truth-seeking function of the examination.

In re Stratosphere Corporate Securities Litigation

Stratosphere holds that although counsel may not request a conference between questions and answers, an attorney and client may confer during a deposition break or recess not so requested. 182 F.R.D. 614, 621-22 (D. Nev. 1998). During that conference, the attorney may, for example, make sure that the client did not misinterpret questions and attempt to rehabilitate the client. Further, any such conference does not waive attorney-client privilege.

The court in Stratosphere agreed with Hall that a deposing attorney is entitled to have the witness alone answer questions. But the court concluded that Hall's prohibition on consultations during deposition breaks went so far as to deny the right to counsel, which should not be jeopardized absent a showing that counsel or deponent is abusing the deposition process.

As to a lawyer's ethical duties, the court disagreed with Hall, stating the duty to prepare a witness does not diminish after the deposition begins. Furthermore, the court refused to give "carte blanche" to the deposing attorney to interrogate into the privileged communications between attorney and client that occur during breaks.

Federal Law and Practices Following Hall and Stratosphere

Since the landmark decision in Hall, some district courts have adopted, to varying degrees, a no-consultation approach to conferences during depositions. See, e.g., Plaisted v. Geisinger Medical Center, 210 F.R.D. 527, 532-533 (M.D. Pa. 2002).

Some courts employ looser standards than Hall's strict holding by, for example, allowing discovery into communications that occurred during breaks and resulted in obvious witness coaching, but preserving the privilege for communications that took place during other breaks. See In re Chassen v. Fidelity National Title Insurance Co., No. 09-CV-291(ES), *4-5 (D.N.J. July 21, 2010).

Other courts have relied on Hall to support ancillary propositions, like granting monetary sanctions where counsel continuously engaged in private conferences with the client. See, e.g., Jones v. J.C. Penney's Department Stores Inc., 228 F.R.D. 190, 198 (W.D.N.Y. 2005).

In one District of New Jersey case, the court ruled that text messages exchanged between attorney and client during the course of a deposition waived privilege and must be produced. Ngai v. Old Navy, No. 07-CV-5653(KSH)(PS), *15-16, 22 (D.N.J. July 31, 2009).

Stratosphere also has progeny that decline to restrict attorney-client conferences during deposition breaks. These courts tend to favor the protection of the attorney-client relationship over the danger of witness coaching and allow private conferences so long as there is no question pending. See, e.g., Pia v. Supernova Media Inc., No. 09-CV-840 (CW), *11-12 (D. Utah Dec. 6, 2011); McKinley Infuser v. Zdeb, 200 F.R.D. 648, 650 (D. Colo. 2001).

Other decisions more adamantly decry the injustice of "blanket prohibitions" on attorney-client conferences during breaks, finding them "contrary to law." See, e.g., Murray v. Nationwide Better Health, No. 10-3262, *10-13 (C.D. Ill. Aug. 24, 2012).

California and Delaware Jurisdictions

1) Case Law

There is no Ninth Circuit decision citing either Hall or Stratosphere.

Only the Southern District of California has squarely addressed the issues raised in these cases. Vestin Realty Mortgage II Inc. v. Klaas is a breach of contract case wherein the court adopted the Hall approach. No. 08-CV-2011 (LAB) (AJB) (S.D. Cal. Oct. 25, 2010). During a deposition, defense counsel engaged in a pattern of lengthy speaking objections and instructed his client not to answer more than 30 times. (See Plaintiff's Motion to Compel at *7, Vestin Realty Mortgage II).

Given defense counsel's "blatant obstructionist behavior," the court granted plaintiff an additional five hours to redepose the defendant. To eliminate further inappropriate conduct at that deposition, the court issued a "Clifton Order," adopting the exact language from Hall v. Clifton Precision and prohibiting counsel from engaging in off-the-record conferences with his client except to discuss privilege.

The order further provided that "any conferences which occur pursuant to, or in violation of, this rule are a proper subject of inquiry for deposing counsel to ascertain whether there has been witness coaching and, if so, what." To date, no cases have followed Vestin in California or elsewhere.

There are no District of Delaware decisions on point, but Hall was decided by a court within the Third Circuit, which includes the District of Delaware, and many district courts within that circuit have adopted Hall.

2) Local Rules and Standing Orders
There are no local rules on this issue in California federal district courts. Three judges in the Northern District, however, have entered standing orders on private conferences during depositions.

Judges William Alsup, Edward Chen and Jeffrey White have adopted the same language: "Private conferences between deponents and their attorneys in the course of deposition are improper and prohibited except for the sole purpose of determining whether a privilege should be asserted."

The District of Delaware has adopted a local rule that explicitly addresses conferences during all breaks and recesses. Delaware Local Rule 30.6 reads, "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 against testifying or on how to comply with a court order."

State Laws and Practices on Deposition Conduct

1) California
California has a dearth of authority on the propriety and discoverability of conferences during deposition breaks. For guidance, practitioners may look to standing orders of judges presiding over their cases or to bar association opinions on the topic of consultations during depositions, but there exists no specific, blanket rule on the issue.

The Los Angeles County Bar Association Professional Responsibility and Ethics Committee issued a formal opinion directly addressing deposition break consultations. (See L.A. CNTY BAR ASS'N, Formal Op. 497 (1999)).

The committee concluded that based on the ethical duty to perform legal services with competence, an attorney also has an ethical duty to ensure a client's interests are protected during a deposition, in some cases by interrupting the deposition or consulting with the client during scheduled breaks.

Additionally, the American Bar Association Section of Litigation published a nationwide survey on the law, rules and practices in each state for consultations with witnesses during depositions. (See David S. Wachen, Can We Talk?, (2005) A.B.A. SEC. OF LITIG.).

The survey found that while there are no official rules in California, respondents agreed that an attorney can talk generally to a client over a short break, lunch or extended recess, but should not discuss a matter other than privilege while a question is pending.

2) Delaware
Unlike many other states, the rules in Delaware prohibiting attorney-client conferences during depositions are historically firm and "unmistakably clear." Webb v. State, 663 A.2d 452, 460 n.7 (Del. 1995).

The Delaware Court of Chancery and Superior Court Rule 30(d)(1) on attorney-deponent communications mostly mirrors the District of Delaware's Local Rule 30.6, prohibiting all consultations during deposition breaks and recesses.

However, Rule 30(d)(1) creates a bright-line exception that allows attorneys and their clients to confer on the substance of the testimony if a recess lasts more than five days.

Additionally, in an asbestos litigation case that predates the decision in Hall, the Delaware Superior Court not only prohibited attorney-client consultations during deposition recesses but provided a specific flow chart of questions for a deposing attorney to ask following any recess to determine whether consultations had taken place, testimony had been discussed and any instruction or advice was given in regards to the testimony. In re Asbestos Litig., 492 A.2d 256, 260 (Del. Super. Ct. 1985).

Takeaways and Important Points to Consider

Because jurisdictions vary so widely in their treatment of deposition break consultations, it is important to consider which rules will be operable for a particular deposition. Attorneys should be especially concerned about provisions regarding waiver of attorney-client privilege and sanctions for violating local rules. The following is a primer on points to consider when defending depositions.

Privilege

- Most, if not all, jurisdictions permit communication with a deponent regarding the issue of privilege at any time during the course of the deposition.
- This includes requesting a break or private conference to discuss privilege while a question is pending.

Initiating a Conference

- Attorneys should not initiate a conference to discuss the subject matter of the deposition testimony while a question or a line of questions is pending.
- Some case authority, however, makes no distinction between breaks requested by the attorney or breaks requested by the client, considering both to be improper.

Breaks, Lunches And Recesses

- Courts are divided as to whether attorneys can consult with their clients on matters other than privilege during breaks.
- Check the applicable local rules and standing orders of judges to find any specific guidance on the issue.
- For jurisdictions that follow Hall, attorneys are prohibited from consulting with clients during the pendency of depositions, including during breaks, lunches and/or overnight recesses.
- Some rules differentiate between lengths of recesses to determine when consultations are allowed.
- For jurisdictions in line with Stratosphere, consultations during breaks (so long as an attorney did not request a break during the pendency of a question), lunches and/or recesses are explicitly permitted.
- Some jurisdictions are ambiguous on whether the no-consultation rule applies during breaks, lunches and recesses.
- For jurisdictions that are silent, it may be implied by local practice that consultations during breaks, lunches and/or recesses are acceptable.

Waiving Privilege

- Communicating with clients during a deposition may waive privilege.
- Jurisdictions following the Hall approach permit inquiry into any communications that do occur during a deposition to determine whether witness coaching has occurred.
- Jurisdictions adopting Stratosphere's reasoning protect attorney-client communications that occur during deposition breaks.