Conversations with Clients During Deposition Breaks: Proceed with Caution

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Publications

I. Introduction

In Tennessee, the attorney-client privilege protects from discovery communications between an attorney and client that were made in confidence for the purpose of obtaining legal advice. T.C.A. § 23-3-105; *Johnson v. Patterson*, 81 Tenn. 626 (1884). However, the privilege is not absolute, and not all discussions between an attorney and his or her client will be protected. *Boyd v. Comdata Network, Inc.*, 2002 WL 772803 (Tenn. Ct. App. 2002).

One situation in which attorneys should tread with caution is during deposition breaks or recesses. It is commonplace for witnesses to ask for breaks during depositions and to confer with counsel about the deposition during those breaks. In most cases, all of the elements required to assert the attorney-client privilege are present. However, several courts have held that the privilege does not apply in these circumstances, and opposing counsel may inquire into what was said between the witness and his or her attorney.

II. The *Hall* Court's Bright-Line Approach

Under Rule 30(c) of the Federal Rules of Civil Procedure, the examination of a witness at a deposition is to "proceed as [it] would at trial." FRCP 30(c)(1). At trial, it is clear that a witness may not confer with counsel during his or her testimony. And attorneys are well-advised to avoid discussions about that testimony with their client-witness during breaks or recesses. However, depositions are often treated more informally than trial testimony. Objections are limited to form, privilege, and harassment, and counsel and client often discuss the deposition during breaks or recesses. But, at least according to some courts, the same rules that apply at trial should apply during depositions. That is, discussions between witness and attorney should not take place, and if they do, the content of those discussions may be discovered by opposing counsel.

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In *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993), the U.S. District Court for the Eastern District of Pennsylvania addressed a lawyer's conduct at a deposition. The lawyer repeatedly interjected during the deposition, and asked that he be allowed to confer with his client about a particular document before his client answered any questions related to it. The Court held that "conferences between witness and lawyer are prohibited both during the deposition *and during recesses*." 150 F.R.D. at 529 (emphasis added). Further, the Court held that anything a lawyer tells a witness during such a conference is not protected by the attorney-client privilege and may be inquired into by opposing counsel in order to determine whether any coaching has occurred. *Id*. The *Hall* court did recognize a limited exception when a conference is requested for the sole purpose of deciding whether to assert a privilege. *Id*.

III. Post-*Hall* Disagreement Among the Courts

In subsequent cases, not all courts have agreed with *Hall*. Some have viewed the decision favorably but refused to adopt a bright-line rule and instead elected a case-by-case, fact-dependent approach. *See In re PSE & G Shareholder Litigation*, 320 N.J. Super. 112 (N.J. Super. Ct. 1998); *Odone v. Croda Intern. PLC*, 170 F.R.D. 66 (D. D.C. 1997). Others have flatly rejected *Hall* and held that a witness has the right to confer with counsel during normal deposition breaks and recesses. *See In re Stratosphere Corp. Sec. Litig.*, 182 F.R.D. 614, 620 (D. Nev. 1998) (adhering to Hall could violate right to counsel); *Haskell Co. v. Georgia Pacific Corp.*, 684 So.2d 297, 298 (Fla. Ct. App. 1996) ("There is no recognized exception to the privilege for a communication between an attorney and client which occurs during a break in deposition. If a deponent changes his testimony after consulting with his attorney, the fact of the consultation may be brought out, but the substance of the communication generally is protected.").

In *In re Stratosphere*, the Court acknowledged the problem identified in *Hall*, but disagreed with the *Hall* court's resolution. 182 F.R.D. at 620-21. The Court agreed that a deponent or his or her counsel cannot stop the deposition when a question is pending in order to confer about the answer. *Id*. However, the Court held that a deponent and his or her counsel should be allowed, during normal

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breaks and recesses not requested by the deponent or counsel, to confer in order to ensure that "the client did not misunderstand or misinterpret questions or documents, or attempt to help rehabilitate the client by fulfilling an attorney's ethical duty to prepare a witness." *Id*. at 621.

Still other courts have agreed with the court in *Hall*, holding 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." *Chassen v. Fidelity Nat. Title Ins. Co.*, 2010 WL 5865977 (D. N.J. July 21, 2010) (*citing Ngai v. Old Navy*, 2009 WL 2391282 (D. N.J. July 31, 2009)).

IV. Local Rules

Some jurisdictions have adopted local rules to address whether witnesses may confer with counsel during depositions. For example, under New Jersey Court Rule 4:14-3(f), "[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 a claim of privilege, a right to confidentiality, or a limitation pursuant to a previously entered court order." While this rule on its face does not directly address breaks during depositions, one New Jersey court has held that there may be no discussions between counsel and witnesses, even during recesses, until the deposition concludes for the day. *In re PSE & G Shareholder Litigation*, 320 N.J. Super. 112 (N.J. Super. Ct. 1998). However, the court preserved the witness's right to confer with counsel in order to prepare for the next day's deposition. *Id*.

Several federal courts have taken the same approach. The U.S. District Court for the Eastern District of New York has adopted the following Local Rule 30.6: "(1) An attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted. (2) There may be unfettered consultation during overnight breaks in a deposition." The District Court for the District of South Carolina takes it a step further,

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specifically prohibiting "private, 'off-the-record' conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege." D. S.C. Local Civil Rule 30.04.

V. State vs. Federal Court

Whether you're in state or federal court, the attorney-client privilege is created and defined by state law, as federal courts apply the law of the state in which they sit. Depositions, on the other hand, are governed by Rule 30 of the Federal Rules of Civil Procedure in federal court, and its corollary in state courts. But given that different federal courts have interpreted FRCP 30 and come to opposing conclusions, practitioners should be familiar with the latest case law and local rules on both the state and federal level when preparing for a deposition.

The Sixth Circuit has not cited *Hall*, and only one Tennessee court has had occasion to comment on the *Hall* court's bright-line rule. In *FedEx Corp. v. U.S.*, the U.S. District Court for the Western District of Tennessee cited *Hall* for the proposition that "once a witness has been prepared . . . that witness is on his or her own" and held that an attorney's "suggestive objections" violated Rule 30 of the Federal Rules of Civil Procedure. 2011 WL 2023297, at *9 (W.D. Tenn. March 28, 2011). But that case dealt only with objections made by counsel on the record, and did not address conversations between counsel and deponent during breaks or recesses.

VI. Conclusion

It is unclear whether the *Hall* approach has been adopted by the 6th Circuit or Tennessee courts. Nevertheless, Tennessee attorneys should not assume that conversations with their clients during breaks in depositions will fall within the attorney-client privilege. And they should definitely avoid asking for breaks when a question is pending for the purpose of discussing that question with their client. And for attorneys in other states taking or defending depositions, a quick search of that state's case law and any local rules on the subject would be time well-spent.

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