

## Focus | Business Litigation/Trial Skills

# Be Careful On Break: Privilege and the Deposition Recess

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Before a recent deposition in a case pending in Delaware, local counsel advised me to ask whether the witness consulted with his attorney about his testimony during a break and to specifically inquire about the contents of those conversations. This line of questioning seemed to directly invade the attorney-client privilege. In Texas, private conferences between a witness and counsel are allowed during agreed recesses and adjournments under Rule 199.5. In Texas federal courts, private conferences are generally allowed unless there is a pending question. See, e.g., W.D. Tex. L.R. CV-30(b). Outside of Texas, however, the law is not uniform on the protected nature of attorney-client communications during a deposition recess, and Texas practitioners with cases pending elsewhere should review the venue's local rules and cases on this topic before taking or defending a deposition.

The countervailing view to the Texas rule is based on the premise that because a deposition generally proceeds as permitted at trial, once a deposition commences, counsel has no right to confer during the deposition except to determine if a privilege should be claimed. Further, the strict prohibition on intra-deposition conferences forecloses improper coaching during a deposition.

The leading case for the "no consultation" rule is *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1992). In *Hall*, the court held that a witness and his attorney should not engage in any private, off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding

whether to assert a privilege. The court held that once the deposition started, the preparation period ended and the deposing lawyer could pursue the chosen line of inquiry without interjection by the witness's counsel. To the extent such a conference occurred, it was not privileged and was fair game for inquiry by the deposing attorney to ascertain whether there had been any coaching and, if so, what.

Recently the rationale in *Hall* was adopted by a federal magistrate judge in New Jersey. There the court held that the defendants were entitled to explore whether the discussions during a deposition break interfered with the fact-finding goal of the deposition process. *Chassen v. Fidelity Nat'l Title Ins. Co.*, 2010 WL 5865977 (D.N.J. July 21, 2010) *aff'd* 2011 WL 723128 (D.N.J. Jan. 13, 2011).

Other jurisdictions have elected to address this matter by local rule. For example, Delaware's federal court has adopted a local rule that provides: "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." D. Del. L.R. 30.6. The Delaware rule has been interpreted to mean that a witness should not be permitted to consult with his attorney regarding his testimony until the deposition is completed. *Deutschman v. Beneficial Corp.*, Civ. A. No. 860595, at

\*3 (D. Del. Feb. 20, 1990).

In South Carolina, the local rule prohibits conferences between counsel and deponents during breaks or recesses, except to assert a privilege, make an objection or move for a protective order; requires counsel engaging in any conference with a deponent to report the results of the conference on the record; and permits the interrogating counsel to inquire of the deponent about the conferences. D.S.C. L.R. 30.04.

These out-of-state decisions and local rules are anathema to the principle that attorney-client communications for the purpose of seeking, obtaining, or providing legal advice are sacrosanct. However, the attorney-client privilege,

like all privileges, is not absolute, and these jurisdictions have determined that excluding these conversations from the privilege altogether assists in the truth-finding mission of discovery.

A Texas attorney taking or defending a deposition in a case pending in another state needs to be aware that any attorney-client discussions during a break or recess may not be privileged. Although it is clear that an attorney and client can discuss issues pertaining to privilege, a witness may be required to testify regarding any other substantive discussions with counsel. **HN**

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