SHOULD DEPOSITION WITNESSES BE ALLOWED TO CONFER WITH THEIR COUNSEL DURING A DEPOSITION?

SUMMARY

The question of whether a witness during a deposition should be allowed to confer with counsel during a deposition, and, if so, under what circumstances and for what reasons, has been controversial for many years. In 1990, it split a Federal Bar Council committee on the conduct of depositions, chaired by now Southern District of New York Judge Sidney H. Stein, for which "[n]o subject . . . generated more controversy . . . than the question of the extent to which a witness should be permitted to discuss matters with his or her attorney during the conduct of the deposition."[1] The majority of that committee found that attorney-initiated conferences should be presumptively improper for any purpose other than to determine whether a privilege should be asserted.[2] The minority found the proposal a gag order that could prevent a client from requesting legal advice during a deposition and therefore an improper interference with the attorney/client relationship.[3]

There still is no consensus as to when it is appropriate for a deponent to consult with counsel, and, if consultation occurs, whether the content of that consultation should be subject to examination by the interrogator. There is contradictory case law,[4]

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[1] Federal Bar Council Committee on Second Circuit Courts, "A Report on the Conduct of Depositions," 131 F.R.D. 613, 618 (1990).

[2] *Id.*

[3] *Id.* At 627.

[4] Compare *Hall v. Clifton Precision*, 150 F.R.D. 525, 529 (E.D. Pa. 1993) (Gawthrop, J.), with *In re Stratosphere Corp. Securities Litig.*, 182 F.R.D. 614 (D. Nev. 1998) (Hunt, M.J.).

and there are a range of local rules.[5] Nonetheless, the Section agrees on two principles, the first of which is incorporated in Local Rule 30.6 of the United States District Court for the Eastern District of New York:

(1) There should never be a consultation while a question is pending, except for the purpose of ascertaining whether a privilege or other protection from discovery should be asserted.

(2) There may be unfettered consultation during overnight breaks in a deposition.

Beyond these principles, no agreement can be found. Some would not prohibit any consultation between a deponent and deponent's counsel. Of this group, however, some would permit the interrogator to explore what was said during the consultation, if the consultation is during a break initiated by the witness or the witness' counsel, although without otherwise waiving the attorney-client privilege. Others would prohibit any consultation between the deponent and the deponent's attorney, except for the purpose of discussing whether to halt the deposition due to the bad faith of the interrogator or unreasonable annoyance, embarrassment or oppression under Rule 30(d)(4), after a record of objections to such questioning has been made.

This report will examine the considerations that lead to the divergent views on whether and when consultation between a deponent and the deponent's counsel should occur.

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[5] See Appendix A.

DISCUSSION

Whether or when counsel should be allowed to confer with witnesses during depositions requires a balancing of the reasons why conferences should be prohibited and why they might occur. It also is affected by a need to draw workable lines that can be recognized in the absence of a jurist, but enforced if required.

There are two reasons why witnesses should not be allowed to confer with counsel during a deposition – coaching and interference in the examination of the witness.

Coaching occurs when counsel, directly or indirectly, tells the witness what to say.[6] This may lead to untruthful testimony (possibly a criminal violation[7]) and may be an ethical, if not criminal, violation by the witness' attorney.[8] The interrogator does not receive a truthful recollection from the witness, but only what counsel views as good for her or his case.[9] Coaching during a deposition frustrates the major purposes of depositions, which are to discover the facts and preserve truthful testimony.[10]

Coaching should be distinguished from preparation. During preparation, counsel and the witness review the witness' recollection of relevant events, relevant

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[6] *In re Stratosphere Corp. Securities Litig.*, 182 F.R.D. 614, 621 (D. Nev. 1998).

[7] 18 U.S.C. § 1621.

[8] New York State Bar Association, *The Lawyer's Code of Professional Responsibility* EC 7-26; DR 7-102(A)(6), 22 N.Y.C.R.R. § 1200.33(a)(6); ABA Model Rules of Professional Conduct 3.3(a)(4); 18 U.S.C. § 1622.

[9] "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." *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993).

[10] *Id.; Henkel v. XIM Products, Inc.*, 133 F.R.D. 556, 557 (D. Minn. 1991).

documents, issues in the case and deposition procedure.[11] Preparation does not seek to alter a witness' recollection, but to improve it. However, the line between permissible preparation and improper coaching is fuzzy.

A second reason for prohibiting conferences between counsel and witnesses during a deposition is that conferences will interfere with the interrogator's examination. Cross-examination is the best mechanism for ascertaining the truth of testimony.[12] Successful cross-examination sometimes depends on raising the witness' level of discomfort high enough for the witness to disclose the truth to put an end to the questioning. Interruptions for conferences may interfere with the

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[11] *See Christy v. Pennsylvania Turnpike Comm'n*, 160 F.R.D. 51, 53 (E.D. Pa. 1995) ("a lawyer has an ethical duty to prepare a witness" before a deposition and no restriction on pre-deposition communications should be imposed).

[12] "[C]ross-examination [is] the 'greatest legal engine ever invented for the discovery of truth.'" *California v. Green*, 399 U.S. 149, 158, 99 S. Ct. 1930, 1935 (1970) (*quoting* 5 J. Wigmore, *Evidence* § 1367 (3d ed. 1940).

"Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110 (1974).

"[C]ross-examination, a '"vital feature" of the Anglo-American system,' "'sheds light on the witness' perception, memory and narration,'" and 'can expose inconsistencies, incompletenesses, and inaccuracies in his testimony.'" *Perry v. Leeke,* 488 U.S. 272, 283 n.7, 109 S. Ct. 594, 601 n.7 (1989) (*quoting* 4 J. Weinstein, Evidence ¶ 800[01] (1988)).

"[T]he truth-seeking function of the trial can be impeded in ways other than unethical 'coaching.' Cross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the right time, in just the right way. Permitting a witness . . . to consult with counsel after direct examination but before cross-examination grants the witness an opportunity to regroup and regain a poise and sense of strategy that the unaided witness would not possess. This is true even if we assume no deceit on the part of the witness; it is simply an empirical predicate of our system of adversary rather than inquisitorial justice that cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney." *Perry v. Leeke,* 488 U.S. 272, 282, 109 S. Ct. 594, 601 (1989).

"For two centuries, common law judges and lawyers have regarded the opportunity of cross-examination as an essential safeguard of the accuracy and completeness of

interrogator's questioning and prevent the deposition from reaching the objectives of discovering the facts and preserving truthful testimony.

On the other hand, there are reasons for allowing witnesses to confer with counsel during a deposition. The deponent may need to seek legal advice about asserting a privilege or protection or about harassing questions, and, reciprocally, counsel may need to determine whether to assert a privilege, invoke protection from discovery or seek a ruling from the court. There may be a need to correct an error on the record. Counsel may need to advise a witness about the process to make the witness more comfortable answering questions. There may also be a need for the witness and counsel to discuss issues relating to the case, but not necessarily relating to the subject of the examination. We examine each of these reasons.

Asserting a Privilege or Protection

If a privilege is not asserted prior to answering a question, the privilege is usually considered to have been waived.[13] Equally, if an assertion is not made that a prospective answer is protected from discovery for some reason other than privilege (perhaps a protective order), waiver of the protection may be inferred from the fact of answering.[14] Therefore, to determine whether it is appropriate to assert a privilege or protection from discovery in response to a question, any consultation between a

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testimony, and they have insisted that the opportunity is a right and not a mere privilege." McCormick on Evidence at 47 (3rd ed. 1984).

[13] 8 Wright, Miller & Marcus, Federal Practice and Procedure § 2016.1 at 229 (2d ed. 1994); *Nguyen v. Excel Corp.*, 197 F.3d 200, 206-07 (5th Cir. 1999); *Thomas v. F. F. Financial, Inc.*, 128 F.R.D. 192, 194 (S.D.N.Y. 1989); *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455, 459 (N.D. Cal. 1978).

witness and the witness' attorney must occur prior to the answer to the question. Although such a consultation interferes with the examination of the witness, the consequences of prohibiting consultation are grave enough to overcome the interference.[15]

Harassing Questions

Normally there is no third party presiding over the conduct of a deposition. This can lead to abuse by interrogators. Interrogators may pursue irrelevant lines of inquiry calculated more to embarrass a deponent than to obtain facts relevant to the subject matter of the case. Interrogators may also phrase questions, make comments and act in a manner designed to intimidate or harass a witness. If such tactics become sufficiently abusive, it might be appropriate to suspend the deposition and seek court intervention.[16] However, such a suspension might result under Rule 37(a)(4)(A) in the imposition on the witness of reasonable expenses, including attorneys' fees, if the court determines the suspension was unjustified. A consultation

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[14] *Cf. Littlejohn v. BIC Corp.*, 851 F.2d 673, 680 (3d Cir. 1988) (failure to object to release at trial of information subject to a protective order waives any rights to confidentiality).

[15] *Hall v. Clifton Precision,* 150 F.R.D. 525, 529 (E.D. Pa. 1993); *American Fun & Toy Creators, Inc. v. Gemmy Indus., Inc.*, 96 Civ. 0799 (AGS) (JCF), 1997 WL 482518 at *9 (S.D.N.Y. Aug. 21, 1997) (Francis, M.J.).

[16] Rule 30(d)(4).

between counsel and the deponent might well be appropriate to discuss the costs and benefits of the available courses of action before taking the step of suspending the deposition.

While the possibility of harassment and the risks of suspending a deposition can be discussed during preparation before a deposition, an assessment of the appropriate course of action may not realistically be able to be made until the event occurs. Moreover, because of the risk of sanctions if a suspension is unjustifiably invoked, it may be that the attorney has an ethical obligation to explain the courses of action to the witness before such an action occurs.[17] These considerations justify a consultation between counsel and the witness when no question is pending and after the witness' attorney has made a record under Rule 30(c) justifying the consultation.[18]

Correct Errors

It has been argued by David H. Taylor that "consultation to correct inadvertent false statements amounts to little more than the allowed post-deposition correction of the record provided for in Rule 30(e). By accelerating the correction to a point in time that allows for immediate follow-up based on the corrected information, interests of

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[17] Model Rules of Professional Conduct Rule 1.4(b) (1994) ("[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

[18] *See Refco, Inc. v. Troika Investment Ltd.*, 87 C 9272, 1989 WL 94326 at *11 (N.D. Ill. Aug. 2, 1989) (Shadur, J.) ("counsel are ordered not to instruct or advise deponents that they are free to decline to answer any questions, but may advise them not to answer only . . . if a question touches sensitive areas or goes beyond reasonable limits"); *Heller v. Consolidated Rail Corp.*, Civ. A. No. 95-3935, 1995 WL 476244 at *3 n.2 (E.D. Pa. Aug. 7, 1995) (Gawthrop, J.) ("[c]ounsel not only has a right to be there [at a deposition], but the right – and duty – to interrupt to protect his client from overreaching and abuse by an opponent, provided it is done within the rules").

economy in discovery are served."[19] Taylor further argues that an attorney's obligation of candor toward the tribunal under Rule 3.3 of the Model Rules of Professional Conduct (1994), which requires an attorney to take reasonable remedial measures if evidence is offered that the attorney knows to be false, obligates counsel to initiate a conference to correct an error in testimony during a deposition.[20]

Correcting errors, however, looks very much like coaching the witness. Correcting a transcript after a deposition is not the same as interrupting a deposition for a consultation between attorney and witness and then producing changed testimony. Moreover, after the questioning by the interrogator, under Rule 30(c), the witness' attorney may ask questions to clarify any previous statements by the witness.[21] The goal of a deposition is not economy or efficiency, but discovery of facts through truthful testimony. Drawing workable lines for depositions conducted outside the presence of a judicial officer might suggest that consultations to correct errors be prohibited.

On the other hand, if there is a material error that will lead to a series of questions based on an incorrect premise, then it is a waste of the time of everyone at

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[19] David H. Taylor, "Rambo as Potted Plant: Local Rulemaking's Preemptive Strike Against Witness-Coaching During Depositions," 40 *Vill. L. Rev.* 1057, 1076 (1995).

[20] *Id.* at 1075; *see In re Stratosphere Corp. Securities Litig.*, 182 F.R.D. 614, 621 (D. Nev. 1998) ("[t]his Court will not preclude an attorney, during a recess that he or she did not request, from making sure that his or her 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").

[21] At least one court has held that it is appropriate for a witness' attorney to consult with the deponent after the interrogator's examination is completed, but before any examination by the witness' attorney. *See Odone v. Croda Int'l PLC*, 170 F.R.D. 66, 68-69 (D.D.C. 1997) (rehabilitation of client on cross-examination, after consultation during a

the deposition for there not to be an immediate correction. A witness' attorney can ask for a break to warn the interrogating attorney that an error has been made that requires correction, but interrogators have been known to disregard such suggestions.

Thus, correcting errors is one reason for interrupting a deposition for consultation with a witness that does not obviously tilt either toward prohibition or toward complete acceptability.

Witness' Comfort

It has been suggested that providing reassurance during a deposition to an inexperienced witness, who may be intimidated by the process, might aid the fact-finding process.[22] However, such an interruption mitigates the stress of undergoing cross-examination, which stress is part of the basis for the belief that cross-examination leads to more truthful testimony.[23] Further, there is a risk that reassurances may shade into coaching, especially with more experienced witnesses.

Reassurance should be provided during preparation, whether before a deposition or at appropriate breaks. It may be appropriate during overnight breaks in a deposition,[24] although, under Rule 30(d)(2), most depositions should now not include

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five-minute recess not requested by client or client's attorney and after interrogator's line of questioning concluded, held not sanctionable).

[22] Taylor, *supra* n. 17, at 1070-71.

[23] *Perry v. Leeke,* 488 U.S. 272, 282, 109 S. Ct. 594, 601 (1989).

[24] *Cf. Geders v. United States*, 425 U.S. 80, 91, 96 S. Ct. 1330, 1337 (1976) (trial court's order directing a criminal defendant while on the stand not to consult his attorney during an overnight recess violated the witness' Sixth Amendment right to counsel); *Potashnik v. Port City Constr. Co.*, 609 F.2d 1101, 1118 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980) (judge's prohibition of consultations between a party and his attorney during breaks and

an overnight break. Courts disagree as to whether reassurance is appropriate during normal breaks such as for a meal.[25]

This is an area where workable rules that do not infringe on direct examination by the interrogator could be devised. One line that could be drawn would be to distinguish between breaks called by the witness or the witness' attorney and all other breaks. To avoid improper coaching or interruption of direct examination, breaks requested by the deponent or the deponent's attorney would not result in consultation. On the other hand, because the interrogator controls the pace of examination, if the interrogator asks for a break or allows a scheduled break, it is less likely that the break will greatly interfere with the examination of the witness. Unfettered consultation could therefore be allowed during breaks not initiated by the deponent or the deponent's attorney.

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recesses in the party's trial testimony violated the party's Fifth Amendment right to counsel in a civil case).

[25] *See Perry v. Leeke,* 488 U.S. 272, 284, 109 S. Ct. 594, 602 (1989) ("in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying [criminal] defendant does not have a constitutional right to advice . . . [but] [o]ur conclusion does not mean that trial judges must forbid consultation between a defendant and his counsel during such brief recesses"); *Hall v. Clifton Precision,* 150 F.R.D. 525, 529 (E.D. Pa. 1993) (Gawthrop, J.) ("Once the deposition has begun, the preparation period is over and the deposing lawyer is entitled to pursue the chosen line of inquiry without interjection by the witness's counsel. Private conferences are barred during the deposition, and the fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules."); *In re PSE&G Shareholder Litig.*, 726 A.2d 994, 997 (N.J. Superior Ct., Essex 1998) ("[O]nce the deposition commences there should be no discussions between counsel and the witness, even during recesses, including lunch recess, until the deposition concludes that day. However, at the conclusion of the daily deposition, counsel and the witness should be permitted to confer and to prepare for the next day's deposition); *Refco, Inc. v. Troika Investment Ltd.*, 87 C 9272, 1989 WL 94326 at *11 (N.D. Ill. Aug. 2, 1989) ("counsel are ordered not to consult with witnesses during the course of their depositions except during mutually-agreed-upon breaks"); *McKinley Infuser, Inc. v. Zdeb*, 200 F.R.D. 648, 650 (D. Col. 2001) ("the truth finding function is adequately protected if deponents are prohibited from conferring with their counsel while a question is pending; other

Another line that could be drawn would be to permit breaks initiated by a deponent or the deponent's counsel, but to make the content of any such consultation subject to examination during the deposition. If the break were truly for the purpose of reassuring the witness, then the disclosure of what was said will not infringe on the attorney-client privilege nor will it provide ammunition for later use at trial. If the break were truly for the purpose of coaching, then the discussion of the change in testimony during the break and its disclosure on the record to the detriment of the witness' credibility will deter future abuse. Further, by having a rule to this effect known to all deposition participants in advance, impermissible coaching may be significantly deterred. Moreover, with such a rule, the deponent and the deponent's counsel will know that communications during breaks they initiate will not be subject to the attorney-client privilege and can act accordingly. This should minimize any impact on attorney-client communications, especially if the rule provides that any examination on the topic of discussions during such breaks will not be considered a waiver of the attorney-client privilege for any other purpose.

In any event, a need for reassurance should not be used as an excuse to interrupt cross-examination while a question is pending.[26]

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consultations, during periodic deposition breaks, luncheon and overnight recesses, and more prolonged recesses ordinarily are appropriate").

[26] *See In re Norplant Contraceptive Prods. Liability Litig.*, MDL Docket No. 1038, 1996 WL 42053 at *4 (E.D. Tex. Jan. 19, 1996); *Refco, Inc. v. Troika Investment Ltd.*, No. 87 C 9272, 1989 WL 94326 at *10 (N.D. Ill. Aug. 2, 1989) (Shadur, J.).

Issues Relating to the Case

A deposition provides an excellent opportunity for counsel and a witness, especially a party witness, to discuss issues relating to the case. Both are focused on the facts of the matter and may obtain insights during the deposition process that affect matters outside of the areas of examination. Such consultation should be allowed, except to the extent it interferes with the examination during the deposition.[27] This is a further item weighing in the balance for "workable" rules discussed in the previous section.

COURT RULES

Because of concerns over costs and delays in civil litigation[28] and discovery,[29] courts and judges have promulgated local or individual rules or guidelines concerning consultation with witnesses during depositions. The text of many of these rules is set out in Appendix A.

Consistent with the lack of consensus as a result of the different factors bearing on consultations between deponents and their counsel, these rules present a variety of approaches to the question of when a deponent can consult with counsel. The United

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[27] *See Reynolds v. Alabama Dep't of Transp.*, 4 F. Supp. 2d 1055, 1064 (M.D. Ala. 1998) (court in a civil case allowed defendants' counsel to consult with any witness about non-testimonial matters during both brief and extended recesses); *cf. Geders v. United States*, 425 U.S. 80, 88, 96 S. Ct. 1330, 1335 (1976) (criminal defendant, unlike a testifying witness, has a constitutional right during an overnight recess in his testimony to discuss matters with his counsel that go beyond the content of his testimony, such as trial tactics).

[28] *See* Section 102 of the Civil Justice Reform Act of 1990, Pub. L. 101-650 § 102, 104 Stat. 5088 (1990).

[29] *See* Advisory Committee Notes to Subdivision (b)(1) of Rule 26 of the Federal Rules of Civil Procedure (2000 Amendment).

States District Court for the District of Oregon has one of the more limited rules, which only governs when a recess may be taken: "[i]f a question is pending, it must be answered before a recess is taken unless the question involves a matter of privacy right; privilege; or an area protected by the constitution, statute, or work product."[30] On the other hand, the United States District Court for the District of South Carolina is one of the more restrictive jurisdictions, basing its rule on the language of the order of Judge Gawthrop in *Hall v. Clifton Precision*.[31] South Carolina's rule prohibits conferences between counsel and deponents during breaks or recesses, except to determine whether 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 conference.[32]

CONCLUSION

In deciding when counsel and a deposition witness should be allowed to confer, there should be a balancing between the reasons for prohibiting consultation – coaching and interference with the interrogator's examination – and the reasons why a consultation could occur – correction of errors, reassurance of the witness, or legal advice about assertion of a privilege or protection, harassing questions, or issues relating to the case. This balance should prohibit consultation during a deposition while a question is pending, except for the purpose of ascertaining whether a privilege

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30 D. Ore. LR 30.5.

31 150 F.R.D. 525, 531-32 (E.D. Pa. 1993).

32 D.S.C. Local Civil Rule 30.04(E), (F), (G).

or other protection from discovery should be asserted, and permit consultation during overnight breaks. Beyond that, each court may weigh the considerations. No further consensus seems possible.

New York State Bar Association
Commercial and Federal Litigation Section
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December 3, 2002

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** Messrs. Jossen and Lowenthal dissent from the conclusion in part. Apart from the circumstances when a question is pending, they do not believe that there is an appropriate basis or concern to suggest that there should by any limit on consultations between a deponent and the deponent's counsel. In the absence of any court-made or ethics rule, they do not believe that lawyers are under, or should be under, any proscription from such consultation.

APPENDIX A

M.D. Ala. Guideline II.G.; S.D. Ala. Guideline II.G.: "Except during normal breaks and for purposes of determining the existence of privilege or the like, normally at the request of the client, a deponent and his attorney should not normally confer during a deposition. The fact and duration of the conference may be pointed out on the record and, in the event of abuse, an appropriate protective order may be sought."

D. Col. LR 30.1C. A.: "The following abusive deposition conduct is prohibited: . . . 2. Interrupting examination for an off-the-record conference between counsel and the witness, except for the purpose of determining whether to assert a privilege. Any off-the-record conference during a recess may be a subject for inquiry by opposing counsel, to the extent it is not privileged."

S.D. Fla. Local Rule 30.1.A.: "The following abusive deposition conduct is prohibited: . . . 2. Interrupting examination for an off-the-record conference between counsel and the witness, except for the purpose of determining whether to assert a privilege."

S.D. Fla. Local Rule App. A. Discovery Practices Handbook . . . II. Depositions . . . B. Objections. . . . (3) Other Restrictions on Deposition Conduct. . . ."off-the-record conferences between counsel and witness are inappropriate."

S.D. Ind. L.R. 30.1(b): "An attorney for a deponent shall not initiate a private conference with the deponent regarding a pending question except for the purpose of determining whether a claim of privilege should be asserted."

D. Md. Rules App. A Discovery Guideline 5.g.: "During breaks in the taking of a deposition, no one should discuss with the deponent the substance of the prior testimony given by the deponent during the deposition. Counsel for the deponent may discuss with the deponent at such time whether a privilege should be asserted or otherwise engage in discussion not regarding the substance of the witness's prior testimony."

M.D.N.C. LR26.1(b)(iii): "Counsel and their witness-clients shall not engage in private, off-the-record conferences while the deposition is proceeding in session, except for the purpose of deciding whether to assert a privilege."

E.D.N.Y. Rule 30.6: "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."

Guidelines for Discovery Depositions of Magistrate Judge Foschio (W.D.N.Y): "(5) Counsel and their witness/clients shall not initiate or engage in private off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding whether to assert a privilege. (6) Any conferences which occur pursuant to, or in violation of, guideline (5) are a proper subject for inquiry by deposing counsel to ascertain whether there has been any witness-coaching and, if so, what. (7) Any conferences which occur pursuant to, or in violation of, guideline (5) shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall also be noted on the record."

D. Ore. LR 30.5: "If a question is pending, it must be answered before a recess is taken unless the question involves a matter of privacy right; privilege; or an area protected by the constitution, statute, or work product."

D.S.C. Local Civil Rule 30.04: "(E) Counsel and witnesses shall not engage in 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 or to make an objection or to move for a protective order. (F) Any conferences which occur pursuant to, or in violation of, Local Civil Rule 30.04(E) are proper subjects for inquiry by deposing counsel to ascertain whether there has been any witness coaching and, if so, to what extent and nature. (G) Any conferences which occur pursuant to, or in violation of, guideline Local Civil Rule 30.04(E) shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall be noted on the record."

W.D. Tex. Rule CV-30(b): "An attorney for a deponent shall not initiate a private conference with the deponent regarding a pending question, except for the purpose of determining whether a claim of privilege should be asserted."

D. Wy. Rule 30.1(f): "An attorney defending at a deposition of a non-party deponent shall not engage in 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."

Alaska Rules of Civil Procedure 30(d)(1): "Continual and unwarranted off the record conferences between the deponent and counsel following the propounding of questions and prior to the answer or at any time during the deposition are prohibited."

Del. Court of Chancery Rule 30(d); Del. Rule of Civil Proc. for the Super. Ct. 30(d): "(1) From the commencement until the conclusion of a deposition, including any recesses or continuances thereof of less than five calendar days, the attorney(s) for the deponent shall not: (A) 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, or (B) suggest to the deponent the manner in which any questions should be answered."

Md. Discovery Guideline 8(e): "An attorney for a deponent should not initiate a private conference with a deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted. To do so, otherwise, is presumptively improper."

Mass. Civil Procedure Rule 30(c): "Any objection to testimony during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. . . . Counsel for a witness or a party may not instruct a deponent not to answer except where necessary to assert or preserve a privilege or protection against disclosure." Reporter's Notes – 2001: "It has been suggested that some attorneys, cognizant of the prohibition against suggestive comments or hints during the deposition, may accomplish the same result by seeking to confer with the client in a

private prior to the client answering the question. It appears that the rule does not permit such conferences except where appropriate to preserve a privilege or protection against disclosure. . . . Just as a lawyer may not interrupt the questioning of a witness in order to confer in private and develop strategy with the witness, nor should the lawyer be allowed to interrupt the flow of questions at a deposition. Nor may the deponent stop the deposition in order to seek the advice of counsel (except in the case of a privilege or protection against disclosure)."

S. Car. Rules of Civil Procedure 30(j): "(5) Counsel and a witness shall not engage in 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 or to make an objection or to move for a protective order. (6) Any conferences which occur pursuant to, or in violation of, section (5) of this rule are proper subjects for inquiry by deposing counsel to ascertain whether there has been any witness coaching and, if so, to what extent and nature. (7) Any conferences which occur pursuant to, or in violation of, section (5) of this rule shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall be noted on the record."

Tex. Rules of Civil Procedure 199.5(d): "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. If the lawyers and witnesses do not comply with this rule, the court may allow in

evidence at trial statements, objections, discussions, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony."

Wash. Superior Court Rule 30(h)(5): "Except where agreed to, attorneys shall not privately confer with deponents during the deposition between a question and an answer except for the purpose of determining the existence of privilege. Conferences with attorneys during normal recesses and at adjournment are permissible unless prohibited by the court."

Uniform Rules for the District Courts of the State of Wyoming Rule 601(c): "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."