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Trials&TRIBULATIONS

Can an attorney confer with his client during deposition?

Although it appears universally accepted that a witness at a deposition may not confer with his or her attorney while a question is pending except to determine whether a privilege should be asserted, differences exist among jurisdictions concerning the extent to which attorney-initiated conferences are improper and whether those communications are privileged. The purpose of this article is to briefly review the differences in New York, and whether it would be appropriate to have a uniform rule for all jurisdictions.

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There have been articles during the past 10 years addressed to these issues, including an American Bar Association Section of Litigation survey entitled "Can We Talk," which represents a nationwide survey of the practices governing communications with witnesses at depositions.

The article reflects the wide disparity among states regarding the extent to which attorneys are permitted to confer with their clients during their deposition, and the extent to which those communications are privileged. In most jurisdictions, such communications are frowned upon and the contents may be the subject of inquiry by opposing counsel.

There is also an article entitled "Should Deposition Witnesses Be Allowed To Confer With Their Counsel During A Deposition," published by the New York Bar Association in 2002, which primarily focuses on practice in federal court. That article indicates that in 1990, communications with a client during a deposition were so controversial that it split a Federal Bar Council Committee into competing views, although the majority concluded that any attorney-initiated conference should be "presumptively improper for any purpose other than to determine whether a privilege should be asserted," (Federal Bar Council Committee on Second Circuit Courts: A Report On The Conduct Of Depositions).

The cases in New York that have addressed this issue have been primarily in federal courts throughout New York, and there are very limited court rules that address this issue.

The Uniform Rules for the New York State Trial Courts §221.3 entitled "Communication With Deponent" provides as follows:

"An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the questions should not be answered on the grounds set forth in §221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly."

The reference to §221.2 deals with the assertion of a privilege or right of confidentiality, and that appears to be the only basis for an attorney to direct a deponent not to answer. On the other hand, the rule appears limited to interruptions of a deposition for the purpose of communicating (as opposed to communications during normal breaks in the deposition).

Throughout the four federal district courts in New York, only the Southern and Eastern Districts have a Court Rule that addresses the issue. Rule 30.6 in the Eastern and Southern Districts, provides as follows:

"An attorney for deponent shall not initiate a private conference with the deponent while a deposition question is pending except for the purpose of determining whether a privilege should be asserted."

Although there is no local rule in either the Western or Northern Districts that is relevant to this issue, there have been cases that have dealt with this dispute.

The case law is not uniform, and it appears to originate with a federal case in *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Penn. 1993).

In that case, the deponent's attorney interrupted the questioning of his client and conferred with him regarding a document that been presented during the questioning. The attorney questioning the deponent objected and sought judicial intervention. The court reviewed practices in other jurisdictions and also looked to the Eastern District of New York's standing order on

Continued …

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Continued ...

the client-deponent's initiating a private conference, and concluded that:

"A lawyer and client do not have an absolute right to confer during the course of the client's deposition."

Furthermore, the court laid down a rule regarding an attorney-deponent conference during a deposition as follows:

"... these conferences are not covered by the attorney client privilege, at least as to what is said by the lawyer to the witness. Therefore, any such conferences are fair game for inquiry by the deposing attorney to ascertain whether there has been any coaching and, if so, what," Id. at 529.

The *Hall* case has become a standard for some federal districts, and has been accepted by the Southern and Western Districts, but not by the Northern District, see "Are Off the Record Communications With Counsel During a Deposition Recess Discovery," NYSBA NY Litigator, Winter 2009, Vol. 14 No. 2 (pp. 71-73).

There are only two reported cases in the Western District of New York, both originating in Buffalo, and they are Opinions written by Magistrate Judge Leslie G. Foschio. The cases are: *Fisher v. Goord*, 184 F.R.D. 45 (WDNY 1999) and *Jones v. J.C. Penney Department Stores*, Inc., 228 F.R.D. 190 (WDNY 2005).

In the *Fisher* case, which dealt with the infamous Amy Fisher who was confined at a New York state correctional facility, Magistrate Judge Foschio's guidelines for depositions were incorporated in his decision and, in essence, provided that counsel and the deponent shall not engage in any private-off-the record conferences during the depositions, breaks or recesses except for the purpose of deciding whether to assert a privilege and, if any such conferences do occur, they are a proper subject of inquiry by opposing counsel.

The case did not deal with any such conferences, but the guidelines are consistent with the reasoning in the *Hall* case. The *Fisher* decision has been noted as the standard in the Western District of New York, even though it does not appear to have been adopted by any of the District Court judges.

In *Jones v. J.C. Penney Department Stores, Inc.*, 228 F.R.D. 190 (2005), Magistrate Foschio's guidelines were also incorporated in the decision. The case dealt with a discovery dispute over the production of counsel's file and the attorneys' interruptions with the questioning of the deposing counsel, and it did not deal with any attorney-client communications during the depositions.

The case was again cited as relevant to the issue of off-the-record discussions between deponent and counsel because the guidelines for depositions were again attached to the decision.

A court in the Northern District of New York has rejected the reasoning in *Hall v. Clifton Precision*, in the case of *Henry v. Champion Enterprises, Inc.*, 212 F.R.D. 73 (NDNY 2003). The court denied defendant's motion that sought to question a witness regarding his conversations with his attorney during breaks in a fairly contentious deposition. The court found that the *Hall* case and its reasoning would not be followed in the Northern District and, as a result, the conversations between the witness and his attorney were not discoverable. The court did not explain its reasoning other than to suggest that no district court within the Second Circuit followed the *Hall* case, and it furthermore concluded:

"To gain this information may truly intrude upon the attorney-client privilege and the work product doctrine. To have this information is only to gain a tactical advantage of some nature, but hardly seems to be a quest for relevant subject matter germane to the issues at hand," *Henry*, 212 F.R.D. at 92.

Based upon the above, it is evident that any practitioner should be cognizant of the rules of practice in the jurisdiction that he or she will be conducting the deposition. It also is prudent that the following rules would govern any deposition regardless of where it is held:

1. No conference with deponent is permitted while a question is pending unless it is intended to discuss whether the answer would intrude upon the attorney-client privilege;

2. It is prudent to avoid discussing questions and potential answers with a deponent during breaks in the deposition; and

3. If any such discussions do occur, they may well be discoverable by your adversary after a motion to compel has been heard and decided.

It also is recommended that there be a uniform rule adopted throughout the Western District on the conduct of depositions, and it would be appropriate for the Bar Associations in Western New York to address this topic and make a recommendation to amend the Local Rules of Practice in federal court.

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