By Daniel P. Dain

Limits on Deponent's Right

to Confer with Counsel During A Deposition

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The conduct of civil depositions in Massachusetts is governed by several rules of civil procedure, a number of different local or court specific rules, and voluminous case law. Yet one area of deposition practice remains largely unregulated: the right of the deponent to confer with counsel during a deposition.

WHAT COURTS HAVE SAID

Although there is no appellate case on point, two Massachusetts trial judges have ruled that it is improper for a witness to confer with counsel when a question is pending, except for the purpose of determining whether the response would disclose privileged information. See *Holland v. Fisher*, No. 92-3900, 1994 WL 878780 (Mass. Super. Ct. Dec. 21, 1994) (Gershengorn, J.) and *Calzaturficio S.C.A.R.P.A. S.P.A. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 40 (D. Mass. 2001). However, there are no reported cases in the Commonwealth, state or federal, discussing whether it is appropriate for a witness to confer with counsel during a deposition when there is *no* question pending, such as during breaks or recesses.

The practice in Massachusetts clearly is that witness and lawyer do in fact confer, at least during breaks in the deposition. That well-established practice, however, may be contrary to a trend in other jurisdictions. The trend started with *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993). Noting that case law on the issue was scant at the time, the Eastern District of Pennsylvania articulated an unambiguous rule: lawyer and witness may not confer during a deposition, even during breaks, unless to consider an issue of privilege. The court stated:

> A clever lawyer or witness who finds that a deposition is going in an undesired or unanticipated direction could simply insist on a short recess to discuss the unanticipated yet desired answers, thereby circumventing the prohibition on private conferences. Therefore, I hold that conferences between witness and lawyer are prohibited both during the deposition and during recesses.

Id. at 529. The court further held that to the extent that such conferences do occur, the attorney-client privilege is waived and the substance of the conference is "fair game for inquiry by the deposing attorney..." *Id.* at 529 n.7.

Since 1993, several courts have followed *Hall*, including *Collins v. International Dairy Queen, Inc.*, 1998 WL 293314 (M.D. Ga. June 4, 1998); *Armstrong v. Hussman Corp.*, 163 F.R.D. 299 (E.D. Mo. 1995); *Chapsky v. Baxter Healthcare Corp.*, 1994 WL 327348 (N.D. Ill. July 6, 1994); *In re: Matter of Anonymous Member of the South Carolina Bar*, 552 S.E. 2d 10, 16 (S.C. 2001); *In re: PSE&G Shareholder Litigation*, 726 A.2d 994 (N.J. Super. Ct. 1998).

Hall's blanket prohibition, however, has been the subject of some criticism. The leading case expressing a contradictory viewpoint is *In re: Stratosphere Corp. Securities Litigation*, 182 F.R.D. 614 (D. Nev. 1998). There, the District Court for the District of Nevada wrote:

> [T]his Court is of the opinion that the *Hall* decision goes too far and its strict adherence could violate the right to counsel... If [breaks] are requested by the deponent or deponent's counsel, and the interrogating

> attorney is in the middle of a question, or is following a line of questions which should be completed, the break should be delayed until a question is answered or a line of questions has been given a reasonable time to be pursued... So long as attorneys do not demand a break in the questions, or demand a conference between questions and answers, the Court is confident that the search for truth will adequately prevail.

Id. at 620-21. *See also State v. King*, 520 S.E.2d 875, 882 (W.V. 1999); *McKinley Infuser, Inc. v. Zdeb*, 200 F.R.D. 648, 650 (D. Col. 2001); *Damaj v. Farmers Ins. Co.*, 164 F.R.D. 559, 560-61 (N.D. Ok. 1995), *Odone v. Croda Int'l Plc.*, 170 F.R.D. 66, 68 (D.D.C. 1997); *Phinney v. Paulshock*, 181 F.R.D. 185, 205 (D.N.H. 1998).

ON WHICH SIDE OF THE DEBATE ARE MASSACHUSETTS COURTS LIKELY TO FALL?

Massachusetts courts have yet to address this issue head on, although a number of Massachusetts courts have cited with approval the general discussion of deposition abuses in *Hall*. *See, e.g., Dominick v. Troscoso*, No. Civ. A 94-2395-B, 1996 WL 408769, *3 (Mass. Super. Ct. July 17, 1996) (Grabau, J.) (actually quoting the *Hall v. Clifton Precision* language, "'I hold that a lawyer and client do not have an absolute right to confer during the course of the client's deposition'"); *Cholfin v. Gordon*, No. CA943623, 1995 WL 809916 (Mass. Super. Ct. March 22, 1995) (McHugh, J) (citing *Hall* for the proposition that, "[t]he witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record"); *Meehan v. Town Lyne House Restaurant*, No. 925584C, 1994 WL 902907 (Mass. Super. Ct. Aug. 29, 1994) (McHugh, J.) (same); *Holland v. Fisher*, No. 92-3900, 1994 WL 878780 (Mass. Super. Ct. Dec. 21, 1994) (Gershengorn, J.) (same).

Despite the Massachusetts courts' endorsement of *Hall's* general view toward deposition abuses, it is hard to imagine that there will be a full embrace of that case's blanket prohibition of attorney-client/witness conferences once the deposition begins. While conferences during the conduct of depositions certainly provide an opportunity for improper coaching, an adoption of *Hall's* blanket prohibition would be both contrary to local practice and more draconian than the dilemma merits. More likely, Massachusetts courts, if presented with the question, would look to the sensible middle ground espoused in *In re: Stratosphere* that provides a safeguard against overt witness coaching during breaks, while permitting the attorney to fulfill his or her role as counselor. That court focused on two key points: (1) who requested the break, and (2) whether the particular line of questioning has been completed. In short, it would be inappropriate for a deponent or his or her counsel to stop a deposition during a line of questioning to confer. Deponent and counsel may confer during a break upon the conclusion of a line of questioning agreed to by the deposing counsel. At that time, counsel and witness could discuss both procedural deposition issues, such as the lawyer cautioning the witness to answer only the specific questions asked, and substantive issues, such as anticipating what questions might be coming after the break.

THE DEPOSING ATTORNEY: HOW TO HANDLE REQUESTS FOR BREAKS

The practical utility of deposition rules regarding conferences is limited by the fact that there is often neither an immediate nor an economic method of enforcement. Except in extraordinary circumstances, there is no judge present to halt improper conduct, and the transaction costs associated with seeking court intervention make that route not wholly satisfying. The attorney taking the deposition can only do so much to prevent inappropriate attorney-client/witness conferences. A deposing attorney who is presented with a request for a break during a line of questioning should ask if the pending question has raised an issue of privilege. If the answer is no, the depositioning attorney should politely state that a question is pending, and offer a break at the conclusion of the current line of questioning. In most instances, at this point, the witness and opposing counsel will agree and permit the deposition to proceed. At times, however, witnesses and counsel will walk out of the room with a question pending or during a line of questioning. In that case, the deposing attorney should make a statement for the record as to what has occurred. When the witness and counsel later return, the attorney should ask the witness about his discussions with counsel during the recess. This will sometimes result in an instruction not to answer on the ground of attorney-client privilege. At this point, the goal is to build a clear record in case court intervention and sanctions later seem appropriate.

THE DEFENDING ATTORNEY: WHEN TO ASK FOR BREAKS

The lack of clear guidance in the procedural rules and case law, coupled with the fact that the risk of immediate court intervention is virtually non-existent also present a dilemma to the attorney defending the deposition: how to handle a situation where the witness is struggling or otherwise in need of advice. A defending attorney who anticipates a problem with a witness's responses may want to ask for a break, or indeed, the witness may request the break. If examining counsel will not agree, the deponent's counsel must decide whether to wait and hope for the best, or to march out of the room. This situation calls for a quick judgment about the relative risks of staying in the room to watch the witness immolate, or leaving the room with the knowledge that opposing counsel may later take the time and expense to seek court intervention. Counsel should not forget, however, that one who sets the precedent of walking out of a deposition during a line of questioning, should expect to face similarly obstructionist behavior when the roles are reversed. Courts rightly tend to have little sympathy for parties with unclean hands. ■