

Are Off-the-Record Communications with Counsel During a Deposition Recess Discoverable?

By Michael A.H. Schoenberg and Jennifer C. Koehler

The scenario is common—during a recess in a deposition, the attorney and his or her client discuss the deposition and the witness’s answers to particularly troublesome questions. This seemingly innocuous discussion, however, presents potential problems, as the substance of those conversations may not be protected by the attorney-client privilege and, thus, discoverable during the course of the deposition.

In general, a deponent and his or her attorney have no right to confer during a deposition, except to determine whether a privilege should be asserted.¹ In the U.S. District Court for the Eastern District of New York, the court’s local rule states that “an attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of the deposition, except for the purpose of determining whether a privilege should be asserted.”² This rule—which may raise more questions than it answers³—does not, however, address the discoverability of the contents of such a conference, as it only prohibits the attorney from initiating the conference.⁴

The questions, thus, remains: Are the attorney’s conversations with his client during a deposition recess discoverable, or are they protected from disclosure by the attorney-client privilege?

I. The Attorney-Client Privilege and Refreshing the Witness’s Memory

The attorney-client privilege protects from discovery “confidential disclosures by a client to an attorney made in order to obtain legal advice.”⁵ The privilege is designed “to encourage attorneys and their clients to communicate fully and frankly and thereby to promote broader public interests in the observance of law and administration of justice.”⁶

Of course, the attorney-client privilege is not absolute and may, under certain circumstances, be waived. Further, because it “renders relevant information undiscoverable,” it will be “narrowly construed; and its application must be consistent with the purposes underlying the immunity.”⁷ This is particularly true in the context of depositions and trial, where the privilege is sometimes asserted, impermissibly, as both a sword and a shield.⁸

For example, Federal Rule of Evidence 612 expressly authorizes the disclosure of privileged documents used by a witness to refresh his or her memory either “(1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice.”⁹ This rule highlights the importance of allowing discovery of documents used to refresh a witness’s

memory “while testifying,” as the “in the interests of justice” limitation is specifically omitted from that clause. So too, attorney-client communications when the attorney refreshes the witness’s memory with facts are not privileged from disclosure.¹⁰

But what about communications between the attorney and client, while the client is testifying, that are not about refreshing the witness’s memory, but instead are about issues raised during the deposition itself, such as how to phrase an answer to a particular question or discussions about how the questioner failed to ask certain key questions? It is well settled that it is inappropriate for an attorney to influence or coach a witness during a deposition,¹¹ but is the content of such a communication privileged from disclosure?

A. *Hall v. Clifton Precision*

In 1993, in *Hall v. Clifton Precision*, the U.S. District Court for the Eastern District of Pennsylvania addressed the situation where, during the plaintiff’s deposition, the plaintiff’s attorney interrupted the questioning to confer privately with his client and to review a document before the client answered any further questions.¹² The issue in *Hall* was not whether the attorney was refreshing the witness’s recollection, but rather, whether the attorney was coaching his client.

Relying upon Eastern District Local Rule 30.6, the court in *Hall* found that such private conferences are prohibited, both during the deposition and during recesses in the deposition, finding that “[o]nce 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.”¹³ The court held that “to the extent that such a conference does occur ... these conferences are not covered by the attorney-client privilege [and] any such conferences are fair game for inquiry by the deposing attorney to ascertain whether there has been any coaching and, if so, what.”¹⁴

II. A Split Among the District Courts in New York

District Courts in New York do not apply the holding in *Hall* uniformly.

A. The Southern and Western Districts of New York Accept *Hall*

In *Wade Williams Distribution v. American Broadcasting Companies, Inc.*, the plaintiff sought an order reopening the deposition of a witness to inquire about a three-and-one-half hour conversation the witness had with his

attorney in preparation for the deposition.¹⁵ The plaintiff specifically wanted to inquire about what the attorney “told the witness to say, or, not to say, since plaintiff should be afforded access to the witness’ own testimony, free from counsel’s influence or direction, if any.”¹⁶ In opposition, the defendant argued that the attorney’s conversation with the witness was protected from disclosure by the attorney-client privilege.

The court relied exclusively on a 1999 decision from the District of Connecticut to find that conversations between the deponent and his attorney, during which the witness was informed of “facts developed during the litigation, such as testimony of other witnesses” or the witness was instructed “as to how a question should be handled,” were not privileged.¹⁷ Thus, the court held, the examining attorney had the right to ask about those conversations to ascertain whether they may have “affected or changed the witness’s testimony.”

Similarly, a court in the Western District of New York has held that “off-the-record” conferences between an attorney and his client during a deposition are not privileged and, accordingly, are the proper subject for inquiry by the deposing attorney to ascertain whether there has been any witness coaching.¹⁸ In that case, the court accordingly established deposition guidelines allowing the examining attorney to question the witness about private, off-the-record conversations with his or her attorney occurring during a recess in the deposition “to ascertain whether there has been any witness-coaching and, if so, what.”¹⁹

Just as in *Hall*, these courts permit the opposing attorney to question the witness to determine if there has been any coaching during the off-the-record attorney-client communication, not just to ascertain what information was used to refresh the witness’s memory, but also to determine whether the witness’s testimony was influenced by his or her attorney.

B. The Northern District of New York Rejects *Hall*

A court in the Northern District of New York, however, has reached the opposite conclusion, finding that off-the-record conversations are privileged from disclosure and will not likely reveal subject matter relevant to the underlying issues.²⁰ In *Henry v. Champlain Enterprises, Inc.*, the attorney and the deponent-plaintiff had several private conversations during breaks in a contentious deposition.²¹ Upon return from the recesses, the examining attorney questioned the witness about his conversations with his attorney. The plaintiff’s attorney objected to the questions on the grounds that the answers would reveal attorney-client communications and the attorney’s work product, and directed the witness not to answer. The defendants subsequently moved for an order directing the plaintiff to reveal what his attorney said to him during the breaks.²²

The court, denying the defendant’s motion, stated, without citing any authority, that the *Hall* decision, which is embraced by the Third Circuit, “seems to be highly criticized elsewhere” and “has not been followed by the Second Circuit or by any district court within the circuit.”²³ The court then found, without much discussion, that gaining “this information may truly intrude upon the attorney-client and work product doctrine[s]” and could only be sought for a tactical advantage in the litigation.²⁴ Therefore, the off-the-record conversations between the witness and his attorney during the course of the deposition remained undiscoverable.

C. The Eastern District of New York Compromise

The Eastern District of New York, which promulgated Local Civil Rule 30.6, has taken a more compromising approach to the issue.

In *Gibbs v. City of New York*, the defendant’s witness advised the plaintiff’s attorney, following a break for lunch during the deposition, that he wished to clarify his testimony given before the lunch break.²⁵ The witness testified earlier that he had discussed his testimony with his attorney during the recess. As a result, Plaintiff’s attorney asked, “Did it suddenly come to you that you made a mistake and needed to make a clarification?” to which the witness’s attorney promptly objected and directed the witness not to answer the question on the basis of the attorney-client privilege.

The court, analyzing the issue under the elements and purpose of the attorney-client privilege, found that the privilege should be “confined within the narrowest possible limits” and, thus, the general subject matter of attorney-client communications is typically not privileged, absent special circumstances.²⁶ The court then directed the witness to answer the question posed—which required a yes or no answer—in an affidavit, rather than re-opening the deposition, as the witness’s written answer would resolve the witness coaching issue by implication without disclosing what was actually communicated between the witness and his attorney during the deposition recess.²⁷

Conclusion

“Once the deposition has begun, the preparation period is over...”²⁸ Counsel should, therefore, refrain from speaking with his or her client during the deposition about the testimony, unless the attorney is prepared for the disclosure of that communication.

Notably, none of the cases addressing this issue arises in the context of a deposition that began and concluded over several days or weeks. Of course, an attorney cannot avoid communication about the case with his or her client for such an extended period of time.²⁹ However, it is unclear whether such communications would be privileged while the deposition remained open.³⁰

It should be noted that even if the substance of the communication is ultimately found to be privileged, the implication of witness coaching, as a result of the witness revealing that a communication took place, may taint the witness's testimony and the attorney's credibility though trial.

Endnotes

1. *Morales v. Zondo, Inc.*, 204 F.R.D. 50 (S.D.N.Y. 2001).
2. Local Civil Rule 30.6, U.S. District Court, Eastern District of New York. There is no similar local rule for the Southern District of New York, and the Uniform Rules for the New York State Trial Courts do not discuss this particular issue. See 22 N.Y.C.R.R. § 221.3.
3. What happens if the attorney does not "initiate" the conference? Is a recess considered the "actual taking" of the deposition?
4. "Consultation between counsel and a witness at a deposition raises questions only when the consultation is initiated by counsel. 'A witness is generally free to consult with counsel at any time during a deposition.'" *Musto v. Transp. Workers Union of Am., AFL-CIO*, 03-CV-2325 (DGT) (RMC), 2009 U.S. Dist. LEXIS 3174, *4-5 (E.D.N.Y. Jan. 9, 2009) (quoting *Okoumou v. Horizon*, 03 Civ. 1606 (LAK) (HBP), 2004 U.S. Dist. LEXIS 19120, *2 (S.D.N.Y. Sept. 23, 2004)).
5. *U.S. Postal Service v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 159 (E.D.N.Y. 1994) (quoting *Fisher v. U.S.*, 425 U.S. 391, 403 (1976)).
6. *In re County of Erie*, 473 F.3d 413, 418 (2d Cir. 2007) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).
7. *HSH Nordbank AG N.Y. Branch v. Swerdlow*, 08 Civ. 6131 (GEL), 2009 U.S. Dist. LEXIS 63711 (S.D.N.Y. July 22, 2009) (citations omitted).
8. *HSH Nordbank AG N.Y. Branch*, 2009 U.S. Dist. LEXIS 63711 at *23; see also *Gray v. Cleaning Sys. & Suppliers*, 143 F.R.D. 48 (S.D.N.Y. 1992) (stating that the goal of discovery and trial is truth-finding).
9. Fed. R. Evid. 612.
10. See, e.g., *Export-Import Bank of the United States v. Asia Pulp & Paper Co., Ltd.*, 232 F.R.D. 103, 112 (S.D.N.Y. 2005) ("It is true ... that the privilege guarding such discussions will not protect pre-deposition conversations that are held to refresh a deponent's memory.").
11. See *Musto*, 2009 U.S. Dist. LEXIS 3174, at *4 (collecting cases).
12. 150 F.R.D. 525, 526 (E.D. Pa. 1993).
13. See *id.* at 528 (stating that the "fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules").
14. See *id.* at 528-29 (finding that "once a deposition begins, the right to counsel is somewhat tempered by the underlying goal of our discovery rules: getting to the truth"). See also 7 James Wm. Moore et al., *Moore's Federal Practice*, ¶ 30.42[3] (3d ed.) (citing *Hall* for the proposition that off-the-record conversations during a deposition should not occur).
15. 2004 U.S. Dist. LEXIS 12152, *2 (S.D.N.Y. June 30, 2004) (quoting *Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999)).
16. *Id.* at *3.
17. *Id.* at *3-4. See also *Morales v. Zondo*, 204 F.R.D. at 53 (although not discussing the issue of attorney-client privilege, the court did impose sanctions upon an attorney who, among other things, conferred with his client during the deposition for reasons other than to determine whether a privilege should be asserted); *Am. Fun & Toy Creators, Inc. v. Gemmy Indus., Inc.*, 96 Civ. 0799 (AGS) (JCF), 1997 U.S. Dist. LEXIS 12419, *26 (S.D.N.Y. August 20, 1997) (stating rule that the deponent and his attorney have no right to confer during a deposition, except to determine if a privilege should be asserted).
18. *Jones v. J.C. Penney's Dept. Stores, Inc.*, 228 F.R.D. 190 (W.D.N.Y. 2005); *Fisher v. Goord*, 184 F.R.D. 45, 48-49 (W.D.N.Y. 1999).
19. *Jones*, 228 F.R.D. at 204.
20. *Henry v. Champlain Enterprises, Inc.*, 212 F.R.D. 73, 90-92 (N.D.N.Y. 2003).
21. See *id.* at 90.
22. See *id.* at 92.
23. *Id.*; see also *McKinley Infuser, Inc. v. McKinley Medical L.L.P.*, 200 F.R.D. 648 (D. Colo. 2001) (criticizing and rejecting the holding in *Hall*); *Odone v. Croda Int'l PLC*, 170 F.R.D. 66 (D.C. 1997) (same).
24. *Henry*, 212 F.R.D. at 92; but see *Corporate Express Office Prods. v. Gamache*, Civ. No. 1:06-MC-127 (LEK/RFT), 2006 U.S. Dist. LEXIS 90345, *48-49 (N.D.N.Y. Dec. 13, 2006) (stating that "[t]he client cannot be compelled to answer the question, 'What did you say or write to the Attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney").
25. CV-06-5112 (ILG) (VVP), 2008 U.S. Dist. LEXIS 22588, *5-6 (E.D.N.Y. March 21, 2008).
26. *Id.* at *6-7.
27. *Id.* at *7-8. See also *In re Stratosphere Corp. Sec. Litig.*, 183 F.R.D. 614 (D. Nev. 1998) (finding the examiner can question the witness about whether the witness's conversation with counsel affected the testimony, but he could not inquire about the substance of those conversations).
28. *Hall*, 150 F.R.D. at 529.
29. For example, in the criminal context, restrictions on the defendant's right to consult with his or her attorney during a brief a recess taken in the middle of the defendant's examination have been found constitutional, while the same prohibition when the recess is taken overnight have not. Compare *Geders v. United States*, 425 U.S. 80, 91 (1976) (holding order not to speak with counsel overnight while he was testifying was unconstitutional) with *Perry v. Leeke*, 488 U.S. 272, 283-84 (1989) (holding that order directing defendant not to consult with attorney during a fifteen minute recess at the end of direct examination of defendant was constitutional). See also *Morgan v. Bennett*, 204 F.3d 360, 367 (2d Cir. 2000) (characterizing *Geders* and *Perry* as supporting the view that when there is an important need to protect a countervailing interest "a carefully tailored, limited restriction on the defendant's right to consult counsel is permissible").
30. Cf. *Musto v. Trans. Workers Union of Am., AFL-CIO*, 2009 U.S. Dist. LEXIS 3174, *2 (E.D.N.Y. Jan. 16, 2009) (finding that conversations between a former union officer and the union's general counsel, which took place during a two-week break in the deposition, were discoverable because they were not attorney-client communications. The court, citing *Hall*, further stated, however, that the local rules are "designed to insure that deposition testimony 'is completely that of the deponent, rather than a version of that testimony which has been edited or glossed by the deponent's lawyer.'"); see also *Hall*, 150 F.R.D. at 529 (stating that the "fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules").

Michael A.H. Schoenberg is an associate at Farrell Fritz, P.C., who concentrates his practice in commercial litigation and can be reached at mschoenberg@farrell-fritz.com. Jennifer C. Koehler is also an associate at the firm and can be reached at jkoehler@farrellfritz.com.