TIMEOUTS OR HALF-TIME PEP TALKS:

When and How to Consult About Your Deposition Game Plan Without Getting a Penalty

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In both football and depositions, taking a break can be a savvy way to change the pace of play when the game isn't going your way, give players a chance to rest when they're not at the top of their game, and adjust strategy once the opposing team has revealed their formation. But, while the rules on discovery conduct are identical in all federal jurisdictions and most states, judges don't always call the same fouls. What constitutes a permissible break in a deposition differs from state to state, case to case, and even between different federal courts in the same circuit. This article seeks to clarify what types of mid-deposition conferences deponents and lawyers can engage in without risking penalties. However, because of the jurisdiction-specific nature of this issue, witnesses and attorneys must become familiar with their referee before a deposition begins.

CALLING TIMEOUTS

The seminal decision on mid-deposition attorney-client consultation is *Hall v. Clifton Precision*,[1] in which an attorney conferred privately with his deponent-client twice during a deposition, despite opposing counsel's objections. In response, the presiding judge issued an extensive "no consultation" order barring, among other tactics, private attorney-client consultations during questioning as well as during regular deposition breaks and recesses. The *Hall* order also permitted opposing counsel to question the witness about any conversations between the witness and his counsel during a break, "to ascertain whether there has been any witness-coaching and, if so, what."

The Federal Rules of Civil Procedure were revised in 1993, five months after the *Hall* decision, to incorporate anti-coaching principles, including a prohibition on speaking objections. However, they do not prohibit off-the-record attorney-client consultations. Federal Rule of Civil Procedure 30(c)(1), still the only federal rule addressing the question, requires that "examination and cross-examination of a deponent proceed as they would at trial...." This vagueness permits individual jurisdictions and judges substantial leeway in deciding whether or not to allow mid-deposition consultations.

Most courts that have considered the issue have agreed with the essential principle of *Hall*, concluding that breaks for attorney-client consultations should not be permitted between the asking and answering of a question. Some states have also explicitly incorporated prohibitions of pre-answer conferences into their Rules of Civil Procedure. Though few courts have had an opportunity to consider the issue, the passing of notes or written discussion of testimony between witness and counsel during witness's active testimony has been similarly universally prohibited. In any jurisdiction, it is not advisable to attempt to call a recess when a question has been asked but not yet answered or to attempt to consult with counsel in written form while answering a question.

Jurisdictions also appear to have universally agreed with the major exception in *Hall*, namely that consultations are permitted at any point during the deposition to discuss whether to assert a privilege. Attorneys and deponents in all jurisdictions should feel comfortable calling for a break to discuss an issue of privilege but should ensure they know the rules regarding what to state on the record when they return. Typically, they must state the reason for the break and the decision reached.

KNOWING YOUR REFEREE

Some of *Hall*'s more extreme principles have not been as widely adopted. While some jurisdictions expressly prohibit attorney-client conferences during scheduled breaks—such as for lunch and even when the deposition adjourns for the day—several courts have rejected this approach, permitting discussions during scheduled breaks to varying degrees. Similarly, most jurisdictions analyze breaks requested by opposing counsel in the same manner as scheduled breaks. Thus, with limited exceptions, deponents in jurisdictions that allow consultations during scheduled breaks should also feel free to consult during opposing-counsel-requested breaks. Jurisdictions also differ as to whether attorneys and clients may consult during a non-scheduled break, requested by the deponent or their counsel, but not requested while a question was pending. Because jurisdictions are split on this issue, and the Rules allow for alteration by individual judges, attorneys and deponents are strongly encouraged to check the rules, case law, and discovery order applicable to their case before calling a timeout.

While some of these rules appear to be geared toward attorneys, in practice they generally apply equally to breaks requested by deponents. The *Hall* prohibition applies to conferences initiated by the attorney and those initiated by the witness. Cases that have considered the issue also do not distinguish between breaks requested by deponents and those requested by deponents' counsel. One limited exception is New York federal courts, which historically expressed a preference for witness-requested breaks.[2] Deponents in those jurisdictions might strategically choose to request breaks themselves.

CALLING AN AUDIBLE OR "WITNESS COACHING"?

Some courts have noted that the motivation for the break request, or the subject of the conversations during the consultation, may be relevant to determining whether a recess is permissible. Generally, conversations about topics other than mid-deposition changes to substantive testimony are more likely to be permissible. For example, attorneys and deponents in West Virginia state court are explicitly permitted to take breaks to clear up witness confusion and are only prohibited from taking breaks when they are requested for an improper purpose.[3] In contrast, other courts have held that the motivation is irrelevant and impossible to discern.

However, as always, attorneys and deponents should check interpretive case law. South Carolina's state rules, arguably the strictest in the country on deposition coaching, only disallow conferences regarding the substance of the testimony.[4] Interpretive case law, however, has concluded that "[c]onferences called to . . . calm down a nervous client, or to interrupt the flow of a deposition are improper and warrant sanctions" as well.[5] To be safe, attorneys and deponents in "no-consultation" states should avoid having private conversations during breaks at all, even if those conversations have nothing to do with the case or the deponent's testimony.

Furthermore, a claim that nothing of substance or impermissible was discussed during a break is not guaranteed to avoid penalties. Courts often order a re-opening of a witness's deposition to inquire into the content of the conversation and determine if it was, in fact, improper. Re-opening a deposition may be both expensive and risky, substantively, even if it does not result in sanctions.

BEST COURSE OF ACTION – SCRIPT YOUR PLAYS

The rules regarding the permissibility of attorney-client consultations during depositions vary immensely from jurisdiction to jurisdiction. It behooves deponents and attorneys to become apprised of their jurisdiction's rules and interpretive case law and not to assume they'll be able to take a timeout whenever the opposing team is coming on strong. The safest route is to ensure a witness is fully prepared before the start of questioning. Deponents and attorneys should prepare ahead of time for various areas of questioning, coordinate regarding who will request a break, if necessary, and discuss how to ensure said request does not appear to be made for an improper purpose.

In jurisdictions that allow attorney-client consultations only on standard breaks, attorneys and deponents should place emphasis ahead of time on preparation for important topics that they believe the deposing attorney will cover early in the deposition. Then, during any breaks, they may have the opportunity to clarify concerns regarding areas that have not been addressed.

In states that allow conferences on specific topics but not others, attorneys and deponents can adjust some aspects of their deposition strategy during mid-deposition discussions without flouting the rules. They might discuss a witness's attitude or nerves (possibly "saving" a deposition).

In general, courts are more likely to impose sanctions or mandate the re-opening of depositions when it is clear from the record that a deponent's testimony changed after the conference. Courts are also more likely to award sanctions when the attorney or deponent's other behavior throughout the deposition was egregiously unprofessional. Good sportsmanship is key to avoiding discovery sanctions.

In conclusion, deponents and attorneys should use their timeouts strategically. In most states, litigants are less likely to run afoul of the rules if they discuss strategy during half-time lunch breaks or timeouts called by the other team than if they repeatedly request breaks on their own. The rules on mid-deposition conferencing can be complicated. If you don't understand them, you're going to get a flag thrown, and the penalty could cost you the game.

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1 *Hall v. Clifton Precision*, 150 F.R.D. 525, 528, n.4 (E.D. Pa. 1993).
2 *See Okoumou v. Safe Horizon*, 2004 U.S. Dist. LEXIS 19120, at *5 (S.D.N.Y. Sep. 17, 2004) (citing to the Local Civil Rules for the Eastern District of New York 30.6); *Musto v. Transp. Workers Union of Am., AFL-CIO*, No. 03-CV-2325 (DGT) (RML), 2009 U.S. Dist. LEXIS 3174 (E.D.N.Y. Jan. 9, 2009).
3 *See, e.g., State ex rel. Means v. King*, 205 W. Va. 708, 715, 520 S.E.2d 875, 882 (1999).
4 S.C. R. Civ. P. 30(j)(5)–(6).
5 *In re Anonymous Member of S.C. Bar*, 346 S.C. 177, 191, 552 S.E.2d 10, 17 (2001).