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Rambo as Potted Plant: Local Rulemaking's Preemptive Strike against Witness-Coaching during Depositions

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RAMBO AS POTTED PLANT: LOCAL RULEMAKING'S PREEMPTIVE STRIKE AGAINST WITNESS-COACHING DURING DEPOSITIONS

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Well, sir, I'm not a potted plant. I'm here as the lawyer. That's my job.[1]

TABLE OF CONTENTS

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1. *Iran-Contra Investigation: Joint Hearings Before the Senate Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Comm. to Investigate Covert Arms Transactions with Iran*, 100th Cong., 1st Sess. (1988) (testimony of Oliver L. North, July 7-10, 1987). Brendan V. Sullivan, Jr., attorney for Lt. Col. Oliver L. North, responding to the exasperated admonition of Iran-Contra committee chairman Senator Daniel K. Inouye, Democrat from Hawaii, that Mr. North could object to the questioning himself if he so desired, but that, under congressional rules, a lawyer representing a testifying witness has a limited role. *Id.*

I. INTRODUCTION

IN recent years, the legal profession has become increasingly concerned with an alleged growing lack of "civility" among practitioners.[2] This concern, bordering on obsession, has given birth to a previously unheard of creature, the "Rambo litigator,"[3] a practitioner who interprets "zealous representation" as a call to arms, views litigation as war and employs any and all tactics in order to secure victory.[4] In a rush to reign in Rambo, the landscape of civil litigation has seen many significant changes, most predominantly in the area of discovery.[5] It is in discovery where Rambo has

2. *See* THE TENTH ANNUAL JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 146 F.R.D. 205, 216-32 (Apr. 30, 1992) [hereinafter JUDICIAL CONFERENCE] (discussing perceived "incivility among lawyers" that "has flourished in the 80s"); *see also* FINAL REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT, 143 F.R.D. 441, 445 (1992) [hereinafter FINAL REPORT] (discussing "civility problems plaguing our profession"); INTERIM REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT, 143 F.R.D. 371, 375 (1991) [hereinafter INTERIM REPORT] (stating that law has changed from occupation characterized by congenial professional relationships to one of "abrasive confrontations"). *But see* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences of Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994) (arguing recent concerns with abuse in discovery are not based on any empirical data but instead are myth created by popular media, politicians, lawyers and judges).

3. *See* JUDICIAL CONFERENCE, *supra* note 2, at 216 (discussing "incivility among lawyers" that "has come to be called Rambo-style lawyering").

4. *See id.* at 217 (discussing tactics commonly utilized in "hardball litigation" for purposes of obstruction and delay); Robert N. Saylor, *Rambo Litigation: Why Hardball Tactics Don't Work*, 74 A.B.A. J., Mar. 1, 1988, at 78, 79-80 (characterizing mindset and tactics of Rambo Litigator). *See generally* Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637 (1990) (criticizing use of unfair tactics and intimidation by attorneys).

5. *See* Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991) (discussing proposal for mandatory disclosure and rulemaking process, which, in part, included no empiri-

been accused of seeking to bury opponents in discovery requests and obstructing opponents from obtaining relevant information and evidence.[6] These tactics allegedly result not only in a waste of time and resources but also are seen as subverting the goal of just results being obtained in litigated disputes.[7]

Perhaps most significant, if not most controversial, among the changes in how discovery is conducted are the mandatory disclosure provisions of Rule 26 of the Federal Rules of Civil Procedure.[8] The scheme of discovery countenanced by the Federal Rules of Civil Procedure, whereby parties seek to obtain relevant information from an opposing party, was transformed, in part, to a system of initial disclosure of relevant information to a party's opponent.[9] This less adversarial approach to discovery seeks to take from Rambo one of the fields on which to do battle,[10] at least in those

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cal study as to need or efficacy for disclosure provision); Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's "Tolstoy Problem,"* 46 FLA. L. REV. 57, 67-68 (1994) (discussing "the Spell of Crisis Rhetoric" and "Corresponding Rush to Reform").

6. *See, e.g.*, FINAL REPORT, *supra* note 2, at 445. The report noted:

> A lack of civility can escalate clients' litigation costs while failing to advance their interests or bring them closer to their ultimate goal of ending disputes. Time expended in "Rambo"-style discovery can hinder or prevent litigation parties from getting to the heart of the important contested issues. Furthermore, with today's crowded dockets, judicial time is wasted resolving needless (often petty) disputes, which, in turn, deprives those litigants who are ready for trial of the opportunity for a more expeditious hearing. Everyone is harmed.

Id.

7. *Id.*; *see also* Saylor, *supra* note 4, at 80-81 (discussing why Rambo tactics are counter-productive).

8. *See* FED. R. CIV. P. 26(a)(1)-(5) (providing, in part, for disclosure "without awaiting a discovery request" of witnesses, documents, and tangible things "that are relevant to disputed facts alleged with particularity in the pleadings"); AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, 146 F.R.D. 401, 507-12 (1993) (dissenting statement of Scalia, J.) (explaining, in part, his dissent from transmitting to Congress proposed amendments to Federal Rules of Civil Procedure containing mandatory disclosure provisions because of "nearly universal criticism from every conceivable sector of our judicial system, including judges, practitioners, litigants, academics, public interest groups, and national, state and local bar and professional associations").

9. *Id.*; *see also* Rochelle C. Dreyfuss, *The What and Why of the New Discovery Rules*, 46 FLA. L. REV. 9, 13 (1994) (detailing requirement of amended Federal Rules of Civil Procedure that require mandatory disclosure under discovery rules); Rogelio A. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Adversary Process*, 36 B.C. L. REV. 479 (1995) (analyzing mandatory disclosure rules and assessing their effectiveness at controlling discovery abuses).

10. *See* FED. R. CIV. P. 26(a) (Advisory Committee Notes, 1993 Amendments) (discussing that in fulfilling initial disclosure obligations "[t]he litigants should not indulge in gamesmanship"). *But see* Samuel Issacharoff & George Loewenstein, *Unintended Consequences of Mandatory Disclosure*, 73 TEX. L. REV. 753 (1995) (arguing that mandatory disclosure provision will actually increase litigation costs).

district courts which have not "opt[ed] out" of the disclosure provisions of Rule 26.[11] Additionally, limitations on discovery have sought to lessen the impact of the weapons in Rambo's arsenal by restricting the number of interrogatories that a party may serve upon another party,[12] or limiting the number of depositions that a party may take.[13]

The district courts have also sought to employ mechanisms aimed at curtailing Rambo through local rulemaking.[14] Many of these echo the above attempts at limiting how much discovery a party may undertake or the manner in which discovery is undertaken.[15] Nevertheless, several district courts have recently embarked on a very different approach to curbing perceived discovery abuse. Rather than curtailing available discovery mechanisms, this approach redefines how an attorney may interact with his or her client. These district courts have enacted rules that seek to preempt Rambo from interfering with the discovery process through improper "witness-coaching" by prohibiting an attorney from engaging in off-the-record consultation with his or her client-witness during the course of a deposition.[16]

Not surprisingly, this control of attorney conduct by local rule has been decried by many of the practitioners who are subject to

11. *See* FED. R. CIV. P. 26(a)(1) (providing for initial disclosure of specified categories of information without awaiting discovery request).

12. *See* FED. R. CIV. P. 33(a) (limiting number of interrogatories that may be served upon another party to 25).

13. *See* FED. R. CIV. P. 30(a)(2)(A) (limiting party to 10 depositions that may be taken without seeking leave of court).

14. The local rulemaking power of the district courts has several sources of authority, from both rule and statute. *See* The Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (1994) (requiring under § 471 that each district court enact and implement expense and delay reduction plans that will "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes"); 28 U.S.C. § 2071(a) (1994) (providing that "all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure . . . ."); FED. R. CIV. P. 83 (Advisory Committee Notes, 1985 Amendment) (permitting "each district to adopt local rules not inconsistent with the Federal Rules").

15. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PRACTICE (July 1988) [hereinafter REPORT OF LOCAL RULES PROJECT] (containing most comprehensive collection of local rules, though somewhat dated); *id.* at 86-117 (setting forth local rules addressing discovery matters that "generally repeat several Federal Rules").

16. For a discussion of the various formulations taken by adopted or proposed local rules that prohibit attorney-client conferences during deposition, see *infra* notes 26-56 and accompanying text.

it.[17] Unlike other efforts to curb discovery abuse, the no-consultation rule is not merely a control on discovery mechanisms. Instead, it intrudes into the attorney-client relationship and relegates the role of the attorney to that of a "potted plant" for the sake of curbing the potential for discovery abuse.[18] Though rules of professional conduct may prescribe attorney obstruction with the flow of information during discovery, the no-consultation rule is based on a mistrust of attorney adherence to ethical obligations. The rule, therefore, seeks to take away the opportunity for an attorney representing a client being deposed to commit an ethical breach, based on the presumption that attorneys will act unethically if given the opportunity.

This article will analyze the varying formulations of the no-consultation rule and discuss how this seemingly innocuous rule is remarkable in two main respects. First, the rule represents much of what critics of local rulemaking have decried.[19] In a rush to address incivility in deposition practice, the rule has been enacted with little or no empirical data supporting the need for the rule.[20] In addition, overlooked in the process are several legitimate purposes for off-the-record conferences during depositions that aid rather than subvert the discovery process and may be professionally mandated. The rule also represents suspect local rulemaking because its most far-reaching formulations violate a constitutionally protected right to consult with counsel and redefine the attorney-client privilege. Because these formulations are inconsistent with existing rules of

17. As will be discussed, a pretrial order entered in Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993), has become the standard-bearer of the no-consultation rules. The decision was given much attention in law-related media. Much of the literature chronicled shock among the bar at the prohibition on client consultation during deposition. *See, e.g.*, Shannon P. Duffy, *Judge Bars Conferences at Depositions; Ruling Sends Shockwaves*, LEGAL INTELLIGENCER, Sept. 29, 1993, at 1 (containing collection of unfavorable attorney reactions to ruling in *Hall*). For a complete discussion of the *Hall Rule*, see *infra* notes 198-216 and accompanying text.

18. *See* A REPORT ON THE CONDUCT OF DEPOSITIONS, FEDERAL BAR COUNCIL, COMMITTEE ON SECOND CIRCUIT COURTS, 131 F.R.D. 613, 627 (1990) [hereinafter SECOND CIRCUIT REPORT ON THE CONDUCT OF DEPOSITIONS] (criticizing proposed no-consultation rule as "an improper interference with the attorney/client relationship . . . [and] a gag order that could prevent a client from requesting legal advice").

19. Local rulemaking pursuant to Rule 83 of the Federal Rules of Civil Procedure has been roundly criticized as a "threat to the integrity of the Civil Rules" adopted in a "casual manner." CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 62, at 431-32 (5th ed. 1994). Local rulemaking pursuant to The Civil Justice Reform Act has been referred to as "[a] threat far greater than [local rulemaking pursuant to Rule 83]". *Id.* § 63A, at 436.

20. For a discussion of this development, see *infra* notes 100-03 and accompanying text.

procedure and evidence, they are beyond the local rulemaking power of the district courts.

Second, the no-consultation rule represents the nadir of attempts to regulate abusive attorney conduct. Instead of drawing a line between acceptable and impermissible conduct, the approach of the no-consultation rule is to assume that attorneys will act unethically if given the opportunity. Based on this presumption, the rule seeks to take away the opportunity for prohibited conduct, but in doing so, it intrudes upon the basic nature of the attorney-client relationship. Therefore, the rule represents what could become the next evolutionary development in regulation of the profession—preempting abusive conduct rather than prohibiting it and punishing the offenders. Unfortunately, this preemptive approach intrudes into the attorney-client relationship and is counter-productive to its own goals of efficient and full disclosure of information during discovery.

Finally, this article will discuss the proposition that where the district courts feel compelled to pursue this path, the best approach is the least intrusive one. The goals of the no-consultation rule can be accomplished simply by prohibiting attorney-client consultations while a question is pending.[21] This approach prevents direct coaching of a witness as to a pending question, but allows for the legitimate uses of off-the-record conferences. Therefore, the functions of an attorney serving a client and aiding the tribunal are not unnecessarily supplanted. Rambo is thereby curtailed but is not transformed into a potted plant.

II. A MYRIAD OF POTS

In an effort to control perceived discovery abuse by attorneys representing a person being deposed, district courts have adopted[22]

21. This approach has been taken by a minority of district courts that have adopted no-consultation rules. For a discussion of this approach, see *infra* notes 38-39 and accompanying text.

22. *See, e.g.*, LOCAL RULES OF PRACTICE FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, RULE 30.1C, Sanctions for Abusive Deposition Conduct [hereinafter DIST. OF COLORADO, RULE 30.1C]; LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, GENERAL RULE 30.1, Conduct of Depositions [hereinafter S. DIST. OF INDIANA, RULE 30.1]; RULES OF THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK, CIVIL RULES, APP. B, RULE 13 [hereinafter S./E. DIST. OF NEW YORK, RULE 13]; RULES OF PRACTICE AND PROCEDURE OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, CIVIL RULE 204(b), Differentiated Case Management and Discovery [hereinafter M. DIST. OF NORTH CAROLINA, RULE 204]; LOCAL RULES OF PRACTICE FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, CIVIL RULE 230-5, Depositions

or are considering[23] local rules aimed at curbing the practice of an attorney and client having off-the-record communication during the deposition.[24] By prohibiting such communications between attorney and client, the rules aim to remove the opportunity for an attorney to subvert the discovery process by suggesting answers to his or her client, commonly known as "witness coaching."[25] While

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[hereinafter DIST. OF OREGON, RULE 230-5]; LOCAL RULES OF THE UNITED STATES DISTRICT COURT OF WYOMING, RULE 30, Depositions Upon Oral Examination [hereinafter DIST. OF WYOMING, RULE 30]. For the applicable text of these rules, see Appendix A.

See also Hall v. Clifton Precision, 150 F.R.D. 525, 531-32 (E.D. Pa. 1993) (entering order containing guidelines for conduct of depositions in case) [hereinafter *Hall Rule*]. For the applicable text of the rule from *Hall*, see Appendix A. *Hall* has been much discussed and cited for the proposition that conferences between a deponent and his or her attorney are prohibited for any purpose other than determining whether to assert a privilege. *See, e.g.*, Christy v. Pennsylvania Turnpike Comm'n, 160 F.R.D. 51 (E.D. Pa. 1995) (denying plaintiff protective order prohibiting defendants from instructing witnesses at deposition to not answer questions that violate attorney-client privilege); Chapsky v. Baxter, No. 93-CIV-6524, 1994 U.S. Dist. LEXIS 9099, at *4 (N.D. Ill. July 5, 1994) (stating that "relevance is rarely an appropriate grounds for instructing a deponent"); Van Pilsum v. Iowa State Univ. of Science & Technology, 152 F.R.D. 179, 181 (S.D. Iowa 1993) (ordering sanctions against attorney using "Rambo Litigation" tactics); Johnson v. Wayne Manor Apts., 152 F.R.D. 56, 58 (E.D. Pa. 1993) (stating that deponent was no longer permitted to speak with counsel except where anticipated answer to question would involve disclosing material protected by attorney-client privilege); WRIGHT, *supra* note 19, § 84, at 614 n.32 (concerning private conferences between deponent and attorney).

The above are the local rules addressing conferences between attorney and deponent during deposition that could be found through computerized research and a non-exhaustive manual search. For a list of the proposed rules, see *infra* note 23. I do not purport that the rules set forth herein are all-encompassing. As noted by Professor Wright, one of the "traps" for practitioners lurking in local rules is "[t]he difficulty in finding out what local rules are in effect. . . ." WRIGHT, *supra* note 19, § 62, at 431 n.31. Nevertheless, I believe the rules herein provide a good representational sample of the varying approaches that form a sufficient basis for discussion. Any further search undoubtedly would have resulted in research assistant revolt.

23. *See, e.g.*, PROPOSAL TO ADOPT LOCAL RULES, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, RULE 5.23, Deponent-Attorney Communications (May 24, 1995) [hereinafter N. DIST. OF ILLINOIS, PROPOSED RULE 5.23]; PROPOSED UNIFORM DEPOSITION DISCOVERY RULES FOR THE DISTRICT COURTS IN THE UNITED STATES SECOND CIRCUIT, RULE 6 [hereinafter SECOND CIRCUIT PROPOSED RULE 6]. For the applicable text of these proposed rules, see Appendix B.

24. For a discussion of the different approaches taken by local rules concerning when the prohibition applies, or, in other words, what constitutes "during the deposition," see *infra* notes 36-48.

25. *See Hall*, 150 F.R.D. at 528. The *Hall* court gave a mocking, yet accurate definition of witness-coaching, commenting 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." *Id.* at 528; *see also* N. DIST. OF ILLINOIS PROPOSED RULE 5.23(B), *supra* note 23 (stating that purpose of proposed no-consultation rule is to "prevent counsel for a deponent from improperly suggesting answers or the content of testimony to a witness").

the essence of the varying rules remains the same, prohibiting communications between a deponent and his or her attorney, a wide variety of approaches have been taken. The troublesome issues raised by a prohibition against attorney-client communication during deposition are illustrated by these different approaches.

A. *Who?*

Several variations exist as to whom the prohibition applies. These differences have significant implications as to whether the prohibition violates a constitutionally protected right to counsel.[26] The most common approach is to prohibit any conference between attorney and client during the deposition except for conferences to determine whether a privilege should be asserted.[27] Other districts back off a blanket prohibition and instead draw distinctions between conferences initiated by an attorney and those initiated by the client, making only the former impermissible.[28] Presumably, this distinction recognizes the attorney as the most likely "bad actor" in deposition consultation and allows client-initiated conferences as a nod toward some right of representation. Nevertheless, another formulation, derived from *Hall v. Clifton Precision*[29] (*Hall Rule*), rejects any distinction between client-initiated and attorney-initiated conferences, and views any conference as an opportunity for "obstructing the truth" because it allows the deponent the op-

26. For a discussion concerning who the prohibition applies to and the effect this has on the constitutionally protected right to counsel, see *infra* notes 217-37 and accompanying text.

27. *See* DIST. OF COLORADO, RULE 30.1C(A)(2), *supra* note 22 (prohibiting "off-the-record conference(s) except for the purpose of determining whether to assert a privilege"); M. DIST. NORTH CAROLINA, RULE 204(b)(2)(iii), *supra* note 22 (same); DIST. OF OREGON, RULE 230-5(d), *supra* note 22 (requiring pending questions to be answered "before a recess is taken unless the question involves a matter of privilege"); *Hall Rule*, *supra* note 22, at 531-32 (prohibiting off-the-record conferences "except for the purpose of deciding whether to assert a privilege"); *see also* N. DIST. OF ILLINOIS, PROPOSED RULE 5.23(B), *supra* note 23 (prohibiting communication between counsel and deponent during examination in deposition except for the purpose of deciding whether to assert privilege).

28. *See* S. DIST. OF INDIANA, RULE 30.1(c), *supra* note 22 (stating that "[a]n attorney for a deponent shall not initiate a private conference"); S./E. DIST. OF NEW YORK, RULE 13, *supra* note 22 (same); *see also* SECOND CIRCUIT PROPOSED RULE 6, *supra* note 23 (providing that "[a]ttorney initiated conferences . . . are not presumptively improper").

It is not always entirely clear as to whether a rule applies to all conferences or just those that are attorney-initiated. *See* DIST. OF WYOMING, RULE 30(e), *supra* note 22 (providing that "attorney . . . shall not engage in a private conference with the deponent"). Prohibiting "engaging" in a conference would seem to apply to any conference, without regard to who initiated the conference.

29. Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993).

portunity to "ask his or her lawyer for the answer, and then parrot the lawyer's response."[30]

Yet another variation distinguishes between party deponents and non-party deponents, applying the prohibition only to non-party deponents and their counsel.[31] Because of the nature of the local rulemaking process, the justification for this distinction is nowhere stated.[32] Nevertheless, it could be assumed that it addresses the differing rights of party and non-party witnesses to consult with counsel; the latter having no constitutional right to consultation, and, therefore, constituting a less controversial object of a no-consultation rule.[33]

One would think that a non-party deponent, with nothing at stake in the litigation at hand, and his or her attorney would have little if any incentive to engage in improper behavior during the consultation. Moreover, the non-party attorney and client would seem to have had far less occasion to discuss and be familiar with the matter giving rise to the deposition. Therefore, it could be argued that greater need would exist to discuss matters for innocent or required purposes.[34] Nevertheless, the right to counsel apparently does not extend to party and non-party deponents alike.[35]

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30. *See id.* at 528.

31. *See* DIST. OF WYOMING, RULE 30(e), *supra* note 22 (prohibiting conferences during deposition only between attorney and "non-party deponent").

32. Amendments were made in 1988 to 28 U.S.C. § 2071 and in 1985 to Rule 83 of the Federal Rules of Civil Procedure to interject opportunity for notice and comment to the local rulemaking process. 28 U.S.C. § 2071(e) (1988); FED. R. CIV. P. 83. Prior to that time, local rules could be enacted without any record as to what they were intended to address.

33. *Compare* Geders v. United States, 425 U.S. 80, 87-88 (1976) (holding, in context of criminal prosecution, trial judge may sequester non-party witness during trial testimony, but holding order preventing testifying party/defendant from consulting with his attorney during overnight recess to be violative of Sixth Amendment right to counsel) *with* Perry v. Leeke, 488 U.S. 272, 283-85 (1989) (holding that criminal defendant has no Sixth Amendment right to consult with counsel during 15-minute break in his testimony).

34. For a discussion of the "good" reasons (as opposed to the "bad" or the "ugly") for attorney-client consultation during deposition, see *infra* notes 58-86 and accompanying text.

35. *See Geders*, 425 U.S. at 87-88. *Geders* drew a distinction between non-party witnesses and testifying party/defendants, providing the testifying party/defendants with a greater right to counsel. *Id.* Oddly, the language of *Geders* appears to have addressed consultations between a non-party witness and trial counsel, but not the witness's own lawyer. *Id.* The court discussed sequestration orders as applied to non-party witnesses in the context of preventing discussions with "trial counsel" only. *Id.*

B. *When?*

The district courts also have taken varying approaches as to when the prohibition applies, ranging in applicability from only when a question is pending to extending into recesses and coffee breaks. Some approaches are troubling due to the lack of clarity as to when they apply. Drawing a distinction between recesses for coffee breaks and over-night breaks may seem silly. Yet the existence of a constitutionally protected right to representation is dependent upon drawing such a line that the United States Supreme Court has referred to as "a line of constitutional dimension."[36] Therefore, whether a no-consultation rule passes constitutional scrutiny depends on the scope of its applicability.[37]

The most narrow approach is to prohibit attorney-client consultations only when a question is pending.[38] This would prevent direct coaching as to a specific question. No constitutional infirmity is present with this limited prohibition.[39] The most far-reaching approach, extending the prohibition to "breaks" and "recesses,"[40] presents questions of constitutional dimension, dependent upon the length of the recess.[41] Another variation, perhaps in an effort to avoid possible constitutional infirmity due to an overly broad application to recesses, exempts the recesses from the prohibition and allows off-the-record conferences during recesses.[42] But,

36. *See Leeke*, 488 U.S. at 280-81 (holding testifying criminal defendant has constitutionally protected right to conference with counsel during evening recess but not during brief 15-minute recess).

37. For a discussion of the constitutionality of the no-consultation rules, see *infra* notes 217-37 and accompanying text.

38. *See* S. DIST. OF INDIANA, RULE 30.1, *supra* note 22 (prohibiting attorney initiated conferences "regarding a pending question"); DIST. OF OREGON, RULE 230-5(d), *supra* note 22 (requiring that "[i]f a question is pending, it shall be answered before a recess is taken"); SECOND CIRCUIT PROPOSED RULE 6, *supra* note 23 (prohibiting "defending attorney" from initiating conferences "during the pendency of a question").

39. For a discussion that there is no interference with the constitutionally protected right to counsel in prohibiting attorney-client consultations during testimony, see *infra* notes 217-21 and accompanying text.

40. *See Hall Rule*, *supra* note 22, at 531-32 (extending prohibition against off-the-record conferences to breaks and recesses).

41. For a discussion of why the prohibition of attorney-client conferences during overnight recesses violates the right to counsel, while a prohibition applied to "brief recesses" has no constitutional infirmity, see *infra* notes 185-91 and accompanying text.

42. *See* N. DIST. OF ILLINOIS, PROPOSED RULE 5.23(B), *supra* note 23 (exempting "ordinary and necessary recesses taken during the deposition session, such as lunch breaks and rest periods" from its prohibition on consultations, but clarifying that recesses or breaks may not be called for purpose of initiating conference between attorney and client).

the exemption extracts a troublesome cost. Consultations are not prohibited during recesses, but the opposing party may inquire as to the content of the consultation, even as to matters that would otherwise be protected by attorney-client privilege.[43] As will be discussed, it is beyond the authority of the district court to remove or rewrite the attorney-client privilege because of the resulting inconsistency with existing law of procedure and evidence.[44]

The approach of several districts prohibits conferences during the "actual taking of a deposition"[45] or "while the deposition is proceeding in session."[46] It is unclear whether these prohibitions only apply while testimony is being given, or whether the scope is intended to reach recesses during the deposition.[47] Under the most far-reaching interpretation of the "pendency of the deposition" language, the prohibition could be thought to extend past the conclusion of testimony and up to the time of signature of the transcript by the deponent.[48] The lack of clarity as to scope of this approach leaves the constitutionality of these variations equally unclear.

C. *What?*

All no-consultation rules provide an exception for discussions to determine whether to assert a privilege.[49] Nothing exists to indi-

43. For an example of a rule permitting counsel conferences during recesses, but also permitting opposing counsel access to the content of the consultation, see N. DIST. OF ILLINOIS, PROPOSED RULE 5.23(C), *supra* note 23.

44. For a discussion of the limitations to the district courts' rule-making authority, see *infra* notes 180-91 and accompanying text.

45. *See* S./E. DIST. OF NEW YORK, RULE 13, *supra* note 22; DIST. OF WYOMING, RULE 30(e), *supra* note 22.

46. M. DIST. OF NORTH CAROLINA, RULE 204(b)(2)(iii), *supra* note 22.

47. Applying the prohibitions to recesses creates further confusion. May a recess be called for the sole purpose of conferencing? Do prohibitions include a ban on attorney-client lunches together if the deposition proceeds over the noon hour or cups of coffee together during a morning or afternoon break unless they maintain strict silence? Does the prohibition apply to the evening hours if the deposition breaks for the evening to continue the following day?

48. This possible confusion is caused, in part, by the language of Rule 30(e) of the Federal Rules of Civil Procedure, which provides for the deponent to have 30 days after a transcript of the deposition becomes available to review the transcript and make changes to the transcript "in form and substance" prior to signing the transcript. FED. R. CIV. P. 30(e). Rule 30(e) refers to this period of time prior to the correction and signing of the deposition as "before completion of the deposition." *Id.* Therefore, if the deposition has not reached "completion" it is probably not "proceeding in session" but it might be considered to be within the "actual taking." *Id.*

49. For a discussion of the privilege determination exception to the no-consultation rules, see *supra* notes 27-33.

The scope of discovery extends to "any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." FED. R. CIV. P.

cate the origin of this universally applied exception. This is puzzling because one of the most frequently made arguments in support of the no-consultation rule is that it causes deposition testimony to proceed in the same manner as trial testimony. At trial, it is doubtful that a recess would be granted routinely for attorney and client to discuss whether to assert a privilege. Admittedly, at trial many questions of privilege are most likely anticipated and addressed by a motion *in limine*, thereby eliminating the need for discussion during testimony. However, Rule 26(c) provides for an analogous procedure at deposition for problems of potential privileges that are anticipated prior to deposition, obviating the need for discussion and the exception.[50] Nevertheless, the exception is universally recognized by the varying formulations of the no-consultation rule.

While the privilege exception may be necessary to protect client interests, there are other compelling reasons for attorney-client consultation which are not recognized by the no-consultation rule. Most notably, the limited scope of the privilege inquiry exception does not allow for an attorney to consult with his or her client when an apparent error, whether inadvertent or fraudulent, appears in client testimony. This overly restrictive aspect of the rule prevents an attorney from aiding in the discovery process and from fulfilling professional obligations.[51] It appears that this consequence was apparently not contemplated by the drafters of the various no-consultation rules, thereby illustrating the problematic nature of the local rulemaking process.

D. *Say What?*

The difficulty with allowing any conference at all, of course, is that when a conference takes place and a privilege is not asserted, nothing is then put on the record to indicate that the purpose for the conference was within the privilege inquiry exception. Perhaps

26(b)(1). To assert a claim that information sought to be discovered is subject to a privilege, "the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a matter that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." FED. R. CIV. P. 26(b)(5).

50. *See* FED. R. CIV. P. 26(c) (providing for protective order to be issued limiting scope of inquiry during discovery).

51. For a discussion of how overly restrictive no-consultation rules can be counterproductive to goals of the economical and efficient discovery, as well as interfering with an attorney's professional obligations, see *infra* notes 72-74, 75-86, 90-97 and accompanying text.

the conference was for the allowed purpose of discussing whether a privilege exists and whether it should be asserted. Perhaps it was for the improper purpose of suggesting an answer or otherwise coaching the witness. A further dilemma exists because attorneys also have the opportunity during coffee breaks and recesses to coach one's client as to what to say and how to say it. The nagging problem, as perceived by the district courts that have adopted the no-consultation rule, is how to know when an attorney has breached his or her professional obligations.[52]

The most far-reaching of the no-consultation rules presumes that an attorney will act unethically if given the opportunity. Thus, these rules allow intrusion into attorney-client conversations to determine whether the subject of the conversation was within allowable boundaries. Attorney-client consultations are made the subject of inquiry by opposing counsel "regardless of whether such communication would otherwise have been protected by the attorney-client or any other privilege."[53] The price then of a cup of coffee had together by attorney and client during a recess is a waiver of applicable privileges that would attach to any communication that took place.

This redefining of the attorney-client privilege is fraught with difficulties. First, it appears to exceed the rulemaking power of the district courts in that a rule of privilege is created that is inconsistent with the scope of discovery defined in Rule 26.[54] Second, it is inconsistent with the federal common law of attorney-client privilege.[55] Third, in diversity actions where state law provides the source of law for privileges, local rules of district courts impermissi-

52. For a discussion of how the no-consultation rule developed from a perception that rules of professional conduct are ineffective in controlling attorney conduct, see *infra* notes 238-49 and accompanying text.

53. N. DIST. OF ILLINOIS, PROPOSED RULE 5.23(C), *supra* note 23, at 10-11; *see also Hall Rule, supra* note 22, at 532 (making off-the-record conferences "proper subject of inquiry by deposing counsel to ascertain whether there has been any witness-coaching and, if so, what"). Though the text of the *Hall Rule* does not specify whether such inquiry is intended to pierce any applicable privileges, the accompanying opinion does not clarify that intention. Hall v. Clifton Precision, 150 F.R.D. 525, 529 n.7. (E.D. Pa. 1993). *But see* DIST. OF COLORADO RULE 30.1C(A.2), *supra* note 22 (making off-the-record conferences proper "subject for inquiry" by opposing counsel, but only "to the extent it is not privileged").

54. For a discussion of how no-consultation rules that seek to limit the applicability of attorney-client privilege could conflict with the scope of discovery defined in Rule 26, see *infra* notes 186-87 and accompanying text.

55. For a discussion that no-consultation rules would be in conflict with federal law if they are viewed as redefining the attorney-client privilege, see *infra* note 188 and accompanying text.

bly redefine state privilege law.[56] Finally, redefining the attorney-client privilege in order to check up on attorney behavior to determine if it comports with ethical norms at best represents a very dim view of the profession. It sacrifices obligations of confidentiality owed to clients because of mistrust of attorneys.

III. WHAT ARE THEY TALKING ABOUT? THE GOOD, BAD AND THE UGLY

Regulation by local rule of attorney-client consultation during deposition is premised on a view that what takes place in such consultations subverts the discovery process.[57] It is presumed that attorneys improperly suggest answers to clients or use consultations to interrupt the questioning of the party conducting the deposition. Yet, in fact there are other reasons and purposes for a consultation during a deposition. Some of these reasons may actually aid the discovery process, or are at least benign. Other reasons perhaps are mandated by an attorney's professional obligations. The utility of a flat prohibition on deposition consultation becomes questionable when considering that helpful or mandated consultations also are brought within the overly broad prohibition. Therefore, an examination of the reasons for which off-the-record conferences occur is warranted as a starting point of discussion.

A. *The Good Reasons*

1. *Reassurance*

An attorney representing a deponent may wish to consult with his or her client for a reason no more sinister than "hand-holding." It should not be assumed that all clients are slick corporate officers wishing to take every opportunity for self-serving conduct. Parties to litigation also include persons who have had no prior exposure to litigation and for whom litigation can be stressful and intimidating. For them, lengthy questioning can be a very unpleasant experience because there is no judicial presence to rule on objections, to moderate the tone or intensity of the questioning, and to afford breaks when necessary. A consultation may be initiated simply for the purpose of reassuring the client that "you're doing fine" and

56. For a discussion of how no-consultation rules alter the scope of the attorney-client privilege thereby creating an *Erie* problem in diversity actions, see *infra* notes 189 and accompanying text.

57. For a discussion that the premise for the no-consultation rule is that any attorney-client consultation during deposition will exceed ethical norms and injure the discovery process, see *infra* note 98 and accompanying text.

"this will be over before too long, hang in there." The calming effect of reassuring words might actually aid the fact-finding process.[58]

In an era of increased concern for a lack of civility in the profession, it would seem consistent with that concern to allow a bit of civility to the persons whom the profession serves. Surely, concerns with civility must extend to how clients are treated as well as to how lawyers treat each other.[59] Nevertheless, two counter-arguments persist. First, depositions are meant to resemble trial testimony, and a client may not consult with his or her attorney in the midst of giving testimony at trial. Therefore, deposition consultations should not be permitted. Second, some attorneys will use a consultation for the improper purpose of suggesting to the deponent how to answer. Neither reason trumps the merit of the hand-holding consultation. Depositions are not in fact the mirror images of trial testimony,[60] and other, more appropriate controls exist for addressing the attorney who uses consultations for improper purposes.[61]

2. *Are Not Two Playing the Game?*

In some respects, the no-consultation rule presumes that it is only the deponent's attorney who is the perpetrator of abusive discovery conduct. Nevertheless, the questioning attorney also can abuse the discovery process by badgering the deponent with insulting, abusive, repetitive or irrelevant questions.[62] Thus, the rule works to put the deponent at the mercy of an abusive questioner

58. *See* Perry v. Leake, 488 U.S. 272, 292 (1989) (Marshall, J., dissenting) ("Vigorous cross-examination is certainly indispensable in discerning the trustworthiness of testimony, but I would think that a few soothing words from counsel to the agitated or nervous defendant . . . might *increase* the likelihood that the defendant will state the truth on cross-examination.").

59. *But cf.* FINAL REPORT, *supra* note 2, at 444 (reporting "the decline of civility standards in litigation practice," but only discussing impact of incivility on clients in economic terms); INTERIM REPORT, *supra* note 2, at 374, 384, 400 (containing survey intended to assess "whether in fact civility problems exist in litigation practice in the Seventh Circuit" but concentrating on "Lawyers' Relations With Each Other" and "Lawyers' Relations With Judges" and somewhat ignoring impact on clients).

60. For a discussion of the differences between deposition and trial testimony, see *infra* notes 120-63 and accompanying text.

61. For a discussion of more appropriate methods of controlling the overzealous attorney during deposition consultations, see *infra* notes 250-55 and accompanying text.

62. *See, e.g.*, Wayne D. Brazil, *Civil Discovery: Lawyer's Views of Its Effectiveness, Its Principal Problems and Abuses*, 4 AM. B. FOUND. RES. J. 859, 859 (1980) (stating "[a]s one litigator phrased it, he used depositions to put hostile witnesses or opposing parties 'through the wringer, through the mud, [so that] they are frightened to be a witness and . . . are a much worse witness' ").

and prevents the deponent's attorney from performing important roles in the attorney-client relationship.[63] *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*[64] serves as an excellent example of opposing attorneys abusing the deposition process and the need for off-the-record attorney-client (deponent) consultation during the deposition. In *Eggleston*, five named plaintiffs brought an action alleging employment discrimination and sought to represent a class of similarly situated African-American and Hispanic persons.[65] In depositions limited to issues of class certification, the defendant conducted an inquiry that the court referred to as "a totally unjustified and reprehensible intrusion into personal family history."[66] The questioning included lengthy inquiry into the deponent's racial ancestry, including such questions as whether the deponent's grandmother had ever mentioned any Caucasian ancestors, whether the deponent believed himself to be Hispanic or African-American, and the deponent's basis for his belief as to his racial identity.[67]

The attorney's first recourse to such a repugnant assault on the client is to object to the relevance of the question.[68] The objection, however, is merely noted for the record and the question must still be answered.[69] Instruction not to answer a question is limited to where a privilege is asserted.[70] If the relevancy objection does not get the point across to the questioner that this is an area into which inquiry should not venture, the next and final recourse is to suspend the deposition and seek relief from the court limiting the

63. *See, e.g.*, Acri v. Golden Triangle Management Acceptance Co., 142 Pitt. Legal J. 225, 229 (Ct. C.P. 1994) (noting that problems at depositions also can be caused by questioning attorney and criticizing *Hall Rule* because it forces deponent's attorney into position where he or she "sits quietly while responding counsel unfairly beats up the client").

64. 657 F.2d 890 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982).

65. *Id.* at 892.

66. *Id.* at 898.

67. *Id.* at 898 n.12 (setting out excerpts of deposition transcript).

68. FED. R. CIV. P. 30(d)(1). Rule 30(d)(1) provides: "[a]ny objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner." *Id.*

69. FED. R. CIV. P. 30(c). Rule 30(c) provides: "[a]ll objections made at the time of the examination . . . to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections." *Id.*

70. FED. R. CIV. P. 30(d)(1). Rule 30(d)(1) further provides: "[a] party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3)." *Id.* For the remaining text of Rule 30(d)(1) of the Federal Rules of Civil Procedure, see *supra* note 68.

scope or manner of the deposition so as to preclude the offensive inquiry.[71]

If strictly interpreted, the no-consultation rule does not allow for attorney-client conferences for the purpose of determining whether the latter course of action should be pursued. This is troublesome for two reasons. First, the client should be consulted as to the extent to which the client feels harassed by offensive, irrelevant questioning. Though the questions are repugnant, the client may find them a relatively minor annoyance and may simply wish to get the deposition over with and not pursue a Rule 30(d)(3) motion. Alternatively, the deponent may have had enough and wish to seek judicial relief from the abusive questioning. Second, it must also be kept in mind that the motion seeking judicial relief is not pursued without some economic risks to the client.[72] Therefore, professional obligations would seem to require that the decision to pursue Rule 30(d)(3) relief be made only after consultation with the client as to the strategic and financial concerns involved in pursuing this course of action.[73] Strictly applied, the no-consultation rule prevents fulfillment of this obligation, for the only exception allowed is for the purpose of determining whether to assert a privilege.[74]

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71. FED. R. CIV. P. 30(d)(3). Rule 30(d)(3) provides:

> At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court . . . may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c).

Id.

72. FED. R. CIV. P. 37(a)(4). Rule 37(a)(4) requires "party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion . . . unless the court finds that . . . opposing party's nondisclosure . . . was substantially justified." *Id.*

73. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1994) (stating that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"); ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 cmt., at 61 (2d ed. 1992) (stating that "[a] lawyer has the obligation not only to advise a client of his or her legal rights and responsibilities but also to counsel the client regarding the advisability of the action contemplated") (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1523 (1987)).

74. For a discussion of what is prohibited by the no-consultation rule, see *supra* notes 49-51 and accompanying text.

3. *Being Helpful*

In addition to being subject to anxiety during deposition, a deponent simply may become confused and give inaccurate information because of nervousness or other reasons. A consultation can address the confusion and result in the communication of more accurate information to the party taking the deposition.[75] The consultation is initiated when the attorney hears the deponent give an answer that does not comport with what the attorney believes to be accurate. During the consultation, the attorney can make sure that his or her client properly understood the question asked or properly recalls the information that the question seeks.[76] Without the consultation occurring, the party conducting the deposition proceeds on the basis of inaccurate information. The mistake may never become apparent, in which case the discovery process is subverted in the absence of consultation. Alternatively, the deponent's error may be discovered as the deposition proceeds. If information of sufficient significance is involved in the mistake or misunderstanding, a portion of the deposition must be repeated with the corrected information in mind.[77] Prohibiting the consultation could result in a needless expenditure of time and resources and cut against the goals of economy that the no-consultation rule is intended, in part, to foster.

In fact, rules of professional conduct would seem to dictate

75. It is often presumed that conferences during the deposition may take place and are a part of the deposition process. *See* Phillip J. Kolczynski, *Depositions As Evidence*, 9 LITIG. 25, 29 (Winter 1983) ("The lawyer is permitted [during the deposition] to talk to his client or his client's agents, of course.").

76. In my experience, client confusion with dates serves as a fine example of client confusion that could easily be cleared up with a conference between attorney and deponent. The deposing attorney may have a mastery of the dates when certain events occurred that far exceeds that of the deponent. Referring to events by description rather than by date may confuse the deponent as to what event is the subject of the inquiry and lead to seemingly inaccurate testimony.

77. If the misunderstanding is revealed at some point in the deposition, earlier portions may have to be repeated. Resources are wasted by the repetition. Alternatively, if the misunderstanding is revealed after completion of the deposition, when the deponent exercises his or her right under Rule 30(e) to make corrections to the deposition transcript prior to signing it, the deposing party then may reopen the deposition for further questioning on the point or points that have been changed. Again, resources are unnecessarily wasted. *See* Sanford v. CBS, Inc., 594 F. Supp. 713, 715 (N.D. Ill. 1984) (stating that when changes made to deposition pursuant to Rule 30(e) make record "incomplete or useless without further testimony," deposition may be reopened by party who took deposition and party making changes will bear expense of reopening); Erstad v. Curtis Bay Towing Co., 28 F.R.D. 583, 584 (D. Md. 1961) (discussing that changes to deposition transcript "may call for further questioning . . . or the continuation of the deposition to some future date").

that the foregoing take place. An attorney has an obligation of candor toward the tribunal that compels the attorney to "take reasonable remedial measures" if evidence is offered "that the lawyer knows to be false."[78] That obligation extends to discovery generally and specifically to deposition testimony.[79] Nevertheless, while Model Rule 3.3 of the *Model Rules of Professional Conduct* speaks only in terms of "false evidence," the accompanying commentary and Formal Opinion 93-376 of the American Bar Association Committee on Ethics and Professional Responsibility address situations where the lawyer's client deliberately gives inaccurate responses to questions at deposition. Therefore, it is somewhat unclear whether inadvertent false statements are also contemplated by the rule.[80]

It is here that the two most commonly mentioned purposes of depositions lead to different conclusions. It is often stated that the purposes of depositions are to obtain accurate information and to preserve testimony.[81] Facilitating accurate fact gathering certainly speaks to bringing inadvertent false statements within Model Rule 3.3. The Rule 30(e) post-deposition correction of deposition transcripts prior to signature would indicate that the ultimate goal of discovery by deposition is to provide for the exchange of accurate information.[82] Therefore, a deponent may correct the record prior

78. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1994). Rule 3.3, entitled "Candor Toward the Tribunal" requires that: "A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." *Id.*; *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (1994). Rule 4.1, entitled "Truthfulness in Statements to Others" states:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Id.

79. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-376 (Aug. 6, 1993) (clarifying that lawyer's obligation of candor to tribunal applies in pretrial situation of testimony offered at deposition and later discovered by lawyer to be false).

80. It would seem that fraudulent statements are a much more troublesome case than inadvertent false statements. Therefore, inadvertent false statements should be treated like fraudulent statements and the lawyer should be able to initiate a conference to correct them.

81. *See* SECOND CIRCUIT REPORT ON THE CONDUCT OF DEPOSITIONS, *supra* note 18, at 613 (issuing report that proposes no-consultation rule and stating that "[u]nderlying this report is an assumption that the purpose of depositions is to obtain facts and preserve testimony").

82. FED. R. CIV. P. 30(e) (providing that deponent shall have 30 days to review deposition transcript and make "changes in form or substance").

to adopting it as his or her testimony and may consult with counsel in the process of so doing.[83] Similarly, inadvertent inaccuracies known to the attorney would also require correction.

The deposition purpose of preserving testimony, however, could lead to the opposite conclusion and not require correction of inaccuracies during the deposition. The goal of committing a deponent to a certain version of a story is not so much concerned with the accuracy of the story as it is concerned with committing the witness to a story.[84] When the witness testifies at trial, any changes in the witness's recitation of events can be used as impeachment fodder.[85] Having been committed to the story, the deponent can then be later impeached, either with the deponent's own changed testimony, or with impeaching testimony of other witnesses whose story is different from the deponent's.

Nevertheless, both discovery purposes are served by mid-deposition correction of inadvertent inaccuracies. As will be discussed, 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).[86] By accelerating the correction to a point in time that allows for immediate follow-up based on the corrected information, interests of economy in discovery are served without prejudicing the proponent of the question. Even for attorneys who do not feel compelled to fulfill professional obligations, it is not farfetched to think that they, in defending a deposition, would consult with clients to aid the discovery process. The possibility of later impeachment with the deposition record constitutes a large incentive to ensure that the record is complete and accurate.

B. *The Bad Reasons*

In considering no-consultation rules, one, of course, should not be so much of a "Pollyanna" as to suggest that all deposition consultations are for purposes that aid in the process of accurate fact-finding. Lawyers also initiate consultations to suggest to a cli-

83. *See, e.g.*, Erstad v. Curtis Bay Towing Co., 28 F.R.D. 583, 584 (D. Md. 1961) (holding that attorney and client may engage in private conference before changes are made to deposition record).

84. *See* THOMAS A. MAUET, PRETRIAL 237 (3d ed. 1995) (noting that "a deposition commits the deponent to the details of his story" is one of several factors that makes depositions "by far the most effective discovery device").

85. *See* FED. R. EVID. 613(a) (allowing for impeachment of witness with prior inconsistent statement); FED. R. EVID. 613(b) (allowing for impeachment of witness with extrinsic evidence of prior inconsistent statement).

86. For a discussion of correcting the record of a deposition pursuant to Rule 30(e), see *infra* notes 136-43 and accompanying text.

ent what to answer or how to answer, as well as to interrupt the interrogation of the attorney conducting the deposition. The reporters and the media are replete with examples of such improper conduct, many of which demonstrate a highly developed, adolescent flair for the profane and the scatological, as well as threats of Rambo-esque violence.[87] Certainly, such conduct subverts the discovery process. Time and expense are wasted. The client's ends are not well served. The profession as a whole suffers.

This behavior should not be allowed to persist without repercussions. But local rules prohibiting all attorney-client conferences are not the appropriate mechanism for controlling it. An attorney engaging in the practice of suggesting answers to his or her client is in violation of established rules of professional conduct.[88] Therefore, a local rule prohibiting consultation is not adding any new proscription to attorney behavior. It is an attempt to take away the opportunity to engage in obviously prohibited behavior. This approach might be warranted in the absence of appropriate reasons for off-the-record conferences, or if a significant number of attorneys are using conferences to subvert the deposition process.[89] Neither are the case. Therefore, no-consultation rules cut far too wide a path through the attorney-client relationship.

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87. *See* David C. Weiner, *Civility*, 21 LITIG. 1 (1994). Weiner provides an exchange which "actually occurred between two very prominent attorneys" that artfully captures almost all forms of abusive conduct in one short conversation between the attorneys and the deponent:

> Attorney A: You don't run this deposition, you understand?
>
> Attorney B: Neither do you, Joe.
>
> Attorney A: You watch and see. You watch and see who does, big boy. And don't be telling other lawyers to shut up. This isn't your g__ d__ job, fat boy.
>
> Attorney B: Well, that's not your job, Mr. Hairpiece.
>
> Witness: As I said before, you have an incipient . . .
>
> Attorney A: What do you want to do about it, a__h__?
>
> Attorney B: You're not going to bully this guy.
>
> Attorney A: Oh, you big fat tub of s__, sit down.
>
> Attorney B: I don't care how many of you come up against me.
>
> Attorney A: Oh, you big fat tub of s__, sit down. Sit down, you big fat tub of s__,

Id. at 1.

88. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4 (1994) (insuring fairness to opposing counsel by mandating access to evidence and prohibiting influencing of witnesses).

89. For a discussion of the appropriate reasons for off-the-record conferences, see *supra* notes 58-86 and accompanying text. For a discussion of the lack of empirical data supporting the no-consultation rule, see *infra* notes 100-113 and accompanying text.

C. *The Ugly Reasons*

There is one other reason why an attorney would want to consult or be required to consult with his or her client during deposition—one that is commanded by professional obligations. In the event that the lawyer believes that his or her client has given an intentionally inaccurate answer to a question at deposition, the lawyer has an obligation to correct the fraud.[90] If the lawyer is aware of the fraud during the deposition, "the lawyer's first step should be to remonstrate with the client confidentially and urge him [or her] to rectify the situation."[91] A blanket prohibition on deposition consultation would prevent such remonstrations.

The lawyer, if prevented from this "first step" during the deposition, can wait until the conclusion of the deposition and urge the client to correct the fraud as part of the transcript review and signature process.[92] But this would result in an unnecessary waste of time and resources if the misstatement concerned a material fact such that the party conducting the deposition would have been misled in any subsequent inquiry. Leaving the misstatement uncorrected would be a violation of the obligation not to subvert the truth-finding process.[93] Correcting the misstatement when it occurred could obviate the need of having to reconvene the deposition after correction of the record.[94]

Those formulations of the no-consultation rule that make any consultation presumptively improper and subject to inquiry by the opposing party without regard to any available privilege are particularly troublesome for the attorney seeking to fulfill the professional obligations of Model Rule 3.3. When confronted with a client wrongdoing at deposition, the lawyer, if possible, is to consult with the client to the end of rectifying the falsehood "without divulging the client's wrongdoing or breaching the client's confidences."[95] A local rule that makes any consultation fair game for inquiry without

90. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1994). For the applicable text of Rule 3.3, see *supra* note 78.

91. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-376, at 1 (Aug. 6, 1993) [hereinafter ABA Formal Op. 93-376] (discussing "The Lawyer's Obligation Where a Client Lies in Response to Discovery Requests").

92. For a discussion of the correction of deposition transcripts by the deponent pursuant to Rule 30(e), see *infra* notes 136-43 and accompanying text.

93. *See* ABA Formal Op. 93-376, *supra* note 91, at 1 (noting that fraud is committed upon tribunal by false statement at deposition even before filing with court because of ongoing reliance upon deception).

94. For a discussion of the need to repeat deposition testimony due to mistake as a wasteful exercise, see *supra* note 77.

95. ABA Formal Op. 93-376, *supra* note 91, at 1.

regard to existing privileges makes it impossible to rectify the client's wrongdoing without removing the protection of confidentiality from the consultation.[96] The attorney then is placed in a dilemma where fulfillment of obligations to the tribunal result in violation of obligations to preserve confidentiality.[97]

IV. LOOK WHO'S TALKING, PLEASE!

The no-consultation rule is premised on the notion that attorneys representing deponents will subvert the discovery process by improperly coaching the deponent as to what to say if given the opportunity.[98] The assumption is that attorneys will ignore applicable rules of professional conduct and act unethically.[99] A local rule

96. The language quoted from Formal Opinion 93-376 at the preceding note contains a puzzling caveat. In its entirety, the quoted language states:

> Thus, the lawyer's first step should be to remonstrate with the client confidentially and urge him to rectify the situation. It may develop that, after consultation with the client, the lawyer will be in a position to accomplish rectification without divulging the client's wrongdoing or breaching the client's confidences, *depending upon the rules of the jurisdiction* and the nature of the false evidence.

Id. at 5-6 (emphasis added).

It is unclear what portion of the lawyer's first step is dependent upon the rules of the jurisdiction. The placement of the phrase would lead one to believe that avoiding a breach of the client's confidences is dependent upon local rules. Therefore, the argument made in the text would be defeated. Nevertheless, the Committee previously had struggled with the tension between preserving client confidences and disclosing client perjury, coming to the conclusion that the obligation to the tribunal supersedes the obligation to the client. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 87-353 (1987). Formal Opinion 93-376, however, still seeks to preserve client confidences, if it all possible while rectifying the fraud. ABA Formal Op. 93-376, *supra* note 91. It would seem odd for the Committee to subject the obligation to preserve client confidences to the whim of local court rule.

97. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1994) (defining lawyer's duty of confidentiality).

98. *See* N. DIST. OF ILLINOIS, PROPOSED RULE 5.23B, *supra* note 23 (providing purpose for proposed no-consultation rule "to prevent counsel for a deponent from improperly suggesting answers or the content of testimony to a witness and to prevent disruption of the deposition"); SECOND CIRCUIT REPORT ON THE CONDUCT OF DEPOSITIONS, *supra* note 18, at 613 (stating that "genesis" for set of proposed discovery rules on discovery conduct, including no-consultation rule, is "that the current method of taking and defending depositions is too often an exercise in competitive obstructionism"); Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993) (holding that "a lawyer and a client do not have an absolute right to confer during the course of the client's deposition" because "[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").

99. Suggesting answers to a deponent would violate several of a lawyer's professional obligations. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a) (1994) (providing that "a lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4

that seeks to take away the opportunity to act unethically is the next, or perhaps the last, step. This is quite an indictment of the profession. One then questions the validity of the premise.

The limited material available concerning the considerations involved in the enactment of the various no-consultation rules does not indicate that any concrete data supports the premise.[100] The proposal of the Committee on Second Circuit Courts states that the Committee "spoke with a number of judges, magistrates and practitioners," but it does not appear that any scientifically supportable survey was undertaken or that any reliable empirical data was gathered. Rather, anecdotal observations were gleaned from a handful of lawyers in a limited geographic region.[101] Even then, the Committee conceded that those lawyers interviewed did not share a uniform belief that a widespread problem existed with the conduct of depositions.[102] Nevertheless, the Committee proceeded to propose rules on deposition conduct addressing "concern areas which have been identified as giving rise to frequent problems" though the identification process is subject to serious question.[103]

The approach taken by the Committee's no-consultation proposal is of equally questionable origin.[104] The Committee concedes

(1994) (providing that "a lawyer shall not . . . falsify evidence, counsel or assist a witness to testify falsely"; or, "in pretrial procedure . . . fail to make reasonably diligent effort to comply with a legally proper discovery request"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (1994) (providing that "a lawyer shall not knowingly . . . make a false statement of material fact . . . to a third person").

100. *See* 28 U.S.C. § 2071(b) (1994). The statutory source of authority for local rulemaking by district courts was amended in 1988 to provide for public notice and comment prior to a rule taking effect. Thus, rules proposed after 1988 provide the best resources of what considerations went into the promulgation of the rule. *See also* FED. R. CIV. P. 83. (allowing creation and amendment of district court rules after giving public notice and comment opportunity).

101. *See* FEDERAL BAR COUNCIL COMMITTEE ON SECOND CIRCUIT COURTS MINORITY REPORT ON CONDUCT OF DEPOSITIONS, 131 F.R.D. 625 (May 1990) [hereinafter MINORITY REPORT] (criticizing observations gathered by committee for contacting lawyers located only in Southern and Eastern Districts of New York and completely overlooking lawyers in Northern and Western Districts of New York, District of Connecticut and District of Vermont).

102. *See* SECOND CIRCUIT REPORT ON THE CONDUCT OF DEPOSITIONS, *supra* note 18, at 614 (stating that litigators interviewed thought "that depositions have become encrusted with too much unproductive posturing"); MINORITY REPORT, *supra* note 101, at 625 (disagreeing with Committee Report that deposition practice amounts to "an exercise in competitive obstructionism," and instead believing that conduct of depositions in Southern and Eastern Districts of New York reflects "a proper balance of courtesy and professionalism toward the adversary counsel, and diligent representation of their own clients' interests").

103. SECOND CIRCUIT REPORT ON THE CONDUCT OF DEPOSITIONS, *supra* note 18, at 616.

104. *See* SECOND CIRCUIT PROPOSED RULE 6, *supra* note 23.

that "[n]o subject has generated more controversy" than the extent of the no consultation rule, and that "there is a wide range of views concerning what is the ideal degree of availability of counsel."[105] Yet, the Committee never addressed the various approaches.[106] No reasoning is offered for why the Committee chose the specific approach contained in the proposal other than a reference to the same approach having been taken or proposed elsewhere.[107] The committee offered little discussion to reflect that any of the troublesome issues involved were considered.[108]

Similarly, the proposal of the Northern District of Illinois also lacks a basis for the premise that attorney-client consultation during depositions is subverting the discovery process and that control by local rule is needed. Nevertheless, the court commented that, although its proposed no-consultation rule is "controversial," "there is an urgent need for a bright line rule . . . in order to prohibit any communication that would improperly interrupt the deposition and jeopardize the truth-finding process."[109]

The basis for the determination of "urgent need" is quite suspect. The Northern District created a Committee on Deposition Practice "to develop a set of guidelines for use by attorneys in the conduct of depositions."[110] Apparently the Committee proceeded from the assumption that some form of guidelines was necessary, rather than undertaking a study of whether any in fact were needed. Two studies on "incivility" in practice are cited to establish that abusive conduct occurs at depositions and that there is a need for deposition guidelines, yet neither actually addressed the specific

105. SECOND CIRCUIT REPORT ON THE CONDUCT OF DEPOSITIONS, *supra* note 18, at 618.

106. For a discussion of the various approaches taken by district courts that have proposed or adopted no-consultation rules, see *supra* notes 26-56 and accompanying text.

107. *See* SECOND CIRCUIT REPORT ON THE CONDUCT OF DEPOSITIONS, *supra* note 18, at 618 n.8 (stating that same rule was also proposed in "A Proposed Code of Litigation Conduct," The Record of the Association of the Bar of the City of New York, at 738 (Aug. 1988)); *id.* (offering same rule as sample in MANUAL FOR COMPLEX LITIGATION (2d ed. 1985) and adopted by Eastern District of New York Standing Order 13).

108. *See id.* at 618 n.8 (offering as sole consideration of underlying issues that no-consultation rule causes deposition to be similar to cross-examination at trial and citing Perry v. Leake, 488 U.S. 272 (1989)).

109. UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, PROPOSAL TO ADOPT LOCAL RULES, COMMENT BY THE COURT TO RULE 5.23 (May 24, 1995).

110. *See* REPORT OF COMMITTEE ON DEPOSITION PRACTICE, Jan. 18, 1995, Introduction [hereinafter REPORT OF COMMITTEE ON DEPOSITION PRACTICE]. The Committee was created by General Order entered on March 15, 1995 by Chief Judge James B. Moran pursuant to the Civil Justice Reform Act, 28 U.S.C. § 471 (1994). *Id.* at 1.

conduct that is the subject of the no-consultation rule.[111] Additionally, the Committee cites two cases, each of which expressed disapproval of attorney-client conferences during deposition.[112] Neither case provides any support for the practice being widespread nor presenting a difficulty outside the specific context before the court. Nevertheless, the Committee finds that "[m]any attorneys have felt the frustration when after recess, a deponent, clearly parroting the words of counsel, reverses or explains away prior testimony."[113] Who the "many" are and what source supports that finding is not identified.

The Committee did engage in a fairly extensive discussion of the "pros and cons" of the no-consultation rule and its possible formulations.[114] It attempted to address the underlying issues

111. *Id.* at 1-2 (introduction) (citing FINAL REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP at 49-50) (finding that incivility is "prevalent" theme in depositions and listing areas of deposition conduct for which local rules should be drafted, but not including attorney-client conferences at deposition); *see also id.* at 22 (Arguments In Favor of Restricting Deponent-Attorney Communications) (citing THE INTERIM REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT, 143 F.R.D. 371, 388 (Apr. 1991) [hereinafter INTERIM REPORT ON CIVILITY] (noting that among discovery abuses was "[a]busive and unethical conduct re: coaching of witnesses during deposition question and answer")).

The Interim Report on Civility conducted a survey of 580 lawyers in the Seventh Circuit. INTERIM REPORT ON CIVILITY, *supra*, at 378. Whether coaching of witnesses was occurring during attorney-client conferences is not clarified. In fact, the question on the survey addressing the topic asked only if there is a "civility" problem in "discovery proceedings." *Id.* at 428, #5a. There is no specific inquiry as to even "coaching of witnesses," let alone coaching through attorney-client conferences. *Id.* The reference in the Report to coaching of witnesses as abusive discovery conduct was apparently based on the anecdotal written comments received with "scores" of survey responses. *Id.* at 388. Nevertheless, there is no mention of any comment addressing attorney-client conferences as "abusive conduct."

The reliance upon the Interim Report on Civility is particularly curious in light of the comments of the Committee Chair, Hon. Marvin E. Aspen, District Court Judge, United States District Court for the Northern District of Illinois, made while participating in a panel discussion on "The Rambo Litigator" where he stated: "It's a rare thing to see Rambo tactics. The vast majority, overwhelming majority of lawyers practice professionally and competently in my courtroom." THE TENTH ANNUAL JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 146 F.R.D. 205, 230 (1992). It seems as if the proposal on deposition conduct of the Northern District of Illinois is aimed at unidentified conduct engaged in by a very small number of practitioners.

112. REPORT OF COMMITTEE ON DEPOSITION PRACTICE, *supra* note 110, at 22 (citing Hall v. Clifton, 150 F.R.D. 525 (E.D. Pa. 1993); Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, 657 F.2d 890, 901 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982) (holding off-the-record conferences at deposition to be improper where deponents and their counsel conferred "an estimated 127" times)).

113. REPORT OF COMMITTEE ON DEPOSITION PRACTICE, *supra* note 110, at 21-23 ("Arguments In Favor of Restricting Deponent-Attorney Communications").

114. *Id.* at 21-25 ("Arguments In Favor of Restricting Deponent-Attorney

presented by the rule. Nevertheless, many of the key issues are overlooked: such as the reordering of attorney-client privilege;[115] and how the attorney confronted with inaccurate information having been given by his or her client is to correct the inaccuracy without the ability to conference with him or her.[116] These omissions speak to the problems inherent in local rulemaking that hastily ventures into territory beyond matters of local "housekeeping."[117]

What is woefully lacking is any reliable empirical data, study or survey demonstrating the need for a no-consultation rule. The basis is simply a handful of anecdotal observations. This lack would not be so troublesome were there not legitimate reasons for attorney-client conferences during deposition, as well as reasons mandated by professional obligations.[118] If the no-consultation rule did not so heavily intrude into the attorney-client relationship, in some formulations even removing the protection of privilege from confidential conversations, this hasty, unsupported jumping on the "incivility" bandwagon might not seem so unjustified.[119] In light of the foregoing, an empirical study should be undertaken before proceeding with the enactment of such a sweeping change in the nature of the attorney-client relationship.

V. AND LOOK WHERE THEY'RE TALKING

A commonly made argument in support of the no-consultation rule is that direct examination at deposition is the analogue of cross-examination at trial.[120] Because a witness at trial may not consult with his or her attorney during the actual examination, and

Communications" and "Arguments Against Restricting Deponent-Attorney Communications").

115. For a discussion of how no-consultation rules can seek to redefine the attorney-client privilege, see *infra* notes 180-91 and accompanying text.

116. For a discussion of how a consultation during a deposition can facilitate efficient discovery by providing the opportunity to correct inaccurate testimony, see *supra* notes 75-86, 90-97 and accompanying text.

117. *See* WRIGHT, *supra* note 19, § 62, at 431-32 (criticizing local rulemaking as threat to uniformity of procedure that has been adopted in "a casual manner," and stating that "[a]lmost every study of experience with local rules has demonstrated how unsatisfactory it has been").

118. For a discussion of the reasons, "good," "bad" and "ugly," why an attorney and client would engage in a conference during a deposition, see *supra* notes 57-97 and accompanying text.

119. For a discussion of those forms of the no-consultation rules that remove the protection of privilege from attorney-client off-the-record conferences held during deposition, see *supra* note 53 and accompanying text.

120. For a discussion of how no-consultation rules are wrongly premised on a false analogy between depositions and cross-examinations, see *infra* notes 134-63 and accompanying text.

possibly during recesses, a deponent must be held to the same restriction. The difficulty with this argument is that cross-examination at trial and questioning of a witness at deposition are not the same in either form or function. Therefore, the analogy is but another false premise for the no-consultation rule.

A. *The Form of Depositions*

Several major differences cause depositions to be very different creatures than cross-examinations at trial and reveal the analogy to be inaccurate. First,[121] depositions take place outside of any judicial presence. Therefore, rulings on objections cannot be made when raised and no one is present to protect the witness in the event that the questioning becomes abusive.[122] Objections are merely noted on the record for later ruling, if necessary.[123] Second, the scope of questioning is much broader than cross-examination at trial.[124] Cross-examination is limited in scope to the "subject matter" of the preceding direct examination[125] and by relevancy.[126] The scope of discovery is not limited to that which is admissible evidence, but rather extends more broadly to any matter that is relevant to the subject matter of the action.[127] Additionally, the strategic considerations involved in cross-examination at trial serve as a more significant limit on the scope of inquiry. The commonly heard rule of cross-examination is "never ask a question to which you do not know the answer."[128] The opposite rule holds for depo-

121. It is very difficult to make a judgment as to the order of significance, and the order of discussion is not meant to imply any rank.

122. *See, e.g.*, REPORT OF COMMITTEE ON DEPOSITION PRACTICE, *supra* note 110, at 23-24 (noting that "there is no judge at depositions who can deal with an obviously frightened or confused witness . . . there is no judge present to rule on, and protect witnesses from, objectionable questions").

123. FED. R. CIV. P. 30(c) (providing that "[a]ll objections made at the time of the examination . . . shall be noted by the officer upon the record of the deposition; but the examination shall proceed").

124. *See, e.g.*, REPORT OF COMMITTEE ON DEPOSITION PRACTICE, *supra* note 110, at 24 (noting that "[t]he scope of deposition testimony is broader [than trial testimony], both because of the broad 'relevant to the subject matter' discovery standard that governs depositions and because there is no judge present to rule on, and protect witnesses from, objectionable questions").

125. FED. R. EVID. 611(b).

126. FED. R. EVID. 402. Relevance is defined as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

127. FED. R. CIV. P. 26(b)(1) (extending scope of discovery to "any matter, not privileged, which is relevant to the subject matter involved").

128. *See, e.g.*, THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 216 (3d ed. 1992) (stating as one of "rules" of cross-examination that "your questions

sition. The purpose is to inquire into every area possible to best determine the strengths and weaknesses of the case.[129] This is done without the limitation of preceding direct examination determining the applicable scope.

Taken together, these differences provide an atmosphere fertile for disputes during deposition.[130] Wide-ranging questioning is pursued without the presence of a neutral party to referee disputes which may arise, especially when the questioning intrudes upon sensitive areas or becomes abusive.[131] At trial, the presence of a judge to rule on objections, limit areas of inquiry and protect the witness from undue abuse, supplants the need for attorney-client conferences for purposes of protecting the witness as may be necessary at deposition.[132] Nevertheless, if the purpose or function of a deposition is identical to that of cross-examination, preventing attorney-client conferences indeed may be warranted to prevent undue coaching of the witness.[133]

B. *The Function of Depositions*

It is commonly stated that the purpose of a deposition is to obtain facts and preserve testimony.[134] It is the perceived testimo-

should tread on safe ground, by asking questions that you know the witness will answer in a certain way").

129. *See* James W. McElhaney, *Basic Deposition Techniques*, 21 LITIG. 1, 43 (Fall 1994) (stating that in discovery deposition "you want to learn as much as possible about the case and find out what the witness has to say").

130. *See, e.g.*, Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, 657 F.2d 890, 903 (7th Cir. 1981) (discussing how "[w]ith a liberal interpretation [of relevancy] comes the risk of abuse and good faith differences of opinion"); Milton Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219 (1978) (discussing history of discovery and how decrease in judicial involvement has contributed to increase in discovery abuse).

131. *See* Acri v. Golden Triangle Management Acceptance Co., 142 Pitt. Legal J. 225, 228-30 (Ct. C.P. 1994) (declining to impose no-consultation rule and discussing at length need for attorney-client conferences to "protect" client from abusive attorney who asks offensive and abusive questions).

132. For a discussion of situations at deposition where a conference could be used to protect the deponent from abusive questioning, see *supra* notes 62-74 and accompanying text.

133. It is difficult to reconcile the exception from the no-consultation rule for discussions related to privilege assertions with the depositions as analogue of trial justification for the rule. For a discussion of the exemption for the purpose of determining whether or not to assert a privilege from the prohibition on conferences during depositions, see *supra* notes 49-51 and accompanying text.

134. *See, e.g.*, Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993) (stating as purposes of discovery to "elicit facts" and "memorialization . . . of a witness's testimony"); SECOND CIRCUIT REPORT ON THE CONDUCT OF DEPOSITIONS, *supra* note 18, at 613 (stating that "[u]nderlying this report is the assumption that the purpose of depositions is to obtain facts and preserve testimony").

nial preservation function that has misled drafters of no-consultation rules. Because attorney-client conferences are not held during testimony at trial, it is then analogized that they should not be allowed during depositions.[135] Nevertheless, the use of deposition testimony at trial is not so much a purpose of depositions; instead, it is an allowed use in somewhat exceptional circumstances. A closer examination of depositions reveals that the primary purpose is fact gathering. Other perceived purposes should not be relied upon to justify the no-consultation rule, especially when it so significantly intrudes upon the attorney-client relationship.

Nothing separates the fact-gathering function from the testimonial preservation function more than Rule 30(e), which allows a deponent to review the transcript of his or her deposition and make any desired changes in "form or substance."[136] Although some courts have limited allowable changes to transcription errors,[137] the more widely held approach is to follow the words of Rule 30(e) and not to impose any limitation on either "form or substance" on the nature of the deponent's changes.[138] If testimonial preservation were a primary purpose of depositions, changes to transcripts would have no function. It is because the primary purpose is to gather accurate facts that changes to the transcript are allowed.[139] This does not mean, however, that wholesale changes could be made to a deponent's testimony without any ramification. The original testimony remains part of the record and is available for

135. *See* REPORT OF THE COMMITTEE ON DEPOSITION PRACTICE, *supra* note 110, at 22 ("As a general rule, once a witness takes the stand at trial, communications with counsel are prohibited until the testimony has been completed. Since deposition testimony is often admissible at trial, the same rule should be applicable at depositions.").

136. FED. R. CIV. P. 30(e) (providing that "[i]f requested by the deponent or a party before the completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript is available in which to review the transcript or recording").

137. *See, e.g.*, Greenway v. International Paper Co., 144 F.R.D. 322, 325 (W.D. La. 1992) (holding that purpose of Rule 30(e) is to correct "substantive errors" made by reporter but that Rule 30(e) "cannot be interpreted to allow one to alter what was said under oath").

138. *See, e.g.*, United States *ex rel.* Burch v. Piqua Eng'g, Inc., 152 F.R.D. 565, 566-67 (S.D. Ohio 1993) (finding that "under the Rule [30(e)], changed deposition answers of any sort are permissible, even those which are contradictory or unconvincing") (citing Perkasie Indus. Corp. v. Advance Transformer, Inc., No. 90-7359, 1992 U.S. Dist. LEXIS 22431, at *1 (E.D. Pa. 1992); Sanford v. CBS, Inc., 594 F. Supp. 713, 714-15 (N.D. Ill. 1984); Lugtig v. Thomas, 89 F.R.D. 639, 641 (N.D. Ill. 1981)).

139. *See, e.g.*, SEC v. Parkersburg Wireless, Ltd., 156 F.R.D. 529, 535 (D.D.C. 1994) ("[I]t is readily apparent that [Rule 30(e)] is geared toward correcting factual statements . . . .").

impeachment purposes.[140] The changes by the deponent are noted with stated reasons for making them.[141] In the event that the changes are significant, the deposition may be reopened at the expense of the deponent whose changes necessitated the reopening.[142] As discussed, attorney-client conferences during deposition can provide a more economical factual correction than waiting for review of the transcript.[143]

There are two testimonial uses of depositions taken in the same proceeding, but neither is frustrated by attorney-client conferences.[144] First, depositions commit the witness to a specific version of his or her story and may be used to impeach the witness at trial if he or she strays from the previous testimony.[145] The ability to coach the witness during attorney-client conferencing does not lessen the impeachment value of the deposition testimony. When a deponent exercises his or her right under Rule 30(e) to make corrections to the record, the impeachment value is not lost. Though

140. *See, e.g., id.* at 536 (stating that "changes under Rule 30(e) are added to the original, and the clarification remains available to be used for impeachment or further clarification") (citing Usiak v. New York Tank Bridge Co., 299 F.2d 808, 810 (2d Cir. 1962); *Lugtig*, 89 F.R.D. at 641-42 (explaining that "[n]othing in the language of Rule 30(e) requires or implies that the original answers are to be stricken when changes are made," and that a witness who changes his answers "may be impeached by his former answers") (citing 8A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2118 (1980)).

141. FED. R. CIV. P. 30(e) (providing that if changes are made by deponent to record of deposition, a statement shall state reasons given by deponent for making them); *see also Piqua Eng'g*, 152 F.R.D. at 568-74 (including, as example, attachment providing deposition record containing changes and stated reasons therefore).

142. *See, e.g., Sanford*, 594 F. Supp. at 714-15 (stating that when changes made to deposition pursuant to Rule 30(e) make record "incomplete or useless without further testimony," deposition may be reopened by party who took deposition, and party having made changes will bear the expense of reopening); Erstad v. Curtis Bay Towing Co., 28 F.R.D. 583, 583 (D. Md. 1961) (discussing that changes to the deposition transcript "may call for further questioning . . . or for continuation of deposition to some future date").

143. For a discussion of the use of attorney-client conferences during deposition to correct factual errors in the deponent's testimony, see *supra* notes 75-86 and accompanying text.

144. *See* FED. R. CIV. P. 32 (setting forth "Use of Depositions in Court Proceedings"). A deposition taken in a previous action may also be used at trial as provided in Rule 804(b)(1) of the Federal Rules of Evidence. *See* FED. R. CIV. P. 32(a)(4) (providing that depositions from previous actions may be used as set forth in Federal Rules of Evidence); FED. R. EVID. 804(b)(1) (exempting deposition testimony taken in different proceeding from exclusion as impermissible hearsay if party against whom it is offered had opportunity and similar motive to examine deponent in that proceeding).

145. *See* FED. R. CIV. P. 32(a)(1) (stating that "[a]ny deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence").

the correction is made, the original statement also remains part of the record, and the change in the testimony is available for impeachment purposes to show a prior inconsistency, a wavering witness, or both.[146] Similarly, the deposition record should reflect that the attorney and deponent held an off-the-record conference and any subsequent answer could be shown to the trier of fact to be suspect.[147]

Depositions also have a testimonial use in the event the deponent is unavailable to testify at trial due to death, distance, disability, inability of service of process, or other exceptional circumstances.[148] The Federal Rules of Civil Procedure do not distinguish between "discovery depositions" and "evidentiary depositions."[149] Any deposition taken for the usual fact gathering purposes of discovery can also be used for evidentiary purposes if the requirements of Rule 32(a)(3) are met.[150] Perhaps because in this use the record serves as a substitute for trial testimony, the proponents of the no-consultation rule mistakenly seek to make the conduct of depositions the same as the conduct of trial testimony.

In jurisdictions that have preserved the distinction between evidentiary and testimonial depositions, different procedures and expectations of attorney conduct also are preserved.[151] It is only the

146. For a discussion of Rule 30(e) regarding the use of corrections to the depositions transcript for purpose of impeachment, see *supra* note 140.

147. *See* Kolczynski, *supra* note 75, at 29 (discussing that "[t]he best way to discourage coaching is to put it on the record . . . [t]he weight given to post-conference testimony may be diminished if the court or jury believes the witness was not providing his own independent and unaided recollection of the facts").

148. *See* FED. R. CIV. P. 32(a)(3)(A)-(E) (outlining circumstances of witness unavailability that, if applicable, allow for deposition of witness, whether or not a party, to be used by any party for any purpose); *see also* FED. R. EVID. 804(b)(1) (exempting from exclusion as impermissible hearsay deposition testimony if party against whom it is offered had opportunity and similar motive to examine deponent in that proceeding).

149. *See, e.g.*, Tatman v. Collins, 938 F.2d 509, 510 (4th Cir. 1991) ("The Federal Rules of Civil Procedure make no distinction for use of a deposition at trial between one taken for discovery purposes and one taken for use at trial (*de bene esse*)."); United States v. International Business Mach. Corp., 90 F.R.D. 377, 381 n.7 (S.D.N.Y. 1981) (providing historical explanation of elimination of distinction between discovery depositions and evidentiary depositions).

150. FED. R. CIV. P. 32(a)(3) (providing that "[t]he deposition of a witness, whether a party or not a party, may be used by any party for any purpose" provided that certain conditions of unavailability are met); *see also* Savoie v. Lafourche Boat Rentals, Inc., 627 F.2d 722, 724 (5th Cir. 1980) (stating that there is no authority "in support of the proposition that discovery depositions may not be used at trial against the party who conducted them").

151. *See generally* McElhaney, *supra* note 129, at 43 ("An evidence deposition is completely different [than a discovery deposition]. Then you are not discovering anything but actually presenting part of your case before trial, typically with your own witness.").

evidentiary deposition that proceeds in the same manner as testimony at trial. The State of Illinois serves as a good example. The notice of deposition must specify whether the deposition is to be a discovery deposition or an evidentiary deposition.[152] If both are desired of the same witness, they must be taken separately.[153] The scope and manner of taking the two forms of deposition are not the same. A discovery deposition has the same broad scope contemplated for discovery under the Federal Rules of Civil Procedure.[154] An evidentiary deposition is more narrow in scope and "the examination and cross-examination shall be the same as though the deponent were testifying at the trial."[155] The uses at trial of the two forms of deposition also are quite different. A discovery deposition may be used for impeachment purposes in ways similar to that of Rule 32(a)(1),[156] while an evidentiary deposition may be introduced at trial as the testimony of an unavailable witness, physician or surgeon.[157] Therefore, evidentiary depositions most frequently are conducted with a party's own witness, while discovery depositions most frequently involve witnesses favorable to the opposing party.

By not preserving the distinction between discovery and evidentiary depositions, the Federal Rules may lead some to conclude that all depositions should be conducted like evidentiary depositions, the equivalent of trial testimony.[158] The no-consultation rule

152. ILL. S. CT. R. 202 (providing that notice of deposition must specify purpose, either evidentiary or discovery, for which deposition is taken).

153. *Id.*

154. ILL. S. CT. R. 206(c)(1) (providing that deponent "may be examined regarding any matter subject to discovery under these rules"). The Illinois Supreme Court Rules define the scope of discovery in similar language to the Federal Rules, extending it to "any matter relevant to the subject matter involved in the pending action." ILL. S. CT. R. 201(b)(1).

155. ILL. S. CT. R. 206(c)(2). Similar language in the Federal Rules has been relied upon by supporters of no-consultation rules. *See* FED. R. CIV. P. 30(c) ("Examination and cross-examination of witnesses may proceed as permitted at the trial under the provision of the Federal Rules of Evidence except Rules 103 and 615."). Nevertheless, the language is not the same. The Illinois Rule clearly states that the evidentiary deposition "shall be the same as . . . testifying at the trial." ILL. S. CT. R. 206(c)(2). Rule 30(c) instead refers to the basic evidentiary manner of proposing questions. FED. R. CIV. P. 30(c). It does not provide that depositions and trial testimony shall be the same.

156. ILL. S. CT. R. 212(a) (outlining "purposes for which discovery depositions maybe used"). For a discussion of the use under the Federal Rules of Civil Procedure of depositions for impeachment purposes, see *supra* notes 140-46 and accompanying text.

157. ILL. S. CT. R. 212(b) (outlining use of evidence depositions).

158. *See, e.g.*, REPORT OF COMMITTEE ON DEPOSITION PRACTICE, *supra* note 110, at 22 (reasoning that "[s]ince deposition testimony is often admissible at trial, the same rule [no communication between counsel and witness until conclusion of

has a place in evidentiary depositions, but not in discovery depositions.[159] As noted by the language of Rule 32(a)(3), the evidentiary use of depositions under the Federal Rules of Civil Procedure arises in "exceptional circumstances,"[160] and more narrow circumstances than the Illinois evidentiary deposition.[161] An analogue that only occurs in "exceptional circumstances" should not be a sufficient basis for intruding upon the attorney-client relationship by prohibiting off-the-record conferences. This is certainly the case in light of the legitimate,[162] if not mandated reasons for such conferences.[163] Perhaps the Federal Rules would be well served to reinstate the distinction between discovery and evidentiary depositions and establish different procedures for each similar to the approach taken by Illinois. This distinction would clarify when a deposition is intended to serve a testimonial function. In such circumstances, having deposition procedure mimic trial testimony makes perfect sense. Nevertheless, making discovery depositions follow trial procedure creates a contentious environment and is counter-productive to the primary function of discovery—fact finding.

VI. CAN THEY DO THIS?

Whether the no-consultation rule is a good idea, or whether it is based upon insufficient factual justification or erroneous premises is irrelevant if the rule is beyond the power of district courts to enact. Several of the formulations are troublesome in this regard because they cut sweeping paths through the constitutional guarantee of a right to representation, regulation of the profession, rules

testifying] should be applicable at depositions"); Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993) (holding that attorney-client conferences during deposition are not permitted, in part, because they are not permitted during witness' testimony at trial).

159. *See In re* Asbestos Litig., 492 A.2d 256, 257 (Del. Super. Ct. 1985) (finding no-consultation rule appropriate for depositions of plaintiffs who suffer from "life-consuming asbestos-related diseases" causing depositions to be evidentiary in nature).

160. *Id.*

161. *Compare* FED. R. CIV. P. 32(a)(3) (conditioning evidentiary use of depositions under Federal Rules upon unavailability of witness) *with* ILL. S. CT. R. 212(b) (allowing for deposition of physicians and surgeons to be used as evidence depositions regardless of availability of witness).

162. For a discussion of the "good" reasons for deposition conferences, such as correcting factual errors and providing support for the deponent in the face of a belligerent questioner, see *supra* notes 58-86 and accompanying text.

163. For a discussion of professional obligations requiring off-the-record attorney-client conferences when the client as deponent either purposefully or inadvertently provides inaccurate information during depositions, see *supra* notes 75-86, 90-97 and accompanying text.

of discovery and rules of evidence. This is neither a proper nor wise exercise of the local rulemaking authority of the district courts. Additionally, consideration of the issue is fraught with confusion because of the various possible sources and scopes of authority for district courts to enact local rules.

A. *Not If It's Inconsistent*

The scheme of local rulemaking contemplates district courts establishing procedures that "would be few in number and confined to purely housekeeping matters."[164] These rules, as established by statutory authority, are to be "consistent with Acts of Congress and the rules of practice and procedure prescribed under section 2072 of this title,"[165] and pursuant to delegation from the Supreme Court in Rule 83, are not to be "inconsistent" with the Federal Rules of Civil Procedure.[166] Nevertheless, courts have enacted a great number of rules that cover a myriad of topics and that frequently violate the mandate of avoiding inconsistency.[167] This may be due in part to the concept of "inconsistency" remaining elusive and ill-defined.[168]

The Supreme Court twice has examined local rules against the standard of "inconsistency." The results unfortunately do not provide much guidance. A local rule providing for discovery depositions in admiralty actions was struck down as inconsistent with the General Admiralty Rules, which at that time governed procedure in admiralty actions and did not provide for discovery depositions.[169] The local rule was deemed a "basic procedural innovation" better left to the rulemaking powers of the Supreme Court.[170] Thirteen years later, a local rule reducing the number of jurors from twelve to six was held not to amount to a "basic procedural innovation"

164. WRIGHT, *supra* note 19, § 6, at 431.

165. 28 U.S.C. § 2071(a) (1994) (providing for rule-making power of federal courts).

166. FED. R. CIV. P. 83 (providing that "[e]ach district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice provided that such rules are not . . . in any manner inconsistent with the Federal Rules of Civil Procedure").

167. *See* REPORT OF LOCAL RULES PROJECT, *supra* note 15 (identifying local rules throughout the country that are in conflict with provisions of Federal Rules).

168. *See* David M. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537, 539-40 n.8 (1985) (discussing failure of Supreme Court to provide useful definition of inconsistency).

169. Miner v. Atlas, 363 U.S. 641, 647 (1960).

170. *Id.* at 650.

because the rule "plainly does not bear on the outcome of the litigation."[171] Taken together, the two cases do not provide much guidance for evaluating inconsistency.[172]

In its most common formulations, the no-consultation rule touches on areas governed by the Federal Rules of Civil Procedure, but is not directly inconsistent with the language of any provision.[173] Rule 30(c) provides, most notably, for the manner in which examination of witnesses should proceed at deposition and how objections should be made.[174] The no-consultation rule arguably addresses the topic of examination of witnesses, but it is not directly inconsistent with the language or intent of Rule 30(c). Similarly, Rule 30(d)(3) provides a mechanism for obtaining relief when a deposition is being conducted "in bad faith," addressing conduct that the no-consultation rule seeks to preemptively control.[175] Here the no-consultation rule does not conflict with the Federal Rule, rather it supplements it. There are other examples, but a further explication seems unnecessary as the Federal Rules governing discovery clearly contemplate supplementing local rules[176] and specifically provide for alteration to the scheme of dis-

171. Colgrove v. Battin, 413 U.S. 149, 163-64 n.23 (1973).

172. *See* Roberts, *supra* note 168, at 539 n.8 (noting that *Miner* and *Colgrove* "provide no useful standards for distinguishing the changes that are basic from those that are not"). Decisions of the lower courts invalidating and upholding local rules support that assessment.

The nature of many local rules, involving minor matters that do not directly affect the ultimate outcome of a case, is such that cause them seldom to be subject of appellate review. *See id.* at 546-47. Therefore, the guidance from case law is sparse and "inconsistent" and hence invalid rules remain "on the books." WRIGHT, *supra* note 19, § 63, at 432.

173. *See* Whitehouse v. United States Dist. Court, 53 F.3d 1349 (1st Cir. 1995). In upholding the local rule requiring federal prosecutors to obtain judicial approval before serving subpoenas on attorneys, the United States Court of Appeals for the First Circuit stated that the "proper method for determining whether a local rule is inconsistent with a federal rule of procedure is to inquire, first whether the two rules are textually inconsistent and, second, whether the local rule subverts the overall purpose of the federal rule." *Id.* at 1363 (citation omitted).

174. FED. R. CIV. P. 30(c). For a further discussion of Rule 30(c), see *supra* note 123 and accompanying text.

175. FED. R. CIV. P. 30(d)(3) (providing for order to be entered that ceases or limits "the taking of a deposition in terms of scope and manner when it has been shown that the examination is being conducted in bad faith or other unreasonable manner").

176. *See, e.g.*, FED. R. CIV. P. 30(d)(2) (providing that local rules may impose limits on "the time permitted for the conduct of a deposition"); *see also* FED. R. CIV. P. 30(d) (Advisory Committee Notes to 1993 Amendment) (discussing amendments to paragraphs (2) and (3) that clarify power of district courts to enact local rules that place limits on length of depositions and that provide for requests for additional time to complete deposition).

covery by local rule.[177] Additionally, none of the possible inconsistencies could be said to subvert the functioning of any rule that would amount to a "basic procedural innovation" that would "bear on the outcome of litigation."[178] Nevertheless, the most far-reaching formulations of the no-consultation rule are invalid because they contain direct inconsistencies with basic notions of the attorney-client privilege and the scope of discovery.[179]

B. *Rewriting the Attorney-Client Privilege—Talk About Inconsistency!*

Not all of the formulations of the no-consultation rule avoid inconsistency. The two most far-reaching approaches, that of the Northern District of Illinois and the *Hall Rule*, contain provisions that limit the extent of the attorney-client privilege and extend the scope of discovery.[180] Each provision is born out of an extreme mistrust of the ability of attorneys to conduct themselves within the boundaries of ethical behavior. Thus, each strips away the attorney-client privilege or any other applicable privilege from off-the-record conferences in order to determine whether improper witness-coaching took place.[181]

The Northern District of Illinois proposal contains the standard exception from the no-consultation rule for conferences held to determine whether to assert a privilege.[182] Being mistrustful of whether any communication for this allowed purpose will be so lim-

177. *See, e.g.*, FED. R. CIV. P. 26(a)(1) (providing for exception by local rule from mandatory disclosure); FED. R. CIV. P. 26(d) (providing for local rule to alter timing and sequence provisions of Rule 26(f)); FED. R. CIV. P. 26(b)(2) (providing that district courts by local rule may "alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36"); *see also* FED. R. CIV. P. 26(b) (Advisory Committee Notes on 1993 Amendment) (discussing one of purposes of amendment is to "dispel any doubt as to the power of the court [by local rule] to impose limitations on the length of depositions under Rule 30 or on the number of requests for admission under Rule 36").

178. For a discussion of what amounts to a "basic procedural innovation," see text accompanying *supra* note 171.

179. For a discussion of the formulation of the no-consultation rule that alters the attorney-client privilege, see *supra* notes 53-56 and accompanying text.

180. *See* N. DIST. OF ILLINOIS, PROPOSED RULE 5.23(C), *supra* note 23 (providing for disclosure of attorney-client consultations regardless of existing privilege); *Hall Rule*, *supra* note 22, at 532, ¶ 6 (making attorney-client conferences "a proper subject of inquiry by deposing counsel").

181. *Cf.* DIST. OF COLORADO, RULE 30.1C, *supra* note 22 (providing for inquiry by opposing counsel into content of any off-the-record conference "to the extent it is not privileged").

182. *See* N. DIST. OF ILLINOIS, PROPOSED RULE 5.23(B), *supra* note 23 (providing that "counsel for the deponent may confer with the deponent off-the-record only for the purpose of deciding whether to assert a privilege").

ited, the proposal provides for inquiry of the deponent as to whether any communication took place that violated the rule and requires the deponent "to disclose the content of the communication regardless of whether such communication would otherwise have been protected by the attorney-client or any other privilege."[183] The *Hall Rule* similarly provides that any attorney-client conferences held during the deposition "are a proper subject of inquiry by deposing counsel to ascertain whether there has been any witness-coaching and, if so, what."[184] Under the *Hall Rule*, the intrusion into the attorney-client relationship is more far-reaching because it prohibits conferences during recesses as well as during the actual taking of testimony.[185]

If challenged, these provisions should be held invalid because they are inconsistent with the Federal Rules of Civil Procedure, the Federal Rules of Evidence and the common law of privileges. The scope of discovery under the Federal Rules of Civil Procedure extends to "any matter, not privileged, which is relevant to the subject matter."[186] Both no-consultation provisions provide for discovery concerning attorney-client communications that otherwise would be subject to a claim of privilege.[187] Alternatively, the provisions might be viewed as not expanding the scope of discovery but rather

183. *See* N. DIST. OF ILLINOIS, PROPOSED RULE 5.23(C), *supra* note 23.

184. *See Hall Rule, supra* note 22, at 532 (making attorney-client conferences "a proper subject of inquiry"). This characterization of attorney-client conferences is somewhat ambiguous in terms of the applicability of the attorney-client privilege. The opinion, however, removes any ambiguity as to whether the allowed inquiry into attorney-client conferences is limited by applicable privilege. Hall v. Clifton Precision, 150 F.R.D. 525, 529 n.7 (E.D. Pa. 1993) (stating that "these conferences are not covered by the attorney-client privilege").

185. *Id.* The proposal of the United States District Court for the Northern District of Illinois exempts recesses from the scope of its no-consultation rule. *See* N. DIST. OF ILLINOIS, PROPOSED RULE 5.23(C), *supra* note 23. Presumably, the provided inquiry that pierces the attorney-client privilege would not extend to conferences during recesses for they would not violate the proposed rule.

186. FED. R. CIV. P. 26(b)(2). For a further discussion of the scope of discovery and Rule 26(b)(1), see *supra* note 127 and accompanying text.

187. *See, e.g.*, Geders v. United States, 425 U.S. 80, 89-90 (1976) (discussing ways to deal with witness coaching other than prohibiting attorney-client conferences during overnight recesses, and stating that "[a] prosecutor may cross-examine a defendant as to the extent of any 'coaching' during a recess, subject, of course, to the control of the court," and that record could be used in closing argument to challenge credibility of witness); Christy v. Pennsylvania Turnpike Comm'n, 160 F.R.D. 51, 54 (E.D. Pa. 1995) (finding that deposition questions asking whether anyone had instructed deponent how to answer questions sought information protected by attorney-client privilege); *In re* Asbestos Litig., 492 A.2d 256, 258-59 (Del. Super. Ct. 1985) (discussing that "questions directed to the deponent subsequent to any attorney-client consultation during deposition testimony must reflect a balance between the interest of preventing coaching and the interest of the attorney-client privilege," and suggesting questions that accommodate bal-

as redefining or creating an exception to the attorney-client privilege. So viewed, the provisions would be in conflict with the Federal Rules of Evidence, which leave the law of privileges to that existing and to be developed by common law.[188] These no-consultation provisions take the development of the attorney-client privilege from the common law and make it the subject of local rulemaking. In actions in which state law supplies the rule of decision, the Federal Rules of Evidence provide for state privilege law to control.[189] These privilege-altering formulations of the no-consultation rule would then either be inapplicable in diversity cases or be in conflict with the Federal Rules of Evidence and, perhaps in conflict with, basic notions of federalism.[190] Even in the effort to reign in Rambo, local rulemaking should not be cutting such a wide path through the landscape of evidence and civil procedure.[191]

C. *Why Worry About Consistency?—Local Rulemaking Pursuant to The Civil Justice Reform Act of 1990*

Rule 83 of the Federal Rules of Civil Procedure mandates local rule consistency with existing rules of procedure and acts of Con-

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ance by inquiring whether coaching took place, but not inquiring as to what was said between attorney and client).

188. FED. R. EVID. 501. Rule 501 provides:

> Except as otherwise provided by the Constitution of the United States or provided by Acts of Congress or in the rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience.

Id.

189. *Id.* (providing that where "state law supplies the rule of decision, the privilege of witness, person, government, state, or political subdivision thereof shall be determined in accordance with state law").

190. In enacting Rule 501 and deferring to state privilege law, Congress rejected a proposed version of the rule which required that federal privilege law would control in all cases, including diversity actions. The proposal was rejected by Congress in favor of deference to state privilege law in order to accommodate principles of comity, the *Erie* doctrine and discourage forum shopping. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 5.4, at 339-41 (1995).

191. It does not appear that either Judge Gawthrop in Hall v. Clifton Precision Systems, 150 F.R.D. 525 (E.D. Pa. 1993), or the Northern District of Illinois contemplated this consequence. No mention of it is made in the *Hall* opinion. *The Report of the Committee on Deposition Practice,* however, does mention the issue as a question to be considered but never actually engages in the contemplated consideration. REPORT OF COMMITTEE ON DEPOSITION PRACTICE, *supra* note 110, at 21. Perhaps this serves as fine example of the basis of much of the criticism of local rulemaking as being adopted without the careful consideration that is attendant to the Federal Rules. For a discussion of how the rule represents much of what critics of local rulemaking have decried, see *supra* note 19.

gress.[192] Although the two privilege-altering versions of the no-consultation rule violate the mandate of consistency, neither formulation claims Rule 83 as its source of authority. The proposal of the Northern District of Illinois came about as a result of its Delay and Expense Reduction Plan developed pursuant to the Civil Justice Reform Act of 1990 (CJRA).[193] Commentators have disagreed whether the CJRA authorizes the adoption of inconsistent local rules that are not shackled with the mandate of consistency of Rule 83.[194] Therefore, the proposal's inconsistency with existing law of privilege might not cause invalidation.[195] Nevertheless, the district courts should not be rewriting the law of evidence in a hastily conceived effort to curb Rambo-esque tactics. The danger of allowing a district court to rewrite the law of evidence is well-illustrated in the Northern District of Illinois.[196] After acknowledging that its rule could take several forms, the *Report of the Committee on Deposition Practice* states that a consensus was arrived at that "*some* rule should be enacted" and a citation is given that "in most matters

192. For a discussion of Rule 83, see *supra* note 166 and accompanying text.

193. 28 U.S.C. § 471 (1994) [hereinafter CJRA] (requiring each district court to implement "a civil justice expense and delay reduction plan"). In formulating a plan a district court "shall consider and may include . . . litigation management and cost and delay reduction [techniques]" that address certain enumerated areas including "such other features as the district court considers appropriate." 28 U.S.C. § 473(a), (b)(6) (1994).

The plan of the Northern District of Illinois set out to develop guidelines for depositions as a litigation management technique. *See* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, CJRA DELAY & EXPENSE REDUCTION PLAN 17 (Nov. 15, 1993) (authorizing Chief Judge "to form a committee of attorneys . . . to develop a set of guidelines for use by attorneys in the conduct of depositions").

194. *See, e.g.*, Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1994) (arguing that CJRA neither compels nor authorizes local rules that are inconsistent with Federal Rules of Civil Procedure or other statutory law); *see also* Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992) (arguing that CJRA authorizes wholesale rulemaking that may alter existing rules of procedure or statutory law); Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and the Separation of Powers*, 77 MINN. L. REV. 1283, 1289-95 (1992) (arguing wholesale rulemaking authorized by CJRA violates basic notions of separation of powers); Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992) (analyzing CJRA as exacerbation of recent trends toward balkanization of procedure by means of non-uniform and inconsistent local rules).

195. *But see* Friends of the Earth, Inc. v. Chevron Chem. Co., No. 94-CIV-580, 1995 U.S. Dist. LEXIS 6481 (E.D. Tex. Sept. 1, 1995) (holding that local rulemaking pursuant to CJRA may extend beyond the boundaries of consistency of Rule 83, but nevertheless refusing to enforce offer of judgment provision because it would frustrate purpose of Federal Water Pollution Control Act).

196. *See* WRIGHT, *supra* note 19, § 63A, at 435-39 (criticizing local rulemaking under CJRA as allowing "amateur and ill-equipped advisory groups" to pose a "[great] threat" to the integrity of the Federal Rules).

it is more important that the applicable law be settled than that it be settled right."[197] The law of evidence and the basic nature of the attorney-client privilege should not be altered out of a desire to do something, though the drafters are not entirely sure what.

D. *Local Rulemaking as a Control of Pre-Trial Procedure—The Suspect Rule of* Hall v. Clifton.

The adoption of local rules pursuant to Rule 83 or the CJRA has been much criticized as threatening the integrity of the Federal Rules, in part because local rulemaking does not include the careful deliberation that is involved in the adoption of the Federal Rules.[198] Nevertheless, each involves some form of consideration by a deliberative body as well as an opportunity for notice and public comment.[199] The *Hall Rule* poses an even greater threat. It is the most far-reaching of the no-consultation rules.[200] By extending the prohibition into all recesses it most likely violates constitutional guarantees of a right to representation.[201] It also creates conflicts with existing law by removing the attorney-client privilege from communications during recesses.[202] Nevertheless, it is simply a pretrial order entered by one judge in one case addressing issues not raised by either party that has transformed itself into controlling case law that trumps local rulemaking.[203]

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197. REPORT OF COMMITTEE ON DEPOSITION PRACTICE, *supra* note 110, at 26 (citing Burnet v. Colorado Oil & Gas Co., 285 U.S. 393, 406 (1932)).

198. *See* WRIGHT, *supra* note 19, § 62, at 431-32 (criticizing local rulemaking, in part, for "casual manner" in which they are adopted).

199. *See* 28 U.S.C. § 472 (1994) (providing for advisory group from each district to submit report containing, in part, assessment of needed reforms to be included in district's expense and delay reduction plan and providing for opportunity for public notice of report); 28 U.S.C. § 474 (1994) (providing for review of each plan by committee comprised of chief judge of district court and chief judge of circuit court); FED. R. CIV. P. 83 (requiring action by majority of judges of district to enact local rules and providing for public notice and comment prior to rule or rules taking effect).

200. For a discussion of the reach of the *Hall Rule* as compared to other no-consultation rules, see *supra* notes 40 and 180 and accompanying text.

201. For a discussion of no-consultation rules as violating the constitutional right to representation, see *infra* notes 217-37 and accompanying text.

202. For a discussion of how removing the attorney-client privilege from recess discussion during depositions creates conflict with existing law, see *supra* notes 184-85 and accompanying text.

203. *See* REPORT OF COMMITTEE ON DEPOSITION PRACTICE, *supra* note 110, at 27 n.20 (discussing that if recent decision in Northern District of Illinois by Judge Castillo in Chapsky v. Baxter, No. 93-C6524, 1994 U.S. Dist. LEXIS 9099 (N.D. Ill. July 5, 1994), which cited *Hall*, had intended to adopt it as controlling case law, then no-consultation rule being proposed by Committee would be inconsistent with controlling case law and could not be adopted by Northern District).

Judge Gawthrop entered the order that was to become the *Hall Rule* after being contacted by counsel about opposing counsel seeking to confer with his client on two occasions during the deposition.[204] Apparently, neither party had filed a motion seeking relief from abusive or evasive discovery tactics.[205] The court held a conference with counsel[206] and entered a pretrial order governing the conduct of depositions in the instant action.[207] The court stated that the grant of power over pre-trial case management in the Federal Rules was sufficient authority to enter its far sweeping no-consultation order.[208] What is troublesome is that the order amounts to a form of back door rulemaking.[209] It addresses matters not raised by the parties and that were not before the court. The troublesome recess and the attorney-client privilege issues were not even presented by the facts of the case.[210] The order would have been an appropriate limitation of "the scope and manner" of taking a deposition in response to bad faith conduct that was actually occurring.[211] Nevertheless, Judge Gawthrop turned the case into an opportunity to implement controls on deposition conduct broadly as a matter of controlling case law.[212]

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204. Hall v. Clifton Precision, 150 F.R.D. 525, 526 (E.D. Pa. 1993).

205. *Id.* at 527 n.1.

206. *Id.* at 526.

207. *See id.* at 531 (referring to order as "guidelines for conduct of depositions of parties and other witnesses represented by counsel in this case").

208. *See id.* at 527 ("Taken together, Rules 26(f), 30, and 37(a), along with Rule 16, which gives the court control over pre-trial case management, vest the court with broad authority and discretion to control discovery, including the conduct of depositions. It is pursuant to that authority and discretion that I enter this Opinion and Order.").

209. *See* FED R. CIV. P. 83. Rule 83 does provide for individual judges to "regulate their practice in any manner not inconsistent with these rules or those of the district in which they act." *Id.* Nevertheless, the *Hall Rule* was not adopted as a standing order or a "practice." For discussion of the problems caused by practices adopted by individual judges, see Myron J. Bromberg & Jonathan M. Korn, *Individual Judges' Practices: An Inadvertent Subversion of the Federal Rules of Civil Procedure*, 68 ST. JOHN'S L. REV. 1 (1994).

210. *See Hall*, 150 F.R.D. at 526. The parties contacted the court about a question concerning the right to consult after two interruptions in the deposition occurred. *Id.* The question of consultation during recesses or the applicability of the attorney-client privilege were not raised by the situation. *Id.*

211. *See* FED. R. CIV. P. 30(d)(3); *see also* 4A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 30.16, at 30-145 (1994) (discussing in context of regulation of deposition conduct pursuant to Rule 30(d) "that the courts will generally refuse to prohibit or limit the scope of an examination before it has commenced, but will require the objecting party to defer his objection until the examination is under way, at which time the validity of the objections can usually be better determined").

212. In fact, *Hall* has been followed by a number of courts. *See* Chapsky v. Mueller, No. 93-C6524, 1994 U.S. Dist. LEXIS 9099, at *4 (N.D. Ill. July 6, 1994)

This sort of back door rulemaking is antithetical to recent changes to statutes and rules intended to improve the local rulemaking process by providing for notice and comment on proposed rules as well as establishing advisory committees to study and make recommendations about local rules.[213] The *Hall Rule* represents one judge's opinion of how depositions should be conducted and seeks to have that view followed as established case law.[214] The danger of such "rulemaking" by judicial fiat is apparent from the problems with the *Hall Rule* concerning right to representation and privilege, reflecting that the order simply was poorly reasoned.[215]

(citing *Hall* for proposition that deponent and attorney cannot hold private conference unless purpose is to decide whether to assert privilege); Johnson v. Wayne Manor Apts., 152 F.R.D. 56, 57 (E.D. Pa. 1993) (same); Christy v. Pennsylvania Turnpike Comm'n, 160 F.R.D. 51, 53 (E.D. Pa. 1995) (noting *Hall* does not support argument not allowing counsel to properly prepare witness for deposition but apparently citing *Hall* for proposition that attorney should not confer with client during deposition); Van Pilsum v. Iowa State Univ. of Science & Technology, 152 F.R.D. 179, 180 (S.D. Iowa 1993) (citing *Hall* for proposition that lawyers should not interrupt questions at depositions in attempt to reformulate witnesses' testimony). The Committee on Deposition Practice of the Northern District of Illinois cited *Hall* as the "key argument in favor of prohibiting deponent-attorney communications." REPORT OF COMMITTEE ON DEPOSITION PRACTICE, *supra* note 110, at 21.

213. *See* 28 U.S.C. § 2071(b) (1994) (providing for "appropriate public notice and an opportunity for comment" as part of rulemaking procedure); 28 U.S.C. § 2077(b) (1994) (providing for each district court to appoint an advisory council to study local rules); FED. R. CIV. P. 83 (providing for "appropriate public notice and an opportunity to comment" as part of rulemaking procedure).

214. *See Hall*, 150 F.R.D. at 526. Eighteen months after entering the pre-trial order in *Hall*, Judge Gawthrop referred to the order as a "holding" that would be followed if it were not for a retro-activity problem, making the order sound as if it were a rule or statute. Langer v. Presbyterian Med. Ctr., No. 91-CIV-1814, 1995 U.S. Dist. LEXIS 2199, at 28 (E.D. Pa. July 3, 1995).

215. The court referred to "orders from numerous courts holding such conversations are not allowed." *Hall*, 150 F.R.D. at 527 n.2. The orders cited, however, address different situations than that presented in *Hall* and do not extend as far as the *Hall* rule. *See, e.g., In re* Branniff, Inc., Nos. 89-03325-BKC-6C1, 92-911, 1992 WL 261641, at *14 (Bankr. M.D. Fla. Oct. 2, 1992) (entering order establishing deposition guidelines including prohibition on conferences "during the actual taking of the deposition" but not extending that prohibition into recesses as did *Hall*); *In re* Domestic Air Transp. Antitrust Litig., No. 90-CIV-2485, 1990 WL 358009, at *9 (N.D. Ga. Dec. 21, 1990) (entering order prohibiting conferences "during the actual taking of the deposition" but allowing conferences "during recesses or adjournments"); *In re* San Juan DuPont Plaza Hotel Fire Litig., No. MDL 721, 1989 WL 168401, at *38 (D.P.R. Dec. 2, 1988) (entering order establishing deposition guidelines including prohibition on conferences "during the conduct of the deposition" but not extending that prohibition into recesses as did *Hall*). Indeed, Judge Gawthrop conceded in *Hall* that the issue was one about which "there is not a lot of caselaw." *Hall*, 150 F.R.D. at 525. Nevertheless, 18 months later he referred to his opinion in *Hall* as based upon caselaw that was "well-established." *Langer*, 1995 U.S. Dist. LEXIS 2199, at *28 n.4. For a discussion of the court's misreading of the status of current case law concerning the extent to which courts may prohibit attorney-client contact during recesses, see *infra* note 224 and accompanying text.

Nevertheless, it has become controlling case law that has been cited with approval and, ironically, has been considered to invalidate properly proposed local rules that do not seek to reach as far.[216]

VII. CAN THEY REALLY (CONSTITUTIONALLY) DO THIS?

The question of whether a witness has a constitutional right to confer with counsel while giving testimony has led a checkered existence. In the context of attorney-client conferences during the testimony of a criminal defendant, the Court has drawn "a line of constitutional dimension" between conferences occurring during fifteen minute recesses and those occurring during overnight breaks.[217] The Sixth Amendment apparently guarantees only the right to engage in overnight consultation,[218] but not during brief recesses.[219] The basis for the distinction is that a witness has no constitutional right to consult with counsel about present testimony, but during overnight recesses the consultation between attorney and client could extend to matters beyond the content of the witness's testimony.[220] Nevertheless, the Court took great pain to explain it was not basing the distinction on "an assumption that trial counsel will engage in unethical 'coaching.' "[221]

The applicability of the right to confer during depositions in civil actions is unclear. Though courts have extended the right to confer to civil litigants during trial recesses,[222] an extension to dep-

216. For a discussion of how a decision adopting *Hall* was considered to invalidate a proposed local rule to the extent there was an inconsistency, see *supra* note 203 and accompanying text.

217. *See* Perry v. Leeke, 488 U.S. 272, 280-85 (1989) (holding that Sixth Amendment does not require allowing criminal defendant to confer with counsel during 15-minute recess occurring during his testimony).

218. *See* Geders v. United States, 425 U.S. 80 (1976) (holding trial judge's order that criminal defendant may not confer with his attorney during overnight recess to be violative of Sixth Amendment).

219. *See Perry*, 488 U.S. at 284-85 (holding "Federal Constitution does not compel every trial judge to allow the defendant to consult with his lawyer while his testimony is in progress if the judge decides that there is a good reason to interrupt the trial for a few minutes").

220. *Id.* at 281, 284.

221. *Id.* at 281. *But see id.* at 292 n.5 (Marshall, J., dissenting) (asserting that holding of majority is "motivated, at least in part, by underlying suspicion that defense attorneys will fail to 'respect the difference between assistance and improper influence' " (citation omitted)).

222. *See* Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1118 (5th Cir.) (holding that civil litigants have Fifth Amendment right to consult with counsel that is same as criminal defendant's Sixth Amendment right as defined in *Geders*), *cert. denied*, 449 U.S. 820 (1980); *see also* Cartin v. Continental Homes, 360 A.2d 96, 98 (Vt. 1976) (holding "in line with the concurring opinion in *Geders*, that there is at least abuse of discretion, if not constitutional infirmity, in *any* order barring

ositions has not been well received.[223] Those decisions are troublesome for two reasons. First, they contain little reasoning or citation to authority.[224] Second, they primarily rely on the premise that attorneys will engage in unethical witness coaching if given the opportunity.[225] This rationale for a no-conference rule was explicitly rejected by the Court in the criminal law context.[226]

Assuming the right to confer as established in civil trials in *Geders v. United States*[227] and *Perry v. Leeke*[228] is applicable to depositions, there is no constitutional infirmity with those formulations of the no-consultation rule that prohibit conferences while a question is pending.[229] The right to confer does not provide for interruption of testimony to confer with counsel.[230] Similarly, those formu-

communication between a party and his attorney"); *cf.* Opinion No. 200 of the Mississippi Bar (June 12, 1992) (finding it "ethically permissible for an attorney to speak to his client in a civil lawsuit concerning the client's testimony during a court recess as long as the attorney does not counsel or assist the client to testify falsely"). *But see* Stocker Hinge Mfg. Co. v. Darnel Indus., Inc., 377 N.E.2d 1125, 1133 (Ill. App. Ct. 1978) (refusing to apply *Geders* to civil actions because "the right of a party to counsel in a civil case is quite divergent from the right of defendant in a criminal prosecution").

223. *See* Hall v. Clifton Precision, 150 F.R.D. 525, 528-29 (E.D. Pa. 1993) (holding deponent's "right to counsel and to due process" does extend past the point that witness "has taken the stand"); *In re* Asbestos Litig., 492 A.2d 256 (Del. Super. Ct. 1985) (holding that order prohibiting attorney-client consultations during deposition does not violate right to counsel); *see also* REPORT OF COMMITTEE ON DEPOSITION PRACTICE, *supra* note 110, at 27 n.28 (stating that proposed no consultation rule "poses no constitutional problems").

224. The *Hall* holding is without cited authority and seems to be based on the false belief that the right to consult with counsel during recess in criminal actions had not been extended to testimony in a civil action and ignoring the holding in *Potashnick*. *Potashnick*, 609 F.2d at 1101. The Committee on Deposition Practice of the Northern District of Illinois noted that its proposed no-consultation rule "could raise constitutional questions," cited applicable authority, both pro and con, but concluded without any explanation other than a reference to the conflicting caselaw that there were "no constitutional problems". *See* REPORT OF COMMITTEE ON DEPOSITION PRACTICE, *supra* note 110, at 25 n.25, 27 n.28.

225. *See Hall*, 150 F.R.D. at 528-29 (justifying imposition of no-consultation rule in order to prevent purposeful witness coaching); *Asbestos Litig.*, 492 A.2d at 259 (holding that order prohibiting attorney-client consultations during deposition is necessary to prevent witness coaching); *see also* N. DIST. OF ILLINOIS, PROPOSED RULE 5.23(B), *supra* note 23 (stating purpose of proposed rule is "to prevent counsel for deponent from improperly suggesting answers or the content of testimony to a witness").

226. For a discussion of the Court's rejection for this rationale, see text accompanying *supra* note 220.

227. 425 U.S. 80 (1976).

228. 488 U.S. 272 (1989).

229. For a discussion of the various forms of the no-consultation rules that apply to pending questions, see *supra* note 38 and accompanying text. It is the interruption of testimony that provides the greatest opportunity for improper witness-coaching.

230. *See* Perry v. Leeke, 488 U.S. 272, 284 (1989) ("[W]e do not believe the

lations that apply to short recesses[231] would also pass constitutional scrutiny.[232] Only the formulations that prohibit conferences occurring during overnight recesses,[233] where matters other than the deponent's testimony are discussed, would infringe upon the client's right to counsel.[234] Nevertheless, although various formulations of the no-consultation rule are constitutionally permissible, that does not mean the rule must or should always be imposed.[235] The Court, in *Perry v. Leeke* clearly contemplated that consultations could be allowed during brief recesses in some situations.[236] In light of the various "good" reasons for attorney-client conferences during deposition, such conferences should be permitted.[237]

VIII. A SAD SURRENDER

In many respects, the no-consultation rule "throws in the towel" on finding the best mechanism for regulating attorney conduct. Regulation of the profession through codes of conduct apparently was deemed ineffectual to control abusive attorney conduct during discovery.[238] Thereafter, a scheme of judicial man-

defendant has a constitutional right to discuss that testimony while it is in process."); *see also id.* at 287 (Marshall, J., dissenting) (stating that idea that there is no constitutional right to interrupt witness's testimony to confer with counsel is "truism").

231. For a discussion of no-consultation rules that prohibit conferences during short recesses, see *supra* notes 40-41 and accompanying text.

232. *See Perry*, 488 U.S. at 284 (noting "in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice").

233. For a discussion of no-consultation rules that would prohibit attorney-client conferences during overnight recesses, see *supra* notes 40-41 and accompanying text.

234. For a discussion that the Sixth Amendment guarantees the right to attorney-client consultation during overnight recesses, see *supra* note 218 and accompanying text.

235. *See Perry*, 488 U.S. at 284.

> Our conclusion does not mean that trial judges must forbid consultation between a defendant and his counsel during . . . brief recesses. As a matter of discretion in individual cases, or of practice for individual trial judges, or indeed, as a matter of law in some States, it may well be appropriate to permit such consultation.

Id.

236. *Id.*

237. For a discussion of the "good," benign, helpful and professionally mandated reasons for attorney-client conference during deposition, see *supra* notes 58-86 and accompanying text.

238. *See, e.g.*, Edward J. Imwinkelried, *A New Antidote for an Opponent's Pretrial Discovery Misconduct: Treating the Misconduct at Trial as an Admission by Conduct of the Weakness of the Opponent's Case*, 1993 B.Y.U. L. REV. 793, 795. Imwinkelried notes that:

> Partly in response to the perceived failure of the bar disciplinary system,

agement and control as well as sanctions for improper conduct was developed to address improper attorney conduct during discovery.[239] Despite these strengthened mechanisms, concerns with the conduct of lawyers persisted.[240] In what could be viewed as coming full circle, the last decade has witnessed a proliferation of "civility codes" aimed at the state of professionalism in general and addressing discovery abuses specifically.[241]

The no-consultation rule represents the next step. It is clearly unethical behavior to coach one's witness as to what to say.[242] It is also an act of "bad faith" that is sanctionable under the rules of discovery.[243] Yet, instead of drawing a line between permissible and impermissible conduct, the no-consultation rule fires a preemptive strike against the opportunity for abusive conduct before it can occur.[244] It is a sad, simple surrender to the belief that attorneys will

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> Federal Rules of Civil Procedure 11, 16, and 26 were amended in 1983. The thrust of the amendments was to toughen the enforcement of discovery obligations. In particular, the amendments were intended to encourage judges to punish discovery misconduct by imposing sanctions more aggressively.

Id.

239. *See* FED. R. CIV. P. 30(d)(3) (providing for party confronted with abuses during depositions to seek relief in form of limitations on "scope and manner of the taking of the deposition" as well as seeking monetary sanctions).

240. *See* Imwinkelried, *supra* note 238, at 795 ("It was hoped that the sanctions 'movement' would discourage obstructionism. Although the movement was promising, it now appears doubtful that sanctions alone will provide an adequate solution to the problem of discovery misconduct.").

241. It is interesting that at the same time that the no-consultation rule and its preemptive approach to controlling attorney conduct has become embraced by district courts, "codes" of "professional conduct" have been adopted by courts as well. *See, e.g.*, STANDARDS FOR PROFESSIONAL CONDUCT WITHIN THE SEVENTH FEDERAL JUDICIAL CIRCUIT (1994) (setting forth enumerated duties owed by lawyers and courts in order to ensure conduct evincing "personal courtesy and professional conduct"). Perhaps the profession has not entirely given up on the ability of attorneys to conform their conduct to ethical norms, obviating the need for the preemptive approach to the control of attorney conduct of the no consultation rule. *See also* Brent E. Dickson & Julia Bunton Jackson, *Renewing Lawyer Civility*, 28 VAL. U. L. REV. 531, 538 n.49 (1994) (noting that in last decade civility codes have been enacted in 24 different states); Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 684 (1994) (discussing civility codes and noting that "lawyer regulation may be evolving backwards"); Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a) — "Much Ado About Nothing?"*, 46 HASTINGS L.J. 679, 785 (1995) (discussing civility codes as redundant mechanism to control discovery abuse).

242. For a discussion of ethical restraints on witness coaching, see *supra* note 88 and accompanying text.

243. *See* FED. R. CIV. P. 30(d)(3) (providing that, on motion of party at any time during deposition that examination is being conducted in bad faith, the court may limit scope and manner of taking of deposition and provides for award of expenses in relation to motion).

244. *See* Perry v. Leeke, 488 U.S. 272, 284 n.8 (1989) (discussing as alternative

engage in unethical conduct if given the opportunity.[245] This mistrust is fueled by the fact that "off-the-record" conferences indeed are "off-the-record." Though there are desirable, permissible and even professionally mandated reasons to engage in attorney-client conferences, the no-consultation rule exists because its proponents do not trust that what takes place when no one is watching is within the bounds of allowable professional conduct. This point is driven home by the deliberations in the Northern District of Illinois where the problem of potential inability to enforce a no-consultation rule astonishingly focused on not being able to be sure of what an attorney and client will discuss while in the bathroom.[246]

There must be a better way. Must the profession worry about not being able to enforce or control what attorneys will say to their clients while in the bathroom? The Northern District of Illinois answered the question with a resounding YES! The no-consultation rule was embraced, while the attorney-client privilege was stripped away from bathroom conversations during depositions in order that opposing counsel may check up on whether the subject matter of the conversation was proper.[247] It is a dangerous, downward path for the profession to take. If mistrust of attorney conduct and adherence to ethical norms is to be the rationale for rules of practice, the adversary system will have to be scrapped.[248] Almost every as-

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to prohibition on attorney-client conferences that "the judge may permit consultation between counsel and defendant during such a recess, but forbid discussion of ongoing testimony").

245. For a discussion of the premise underlying the no-consultation rule that conferences are used by attorneys to subvert the discovery process, see *supra* notes 98-99 and accompanying text.

246. *See* REPORT OF COMMITTEE ON DEPOSITION PRACTICE, *supra* note 110, at 24-25. The Report stated:

> Enforceability is another consideration. One purpose of rules is to let honest, conscientious lawyers know what is permissible and what is impermissible conduct in the promotion of their clients' interests. A related purpose is to control the conduct of less scrupulous lawyers, but that purpose is served only if the rule is enforceable. Rules governing the conduct of attorneys and witnesses in the presence of opposing counsel and while proceedings are being transcribed or otherwise recorded can be enforced because opposing counsel know of, and there is a record of, any questionable conduct. That is not true of rules that purport to govern conduct of a deponent and the deponent's lawyer at a bathroom or overnight recess in a deposition.

Id.

247. *See* N. DIST. OF ILLINOIS, PROPOSED RULE 5.23(B), (C), *supra* note 23 (providing for inquiry into attorney-client conferences during recesses regardless of applicable privilege).

248. *See* Geders v. United States, 425 U.S. 80, 93 (1976) (Marshall, J., concurring) (agreeing that criminal defendant has Sixth Amendment right to consult with counsel during overnight break in testimony, and, in expressing unwillingness

pect of litigation presents an opportunity for the unethical attorney to engage in unethical conduct. Must the attorney be turned into a potted plant throughout the process of litigation, or the attorney-privilege be removed, in order to provide for inquiry into the possibility of inappropriate behavior? Must the client be denied the assistance of the counsel the client has retained? Is the next step to prevent all contact throughout the litigation between attorney and client because we cannot trust that unethical behavior will not take place?[249]

There are better ways to deal with attorneys who engage in improper conduct during depositions. Professional punishment is warranted for those attorneys who engage in improper conduct in the more extreme forms.[250] In other situations, the mechanisms available in the Federal Rules should be vigorously pursued.[251] Rule 30(d)(3) provides for judicial intervention during a deposition to address improper conduct by limiting the "scope and manner" of the deposition and by awarding expenses.[252] In appropriate

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to base any decision on belief that attorneys will act unethically stating, "[i]f our adversary system is to function according to design, we must assume that an attorney will observe his responsibilities to the legal system, as well as to his client"); *see also id.* at 89-90 (holding that criminal defendant has Sixth Amendment right to consult with counsel during overnight break in testimony, and discussing that alternatives exist to deal with improper witness-coaching that are preferable to ban on attorney-client contact that is based upon belief that attorneys will act unethically); United States v. Allen, 542 F.2d 630, 633 (4th Cir. 1976) ("All but very few lawyers take seriously their obligations as officers of the court and their proper role in the administration of justice. We think the probability of improper counseling, i.e., to lie or evade or distort the truth, is negligible in most cases."), *cert. denied*, 430 U.S. 908 (1977). *But see* Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978) (arguing that adversary nature of discovery contributes to many of its ills and proposing according reforms).

249. Preventing pre-deposition contact between attorney and client may not be that far off. Parties have in fact sought such relief, albeit unsuccessfully. *See* Christy v. Pennsylvania Turnpike Comm'n, 160 F.R.D. 51, 53 (E.D. Pa. 1995) (declining to issue protective order prohibiting counsel from "instructing witnesses prior to depositions").

250. *See In re* Snyder, 472 U.S. 634, 643 (1985) (discussing authority of federal courts to discipline attorneys).

251. *See Panel Discussion: The Rambo Litigator, The Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 146 F.R.D. 216, 227 (Apr. 30, 1992) (expressing "amazement" that "lawyers don't use the tools that are available [Rules 16, 26, 37 and 56] when confronted with abusive discovery tactics) (comments of Professor Michael E. Tigar)).

252. FED. R. CIV. P. 30(d)(3); *see also* CHARLES ALAN WRIGHT & RICHARD MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2113, at 95-100 (1994) (discussing evolution of Rule 30(d) as mechanism of control of deposition conduct).

For an example of the effective use of available mechanisms to control abusive behavior at a deposition, see Van Pilsum v. Iowa State Univ. of Science & Technology, 152 F.R.D. 179, 180-81 (S.D. Iowa 1993) (imposing order to deal with "Rambo

situations, one of the limitations could include a no-consultation order.[253] But the order should be applied only after a specific attorney has shown the predilection to engage in improper witness-coaching.[254] Application across the board unduly interferes with practitioners who seek to use conferences for reasons that are professionally mandated and assist the discovery process. Of course, it could be argued that the sanctions approach is an inefficient mechanism that encourages satellite litigation. Nevertheless, the no-consultation rule does not alleviate that problem. It simply makes conferences presumptively improper, leaving enforcement to the existing sanction mechanisms.[255] As long as there is an exception for discussion of whether to assert a privilege, a matter of contention remaining that is ripe for further satellite litigation.

IX. DO WHAT YOU MUST, BUT STAY OUT OF THE BATHROOM!

The bottom line attorney behavior that the no-consultation rule seeks to prevent is coaching the deponent as to what his or her testimony should be. Or, as stated by Judge Gawthrop in *Hall v. Clifton Precision*, "[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 answer."[256] A broad prohibition against all attorney-client conferences might accomplish that purpose. Yet a problem remains. The no-consultation rule allows attorneys and clients to consult in order to decide whether to assert a privilege.[257] Therefore, an exception was created for conferences for this perceived permissible purpose. Once any consultation is permitted, then the specter of mistrust raises its head as to whether the consultation was actually for the permissible purpose. The answer—remove the privilege from consultations in order to allow a peak into the bathroom to

Litigation" tactics at deposition that included offender paying for 50% of his opponent's deposition costs, and use of discovery master, at expense of offender, to oversee further depositions ordered to take place in United States Courthouse).

253. FED. R. CIV. P. 30(d)(3).

254. *Id.*

255. *See* Johnson v. Wayne Manor Apts., 152 F.R.D. 56, 58-59 (E.D. Pa. 1993) (citing *Hall* with approval and providing enforcement by means of provisions of Rules 26, 30 and 37).

256. Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993).

257. One could argue that conferring for purposes of determining whether to assert a privilege is also unnecessary and that the privilege could be asserted without consultation. It would seem the result would be antithetical to the discovery process that fear of inadvertent waiver of the privilege would cause it to be raised in the face of any possibility of its existence. Conferences lead to a more judicious use of the privilege.

determine whether anything that was said between attorney and client was impermissible because no record is made of that conversation (fortunately). This downward spiral loses track of the bottom line, and of the desirable, permissible and even mandated reasons for off-the-record attorney-client consultation.[258]

For the most part, the bottom line can be accomplished with minimal intrusion into the attorney-client relationship. If district courts feel compelled to attempt to regulate this aspect of attorney conduct, the best approach is that of the districts that simply prohibit conferences while a question is pending.[259] This accomplishes the goal of preventing direct suggestion of answers. At the same time, attorney-client conferences for the "good" reasons are not inadvertently prohibited, and the unwarranted rewriting of the attorney-client privilege is avoided.

Of course, any allowed consultation, even one for an intended "helpful" purpose, could be prone to misuse. Instead of ensuring accuracy and merely engaging in "hand-holding," the attorney could subvert the fact-finding process by suggesting answers. Even the inadvertent suggestion of an answer might occur during the attorney's inquiry into deponent mistake or misunderstanding. Therefore, this consultation would have no place prior to the deponent having answered a pending question. Nevertheless, after the inaccurate answer has been given, the consultation can have the useful purpose of correcting errors without filtering or suggesting the answer.[260] With the consultation occurring only after an answer has been given and when there is no question pending, the impeachment value of the inaccurate answer is not lost for the proponent. If there is a significant change in the deponent's response after the consultation, the prior response would most likely be inconsistent with later testimony at trial and provide a source for im-

258. For a discussion of the problems inherent in removing the attorney-client privilege from deposition discussions, see *supra* notes 58-86, 90-97 and accompanying text.

259. For examples of rules of courts which prohibit discussion only while a question is pending, see *supra* note 38.

260. Practitioners employing consultation for proper purposes would not initiate the consultation until after the answer has been given. Such consultation is limited to a discussion of whether mistake or misunderstanding has occurred. If that is discovered, the deposition recommences on-the-record with the consulting attorney making a statement to the effect: "After consultation with my client we believe the answer given to the previous question was inaccurate as my client misunderstood the question. If you will re-ask the question, my client can you give you a more accurate answer." This represents the custom observed by other practitioners and during my ten years of civil practice, primarily in the Northern District of Illinois.

peachment as a prior inconsistent statement.[261]

The questioning attorney is not left without recourse if the use of off-the-record conferences appears to be improper or becomes obstructionist. The fact that conferences have been held can be noted for the record putting a taint on the post-conference answer that can be used to attack the credibility of the witness.[262] Additionally, the deponent may be asked after the conclusion of the conference whether the conference concerned prior testimony.[263] The trier of fact would then be left with the impression that the witness is less than credible as the witness's version of what happened is subject to change at the suggestion of counsel. It is problematic as to how significantly the proponents of the no-consultation rule believe that attorneys consulting with clients for the improper purpose of suggesting answers are able to affect their client's testimony without setting the client up for later impeachment. If a witness is in fact coached during a "no-question-pending conference" that results in a change in that witness's testimony, the record will reflect the change. The pre-conference answer can be compared to the post-conference answer for purposes of impeachment. The fact that a consultation occurred can itself be noted for the record and used to attack the credibility of the witness at trial. These controls are sufficient if fully utilized.

One could argue that the "no-question-pending conference" still allows for witness coaching, just not directed at a specific answer to pending question, and if done artfully, the price of impeachment does not have to be paid. But, an attorney with a bent toward such behavior would most likely coach his or her client before the deposition begins as to the answers to specific ques-

261. *See* FED. R. EVID. 613(a) (providing for impeachment of witness by prior inconsistent statement); *see also* Chapsky v. Baxter, No. 93-C6524, 1994 U.S. Dist. LEXIS 9099, at *5 (N.D. Ill. July 6, 1994) (discussing in response to motion seeking to bar use of deposition testimony changed after attorney-client consultation that "the better approach would be to use plaintiff's prior inconsistent deposition testimony to impeach her at trial").

262. *See* MUELLER & KIRKPATRICK, *supra* note 190, § 6.34 (stating that proof of bias of witness "may properly show . . . that the witness has been 'coached' by trial counsel"); *see also* Kolczynski, *supra* note 75, at 25, 29 (discussing that "[t]he best way to discourage coaching is to put it on the record . . . [t]he weight given to post-conference testimony may be diminished if the court or jury believes the witness was not providing his own independent and unaided recollection of the facts").

263. *See* Kolczyniski, *supra* note 75, at 29 (discussing ways "to turn the tables . . . [i]f conferences occur repeatedly"); *id.* ("After any conference or recess, ask the witness whether he had a conference with his lawyer or consultant concerning the prior testimony. The lawyer may assert the attorney-client privilege, but this question is proper because it is directed whether they conferred about prior testimony, not what was said.").

tions.[264] Even the most restrictive no-consultation rule does not seek to control such conduct.[265] When there is not a question pending, any improper coaching during the consultation is nothing more than a reminder of the previous improper coaching that took place.

These forms of behavior aimed at disrupting the free flow of information during discovery simply cannot be controlled by local rule.[266] That can only be achieved if local rule chases the attorney and client from the deposition to whatever location they may have previously conversed and strip away even more of the attorney-client privilege. The downward spiral based on mistrust of attorneys must stop somewhere. The "no-question-pending conference" is a good place to stop.

X. CONCLUSION

The no-consultation rule is an ill thought out over-reaction to the problem of discovery abuse during depositions. It represents that which critics of local rulemaking have much decried. Having been adopted without any reliable empirical support for its utility, it overlooks that there are reasons other than witness-coaching for consulting with a client during deposition. Consultations also take place for purposes that are consistent with the goal of "just, speedy, and inexpensive" discovery, and are, perhaps, mandated by an attorney's professional obligations. Additionally, in its most far-reaching formulations, the no-consultation rule presents significant difficulties. Most notably, the attorney-client privilege is improperly redefined by local rule, and the right of a client to representation is intruded upon. Thus, the rule has taken forms that are unconstitutional, inconsistent with rules of procedure and evidence, and beyond the authority of the district courts to enact.

Most significantly, the no-consultation rule represents a low

264. Additionally, attorneys routinely admonish their clients prior to being deposed as to the form the deponent's answers should take. The goal is to encourage the client to volunteer as little information as possible by giving the shortest possible answer and never volunteering information. *See* Brazil, *supra* note 248, at 1330-31 (discussing instructions given by "aggressive litigators" to their clients in order to "limit and distort the flow of information" during depositions).

265. *See* Christy v. Pennsylvania Turnpike Comm'n, 160 F.R.D. 51 (E.D. Pa. 1995) (citing *Hall* with approval but declining to issue protective order prohibiting counsel from "instructing witnesses prior to depositions").

266. *See* Brazil, *supra* note 248, at 1348-61 (discussing proposals to change adversary nature of discovery in order to address discovery abuses that are largely based on increased professional obligations on attorneys and clients rather than on mechanisms such as no-consultation rule).

point in efforts to control discovery abuse. Adequate mechanisms exist for the control of discovery abuse and to professionally punish those attorneys who persist in improper conduct. Nevertheless, the no-consultation rule takes a very different approach. Based on an assumption that all attorneys will act unethically if given the opportunity, the rule seeks to preempt improper attorney conduct by restricting the interaction of attorneys and clients in order to remove the opportunity for prohibited conduct. It is an unnecessary overreaction that turns Rambo, as well as the most civil of litigators, into potted plants.

APPENDIX A
ADOPTED LOCAL RULES

Local Rule 30.1C for the United States District Court for the District of Colorado, entitled Sanctions for Abusive Deposition Conduct, provides:

> A. The following abusive deposition conduct is prohibited:
> 1. Objections or statements which have the effect of coaching the witness, instructing the witness concerning the way in which he or she should frame a response, or suggesting an answer to the witness.
> 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.

Local Rule 30.1 for the United States District Court for the Southern District of Indiana, entitled Conduct of Depositions, provides:

> 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.

Local Rule 13 for the United States District Court for the Southern and Eastern Districts of New York, entitled Conferences Between Deponent and Defending Attorney, provides:

> 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.

Local Rule 204(b) for the United States District Court for the Middle District of North Carolina, entitled Differentiated Case Management and Discovery, states:

> Depositions shall be conducted in accordance with the following guidelines: . . . 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.

Local Rule 230-5 for the United States District Court for the District of Oregon, entitled Depositions, provides:

> (a) Conduct of Counsel at Depositions. Counsel shall not engage in any conduct during a deposition that would not be allowed in the presence of a judge.
>
> . . . .
>
> (d) Pending Questions. If a question is pending, it shall 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.

Local Rule 30 for the United States District Court for the District of Wyoming, entitled Depositions Upon Oral Examination, provides:

> (e) Conferences Between Non-Party Deponent and Defending Attorney. 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.

The *Hall Rule* as adopted by Judge Gawthrop in Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993), stated:

> 5. Counsel and their witness-clients shall not 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.

Id. at 531-32.

APPENDIX B
PROPOSED LOCAL RULES

Proposed Rule 5.23 for the United States District Court for the Northern District of Illinois, entitled Deponent-Attorney Communications, provides:

> A. Examining Counsel May Instruct Deponent to Seek Clarification, etc., from Examining Counsel
>
> At any time during a deposition, examining counsel may instruct the deponent to ask examining counsel, rather than the deponent's own counsel, for clarification, definitions of any words, questions, or documents presented during the course of the deposition.
>
> B. Limitations on Communications with Deponent
>
> In order to prevent counsel for a deponent from improperly suggesting answers or the content of testimony to a witness and to prevent the disruption of the deposition, during examination by any party or counsel other than the party offering the deponent as a witness, no party or counsel, including the deponent's counsel, shall communicate with the deponent (other than through on-the-record interrogation) regarding the interrogation, the testimony or the facts of the case. During interrogation by other counsel, counsel for the deponent may confer with the deponent off-the-record only for the purpose of deciding whether to assert a privilege, and as permitted by section D of this Rule. This prohibition applies, without limitation, to all means of communication and is applicable, without limitation, to all periods of examination of the witness by anyone other than counsel for the party offering the deponent as witness. The prohibition, however, does not apply during ordinary and necessary recesses taken during the deposition session, such as lunch breaks and rest periods. Counsel for a deponent and the deponent shall not initiate breaks or recesses for the purpose of engaging in communications to circumvent the prohibitions of this Rule.
>
> C. Determination of Communications Violating Section B
>
> To determine whether any communication has taken place in violation of section B of this Rule, examining counsel may ask a deponent whether the deponent has

> communicated with any person regarding the interrogation, the testimony or the facts of the case in violation of this Rule. Examining counsel may bring any such violation to the Court's attention during the course of the deposition or thereafter, and the Court may instruct the witness to disclose the content of any prohibited communication regardless of whether such communication would otherwise have been protected by the attorney-client or any other privilege.
>
> D. Communication Permitted Between Deponent & Counsel Following Interrogation by All Other Counsel
>
> After a deponent has been interrogated by all counsel except for counsel offering the deponent as a witness, the deponent may communicate with counsel prior to being asked any further questions. The substance of any such communication will be protected by any privilege that would be applicable in the absence of this Rule.

Proposed Rule 6 for the United States Court of Appeals for the Second Circuit, entitled Conferences Between Deponent and Defending Attorney provides:

> Attorney-client conferences should be kept to a minimum. The defending attorney should not initiate a conference during the pendency of a question except to determine whether a privilege should be asserted. Attorney-initiated conferences for any other purpose during the pendency of a question are presumptively improper and continued conferences are sanctionable.