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Rambo Depositions Revisited: Controlling Attorney-Client Consultations During Depositions

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ARTICLES

Rambo Depositions Revisited: Controlling Attorney-Client Consultations During Depositions

JEAN M. CARY*

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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.

Any conferences which occur pursuant to, or in violation of, [the above] guideline are a proper subject for inquiry by deposing counsel to ascertain whether there has been any witness-coaching and, if so, what.¹

I. INTRODUCTION

The late Judge Robert S. Gawthrop, III, of the Eastern District of Pennsylvania, started a maelstrom of debate among trial attorneys, legal ethicists, and the judiciary² when he entered this "no-consultation"³ order in 1993. He drafted the order to stop attorneys from coaching witnesses during depositions. The attorneys sought his judicial help when the deposition process broke down over the issue of witness coaching. When entering his order, Judge Gawthrop explained the problem he was trying to rectify:

The underlying purpose of a deposition is to find out what a witness saw, heard, or did—what the witness thinks The 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. It is the witness—not the lawyer—who is the witness.⁴

To curb witness coaching, Judge Gawthrop prohibited *all* discussions between attorneys and their clients once the deposition started. The only exception was a conference between the attorneys and their clients to determine if the attorneys should protect the client by asserting a claim of privilege over a particular topic or line of questioning. To put teeth into his order, Judge Gawthrop specified that if an attorney violated the order and talked with the client after the deposition began, the conversation lost the cloak of protection of the attorney-client privilege. The deposing attorney could inquire into the content of the off-the-record attorney-deponent discussion.

Judge Gawthrop did not turn his order in *Hall* into a standing order for future cases in his courtroom. It remained an order applicable only to the litigation in *Hall*, and therefore might have remained an interesting anomaly⁵ if other federal

1. *Hall v. Clifton Precision Inc.*, 150 F.R.D. 525, 531-532 (E.D. Pa. 1993).

2. See Dennis R. Suplee & Diana S. Donaldson, *Dealing with the Difficult Opponent: Judicial Approaches to Deposition Dynamics*, PA. L. WKLY., May 19, 2003, at 8; David H. Taylor, *Rambo as Potted Plant: Local Rulemaking's Preemptive Strike Against Witness-Coaching During Depositions*, 40 VILL. L. REV. 1057 (1995); L.A. County Bar Ass'n Prof'l Responsibility & Ethics Comm., Formal Op. 497 (1999) (consulting with a client during a deposition), reprinted in 22 L.A. LAW. 68 (1999).

3. See Sandra F. Gavin, *Playing by the Rules: Strategies for Defending Depositions*, 1999 L. REV. MICH. ST. U. DETROIT C. L. 645, 646-647 (1999) (coining the term "no-consultation").

4. *Hall*, 150 F.R.D. at 528.

5. Suplee & Donaldson, *supra* note 2.

judges had not followed his lead with similar prohibitions regarding attorney-client conferences during depositions.⁶ Several states have also followed Judge Gawthrop's lead by adopting language in their respective rules of civil procedure that prohibit, to varying degrees, conferences between lawyers and their clients once a deposition has begun.⁷

There is no question that coaching of witnesses during a deposition can significantly interfere with the deposing attorney's access to truthful testimony

6. See *O'Brien v. Amtrak*, 163 F.R.D. 232 (E.D. Pa. 1995); *Applied Telematics, Inc. v. Sprint*, No. 94-CV-4603, 1995 WL 79237 (E.D. Pa. Feb. 22, 1995); *Langer v. Presbyterian Med. Ctr.*, Civ. A. Nos. 87-4000, 91-1814 and 88-1064, 1995 WL 79520 (E.D. Pa. Feb. 17, 1995); *Armstrong v. Hussman Corp.*, 163 F.R.D. 299, 302-04 (E.D. Mo. 1995); *Johnson v. Wayne Manor Apartments*, 152 F.R.D. 56 (E.D. Pa. 1993); *United States v. Davila*, No. 96C00031, 1996 WL 762114 (O.C.A.H.O. Oct. 11, 1996); see also COLO. U.S. DIST. CT. CIV. R. 30.3(A) ("The following abusive deposition conduct is prohibited: 1. Making 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, or pro se party, to the extent the conference is not privileged.").

7. See ALA. R. CIV. P. 30(d)(1) ("Continual and unwarranted off the record conferences between the deponent and counsel following the propounding of questions and prior to the answer or at any time during the deposition are prohibited."); DEL. SUPER. CT. R. CIV. P. 30(d)(1) ("From the commencement until the conclusion of a deposition, including any recesses or continuances thereof of less than five calendar days, the attorney(s) for the deponent shall not: (A) consult or confer with the deponent regarding the substance of the testimony already given or anticipated to be given except for the purpose of conferring on whether to assert a privilege against testifying or on how to comply with a court order, or (B) suggest to the deponent the manner in which any question should be answered."); N.J. CT. R. 4:14-3(f) ("Once the deponent has been sworn, there shall be no communication between the deponent and counsel during the course of the deposition while testimony is being taken except with regard to the assertion of a claim of privilege, a right to confidentiality or a limitation pursuant to a previously entered court order."); S.C. R. CIV. P. 30(j)(5)-(6) ("(5) Counsel and a witness shall not engage in private, off-the-record conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order. (6) Any conferences which occur pursuant to, or in violation of, section (5) of this rule are proper subjects for inquiry by deposing counsel to ascertain whether there has been any witness coaching and, if so, to what extent and nature."); TENN. R. CIV. P. 30.03 advisory commission cmt. to 1995 amendment ("Some courts have reminded the bar that a deposition is a formal judicial proceeding – albeit absent a presiding judge – and consequently consultations between counsel and deponent during questioning are not to be tolerated any more than it would be in the courtroom."); see also *Hall*, 150 F.R.D. at 525 (prohibiting all attorney-client discussions once the deposition had started except to determine whether client should assert a claim of privilege). Two states prohibit conferences during the deposition, but permit conferences during recesses and breaks. See TEX. R. CIV. P. 199.5(d) ("The oral deposition must be conducted in the same manner as if the testimony were being obtained in court during trial. Counsel should cooperate with and be courteous to each other and to the witness. The witness should not be evasive and should not unduly delay the examination. Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining where a privilege should be asserted. Private conferences may be held, however during recesses and adjournments. If the lawyers and witnesses do not comply with the rule, the court may allow in evidence at trial statements, objections, discussions, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony."); WASH. SUP. CT. CIV. R. 30(h)(5) ("Except where agreed to, attorneys shall not privately confer with deponents during the deposition between a question and an answer except for the purpose of determining the existence of privilege. Conferences with attorneys during normal recesses and at adjournment are permissible unless prohibited by the court.").

from the witness.⁸ Many deposing lawyers have been frustrated by constant interruptions of the deposition caused by the defending attorney's objections that thinly disguise coaching instructions to the witness.⁹ In one now famous exchange in *Paramount Communications, Inc. v. QVC Network, Inc.*,¹⁰ Mr. Johnston, Delaware counsel for the defendant, QVC, arranged to take a deposition of a witness, J. Hugh Liedtke, in Texas. Joseph D. Jamail appeared on behalf of Mr. Liedtke at the deposition. The following exchange demonstrates both the coaching of the witness and the Rambo tactics employed by the defending attorney, Mr. Jamail:

A. [Mr.Liedtke:] I vaguely recall [Mr. Oresman's letter] I think I did read it, probably.

. . . .

Q. (By Mr. Johnston [Delaware counsel for QVC]) Okay. Do you have any idea why Mr. Oresman was calling that material to your attention?

MR. JAMAIL: Don't answer that. How would he know what was going on in Mr. Oresman's mind? Don't answer it. Go on to your next question.

MR. JOHNSTON: No, Joe—

MR. JAMAIL: He's not going to answer that. Certify it. I'm going to shut it down if you don't go to your next question.

MR. JOHNSTON: No, Joe, Joe—

MR. JAMAIL: Don't Joe me, asshole. You can ask some questions, but get off of that. I'm tired of you. You could gag a maggot off a meat wagon. Now, we've helped you every way we can.

MR. JOHNSTON: Let's just take it easy.

MR. JAMAIL: No, we're not going to take it easy. Get done with this.¹¹

The Delaware Supreme Court was so outraged by Mr. Jamail's behavior that it

8. *See, e.g.,* Choflin v. Gordon, 3 Mass. L. Rptr. 357 (Mass. Super. Ct. 1995). The court prohibited the defending attorney from taking future depositions and attending other depositions in the case unless accompanied by another member of the bar who would be permitted to make appropriate objections. *Id.* at *11. When explaining its unusual ruling, the court admonished: "A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers." *Id.* at *10.

9. *See In re Stratosphere Corp. Sec. Litig.*, 182 F.R.D. 614, 621 (D. Nev. 1998) ("What this Court, and the Federal Rules of Procedure seek to prevent is coaching the witness by telling the witness what to say or how to answer a specific question.").

10. 637 A.2d 34 (Del. 1994).

11. *Id.* at 53-54 (addendum to the opinion relating to the issue of professionalism in depositions).

raised the issue of professionalism *sua sponte* in an addendum to a lengthy opinion on the merits of the case. The court characterized the behavior of Mr. Jamail as “extraordinarily rude, uncivil, and vulgar” and gave him thirty days to make a voluntary appearance to show cause why his conduct “should not be considered as a bar to any future appearance . . . in a Delaware proceeding.”¹² Mr. Jamail did not respond.¹³

Although this article does not address the potential violations of the *Model Rules of Professional Conduct* (“*Model Rules*”) raised by the issue of witness coaching, it appears that two rules may apply to the situation. Model Rule 3.2 provides that a “lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”¹⁴ Frequent baseless objections and speaking objections by the attorney defending the deponent will of course needlessly prolong the deposition, thereby slowing the litigation. In addition, Model Rule 3.4 provides that a “lawyer shall not: (a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.”¹⁵ Certainly, some attorneys who engage in witness coaching are attempting to obstruct the opponent’s access to evidence.

In 1996, I wrote an article documenting the Rambo tactics employed by some lawyers when defending their clients in a deposition. In that article, I advocated that judges and the organized bar take an assertive role in controlling this ethical cancer growing in the deposition room.¹⁶ I outlined several methods for defending attorneys to use to prevent Rambo lawyers from controlling the deposition room. One of the methods for controlling the coaching of witnesses that I discussed was for the deposing attorney to seek a blanket order from the trial judge “prohibiting all consultations between clients and their defending attorneys once a deposition has begun.”¹⁷ I cited Judge Gawthrop’s order in *Hall v. Clifton Precision* as a model for such an order.¹⁸ I warned that such blanket “no-consultation” orders “may also stop any necessary consultation between the attorney and his or her client concerning whether a mistake has been made or fraudulent testimony has been given.”¹⁹ However, at that time I did not anticipate the full consequences of these “no-consultation” orders.

When judges enter these “no-consultation” orders, they successfully muzzle

12. *Id.* at 53, 56.

13. Jean M. Cary, *Rambo Depositions, Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561, 567 n.13 (1996).

14. MODEL RULES OF PROF’L CONDUCT R. 3.2 (2004) [hereinafter MODEL RULES].

15. MODEL RULES R. 3.4.

16. Cary, *supra* note 13, at 561.

17. *Id.* at 587 (citing *Johnson v. Wayne Manor Apartments*, 152 F.R.D. 56, 59 (E.D. Pa. 1993) and *Hall v. Clifton Precision Inc.*, 150 F.R.D. 525, 531-32 (E.D. Pa. 1993)).

18. *Id.*

19. *Id.*

the defending attorney, who can no longer coach the witness. However, the "no-consultation" order also silences defending attorneys from appropriately protecting their clients. The balance of power shifts in the deposition. Unscrupulous deposing attorneys can swiftly step into the power vacuum and ask irrelevant and embarrassing questions. The defending attorney may object to the questions, but he cannot take a break to explain the power shift to his client. As a result, the defending attorney is powerless to advise his client about how to protect himself from the new Rambo, the lawyer taking the deposition.

I now find myself in the uncomfortable position of changing my earlier recommendation. I have come to the conclusion that these "no-consultation" orders are dangerous to the attorney-client relationship and should not be entered. Because federal courts have varied greatly in their approach to controlling witness coaching in depositions,²⁰ I urge the United States Supreme Court to adopt language in the Federal Rules of Civil Procedure to set a national standard prohibiting trial courts from entering these blanket "no-consultation" orders. I also urge state legislatures to repeal language in their respective rules of civil procedure prohibiting consultations between attorneys and their deponents. The harm these "no-consultation" orders and rules inflict on the attorney-client relationship outweighs the benefit to the fact-finding process derived from preventing the defending attorney and the witness from talking to each other once the deposition begins. These "no-consultation" orders and rules have the dangerous potential of transforming the deposing attorney into a "Rambo," fighting against a deponent whose attorney cannot properly protect him due to a "no-consultation" order or rule.

Because witness coaching during depositions remains a problem, I also urge the United States Supreme Court to amend Rule 30(d)(1) of the Federal Rules of Civil Procedure to prohibit consultations between a deponent and his or her counsel once a question has been posed by the deposing attorney unless a question of privilege has arisen. Although excessive consultations between the lawyer defending the deposition and his deponent-client may certainly interfere with the search for truth and inhibit a full and fair disclosure of the facts, a blanket order or adoption of a rule prohibiting all attorney-client consultations after a deposition begins intrudes too far into the attorney-client relationship. First, it leaves deponents undefended and vulnerable to unscrupulous questioning by the deposing attorney. Second, an absolute prohibition on attorney-client consultations may also prevent a lawyer from following her ethical duty to take "reasonable measures" to counsel a client about correcting an unintentionally false or misleading statement.²¹ Third, a "no-consultation" rule prevents an attorney from learning which questions she needs to ask the client at the end of

20. See *infra* Part IV.

21. MODEL RULES R. 3.3-3.4; see also *State ex rel Means v. King*, 520 S.E.2d 875, 882 (W. Va. 1999).

the deposition in order to explain or correct earlier erroneous testimony. Fourth, the “no-consultation” rule may actually hinder the search for truth by preventing an attorney from checking with a client at breaks and recesses as to the accuracy of the client’s earlier testimony that may have resulted from a poorly worded question or the client’s misunderstanding of a question posed by the deposing attorney. And finally, such a rule or order is unnecessary in light of other remedies available to a judge who wishes to control witness coaching in the deposition room.

II. THE ORIGIN OF THE “NO-CONSULTATION” ORDER

Before Judge Gawthrop entered his order in *Hall* in July 1993, courts and legal commentators were scrambling to find a way to control Rambo tactics employed by defending counsel in depositions. United States Supreme Court Justice Lewis F. Powell had warned the practicing bar, after seeing a 26 volume, 3,000 page deposition taken intermittently over a year, that he was seeing a pattern of discovery abuse in cases coming before the Court: “As the years have passed, discovery techniques and tactics have become a highly developed litigation art—one not infrequently exploited to the disadvantage of justice.”²² The Federal Bar Counsel Committee on Second Circuit Courts studied problems with depositions and published its findings in *A Report on the Conduct of Depositions*:

The genesis of this report is the frequently expressed belief among attorneys who spend their time litigating in the federal courts in this Circuit that the current method of taking and defending depositions is too often an exercise in competitive obstructionism. The process frequently is wasteful and unproductive in view of the amount of time, effort and money that lawyers and their clients spend participating in discovery disputes. Depositions have often become theaters for posturing and maneuvering rather than efficient vehicles for the discovery of relevant facts or the perpetuation of testimony. . . . Whatever standards currently exist for the conduct of depositions are frequently neither followed by the participating attorneys nor enforced by the courts. As a result, depositions are often no longer cost-effective devices for obtaining discovery.²³

When entering his “no-consultation” order, Judge Gawthrop framed the witness coaching issue that presented itself in *Hall* as “to what extent may a lawyer confer with a client, off the record and outside earshot of the other lawyers, during a deposition of the client.”²⁴ Judge Gawthrop then noted that he

22. *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring); see also *McDonough v. Keniston*, 188 F.R.D. 22 (D.N.H. 1998).

23. Fed. Bar Counsel Courts Comm. on Second Circuit Courts, *A Report on the Conduct of Depositions*, 131 F.R.D. 613, 613 (1990).

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

had found little case law on the subject of attorney conduct at depositions.

In *Hall*, the issue of witness coaching had arisen near the beginning of the deposition of the plaintiff, Arthur Hall, when Robert F. Stewart, defendant's counsel, instructed the deponent, "Certainly ask me to clarify any question that you do not understand. Or if you have any difficulty understanding my questions, I'll be happy to try to rephrase them to make it possible for you to be able to answer them." Hall's attorney, Joel W. Todd, then interjected: "Mr. Hall, at any time if you want to stop and talk to me, all you have to do is indicate that to me."²⁵ Mr. Stewart immediately responded, "This witness is here to give testimony, to be answering my questions, and not to have conferences with counsel in order to aid him in developing his responses to my questions."²⁶ Shortly after this exchange, Mr. Hall interrupted the deposition to consult with his attorney concerning the meaning of the word "document." A second interruption occurred when Mr. Stewart showed Hall a document and proceeded to question him about it. Hall's attorney, Mr. Todd, interrupted the questioning stating, "I've got to review it with my client." Mr. Stewart then objected to Mr. Todd's reviewing documents with his client, which Mr. Stewart was about to use in questioning the deponent.²⁷ At this point in the deposition, the parties contacted the court and adjourned the deposition until the question of attorney-client conferences during the deposition could be resolved.

Before ruling in the case, Judge Gawthrop asked for briefs from both sides and reviewed his authority to enter an order controlling consultations between counsel and the deponent. He found authority in then-Rule 26(f) of the Federal Rules of Civil Procedure, which "authorizes the court, after a discovery conference, to enter an order 'setting limitations on discovery' and 'determining other such matters . . . as are necessary for the proper management of discovery.'"²⁸ He also looked to the Advisory Committee Notes to Rule 26 that provided that "[discovery] abuse can best be prevented by intervention by the court as soon as abuse is threatened."²⁹

Judge Gawthrop then looked to the language in Rule 30(c) of the Federal Rules of Civil Procedure that governs oral depositions: "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial." He also looked

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 527. Although Rule 26(f) no longer contains the language authorizing a court to enter an order "setting limitations on discovery" and "determining such other matters . . . as are necessary for the proper management of discovery" relied upon by Judge Gawthrop, the revised Rule 16(c)(6) of the Federal Rules of Civil Procedure makes it clear that a trial judge still has the authority to enter an order concerning "the control and scheduling of discovery." Compare FED. R. CIV. P. 26(f) (1980), with FED. R. CIV. P. 16(c)(6). Therefore, a trial court today still has the same control over the discovery process that a trial judge had in 1993 when Judge Gawthrop entered his order in *Hall*. See 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE §§ 2113, 2116 (2d ed. 1994).

29. *Hall*, 150 F.R.D. at 527.

at the language in Rule 30(d) that “gives the court the power to terminate or limit the scope of a deposition ‘on motion of a party’ if the court finds that the deposition is being conducted in ‘bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party.’”³⁰ Judge Gawthrop then concluded that “[t]aken 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.”³¹ Concluding that he had the authority to control conferences between the deponent and his lawyer, Judge Gawthrop held:

A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness’s own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. . . . It is the witness—not the lawyer—who is the witness. As an advocate, the lawyer is free to frame those facts in a manner favorable to the client, and also to make favorable and creative arguments of law. But the lawyer is not entitled to be creative with the facts. Rather, a lawyer must accept the facts as they develop. Therefore, I hold that a lawyer and client do not have an absolute right to confer during the course of the client’s deposition.³²

Anticipating problems with the implementation of his order, Judge Gawthrop clarified that his order was not limited to the actual time that the deposition was in session and “on the record.” He prohibited *all* conferences during the taking of testimony including conferences occurring during breaks in the deposition and during overnight recesses:

Once the deposition has begun, the preparation period is over and the deposing lawyer is entitled to pursue the chosen line of inquiry without interjection by the witness’s counsel. Private conferences are barred during the deposition, and the fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules.³³

Judge Gawthrop further explained that his order prohibiting attorney-witness conferences during the deposition applied to all conferences, regardless of whether they were initiated by the attorney or by the client.³⁴

At the time of the order in *Hall*, the Federal Rules of Civil Procedure were silent concerning the issue of coaching witnesses during depositions.³⁵ But, five months after the decision in *Hall*, Congress modified Rule 30 of the Federal

30. *Id.*

31. *Id.* (footnote omitted).

32. *Id.* at 528.

33. *Id.* at 529.

34. *Id.* at 528.

35. See FED. R. CIV. P. 30(d) (1988).

Rules of Civil Procedure by adding the following language to Rule 30(d):

(1) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. 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).³⁶

According to the Advisory Committee Notes accompanying the 1993 amendments to the Federal Rules of Civil Procedure, this addition to Rule 30 occurred because "[d]epositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond."³⁷

To stop the coaching of witnesses, the drafters of the amendments to the Rules of Civil Procedure chose to prohibit argumentative and suggestive objections, not to eliminate all attorney-client conferences. The 1993 amendments to Rule 30 provided clear directives to defending attorneys to cease coaching their witnesses through their lengthy "speaking objections" occurring *on-the-record* at the deposition. The 1993 amendments did not attempt to control *off-the-record* conversations between witnesses and their counsel occurring at the deposition, nor did the amended rule attempt to control conversations between the attorney and client occurring during breaks or overnight recesses. The drafters of the 1993 amendments to the Federal Rules chose not to go as far as Judge Gawthrop's "no-consultation" order prohibiting conduct occurring off the record and often out of the presence of the attorney taking the deposition.

III. COURTS ARE DIVIDED ON ADOPTION OF *HALL V. CLIFTON PRECISION* GUIDELINES

Not surprisingly, courts in the Eastern District of Pennsylvania, where *Hall* was decided, started seeing motions for sanctions and requests for authority to conduct second depositions based on Judge Gawthrop's order in *Hall*. For instance, in *Johnson v. Wayne Manor Apartments*, Judge J. Curtis Joyner of the Eastern District of Pennsylvania expressed agreement with Judge Gawthrop's pronouncement that there is no need for a witness's lawyer to act as an intermediary, interpreting questions and helping the witness formulate his answers.³⁸ Judge Joyner granted plaintiff's request to conduct second depositions

36. FED. R. CIV. P. 30(d) (1993). Rule 30(d) was further amended in 2000 to remove the references to "to evidence" and "on evidence," but otherwise the 1993 version reflects the current rule. See FED. R. CIV. P. 30(d)(1) ("Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4).").

37. FED. R. CIV. P. 30(d) (1993) advisory committee's note.

38. 152 F.R.D. 56, 59 (E.D. Pa. 1993).

of two of the defendants and ordered defendants and their counsel to pay plaintiff and her counsel \$1,314.20 in sanctions. In that case, Judge Joyner reviewed the partial depositions that had been conducted and found that, as a result of defendant's "objections" during the first deposition, "what plaintiff's counsel has effectively 'discovered' is the opinion and concomitant testimony of the defendant's attorney."³⁹

Two years later, Judge Joyner cited *Hall* with approval in *Frazier v. Southeastern Pennsylvania Transportation Authority*: "we held that there is no right for a lawyer and witness to confer during the course of the deposition We concluded that 'lawyers are strictly prohibited from making any comments, either on or off the record, which might suggest or limit a witness's answer to an unobjectionable question.'"⁴⁰ In *Frazier*, Judge Joyner granted defendant's motion to compel the re-deposition of the plaintiff, concluding that during the initial deposition, plaintiff's lawyer had "repeatedly interrupted the deposition, suggesting answers to the witness, cutting short the witness's responses to questioning, and instructing the witness, without basis, not to answer certain questions."⁴¹ In both *Frazier* and *O'Brien v. Amtrak*,⁴² Judge Joyner adopted the *Hall* guidelines and allowed second depositions as a result of defending counsel's conduct during the initial depositions.⁴³

Similarly, after reviewing transcripts of several depositions, United States Magistrate Judge Edwin E. Naythons from the Eastern District of Pennsylvania relied on *Hall* in his instructions for future depositions: "Therefore, once the deposition has begun, the preparation period is over and the deposing lawyer is entitled to pursue the chosen line of inquiry without interjection by the witness' counsel."⁴⁴

Judges in other jurisdictions also began to adopt the *Hall* guidelines.⁴⁵ Judge Charles A. Shaw from the Eastern District of Missouri cited *Hall* with approval when he implemented a series of deposition guidelines similar to those imposed in *Hall* in a case in which plaintiff's two attorneys had "repeatedly instructed their client not to answer a question; interposed 'objections' which were then incorporated by Plaintiff into his answers; restated questions in order to 'clarify' them for Plaintiff; and whispered with, and pointed out portions of documents to Plaintiff."⁴⁶

39. *Id.*

40. *Frazier v. Se. Pa. Transp. Auth.*, 161 F.R.D. 309, 315 (E.D. Pa. 1995) (quoting *Hall v. Clifton Precision Inc.*, 150 F.R.D. 525, 531 (E.D. Pa. 1993)).

41. *Id.* at 316.

42. 163 F.R.D. 232 (E.D. Pa. 1995).

43. *See id.* at 236.

44. *Applied Telematics, Inc. v. Sprint*, No. 94-CV-4603, 1995 WL 79237, at *2 (E.D. Pa. Feb. 22, 1995).

45. *See Plaisted v. Geisinger Med. Ctr.*, 210 F.R.D. 527 (M.D. Pa. 2002); *Fisher v. Goord*, 184 F.R.D. 45, 48 (W.D.N.Y. 1999); *Armstrong v. Hussmann, Inc.*, 163 F.R.D. 299 (E.D. Mo. 1995).

46. *Armstrong*, 163 F.R.D. at 301.

Judge James F. McClure, Jr. from the Middle District of Pennsylvania adopted the *Hall* guidelines in *Plaisted v. Geisinger Medical Center*, noting that although the Third Circuit (presiding over the *Hall* court) had not yet addressed the issue, he was going to adopt the *Hall* guidelines for attorney behavior at depositions.⁴⁷ In *Plaisted*, defense counsel had left a deposition to consult with her client two different times while a question was pending. In response to plaintiff's motion to compel answers to those questions, "defense counsel denie[d] that a question was pending" when she took the breaks, even though "[t]he first sentence on the record after the first break is plaintiffs' counsel asking [the witness] if he remembered the question," and "[t]he first sentence on the record after the second break is defense counsel asking 'Do you want to read back the last question? I think there had been a question pending.'"⁴⁸

The Supreme Court of South Carolina likewise relied on *Hall* when it alerted the South Carolina Bar to the enactment of Rule 30(j) of the South Carolina Rules of Civil Procedure: "Our Rule 30(j), SCRCP, is derived from Judge Robert S. Gawthrop's seminal opinion in *Hall [v.] Clifton Precision*. Having adopted the *Hall* approach, our Court requires attorneys in South Carolina to operate under one of the most sweeping and comprehensive rules on deposition conduct in the nation."⁴⁹

Not all courts embraced the *Hall* guidelines. The United States District Court for the District of Columbia specifically refused to allow the defendant's attorney to re-depose the plaintiff regarding a conversation between the plaintiff and his attorney during a recess at plaintiff's deposition. The court pointed out that defendant's motion for sanctions relied entirely on *Hall* and its progeny in the Eastern District of Pennsylvania and went on to say: "*Hall*, a case that is distinguishable on its facts to the instant action, is instructive, but this District has not adopted nor is it bound by the litany of deposition restrictions and prohibitions it outlines."⁵⁰

Judge R. Stanton Wettick, of the Pennsylvania Court of Common Pleas of Allegheny County, Civil Division, refused to implement the *Hall* guidelines even though he agreed that plaintiff's counsel had frequently interrupted the questioning by raising objections and instructing the plaintiff not to answer various questions on topics unrelated to a question of privilege.⁵¹

I choose not to follow the *Hall v. Clifton Precision* guidelines because (1) they prohibit counsel for a party being deposed from raising objections that our

47. See *Plaisted*, 201 F.R.D. at 532.

48. *Id.* at 534-35.

49. *In re Anonymous Member of S.C. Bar*, 552 S.E.2d 10, 16 (S.C. 2001) (internal citation omitted). For the text of Rule 30(j) of the South Carolina Rules of Civil Procedure, see *supra* note 7.

50. *Odone v. Croda Int'l PLC*, 170 F.R.D. 66, 68 (D.D.C. 1997) (footnote omitted).

51. See *Acri v. Golden Triangle Mgmt. Acceptance Co.*, No. G.D. 93-12188 (Ct. Com. Pl. Allegheny County 1994), printed in 142 PITTSBURGH LEGAL J. 225, 226 (1994).

discovery rules specifically allow; (2) they provide insufficient protection to the deponent; (3) they can produce results that could not have been intended; (4) they fail to recognize the proper role of counsel; (5) they increase the burden and expense of litigation; and (6) they are not necessary to curb the discovery abuses which are described in the *Hall v. Clifton Precision* opinion.⁵²

In his opinion, Judge Wettick discussed each of these six problems with the *Hall* opinion. He concluded his discussion with a comment that if he thought there were a large number of lawyers trying to thwart the discovery process, he would agree with Judge Gawthrop that courts must develop different approaches, but his experience had shown that a high percentage of lawyers in Allegheny County were complying with the letter and spirit of the discovery rules.⁵³

United States Magistrate Judge Robert Hunt from Nevada also refused to implement the *Hall* guidelines.⁵⁴ He was troubled by the way the *Hall* guidelines impinged on the right to counsel.⁵⁵ Judge Hunt noted that he had been unable to find any decision by any court within the Ninth Circuit that addressed prohibiting an attorney from speaking to his or her client/witness during recesses at trial or during regularly scheduled recesses at depositions.⁵⁶ He concluded: "While this Court agrees with the *Hall* court's identification of the problem, it feels *Hall* goes too far in its solution."⁵⁷ Judge Hunt proposed a much narrower rule limiting attorney-deponent consultations only when a question has been posed by the deposing attorney, but not yet answered by the witness. He suggested:

If [breaks] are requested by the deponent or deponent's counsel, and the interrogating attorney is in the middle of a question, or is following a line of questions which should be completed, the break should be delayed until a question is answered or a line of questions has been given a reasonable time to be pursued.⁵⁸

United States Magistrate Judge Boyd N. Boland also refused to adopt the *Hall* guidelines in their entirety. He noted, "The *Hall* case has met with substantial, and I believe justified, criticism."⁵⁹ Thus, while he did prohibit deponents and their counsel from conferring with each other at the deposition while a question was pending (except for the purpose of determining whether to assert a privilege), he broke with *Hall* when he decided that deponents and their counsel may confer during periodic deposition breaks, including luncheons and overnight recesses.⁶⁰

52. *Id.* at 228.

53. *Id.* at 230.

54. *In re Stratosphere Corp. Sec. Litig.*, 182 F.R.D. 614 (D. Nev. 1998).

55. *See id.* at 620.

56. *See id.* at 621.

57. *Id.*

58. *Id.*

59. *McKinley Infuser, Inc. v. Zdeb*, 200 F.R.D. 648, 650 (D. Colo. 2001).

60. *Id.*

IV. JUDICIAL ORDERS RESTRICTING ATTORNEY-CLIENT CONFERENCES DURING A DEPOSITION VARY GREATLY

Judges and legal commentators have had a hard time establishing whether it is proper for deponents and their attorneys to confer during the taking of testimony at a deposition or during breaks in the deposition. The restrictions vary from an absence of any mention of attorney-deponent conferences (presumably allowing all conferences), to an absolute prohibition against all attorney-deponent conferences in jurisdictions that have adopted Judge Gawthrop's deposition guidelines announced in *Hall*. In this section of the article, I will discuss the various restrictions on witness-attorney conferences that courts have imposed, starting with the least restrictive and culminating with the most restrictive prohibitions.

A. REFUSAL TO RESTRICT ATTORNEY-DEPONENT CONFERENCES

When asked to enter an order finding that there had been improper coaching when a witness twice consulted his attorney before answering a question, Judge Joan Humphrey Lefkow of the Northern District of Illinois carefully reviewed Rule 30 of the Federal Rules of Civil Procedure and found there was "no rule that prohibits a witness from consulting with counsel before the witness answers a question."⁶¹ The issue had arisen in a deposition of a witness designated under Federal Rule of Civil Procedure 30(b)(6) to be the corporate representative of the bank. The first time the witness consulted with his attorney there was no question pending. The second conference occurred when the witness was asked about his personal affairs, a matter outside the knowledge of the bank and thus outside the scope of the subpoena. The court refused to award fees or expenses, determining that objections to both questions were well founded and that it was appropriate for the witness to consult with his attorney prior to answering either question.⁶²

B. RESTRICTION OF ATTORNEY-DEPONENT CONFERENCES ONLY WHEN DOCUMENTS ARE SHOWN TO DEPONENT

Judge Norman in the Middle District of Georgia entered an order prohibiting witness-coaching during all future depositions of fact-witnesses in *Collins v. International Dairy Queen, Inc.*⁶³ Although he ordered counsel not to make any objections or statements which might suggest an answer to the witness, he restricted attorney-client conferences during a deposition in only one situation, stating that attorneys and their witnesses "do not have the right to discuss

61. *Circle Group Internet, Inc. v. Atlas, Pearlman, Trop & Borkson, P.A.*, No. 03 C 9004, 2004 WL 406988, at *2 (N.D. Ill. Mar. 2, 2004).

62. *Id.* at *2-3.

63. No. CIV. A. 94-95-4MACWDO, 1998 WL 293314, at *3 (M.D. Ga. June 14, 1998).

documents privately before the witness answers questions about them.”⁶⁴ Other than this reference to off-the-record attorney-client consultations concerning a document, Judge Norman did not explicitly restrict any other attorney-client conferences during a deposition. He did not restrict attorneys or their clients from initiating conferences at any time, including when a question had been asked, but not yet answered.

C. ATTORNEY-DEPONENT CONFERENCES PROHIBITED WHEN INITIATED BY DEFENDING ATTORNEY

Three years before Judge Gawthrop’s order in *Hall*, the Federal Bar Counsel Committee on Second Circuit Courts issued *A Report on the Conduct of Depositions*.⁶⁵ Although this report condemned the “current method” of taking and defending depositions as “too often an exercise in competitive obstructionism,”⁶⁶ the report recommended a prohibition on attorney-client conferences in only one situation: when *initiated by a defending attorney* (unless the conference is for the purpose of determining whether a privilege should be asserted).

The Committee’s view is that attorney-client conferences should be kept to a minimum. Certainly, 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.⁶⁷

Although the report urges that attorney-deponent conferences “be kept to a minimum,”⁶⁸ the Committee of the Second Circuit did not actually recommend a prohibition on conferences initiated by the client after a question has been posed. The Committee also did not prohibit attorney-deponent conferences during regularly scheduled breaks or overnight recesses.

United States Magistrate Judge Henry Pitman of the Southern District of New York followed the same reasoning when he determined that “consultation between counsel and a witness at a deposition raises questions only when the consultation is initiated by counsel.”⁶⁹ The court went on to approve witness-initiated consultations: “[a] witness is generally free to consult with counsel at any time during a deposition.”⁷⁰

64. *Id.*

65. See Fed. Bar Counsel Courts Comm. on Second Circuit Courts, *A Report on the Conduct of Depositions*, 131 F.R.D. 613 (1990).

66. *Id.* at 613.

67. *Id.* at 618.

68. *Id.*

69. *Okoumou v. Safe Horizon*, No. 03 Civ. 1606LAKHBP, 2004 WL 2149118 (S.D.N.Y. Sept. 23, 2004).

70. *Id.*

D. ATTORNEY-DEPONENT CONFERENCES PROHIBITED WHILE A QUESTION IS PENDING

The year before the entry of the *Hall* "no-consultation" order, Bankruptcy Judge C. Timothy Corcoran drafted detailed guidelines for the taking of depositions before the Orlando Division of the United States Bankruptcy Court in the Middle District of Florida. He went a step further than the Second Circuit and in *In re Braniff, Inc.* prohibited *all* attorney-deponent conferences during a deposition *while a question is pending*, except to determine if a claim of privilege should be asserted:

(d) *Private consultation.* Private conferences between deponents and their attorneys during the actual taking of the deposition are improper when a question is pending except for the purpose of determining whether a privilege or claim of confidentiality should be asserted. Unless prohibited by the court for good cause shown, such conferences may however be held during normal recesses and adjournments.⁷¹

Judge Corcoran did not distinguish between attorney-initiated and client-initiated conferences. Instead, he prohibited any conferences *while a question is pending* in the deposition.

In 1998, United States Magistrate Judge Hunt in Nevada also refused to adopt the *Hall v. Clifton Precision* guidelines in *In re Stratosphere Corporate Securities Litigation*, but he did enter an order prohibiting conferences *when a question is pending*:

This Court agrees with the *Hall* court that a questioning attorney is entitled to have the witness, and the witness alone, answer questions. When there is a question pending neither the deponent nor his or her counsel may initiate the interruption of the proceeding to confer about the question, the answer, or about any document that is being examined, except to assert a claim of privilege.⁷²

Judge Hunt did not prohibit deponent-attorney conferences during recesses or overnight adjournments.

In *McKinley Infuser, Inc. v. Zdeb*, Magistrate Judge Boyd N. Boland adopted the reasoning of Judge Hunt in *In re Stratosphere*, concluding:

I agree with the reasoning of *In re Stratosphere* and our local rule 30.1C that . . . the truth finding function is adequately protected if deponents are prohibited from conferring with their counsel while a question is pending; other

71. *In re Braniff, Inc.*, Nos. 89-03325-BKC-6C1, 92-911, 1992 WL 261641, at *14 (Bankr. M.D. Fla. Oct. 2, 1992).

72. *In re Stratosphere Corp. Sec. Litig.*, 182 F.R.D. 614, 621 (D. Nev. 1998) (citation omitted) (noting also that an interruption is proper to conform to a court order or to seek a protective order).

consultations, during periodic deposition breaks, luncheon and overnight recesses, and more prolonged recesses ordinarily are appropriate.⁷³

Judge Boland reasoned that the plaintiffs were worried that allowing the deponent to talk with his counsel at breaks might result in a decision by defense counsel to question his own witness at the close of the deposition. Plaintiffs appeared to fear that the deponent might alter his prior deposition testimony when responding to questions from his own counsel thereby resulting in a less advantageous record for plaintiffs. Plaintiffs also appeared to fear that, when answering the defending attorney's questions at the end of the deposition, the deponent might raise disputed issues of fact thereby precluding entry of summary judgment for the plaintiffs. Although the court acknowledged plaintiffs' arguments, it permitted consultations between counsel and the deponent at breaks and overnight recesses because "[f]act-finding is a two-way street, however, and each party must be allowed to develop the facts of the case in any appropriate manner."⁷⁴

As noted above, a number of courts, while prohibiting consultations during the deposition itself, permit attorney-client conferences during breaks in the deposition. Thus, in 1990, Judge Marvin H. Shoob entered an order in the United States District Court in the Northern District of Georgia with wording that was very similar to that used by Judge Corcoran in *In re Braniff, Inc.*:

(d) *Private consultation.* Private conferences between deponents and their attorneys during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Unless prohibited by the Court for good cause shown, such conferences may be held during recesses or adjournments.⁷⁵

E. PROHIBITION ON ALL ATTORNEY-DEPONENT CONFERENCES AT BREAKS AND OVERNIGHT RECESSES WHEN DEPOSITION IS HELD ON CONSECUTIVE DAYS

Judge Gladys Kessler of the United States District Court for the District of Columbia found that even though there were "constitutional overtones and concerns about any interference with or limitation on the ability of counsel to confer with her witnesses (whether client or not),"⁷⁶ nonetheless, "the importance of ensuring that depositions are free from impermissible coaching"⁷⁷ required

73. *McKinley Infuser, Inc. v. Zdeb*, 200 F.R.D. 648, 650 (D. Colo. 2001).

74. *Id.* at 651.

75. *In re Domestic Air Transp. Antitrust Litig.*, Nos. 1:90-CV-2485-MHS, MDL 861, 1990 WL 358009, at *9 (N.D. Ga. Dec. 21, 1990). For Judge Corcoran's order in *In re Braniff, Inc.*, see *supra* text accompanying note 69.

76. *United States v. Phillip Morris Inc.*, 212 F.R.D. 418, 420 (D.D.C. 2002).

77. *Id.*

some restriction of attorney-witness conferences. After reviewing the prohibition of all attorney-witness conferences imposed in *Hall*, Judge Kessler opted to prohibit all conferences "if there is no temporal interruption and the deposition is continued on a day-to-day basis with no intervening passage of time."⁷⁸ In other words, witnesses and lawyers were prohibited from all communications once the deposition began unless the deposition continued to another day that was non-consecutive. In that situation, attorneys and their witnesses could talk during the intervening time period. She found it was inappropriate to impose an absolute prohibition on all communications between counsel and a witness in cases such as the one at issue (where the United States had brought suit against numerous tobacco companies to recover health care expenses for smoking related illnesses) when the depositions exceeded the presumptive seven hours and continued over a lengthy period of non-consecutive days due to the deposition schedules of all the lawyers involved in the case.⁷⁹

The drafters of the Delaware Rules of Civil Procedure imposed a similar prohibition on all consultations between a deponent and his or her counsel:

From the commencement until the conclusion of a deposition, including any recesses or continuances thereof of less than five calendar days, the attorney(s) for the deponent shall not: (A) consult or confer with the deponent regarding the substance of the testimony already given or anticipated to be given except for the purpose of conferring on whether to assert a privilege against testifying or on how to comply with a court order⁸⁰

In other words, counsel and the deponent could confer if there was a recess in the deposition of longer than five days; with recesses of shorter duration, no conferences were permitted.

F. PROHIBITION ON ALL ATTORNEY-DEPONENT CONSULTATIONS

Judge Gawthrop imposed the most extreme, and the most easily understood limits on witness coaching. He prohibited *all* conferences between attorneys and their client-deponents unless the conference was to determine if an objection based on the existence of privilege should be asserted.⁸¹ He pointedly did not make an exception for client-initiated requests for consultation, nor did he allow conferences during a luncheon recess or an overnight recess.⁸² As far as he was concerned, once the deposition started, all discussions between attorneys and their deponent-clients had to stop.⁸³ The advantage of his rule is that it is easily

78. *Id.*

79. *Id.*

80. DEL. SUPER. CT. R. CIV. P. 30(d)(1).

81. See *Hall v. Clifton Precision Inc.*, 150 F.R.D. 525, 531-532 (E.D. Pa. 1993).

82. See *id.* at 526.

83. See *id.*

stated and easily understood. Judge Gawthrop also defined the punishment for violation of his order: any conferences held in violation of the prohibition could be inquired into by opposing counsel.⁸⁴ Thus, any attorney-client conference after the deposition had started explicitly lost the cloak of the attorney-client privilege.

V. FLAWED REASONING BEHIND THE PROHIBITION ON ATTORNEY-DEPONENT CONSULTATIONS

Judge Gawthrop's reasoning in prohibiting attorney-deponent consultations during a deposition is flawed in three respects. In this section of the article, I will discuss each of these flaws and articulate why attorney-deponent conferences should not be prohibited once the deposition begins.

A. JUDICIAL PRESENCE AT TRIAL

First, Judge Gawthrop erred when he stated that "depositions generally are to be conducted under the same testimonial rules as are trials."⁸⁵ In his order in *Hall*, Judge Gawthrop used the wording of Rule 30(c) of the Federal Rules of Civil Procedure to justify equating the conduct of a deposition to the conduct of a trial. Citing the language in Rule 30(c) that "[e]xamination and cross-examination of witnesses [at a deposition] may proceed as permitted at the trial,"⁸⁶ Judge Gawthrop concluded that the method of conducting a deposition must mimic the conduct of a trial. However, Rule 30 does not say the conduct of a deposition shall be the same as the conduct of a trial, but only that the "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial."⁸⁷

When analyzing the wording of this portion of Rule 30(c), commentators Wright, Miller, and Marcus state, "Rule 30(c) further directs that the examination and cross-examination proceed as permitted at trial, so that leading questions are allowed with adverse witnesses."⁸⁸ If the language, the "examination and cross-examination of witnesses may proceed as permitted at the trial," refers only to the types of questions that are permissible during the deposition of an adverse witness and not to the method of conducting the entire deposition, Judge Gawthrop erred in his sweeping conclusion that depositions "generally are to be conducted under the same testimonial rules as are trials."⁸⁹ By equating depositions with trials, Judge Gawthrop failed to appreciate the great difference between the two: there is no judge present at

84. *See id.* at 531-32.

85. *Id.* at 528.

86. FED. R. CIV. P. 30(c).

87. FED. R. CIV. P. 30(c) (emphasis added).

88. WRIGHT, MILLER & MARCUS, *supra* note 28, § 2113.

89. *Hall*, 150 F.R.D. at 528.

the deposition. Judge Gawthrop's conclusion that depositions must mimic trials is overbroad.

B. CONSULTATIONS DURING TRIAL TESTIMONY

The second flaw in Judge Gawthrop's reasoning is his deceptively obvious assertion that a deponent and his attorney cannot request a break in the deposition to confer because "[d]uring a civil trial, a witness and his or her lawyer are not permitted to confer at their pleasure during the witness's testimony."⁹⁰ However, Judge Gawthrop's conclusion does not necessarily follow.

We can all agree that in the middle of the trial, a witness and a lawyer do not have the right to take a break whenever they wish to confer. However, most trial attorneys are familiar with the situation in which a witness testifying at trial becomes visibly confused or upset by a question or series of questions. The lawyer representing that witness may then request a recess to permit the witness to compose him or herself. Although the judge is not required to grant the requested recess, many judges will permit the witness to take a break, leave the stand, get a drink of water, and seek reassurance from counsel before resuming the testimony.

If the same situation arises at the deposition, there is no judge present to protect the witness and declare a recess. The lawyer representing the deponent is then in the difficult position of either demanding a break to calm the witness, thereby angering the deposing attorney, or permitting the visibly upset witness to continue answering questions under oath. The attorney representing the deponent may realize that most trial judges would permit a break at this point in the testimony if the questioning were occurring during a trial. Judge Gawthrop's statement that "[d]uring a civil trial, a witness and his or her lawyer are not permitted to confer at their pleasure during the witness's testimony"⁹¹ is therefore an oversimplification and in many cases not in accordance with reality.

Furthermore, a witness at a deposition may need reassurance from counsel even more than witnesses at trial do because there is no judge present at the deposition to rule that certain personal questions are irrelevant or argumentative. At a trial, the judge may sustain an objection to irrelevant or argumentative questions. The witness who is testifying at trial then does not have to answer the question. If the same situation arises at the deposition, the witness has to answer the question unless the question delves into a privileged matter⁹² or "a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent."⁹³ Because there is

90. *Id.*

91. *Id.*

92. FED. R. CIV. P. 30(d)(1).

93. FED. R. CIV. P. 30(d)(4).

no judge at the deposition to protect the witness from irrelevant or argumentative questions, the deponent may become more distraught at a deposition than at trial and may need a break to confer with counsel even more than at trial. Judge Gawthrop's order prohibiting consultations between deponents and their attorneys is predicated on equating a deposition with a trial and does not recognize the profound difference between the two: the presence of a judge at a trial and not at a deposition.

C. CONSULTATIONS DURING REGULARLY SCHEDULED TRIAL RECESSES

The third flaw in Judge Gawthrop's reasoning is his conclusion that witnesses and their lawyers are not permitted to talk during regularly scheduled breaks and overnight recesses during trial, and therefore, the same rules should apply at depositions. In *Hall*, Judge Gawthrop explained his conclusion: "During a civil trial, a witness and his or her lawyer are not permitted to confer at their pleasure during the witness's testimony. Once a witness has been prepared and has taken the stand, that witness is on his or her own."⁹⁴

Contrary to Judge Gawthrop's conclusion, courts appear to vary greatly on the issue of whether attorneys may talk to their clients during regularly scheduled breaks and overnight recesses during their trial testimony.⁹⁵ Although some courts have entered orders prohibiting lawyers and witness-clients from conferring during trial court recesses,⁹⁶ those rulings are the exception.⁹⁷ The mere fact that those courts thought they needed to enter an order prohibiting contact demonstrates that the usual practice is to allow contact between witnesses and their counsel during the witness's trial testimony. The Federal Rules of Civil Procedure do not prohibit contact between testifying witnesses and their counsel during regularly scheduled breaks or overnight recesses in a trial, and the United States Supreme Court has not ruled on the issue in a civil case.

1. PROHIBITIONS IN CRIMINAL CASES

In a criminal case, the United States Supreme Court found that it was "common practice" for defendants and their counsel to discuss the trial during

94. *Hall*, 150 F.R.D. at 528 (footnote omitted).

95. See *Geders v. United States*, 425 U.S. 80, 93 (1976); *Aiello v. City of Wilmington*, 623 F.2d 845, 858-59 (3d Cir. 1980); *Reynolds v. Ala. Dep't of Transp.*, 4 F. Supp. 1055 (M.D. Ala. 1998); *Thompson v. Atl. Bldg. Corp.*, 107 A.2d 784 (D.C. 1954); *Commonwealth Edison Co. v. Danekas*, 433 N.E.2d 736, 741 (Ill. App. Ct. 1982); *Stocker Hinge Mfg. Co. v. Darnel Indus., Inc.*, 377 N.E.2d 1125 (Ill. App. Ct. 1978).

96. *Aiello*, 623 F.2d at 858-59; *Reynolds*, 4 F. Supp. 1055; *Stocker Hinge Mfg. Co.*, 377 N.E.2d 1125; *Commonwealth Edison Co.*, 433 N.E.2d at 741.

97. *Geders*, 425 U.S. at 96; cf. *Thompson*, 107 A.2d 784 (noting prohibition on attorney-client conferences during trial has arisen few times).

overnight recesses. In *Geders v. United States*,⁹⁸ the United States Supreme Court examined a trial court’s order prohibiting contact between a criminal defendant and his counsel during a seventeen hour overnight recess occurring between the witness’s direct and cross examination. The Supreme Court concluded:

It is common practice during such recesses for an accused and counsel to discuss the events of the day’s trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day’s testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day’s events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer’s guidance.⁹⁹

The Court in *Geders* unanimously reversed the defendant’s conviction and held that the conflict between the defendant’s right to consult with his attorney and the prosecutor’s desire to cross-examine the defendant without intervention of counsel had to be resolved in favor of the right to assistance and guidance of counsel:¹⁰⁰ “We hold that an order preventing petitioner from consulting his counsel ‘about anything’ during a 17-hour overnight recess between his direct and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment.”¹⁰¹

Although the Court expressly refused to apply its ruling to all trial recesses in all circumstances stating, “[w]e need not reach, and we do not deal with limitations imposed in other circumstances,”¹⁰² the Court declared:

There are other ways to deal with the problem of possible improper influence on testimony or “coaching” of a witness short of putting a barrier between client and counsel for so long a period as 17 hours. The opposing counsel in the adversary system is not without weapons to cope with “coached” witnesses.¹⁰³

The Court then suggested that the prosecutor could use skillful cross-examination techniques to challenge the credibility of the “coached” defendant without having to resort to asking the judge to impose an order prohibiting contact between the defendant and his attorney during an overnight break in the trial.¹⁰⁴

The D.C. Circuit confronted a slightly different trial court order in *Mudd v.*

98. 425 U.S. 80 (1976).

99. *Id.* at 88.

100. *Id.* at 91.

101. *Id.*

102. *Id.*

103. *Id.* at 89.

104. *Id.* at 89-90.

United States.¹⁰⁵ In that case the trial court had instructed the defendant's criminal attorney: "You are not to talk to Mr. Mudd about his testimony between now and the time he undergoes his cross-examination. You can talk to him about other things, but not about his testimony."¹⁰⁶ Defendant appealed his conviction contending that the order preventing him from talking to his attorney denied him effective assistance of counsel. The government argued that Mr. Mudd's case was distinguishable from *Geders* because the trial court in *Geders* had prohibited all consultations between counsel and his client during the overnight recess while the trial court in Mr. Mudd's case prohibited only discussions about the witness's testimony. The D.C. Circuit disagreed with the government's position and ruled:

While the order in this case was indeed more limited than the one in *Geders*, the interference with sixth amendment rights was not significantly diminished. Even though Mudd was free to discuss strategy and tactics, there are obvious, legitimate reasons he may have needed to consult with counsel about his upcoming cross-examination. For example, Mudd's lawyer may have wanted to warn defendant about certain questions that would raise self-incrimination concerns, or questions that could lead Mudd to mention excluded evidence. More generally, defendant may have needed advice on demeanor or speaking style, a task made more difficult if specific testimony could not be mentioned. While many of the benefits of counsel outlined by *Geders* are not related to testimony *per se*, an order such as the one in this case can have a chilling effect on cautious attorneys, who might avoid giving advice on non-testimonial matters for fear of violating the court's directive. Consultation between lawyers and clients cannot be neatly divided into discussion about "testimony" and those about "other" matters.¹⁰⁷

The D.C. Circuit accordingly vacated Mr. Mudd's criminal conviction based on a violation of his Sixth Amendment right to counsel because the trial court prevented the defendant from talking with his lawyer about his testimony during an overnight break in the trial.

Thirteen years after the decision in *Geders*, in the case *Perry v. Leeke*, a criminal defendant challenged an order prohibiting him from consulting with his attorney during a fifteen minute break in his trial.¹⁰⁸ The trial court had taken a short break between the direct examination and the cross-examination of the defendant and prohibited any contact between the defendant and his counsel during this break. The United States Supreme Court determined that the order preventing contact during the fifteen minute break did not violate the defendant's constitutional rights.¹⁰⁹

105. 798 F.2d 1509 (D.C. Cir. 1986).

106. *Id.* at 1510.

107. *Id.* at 1511.

108. *Perry v. Leeke*, 488 U.S. 272 (1989).

109. *Id.*

The difference between the Supreme Court's decisions in *Geders* and *Perry* appears to be the length of the break or recess and the substance of the conversations anticipated to occur. In both cases, the recess was called at the end of the direct examination and before the cross examination of the criminal defendant. In *Geders*, the Supreme Court ruled that the order prohibiting contact between the defendant and his counsel during a seventeen-hour overnight recess violated the defendant's Sixth Amendment right to counsel. In *Perry*, the Court determined that the prohibition on contact between the defendant and his counsel during a fifteen-minute recess did not violate the defendant's constitutional rights. Justice Stevens, writing for the majority in *Perry*, attempted to explain the different rulings by describing the different content of the anticipated conversations between the defendant and his attorney during the two recesses. Describing the anticipated conversation between counsel and the defendant during the fifteen-minute recess, Justice Stevens stated: “[I]t is appropriate to presume that nothing but the testimony will be discussed.”¹¹⁰ He contrasted that predicted conversation with the likely content of the conversation occurring during a seventeen-hour recess:

[T]he normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant's own testimony—matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain.¹¹¹

Thus, the Supreme Court concluded that the trial court's order in *Perry* prohibiting the defendant and his counsel from talking during a fifteen minute recess in his testimony did not violate the defendant's constitutional rights in the same manner as did the trial court's seventeen hour prohibition on consultation in *Geders*.

2. PROHIBITIONS IN CIVIL CASES

In the civil arena, judges have struggled to define if and when a court may prohibit contact between a testifying party and his counsel during trial. The United States Supreme Court has not ruled on the constitutionality of court orders prohibiting contact between the witness and lawyer in the civil context. In *Potashnick v. Port City Construction Co.*,¹¹² the Fifth Circuit Court of Appeals reversed a lower court's decision prohibiting counsel from communicating with a party-witness during an overnight recess in a civil trial. The Fifth Circuit noted that even though there was “a paucity of authority dealing with the existence of a

110. *Id.* at 284.

111. *Id.*

112. 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980).

right to counsel in civil cases,”¹¹³ the United States Supreme Court had indicated in its criminal decisions that the right to counsel in the civil arena “is implicit in the concept of fifth amendment due process.”¹¹⁴ The court then concluded that if a civil litigant has a constitutional right to retain hired counsel, a trial judge’s prohibiting consultation between counsel and his client during an overnight recess impinged upon that right.¹¹⁵ The Fifth Circuit found that this violation of a constitutional right constituted a ground for reversal of the judgment, stating:

Our analysis of the fifth amendment to the United States Constitution establishes that a civil litigant has a constitutional right to retain hired counsel. Because the prohibiting of communication between a testifying party-witness and his attorney during an overnight recess in the party-witness’ testimony impinges on that constitutional right, we are compelled to reverse.¹¹⁶

The Third Circuit Court of Appeals arrived at a different conclusion in *Aiello v. City of Wilmington*, when it examined whether a trial judge could restrict communication between an attorney and his client during the period when the client is under cross-examination at trial.¹¹⁷ The Third Circuit noted that “[t]he extension of the *Geders* rule to civil cases is an interesting but troublesome question that has been addressed only infrequently by the courts and not at all by commentators.”¹¹⁸ The Third Circuit distinguished the case before it from *Potashnick* by pointing out that the defendant in the instant case was given an opportunity to talk with his counsel for ten minutes prior to cross-examination and chose not to do so. Thus, the Third Circuit concluded that the district court did not commit reversible error in light of the facts.

Some courts have focused on the content of the anticipated conversation between counsel and client as the determinative factor in deciding whether there is a constitutional right for the testifying civil party to confer with his retained attorney during breaks in the trial. When confronted with the issue of whether a court could prohibit a party from conferring with counsel during breaks in his trial testimony, United States District Court Judge Myron Thompson noted that although a party who is testifying at trial does not have a right to consult his counsel about any matter at any time during the course of his testimony,¹¹⁹ the testifying party does have a right to confer with his counsel when he is discussing the strategy of the case as a whole as distinguished from his trial testimony:

113. *Id.* at 1117.

114. *Id.* (citing *Powell v. Alabama*, 287 U.S. 45 (1932) and *Cooke v. United States*, 267 U.S. 517 (1925)).

115. *Id.* at 1118.

116. *Id.* at 1104.

117. *Aiello v. City of Wilmington*, 623 F.2d 845, 858 (3d Cir. 1980).

118. *Id.*

119. *Reynolds v. Ala. Dep’t of Transp.*, 4 F. Supp. 2d 1055, 1066 (M.D. Ala. 1998).

[T]he trial court has broad power to control the progress of testimony before it. This broad power is, however, limited by a testifying party's right to engage in such non-testimonial matters as giving and receiving information and working on the presentation of his or her case through strategizing, developing tactics, and generally managing the progress of the case. Because these non-testimonial matters arise most often during extended recesses—in particular, over evenings and weekends—the court must be sensitive to allow a testifying party to confer with his or her attorney during such periods.¹²⁰

Judge Thompson then concluded he would continue his policy of prohibiting attorneys from talking to witnesses during breaks in trial testimony.¹²¹ However, he agreed to make exceptions to that rule when the witness was testifying on several topics at different times during the trial.¹²² Judge Thompson found that the witness was subject to the rule prohibiting consultation while testifying only during his testimony about the individual topic he was discussing at that point in the trial.¹²³ He permitted the witness to confer with his attorney about non-testimonial matters during evenings and weekends.¹²⁴ Finally, the court said it would even consider permitting additional consultations on a case-by-case basis.¹²⁵

Other federal district courts have arrived at different conclusions regarding consultations between testifying witnesses and their trial counsel. When asked to prohibit counsel from talking with his witness during any breaks in a deposition, United States Magistrate Judge Hunt researched civil cases in which trial courts had been asked to prohibit counsel from talking with a witness during the course of a civil trial. Magistrate Judge Hunt was unable to find a single case in the Ninth Circuit that "precludes counsel from speaking to his or her client/witness during recesses called by the court during trial or during regularly scheduled recesses of depositions."¹²⁶ Magistrate Judge Hunt then explained his understanding of the right of witnesses to confer with their attorneys during a trial: "It is this Court's experience, at the bar and on the bench, that attorney's [sic] and clients regularly confer during trial and even during the client's testimony, while the court is in recess, be it mid morning or mid afternoon, the lunch recess, are [sic] the evening recess."¹²⁷ Based on his experience and his research, Judge Hunt refused to enter an order governing future depositions that would prevent an attorney from consulting with his or her witness-deponent during a recess not requested by counsel.

120. *Id.*

121. *Id.* at 1067.

122. *Id.* at 1060.

123. *Id.* at 1067.

124. *Id.*

125. *Id.*

126. *In re Stratosphere Corp. Sec. Litig.*, 182 F.R.D. 614, 621 (D. Nev. 1998).

127. *Id.*

When Judge Gladys Kessler, United States District Court Judge for the District of Columbia, was asked to impose the *Hall* guidelines on depositions being taken in the tobacco litigation, she concluded there were “clearly constitutional overtones and concerns about any interference with or limitation on the ability of counsel to confer with her witnesses”¹²⁸ After researching the issue of prohibiting contact between deponents and their counsel, Judge Kessler stated:

First, it should be noted that there is a paucity of governing case law in this area. The D.C. Circuit has not spoken on the issue, so far as this Court could find, and the briefs offer no such authority. The two Supreme Court cases relied on by Defendant—*Perry v. Leeke* and *Geders v. United States*—while appearing to be relevant at first glance turn out upon more careful analysis, to provide little or no guidance. They are both criminal cases and therefore raise Constitutional issues under the Sixth Amendment that are obviously not present in this case.¹²⁹

State courts have also confronted the issue of whether counsel may consult with a testifying witness during a break in a trial. The West Virginia Supreme Court decided that “[w]hile it is clear that a criminal defendant enjoys the right to confer with his attorney during the course of his trial testimony, such an encompassing right does not apply to a party in a civil trial.”¹³⁰ The West Virginia Supreme Court did acknowledge that other courts have differed with its conclusion and have found the rule in *Geders* applies to civil trials as well.¹³¹

These cases show judges struggling to balance a client’s right to consult a lawyer during trial testimony against the court’s interest in the uncoached testimony of the witness. The U.S. Supreme Court has determined that in the criminal case, a defendant’s right to counsel guarantees that the criminal defendant may consult with his attorney during significant breaks in the trial and during overnight recesses. Although the U.S. Supreme Court has not yet extended that same protection to the civil client, several lower courts have concluded that civil parties should be able to consult with their attorneys during breaks and overnight recesses in a trial.

It is clear that Judge Gawthrop misstated the general state of the law when he concluded, “[d]uring a civil trial, a witness and his or her lawyer are not permitted to confer at their pleasure during the witness’s testimony.”¹³² He justified his order prohibiting contact between deponents and their counsel after the start of a deposition on a false premise that a similar rule governed trials. There is no generally accepted rule prohibiting consultation between a testifying party in a civil trial and his or her attorney.

128. *United States v. Philip Morris Inc.*, 212 F.R.D. 418, 420 (D.D.C. 2002).

129. *Id.* at 419 (citations omitted).

130. *State ex rel. Means v. King*, 520 S.E.2d 875, 883 (W. Va. 1999) (footnote omitted).

131. *Id.* at 883 n.6 (citing *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101 (5th Cir. 1980)).

132. *Hall v. Clifton Precision Inc.*, 150 F.R.D. 525, 528 (E.D. Pa. 1993) (footnote omitted).

VI. “NO-CONSULTATION” ORDERS INJURE THE ATTORNEY-CLIENT RELATIONSHIP

Not only is Judge Gawthrop’s justification for his order flawed, the order itself is bad policy because of its impact on the attorney-client relationship.

A. UNSCRUPULOUS QUESTIONING

Judges who bar consultations between the deponent and his or her counsel once a deposition begins strip the deponent of any defense to a wily or unscrupulous deposing attorney. Under the *Hall* guidelines, the defending attorney may not talk with his client/deponent once the deposition has begun, except to discuss the assertion of a claim of privilege. If an unscrupulous deposing attorney forces the deponent into an unfair admission with questions similar to the proverbial “When did you stop beating your wife?” the *Hall* guidelines prevent the defending attorney from taking a break to explain to the deponent how the deposing attorney is confusing and unfairly trapping him into an unintended and unfair admission.

When Judge Wettick of the Court of Common Pleas of Allegheny County, Civil Division, in Pennsylvania was asked to impose the *Hall* guidelines, he refused, explaining this potentially disastrous problem:

While the *Hall v. Clifton Precision* guidelines silence the unethical attorney when I (an ethical attorney) am deposing his or her client, it also silences me when this unethical attorney goes after my client at my client’s deposition. This is a bad trade-off because of the enormous damage that the unethical attorney can do to my client and to the relationship between my client and myself if I am silenced while my client is being unfairly deposed.¹³³

Judge Wettick then said that every attorney involved in the discovery process “must have the ability to prevent the mistreatment of any witness.”¹³⁴ He concluded that the *Hall* guidelines stripped away the defending attorney’s ability to protect his witness. The Fifth Circuit Court of Appeals noted this same problem when it said: “[T]he litigant usually lacks the skill and knowledge to adequately prepare his case, and he requires the guiding hand of counsel at every step in the proceeding against him.”¹³⁵

A few years after the decision in *Hall*, a partner and an associate in the law firm of Fulbright and Jaworski wrote an article for the *National Law Journal* describing the problems faced by counsel to a lay witness when the *Hall* guidelines are in place:

133. *Acri v. Golden Triangle Mgmt. Acceptance Co.*, No. G.D. 93-12188 (Ct. Com. Pl. Allegheny County 1994), printed in 142 PITTSBURGH LEGAL J. 225, 228 (1994).

134. *Id.*

135. *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1118 (5th Cir.), cert. denied, 449 U.S. 820 (1980).

It is difficult to prepare a lay witness to avoid the traps which a skilled questioner can set. Whether such questions are unethical is debatable, but surely it can be agreed that they are at least unfair. Is it fair to ask a question which assumes a fact not in evidence (and which fact might not be true)? Is it fair to preface a question with a summary of a witness' previous testimony that is unduly favorable to the questioner's case? Is it fair to ask the same question several times over the course of a long deposition in the hope that the witness may give slightly differing answers, and thus put his or her credibility at risk—or even inject a “genuine issue of material fact” into a case that otherwise would be a prime candidate for resolution by summary judgment? Is it fair to try to put words in a witness' mouth that will come back to haunt that witness later in the case?¹³⁶

These authors went on to note that although counsel can spend time preparing his or her witness for these unfair questions and can object to inappropriate ones, the lay witness is still vulnerable to the unscrupulous attorney:

[U]nder *Hall* the witness cannot be instructed not to answer them—and the objection cannot articulate what is wrong with the question, for that would be considered coaching. Thus, one can be left with a record that is rife with erroneous—or at best conflicting—testimony, a record that cannot be corrected effectively when it counts the most—at the time the testimony is taken.¹³⁷

Even in a jurisdiction that has implemented the *Hall* guidelines, the defending attorney still has one method to protect her client when the deposing attorney continues to ask offensive questions and a “no-consultation” order is in place. She can seek a court order relieving her client of the obligation of continuing the deposition. According to Rule 30(d)(4) of the Federal Rules of Civil Procedure:

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).¹³⁸

However, if a “no-consultation” order is in effect, the defending attorney cannot take a break in the deposition to discuss with her client the option of seeking a court order under Rule 30(d)(4). She cannot determine if the client wishes to continue answering the offensive questions so as to be done with the deposition, or if the client wants the attorney to make a motion for relief from the harassing

136. Richard L. Jacobson & Rene Y. Quashie, *A District Court's Ruling Limiting Consultation with Witnesses During Depositions Could Restrict Longstanding Practices and Hinder Representation of a Client*, NAT'L L.J., Dec. 15, 1997, at B4.

137. *Id.*

138. FED. R. CIV. P. 30(d)(4).

questions. In addition, the attorney cannot consult with her client about the monetary cost of seeking a court order under Rule 30(d)(4) of the Federal Rules of Civil Procedure.¹³⁹ Thus, the one remaining method of protection in a jurisdiction following *Hall* is ultimately illusory.

B. CORRECTING A FALSE OR MISLEADING STATEMENT

Judges who enter "no-consultation" orders also tie the hands of the ethical lawyer who wishes to counsel his client to correct false or misleading information to which the client has testified at the deposition. According to Rule 3.3(b) of the American Bar Association's *Model Rules of Professional Conduct*: "A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."¹⁴⁰ In the comments following Rule 3.3, the drafters of the *Model Rules* make clear that the above rule applies during depositions as well as during trials.¹⁴¹ During a deposition, if a lawyer suspects that his client is testifying falsely, he has a duty under the *Model Rules* to take "remedial measures" to correct the false testimony: "In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence."¹⁴²

A lawyer who is operating under a "no-consultation" order cannot take a break in the deposition to remonstrate with his client to tell the truth without running afoul of the "no-consultation" order prohibiting all contact between the lawyer and his client once the deposition has begun. The ethical lawyer is in a double bind. If he does take a break in the deposition and counsels his client to tell the truth, he cannot guarantee the confidentiality of the conversation, because under *Hall*, conversations in violation of the "no-consultation" order may be inquired into by opposing counsel. If he sits silently while his client testifies falsely, he is violating his ethical duty under Rule 3.3(b) of the ABA's *Model Rules of Professional Conduct* "to remonstrate with his client confidentially" to tell the truth.

C. END OF THE DEPOSITION QUESTIONING

At the end of a deposition, after the deposing attorney has completed his

139. See Taylor, *supra* note 2, at 1073.

140. MODEL RULES R. 3.3(b).

141. See MODEL RULES R. 3.3 cmt. 10 ("In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures.").

142. MODEL RULES R. 3.3 cmt. 10.

examination, the defending attorney has an opportunity to ask his client questions as part of the record of the deposition. In their excellent book, *The Effective Deposition, Techniques and Strategies That Work*, David Malone and Peter Hoffman explain the rarity of examining one's own client on the record:

Defending counsel usually does not ask any questions at the deposition of the witness. The reason is simple. If the witness is friendly or a client, the best place to ask questions is in the privacy of the lawyer's office where opposing counsel cannot overhear what is being said. There is no sense sharing information with the other side when there is no requirement of doing so. But exceptions to this rule do arise.¹⁴³

Questioning by the defending attorney at the end of the deposition is similar to a redirect examination at trial. Dennis R. Suplee and Diana S. Donaldson explain this process in their book, *The Deposition Handbook*:

After the initial interrogator has completed his examination, other counsel (usually in the order in which their clients appear in the caption) may question the witness. When they have concluded their questioning, counsel for the witness must decide whether to ask his own questions. Most frequently, he will elect not to do so.¹⁴⁴

Suplee and Donaldson describe the process an attorney should utilize in deciding whether to ask the client questions at the end of a deposition. They point out that the defending attorney needs to evaluate the client's ability to withstand additional questioning and to defend the corrected responses. In order to make a wise decision, Suplee and Donaldson suggest "counsel for the witness may want to request a break after opposing counsel have finished their questioning, so that he can confer with the witness about the additional questions he proposes to ask and determine how the witness will respond to those questions."¹⁴⁵

In a jurisdiction in which a blanket "no-consultation" order has been entered, or in a jurisdiction that has adopted a rule prohibiting attorney-deponent conferences once the deposition has begun, the defending attorney will not be able to consult with his client to determine the appropriate questions he should ask to clarify any earlier confusion in his client's testimony. A "no-consultation" order interferes with the attorney-client relationship by preventing the lawyer from determining the appropriate questions to ask the client at the end of the deposition.

For many deponents, the deposition process is unfamiliar and frightening. Although most people have seen trials on television, they have not seen a

143. DAVID M. MALONE & PETER T. HOFFMAN, *THE EFFECTIVE DEPOSITION, TECHNIQUES AND STRATEGIES THAT WORK* 200 (2001).

144. DENNIS R. SUPLEE & DIANA S. DONALDSON, *THE DEPOSITION HANDBOOK* 209 (2002).

145. *Id.*

deposition. With the exception of the depositions of President Clinton and Bill Gates, few depositions have been publicized by the media.

Deponents rely on their counsel to explain the rules of the deposition and to support them through the process. Deponents often spend many hours with their counsel preparing for their depositions. They learn to trust their lawyers. Often these preparatory sessions end with reassuring comments from the attorney such as, "Don't worry, I'll be sitting right beside you. Remember, I can ask you questions at the end of the deposition if we feel you need to correct or clarify any of your answers."

In a jurisdiction with a "no-consultation" order in effect, the attorney is prohibited from reassuring his or her client once the deposition begins. Even such innocent comments as, "You're doing fine," and "This will be over before long, hang in there," during a break in the deposition are prohibited. The client who has learned to trust and depend on his or her attorney is bound to feel betrayed when the attorney remains silent or makes a one word objection when the deposing attorney asks a series of mean-spirited and irrelevant questions.¹⁴⁶ Judge Wettick described the harm done to the attorney-client relationship in this situation: "It is not possible for an attorney to maintain a satisfactory relationship with a client if the attorney sits quietly while responding counsel unfairly beats up the client."¹⁴⁷ The "no consultation" rule erodes the trust the client has in his or her lawyer.

D. VERIFYING THE TRUTHFULNESS OF CLIENT'S STATEMENTS

According to Judge Gawthrop, the purpose of the Federal Rules of Civil Procedure is "to find and fix the truth."¹⁴⁸ In jurisdictions where there is no rule prohibiting contact between the attorney and deponent at a break in the deposition, an experienced defending attorney who suspects the deponent has testified to an inaccurate recounting of an event will probe the deponent's memory at a break to determine the truthfulness of the testimony. The witness may say, "No, I didn't make a mistake. What I just testified to is accurate." In that situation, the ethical defending attorney should do nothing and the testimony will stand.

At other times, the witness may acknowledge during the break that he or she was confused and the earlier testimony was erroneous. At that point, the defending attorney can urge the deponent to correct the record by volunteering the information when the deposition resumes, or the defending attorney can elicit the corrected testimony by questioning the deponent at the end of the deposition. In either case, the result of the consultation between an ethical attorney and the

146. See Taylor, *supra* note 2.

147. *Acri v. Golden Triangle Mgmt. Acceptance Co.*, No. G.D. 93-12188 (Ct. Com. Pl. Alleghany County 1994), printed in 142 PITTSBURGH LEGAL J. 225, 229 (1994).

148. *Hall v. Clifton Precision Inc.*, 150 F.R.D. 525, 531 (E.D. Pa. 1993).

deponent should be accurate and truthful testimony. Thus, if the purpose of the deposition is to obtain truthful testimony, a conference between the deponent and his or her counsel is essential so that the defending attorney can point out the potentially inaccurate testimony to the deponent.

Without the consultation occurring, the party conducting the deposition proceeds on the basis of inaccurate information. . . . 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. 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.¹⁴⁹

Of course, the original testimony as well as the "corrected testimony" will appear in the transcript. Those who distrust the truthfulness of "corrected testimony" that follows a consultation between the attorney and the deponent will still have the original testimony in the transcript. The client who has "corrected" his testimony after consulting with his attorney can still be impeached with his earlier testimony. At trial, the judge or the jury can use the two versions of the testimony to evaluate the credibility of the witness.

E. THE "NO-CONSULTATION" RULE IS UNNECESSARY IN LIGHT OF OTHER REMEDIES

Prior to 1993, the Federal Rules of Civil Procedure were silent on the issue of witness coaching in depositions. In 1993 Congress amended the Federal Rules of Civil Procedure to prohibit witness coaching with objections that suggested the answer to the deponent.¹⁵⁰ In 2000, Rule 30(d) was amended yet again to further strengthen its provisions. The amended Rule 30(d) provides: "Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4)."¹⁵¹

Since 1993 all federal courts and any state courts that have adopted rules of civil procedure modeled on the Federal Rules of Civil Procedure already have in place a prohibition on suggestive or argumentative objections during a deposition. A court order prohibiting witness coaching is therefore merely duplicating

149. Taylor, *supra* note 2, at 1074.

150. FED. R. CIV. P. 30(d)(1) (1993) ("Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. 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).").

151. FED. R. CIV. P. 30(d)(1).

the requirements already in place in amended Rule 30(d).

The Federal Rules of Civil Procedure also give the federal courts the authority to enter sanctions against persons responsible for frustrating "the fair examination of the deponent" by causing "any impediment, delay or other conduct."¹⁵² Therefore, courts already have the authority to enter monetary or other sanctions against any attorney engaging in witness coaching during a deposition. The courts do not need to issue "no-consultation" orders to prevent witness coaching. They merely need to sanction the attorney who engages in witness coaching.

In addition, some of the causes of witness coaching can be eliminated if judges respond favorably to attorneys who seek protective orders to protect their clients "from annoyance, embarrassment, oppression, or undue burden or expense"¹⁵³ before a deposition begins. If a court grants a protective order before the deposition begins, the justification for witness coaching has been eliminated. The defending attorney should be able to use the protective order as a basis to instruct the witness not to answer unfair questions covered by the protective order instead of coaching the witness as to how to respond to the unfair questions.

Courts may also be able to eliminate witness coaching if they grant protective orders to defending attorneys who adjourn the deposition to seek the court's protection in the middle of the deposition. If a court grants a protective order prohibiting questioning on an unfair topic, the defending attorney will no longer have any justification for coaching his witness's responses. He can instead instruct his witness not to answer based on the court's protective order.

VII. RECOMMENDATIONS TO CONTROL WITNESS COACHING AT DEPOSITIONS AND MAINTAIN UNIFORM STANDARDS IN THE COURTS

Courts and legislatures that are considering methods of controlling the coaching of witnesses at depositions should first assume that most attorneys will observe the prohibitions against witness coaching found in Rule 30(d)(1) of the Federal Rules of Civil Procedure: "Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner."¹⁵⁴ Judge Wettick from the Pennsylvania Court of Common Pleas of Allegheny County, concluded that in his experience few attorneys engage in egregious coaching of witnesses:

Our discovery rules will not work unless the norms of the legal profession are consistent with the standards of behavior described in the Preamble to the Rules of Professional Conduct. If small numbers of lawyers deviate, judicial intervention will be effective. . . . On the basis of my experience in Allegheny County, I do not believe that we have a problem. An extremely high percentage

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

153. FED. R. CIV. P. 26(c).

154. FED. R. CIV. P. 30(d).

of lawyers want discovery to work and comply with the letter and spirit of the discovery rules.¹⁵⁵

If Judge Wettick is correct, and the number of attorneys engaging in egregious coaching of witnesses during a deposition is in fact small, there is no need for a court to order or a legislature to enact blanket rules preventing any consultation between an attorney and his witness once the deposition has commenced. The adoption of such an order or rule is comparable to using a sledgehammer to pound a tack into a wall. The remedy is far worse than the unwanted behavior. Blanket “no-consultation” orders are not necessary and interfere with the attorney-client relationship, leave the client undefended against unscrupulous questioning, prevent attorneys from counseling clients to correct false statements, and inhibit attorneys from checking the accuracy of testimony that may need to be addressed before the end of the deposition.

Instead of the entry of blanket no-consultation orders, what is needed to correct witness coaching is a targeted modification of the Federal Rules of Civil Procedure. One of the original purposes of the enactment of the Federal Rules of Civil Procedure was to develop a relatively uniform practice of law throughout the country. As discussed earlier, there is no uniform practice regarding attorney consultations with a deponent during a deposition.¹⁵⁶ To resolve this confusing array of court orders, it is time for the United States Supreme Court again to amend Rule 30 of the Federal Rules of Civil Procedure. The Court should restrict the coaching of witnesses during a deposition while a question is pending and clarify that courts may not restrict attorney-witness consultations during recesses and overnight breaks in a deposition.

I propose that the following two sentences be added to Rule 30(d)(1) of the Federal Rules of Civil Procedure:

Counsel may not consult with a deponent while the deposing attorney is in the middle of a question, or is following a line of questions that can be completed in a reasonable time except when necessary to discuss privilege issues, correct a false statement, or correct an unintended misimpression left by the witness. Courts may not restrict attorney-deponent consultations during recesses and overnight breaks in a deposition.

The addition of these two sentences to Rule 30 of the Federal Rules of Civil Procedure will set a national standard for depositions. Counsel for deponents will know that breaks to consult with the deponent cannot be taken whenever a difficult question is posed to the deponent. The deponent will have to answer the question before taking a break. This rule will place the onus on deponent's

155. *Acri v. Golden Triangle Mgmt. Acceptance Co.*, No. G.D. 93-12188 (Ct. Com. Pl. Alleghany County 1994), printed in 142 PITTSBURGH LEGAL J. 225, 230 (1994).

156. See *supra* Part IV.

counsel to prepare the deponent before the deposition begins. Witness preparation will have to occur before the deposition begins because breaks to counsel the deponent will not be permitted while a question is pending.

The addition of the second sentence clarifying that judges may not intrude into the attorney-client relationship by restricting counsel from talking with the client during breaks and overnight recesses will resolve a confusing array of court orders governing attorney-deponent consultations. As can be seen above, judges have entered orders that range from no restriction all the way to a complete prohibition on attorney-deponent consultations. In this age of multi-district practice, attorneys who are attempting to zealously represent their clients need a uniform set of rules regarding when they may consult with their clients. They particularly need to know that their discussions with their clients will be protected from inquiry. If the proposed amendment to Rule 30 is adopted, courts will no longer be able to enter orders such as the one entered in *Hall*, permitting the opposing side to inquire into the content of deponent-attorney consultations that occur during recesses and overnight breaks in a deposition.

For the above reasons, I urge the United States Supreme Court to amend Rule 30 of the Federal Rules of Civil Procedure to prohibit attorney-deponent consultations while a question is pending at the deposition, but to permit attorney-deponent consultations during breaks and overnight recesses in the deposition.