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IN PRACTICE

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We Were on a Break

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To those who were fans of "Friends," the phrase "we were on a break" brings back memories, though no connections to the law. A federal court in New Jersey recently addressed the issue of the discoverability of conversations between an attorney and a witness during a different kind of break — a deposition break.

The key to taking or defending any deposition is preparation. When taking a deposition, litigators are sure to review every document and tighten up questions to elicit the information necessary to defend and/or prosecute a case. This recent decision governing attorney conduct during a deposition demonstrates that preparation of your witness for a deposition is equally important.

The Federal Rules of Civil Procedure and New Jersey Court Rules both address attorney conduct during a deposition. F.R.C.P. 30(c)(1) provides that the "examination and cross-examination of a deponent proceed as they would at trial." While N.J.Ct.R. 4:14-3(f) provides that "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 of confidentiality or a limitation pursuant to a previously entered court order."

The purpose behind these rules is to prevent a witness from being coached by an attorney during the deposition. The rules also limit objections during a deposition to prevent "speaking objections" that all but constitute coaching a witness. Nonetheless, neither rule expressly defines the permissible conduct between a deponent and an attorney during a deposition break.

In *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D.Pa. 1993), the court adopted an expansive view of the restrictions on attorney/deponent conversations during a deposition. The court pointed out that F.R.C.P. 30(c)(1) mandates that a deposition proceed as if at trial, and that an attorney cannot confer with a witness at trial during a break. As such, the judge reasoned that it would be improper for an attorney to confer with a deponent during a deposition break. The court held that "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."

While the holding in *Hall* encompasses all recesses, including evening recesses, not all courts have been willing to go as far. Indeed, in *In Re Stratosphere Corp. Sec. Litig.*, 182 F.R.D. 614 (D.Nev. 1998), for example, the court considered *Hall* and rejected its expansive view of the limitation on conversations during a deposition. Instead, the court held that a witness has the right to confer with counsel during any recess that is not requested by the deponent or attorney.

Magistrate Judge Salas in *Chassen v. Fidelity Nat'l Title Ins. Co.*, Civ. No. 09-291, (D.N.J. July 21, 2010) (order granting defendant's request for redeposition of plaintiff), aff'd, *Chassen v. Fidelity Nat'l Title Ins. Co.*, Civ. No. 09-291 (D.N.J. Jan. 13, 2011), recently addressed a deponent's ability to confer with an attorney during a deposition break. In *Chassen*, the plaintiff and her attorney had a conversation with respect to her testimony during a short deposition break. Defense counsel sought to question the deponent on her conversation with her attorney during the break. Plaintiff's counsel, in attempting to shield the conversation with the attorney-client privilege, stated that he "disclosed [his] mental impressions and opinions about [Ms. Hoffman's] testimony" during the break.

The court's concern focused on the potential for a witness to be coached during a deposition. Judge Salas noted that the line of questioning prior to the break dealt with the availability of the witness at trial, a critical point as the witness had the potential to serve as the class representative. Prior to the break, the witness testified that she could not leave work to attend the trial. After the break, and her conversation with counsel, the witness advised that she could attend the trial as long as she had ad-

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vanced notice.

Judge Salas held that counsel's conversation with the deponent after she was sworn in violated F.R.C.P. 30(c). Since the plaintiff presented no evidence that the conversation related to a discussion of privilege, which would be shielded from discovery, then the defendant was entitled to question the deponent as to the substance of the conversation with her counsel during the deposition break. Nonetheless, the facts in *Chassen* did not require Judge Salas to determine whether counsel would be prohibited from having conversations with the deponent when there was an evening recess.

While *Hall* is generally accepted in the District of New Jersey, its holding has not been fully implemented in New Jersey state court. Judges Pressler and Verniero, in the comments to R. 4:14-3, note that "since the rule speaks only to 'while the deposition is being taken,' it clearly does not address consultation during overnight, lunch, and other breaks." Pressler & Verniero, *Current N.J. Court Rules*, comment R. 4:14-3, paragraph (f) (Gann).

Despite the plain language of R. 4:14-3, and the comments thereto, the court in *In Re PSE&G Shareholder Litigation*, 320 N.J.Super. 112, 726 A.2d 994 (Ch. Div. 1998), extended part of the holding in *Hall* to a New Jersey state court matter. In *PSE&G*, plaintiffs' counsel requested information as to the conversation between defendants' counsel and the deponent during a deposition break. The court recognized the *Hall* holding and the fact that it had been questioned by other courts. The court also credited the *Hall* court with addressing the risks of witness coaching during a deposition. However, the court refused to apply the blanket restrictions in *Hall* to every case. Instead the court balanced the realities of litigation and restricted any conversations between a deponent and counsel during recesses and lunch breaks until a deposition concludes. The court held "at the conclusion of the daily deposition, counsel and the witness should be permitted to confer and to prepare for the next day's deposition."

In sum, the prevention of witness coaching can be accomplished without infringing on an attorney's ability to perform his or her duties in preparing witnesses. By precluding counsel from having conversations with a witness during an evening recess, *Hall* goes too far and unreasonably prevents counsel from properly preparing witnesses for deposition. Likewise, no restrictions on attorney conversations with a deponent once a deposition begins are equally unworkable. The approach by the court in *PSE&G* finds a middle ground that prevents witness coaching while still permitting an attorney to properly prepare a witness.

However, in light of the holding in *Hall*, and the limited extension of *Hall* by the court in *PSE&G*, counsel should be cautious with respect to substantive conversations with a deponent once a deposition begins. It becomes more important than ever during witness preparation to explain that once the deposition begins the deponent is on her own, with very few exceptions. In addition, litigators should expect that a court will not afford protection to conversations with a deponent during a lunch recess or other short recess during a deposition. Though, at this time, it appears unlikely that a New Jersey court, whether federal or state, would preclude counsel from having conversations with a deponent during an overnight recess.■