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COACHES SHOULD STICK TO THE SIDELINES: WHY THE FEDERAL RULES SHOULD TRACK DELAWARE RULES REGARDING CONFERENCES BETWEEN DEPONENTS AND COUNSEL

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Depositions are the factual battleground where the vast majority of litigation takes place . . . Thus, it is particularly important that this discovery device not be abused. Counsel should never forget that even though the deposition may be taking place far from a real courtroom, with no black-robed overseer peering down upon them, as long as the deposition is conducted under the authority of the rules of this court, counsel are operating as officers of the court. They should comport themselves accordingly; should they be tempted to stray, they should remember that [a] judge is but a phone call away. [FN2]

Picture yourself taking a key deposition in a business litigation (the "Key Deposition Hypothetical"). The deponent, a former executive of your corporate adversary, is savvy at answering questions in a way that supports his former company's litigation position. You, however, are persistent. By the middle of the day, the witness is unwittingly providing you with valuable information. While the witness does not appreciate how his description of events, meetings and conversations undermine his former employer's position, the lawyer across the table recognizes that his case is going south.

Through effective follow-up questioning, you learn about a conversation between the witness and the company's CEO that materially helps your client's position and connects the proverbial dots as only the truth can. At a logical breaking point, you initiate a ten minute break. The witness, his counsel and your adversary's counsel walk quickly into another conference room, leaving the door wide open. As you walk by the room you can't help but overhear your adversary "reminding" the witness what happened during the conversation at issue and explaining to the witness why his testimony so far is helping your case. Lo and behold, immediately after the break, the witness "corrects the record" about the key conversation, and generally reframes his story about material events underlying the case.

You feel cheated. The testimony from this witness, who was hostile to your cause but was giving you truthful answers that would help prove your client's position, was clearly affected by an off-the-record conversation with your adversary's counsel. Was your adversary's conduct permissible? Appropriate? Do you have any recourse?

As explained below, the answer depends in large part on the jurisdiction whose law governs the deposition. This article explores the ways in which different jurisdictions regulate private substantive conferences between an attorney and deponent during a deposition. Based on our review of the competing policy approaches, we advocate that the Federal Rules of Civil Procedure should be amended to mimic Delaware Court of Chancery Rule 30(d)(1) ("Delaware Rule 30(d)(1)"), which expressly prohibits counsel from engaging in substantive dialogue with a witness during a deposition. The societal benefit of increasing the truth-finding value of the deposition process by prohibiting these discussions far outweighs any theoretical cost in doing so.

A. DEPOSITIONS PLAY A VITAL ROLE AS PART OF THE TRUTH-FINDING FUNCTION IN LITIGATION

The underlying goal of the discovery process is, or at least should be, to find the truth. In fairness, the limits of memory, coupled with the nature of the adversarial litigation process, make it difficult to ever uncover the full, objective truth, about exactly what happened in the past. But the inherent limitations of the litigation process should not stop us from crafting its rules and procedures with the aspiration of identifying an evidentiary record that most closely depicts what really happened between the litigants.

Depositions play an important role in discovery because they may be the best tool for a litigator to discover the truth. The United States (the "U.S.") court system does not endorse "trials by surprise", but rather intends for depositions (and other discovery methods) to permit adversaries to test each other's factual and legal theories in order to assemble a reliable record that most closely approximates the truth.

Many discovery methods (like interrogatories or requests for admission) are controlled by attorneys who can shape answers to serve their client's legal strategies. In contrast, depositions allow the facts to be uncovered without an attorney vetting each word that comes out of the deponent's mouth. Depositions provide raw factual answers from

percipient witnesses who often are not expert in how their testimony helps or hurts any of the litigant's positions in the case, but rather are simply answering questions as best they can.

Not only do depositions provide the parties with an opportunity to discover the truth, but depositions also preserve the "facts" for a trial, which may be in the distant future when the events at issue have either faded or have been altered by intervening events in the deponent's mind. In fact, depositions may provide an attorney with his only chance to find out the facts from witnesses who cannot be called as witness at trial due to distance, sickness or death.

Depositions also provide an opportunity to evaluate a witness's credibility and demeanor. This helps attorneys decide who to call as potential trial witnesses, and whether or on what terms to recommend that clients compromise their claims. Finally, depositions expose weaknesses and strengths in one's case, which is always very important when considering potential settlements.

For all these reasons, limiting or eliminating the influence of attorneys on the testimony of a fact witness is itself a positive outcome. As the U.S. Supreme Court highlighted in *Perry v. Leeke*,

> It is simply an empirical predicate of our system of adversary rather than inquisitorial justice that cross-examination of a witness who is uncounseled between direct examination and cross examination is more likely to lead to the discovery of truth than in cross-examination of a witness who is given time to pause and consult with an attorney. [FN3]

B. COUNSEL'S ETHICAL OBLIGATIONS IN THE DEPOSITION CONTEXT REQUIRES THEM TO UPHOLD THE TRUTH-FINDING FUNCTION

Each state adopts rules related to attorney's ethical obligations. While these rules do not expressly prohibit substantive discussions between witnesses and attorneys during depositions, certain of these obligations seek to ensure the integrity of the discovery process.

For example, ABA Model Rules of Professional Conduct (the "ABA Model Rules") 3.4(a) and Delaware Lawyers' Rules of Professional Conduct (the "Delaware Cannons") 3.4(a) preclude a lawyer from "unlawfully obstructing another party's access to evidence or unlawfully alter, destroy or conceal ... material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act." Additionally, ABA Model Rule 3.4(b) and Delaware Cannon 3.4(b) state that a lawyer shall not "falsify evidence, counsel or assist a witness to testify falsely." Furthermore, ABA Model Rule 8.4 and Delaware Cannon 8.4 conclude that "[i]t is professional misconduct for a lawyer to: ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice."

In light of the rules described above, coaching a witness during a deposition, especially to the extent such coaching involves instructing the deponent to misrepresent the truth in any way, could be viewed as transgressing an attorney's ethical obligations.

C. WOULD THE FEDERAL RULES OF CIVIL PROCEDURE PROHIBIT THE CONFERENCE DESCRIBED IN THE KEY DEPOSITION HYPOTHETICAL?

Federal Rule of Civil Procedure 30 ("Federal Rule 30") governs the taking and defending of depositions under federal law. Federal Rule 30 does not specifically address whether an attorney may consult with a deponent after a deposition starts. Instead, Federal Rule 30(c) only provides the following instructions related to an attorney's conduct during a deposition:

> ***(1) Examination and Cross-Examination***. The examination and cross-examination of a deponent proceed as they would at trial . . .**(2) *Objections***. An objection at the time of the examination--whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition--must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely 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 ordered

by the court, or to present a motion under Rule 30(d)(3).

When interpreting Federal Rule 30, most courts conclude that counsel cannot confer with the witness while a question is pending for any reason other than privilege. [FN4] But the federal courts have developed several different (and sometimes inconsistent) positions concerning whether other types of conferences are permissible under federal law.

The starting point to examine the debate among the various federal jurisdictions is *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993). In *Hall*, the court concluded that Federal Rule 30 prohibited an attorney from engaging in any substantive discussion with the deponent unless necessary to determine whether a privilege should be asserted. [FN5] The court also held that if a conference about privilege occurs, the conferring attorney should place on the record (a) the fact that the conference occurred, (b) the subject of the conference and (c) the decision reached as to whether to assert a privilege. [FN6] Consequently, under the *Hall* approach, your adversary counsel's conduct in the Key Deposition is prohibited and may result in sanctions. [FN7]

Many federal courts, however, have disagreed with *Hall's* interpretation of Federal Rule 30. These courts generally have permitted substantive conferences between attorneys and witnesses during depositions. Some courts developed a policy that an attorney may confer with a witness only during breaks that the defending attorney did not request. [FN8] In *In re Stratosphere Corp. Sec. Litig.*,the court explained that an "interrogating counsel has the right to the deponent's answers, not an attorney's answers", which justifies prohibiting substantive discussions during breaks initiated by the defending attorney and the witness. [FN9] The court further explained, however, that it will permit substantive discussions during other breaks due to a witness' right to the assistance of counsel. [FN10] Under this policy, your adversary counsel's discussion with the witness in the Key Deposition Hypothetical may be permitted only because you initiated the break in the deposition, but would otherwise be prohibited.

Other courts have allowed an attorney and a deponent to engage in private substantive discussions during any break in the deposition. [FN11] In fact, some courts rely on a client's right to effective counsel to advance this policy even further by refusing to impose any restrictions on attorneys conferring with witnesses during depositions. [FN12] For instance, in *Christy v. Pennsylvania Turnpike Comm'n*, the court explained that the right to zealous representation by an attorney allows substantive discussions between counsel and witnesses during depositions. [FN13] The court found that conferences between counsel and deponents constitute part of the deposition preparation process. [FN14] Under this approach, your adversary counsel's conduct in the Key Deposition Hypothetical was clearly permissible irrespective of who initiated the break.

D. DELAWARE LAW PROHIBITS THE DEFENSE COUNSEL'S CONDUCT IN THE KEY DEPOSITION HYPOTHETICAL

Unlike the Federal Rules, Delaware Rule 30(d)(1) expressly prohibits counsel from conferring with the deponent about any substantive issues related to the deposition after the commencement of the deposition, except for issues relating to privilege and other limited circumstances. [FN15]

This rule applies to all breaks, regardless of who initiates the break or how long it lasts, unless the deposition if continued for a period over five days. Delaware Rule 30(d)(1) also prohibits an attorney from suggesting to a deponent how to answer questions during a deposition unless an instruction relates to a privilege or another very limited exception, like a court order.

If Delaware Rule 30(d)(1) applied in the Key Deposition, little doubt exists that your adversary's counsel acted improperly by discussing substantive issues related to the case with the deponent during the break, and by instructing the deponent about the broader significance of his answers to your questions. [FN16]

In fact, if you brought a motion for sanctions against the other side's counsel for engaging in the off-the-record conversation, a Delaware court would likely grant it. For example, in *In re Fuqua Industries, Inc. Shareholder Litig.*, 752 A.2d 126 (Del. Ch. 1999), the court held that an attorney violated Rule 30 during the defense of a deposition by, among other things, engaging in behavior similar to that present in the Key Deposition Hypothetical. The court

explained that this behavior “not only frustrated [the other side's] ability to gather and present evidence, but he also undermined this Court's fact-finding ability”. [FN17] The court then sanctioned the attorney by requiring him to pay the other side's costs associated with the deposition in question. [FN18]

E. DELAWARE'S RULE 30(d)(1) IS MORE CONSISTENT WITH COUNSEL'S ETHICAL OBLIGATIONS AND THE TRUTH FINDING FUNCTION OF THE DEPOSITION PROCESS

We believe that prohibiting substantive conferences between an attorney and deponent during a deposition, except in very limited circumstances, is more consistent with the deposition's truth-finding function. Even if you assume no ill intent on the part of counsel, discussions between a deponent and counsel during a deposition inherently throw a wrench in the truth-seeking process. Human nature will cause the lawyer to signal what he wants to hear, even if unconsciously. And human intelligence will assure that the witness understands the message, even if the message was delivered in the most subtle way. If the purpose of a deposition is to uncover the closest approximation to an objective truth about the underlying events, we see significant harm in ever allowing counsel to shape the way a witness testifies. We, therefore, believe that Federal Rule 30(c) should be revised to mimic Delaware Rule 30(d)(1).

While we believe the benefits of modifying Federal Rule 30(c) are clear, certain judges and practitioners nonetheless argue that allowing substantive conferences between counsel and a witness during a deposition is proper. [FN19] These voices typically justify private discussions between counsel and client on three principal grounds: (1) adequacy of representation, (2) the obligation to correct the record, [FN20] and (3) the need to “comfort” the witness and prevent harassment. [FN21] None of these arguments is particularly persuasive.

Under ABA Model Rule 1.1 and Delaware Canon 1.1, a lawyer is obligated to competently represent a client by having the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation”. Having the right to engage in off-the-record discussion with a deponent during a deposition is unrelated to fulfilling counsel's obligation to adequately prepare one's client for a deposition. An attorney can and should fulfill this obligation by spending sufficient time preparing a witness before a deposition starts. In fact, if an attorney knows that a no-consultation rule is in effect during a deposition, it may encourage better deposition preparation. [FN22]

Additionally, an attorney's ethical obligation to correct the record if a deponent testifies in error does not justify a rule that permits substantive discussions between counsel and deponent during the deposition. An attorney has the necessary tools to correct the record without engaging in an off-the-record discussion with a deponent, including (a) cross-examination after the initial questioner concludes her examination, (b) filing an errata sheet after reviewing the deposition transcript to correct plainly erroneous testimony, or (c) requesting to go off the record, instructing the deponent to leave the room, and then discussing the “inaccurate” testimony with all counsel. Thus, ample opportunities exist to “correct” a misleading record, none of which require the attorney to engage in substantive discussions with a witness during the deposition.

Finally, the need to comfort the witness and prevent harassment does not support the courts' liberal interpretation of Federal Rule 30. An attorney can surely put a witness at ease about the deposition process by reminding the witness to listen to the questions or to slow down his testimony. [FN23] Moreover, an attorney should be able to determine whether a line of questioning is harassing without consulting with the deponent. If the questions are harassing, the attorney can stop the deposition and seek judicial intervention. A lawyer may also seek a protective order and sanctions related to the harassing questions after the deposition concludes.

F. CONCLUSION

While a lawyer is free to frame facts in a manner most favorable to the client, a lawyer is not entitled to re-create what those facts are or impede his adversaries' legitimate efforts to uncover those facts. [FN24] For this reason and the others detailed above, we believe that the Federal Rules should be modified to prohibit substantive discussions between a witness and counsel during a deposition, except in limited circumstances. Modifying Federal Rule 30 to more closely track Delaware Rule 30(d)(1), will simultaneously curb some of the abuses in which counsel too often engage during depositions and dramatically enhance the discovery device's truth-finding function.

[FN2]. *Paramount Communications v. QVC*, 637 A.2d 34, 55 n. 34 (1994) (*quoting Hall v. Clifton Precision*, 150 F.R.D. 525, 531 (E.D. Pa. 1993)).

[FN3]. 488 U.S. 272, 281-282 (1989).

[FN4]. *See BNSF Railway Co. v. San Joaquin Valley Railroad Co., No. 1:08-cv-01086-AWI-SMS*, 2009 WL 3872043, at *3-4 (E.D. Cal. Nov. 17, 2009) (court sanctioned attorney for interrupting a deposition to confer with a witness while a question was pending); *Langer v. Presbyterian Medical Center of Pa., Civ. A. Nos. 87-4000, 91-1814 and 88-1064*, 1995 WL 79520, at *11 (E.D. Pa. Feb. 17, 1995), vacated on reconsideration on other grounds, 1995 WL 395937 (E.D. Pa. July 3, 1995) (same); *Holland v. Fisher, No. 92-3900*, 1994 WL 878780, at *6 (Mass. Super. Dec. 21, 1994) (holding that an attorney cannot confer with a deponent while a question is pending).

[FN5]. *Id*. at 531-532.

[FN6]. *Id*. at 530.

[FN7]. *See e.g., Plaisted v. Geisinger Medical Center*, 210 F.R.D. 527, 535 (M.D. Pa. 2002) (court ordered a witness to be re-deposed where defending attorney engaged in off the record substantive discussions with deponent during a deposition); *O'Brien v. Amtrak*, 163 F.R.D. 232, 236 (E.D. Pa. 1995) (court sanctioned a defending attorney by imposing the costs of re-deposing a witness where the attorney consulted with the deponent during the deposition); *Armstrong v. Hussman Corp.*, 163 F.R.D. 299, 302-04 (E.D. Mo. 1995) (court ordered the defending attorneys to reimburse certain deposition expenses of opposing counsel due to their improper conduct during depositions, which included substantive discussions with the witnesses during the depositions).

[FN8]. *See e.g., McKinley Infuser, Inc. v. Zdeb*, 200 F.R.D. 648, 650 (D. Colo. 2001) (holding that no off-the-record conferences may occur if they interrupt the examination by the questioning attorney, except for the purpose of determining whether to assert a privilege); *State ex rel. Means v. King*, 520 S.E.2d 875, 882 (W. Va. 1999) (allowing an attorney to confer with his client during any breaks in a deposition as long as the attorney did not request the break in the questions).

[FN9]. *In re Stratosphere Corp. Sec. Litig.*, 182 F.R.D. 614, 621 (D. Nev. 1998).

[FN10]. *Id*.

[FN11]. *See e.g., In re San Juan DuPont Plaza Hotel Fire Litig.*, MDL 721, 1989 WL 168401, at *38 (D. Puerto Rico Dec. 2, 1988)(allowing private conferences between attorney and witness during "normal recesses and adjournments" after the start of a deposition); *In re Domestic Air Transp. Antitrust Litig.*, 1:90-CV-2485-MHS, MDL 861, 1990 WL 358009, at *9 (N.D. Ga. Dec. 21, 1990) (allowing conferences between attorney and witness during any breaks in deposition).

[FN12]. *See e.g., Circle Group Internet, Inc. v. Atlas, Pearlman, Trop & Borkson, P.A.*, No. 03 C 9004, 2004 WL 406988, at *2 (N.D.Ill. March 2, 2004) (finding that attorney did not act improperly when engaging in private conferences with witness during a deposition); *Christy v. Pennsylvania Turnpike Comm'n*, 160 F.R.D. 51, 53 (E.D. Pa. 1995) (allowing substantive discussions between an attorney and witness during a deposition by finding that those discussions qualified as deposition preparation).

[FN13]. *Christy v. Pennsylvania Turnpike Comm'n*, at 160 F.R.D. 53.

[FN14]. *Id*.

[FN15]. Delaware Rule 30(d)(1) states that "[f]rom 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 questions should be answered. A person 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 (d)(3).” Similarly, Delaware Superior Court Civil Rule 30(d)(1) provides that an attorney may not “consult or confer with the deponent regarding the substance of the testimony already given or anticipated” nor may the attorney “suggest to the deponent the manner in which any question should be answered.”

[FN16]. Numerous jurisdictions have also adopted rules similar to Delaware Rule 30(d)(1), which prohibit an attorney from conferring about substantive issues with a witness during a deposition. *See e.g.*, Alaska R.C.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.”); 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 of confidentiality or a limitation pursuant to a previously entered court order.); S.C. R.C.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.); D. Md. Loc. R., Guideline 5(g) (“During breaks in the taking of a deposition, no one should discuss with the deponent the substance of the prior testimony given by the deponent during the deposition).

[FN17]. *Id*. at 136.

[FN18]. *See also* *State v. Mumford*, 731 A.2d 831, 836 (Del. Super. 1999) (court revoked attorney's pro hac vice admission for violating ethical rules during the defense of a deposition by conferring with witness).

[FN19]. *See e.g.*, Jean M. Cary, Rambo Depositions Revisited: Controlling Attorney-Client Consultations During Depositions, 19 Geo. J. Legal Ethics 367, Spring 2006; *Circle Group Internet, Inc. v. Atlas, Pearlman, Trop & Borkson, P.A.*, No. 03 C 9004, 2004 WL 406988, at *2 (N.D.Ill. March 2, 2004); New York State Bar Association, Commercial and Federal Litigation Section, Committee on Federal Procedure, Should Deposition Witnesses Be Allowed To Confer With Their Counsel During A Deposition?, 2002.

[FN20]. *See* Jean M. Cary, Rambo Depositions Revisited: Controlling Attorney-Client Consultations During Depositions, 19 Geo. J. Legal Ethics 367, 397, Spring 2006; New York State Bar Association, Commercial and Federal Litigation Section, Committee on Federal Procedure, Should Deposition Witnesses Be Allowed To Confer With Their Counsel During A Deposition?, 7-9, 2002.

[FN21]. New York State Bar Association, Commercial and Federal Litigation Section, Committee on Federal Procedure, Should Deposition Witnesses Be Allowed To Confer With Their Counsel During A Deposition?, 9, 2002.

[FN22]. A. Darby Dickerson, The Law and Ethics of Civil Depositions, 57 Md. L. Rev. 273, 324, 1998.

[FN23]. While we are not opining on whether the Delaware rules allow or disallow such communications, we note that disallowing even the most general exchanges about the deposition process would seem needlessly rigid.

[FN24]. *Hall* at 528.