Appropriate Conduct in Protecting a Client During Deposition

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Very little reported case law exists setting forth legal standards of conduct for attorneys who are defending depositions. No reported Oregon case sets forth such a standard of conduct. Many attorneys who practice in Multnomah County, however, have properly relied on the deposition guidelines promulgated by the Multnomah Bar Association (MBA) Court Liaison Committee in 1992 for the proper conduct of the defending attorney during depositions. A rare reported case, *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993), establishes standards of conduct that are similar to and provide support for the Multnomah County deposition guidelines. However, the opinion in *Hall* goes too far in restricting the role of defending attorneys in counseling their clients. The Multnomah County guidelines more carefully balance the roles of the defending lawyer and the deposing lawyer.

1. The Multnomah County deposition guidelines.

The Multnomah County deposition guidelines are the result of a collaboration between the bench and the bar. The purpose of the guidelines is to provide uniformity and thereby reduce disputes during depositions. In pertinent part, they provide:

> *OBJECTIONS.* ORCP 39(d) creates a mechanism so that the attorney whose question is objected to may accept the objection as an invitation to correct an alleged defect in the question; rejection of the invitation may result in exclusion of the question and answer at trial. Attorneys do not need to state anything more than the legal grounds for the objection to preserve the record, and objection should be made without comment to avoid contamination of the answers of the witness. Argument in response to the objection is neither necessary nor desirable.
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> *INSTRUCTIONS NOT TO ANSWER.* The only basis for an instruction not to answer a question reasonably calculated to lead to the discovery of admissible evidence is in response to an attempt by the attorney taking the deposition to inquire into an area of privacy right, privilege, an area protected by the constitution, statute, work product, or questioning amounting to harassment of the witness. Any other objection to inquiry, such as lack of foundation, competence, asked and answered, etc., can be preserved with recitation of a brief objection.
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> *PENDING QUESTIONS.* If a break in questioning is requested, it shall be allowed so long as a question is not pending. If a question is pending, it shall be answered before a break is taken, unless the question involves a matter of privacy right, privilege or an area protected by the constitution, statute or work product.

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2. The standards of conduct in *Hall*.

The factual background in *Hall v. Clifton Precision* may have spurred the district court to issue guidelines that in one respect are too harsh. The parties in *Hall* almost immediately began to butt heads over the expansive and controlling role the plaintiff's attorney wanted to play in the plaintiff's deposition.

During the deposing attorney's introductory statements, the plaintiff's attorney interjected and told his client that at any time the client wanted to speak with him, he could stop and do so. The deposing attorney disagreed, stating that the deposition was for the deponent to answer questions, not to have conferences with counsel to formulate his responses. During the brief questioning that followed, the plaintiff stopped to confer with his attorney regarding the meaning of "document" and then asked the deposing attorney the meaning of the term. The plaintiff's attorney later interrupted a question regarding a document that had been shown to the plaintiff by stating that he had to review that document with his client, to which the deposing attorney objected. The deposition then terminated after having barely begun, and the parties asked the district court for a ruling regarding the rights of deponents to confer with their lawyers during depositions. *Hall*, 150 F.R.D. at 526.

Citing unreported orders from lower federal courts and standing orders of the

United States District Court for the Eastern District of New York, the court in *Hall* noted that a number of courts have forbidden all private conferences between deponents and their lawyers except in aid of determining whether to assert a privilege. 150 F.R.D. at 527. The court held that a lawyer and client do not have an absolute right to confer during the course of the client's deposition; a lawyer is "not to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers." *Id.* Thus, whether initiated by the deponent's lawyer or the deponent, the court determined that conferences should be "prohibited both during the deposition *and during recesses*," except for the purpose of determining whether to assert a privilege. *Hall*, 150 F.R.D. at 529 (emphasis added). The court went even further in ordering that the fact and the subject matter of any conferences must be disclosed on the record, and attorney-client communications during the conferences are made discoverable to the extent of determining what, if any, witness-coaching occurred. *Hall*, 150 F.R.D. at 532.

The court in *Hall* also addressed on-the-record witness coaching through suggestive objections. The court emphasized that depositions are to be question-and-answer sessions aimed at uncovering the facts in a lawsuit, without lawyers' comments that might suggest or limit a witness's answer. Accordingly, the court held that counsel were not to make objections except for those that would be waived, were not to suggest answers, and were not to direct the witness not to answer unless on the grounds of privilege or a limitation on evidence ordered by the court. *Hall*, 150 F.R.D. at 531. The court also ordered that the deponent may ask the deposing attorney for clarifications regarding terms, questions, or documents; but the deponent's attorney may not provide clarification. *Hall*, 150 F.R.D. at 531-32.

3. Analysis of the *Hall* and Multnomah guidelines.

The Multnomah County Deposition Guidelines and the guidelines in *Hall* are essentially the same with respect to the scope of the deposition and the proper manner of making objections. The Multnomah County guidelines regarding objections, however, helpfully add that arguments regarding objections are a waste of deposition time. On-the-record coaching is also condemned by other courts. *See, e.g., Van Pilsum v. Iowa State University of Science and Technology*, 152 F.R.D. 179 (S.D. Iowa 1993). The Multnomah guideline that a witness must answer a pending question before taking a break to confer with counsel also comports with *Hall*.

As to the differences between *Hall* and the Multnomah guidelines, the Multnomah guidelines on instructions not to answer are more detailed and provide a slightly broader basis for instructing a witness not to answer than the guidelines in *Hall*. The Multnomah guidelines also provide a procedure for resolving disputes that occur during the deposition and a rule regarding those who may attend a deposition, two issues not addressed directly by *Hall*.

The major difference between the *Hall* and the Multnomah County guidelines, though, is the limitation of the defending lawyer's role as a counselor during breaks in the deposition. The Multnomah guidelines permit deponents and their lawyers to recess, so long as a question is not pending. Lawyers then have an opportunity to freely confer with their clients during any deposition recess. *Hall*, however, prohibits lawyer-client conferences except for assessing whether a privilege should be asserted.

The rules articulated in *Hall* are apparently being used in the Eastern District of Pennsylvania. *See Johnson v. Wayne Manor Apartments*, 152 F.R.D. 56 (E.D. Pa. 1993). Although the decision in *Hall* has been cited several times by courts outside the Eastern District of Pennsylvania, off-the-record conferences were not raised as an issue in the opinions. *See Van Pilsum*, 152 F.R.D. 179 (S.D. Iowa 1993); *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. Supr. Ct. 1994). It appears that *Hall* is the only reported case that goes so far as to prohibit as a general rule all off-the-record conferences except for those regarding assertion of a privilege, although the opinion in *Hall* notes that other courts have issued such orders. 150 F.R.D. at 527.

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Hall should not be adopted for practice in Oregon because it unduly restricts the role of counsel defending a deposition. Certainly, if deponents and their lawyers abuse the opportunity to confer during breaks by repeatedly conferring and changing answers, limitations on conferences may be appropriate. However, witnesses, particularly those who have never before testified or been deposed, often have questions or request direction and assistance that are legitimate areas for the attorney's advice and counsel. If Oregon attorneys continue to conduct depositions in accordance with the letter and spirit of the rules of civil procedure and follow the Multnomah guidelines, we can avoid the draconian rules that have been imposed in *Hall*. ❐