

Caution: Discussions between Counsel and Client during a Deposition May Not Be Privileged

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The morning session of the deposition could not have gone better. Defense counsel has not asked too many tough questions and both plaintiff and her counsel are pleased with her answers – except for one. During the lunch break, after discussing their respective plans for the upcoming holiday weekend, plaintiff asks her counsel about one of her answers. She is troubled that, upon reflection, her answer may not have been entirely accurate. Counsel’s immediate response is to assure plaintiff not to worry. His next instinct is to talk through the question and answer with his client to determine whether a clarification is necessary. But, should he? He sees no reason not to do so, as he firmly believes such discussion is within the attorney-client privilege. It is also necessary, not to coach the witness, but to ensure an accurate record. So, counsel and client discuss the answer in detail and determine that plaintiff’s response is, in fact, misleading. Following the lunch break, plaintiff’s counsel interrupts defense counsel’s first question and informs him that plaintiff wishes to amend one of her prior answers. Upon hearing the “new” answer, defense counsel asks plaintiff to describe, in detail, her discussions with her counsel during the lunch break. Plaintiff’s counsel jumps out of his seat, objects and directs his client not to answer on privilege grounds. Does plaintiff have to disclose the subject of her lunchtime conversation with her counsel or is it privileged? In the federal court in New Jersey, such conversations during a deposition break appear to be fair game for questioning and are not considered privileged.

This issue recently arose in ***Chassen v. Fidelity Nat’l Fin., Inc., Civ. Action No. 09-291 (D.N.J. July 21, 2010) (“Letter Order”)***. There, Magistrate Judge Salas determined that communications between client and counsel during a break in a deposition are not privileged and may be explored during the deposition, unless the discussion involves issues of privilege. According to Magistrate Judge Salas:

“Defendants have a right to explore whether the discussions counsel had with the Plaintiff during the recess may have influenced her testimony, thus interfering with the fact-finding goal of the deposition process.” *Id.* at 2. In a Memorandum and Order filed on January 13, 2011, Judge Sheridan agreed.

The Federal Rules of Civil Procedure do not directly address this issue. Fed. R. Civ. Pro. 30(c)(1) provides that deposition testimony should proceed as if it were trial testimony. Thus, the court in *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993), a case relied upon extensively by Magistrate Judge Salas, found that counsel may not consult with a client at any time after the start of the deposition. “During a civil trial, a witness and his ... lawyer are not permitted to confer at their pleasure during the witness’s testimony ... The same is true at deposition.” Letter Order, at 1, quoting *Hall*, 150 F.R.D. at 528.

In *Chassen*, Deborah Hoffman, a proposed class representative, testified at deposition that she would not be available to attend the trial in the matter because of work. As a proposed class representative, Mrs. Hoffman’s availability to appear at the trial was relevant to her suitability to represent the class. A few moments later, the parties took a break so that the videographer could change tapes. When the deposition resumed, defense counsel asked Mrs. Hoffman, “[d]id you discuss your testimony you gave this morning with your lawyers during the break?” She responded, “Yes.” Defense counsel next asked Mrs. Hoffman to describe the discussion, which drew an objection from plaintiff’s counsel and a direction not to answer. During a brief colloquy, plaintiff’s counsel argued that, “[t]here was no question outstanding when we took the break, and counsel is allowed to consult with [a client] during a break in deposition,” under those circumstances. During another colloquy later in the deposition, plaintiff’s counsel admitted that, “I disclosed my mental impressions and opinions about her testimony” during the break. After defense counsel concluded his questioning, plaintiff’s counsel then asked several questions regarding Mrs. Hoffman’s availability to testify at trial. This time, under questioning by her counsel, Mrs. Hoffman testified that she could attend the trial as required.

Following the deposition, defense counsel filed an application with Magistrate Judge Salas seeking an order permitting defendants to question Mrs. Hoffman about her discussion with her counsel during the break in the deposition. Magistrate Judge Salas held that “counsel and witness are prohibited from engaging in private, off-the-record conferences during any breaks in a deposition, except for the purpose of deciding whether to assert a privilege.” Letter Order, at 1. If such conferences occur, the attorney taking the deposition is entitled to “inquire about the specific content of those communications to ascertain whether any witness-coaching has occurred.” *Id.* at 1-2; see also *Hall*, 150 F.R.D. at 532.

In plaintiff’s brief opposing defendants’ application, counsel argued that *Hall* is not controlling and, in fact, has been subject to much disagreement in other districts. Magistrate Judge Salas rejected plaintiff’s argument, finding that *Hall* was adopted by the District of New Jersey in *Ngai v. Old Navy*, Civil Action No. 07-5653, 2009 U.S. Dist. LEXIS 67117 (D.N.J. July 31, 2009). In *Ngai*, Magistrate Judge Shwartz, relying on *Hall*, found that text messages exchanged during a deposition between defense counsel and the deponent, who were in different locations, violated Fed. R. Civ. Pro. 30 and were not protected by the attorney-client privilege. Applying *Hall*, Magistrate Judge Salas held that “Defendants will be permitted to question Mrs. Hoffman about the communications between her and counsel during the break where Mrs. Hoffman admitted she spoke to counsel about her testimony.” Letter Order, at 2.

Plaintiff appealed the decision to Judge Sheridan who focused on two competing issues: (1) “whether the attorney impermissibly ‘coached’ Ms. Hoffman skewing the truthfulness of her testimony”; and (2) “whether such an attorney-client communication is privileged, and should remain confidential despite the coaching (if any).” Memorandum/Order at 1. In attempting to resolve these

potentially conflicting positions, Judge Sheridan offered to hold an *in camera* hearing with plaintiff and her counsel to determine whether the discussions during the deposition were protected by the attorney-client privilege. After both parties rejected this suggestion, Judge Sheridan affirmed Magistrate Judge Salas's decision and ordered Mrs. Hoffman to be deposed regarding her intra-deposition discussion with her counsel.

Unlike the Federal Rules of Civil Procedure, the New Jersey Court Rules directly address this issue, at least in part. The Court Rules expressly forbid a lawyer from consulting with a client "during the course of the deposition while testimony is being taken" except with regard to issues involving (a) privilege; (b) confidentiality; or (c) a limitation created by a previous order of the court. R. 4:14-3(f). There is some debate, however, as to the scope of the phrase "while testimony is being taken" and whether it is intended to extend the prohibition to breaks during the deposition. The comment to the Court Rule takes the position that the Rule applies only in the deposition room and "clearly does not address consultation during overnight, lunch, and other breaks." *Id.*, comment 6. However, in *In re PSE&G Shareholder Lit.*, 320 N.J. Super. 112, 116-118 (Ch. Div. 1998), the court, after citing to the comment to the Rule, nevertheless imposed an order prohibiting consultation between lawyers and clients during deposition breaks.

In practice, an attorney defending a deposition needs to be aware that any discussions he/she has with a client during a break may not be privileged. Both the *Chassen* decision and R. 4:14-3(f) permit counsel to discuss with a client during a deposition issues pertaining to privilege (*i.e.*, whether particular questions implicate privileged communications). However, a witness may be required to testify regarding any other substantive discussions with counsel during a break in the deposition. This is particularly true in cases pending in New Jersey federal court in light of the *Chassen* decision. Following *Chassen*, attorneys who discuss substantive matters with a client during a deposition break does so at their peril.

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