You Don't Have The Right to Remain Silent: The Middle District of Pennsylvania Reaffirms that Attorney-Client Communications During Depositions are NOT PRIVILEGED

Insights
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In Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993), the United States District Court for the Eastern District of Pennsylvania issued its opinion regarding attorney-client communications during depositions which has since become "widely accepted among the Pennsylvania district courts." Vnuk v. Berwick Hosp. Co., No. 14-CV-01432, 2016 WL 907714, at *1 (M.D. Pa. Mar. 2, 2016) (citations omitted). In Hall, the Court held that:

A lawyer, of course, has the right, if not the duty, to prepare a client for a deposition. But once a deposition begins, the right to counsel is somewhat tempered by the underlying goal of our discovery rules: getting to the truth. Under Rule 30(c), depositions generally are to be conducted under the same testimonial rules as are trials. 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.

150 F.R.D. at 528. The court recognized, however, that there is one narrow exception to this rule which permits a private conference between witness and attorney only if the purpose is to decide whether to assert a privilege. Additionally, the Hall court reiterated that the same considerations prohibiting witness-coaching also limit an attorney's use of speaking objections during a deposition, because such objections improperly signal a deponent to use certain language or testify in a certain way.

In Vnuk, during plaintiff's deposition, counsel for plaintiff committed myriad improprieties expressly prohibited by the Federal Rules and Hall, including: (1) speaking with his client during multiple breaks including a thirty-minute lunch break; (2) during questioning, writing down information on a notepad and showing it to his client; (3) during questioning, whispering to his client; and (4) engaging in lengthy speaking objections in order to influence his client's testimony. When defense counsel questioned plaintiff regarding these communications with counsel, plaintiff's attorney claimed privilege and instructed her not to respond.

Counsel for plaintiff argued that Hall (a decision issued by the U.S. District Court for the Eastern District of Pennsylvania) was not the controlling law of 3rd Circuit or the U.S. District Court for the Middle District of Pennsylvania (where Vnuk was pending). The Vnuk court summarily rejected plaintiff's "attempt to cast doubt on Hall's precedential value" and found that plaintiff's reliance on

"other district courts half a continent away are insufficient to override Hall's broad acceptance in Pennsylvania, where the parties and attorneys here live and practice." Further, relying on Hall, Judge Mariani also found that "[s]peaking objections, or any other type of strategic interruption meant to undermine the truth-finding purpose of depositions through an attorney's intermediation, will not be tolerated in this or any other proceeding assigned to me."

There are three (3) important practice pointers to extract from the Vnuk decision for any attorneys practicing within the 3rd Circuit:

1. 1. Any communications you have with a deponent once the deponent is sworn in and the deposition begins – apart from communications regarding whether or not you are going to assert privilege as to a particular issue – are fair game for inquiry by opposing counsel;
   2. Lengthy speaking objections during a deposition are potentially improper, particularly when such objections are meant to coach or suggest an answer to a witness; and
   3. Bring copies of the Hall and Vnuk opinions with you to any depositions that you are taking, especially if you anticipate any potential friction or funny business from your counterpart.

To produce an even cleaner deposition record in the event your opposing counsel engages in improper communications during a deposition, attorneys should also consider instructing a witness at the beginning of a deposition – and also immediately prior to any breaks during the deposition – that you will inquire about any interactions you observe between the deponent and their attorney while the deponent is sworn in. Because, in the 3rd Circuit, a witness does not have the right to remain silent if he or she is caught being coached during a deposition.