Give Me a Break: Regulating Communications Between Attorneys and Their Witness-Clients During Deposition Recesses

BRIAN R. IVERSON*

Abstract

Civil depositions typically include periodic breaks, and many attorneys naturally want to discuss the testimony with their witness-clients during those breaks. With the increase in remote depositions during the COVID-19 pandemic, an attorney and witness-client may wish to communicate even more frequently, for example, by exchanging text messages during the questioning. Case law varies greatly by jurisdiction and does not provide clear guidance on what types of communications during a deposition are permitted. This Article reviews the existing authorities, policy rationales, and other scholarly proposals before recommending an amendment to the Federal Rules of Civil Procedure to provide greater clarity and predictability to attorneys and their witness-clients.

Table of Contents

* Member, Bass, Berry & Sims PLC in Washington, D.C.; Pepperdine University School of Law, J.D., *magna cum laude* and Order of the Coif; Belmont University, B.B.A., *cum laude*. I wish to thank my wife, Jessica Iverson, for her helpful insights on previous drafts of this Article and for her loving support during many hours of research and drafting. I also wish to thank my colleagues Jonathan Nelson and Brook Lathram for their valuable feedback on my analysis and proposed rule. Finally, I wish to thank the staff and editorial board at the Georgetown Journal of Legal Ethics, particularly Nathan Winshall, Joshua Raizner, and Brooke Brimo, for their constructive suggestions and edits.

INTRODUCTION

Civil depositions usually include periodic breaks to stretch, refill drinks, use the restroom, or eat lunch.[1] During these breaks, the witness and her counsel often want to discuss the testimony.[2] Since the COVID-19 pandemic began, many depositions have shifted to Zoom or other remote platforms.[3] In remote depositions, attorneys and clients may be tempted to communicate more frequently by text messages or instant messages, even while questions are pending.[4] Although communications between an attorney and witness-client in the course of a deposition are common, many attorneys do not have a clear understanding of the permissible bounds for

1. A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 MD. L. REV. 273, 342–43 (1998).
2. *Id.* (observing that, "[b]ecause most attorneys use private conferences, no one wants to complain too loudly").
3. *See, e.g.*, Suzanne Quinson, *Depositions: Is the Future Remote?*, PLANET DEPOS (Jan. 19, 2022), https://www.jdsupra.com/legalnews/depositions-is-the-future-remote-1473803/ [https://perma.cc/7AVQ-845C] (describing the results of a survey in summer 2021 assessing law firms' attitudes toward remote depositions).
4. *See, e.g.*, Ngai v. Old Navy, No. 07-5653, 2009 WL 2391282, at *4–5 (D.N.J. July 31, 2009).

the communications.[5] That is for good reason: the rules and case law do not provide clear guidance.

In the 1980s and 1990s, some federal district courts began imposing "no-consultation" rules through orders, standing orders, and local rules.[6] Although the parameters varied, "no-consultation" rules imposed significant restrictions on an attorney's ability to communicate with a witness-client during a deposition.[7] Penalties for violating these rules included monetary sanctions[8] and waiver of the attorney-client privilege.[9] Since this trend began, federal courts across the country have taken a wide range of approaches to address conferences between attorneys and their witness-clients during a deposition.[10]

Limitations on private conferences are rarely addressed on appeal, and the variance in federal district court approaches has increased over time.[11] For example, in recent years, one court ordered a complete ban on all conferences between an attorney and witness-client during deposition breaks, stating that any conferences that occurred in violation of the ban would not be protected by privilege and would be a proper subject for inquiry by the deposing counsel.[12] Another court found that an attorney improperly conferred with his witness-client during a break requested by the interrogating attorney but declined to impose sanctions for the improper conference.[13] Meanwhile, a third court declined to enter any restrictions on conferences between an attorney and witness-client between non-consecutive deposition days, except when a question was pending.[14]

The significant variance in the case law raises a serious concern for counsel and litigants in view of the important rights involved, such as the attorney-client privilege and the right to counsel.[15] Those concerns only

---

5. *See* Dickerson, *supra* note 1, at 342.

6. *See* David H. Taylor, *Rambo as Potted Plant: Local Rulemaking's Preemptive Strike Against Witness-Coaching During Depositions*, 40 VILL. L. REV. 1057, 1062–70 (1995); Jean M. Cary, *Rambo Depositions Revisited: Controlling Attorney-Client Consultations During Depositions*, 19 GEO. J. LEGAL ETHICS 367, 374–86 (2006); Joseph R. Wilbert, Note, *Muzzling Rambo Attorneys: Preventing Abusive Witness Coaching by Banning Attorney-Initiated Consultations with Deponents*, 21 GEO. J. LEGAL ETHICS 1129, 1131–37 (2008).

7. *See, e.g.*, Hall v. Clifton Precision, 150 F.R.D. 525, 531–32 (E.D. Pa. 1993).

8. *See, e.g.*, BNSF Ry. Co. v. San Joaquin Valley R.R. Co., No. 1:08-cv-01086-AWI-SMS, 2009 WL 3872043, at *4 (E.D. Cal. Nov. 17, 2009).

9. *See, e.g.*, *Hall*, 150 F.R.D. at 532.

10. *See infra* Parts I, II.

11. *See infra* Parts I, II.

12. *See* Peronis v. United States, No. 2:16-cv-01389-NBF, 2017 WL 696132, at *2–3 (W.D. Pa. Feb. 17, 2017).

13. Gay v. City of Rockford, No. 20 CV 50385, 2021 WL 5865716, at *3–4 (N.D. Ill. Dec. 10, 2021).

14. Or. Laborers Emps. Pension Tr. Fund v. Maxar Techs. Inc., No. 1:19-cv-00124-WJM-SKC, 2022 WL 684168, at *2–3 (D. Colo. Mar. 8, 2022).

15. As discussed in Part III.C, *infra*, courts uniformly seem to accept that clients in civil cases have a right to hired counsel, although the authorities disagree on whether this is a

increase when attorneys consider the competing ethical considerations at play. For example, attorneys have the right, if not an ethical duty, to prepare their witness-clients before a deposition,[16] but attorneys are never permitted to "coach" a witness by telling the witness what to say.[17] Some courts have suggested that the concern about unethical "coaching" is so great during a deposition that no conferences should be permitted at all.[18] But by placing the "coaching" concern as paramount, strict "no-consultation" rules give rise to other ethical concerns, such as how an attorney may best comply with his ethical duty to remonstrate confidentially with the client if he believes the client has testified falsely.[19]

This Article analyzes the various authorities governing communications between attorneys and their witness-clients during depositions and recommends a uniform federal rule that balances competing legal, ethical, and practical concerns to provide greater predictability for attorneys and litigants.

Part I starts by examining two seminal federal district court decisions that reach different conclusions on the permissible bounds of private, off-the-record conferences between an attorney and witness-client.[20] In *Hall v. Clifton Precision*, the court strongly condemned private conferences, ordering that "[c]ounsel and their witness-clients shall not engage in private, off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding whether to assert a privilege."[21] A few years later, the court in *In re Stratosphere Corporate Securities Litigation* recognized the *Hall* court's concerns about witness coaching but held that "the *Hall* decision goes too far and its strict adherence could violate the right to counsel."[22] The *Stratosphere* court therefore expressly permitted an attorney to confer with his witness-client during recesses that the attorney did not request.[23] Part I describes the *Hall* and *Stratosphere* holdings in

---

constitutional right under the Fifth Amendment's Due Process Clause. *Compare* Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1118 (5th Cir. 1980) (suggesting that civil litigants have a Fifth Amendment right to hired counsel), *with* Doe v. Dist. of Columbia, 697 F.2d 1115, 1119–20 (D.C. Cir. 1983) (recognizing that "every litigant has a powerful interest in being able to retain and consult freely with an attorney" while stating, "we need not elevate to constitutional status the right to the aid of counsel").

16. Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993).

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

18. *Hall*, 150 F.R.D. at 528.

19. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2018) [hereinafter MODEL RULES]; *see also* DeAngelis v. Countrywide Home Loans, Inc. (*In re* Hill), 437 B.R. 503, 543–46 (Bankr. W.D. Pa. 2010) (relying on Model Rule 3.3 and Comment 10 in ordering an attorney to show cause why he should not be personally sanctioned for presenting at trial false deposition testimony from a client representative); *infra* Part III.D.

20. *Infra* Part I.

21. *Hall*, 150 F.R.D. at 531–32.

22. *Stratosphere*, 182 F.R.D. at 620.

23. *Id.* at 621.

detail and examines the courts' rationales for these divergent approaches to private, off-the-record conferences.

Part II explores the wide range of approaches federal courts have taken to address private, off-the-record conferences since *Hall* and *Stratosphere*. In *Hunt v. DaVita*, the Seventh Circuit became the only federal appellate court to address the issue directly, finding that it was "not appropriate or professional" for an attorney to engage in private conferences with his witness-client during the deposition, but holding that the district court did not abuse its discretion in refusing to impose sanctions for the misconduct.[24]

With scant guidance from appellate courts, federal district courts have been left to devise their own rules. This has created great inconsistency in how different district courts view private, off-the-record conferences, including occasional contradictory opinions from different judges in the same district. Some district courts follow *Hall*, others follow *Stratosphere*, and still others have crafted entirely new rules, such as the case-by-case approach in the District of D.C.[25] Part II concludes that district courts' wide range of approaches leads to significant uncertainty and creates a need for a uniform federal rule on private, off-the-record conferences between an attorney and witness-client during a deposition.

Building on the conclusion that a uniform federal rule is necessary, Part III explores the primary rationales that courts have relied on for the various approaches. To support its strict prohibition on conferences, the *Hall* court relied heavily on a clause in the Federal Rules of Civil Procedure that depositions "proceed as they would at trial,"[26] explaining that a witness and his or her lawyer are not permitted to confer at their pleasure during trial testimony.[27] Similarly, many decisions discuss concerns about improper witness coaching during private, off-the-record conferences.[28] Some courts attempt to balance the coaching concern against civil litigants' right to counsel and due process[29] or attorneys' ethical obligation to take remedial measures for false testimony.[30] Part III critically examines the merits of these rationales to inform whether and how best to address them in a proposed rule.

Part IV proposes an amendment to the Federal Rules of Civil Procedure to establish uniform standards for communications between attorneys and their witness-clients during depositions. The Part starts by examining two earlier scholarly proposals[31] and identifying areas for improvement in each. It then observes that the use of remote depositions has increased

24. Hunt v. DaVita, Inc., 680 F.3d 775, 780 (7th Cir. 2012).
25. *See, e.g.*, United States v. Philip Morris, 212 F.R.D. 418, 420 (D.D.C. 2002).
26. FED. R. CIV. P. 30(c)(1).
27. *See* Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993).
28. *Id.*; *see also In re* Stratosphere Corp. Sec. Litig., 182 F.R.D. 614, 621 (D. Nev. 1998).
29. *See*, *e.g.*, Odone v. Croda Int'l PLC, 170 F.R.D. 66, 66–70 (D.D.C. 1997).
30. MODEL RULES R. 3.3(a)(3).
31. *Cary*, *supra* note 6; Wilbert, *supra* note 6.

substantially during the COVID-19 pandemic, and many practitioners expect that remote depositions will remain commonplace even after pandemic-related restrictions are relaxed.[32] The increased use of remote depositions creates a new urgency for a uniform federal rule because attorneys and their witness-clients have new temptations to communicate via text messages or instant messages during remote depositions.[33]

Part IV concludes with the text and analysis of a proposed amendment to Rule 30 of the Federal Rules of Civil Procedure that would create a uniform standard for private, off-the-record communications between an attorney and witness-client during a deposition. The proposed rule states that attorneys and their witness-clients may not communicate while a question is pending, except for the purpose of deciding whether to assert a privilege, to enforce a limitation ordered by the court, or to present a motion to terminate or limit the deposition. During breaks and recesses, however, the rule generally would permit communications between attorneys and their witness-clients, and mere fact of the communication would not waive any otherwise applicable privilege. The rule would allow the court, in particular cases, to modify the restrictions for good cause shown. This proposed rule balances the relevant concerns while expressly giving district judges authority to modify the restrictions based on the conduct of the attorneys and litigants in a particular case. Under the existing text of Rule 30(d), federal courts have authority to allow additional time for the deposition or to impose sanctions for any communications that violate the new proposed rule.

I. THE SEMINAL DECISIONS IN *HALL* AND *IN RE STRATOSPHERE*

In 1993, District Judge Robert S. Gawthrop III of the Eastern District of Pennsylvania issued the seminal no-consultation order in *Hall v. Clifton Precision*.[34] A few years later, in 1998, Magistrate Judge Roger L. Hunt of the District of Nevada decided *In re Stratosphere Corporate Securities Litigation*,[35] which is the most prominent case disagreeing with *Hall*'s substantial restrictions. *Hall* and *Stratosphere* establish two divergent standards for the permissible bounds of private, off-the-record conferences between an attorney and witness-client, and the opinions often lay the foundation for subsequent orders on the issue. This Part summarizes the holdings and analyses in *Hall* and *Stratosphere*.

32. *See* Quinson, *supra* note 3.
33. *See, e.g.*, Savoia-McHugh v. Glass, No. 3:19-cv-2018-MCR-HTC, 2020 WL 12309562, at *1 (N.D. Fla. Nov. 30, 2020).
34. Hall v. Clifton Precision, 150 F.R.D. 525, 531–32 (E.D. Pa. 1993).
35. *In re* Stratosphere Corp. Sec. Litig., 182 F.R.D. 614 (D. Nev. 1998).

A. *HALL v. CLIFTON PRECISION*

Hall involved a plaintiff's deposition that effectively ended before it began. While going through the typical admonitions at the beginning of the deposition, the examining attorney told the witness, "[c]ertainly ask me to clarify any question that you do not understand. Or if you have any difficulty understanding my questions, I'll be happy to try to rephrase them to make it possible for you to be able to answer them."[36] The witness's counsel then interjected, "Mr. Hall, at any time if you want to stop and talk to me, all you have to do is indicate that to me."[37] The examining attorney took exception to this comment, stating "[t]his witness is here to give testimony, to be answering my questions, and not to have conferences with counsel in order to aid him in developing his responses to my questions."[38] When the questioning began, the witness requested to speak with his attorney about the meaning of the word "document," and the attorney later stopped the questioning to review a document with the witness.[39] The examining attorney objected to these conferences, and the parties contacted the court for guidance.[40]

In response, the court established nine specific guidelines for discovery depositions, including the following three, which are most relevant to this Article:

> 5. Counsel and their witness-clients shall not engage in private, off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding whether to assert a privilege.
>
> 6. Any conferences which occur pursuant to, or in violation of, guideline (5) are a proper subject for inquiry by deposing counsel to ascertain whether there has been any witness coaching and, if so, what.
>
> 7. Any conferences which occur pursuant to, or in violation of, guideline (5) shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall also be noted on the record.[41]

The court essentially wrote on a blank slate, explaining that, although the issue was "presen[t] in nearly every case brought under the Federal Rules of Civil Procedure," there was "not a lot of case law on point."[42] In

36. *Hall*, 150 F.R.D. at 526.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 531–32.
42. *Id.* at 526.

view of the dearth of case law, the court began with the text of Rules 16, 26, 30, and 37 of the Federal Rules of Civil Procedure, finding that they "vest the court with broad authority and discretion to control discovery, including the conduct of depositions."[43] The court noted that the plaintiff-witness submitted no authority for the proposition that "an attorney and client may confer at their pleasure during the client's deposition," whereas the defendant submitted several orders from other courts holding that such conferences were not allowed or should be significantly limited.[44]

In an oft-quoted portion of the opinion, the court analyzed the purposes and policies of depositions, stating that the point of a deposition is to record the witness's testimony, not to have the witness's attorney help to formulate answers, and therefore, attorneys and witness-clients do not have an absolute right to confer during a deposition:

> The underlying purpose of a deposition is to find out what a witness saw, heard, or did—what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness—not the lawyer—who is the witness. As an advocate, the lawyer is free to frame those facts in a manner favorable to the client, and also to make favorable and creative arguments of law. But the lawyer is not entitled to be creative with the facts. Rather, a lawyer must accept the facts as they develop. Therefore, I hold that a lawyer and client do not have an absolute right to confer during the course of the client's deposition.[45]

---

43. *Id.* at 527.

44. *See id.* (first citing *In re* Braniff, Inc., Nos. 89-03325-BKC-6C1, 92-911, 1992 WL 261641 (Bankr. M.D. Fla. Oct. 2, 1992); then citing RTC v. KPMG Peat Marwick, No. 92-1373 (E.D. Pa. Sept. 19, 1992); then citing *In re* Domestic Air Transp. Antitrust Litig., No. 1:90-CV-2485-MHS, MDL 861, 1990 WL 358009 (N.D. Ga. Dec. 21, 1990); then citing *In re* San Juan DuPont Plaza Hotel Fire Litig., No. MDL 721, 1989 WL 168401 (D.P.R. Dec. 2, 1989); then citing *In re* Rhode Island Asbestos Cases, R.I.M.L. No. 1 (D.R.I. Mar. 15, 1982); then citing *In re* Asbestos-Related Litig., No. CP-81-1 (E.D.N.C. Sept. 15, 1981); and then citing STANDING ORDERS OF THE COURT ON EFFECTIVE DISCOVERY IN CIVIL CASES, 102 F.R.D. 339, 351, nos. 12–13 (E.D.N.Y. Mar. 21, 1984)).

45. *Hall*, 150 F.R.D. at 528 (footnote omitted). Although the *Hall* court relied heavily on a concern about witness coaching, the court did not articulate why existing restrictions on coaching were insufficient to address the concern. For example, the *Model Rules of Professional Conduct* state that a lawyer shall not knowingly "offer evidence that the lawyer knows to be false" and shall not "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law." MODEL RULES R. 3.3(a)(3), 3.4(b). These rules already prohibit the type of "coaching or bending the witness's words to mold a legally convenient record" with which the *Hall* court was

Turning to address concerns about the client's rights to counsel and due process, the court acknowledged that an attorney has the right, and perhaps the duty, to prepare a client for a deposition, but found that the right to counsel "is somewhat tempered" during a deposition by the underlying goal of getting to the truth.[46] In reaching this conclusion, the court relied on Federal Rule of Civil Procedure 30(c), which at the time read, "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial."[47] Applying this language, the court wrote, "a witness and his or her lawyer are not permitted to confer at their pleasure" during a trial, and "[t]he same is true at a deposition."[48]

Hall's strict prohibition on conferences is the same regardless of who requests the conference (the attorney or the witness-client).[49] All conferences are prohibited "both during the deposition and during recesses."[50]

The opinion gives teeth to this broad prohibition by declaring in a footnote that the attorney-client privilege does not apply to conferences in violation of the order, and the deposing attorney is free to ask the witness questions about any conferences to determine whether the witness was improperly coached.[51] Notwithstanding the deep and thoughtful analysis elsewhere in the opinion, this footnote contains limited analysis and cites no authorities on such an important privilege question.[52]

The opinion provides one limited exception for private, off-the-record discussions about whether to assert privilege: "[s]ince the assertion of a privilege is a proper, and very important, objection during a deposition, it makes sense to allow the witness the opportunity to consult with counsel about whether to assert a privilege."[53] For any such conferences, "the conferring attorney should place on the record the fact that the conference

---

concerned, *see Hall*, 150 F.R.D. at 528, even without imposing a strict no-consultation rule during a deposition.

46. *Hall*, 150 F.R.D. at 528.

47. *Id.* at 527 (quoting FED. R. CIV. P. 30(c) (1987) (amended 1993)). As discussed in Part III.A, *infra*, Rule 30(c) was subsequently amended in 1993, but the "proceed as permitted at the trial" language remains. The current version of Rule 30(c)(1) reads, in relevant part, "[t]he examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615." Federal Rule of Evidence 103 addresses rulings on evidence and Federal Rule of Evidence 615 governs excluding witnesses so they cannot hear other witnesses' testimony. FED. R. EVID. 103, 615. The witness exclusion rule, commonly referred to simply as "The Rule," is also discussed in Part III.A, *infra*.

48. *Hall*, 150 F.R.D. at 527.

49. *Id.* at 528–29.

50. *Id.*

51. *Id.* at 529 n.7.

52. *Id.*

53. *Id.* at 529.

occurred, the subject of the conference, and the decision reached as to whether to assert a privilege."[54]

Although the *Hall* opinion has received praise for its thoughtful analysis of the concerns at issue, courts and scholars have often criticized *Hall* for going too far to address those concerns and for impinging on the attorney-client relationship.[55] Civil litigants usually lack the skill and knowledge to prepare a case without counsel's guidance,[56] and a strict no-consultation rule deprives the client of his ability to consult counsel during one of the most critical points in the litigation.[57] *Stratosphere* is the most prominent rebuttal to *Hall*, and *Stratosphere* resolves the competing concerns in favor of the client's right to counsel.[58]

B. *IN RE STRATOSPHERE CORPORATE SECURITIES LITIGATION*

Stratosphere was a class action lawsuit for securities fraud.[59] The parties had previously litigated against one another in a related bankruptcy proceeding,[60] and the plaintiffs filed a motion to establish a deposition protocol in the securities fraud case to "avoid the wasted time and circus-like atmosphere they endured" in the bankruptcy case.[61] Among other things, the plaintiffs' motion relied on *Hall* to advocate for a no-consultation order, arguing that "a deponent does not have the right to confer with counsel at any time during the deposition, including breaks" and that "opposing counsel has a right to inquire into whether they have spoken and, if so, what was discussed."[62] Neither party provided any decision by any

54. *See id.* at 530. After addressing off-the-record private conferences, the court addressed on-the-record witness-coaching through suggestive objections. *Id.* It noted that the Supreme Court had recently proposed amendments to the Federal Rules of Civil Procedure to address suggestive objections. *Id.* (citing Proposed Amendments to the Federal Rules of Civil Procedure and Forms, H.R. DOC. NO. 74, 103d Cong., at 50–52 (1st Sess. Apr. 22, 1993)). Congress allowed the proposed amendments to become effective on December 1, 1993. For additional analysis of the 1993 amendment to address objections, see Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561, 582–84 (1996).

55. For example, shortly after *Hall* was decided, Professor David Taylor analyzed *Hall* and several no-consultation local rules, concluding, "[t]he no-consultation rule is an ill thought out over-reaction to the problem of discovery abuse during depositions." Taylor, *supra* note 6, at 1109.

56. *See* Odone v. Croda Int'l PLC, 170 F.R.D. 66, 67–70 (D.D.C. 1997) (quoting Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1108 (5th Cir. 1980)) (citing *Hall*, 150 F.R.D. at 529 n.7).

57. *See, e.g.*, *In re* Stratosphere Corp. Sec. Litig., 182 F.R.D. 614, 620 (D. Nev. 1998).

58. *Id.*

59. *In re* Stratosphere Corp. Sec. Litig., 66 F. Supp. 2d 1182, 1186 (D. Nev. 1999).

60. *Id.*

61. *Stratosphere*, 182 F.R.D. at 616.

62. *Id.* at 619.

court in the Ninth Circuit that addressed this issue or cited *Hall*, and the court was unable to locate any such decisions.[63]

Given the lack of binding authority, the *Stratosphere* court also effectively wrote on a blank slate, but it analyzed *Hall* in detail for its persuasive value.[64] The court began by noting its agreement "with the underlying concern and essential purpose of the *Hall* court's ruling," but the court concluded *Hall* went "too far and its strict adherence could violate the right to counsel."[65]

The *Stratosphere* opinion highlighted a "difference between what the problem is, and what the *Hall* court's solution is."[66] The court agreed with *Hall*'s premises that the interrogating counsel has a right to the deponent's answers, not the attorney's answers, and that the witness's counsel should not initiate a conference while a question is pending, except to assert a privilege claim, conform to a court order, or seek a protective order.[67] The *Stratosphere* court found, however, that the *Hall* order went further than necessary to address these concerns, and in doing so, unnecessarily interfered with the right of counsel:

> It is one thing to preclude attorney-coaching of witnesses. It is quite another to deny someone the right to counsel. Even the court in *Hall* notes in footnote 5 that the right to counsel is an issue that has not been decided in this context. It is this Court's opinion that the right of counsel does not need to be unnecessarily jeopardized absent a showing that counsel or a deponent is abusing the deposition process.[68]

Addressing the trial analogy based on Rule 30(c), the court observed that attorneys and clients regularly confer during trial and even during the client's testimony when the court stands in recess.[69] The court asserted that witness preparation can, and often does, continue during testimony, and the restrictions should only "seek to prevent . . . coaching the witness by telling the witness what to say or how to answer a specific question."[70] The court also noted a practical concern: "consultation between lawyers and clients cannot be neatly divided into discussions about 'testimony' and those about 'other' matters," which weighed against imposing the broad no-consultation rule adopted in *Hall*.[71]

---

63. *Id.* at 619–20.
64. *Id.* at 619–22.
65. *Id.* at 620.
66. *Id.*
67. *Id.* at 621.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* (quoting Mudd v. United States, 798 F.2d 1509, 1512 (D.C. Cir. 1986)).

The *Stratosphere* court identified several appropriate reasons for a conference between an attorney and witness-client, such as making sure the client did not misunderstand a document or question, or attempting to rehabilitate the client as part of the attorney's ethical obligation to prepare the witness.[72] The court suggested that these types of conferences always would be appropriate if they occur during a recess that the attorney did not request, but that it would be improper for an attorney to demand a break in the questions or a conference between the question and answers.[73]

Addressing the privilege waiver component of the *Hall* order, the *Stratosphere* court agreed that an attorney who consults with a witness-client about a potential instruction not to answer on the basis of privilege should place on the record the fact that a conference was held, the subject of the conference, and the privilege decision reached.[74] The court disagreed, however, that any conference between a witness-client and his counsel during a deposition break waives the attorney-client privilege, and it declined to give the interrogating counsel "*carte blanche* to invade the privileged communications between counsel and his client."[75]

Based on this analysis, the court entered a deposition protocol stating in relevant part that "neither a deponent nor Counsel for a deponent may interrupt a deposition when a question is pending or a document is being reviewed except as permitted in Rule 30(d)(1)."[76] This is a substantially more limited restriction than *Hall*, as it generally would allow private, off-the-record conferences between an attorney and his witness-client, as long they do not take place during a break requested by the witness or her counsel while a question is pending or a document is being reviewed.

By rejecting the strict no-consultation rule from *Hall*, the *Stratosphere* court set the stage for a splintered set of rules to develop. Over the past twenty-five years, federal courts presented with a question about private, off-the-record conferences during deposition recesses have typically cited *Hall*, *Stratosphere*, or both. Still, those decisions are technically not binding anywhere (even the districts in which they were decided); therefore, they are usually cited only for their persuasive value. Many federal judges take what they find most compelling from one decision or another and then add their own guidance to it.[77] The next Part explores the splintered body of case law that has developed in the wake of *Hall* and *Stratosphere*.

---

72. *Id.*
73. *Id.*
74. *Id.* at 621–22 (citing Hall v. Clifton Precision, 150 F.R.D. 525, 529–30 (E.D. Pa. 1993)).
75. *Id.* at 622.
76. *Id.*
77. *See infra* Part II.B.

II. FEDERAL COURTS HAVE TAKEN A VARIETY OF APPROACHES SINCE *HALL* AND *STRATOSPHERE*

This Part provides an overview of how federal courts across the country have addressed private, off-the-record conferences since *Hall* and *Stratosphere*. In its 2012 decision in *Hunt v. DaVita, Inc.*, the Seventh Circuit became the only federal appellate court to directly address private, off-the-record conferences during a deposition.[78] The Part begins with an overview of the Seventh Circuit's *Hunt* decision, which is effectively a bright-line rule that leaves district courts with discretion regarding how to address violations.[79] It then discusses the wide range of approaches district courts in other circuits have taken.

Because only one circuit court of appeals has addressed private, off-the-record conferences between attorneys and their witness-clients during a deposition and district courts have taken a wide variety of approaches, occasionally leading to conflicting decisions even within the same district, the analysis in this Part compels the conclusion that a uniform federal rule is necessary.

A. THE SEVENTH CIRCUIT'S BRIGHT-LINE RULE WITH DISCRETION LEFT TO DISTRICT COURTS TO ADDRESS VIOLATIONS

In *Hunt v. DaVita, Inc.*, a former DaVita employee alleged that her employment was unlawfully terminated in retaliation for her intention to file a workers' compensation claim.[80] The district court awarded summary judgment to DaVita, and the former employee appealed.[81]

One of the issues on appeal was whether the district court abused its discretion in refusing to strike deposition testimony of a DaVita witness as a sanction for private conferences between the witness and DaVita's counsel during the deposition.[82] The former employee asserted that DaVita's counsel conferred privately with the witness about exhibits and pointed out policy language that was the subject of questioning.[83] She further claimed that DaVita's counsel engaged in substantive discussions of testimony with the witness during breaks.[84] DaVita's counsel argued that he was merely assisting and not coaching and that he had no memory of

78. Hunt v. DaVita, Inc., 680 F.3d 775, 777 (7th Cir. 2012). The Third Circuit has cited *Hall* in two opinions, both of which address counsel's questioning and objections on the record during the deposition. Jarbough v. Att'y Gen. of the U.S., 483 F.3d 184, 192–93 (3d Cir. 2007); Deville v. Givaudan Fragrances Corp., 419 F. App'x 201, 209 (3d Cir. 2011). The *Stratosphere* decision has not been cited in any federal appellate court opinions.
79. *See Hunt*, 680 F.3d at 780.
80. *Id.* at 777.
81. *Id.*
82. *Id.* at 780.
83. *Id.*
84. *Id.*

whether private conferences occurred.[85] Even with some ambiguity in the record, the court found that, at a minimum, the attorney pointed out the content of documents as they were introduced to the witness.[86] The Seventh Circuit described this conduct as "not appropriate or professional," explaining that "[t]he fact-finding purpose of a deposition requires testimony from the witness, not from counsel, and without suggestions from counsel."[87] The court relied on a trial analogy to state that coaching and private conferences (other than on issues of privilege) are not permitted during a deposition, just as they are not permitted during trial testimony.[88]

Still, the court noted that district courts have broad discretion in supervising discovery, including whether and how to sanction discovery misconduct, holding that the district court did not abuse its discretion by refusing to strike the relevant testimony or to impose other sanctions.[89]

The Seventh Circuit's decision in *Hunt* underscores that no clear, consistent rules on conferences between an attorney and his witness-client are likely to emerge through the case law. The issue is rarely appealed, and when it is, the abuse of discretion standard will apply to district court rulings regarding discovery and sanctions.[90]

---

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* The Seventh Circuit's seemingly bright-line prohibition on private conferences on issues other than privilege is consistent with an earlier decision from the Northern District of Illinois. Chapsky v. Mueller Div., No. 93 C 6524, 1994 WL 327348, at *1 (N.D. Ill. July 6, 1994) (citing *Hall* for the proposition that "private conferences during a deposition between a deponent and his or her attorney for any purpose other than to decide whether to assert a privilege are not permitted"); LM Ins. Corp. v. ACEO, Inc., 275 F.R.D. 290, 491 (N.D. Ill. 2011) ("Because a deposition generally proceeds as at trial . . . courts have uniformly held that once a deposition starts, counsel has no right to confer during the deposition, with perhaps one narrow exception [for discussing whether to assert a privilege]." (citations omitted)).

89. *Hunt*, 680 F.3d at 780. Before the Seventh Circuit's decision in *Hunt*, a district judge in the Southern District of Illinois granted a motion to compel an answer to the question, "[d]id you and [the lawyer] discuss Deposition Exhibit 35 [during the break]?" Phillips v. Spartan Light Metals, Inc., No. 3:06-cv-864-GPM, 2008 WL 11508988, at *11 (S.D. Ill. Jan. 25, 2008). Although the motion relied on *Hall*, the court did not directly address the scope of permissible conferences. *Id.* Instead, the court held that this specific question called for a yes or no answer that would not be privileged regardless, and therefore, the objection was at the very least premature. *Id.*

Approximately three months after the Seventh Circuit decided *Hunt*, a district judge in the Central District of Illinois effectively adopted *Stratosphere*. Murray v. Nationwide Better Health, No. 10-3262, 2012 WL 3683397, at *10–12 (C.D. Ill. Aug. 24, 2012). The *Murray* court did not cite *Hunt*. Given the Seventh Circuit's suggestion in *Hunt* that private, off-the-record conferences are *per se* "not appropriate or professional," the district court in *Murray* was arguably incorrect to adopt the more lenient *Stratosphere* standard.

90. Highlighting the significant discretion the Seventh Circuit left to district courts, a district judge in the Northern District of Illinois recently relied upon *Hunt* to deny a motion for sanctions where the undisputed record reflected a private, off-the record conference between a witness-client and his attorney. Gay v. City of Rockford, No. 20 CV 50385,

B. OTHER DISTRICT COURTS HAVE TAKEN A VARIETY OF DIFFERENT APPROACHES

With a general lack of appellate court guidance, district courts across the country have taken a wide range of approaches to address off-the-record conferences during depositions. First, the seminal *Hall* decision—with a strict ban on conferences—was decided by the Eastern District of Pennsylvania, which sits in the Third Circuit. Although many decisions in the Third Circuit cite *Hall* with approval, district courts in the Third Circuit do not uniformly follow *Hall*. Second, *Stratosphere*, the most prominent case disagreeing with *Hall*, was decided by the District of Nevada, which sits in the Ninth Circuit. As with *Hall* in the Third Circuit, district courts in the Ninth Circuit do not uniformly follow *Stratosphere*. Third, district courts in other circuits look to *Hall*, *Stratosphere*, and other authorities for their persuasive value, but often make changes to the guidelines to fit their policy views.

1. DISTRICT COURTS IN THE THIRD CIRCUIT DO NOT UNIFORMLY FOLLOW *HALL*

Given that *Hall* comes from the Eastern District of Pennsylvania, it is not surprising that the case has been cited more times by that court than by any other district court. The majority of cases in that district adopt *Hall*'s strict guidelines regarding private, off-the-record conferences between an

2021 WL 5865716, at *1–5 (N.D. Ill. Dec. 10, 2021). In *Gay v. City of Rockford*, the defendant's attorney showed the defendant a video tape during a break from his deposition. *Id.* at *1. This caused the defendant to realize that his testimony earlier in the deposition was inaccurate, and he then modified his testimony to be consistent with the video tape. *Id.* The defendant admitted on the record that he was changing his testimony based on the video tape his counsel showed him during the break. *Id.* at *2. Applying *Hunt*, the court held that "Defendant and his counsel's conduct was improper" but declined to impose sanctions for the improper conduct because "the private conference did not frustrate the purpose of the deposition or interfere with Plaintiff's counsel's ability to obtain substantive testimony." *Id.* at *4. Nonetheless, the court admonished defense counsel, stating "[t]his Court fully expects that defense counsel will take care to ensure that his future conduct comports with the dictates of *Hunt* as discussed above." *Id.* at *3–4.

attorney and a witness-client.[91] Some decisions in that district have suggested, however, that *Hall* "goes too far."[92]

Other nearby district courts in the Third Circuit generally have followed *Hall*. For example, in 2016, one judge in the Middle District of Pennsylvania effectively made the *Hall* guidelines a standing order by writing, "[t]he Opinion that follows is written not only for the benefit of the parties, but rather serves as a statement of the standards that I expect all counsel to adhere to in all depositions in cases before the undersigned, now and in the future."[93] Some judges in the Western District of Pennsylvania and the District of New Jersey have similarly suggested that the *Hall* guidelines apply to all depositions even without an order specifically adopting the guidelines in a particular case.[94] Nonetheless, one decision

---

91. *See, e.g.*, Wabote v. Ude, No. 5:21-cv-2214, 2022 WL 684844, at *6–8 (E.D. Pa. Mar. 8, 2022) (quoting and citing several passages from *Hall* as applicable legal principles, including that "[t]here is no valid reason why the lawyer and the witness should have to confer about the document before the witness answers questions about it."); Dalmatia Imp. Grp., Inc. v. Foodmatch, Inc., No. 16-2767, 2016 WL 6135574, at *2–6 (E.D. Pa. Oct. 21, 2016); Arietta v. Allentown, No. 04-5306, 2006 WL 8459372, at *1 n.2 (E.D. Pa. Apr. 7, 2006) ("The *Hall* case sets forth the standards of conduct at depositions within this district."); O'Brien v. Amtrak, 163 F.R.D. 232, 236–37 (E.D. Penn. 1995); Christy v. Penn. Tpk. Comm'n, 160 F.R.D. 51, 53 (E.D. Pa. 1995); Applied Telematics, Inc. v. Sprint Corp., No. 94-cv-4603, 1995 WL 79237, at *1 (E.D. Pa. Feb. 22, 1995) (finding that counsel acted improperly by, among other things, engaging in private conferences with the witness-client during the deposition and stating, "[t]his Court is bound by the decision in *Hall*" and "[t]herefore, using [*Hall*'s] holding not only as guidance, but as controlling directive, this Court finds that plaintiff's counsel's behavior at the deposition of Riskin was obstructive and improper").

92. *E.g.*, Shaffer v. Pennsbury Sch. Dist., 525 F. Supp. 3d 573, 580 (E.D. Pa. 2021); Birdine v. Coatesville, 225 F.R.D. 157, 158 (E.D. Pa. 2004); *see also* Fields v. Am. Airlines, Inc., No. 19-903, 2022 WL 2192933, at *5 (E.D. Pa. June 17, 2022).

State privilege law applies to claims or defenses for which state law supplies the rule of decision, FED. R. EVID. 501, and one Eastern District of Pennsylvania case indicates that this may require a different rule on private, off-the-record communications in cases where subject matter jurisdiction is based on diversity of citizenship. *In re* Flonase Antitrust Litig., 723 F. Supp. 2d 761, 763 (E.D. Pa. 2010) (declining to find privilege waiver for private, off-the-record conferences where the communications satisfied the four elements of privilege under Pennsylvania law and no exception applied).

93. Vnuk v. Berwick Hosp. Co., No. 3:14-cv-01432, 2016 WL 907714, at *1 (M.D. Pa. Mar. 2, 2016); *see also* Plaisted v. Geisinger Med. Ctr., 210 F.R.D. 527, 533 (M.D. Pa. 2002) ("We believe that *Hall* has established clear, workable guidelines that we find particularly applicable to the instant motions.").

94. Wise v. Wash. Cnty., No. 2:10-cv-01677-NBF, 2014 U.S. Dist. LEXIS 29267, at *26 (W.D. Pa. Mar. 7, 2014) ("Judge Gawthrop's opinion in *Hall v. Clifton Precision*, provides the legal standards for attorney conduct during an oral deposition."); Peronis v. United States, No. 2:16-cv-01389, 2017 WL 696132, at *1–2 (W.D. Pa. Feb. 17, 2017); *see also* Ngai v. Old Navy, No. 07-5653, 2009 WL 2391282, at *4 (D.N.J. July 31, 2009); Chassen v. Fidelity Nat'l Title Ins. Co., No. 09-291, 2010 WL 5865977, at *1 (D.N.J. July 21, 2010); *In re* Neurontin Antitrust Litig., No. 02-1390, 2011 WL 253434, at *11 (D.N.J. Jan. 25, 2011).

Ngai and *Neurontin* were both decided by then-Magistrate Judge Patty Schwartz, who has since been elevated to the Third Circuit. *Judge Patty Schwartz*, FED. JUD. CTR.,

from the District of New Jersey permitted conferences after direct examination and before cross-examination.[95]

2. DISTRICT COURTS IN THE NINTH CIRCUIT DO NOT UNIFORMLY FOLLOW *STRATOSPHERE*

Stratosphere was decided in the District of Nevada. Subsequent decisions in that court generally have cited *Stratosphere* with approval for its guidelines on non-argumentative and non-suggestive objections,[96] but the court has not addressed private, off-the-record conferences between an attorney and witness-client since *Stratosphere*.

Several other district courts in the Ninth Circuit have applied the *Stratosphere* guidelines for off-the-record conferences between an attorney and witness-client.[97] These cases generally recognize that such conferences are permitted during regularly scheduled recesses, but are inappropriate during a break requested by the deponent or the deponent's counsel or when the interrogating attorney is in the middle of a question or a line of questions.[98] Courts in the Ninth Circuit enforce this rule by granting motions to compel further testimony, which can include questions about conferences that may violate the *Stratosphere* limitations,[99] and/or imposing monetary sanctions.[100]

As is the case with *Hall* in the Third Circuit, however, the district court decisions in the Ninth Circuit are not uniform in adopting *Stratosphere*. A recent case from the Central District of California, *New Age Imports, Inc. v. VD Importers, Inc.*,[101] exemplifies the confusion developing in the case law.

---

https://www.fjc.gov/history/judges/shwartz-patty [https://perma.cc/8GQR-7CRR] (Mar. 27, 2023).

95. Diebold, Inc. v. Continental Cas. Co., No. 07-1991, 2009 WL 10677801, at *2 (D.N.J. Aug. 20, 2009).

96. *See, e.g.*, Hologram USA, Inc. v. Pulse Evolution Corp., No. 2:14-cv-0072-GMN-NJK, 2016 WL 3353935, at *2 (D. Nev. June 10, 2016); Luangisa v. Interface Operations, No. 2:11-cv-00951-RCJ-CWH, 2011 WL 6029880, at *7 (D. Nev. Dec. 5, 2011). Interestingly, the *Luangisa* decision relies more heavily on *Hall* than *Stratosphere* for its analysis of inappropriate objections. *Luangisa*, 2011 WL 6029880, at *6–8.

97. *In re* Cathode Ray Tube (*CRT*) Antitrust Litig., No. 3:07-cv-05944SC, 2015 WL 12942210, at *3 (N.D. Cal. May 29, 2015) (finding that an attorney improperly took a break during a line of questioning about a document where no question was pending, the attorney did not represent that the conference was solely to determine whether to assert a privilege, and the witness's testimony about the document was "noticeably more circumspect and uninformative" after the break); *see also* BNSF Ry. Co. v. San Joaquin Valley R.R. Co., No. 1:08-cv-01086-AWI-SMS, 2009 WL 3872043, at *2–4 (E.D. Cal. Nov. 17, 2009); Sklany v. Mid-Century Ins. Co., No. 04-251-M-DWM, 2006 WL 8435925, at *2 (D. Mont. May 17, 2006).

98. *CRT*, 2015 WL 12942210, at *3.

99. *Id.*

100. *BNSF*, 2009 WL 3872043, at *4.

101. New Age Imps., Inc. v. VD Imps., Inc., No. 8:17-cv-02154-CJC-KESx, 2018 WL 7507429 (C.D. Cal. Dec. 21, 2018).

There, a defense witness admitted that she had a discussion with her attorney during a break and that the attorney told her "what to answer or what you should answer" in response to questions asked during the deposition.[102] The magistrate judge denied the plaintiff's motion to compel further testimony and awarded attorneys' fees to the defendant as a sanction, finding that the motion was not substantially justified.[103] In other words, the magistrate judge found that the private, off-the-record conference clearly was permitted and the plaintiff was so wrong to suggest otherwise that it should be sanctioned for bringing the motion.

On reconsideration, the district judge affirmed the magistrate judge's ruling as to the motion to compel, but reversed her award of attorneys' fees as a sanction.[104] The district judge first suggested that "[a]t least two district courts in the Ninth Circuit have held that '[a] witness being deposed may not confer with his counsel during a deposition unless the conference is for the purpose of determining whether an applicable privilege should be asserted,'"[105] citing *Horowitz v. Chen*[106] and *BNSF Railway Co. v. San Joaquin Valley Railroad.*[107] He then cited *Stratosphere* for the proposition that, "even courts that decline to adopt the standard in *Horowitz*, *Hall*, and *BNSF* nevertheless affirm the principle that an attorney may not 'coach[] the witness by telling the witness what to say or how to answer a specific question.'"[108] Therefore, he held that the magistrate judge erred in finding the motion was "not substantially justified," concluding, "[w]hile there is no binding precedent that requires this Court to prevent a witness from conferring with his or her counsel during a deposition, reasonable people could differ on the issue given the above-cited case law."[109]

---

102. *Id.* at *1.
103. *Id.* (citing FED. R. CIV. P. 37(a)(5)(B)).
104. New Age Imps., Inc. v. VD Imps., Inc., No. SACV 17-02154-CJC-KES, 2019 WL 1427468, at *3 (C.D. Cal. Feb. 21, 2019)
105. *Id.*
106. Horowitz v. Chen, No. 17-cv-00432, 2018 WL 4560697, at *3–6 (C.D. Cal. Sept. 20, 2018) (compelling further deposition testimony and awarding monetary sanctions where, among other things, the attorney and witness-client repeatedly left the deposition room to confer while a question was pending). *See also* Horowitz v. Chen, No. SA CV 17-00432-AG (DFMx), 2019 WL 9313599, at *3–5 (C.D. Cal. Aug. 22, 2019) (imposing further sanctions in the form of attorneys' fees, costs, and a proposed jury instruction where, among other things, the attorney and witness-client again engaged in private, off-the-record conferences during the further deposition testimony compelled by the court's prior order).
107. BNSF Ry. Co. v. San Joaquin Valley R.R. Co., No. 1:08-cv-01086-AWI-SMS, 2009 WL 3872043, at *3–5 (E.D. Cal. Nov. 17, 2009) (reopening the deposition and awarding monetary sanctions where, among other things, the attorney took an unscheduled break to obtain water for the witness while a question was pending and a bottle of water was within the reach of the witness).
108. *New Age Imps.*, 2019 WL 1427468, at *3 (quoting *In re* Stratosphere Corp. Sec. Litig., 182 F.R.D. 614, 621 (D. Nev. 1998)).
109. *Id.* at *4. He also referenced ambiguity in the witness's testimony in granting reconsideration of the attorneys' fee award. *Id.*

Although *Horowitz* and *BNSF* arguably do not stand for as broad a prohibition on conferences as the *New Age Imports* decision would suggest,[110] other district judges in the Ninth Circuit have similarly cited them for strict *Hall*-like restrictions. For example, in *Salazar v. Phoenix*, the District of Arizona cited *Horowitz* and *BNSF* for the broad rule that "[a] witness being deposed may not confer with his counsel during a deposition unless the conference is for the purpose of determining whether an applicable privilege should be asserted."[111] In *Salazar*, one attorney for the witness requested a break, and another attorney for the witness sent the witness a text message during the break.[112] The same attorney then sent three additional text messages to the witness during subsequent testimony.[113] The court found that these text messages, which included derogatory statements about opposing counsel, constituted bad faith conduct and awarded monetary sanctions under the court's inherent power.[114] Therefore, while the court's opinion included a broader statement of the rule than found in *Stratosphere*, the conferences at issue in *Salazar* would likely have violated the *Stratosphere* rule in any event.

Similarly, the Northern District of California arguably read earlier authority too broadly in *Barajas v. Abbot Laboratories, Inc.*, in which the court stated, "[i]t is improper for a witness and her attorney to discuss the substance of her testimony during breaks in a deposition, except where necessary to address matters of privilege."[115] The conferences at issue in

---

110. In *Horowitz*, the parties effectively adopted the *Hall* standard in the report of the parties' planning meeting and joint discovery plan pursuant to Rule 26(f), which stated, "[c]ounsel and their witness-clients shall not engage in private, off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding whether or not to assert a privilege." *Horowitz*, 2019 WL 9313599, at *4 n.4. Moreover, the *Horowitz* court expressly found that the attorney engaged in improper witness coaching, and therefore, "[t]his conduct is not what *Stratosphere* intended." *Id.* at *4. In so holding, the court emphasized that a permissible conference under *Stratosphere* would be to ensure the "client did not misunderstand or misinterpret questions or documents." *Id.* (quoting *Stratosphere*, 182 F.R.D. at 621).

In *BNSF*, the court cited both the *Hall* and the *Stratosphere* rules, as well as another approach from the District of D.C., before concluding that "the taking of an otherwise unscheduled break to obtain water for the witness when a question was pending and a bottle of water was within reach of the witness amounted to an improper conference." *BNSF*, 2009 WL 3872043, at *3–4. Because the court cited several different versions of the rule from several different courts, it is unclear whether the court actually intended to state a broader prohibition on conferences than found in *Stratosphere*.

111. Salazar v. Phoenix, No. CV-19-01188-PHX-SRB (ESW), 2021 WL 2075735, at *2 (D. Ariz. May 24, 2021) (quoting Horowitz v. Chen, No. 17-cv-00432, 2018 WL 4560697, at *3 (C.D. Cal. Sept. 20, 2018)) (citing *BNSF*, 2009 WL 3872043, at *3).

112. *Id.* at *1.

113. *Id.*

114. *Id.* at *1, *3.

115. Barajas v. Abbot Labs., Inc., No. 18-cv-008329-EJD (VKD), 2018 WL 6248550, at *4 (N.D. Cal. Nov. 29, 2018) (first citing *In re* Cathode Ray Tube (*CRT*) Antitrust Litig., No. 3:07-cv-05944SC, 2015 WL 12942210, at *3 (N.D. Cal. May 29, 2015); and then citing *Stratosphere*, 182 F.R.D. at 621).

Barajas took place during breaks requested by the witness's attorney, and the court found that one of the conferences led to a change in testimony.[116] The court held that these "coaching breaks were absolutely improper here," but denied a motion for a further deposition because the interrogating attorney did not identify "any specific questions or line of questioning that it believe[d] it could not fairly pursue because of improper communications occurring on a break."[117] In reaching this conclusion, the court also noted that the interrogating attorney invited the witness's attorney to take a break to discuss the testimony.[118] As with *Salazar*, these conferences were initiated by counsel for the deponent to discuss a matter other than privilege, and therefore, despite the broad statement of the rule, the outcome likely would not have been different even under the less restrictive *Stratosphere* rule.

This split of authority within the Ninth Circuit, with some judges following the limited restrictions in *Stratosphere* and others adopting a more restrictive rule akin to *Hall*, leads to significant uncertainty for litigants and counsel.

3. District Courts in Other Circuits Take a Variety of Approaches

Given the lack of uniformity in the circuits in which the seminal opinions were issued, it is unsurprising that district courts in other circuits do not take a consistent approach to off-the-record conferences between an attorney and witness-client during a deposition. Some courts have adopted *Hall*'s strict no-consultation approach[119] and others have adopted the *Stratosphere* rule that neither the attorney nor her witness-client may interrupt a deposition when a question is pending or a document is being reviewed, except as permitted in Rule 30(d)(1).[120] Still other courts have made slight modifications to *Hall* or *Stratosphere* or crafted an entirely new rule.[121]

---

116. *Id.* at *3–4.
117. *Id.* at *4.
118. *Id.*
119. *See, e.g.*, Jones v. J.C. Penney's Dept. Stores, Inc., 228 F.R.D. 190, 204–05 (W.D.N.Y. 2005); Fisher v. Goord, 184 F.R.D. 45, 48–49 (W.D.N.Y. 1999); Armstrong v. Hussmann Corp., 163 F.R.D. 299, 303 (E.D. Mo. 1995); Heins v. Com. & Indus. Ins. Co., No. 3:17-cv-1110, 2018 WL 4963570, at *5 (S.D. Ohio Oct. 15, 2018); Bracey v. Delta Tech. Coll., No. 3:14CV238-MPM-SAA, 2016 WL 918939, at *1 (N.D. Miss. Mar. 9, 2016).
120. McKinley Infuser, Inc. v. Zdeb, 200 F.R.D. 648, 650 (D. Colo. 2001); Pia v. Supernova Media, Inc., No. 2:09-CV-840 CW, 2011 WL 6069271, at *3 (D. Utah Dec. 6, 2011); Murray v. Nationwide Better Health, No. 10-3262, 2012 WL 3683397, at *5 (C.D. Ill. Aug. 24, 2012). *But see supra* note 89 (questioning whether *Murray* is consistent with the Seventh Circuit's decision in *Hunt*).
121. Callahan v. Toys "R" Us-Del. Inc., No. 15-cv-2815-JKB, 2016 WL 9686055, at *3–4 (D. Md. July 15, 2016) (finding that communications between an attorney and retained

For example, the District of D.C. has rejected *Hall*'s prohibition on communications and its analysis of the attorney-client privilege.[122] Subsequent cases suggest that the court will not impose a "categorical prohibition" on conferences but that it will consider prohibitions or limitations on a case-by-case basis.[123]

The Northern District of New York has issued conflicting decisions. One magistrate judge in the district declined to enter the *Hall* guidelines, describing them as "highly criticized" outside of the Third Circuit.[124] Another magistrate judge from the same court subsequently adopted the relevant *Hall* guidelines nearly verbatim, describing them as "this court's standing guidelines regarding depositions."[125]

The District of New Mexico has cited both *Hall* and *Stratosphere* with approval and, when the district's authorities are all viewed together, they suggest that the court follows something akin to *Stratosphere*.[126]

The Northern District of Oklahoma and the Middle District of Georgia have adopted some of the *Hall* guidelines, but their orders did not include any of the guidelines relating to private, off-the-record conferences between an attorney and witness-client.[127] Similarly, district courts in Arkansas,[128]

---

expert witness during a deposition were protected by the work product doctrine, but striking the portion of deposition testimony that may have resulted from improper coaching that impeded the examination).

122. Odone v. Croda Int'l PLC, 170 F.R.D. 66, 69–70 (D.D.C. 1997).

123. United States v. Philip Morris, 212 F.R.D. 418, 420 (D.D.C. 2002) (first citing Hall v. Clifton Precision, 150 F.R.D. 525, 529 (E.D. Pa. 1993); then citing Morales v. Zondo, 204 F.R.D. 50, 52 (S.D.N.Y. 2001); then citing 7 MOORE'S FEDERAL PRACTICE - CIVIL § 30.42[2] (3d ed. 1997); and then citing *Odone*, 170 F.R.D. at 68).

124. Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 92 (N.D.N.Y. 2003).

125. NXIVM Corp. v. Cote, No. 1:11-MC-0058 (GLS/DEP), 2011 WL 3648852, at *1–2 (N.D.N.Y. Aug. 18, 2011).

126. *See, e.g.*, Cordova v. United States, No. CIV 05-563 JB/LFG, 2006 WL 4109659, at *4 (D.N.M. July 30, 2006) (finding that an attorney acted improperly by engaging in off-the-record conferences while a question was pending, but indicating that conferences were permissible while no questions were pending); Wilkins v. DeReyes, No. CIV-02-0980 MV/RLP, 2004 WL 7338327, at *1 (D.N.M. Apr. 13, 2004) (citing both *Hall* and *Stratosphere* to impose monetary sanctions against an attorney who interrupted the deposition to confer with his witness-client after the witness was shown a document but before the interrogating attorney asked any questions about it).

127. Damaj v. Farmers Ins. Co., 164 F.R.D. 559, 560–61 (N.D. Okla. 1995); ZCT Sys. Grp., Inc. v. FlightSafety Int'l, No. 08-CV-447-JHP-PJC, 2010 WL 1257824, at *5–6 (N.D. Okla. Mar. 26, 2010); Collins v. Int'l Dairy Queen, Inc., No. CIV.A. 94-95-4MACWDO, 1998 WL 293314, at *3 (M.D. Ga. June 4, 1998); *see also* Perrymond v. Lockheed Martin Corp., No. 1:09-cv-01936-TWT-AJB, 2011 WL 13269787, at *2–3 (N.D. Ga. Feb. 18, 2011).

128. Schaffhauser v. UPS, Inc., No. 4:12-cv-00599 KGB, 2014 WL 221963, at *2 (E.D. Ark. Jan. 21, 2014) (citing *Hall* with approval in imposing sanctions where an attorney, among other things, passed notes to his witness-client and whispered to him while questions were pending).

Louisiana,[129] Massachusetts,[130] Tennessee,[131] and Wisconsin[132] have relied upon *Hall* or *Stratosphere* while analyzing specific allegedly improper conferences without articulating clear guidelines on the scope of permissible conferences or the privilege impact for improper conferences.

Some districts have adopted local rules, standing orders, or guidelines to address private, off-the-record conferences during depositions. For example, the Eastern and Southern Districts of New York,[133] the District of Kansas,[134] and the District of Colorado[135] have adopted slightly modified versions of *Stratosphere* in their local rules. The Districts of Delaware and South Carolina have adopted strict prohibitions on conferences akin to *Hall* in their local rules, although the Delaware local rule does not address

129. S. La. Ethanol, LLC v. Fireman's Fund Ins. Co., Nos. 11-2715, 12-0379, 2013 WL 1196604, at *7 (E.D. La. Mar. 22, 2013) (citing *Hall* in compelling further testimony and imposing monetary sanctions upon finding that an attorney acted inappropriately by, among other things, "unilaterally taking a 'break' in the deposition, and speaking to [the witness-client] outside the deposition"); *see also* Plaquemines Holdings, LLC v. CHS, Inc., No. 11-3149, 2013 WL 1526894, at *6 (E.D. La. Apr. 11, 2013).

130. Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., 201 F.R.D. 33, 40–41 (D. Mass 2001) (citing *Hall* in compelling further testimony and sanctioning a lawyer who, among other things, "conferred with his witnesses during questioning, left the room with a deponent while a question was pending, [and] conferred with deponents while questions were pending").

131. Cullen v. Nissan N. Am., Inc., No. 3-09-0180, 2010 WL 11579750, at *7 (M.D. Tenn. Feb. 2, 2010) (noting that "there is no unanimity on whether all communications between a witness and counsel during breaks in a deposition are prohibited" and declining to find that such a conference "was clearly prohibited and thus not protected by attorney-client privilege"). The court continued, "[w]hile it might be helpful were the Court to adopt specific protocols for counsel to adhere to during depositions or during specific cases, the fact is that this Court has not done so." *Id.* at *8.

132. Ecker v. Wisc. Cent. Ltd., No. 07-C-371, 2008 WL 1777222, at *2–3 (E.D. Wis. Apr. 16, 2008) (reviewing *Hall*, *Stratosphere*, and other authorities and declining to impose sanctions where counsel for the defendant privately conferred with the witness during a break after plaintiff completed his examination).

133. U.S. DIST. CTS. FOR THE S. & E. DISTS. OF N.Y. LOCAL CIV. RULES R. 30.4 (S.D.N.Y. & E.D.N.Y. 2018). Unlike *Stratosphere*, the New York rule does not prohibit conferences initiated by the witness-client, and "[a] witness is generally free to consult with counsel at any time during a deposition." Okoumou v. Horizon, No. 03 Civ. 1606LAKHBP, 2004 WL 2149118, at *2 (S.D.N.Y. Sept. 23, 2004).

134. *Deposition Guidelines*, U.S. DIST. CT. FOR THE DIST. OF KAN., at Guideline 5(c), https://ksd.uscourts.gov/index.php/deposition-guidelines/ [https://perma.cc/2NAU-TTRZ] (last visited June 6, 2022); *see also* Norwood v. UPS, Inc., No. 19-2496-DDC, 2020 WL 2615763, at *3–4 (D. Kan. May 22, 2020).

135. U.S. DIST. CT. FOR THE DIST. OF COLO. LOCAL CIV. RULES OF PRAC. R. 30.4 (D. Colo. 2021) (prohibiting counsel from "interrupting examination by counsel except to determine whether to assert a privilege"). The court has interpreted this as being consistent with *Stratosphere*. McKinley Infuser, Inc. v. Zdeb, 200 F.R.D. 648, 650 (D. Colo. 2001). *But see* Or. Laborers Emps. Pension Tr. Fund v. Maxar Techs. Inc., No. 1:19-cv-00124-WJM-SKC, 2022 WL 684168, at *2 (D. Colo. Mar. 8, 2022) (approving of the District of D.C.'s case-by-case approach).

privilege issues relating to conferences in violation of the rule.[136] The District of Maryland prohibits private conversations between an attorney and witness-client during questioning, and it further prohibits anyone from discussing the substance of the prior testimony given by the deponent during breaks.[137] During breaks, however, counsel may engage in discussions with the witness-client on issues not regarding the substance of the witness's prior testimony.[138]

Given the wide range of different—and occasionally conflicting—rules governing private, off-the-record conferences between an attorney and a witness-client, litigants and counsel would greatly benefit from an amendment to the Federal Rules of Civil Procedure to set a clear, uniform standard for such communications.

III. EXAMINING THE RATIONALES FOR THE VARIOUS APPROACHES

Parts I and II demonstrated that case law on private, off-the-record conferences has developed into a morass of contradictory rules, even within the same district. Because issues relating to private, off-the-record conferences are rarely raised on appeal, uniformity is unlikely to develop through case law. Accordingly, Rule 30 of the Federal Rules of Civil Procedure should be amended to state clear, uniform standards applicable to depositions in all districts. To inform the content of such a rule, this Part analyzes four of the primary policy concerns that courts and commentators have used to address private, off-the-record conferences.

First, Rule 30(c)(1) of the Federal Rules of Civil Procedure provides that depositions "proceed as they would at trial."[139] Some authorities, including the *Hall* decision, rely on this language for a strict prohibition on conferences. Strict no-consultation rules construe the language of Rule 30(c)(1) too broadly, however, because private, off-the-record conferences are common during trial recesses.

Second, all of the authorities addressing private, off-the-record conferences during depositions express some concern about improper witness coaching. Concerns about witness coaching certainly justify some restrictions, but strict no-consultation rules during a deposition go further than necessary to curb witness coaching. Witness coaching is clearly

136. U.S. DIST. CT. FOR THE DIST. OF DEL. LOCAL RULES OF CIV. PRAC. & PROC. R. 30.6 (D. Del. 2016); U.S. DIST. CT. FOR THE DIST. OF S.C. LOCAL CIV. RULES R. 30.4 (D.S.C. 2022). *But see* Hulsey v. HomeTeam Pest Def. LLC, No. 2:10-cv-03265-DCN, 2012 WL 1533759, at *3 n.8 (D.S.C. May 1, 2012) (stating that the local rule applies to conferences between counsel and "witnesses," and the case law is silent about whether the local rule applies to conferences between attorneys and clients).

137. U.S. DIST. CT. FOR THE DIST. OF MD. LOCAL RULES, at App. A, Guideline 6(f)–(g) (D. Md. 2021).

138. *Id.* Guideline 6(g).

139. FED. R. CIV. P. 30(c)(1).

improper under existing authorities and ethics rules, and coaching is already punishable even in the absence of a rule specifically addressing conferences during a deposition.

Third, the authorities uniformly recognize that civil litigants have a right to hired counsel, although there is some disagreement on whether that is a constitutional right under the Fifth Amendment's Due Process Clause. Regardless of the source of the right, strict no-consultation rules—and indeed many of the less-restrictive rules—interfere too substantially with the attorney-client relationship.

Fourth, attorneys are ethically required to take remedial measures for false testimony. The first step in this process is for the attorney "to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence."[140] A strict no-consultation rule substantially interferes with the attorney's ability to fulfill his ethical obligation when a client testifies incorrectly (even if unintentionally).

A. DEPOSITIONS "PROCEED AS THEY WOULD AT TRIAL"

Under Rule 30(c)(1) of the Federal Rules of Civil Procedure, "[t]he examination and cross-examination of a deponent proceed as they would at trial."[141] Some authorities rely upon this language to impose substantial restrictions on private, off-the-record conferences during depositions. These restrictions are not justified by the text of the rule or by typical trial procedures.

The *Hall* court relied heavily on the "proceed as they would at trial" language in crafting its strict prohibition on conferences:

> 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. The same is true at a deposition. The fact that there is no judge in the room to prevent private conferences does not mean that such conferences should or may occur.[142]

Although few practitioners would dispute the court's statement that a witness and lawyer are not permitted to confer "at their pleasure" during trial testimony, that does not mean that a witness and lawyer are not permitted to confer *at all* during trial testimony. As Professor Cary noted, counsel and witnesses frequently confer during recesses in a civil trial, and

140. MODEL RULES R. 3.3 cmt. 10.
141. FED. R. CIV. P. 30(c)(1).
142. Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993).

judges sometimes grant recesses for an attorney to reassure a client who becomes visibly confused or upset on the stand.[143] Indeed, the *Stratosphere* decision stated, "[i]t is this Court's experience, at the bar and on the bench, that attorney's [sic] and clients regularly confer during trial and even during the client's testimony, while the court is in recess, be it mid morning or mid afternoon, the lunch recess, [or] the evening recess."[144]

Not only are conferences during recesses and breaks commonplace during trials, but the plain language of Rule 30(c)(1) does not even address conduct during recesses and breaks. Instead, the rule merely states that "*examination and cross-examination* of a deponent proceed as they would at trial *under the Federal Rules of Evidence*."[145] The *Hall* court even notes that Rule 30(c)(1) refers to the "testimonial rules" that apply at trial.[146] By their very nature, private, off-the-record conferences are not part of the "examination and cross-examination," and they are not within the scope of the Federal Rules of Evidence or the "testimonial rules" that might be applicable at trial. Although Rule 30(c)(1) might compel the conclusion that an attorney or witness-client generally may not interrupt the examination or cross-examination, the *Hall* decision reads Rule 30(c)(1) too broadly in relying upon it to prohibit conferences during breaks and recesses.

Post-*Hall* amendments to Rule 30(c)(1) further compel a more limited reading of the "proceed as they would at trial" language.[147] Among other changes, the 1993 amendments state that Federal Rule of Evidence 615 does not apply during depositions.[148] Rule 615, commonly referred to simply as "The Rule," provides in relevant part that, "[a]t a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony."[149]

The Supreme Court has explained that Rule 615 "exercises a restraint on witnesses 'tailoring' their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid."[150] In other words, Rule 615 is designed to achieve the same goals of "getting to the truth" and avoiding "obstructing the truth" that the *Hall* court cited as the basis for a strict no-consultation rule.[151] Yet, despite the long history and strong policy behind witness sequestration under Rule 615, in the 1993 amendments, the

143. Cary, *supra* note 6, at 387–88.
144. *In re* Stratosphere Corp. Sec. Litig., 182 F.R.D. 614, 621 (D. Nev. 1998).
145. FED. R. CIV. P. 30(c)(1) (emphasis added).
146. *Hall*, 150 F.R.D. at 528.
147. When *Hall* was decided, the Supreme Court had already proposed the amendments, but they did not go into effect until later in the year. *Id.* at 530. The *Hall* court addressed the proposed amendments in the section of the opinion dealing with "on-the-record witness-coaching through suggestive objections," but not in the section addressing private, off-the-record conferences. *Id.*
148. FED. R. CIV. P. 30, Advisory Committee Notes to 1993 Amendment.
149. FED. R. EVID. 615.
150. Geders v. United States, 425 U.S. 80, 87 (1976).
151. *Compare Geders*, 425 U.S. at 87, *with Hall*, 150 F.R.D. at 528–29.

rules committee and the Supreme Court decided to make depositions much different than trial by expressly stating that Rule 615 does not apply to depositions.[152] The express exclusion of Rule 615, notwithstanding the truth-seeking policy behind it, suggests that the rules committee and the Supreme Court did not intend for the "proceed as they would at trial" language in Rule 30(c)(1) to carry the significant weight *Hall* placed upon it.

By excluding Rule 615 from Rule 30(c)(1)'s statement that "examination and cross-examination of a deponent proceed as they would at trial," the rules presumptively permit one witness to attend another witness's deposition and to discuss their versions of the underlying facts.[153] Courts nonetheless retain authority under Rule 26(c) to order witness sequestration during depositions for good cause.[154] The same is true for private, off-the-record conferences between an attorney and witness-client. While Rule 30(c)(1) does not justify, much less mandate, any restrictions on such conferences, district courts already have authority under Rule 26(c) to impose restrictions for good cause to protect the truth-seeking function.

B. ATTORNEYS SHOULD NOT BE PERMITTED TO COACH THEIR WITNESS-CLIENTS

Professor Wydick has explained that the "standard wisdom about the ethics of witness coaching" is three-fold: (1) "a lawyer may discuss the case with the witness before they testify," (2) "the lawyer must not try to bend the witness's story or put words in the witness's mouth," and (3) "a lawyer can be disciplined by the bar for counseling or assisting a witness to testify falsely or for knowingly offering testimony that the lawyer knows is false."[155] He defined "witness coaching" simply as "conduct by a lawyer that alters a witness's story about the events in question," explaining that

152. FED. R. CIV. P. 30(c)(1). Some have argued that not allowing parties to invoke "The Rule" on witness sequestration during a deposition is a poor policy decision, while others suggest that "hearing other witnesses testify may stimulate a party's recollection of events, thus enabling the party to give more accurate testimony." Michael D. Moberly, *Can't We All Just Play By "The Rule"? Sequestering Witnesses During Pretrial Discovery*, 33 AM. J. TRIAL ADVOC. 447, 473–74 (Spring 2010).

153. *See, e.g.*, Veress v. Alumax/Alcoa Mill Prods., Inc., No. CIV.A. 01-2430, 2002 WL 1022455, at *1 (E.D. Pa. May 20, 2002); *see also* Lee v. Denver Sheriff's Dept., 181 F.R.D. 651, 653 (D. Colo. 1998).

154. FED. R. CIV. P. 30(c)(1) Advisory Committee Notes to 1993 Amendment. Under Rule 26(c)(1)(E), the court may, for good cause shown, limit the persons who may be present while a deposition is conducted. FED. R. CIV. P. 26(c)(1)(E). However, "[t]he case law is clear that such power should be used rarely and only in extraordinary circumstances," and the "good cause" standard is not satisfied by a garden-variety concern that one witness will tailor his or her testimony to that of another witness. *Lee*, 181 F.R.D. at 653; *see also Veress*, 2002 WL 1022455, at *1–2.

155. Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1, 2 (1995).

coaching can be done knowingly and overtly, knowingly and covertly, or unknowingly.[156] Any type of witness coaching is improper, although unknowing coaching can be difficult to avoid and often flows from typical witness interviews and preparation.[157]

The *Hall* court's strict no-consultation rule stemmed from a concern that private, off-the-record conferences could lead to improper witness coaching.[158] The court explained that the point of a deposition is to record the witness's recollection through a question-and-answer conversation.[159] There is no proper need for the witness's attorney to interpret questions, help the witness to formulate answers, or coach the witness to answer in a way that creates a better case.[160] The lawyer must accept the facts as they develop, and may then frame those facts in a manner favorable to the client.[161] Based on this policy and concern about witness coaching, the *Hall* court held "that a lawyer and client do not have an absolute right to confer during the course of the client's deposition."[162]

Improper witness coaching certainly is a legitimate concern, but it does not require a strict no-consultation rule during a deposition. Applicable law and ethics rules already prohibit altering evidence or testimony in any context. The *Model Rules of Professional Conduct* regulate witness coaching and provide that a lawyer shall not knowingly "offer evidence that the lawyer knows to be false"[163] or "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."[164] An attorney who improperly coaches a witness is subject to attorney discipline and criminal punishment for suborning perjury.[165] Under existing law, courts also may find the attorney-client privilege waived under the crime-fraud exception if the discussion leads to false testimony.[166] Accordingly, witness coaching is already prohibited and

156. *Id.*; *see also* Joseph D. Piorkowski, Jr., *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching*," 1 GEO. J. LEGAL ETHICS 389 (1987).
157. Wydick, *supra* note 155, at 2.
158. Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993).
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. MODEL RULES R. 3.3(a)(3). Comment 8 to this rule emphasizes that the prohibition applies only to evidence the lawyer knows to be false, although knowledge can be inferred from the circumstances, and "a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client." MODEL RULES R. 3.3(a)(3) cmt. 8.
164. MODEL RULES R. 3.4(b).
165. Wydick, *supra* note 155, at 23.
166. *See, e.g.*, Ngai v. Old Navy, No. 07-5653, 2009 WL 2391282, at *5–6 (D.N.J. July 31, 2009) (suggesting without deciding that the crime-fraud exception may support disclosure of certain attorney-client communications during a deposition).

courts already have tools to punish improper coaching.[167] Therefore, a no-consultation rule is unnecessary to address coaching.

Moreover, attorneys are permitted to prepare their witness-clients to testify, and "the adversary system benefits by allowing lawyers to prepare witnesses so that they can deliver their testimony efficiently, persuasively, comfortably, and in conformity with the rules of evidence."[168]

Although the *Hall* court recognized the right to prepare a witness, it nevertheless suggested, "[o]nce a witness has been prepared and has taken the stand, that witness is on his or her own."[169] Contrary to the *Hall* court's analysis, the line between proper preparation and improper coaching is based on content of the communication, not its timing.[170] Whether before or during the deposition, a lawyer is within ethical bounds to discuss the witness's recollection of the facts and to assist the witness in delivering testimony effectively.[171] And whether before or during a deposition, a lawyer can always be disciplined "for counseling or assisting a witness to testify falsely or for knowingly offering testimony that the lawyer knows is false."[172] Accordingly, insofar as coaching is concerned, there is no practical difference between communications before and during a deposition.[173]

Although the temptation to coach a witness may be greater during the deposition than during pre-deposition preparation, that temptation does not justify a strict no-consultation rule during the deposition. If an attorney has engaged in improper coaching—whether prior to the deposition or during deposition breaks—a skilled examination of the witness can draw out non-privileged testimony about the coaching.[174] For example, if a witness's testimony changes after a break, the interrogating attorney could ask why the testimony changed, if the witness reviewed any documents that

---

167. *See* Cary, *supra* note 6, at 400–01; Wilbert, *supra* note 6, at 1136–37.

168. Wydick, *supra* note 155, at 1–2; *see also* Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993) ("A lawyer, of course, has the right, if not the duty, to prepare a client for a deposition.").

169. *Hall*, 150 F.R.D. at 528.

170. *See generally* Wydick, *supra* note 155.

171. *Id.* at 1.

172. *Id.*

173. *See* Pape v. Suffolk Cnty. Soc'y for Prevention of Cruelty to Animals, No. 20-cv-01490 (JMA) (JMW), 2022 WL 1105563, at *4 n.6 (E.D.N.Y. Apr. 13, 2022) (stating "the Court finds no practical difference between a conversation to remind the witness of facts before a deposition begins or during a recess"); *see also In re* Stratosphere Corp. Sec. Litig., 182 F.R.D. 614, 621 (D. Nev. 1998) ("The right to prepare a witness is not different before the questions begin than it is during (or after, since a witness may be recalled for rebuttal, etc., during trial).").

174. Geders v. United States, 425 U.S. 80, 89–90 (1976); *In re* Neurontin Antitrust Litig., No. 02-1390, 2011 WL 253434, at *10 (D.N.J. Jan. 25, 2011) (imposing sanctions and adopting the *Hall* restrictions where the defendants did "nothing to prepare their [Rule 30(b)(6) corporate representative] other than to have him recite counsel's compilation of information from this and other lawsuits").

refreshed his recollection, or if the witness spoke to counsel during the break. Although counsel for the witness may be overly aggressive in privilege objections to these types of questions, they generally seek non-privileged information, and a privilege objection may actually help support a showing that improper coaching occurred.[175] Indeed, if no conference occurred, there would be no privilege to assert.[176]

Finally, preparation of the errata sheet after a deposition is perhaps an even more tempting time for improper witness coaching.[177] And the impact of coaching in connection with the errata can have even more significant consequences, as the interrogating attorney will have no ability to ask follow-up questions about changed testimony absent an agreement or court order to reopen the deposition.[178] Yet, courts have demonstrated an ability to police improper coaching in connection with errata sheets without

---

175. *See, e.g.*, *Pape*, 2022 WL 1105563, at *3–5; Phillips v. Spartan Light Metals, Inc., No. 3:06-cv-864-GPM, 2008 WL 11508988, at *3–4 (S.D. Ill. Jan. 25, 2008).

176. The Florida Court of Appeals has explained:

> The attorney/client privilege, when properly invoked, must be respected. It is not waived because a witness changes an answer to a question after consulting with an attorney. The fact of consultation may be brought out. However, the substance of the communication is protected.

Feltner v. Internationale Nederlanden Bank, N.V., 622 So. 2d 123, 125 (Fla. Ct. App. 1993).

177. Ilya A. Lipin, *Litigation Tactics Addressing Changes to Deposition Testimony Through Rule 30(e) Errata Sheet Corrections*, 63 ARK. L. REV. 741, 755–56 (2010) (further noting that, "[e]xcept timing, there is no difference between coaching a witness to change an answer during the deposition or suggesting corrected answers during a private conference thereafter"). Although I conclude that this weighs in favor of allowing conferences both during and after the deposition, even those who disagree with my conclusion concur that there is no reason for a different rule during the deposition than in connection with the errata. A. Darby Dickerson, *Deposition Dilemmas: Vexatious Scheduling and Errata Sheets*, 12 GEO. J. LEGAL ETHICS 1, 62 (1998) (arguing that timing is the only real difference between coaching a witness during a deposition and urging a witness to change answers after the deposition, and "that difference is not material to the analysis"); Gregory A. Ruehlmann, Jr., *"A Deposition is Not a Take Home Examination": Fixing Federal Rule 30(e) and Policing the Errata Sheet*, 106 NW. U. L. REV. 893, 920–21 (2012) ("If it is forbidden in one circumstance, it should be forbidden in the other as well.").

178. *See, e.g.*, Foutz v. Town of Vinton, 211 F.R.D. 293, 295 (W.D. Va. 2002) (allowing both the original testimony and the proposed changes to be admitted into evidence and also allowing the deposition to be reopened for further examination and impeachment where "the changes [the witness] proposes are so substantive"); *see also* Lugtig v. Thomas, 89 F.R.D. 639, 642 (N.D. Ill. 1981). Wilbert notes that, if a blanket no-consultation rule is in effect, an attorney may not comply with his ethical obligation to correct false or misleading testimony until *after* the deposition. Wilbert, *supra* note 6, at 1137–38. This may require the parties to reconvene and reopen the deposition, "which is more time-consuming and less efficient than having the defending attorney correct false or misleading testimony soon after it is given." *Id.*

imposing a wholesale ban on communications between the attorney and witness-client about the errata.

For example, Rule 30(e) requires the errata to include "a statement listing the changes and the reasons for making them."[179] The Ninth Circuit has explained that "[a] statement of reasons explaining corrections is an important component of an errata submitted pursuant to FRCP 30(e), because the statement permits an assessment concerning whether the alterations have a legitimate purpose."[180] Under that Circuit's "sham affidavit" rule, courts may strike changes in an errata where changes are "offered solely to create a material factual dispute in a tactical attempt to evade an unfavorable summary judgment."[181] In other words, instead of imposing a blanket prohibition on conferences between an attorney and witness-client in preparing the errata, this approach looks to the substance and reasons for the changes to address concerns about improper coaching or other impermissible changes to testimony. Similarly, improper coaching can be effectively addressed during deposition testimony without a broad no-consultation rule. If a witness's testimony changes after a break, the deposing attorney may ask why the testimony changed and whether the deponent spoke to counsel during the break. As with changes in an errata, courts should be receptive to motions to strike changed testimony where it results from improper coaching or where the change is designed to manufacture a factual dispute to avoid summary judgment.

C. CLIENTS HAVE A RIGHT TO COUNSEL

Federal courts have uniformly held that civil litigants have a right to hired counsel. A blanket no-consultation rule akin to *Hall* interferes too substantially with the attorney-client relationship.

In *Geders v. United States*, the Supreme Court held that a trial court order prohibiting a criminal defendant from conferring with his counsel during an overnight recess between his direct and cross-examination at trial violated the defendant's Sixth Amendment right to counsel.[182] Subsequent decisions have applied *Geders* to civil cases,[183] with some suggesting that

179. FED. R. CIV. P. 30(e)(1)(B).

180. Hambleton Bros. Lumber Co. v. Balkin Enters., Inc., 397 F.3d 1217, 1224–25 (9th Cir. 2005).

181. *Id.* at 1225; *see also* EBC, Inc. v. Clark Bldg. Sys., Inc., 618 F.3d 253, 269–70 (3d Cir. 2010) (addressing the "sham affidavit" rule in connection with substantive changes on a deposition errata).

182. Geders v. United States, 425 U.S. 80 (1976); *see also* Mudd v. United States, 798 F.2d 1509 (D.C. Cir. 1986). *But see* Perry v. Leeke, 488 U.S. 272 (1989) (finding that a trial court order prohibiting a criminal defendant from conferring with counsel during a fifteen-minute recess at the end of direct examination did not violate the defendant's Sixth Amendment right to counsel).

183. Gray v. New Eng. Tel. & Tel. Co., 792 F.2d 251, 257 (1st Cir. 1986); Adir Int'l, LLC v. Starr Indemn. & Liab. Co., 994 F.3d 1032, 1038–39 (9th Cir. 2021).

rules prohibiting litigants from consulting with counsel during breaks in their trial or deposition testimony impinge on a civil litigant's Fifth Amendment right to hired counsel.[184] Although some courts have questioned whether this truly rises to a constitutional concern under the Fifth Amendment's Due Process Clause, there seems to be a consensus that courts should be careful not to interfere with the attorney-client relationship in civil cases.[185] For example, the District of D.C. identified the right to hired counsel in a civil case as a reason to reject *Hall*'s strict prohibition on conferences during depositions.[186] As that court noted, the civil litigant "usually lacks the skill and knowledge to adequately prepare his case, and he requires the guiding hand of counsel at every step in the proceeding against him."[187]

Although the *Hall* decision seems to accept that clients have a right to counsel, it concludes that the right is "somewhat tempered" during a deposition "by the underlying goal of our discovery rules: getting to the truth."[188] To support this conclusion, the opinion relies upon the trial analogy,[189] but the court does not fully analyze whether a no-consultation rule may impinge on the client's right to counsel.[190]

Whether or not it raises due process concerns, many restrictions on private, off-the-record conferences interfere too substantially with the attorney-client relationship. For example, a blanket no-consultation rule would interfere with an attorney's ability to confer with his client about whether to stop the deposition to obtain a protective order or whether to ask questions at the end of the deposition.[191] Each of these decisions can have both strategy and cost implications that require a client's involvement,[192] and neither implicates any greater coaching concern than pre-deposition witness preparation.[193]

---

184. Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1118 (5th Cir. 1980); Odone v. Croda Int'l PLC, 170 F.R.D. 66, 67–70 (D.D.C. 1997).

185. SEC v. Cherif, 933 F.2d 403, 416 n.16 (7th Cir. 1991); Aiello v. City of Wilmington, 623 F.2d 845, 858–59 (3d Cir. 1980); Doe v. Dist. of Columbia, 697 F.2d 1115, 1119–20 (D.C. Cir. 1983) (recognizing that "every litigant has a powerful interest in being able to retain and consult freely with an attorney" while stating, "we need not elevate to constitutional status the right to the aid of counsel").

186. *Odone*, 170 F.R.D. at 67–70.

187. *Id.* (quoting *Potashnick*, 609 F.2d at 1108) (citing Hall v. Clifton Precision, 150 F.R.D. 525, 529 n.7 (E.D. Pa. 1993)).

188. *Hall*, 150 F.R.D. at 528.

189. *See id.*

190. *See supra* Part III.A.

191. Cary, *supra* note 6, at 395–99.

192. *Id.*

193. *Cf.* Pape v. Suffolk Cnty. Soc'y for Prevention of Cruelty to Animals, No. 20-cv-01490 (JMA) (JMW), 2022 WL 1105563, at *4 n.6 (E.D.N.Y. Apr. 13, 2022) ("[T]he Court finds no practical difference between a conversation to remind the witness of facts before a deposition begins or during a recess.").

Even the less-restrictive rules often tread too far on the attorney-client relationship. For example, some judges and commentators have suggested that conferences initiated by the witness-client or her attorney should be treated differently than regularly scheduled recesses or breaks initiated by the interrogating attorney.[194] The identity of the person requesting the break may be one factor for the court to consider in determining whether improper coaching occurred,[195] but the attorney-client relationship is too important for this to be a determining factor in whether the conferences are permitted.[196] Indeed, a witness's attorney may request a break for many proper purposes that have nothing to do with coaching, such as where a witness becomes visibly confused or upset and the attorney merely requests a break to allow the witness to compose himself.[197] And as a practical matter, no compelling reason exists for courts to apply a different rule if the witness's counsel states, "whenever you get to a good stopping point, I'd like to take a quick restroom break" than if the interrogating counsel states, "we've been going for about an hour, let's take a short comfort break."

D. ATTORNEYS ARE ETHICALLY REQUIRED TO TAKE REMEDIAL MEASURES FOR FALSE TESTIMONY

Another prominent argument against a strict no-consultation rule is that attorneys must confer with their clients to fulfill their ethical obligations.

Under Model Rule 3.3(a)(3), "[i]f a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."[198] Sometimes during a deposition, a witness will testify in a way the attorney believes is inaccurate. This typically results from a misunderstanding of the questions or a faulty recollection, but occasionally a client will intentionally offer

194. *See, e.g.*, *In re* Stratosphere Corp. Sec. Litig., 182 F.R.D. 614, 621 (D. Nev. 1998) ("This Court will not preclude an attorney, during a recess that he or she did not request, from making sure that his or her client did not misunderstand or misinterpret questions or documents, or attempt to help rehabilitate the client by fulfilling an attorney's ethical duty to prepare a witness."); Okoumou v. Horizon, No. 03 Civ. 1606LAKHBP, 2004 WL 2149118, at *2 (S.D.N.Y. Sept. 23, 2004) (stating that "consultation between counsel and a witness at a deposition raises questions only when the consultation is initiated by counsel" and "[a] witness is generally free to consult with counsel at any time during a deposition"); Wilbert, *supra* note 6, at 1146–47 (proposing a ban on conferences initiated by the attorney for the witness).

195. Lisa C. Wood, *A Murky Future for Witness Conferences in Depositions*, 29 FALL ANTITRUST 107, 108–09 (2014) (arguing that interruptions by the deponent's counsel or the deponent while questions are pending "are indicative of explicit or implicit witness coaching and, therefore, restricting access to counsel at these times is generally permitted to promote the truth-finding function of discovery").

196. *See* Odone v. Croda Int'l PLC, 170 F.R.D. 66, 69 (D.D.C. 1997).

197. Cary, *supra* note 6, at 387.

198. MODEL RULES R. 3.3(a)(3).

false testimony because he believes it will help his case.[199] Either way, Model Rule 3.3(a)(3) requires the attorney "to take reasonable remedial measures" for the inaccurate testimony.[200] The comments expressly contemplate that the first step is for the attorney "to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence."[201] This rule serves the same truth-seeking rationale that the court cited in *Hall*.[202] A strict no-consultation rule, however, would make it impossible for the attorney to comply with this ethical obligation to remonstrate with the client confidentially during the deposition.

Some courts have suggested that the witness's attorney should simply address any potential inconsistencies on the record during cross-examination and refrain from any off-the-record discussion about it.[203] This approach incorrectly assumes that it is always clear to an attorney when his client has testified inaccurately.[204] If an attorney is not sure whether the testimony is inaccurate during the deposition, a no-consultation rule leaves him unable to discuss the testimony with his client at the time when it is easiest to correct—while the deposition remains open. If this discussion during the deposition is prohibited, it becomes a much more significant ordeal to correct the testimony later through an errata or affidavit, which can lead to reopening the deposition.[205]

---

199. *See* Wilbert, *supra* note 6, at 1137–40; *see also* Stephen M. Goldman & Douglas A. Winegardner, *The Anti-False Testimony Principle and the Fundamentals of Ethical Preparation of Deposition Witnesses*, 59 CATH. U. L. REV. 1, 11–12 (2009).

200. MODEL RULES R. 3.3(a)(3); *see also* Cary, *supra* note 6, at 397.

201. MODEL RULES R. 3.3 cmt. 10; *see also* DeAngelis v. Countrywide Home Loans, Inc. (*In re* Hill), 437 B.R. 503, 543–46 (Bankr. W.D. Pa. 2010) (relying on Model Rule 3.3 and Comment 10 in ordering an attorney to show cause why he should not be personally sanctioned for presenting at trial false deposition testimony from a client representative).

202. *See, e.g.*, Nix v. Whiteside, 475 U.S. 157, 170–71 (1986) ("The essence of the brief *amicus* of the American Bar Association reviewing practices long accepted by ethical lawyers is that under no circumstance may a lawyer either advocate or passively tolerate a client's giving false testimony. This, of course, is consistent with the governance of trial conduct in what we have long called 'a search for truth.'").

203. Perrymond v. Lockheed Martin Corp., No. 1:09-cv-01936-TWT-AJB, 2011 WL 13269787, at *3 (N.D. Ga. Feb. 18, 2011) ("Initially, the Court notes that the better course in this case would have been for [the attorney] to refrain from mentioning the date to [the witness-client] during the bathroom break and to have waited until cross examination to clarify when [the witness-client] met with Plaintiff.").

204. *See* Goldman & Winegardner, *supra* note 199, at 11–12 ("Witnesses, of course, may attempt deception on their own by offering testimony that they—but not their lawyers—know to be inaccurate."). By its plain language, Model Rule 3.3(a)(3) applies only to evidence the lawyer knows to be false, but the comments make clear that knowledge can be inferred from the circumstances. MODEL RULES R. 3.3 cmt. 8. Many prudent lawyers will want to investigate rather than remain ignorant under the hope that their knowledge will not later be inferred from the circumstances. *See id.*

205. *See, e.g.*, Wilbert, *supra* note 6, at 1137–38; *see also* Taylor, *supra* note 6, at 1075–79. For example, in *Englebrick v. Worthington Industries*, the interrogating attorney

Conversely, even where the attorney knows that his client's testimony is inaccurate, a private, off-the-record conversation allows the attorney to fulfill his ethical obligation to impress upon his client the importance of telling the truth and to understand what questions to ask on cross-examination.[206] For example, the cross-examination questions may differ depending on whether the client misunderstood the question, whether the client based his testimony on hearsay and did not have personal knowledge, or whether the client intentionally testified falsely.[207]

To be sure, there is a risk that an attorney will improperly coach a witness during a conference about potentially inaccurate testimony, but that risk is no greater during a deposition than before or after.[208] To the contrary, the risk of improper coaching is higher if the discussion is delayed until after the deposition and the attorney is then involved in helping the witness craft an errata or affidavit to correct the testimony.[209]

IV. PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE

Parts I and II established that federal courts across the country take a wide variety of approaches to regulating private, off-the-record conferences between attorneys and their witness-clients during depositions. Part III examined the policy rationales relating to those conferences, finding that certain restrictions are appropriate (such as restrictions on conferences while questions are pending), but blanket no-consultation rules and other significant restrictions interfere too substantially with the client's right to counsel and the attorney's ethical obligations.

---

uncovered evidence after the deposition suggesting that the plaintiff had testified falsely. Englebrick v. Worthington Industries, No. SACV 08-01296-CJC(MLGx), 2016 WL 6818350, at *2 (C.D. Cal. Aug. 12, 2016). The interrogating attorney provided that information to the plaintiff's attorney, and the plaintiff's attorney conferred with the plaintiff, impressing upon him the importance of testifying truthfully. *Id.* at *2–3. This led to reopening the deposition for the plaintiff to correct the misstatements. *Id.* The defendant moved for sanctions based, in part, on Model Rule 3.3(a)(3). *Id.* at *13. The court denied sanctions, finding that even if Model Rule 3.3(a)(3) applied, the plaintiff's attorney properly remonstrated with the plaintiff to correct the record and tell the truth. *Id.* Although the plaintiff's attorney was found to have acted appropriately, this case highlights the inefficiencies that can result if attorneys are not able to confer with their clients during the deposition in an attempt to correct misstatements.

206. Wilbert, *supra* note 6, at 1142.

207. *Id.* at 1139–40.

208. *See* Pape v. Suffolk Cnty. Soc'y for Prevention of Cruelty to Animals, No. 20-cv-01490 (JMA) (JMW), 2022 WL 1105563, at *4 n.6 (E.D.N.Y. Apr. 13, 2022) (stating "the Court finds no practical difference between a conversation to remind the witness of facts before a deposition begins or during a recess"); *see also In re* Stratosphere Corp. Sec. Litig., 182 F.R.D. 614, 621 (D. Nev. 1998) ("The right to prepare a witness is not different before the questions begin than it is during (or after, since a witness may be recalled for rebuttal, etc., during trial).").

209. *See supra* Part III.B.

This Part proposes an amendment to the Federal Rules of Civil Procedure to create a uniform federal standard that balances the various concerns described in Part III. This Part starts by discussing areas for improvement in two earlier proposals for a uniform standard. Jean M. Cary's proposed rule[210] benefits from simplicity and clarity but allows too many interruptions to the questioning and unduly strips power from district judges. Joseph R. Wilbert's proposed rule[211] admirably attempts to balance the competing concerns, but it requires an unnecessary inquiry into the attorney's state of mind, it erodes the current limitation on objections in Rule 30, it is ambiguous as to privilege questions, and its structure is overly complicated.

Recent circumstances have renewed the urgency for a uniform rule. Remote depositions have increased during the COVID-19 pandemic, and many practitioners and commentators believe remote depositions will remain prominent as COVID-19 restrictions ease. Attorneys and their witness-clients may be more tempted to communicate during a remote deposition—even while questions are pending—by text message, instant message, or other means.

To address these concerns, I offer an amendment to Rule 30(c) of the Federal Rules of Civil Procedure. Under the proposal, an attorney would not be permitted to communicate with a witness-client while a question is pending unless the communication relates to one of the grounds on which the attorney may instruct the witness not to answer under Rule 30(c)(2). The proposal would expressly permit communications during recesses and breaks, regardless of who requests the break, and the mere fact of the communication would not waive any otherwise applicable privilege. District judges would have discretion to depart from the rule for good cause shown in a particular case. The proposed rule does not specify remedies for improper conferences, as courts already have sufficient authority to address violations of the proposed rule.

A. AREAS FOR IMPROVEMENT IN PRIOR PROPOSALS

Jean M. Cary and Joseph R. Wilbert are among a handful of scholars who have previously written about private, off-the-record conferences between attorneys and their witness-clients during deposition recesses. Cary published two articles dealing with "Rambo" litigation tactics. Her first article suggested that deposing attorneys should ask courts to enter strict *Hall*-like no-consultation orders.[212] Ten years later, she "[found herself] in the uncomfortable position of changing [her] earlier recommendation," stating that "'no-consultation' orders are dangerous to the attorney-client

210. Cary, *supra* note 6, at 402.
211. Wilbert, *supra* note 6, at 1146.
212. Cary, *supra* note 54, at 587.

relationship and should not be entered."[213] Cary reviewed various approaches and policies before proposing an amendment to the Federal Rules of Civil Procedure.[214] Wilbert's Note picked up on Cary's "Rambo" theme and suggested that Rambo litigation tactics had become so problematic that Rambo attorneys should be "muzzled" by banning attorney-initiated conferences during a deposition.[215]

At the end of her second thoughtful and thorough article on the topic, Cary proposed the addition of two sentences to the end of Rule 30(d)(1):

> Counsel may not consult with a deponent while the deposing attorney is in the middle of a question, or is following a line of questions that can be completed in a reasonable time except when necessary to discuss privilege issues, correct a false statement, or correct an unintended misimpression left by the witness. Courts may not restrict attorney-deponent consultations during recesses and overnight breaks in a deposition.[216]

Cary's proposal can be improved in two ways. First, Cary would allow consultations while a question is pending for privilege, to correct a false statement or to correct an unintended misimpression. Good policy reasons support a rule allowing consultations in the middle of a question for privilege. As the *Hall* court explained, "privileges are violated not only by the admission of privileged evidence at trial, but by the very disclosures themselves."[217] The same rationale does not apply to consultations *in the middle of questions* to correct a false statement or correct an unintended misimpression left by the witness. Unlike privilege issues, concerns about potentially inaccurate testimony are not implicated by the very disclosures themselves. Instead, inaccurate testimony can be corrected later in the deposition without the need to interrupt questioning. Accordingly, while consultations to address potentially inaccurate testimony are appropriate, and may be ethically necessary,[218] they should be handled during a break after the interrogating attorney finishes the line of questions. The witness can then clarify or correct testimony when the deposition resumes, or the attorney for the witness can ask questions on cross-examination to elicit the clarified or corrected testimony. Allowing breaks in the middle of questioning to correct a false impression or correct an unintended misimpression, as Cary proposed, could lead to frequent interruptions that

213. Cary, *supra* note 6, at 373.
214. *See generally id.*
215. *See generally* Wilbert, *supra* note 6.
216. Cary, *supra* note 6, at 402.
217. Hall v. Clifton Precision, 150 F.R.D. 525, 529–30 (E.D. Pa. 1993).
218. *See supra* Part III.D.

unfairly impede the "question-and-answer conversation between the deposing lawyer and the witness."[219]

Second, Cary's proposal would prohibit courts from restricting attorney-deponent consultations during recesses and overnight breaks. This goes too far in restraining judicial discretion over discovery in particular cases. It is well-settled that trial courts have broad discretion in managing and supervising discovery.[220] By prohibiting district courts from restricting conferences during recesses and overnight breaks, Cary's proposal would unduly limit their ability to address truly bad behavior. Instead of tying judges' hands, the better approach is to permit private, off-the-record conferences and require any modification to the rule to be subject to the "good cause" standard for a protective order under Rule 26(c).

At the end of a similarly rigorous analysis, Wilbert proposed the following rule:

> An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless
>
> (1) all parties consent;
>
> (2) the communication is made for the purpose of determining, whether the question should not be answered on the grounds of
>
> (a) privilege;
>
> (b) enforcing a court-ordered limitation, or
>
> (c) avoiding significant prejudice to any person when the question is plainly improper,
>
> (3) the attorney requests to consult with the attorney's client regarding whether to file a motion to terminate or limit the deposition, or
>
> (4) the attorney wishes to question his own witness after all other attorneys present have had a reasonable opportunity to question the deponent and have finished questioning.
>
> Judges may, in their discretion, allow inquiry into any non-privileged off-the-record communication made during the course of a deposition if the party requesting such an inquiry can raise a reasonable suspicion of bad-faith conduct.[221]

219. *Hall*, 150 F.R.D. at 528.
220. *See, e.g.*, Crawford-El v. Britton, 523 U.S. 574, 598–99 (1998); *see also* Hunt v. DaVita, Inc., 680 F.3d 775, 780 (7th Cir. 2012).
221. Wilbert, *supra* note 6, at 1146.

Wilbert's proposal could also be improved in several ways. First, prohibiting an attorney from interrupting a deposition "for the purpose of communicating with the deponent" requires an unnecessary inquiry into the attorney's state of mind. For example, if an attorney requests a break to use the restroom, may he then communicate with the deponent during the break? More importantly, the permissibility of conferences between an attorney and witness-client should not turn on who requested the break.[222] Second, the phrase "avoiding significant prejudice to any person when the question is plainly improper" erodes the current limitation on objections in Rule 30(c)(2)[223] and would give the defending attorney too much power in deciding that a question is "plainly improper." Third, although it is prudent to require a showing such as "reasonable suspicion of bad-faith conduct" before allowing inquiry into the content of a private, off-the-record conference, it is unclear whether Wilbert's reference to "non-privileged" communications is intended to suggest that the entire conference is deemed non-privileged if the standard is met. Finally, Wilbert's rule is structured as a broad prohibition with enumerated exceptions, which is an ineffective structure in this context that contributes to the substantive shortcomings in the proposal. Instead of Wilbert's broad prohibition with limited exceptions, the policy rationales favor the opposite approach—broad permission for an attorney and witness-client to communicate with limited enumerated restrictions.

B. THE INCREASE IN REMOTE DEPOSITIONS RAISES A NEW URGENCY FOR A UNIFORM RULE

Although the Federal Rules of Civil Procedure have allowed for depositions by telephone since 1980[224] and depositions by other remote means since 1993,[225] the use of remote depositions has increased

222. *See supra* Part III.C.

223. Rule 30(c)(2) provides:

> 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 nonargumentative and nonsuggestive 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).

FED. R. CIV. P. 30(c)(2).

224. FED. R. CIV. P. 30 Advisory Committee Notes to 1980 Amendments.

225. FED. R. CIV. P. 30 Advisory Committee Notes to 1993 Amendments.

dramatically during the COVID-19 pandemic.[226] Similarly, in recent years, lawyers have increasingly used text messaging and instant messaging to communicate with clients.[227] This combination makes it more tempting for attorneys and their witness-clients to communicate during a deposition, even while questions are pending, with their cell phones or a second computer just outside the camera's view.

Courts have emphasized that "[t]he same basic standards of civility and decency that govern in-person depositions apply to remote video depositions."[228] That statement highlights the urgency of the question—what are the basic standards for communications between an attorney and witness-client for in-person depositions that should be applied to remote video depositions?

The authorities and proposals generally agree that communications while a question is pending are improper for any purpose other than whether to assert a privilege, to enforce a limitation ordered by the court, or to move for a protective order.[229] In a traditional in-person deposition, courts have sanctioned attorneys for passing notes or whispering to a witness-client during questioning.[230] Similarly, courts have sanctioned attorneys for sending text messages to a witness-client during questioning in a remote video deposition.[231]

Beyond this one relatively bright line, however, the authorities do not provide clear, uniform guidance on other communications between an attorney and witness-client during breaks in questioning.[232] This lack of clarity is now beginning to carry over into communications by text message or instant messages during breaks from a remote video deposition. For example, in *Savoia-McHugh v. Glass*, a husband and wife filed a lawsuit relating to an investment that resulted in a substantial loss.[233] The defendant

226. *See, e.g.*, Lyle Moran, *Business as (Un)Usual: Will the COVID-19 Pandemic Fundamentally Remake the Legal Industry?*, 106 ABA J. 34, 36 (Aug./Sept. 2020); Quinson, *supra* note 3 (describing the results of a survey in summer 2021 assessing law firms' attitudes toward remote depositions).

227. *See, e.g.*, PracticePanther, *Text Messaging for Lawyers: Building Stronger Client Relationships*, NAT'L L. REV., Volume XI, No. 315 (Nov. 11, 2021).

228. Johnson v. Statewide Investigative Servs., Inc., No. 20 C 1514, 2021 WL 825653, at *6 (N.D. Ill. Mar. 4, 2021) (declining to impose sanctions for alleged off-the-record communications during a remote video deposition where the record did not provide sufficient evidence to support a conclusion of coaching).

229. *See generally supra* Parts I and II.

230. *See, e.g.*, Schaffhauser v. UPS, Inc., No. 4:12-cv-00599, 2014 WL 221963, at *1–2 (E.D. Ark. Jan. 21, 2014).

231. *See, e.g.*, Ngai v. Old Navy, No. 07-5653, 2009 WL 2391282, at *4–5 (D.N.J. July 31, 2009).

232. *See generally supra* Parts I and II.

233. Savoia-McHugh v. Glass, No. 3:19-cv-2018-MCR-HTC, 2020 WL 12309562, at *1 (N.D. Fla. Nov. 30, 2020).

took the husband's deposition via Zoom.[234] The defendant asserted that the husband's deposition testimony changed significantly after the lunch break, and the defendant issued a subpoena to Verizon for text message logs to determine if the husband exchanged messages with his wife or their attorney during the break.[235] The court granted Verizon's motion to quash, finding that the defendant provided no evidence that the husband communicated with his wife or counsel and was instead only speculating that the communications occurred based on the change in testimony.[236] As part of its analysis, however, the court cited *Hall* for the broad proposition that it is improper for an attorney to confer with his client after deposition testimony has begun, other than on issues of privilege.[237] The court then cited *Ngai* for the proposition that, even if the actual text messages were sought (as opposed to just the text message logs), the contents might not be protected by the attorney-client privilege.[238]

Commentators and practitioners believe that many depositions will continue to be taken remotely, even as COVID-19 restrictions ease.[239] The uncertainty in the case law surrounding electronic communications between an attorney and witness-client during a remote deposition raises a new and compelling urgency for a uniform rule.

C. PROPOSED AMENDMENT TO RULE 30

To improve upon the previous court orders, local rules, and scholarly proposals, the Supreme Court, through the Judicial Conference Committee

234. *Id.* at *2. Although the court's opinion does not state that the deposition was taken by remote means, the defendant's brief repeatedly describes it as a "Zoom deposition." Defendant Eastern Union Funding, LLC's Response in Opposition to Plaintiffs' Objection to Subpoena to Verizon and Motion to Quash and for Protective Order, at 2, 3, 5 n.2, 8, 9, 9 n.3, 10, Savoia-McHugh v. Glass, No. 3:19-cv-2018-MCR-HTC (N.D. Fla. filed Nov. 17, 2020) (Docket No. 105).

235. *Savoia-McHugh*, 2020 WL 12309562, at *1.

236. *Id.* at *3.

237. *Id.* at *2 n.1.

238. *Id.* In *BioConvergence LLC v. Attariwala*, the District of D.C. recently gave a similar admonishment without a remedy. BioConvergence LLC v. Attariwala, No. 20-cv-101, 2023 WL 2086078, at *7 (D.D.C. Feb. 17, 2023). There, the witness-client looked away from his screen at least ten times during a remote deposition, and he admitted on the record that he was communicating with his counsel by text messages. *Id.* After reviewing the text messages *in camera*, the court denied a motion to compel their production, finding that they did not reflect any improper coaching. *Id.* Still, the court cautioned the witness-client and his counsel that their conduct "treads close to the line at which the Court might reasonably have considered the possibility of sanctions" and stated that their communications were inappropriate. *Id.* When the deposition was re-opened, the court further instructed the witness-client and counsel to remember *Hall*'s statement that the underlying purpose of a deposition is to find out what the witness thinks. *Id.* (quoting Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993)).

239. Quinson, *supra* note 3.

on Rules of Practice and Procedure, should amend Rule 30(c) by adding the following language:

> The deponent may not communicate with his or her counsel while a question is pending, except for the purpose of deciding whether to assert a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).[240] The deponent may communicate with his or her counsel during recesses and breaks in the testimony, and the mere fact of such a communication does not waive any otherwise applicable privilege. The court may modify this rule for good cause shown in a particular case consistent with Rule 26(c).

The first sentence mirrors the three grounds upon which an attorney may instruct a deponent not to answer under Rule 30(c)(2).[241] If the attorney can instruct a witness not to answer for these reasons, the attorney-client relationship demands that the attorney and client be permitted to discuss the potential instruction while a question is pending. If the attorney requests a break while a question is pending, the attorney should state on the record that the break is for one of these three permitted purposes.

The second sentence expressly permits private, off-the-record communications between an attorney and witness-client during recesses and breaks. It does not matter whether the break is requested by the interrogating attorney, the defending attorney, the deponent, the court reporter, or someone else. The phrase relating to privilege does not presume that any privilege necessarily applies to the communication. For example, whether or not a discussion took place typically would not be privileged, but the content of the communication might be privileged, depending on the discussion.[242] This wording generally preserves any applicable privilege while giving the interrogating attorney the ability to inquire into non-privileged information that could show improper coaching. If the interrogating attorney believes improper coaching occurred, he should then ask questions about the content of the communication. Of course, these questions will almost certainly draw objections and instructions not to answer, but a strong record of the questions and instructions will help support an argument to the court that the privilege does not apply under the crime-fraud exception or otherwise.[243] These arguments against privilege

240. Rule 30(d)(3) provides that, "[a]t any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or a party." FED. R. CIV. P. 30(d)(3).

241. *See* FED. R. CIV. P. 30(c)(2).

242. Phillips v. Spartan Light Metals, Inc., No. 3:06-cv-864-GPM, 2008 WL 11508988, at *3–4 (S.D. Ill. Jan. 25, 2008).

243. Geders v. United States, 425 U.S. 80, 89–90 (1976); *In re* Neurontin Antitrust Litig., No. 02-1390, 2011 WL 253434, at *10 (D.N.J. Jan. 25, 2011); Ngai v. Old Navy, No. 07-

would remain viable under the proposed rule, as it states only that "the mere fact" of the communication does not constitute waiver. The wording also recognizes that privilege can be waived in other ways, such as through voluntary disclosure.[244]

The third sentence maintains uniformity in federal courts across the country without unnecessarily impeding on district and magistrate judges' discretion to manage and supervise discovery.[245] Although the proposed rule expressly grants discretion to district courts, the phrase "for good cause shown in a particular case" indicates that district courts should insist upon a specific showing of good cause before imposing some greater restriction on private, off-the-record conferences. This specific showing might be based on the attorneys' conduct in open court, prior depositions in the case, specific discovery abuses in the case, or other factors. Because good cause must be shown "in a particular case" to depart from the rule, district courts should not impose greater restrictions on private, off-the-record communications in local rules, standing orders, or blanket restrictions entered in every case.[246] This proposal gives litigants and their counsel greater predictability while retaining judicial discretion to address misconduct in a particular case.

Many court orders and earlier scholarly proposals use the words "conference" or "confer." Those words could be misconstrued as limiting the rule's applicability to oral communications. This proposal intentionally uses the words "communicate" and "communications" to encompass all forms of communication, including text messages and instant messages during remote depositions.

Finally, unlike some earlier proposals, this proposed rule does not include specific remedies for violation. The problem is not that federal

---

5653, 2009 WL 2391282, at *5–6 (D.N.J. July 31, 2009); Pape v. Suffolk Cnty. Socʹy for Prevention of Cruelty to Animals, No. 20-cv-01490 (JMA) (JMW), 2022 WL 1105563, at *3–5 (E.D.N.Y. Apr. 13, 2022); *Phillips*, 2008 WL 11508988, at *3–4.

244. The proposal also avoids wading into complex and nuanced issues regarding what privilege law will apply. Certain privilege issues, including the burden of proof for the crime-fraud exception, are subject to a circuit split. *See, e.g.*, Blake R. Hills, *Using Policy to Resolve the Circuit Split Over the Crime-Fraud Exception to the Attorney-Client Privilege*, 48 CAP. U. L. REV. 1 (2020). Moreover, state law governs privilege regarding claims or defenses for which state law supplies the rule of decision. FED. R. EVID. 501.

245. *See, e.g.*, Crawford-El v. Britton, 523 U.S. 574, 598–99 (1998); *see also* Hunt v. DaVita, Inc., 680 F.3d 775, 780 (7th Cir. 2012).

246. The phrase "for good cause shown in a particular case" is used for similar purposes in other rules. *See, e.g.*, U.S. DIST. CT. FOR THE DIST. OF S.C. LOCAL CIV. RULES R. 1.02; U.S. CT. APP. FOR THE 10TH CIR., CM/ECF USER'S MANUAL, at § II.A.2 (11th ed. Jan. 1, 2022), https://www.ca10.uscourts.gov/sites/ca10/files/documents/downloads/2022%20CMECF%20User%27s%20Manual.pdf [https://perma.cc/Z6P3-RBH3]; U.S. CT. APP. FOR THE 4TH CIR., APPELLATE PROCEDURE GUIDE 4 (Dec. 2021), https://www.ca4.uscourts.gov/AppellateProcedureGuide/AppellateProcedureGuide.pdf [https://perma.cc/UL5W-NCUR].

courts lack authority to remedy improper communications between an attorney and witness-client, but rather that the bench and the bar lack clear guidelines on what qualifies as an improper communication deserving of a remedy. The proposed rule seeks to provide those guidelines. If the proposed rule is implemented, existing remedies are sufficient to address the violation. The typical remedies for violation will derive from the current text of Rule 30(d). Under Rule 30(d)(1), the court must allow additional time for the deposition if needed to fairly examine the witness or if private, off-the-record communications impede or delay the examination.[247] Under Rule 30(d)(2), the court may impose appropriate sanctions, including reasonable attorneys' fees and expenses, where private, off-the-record communications impede, delay, or frustrate the fair examination.[248] Combined with the new rule proposed herein, these existing remedies promote the truth-seeking purpose of depositions without punishing conduct that does not negatively impact the fair examination of the deponent.[249]

CONCLUSION

Courts began imposing restrictions on private, off-the-record conferences between an attorney and witness-client during a deposition in the 1980s and 1990s. The *Hall* decision was issued in 1993, and the *Stratosphere* decision was issued in 1998. Despite the passage of time, federal district courts have not reached a consensus on how to address such conferences. To the contrary, the various approaches that courts have devised have only become more splintered with time. This leads to a lack of predictability for counsel and litigants, and the implications include privilege waiver and sanctions. The increase in remote video depositions caused by the COVID-19 pandemic brings new urgency for uniform standards. Accordingly, to provide greater certainty and uniformity while retaining judicial discretion over discovery, the Supreme Court should consider amending the Federal Rules of Civil Procedure as proposed herein.

---

247. FED. R. CIV. P. 30(d)(1).

248. FED. R. CIV. P. 30(d)(2).

249. In addition to the typical remedies under Rule 30(d), if a deponent fails to answer a question as a result of an improper communication, the court has existing authority to compel a response and award attorneys' fees to the interrogating party. FED. R. CIV. P. 37(a)(3)(B)(i), (5)(A). Courts also have the existing authority to impose monetary sanctions for abusive litigation tactics against attorneys under 28 U.S.C. § 1927 and against both attorneys and litigants under the courts' inherent power. Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991). Finally, courts have existing authority to address improper witness coaching, either on or off the record, through attorney discipline, criminal charges for suborning perjury, and/or waiver of the attorney-client privilege under the crime-fraud exception. *See supra* Part III.B. These existing remedies are sufficient to address violations of the new rule proposed herein.