

Does Privilege Take a Break?

Approaches to Privilege During Deposition Breaks

University of Texas School of Law LIVE First Friday Ethics
March 4, 2022

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Texas

Texas Approach (*aka Stratosphere Approach*)

“Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments.”

TEX. R. CIV. PRO. 199.5(D)

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Texas

Texas Approach (*aka Stratosphere Approach*)

One court's take on "agreed" recess:

"Eckels and Davis also argue that Welch's attorney prevented Kathy Boobar from testifying fully at her deposition about the reason for creating Account # 2095 because a lunch break was requested. Eckels and Davis do not point us to any reference in the record showing where they objected to this recess. Since private conferences may be held during agreed recesses and adjournments, we disagree that the lunch recess tainted Boobar's testimony. See TEX.R. CIV. P. 199.5(d)."

Eckels v. Davis, 111 S.W.3d 687, 698 fn.5 (Tex. App.—Fort Worth 2003, pet. denied)

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Texas

Texas Approach (*aka Stratosphere Approach*)

"An attorney for a deponent shall not initiate a private conference with the deponent regarding a pending question, except for the purpose of determining whether a claim of privilege should be asserted."

W.D. TEX. LOCAL RULE CV-30(B).

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The Other Approach

Hall v. Clifton (E.D. Pa 1993):

“Under Rule 30(c), depositions generally are to be conducted under the same testimonial rules as are trials. During a civil trial, a witness and his or her lawyer are not permitted to confer at their pleasure during the witness's testimony. ... The same is true at depositions. ...

These considerations apply also to conferences initiated by the witness, as opposed to the witness's lawyer. To allow private conferences initiated by the witness would be to allow the witness to listen to the question, ask his or her lawyer for the answer, and then parrot the lawyer's response. ... There is simply no qualitative distinction between private conferences initiated by a lawyer and those initiated by a witness. Neither should occur.”

Hall v. Clifton, 150 F.R.D. 525, 528-29 (E.D. Pa. 1993)

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The Other Approach

Hall v. Clifton (E.D. Pa 1993):

“These rules also apply during recesses. Once the deposition has begun, the preparation period is over, and the deposing lawyer is entitled to pursue the chosen line of inquiry without interjection by the witness's counsel. Private conferences are barred during the deposition, and the fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules. ... Therefore, I hold that conferences between witness and lawyer are prohibited both during the deposition and during recesses.”

Hall v. Clifton, 150 F.R.D. 525, 528-29 (E.D. Pa. 1993)

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& MARIN L.L.P.

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