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Approaches to Privilege During Deposition Breaks

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I. INTRODUCTION

As any practicing trial lawyer or litigator knows, the pandemic brought video depositions into mainstream practice. Before the pandemic, attorneys would of course take depositions in other states, and for some it was even commonplace. During the pandemic, however, state lines blurred radically and almost every attorney found him or herself being asked to defend or present a witness in a jurisdiction they had never practiced in before. What might have once been the work of local counsel was suddenly the work of the client's day-to-day counsel.

As one would expect, Texas state and local federal rules are top of mind for Texas attorneys. Indeed, lawyers who grew their practices in Texas might not even realize some of the customs and norms they take for granted are actually grounded in *rules*, rules that may be very different in another jurisdiction.

This paper will discuss one such custom-based-in-a-rule, namely the question of privilege for discussions between a lawyer and a client during a deposition break. As discussed below, there are two competing approaches: one that broadly allows for private conferences provided they are agreed and no question is pending and another that broadly disallows private conferences during a deposition except to the extent necessary to determine whether a privilege applies.

II. DOES PRIVILEGE TAKE A BREAK?

As set forth below, all courts generally allow for a break during a deposition to determine whether a privilege needs to be asserted. Likewise, all courts generally prohibit attorneys from feeding witnesses testimony. Where courts differ, however, is whether and under what circumstances a defending attorney can have a private conference with a witness during a deposition.

A. The Texas Approach

In Texas, the rule governing an attorney's ability to consult with a deponent during a deposition is relatively straight-forward:

> 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. PROC. 199.5(d).

Stated differently, the default rule in Texas is that a lawyer cannot have a private conference with his or her client during a deposition unless (1) it is for the purpose of determining whether to assert a privilege; or (2) it is during an *agreed* recess or adjournment. Notably, at least one Texas court has interpreted an "agreed" recess to be one to which the other side does not object. *See Eckels v. Davis*, 111 S.W.3d 687, 698 fn.5 (Tex. App.—Fort Worth 2003, pet. denied) (holding a lunch

recess was "agreed" for purposes of Texas Rule of Civil Procedure 199.5(d) because there was no evidence the other side objected to the recess). As the Eckels court explained,

> 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).

Id. (citing TEX. R. CIV. P. 199.5(d)).

Although very similar to the Texas state rule, the local rules of the United States District Court for the Western District of Texas set forth a somewhat more generous standard:

> 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).

The Western District is narrower in its restriction (*i.e.*, is more generous toward private conferences) than the Texas rule by providing only that an attorney (1) may not initiate a private conference (2) regarding a pending question, except (3) for the purpose of determining whether to assert a privilege. Read plainly, the Western District rule says nothing of agreed breaks, breaks initiated by the witness, or breaks initiated by the other side. *See id.* Likewise, read plainly, the rule says nothing of breaks initiated by the defending attorney for the purpose of discussing anything other than a pending question. *See id.*

Texas is not alone in taking a generally "pro-privilege" approach to discussions with a witness during the witnesses' deposition. New York, for example, takes a very similar approach at both the state and federal level. *See* N.Y. COMP. CODES R. & REGS. TIT. 22, § 221.3 ("An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on [specific grounds under the rules]."); NY R USDCTS&ED Civ Rule 30.4 ("An attorney for a deponent shall not initiate a private conference with the deponent while a deposition question is pending, except for the purpose of determining whether a privilege should be asserted."); *see also, e.g., Few v. Yellowpages.com*, 2014 WL 3507366, at *2 (S.D.N.Y. July 14, 2014) (noting New York law applies and "[Civil Rule 30.4], which applies both in this district and in the Eastern District, narrows the restriction on counsel to conferencing during the pendency of a question, a change that obviously represents a deliberate decision to alter the scope of the prohibition."); *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, 2011 WL 4526141, *8 (S.D.N.Y. Sept. 21, 2011) (reciting rule of Judge Scheindlin precluding counsel initiating

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