

## Ethical Considerations Governing Counsel Conducting and Defending Remote Depositions

**Opposing counsel sent me copies of the deposition exhibits ahead of my client's deposition next week. Can I look at them? Can I discuss them with my client?**

This question presents an interesting scenario, and the answer is not altogether clear. As an initial matter, there is a possibility that the court would consider the documents and exhibits to be attorney work product. As one court held, “the selection and compilation of documents by counsel . . . in preparation for pretrial discovery falls within the highly-protected category of opinion work product.”<sup>1</sup> Under this viewpoint, the deposition exhibits are entitled to heightened protection not simply because they are to be used in the deposition, but primarily because the selection and ordering of the documents provide insights into the attorney’s mental impressions, legal theories, and case strategies—so-called “opinion” work product. However, even *if* such documents are entitled to the protection of the work product privilege, the voluntary disclosure of the document compilation may operate to waive the protections of the work product privilege as to the documents actually disclosed, particularly if counsel failed to take reasonable steps to prevent the documents from being reviewed.<sup>2</sup>

Setting aside the question of privilege, several ethical obligations must be considered before reviewing the documents or sharing their contents with your client. In particular, counsel are reminded of Model Rule 3.4(b), which expressly prohibits a lawyer from counseling or assisting a witness to testify falsely, and the comment to Model Rule 3.3, which reminds counsel of their special duties as officers of the court to avoid conduct that undermines the integrity of the adjudicative process.<sup>3</sup> Any steps an attorney takes to prepare his or her client for a deposition should be consistent with these obligations and with the truth-seeking goals of the judicial system as a whole; in other words, counsel must act consistent with his or her duty “to extract the facts from the witness, not to pour them into him.”<sup>4</sup>

As a best practice, a lawyer who intends to send deposition exhibits to opposing counsel for use at a remote deposition should take steps to prevent opposing counsel from reviewing the documents or exhibits before the deposition. This may be accomplished by, for instance, placing the exhibits in a sealed envelope or package with explicit instructions that the seal on the packaging should not be broken until the time of the deposition, at which time the seal should be broken on camera. Another option to consider is only available if a court reporter or other officer of the court will be present with the deponent during the remote deposition. If so, counsel should consider sending the exhibits directly to him or her with specific instructions to keep the exhibits

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<sup>1</sup> *Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985).

<sup>2</sup> *In re United Mine Workers of Am. Employee Ben. Plans Litig.*, 159 F.R.D. 307, 310 (D.D.C. 1994) (“It seems equally clear . . . that the disclosure of documents protected by the attorney work product privilege waives the protections of the attorney work product privilege as to the documents disclosed.”).

<sup>3</sup> See Model Rules Prof'l Conduct r. 3.3, 3.4.

<sup>4</sup> *In re Eldridge*, 82 N.Y. 161, 171 (1880).

secured until the deposition begins. Taking these prophylactic steps on the front end could also serve as evidence that the attorney took reasonable steps to preserve the work product privilege.

Of course, counsel may consider foregoing the mailing of hard copy exhibits altogether and instead look to alternative options, such as remotely uploading documents through a secure channel or medium at the time of the deposition. Many remote deposition platforms offer this option. While real-time remote upload eliminates the above-mentioned concerns regarding premature disclosure of counsel's deposition exhibits, such expanded capabilities present a unique set of challenges, as discussed below.

### **Can I communicate with my client during his or her remote deposition?**

Despite the temptation to communicate with your client in a manner that would not draw the attention of opposing counsel—for instance, by sending a text message, using a virtual messaging service like Skype, or writing notes to the client or making suggestive gestures out of view of the camera—attorneys are prohibited from communicating with or advising their clients during a remote deposition to the same extent as such actions would be prohibited during an in-person deposition. Federal Rule of Civil Procedure 30(c)(2) provides “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 [to terminate or limit the deposition].” Beyond those narrow exceptions, attorneys are expressly prohibited from instructing or influencing their clients once their depositions have commenced.

Of course, you may continue to lodge timely objections during the deposition, but such communications are made for the record and not communicated to—or through—the client. Counsel is also reminded of the mandate in Rule 30(c)(2) that an objection must be stated concisely in a nonargumentative and nonsuggestive manner—in other words, lawyers are prohibited from the “making of lengthy objections which contain information suggestive of an answer to a pending question” because such objections are considered offensive to the spirit of the prohibition against private conferences.<sup>5</sup>

### **What if I want to talk to my client during a break in the deposition?**

As an initial matter, courts are somewhat divided over whether attorneys are permitted to confer with their clients during breaks in depositions.<sup>6</sup> The permissibility of such attorney-client communications may also be the subject of a trial court's discovery order.<sup>7</sup> Thus, counsel should

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<sup>5</sup> *Hall*, 150 F.R.D. at 530.

<sup>6</sup> *Compare Hall*, 150 F.R.D. at 529 (“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.”) *with Coyote Springs Inv., LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 131 Nev. 140, 149 (2015) (holding that “attorneys may confer with witnesses during an unrequested recess or break in a discovery deposition.”).

<sup>7</sup> *See, e.g., In re Domestic Air Transp. Antitrust Litig.*, No. 1:90-CV-2485-MHS, 1990 WL 358009, at \*9 (N.D. Ga. Dec. 21, 1990) (trial court order stipulating that “[p]rivate conferences between deponents and

first become familiar with the applicable rules and court orders in the relevant jurisdiction governing attorney-client communications at depositions.

Assuming that you are not expressly prohibited from conferring with your client during a break in the deposition, extra caution must be taken in the remote setting to ensure that the attorney-client privilege is protected. In contrast to a face-to-face conferral where the attorney can ensure that no third parties are within earshot whose presence would destroy the protections of the privilege, the same is not necessarily true for remote communications. Therefore, these attorney-client conversations should take place beyond the “walls” of the virtual deposition software and should be conducted over a secure line of communication.

On the other side of this coin, the attorney taking the deposition is not without recourse if he or she believes that the deponent has been improperly coached by opposing counsel during a break in the deposition, which would constitute a violation of Model Rule 3.4(b). For one, “[i]f a deponent changes his testimony after consulting with his attorney, the fact of the consultation may be brought out” in subsequent questioning in the deposition, although “the substance of the communication generally is protected [as privileged].”<sup>8</sup> Moreover, if the deponent is not opposing counsel’s client, the lawyer taking the deposition may have even more leeway to ask the deponent the specifics of his or her discussion during the break, as such conversations are less likely to be entitled to privilege protections. This provides the attorney taking the deposition with the opportunity to establish, on the record, that the deponent engaged in substantive consultations with the attorney defending the deposition during a break in the proceedings, which may be useful in impeaching the deponent’s credibility or, as discussed further below, seeking recourse from the trial court.

**I am conducting a remote deposition soon and I am worried that opposing counsel will be communicating with the deponent. What can I do to prevent this? Are there any red flags that I should look out for?**

First, find out whether opposing counsel is planning to be in the same room as the deponent during the deposition. If so, to the extent reasonably possible under the circumstances, you should consider having either your agent or an officer of the court (including, potentially, the court reporter) in the same room with the deponent. You may also consider requesting both the attorney and the deponent to appear on video simultaneously. Similarly, you may ask the witness to identify all individuals present in the room and to explain where the defending attorney (and his or her team) are located in relation to the deponent. These steps alone will make it exceedingly difficult for opposing counsel to communicate with his or her client during the deposition without drawing attention.

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their attorneys during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Unless prohibited by the Court for good cause shown, such conferences may be held during recesses or adjournments.”).

<sup>8</sup> *Haskell Co. v. Georgia Pac. Corp.*, 684 So. 2d 297, 298 (Fla. Dist. Ct. App. 1996).

If, on the other hand, your deposition will be a true remote deposition in that all attorneys, the court reporter, and the deponent will be attending the deposition virtually, then you should consider instructing the deponent at the outset of the deposition to remove all technology that is not being used for the taking and recording of the deposition. This instruction may also be given on the record, and you may request that the deponent confirm all such technology has been removed before commencing with the questioning.

In any event, you should be on the lookout for behavior that would indicate that the deponent is receiving real-time communications, such as long pauses before answering questions or if the deponent's eyes constantly shift away from the camera. If you reasonably believe that such communications are taking place, then you are permitted under Rule 30(d)(3)(A) to move the court for an order terminating the deposition on the grounds that the deponent and/or opposing party are acting in bad faith. If the motion is granted, then the party or deponent whose conduct necessitated the motion may be required to pay the reasonable expenses incurred in making the motion, including attorneys' fees.<sup>9</sup>

### **Is it really necessary that I learn how to use all of this new technology?**

While the learning curve may be steep as attorneys and their clients adapt to the use of remote technology to conduct various litigation tasks that traditionally have been handled in-person, this does not absolve counsel of the obligation to uphold their legal and ethical duties. Attorneys are reminded of Comment 8 to Model Rule 1.1, which provides in part: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."<sup>10</sup>

There are several risks associated with participating in a remote deposition without a working knowledge of the relevant technology. For instance, without an understanding of the chat feature in the deposition software, counsel runs the risk of erroneously disclosing to opposing counsel what were intended to be confidential communications between team members or even between counsel and his or her client. Likewise, an attorney who misuses the camera and microphone features (by, for instance, activating one or both without realizing it) runs the risk of making inadvertent disclosures or, even worse, waiving privilege. The same is true when it comes to sharing exhibits, and all attorneys should proceed with extreme caution before uploading documents from their computers into a virtual deposition. Therefore, to avoid these potential pitfalls, lawyers are encouraged to take steps to become familiar with the various remote options available and to consider whether and to what extent such options may be utilized in their cases.

Fortunately, many law firms, legal technology vendors, and legal organizations are offering training to attorneys to help ease the transition into remote litigation, and lawyers should take advantage of these resources. Many remote deposition vendors are also offering so-called "test runs" of the software before the deposition to allow counsel to become acquainted with the

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<sup>9</sup> Fed. R. Civ. P. 37(a)(5)(A).

<sup>10</sup> See Model Rules Prof'l Conduct r. 1.1 cmt.

technology and to troubleshoot any potential issues before they have the chance to disrupt the deposition.

Finally, while it may be tempting to slow-walk one's cases while waiting for the practice of law to return to "normal," counsel should be mindful of Model Rule 1.3, which requires attorneys to act with "reasonable diligence and promptness" in representing their clients.<sup>11</sup> As Comment 3 to the Model Rule points out, "[e]ven when the client's interests are not affected in substance" by a delay, "unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness."<sup>12</sup> And where, as here, the length of the delay is unknown, attorneys should take reasonable steps to advance their clients' cases, including through obtaining a working knowledge of remote litigation tools and using such tools wherever possible.

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<sup>11</sup> See Model Rules Prof'l Conduct r. 1.3.

<sup>12</sup> *Id.*