Depositions: Should Courts End the Nonsense?

by Steve Selsberg and Mike Stenglein

You represent the plaintiff in a breach of contract case. At the deposition of an employee of the defendant, you mark as an exhibit a letter the employee wrote to your client after their contract to purchase goods was executed. You begin asking questions about a statement in the letter which confirms that under the agreement goods must be shipped within 45 days of order. The witness confirms that this provision is in the agreement. Before you finish your next question, the opposing lawyer blurts out, "I object. You are mischaracterizing testimony and assuming facts not in evidence. You are trying to trick the witness. Everyone in this case knows that this witness did not sign the agreement, her boss did. And her boss told this witness that the 45 day provision was included by mutual mistake, because the parties had used a form from another deal." Now sufficiently coached, the witness proceeds to answer your questions by testifying that she did not sign the agreement and her boss, who did, mistakenly included the 45 day provision in the contract because she used a form from an old deal.

You represent the defendant in a slip and fall case. At the deposition of the plaintiff you seek to establish that the plaintiff was late for an appointment with his doctor and therefore was recklessly running through the store when he fell. After getting the plaintiff to admit that he had a doctor's appointment that day, plaintiff's counsel interrupts and states that he must break because he "has to make a very important phone call on another case." After the plaintiff and his lawyer are in another room for 20 minutes, they return and plaintiff is completely prepared with answers to your questions.

You represent the plaintiff in a lender liability case. In the deposition of defendant's chief witness, a bank officer, the witness admits that the bank knew that if it did not fully fund plaintiff's line of credit, plaintiff's business would likely fail. Immediately after a lunch break, the witness states that he wants to "clarify" his earlier testimony. The truth, according to the witness, is that the bank really did not know what the impact would be of not funding the plaintiff's business. The witness then explains why.

Every litigator has encountered deposition tactics like those illustrated above. Such conduct is so commonplace, it is now considered the norm.[1] As demonstrated by *Hall v. Clifton Precision,* 150 F.R.D. 525 (E.D. Pa. 1993), however, the pendulum may now be swinging the other way, towards deposition testimony that belongs to the witness and not the witness' attorney. In *Hall,* the United States District Court for the Eastern District of Pennsylvania dramatically limited the conduct of lawyers defending depositions. This article reviews the *Hall* decision, addresses the responses to *Hall,* and discusses whether *Hall* provides a viable solution to obstructionist deposition tactics.

THE HALL CASE

A. The Facts

Hall involved a dispute over the conduct of a lawyer defending his client's deposition. Before the deposition began, the deponent's counsel requested that the deposing attorney forward a copy of each document he intended to show the deponent during the deposition so that he could review the documents with the deponent before the deposition. The deposing attorney refused to produce the documents.

At the beginning of the deposition, the deposing attorney went through routine deposition "ground rules." For example, he informed the deponent that if he misunderstood any question he should ask that the question be clarified. The deponent's attorney interjected and added that if the deponent wanted to stop and talk to him at any time all he had to do was say so. The deposing attorney objected to this additional instruction and explained that the deponent was there to give testimony and not to have conferences with his counsel to aid him in his responses to questions. This was the beginning of the end of the deposition.

Early in the deposition, after the deponent was shown a document and the deposing attorney began asking him questions about it, the deponent's counsel stopped the deposition so that he could review the document with the deponent before he answered any questions about it. The deposing attorney objected and telephoned the court in an effort to control the behavior of the deponent's counsel. The court ordered the deposition ended.

B. Issues Covered by the *Hall* Opinion

Hall discusses the following issues: "(1) to what extent may a lawyer confer with a client, off the record and outside earshot of other lawyers, during a deposition of the client, and (2) does a lawyer have the right to inspect, before the deposition of a client begins, all documents which opposing counsel intends to show the client during the deposition, so that the lawyer can review them with the client before the deposition?"[2]

C. The Court's Power to Control Depositions

First, the *Hall* court established its authority to control the conduct of lawyers at depositions. The court relied on Federal Rules of Civil Procedure 26, 30, and 37. The court first noted that under Rule 26(f) a court, after a discovery conference, may enter an order "setting limitations on discovery" and "determining other such matters ... as are necessary for the proper management of discovery."[3]

Next, the court turned to Rule 30 and explained that under Rule 30(c) depositions are to be conducted the same as an "[e]xamination and cross-examination of witnesses . . . as permitted at . . . trial." Further, Rule 30(d)(1) provides limits on objections during a deposition:

> Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion . . . .

Moreover, Rule 30 gives the court the power to terminate or limit the scope of a deposition if the court finds that the deposi-

tion is being conducted in "bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party."[4] The *Hall* court concluded that under Rule 30 all phases of a deposition are subject to control by the court and, therefore, courts have the discretion to issue any orders necessary to prevent abuse of the deposition process.[5]

Finally, to show that there is real need for more aggressive judicial control over depositions (the *Hall* court remarked that "the pretrial tail now wags the trial dog"), the court cited the following comments in the Advisory Committee Notes to the Federal Rules:

> Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond .... [O]bjections ... should be limited to those that under Rule 32(d)(3) might be waived if not made at that time .... [O]ther objections can ... be raised for the first time at trial and therefore be kept at a minimum during a deposition.
>
> Directions to a deponent not to answer a question can be even more disruptive than objections ...
>
> In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer. The making of an excessive number of objections may itself constitute sanctionable conduct.[6]

The *Hall* court thus concluded that, in the aggregate, the Federal Rules of Civil Procedure[7] empowered the court to control the conduct of counsel at depositions.

D. *Hall* Limits A Deponent's Contact With Counsel

In imposing strict limitations on a deponent's contact with counsel, the Hall court sought to make depositions better serve their intended purpose. Depositions are supposed to even the playing field by allowing all parties access to the same information, helping to prevent surprises at trial.[8] Depositions should also freeze a witness's testimony at an early stage of the proceedings, before that witness's recollection of the events either fades or is altered by intervening events, other discovery, or "the helpful suggestions of lawyers."[9] The court summarized as follows:

> A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no 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.[10]

The *Hall* court held that a lawyer and client do not have a right to confer during the course of a deposition.[11] Comparing a deposition to a witness's testimony at trial, the court ruled that "[j]ust as a witness in a trial may not confer with his lawyer during cross-examination, neither may a deponent confer with his lawyer."[12] The court added that counsel should remember that even though a deposition is not taking place in a courtroom,

depositions are still conducted under the rules of the court and counsel are operating as officers of the court. The court therefore observed that "[i]t should go without saying that lawyers are strictly prohibited from making any comments, either on or off the record, which might suggest or limit a witness's answer to an unobjectionable question."[13]

The *Hall* court applied the same limitations to lunch breaks and other deposition recesses.[14] In short, once a deposition begins, preparation is over and the witness is on his or her own.

The *Hall* court, however, recognized that an absolute prohibition on contact between a deponent and counsel could infringe on a deponent's right to counsel and due process rights. The court therefore tempered its ruling by stating that "[a] lawyer, of course, has the right, if not the duty, to prepare a client for deposition."[15] Moreover, the court recognized that a deponent's counsel is free to present objections that would otherwise be waived.[16]

E. Counsel And Deponent May Not Confer About Documents

The *Hall* court then addressed the second issue. Not surprisingly, the court similarly restricted conferences between a lawyer and his client concerning documents shown to a witness during a deposition.[17] That is, when a deposing attorney presents a document to a deponent, only the witness may answer questions about the document.[18]

The *Hall* court held that "there is no valid reason why the lawyer and the witness should have to confer, on or off the record, about the document before the witness answers questions about it."[19] The court reasoned that if the witness does not recall the document, the witness may ask the deposing lawyer for additional information, or may simply testify that he has no knowledge of the document. The court noted that this approach is consistent with the Advisory Committee Notes to Federal Rule of Evidence 613(a) because Rule 613 requires only that a document be shown opposing counsel to assure counsel that the document actually exists, not to allow counsel to prepare the witness to testify about it.

Again, the court tailored its ruling so as to not affect privileges. Under *Hall,* counsel and deponent may confer to decide whether to assert a privilege. Because privileges are waived by their very disclosure, the court stated that it is important for the deponent to be fully informed of his or her rights before revealing privileged information. To avoid any impropriety in such a conference, however, the court ruled that the conferring attorney must place on the record the fact that the conference occurred, the subject of the conference, and the decision reached as to whether to assert a privilege.[20]

Post-Hall Responses

A. Courts Following *Hall*

Although most commentators argue that *Hall* is too onerous, several recent cases[21] follow *Hall,* including one from the Northern District of Texas.

In *Bucher v. Richardson Hospital Authority,* No. 3-94-CV-1296-R, 1994 WL 728485, at 6 (N.D. Tex. Dec. 13, 1994), the

court cited Hall for the proposition that it is improper for an intermediary to interpret questions and help the witness formulate answers. In Bucher, plaintiff's counsel resisted the defendants' attempts to take the deposition of the plaintiff teenager who accused the defendant of sexually abusing her. Because of plaintiff's fragile mental condition, plaintiff's counsel requested that the defendant's questions be asked through a third-party "interpreter." Relying, in part, on *Hall,* the court denied plaintiff's request because allowing defendants to ask their own questions is an important right and should only be restricted in exceptional circumstances.[22]

The Delaware Supreme Court, in *Paramount Communications, Inc. v. QVC Network, Inc.,* 637 A.2d 34 (Del. 1994), also cited *Hall* for support while addressing the propriety of counsel's conduct during depositions. In *Paramount,* the Delaware Supreme Court sanctioned a deponent's attorney for "verbally abusing" the deposing attorney. The court offered the following analysis of *Hall:*

> While we do not necessarily endorse everything set forth in the Hall case, we share Judge Gawthrop's view not only of the impropriety of coaching witnesses on and off the record of the deposition [ ], but also the impropriety of objections and colloquy which 'tend to disrupt the questions-and-answer rhythmn of a deposition and obstruct the witness's testimony.' [cite omitted] To be sure, there are also occasions when the questioner is abusive or otherwise acts improperly and should be sanctioned.[23]

B. Courts Criticizing *Hall*

Acri v. Golden Triangle Management Acceptance Co., 142 P.L.J. 225 (1994), criticized *Hall.* Rejecting *Hall,* the court ruled as follows:

> I choose not to follow the *Hall v. Clifton Precision* guidelines because (1) they prohibit counsel for a party being deposed from raising objections that our discovery rules specifically allow; (2) they provide insufficient protection to the deponent; (3) they can produce results that could not have been intended; (4) they fail to recognize the proper role of counsel; (5) they increase the burden and expense of litigation; and (6) they are not necessary to curb the discovery abuses which are described in the *Hall v. Clifton* decision.[24]

The *Acri* court recognized that clients expect their attorneys to vigorously defend them at depositions; therefore the *Hall* restrictions may create conflict between client and counsel.[25] The *Acri* court pointed out that while *Hall* works to silence an unethical attorney when an ethical attorney is taking a deposition, it operates against the ethical attorney when the unethical attorney is taking a deposition. The *Acri* court observed that under *Hall* an ethical attorney must sit idly by while an unethical attorney, unchecked, goes after the deponent. The *Acri* court noted that an unethical attorney could severely damage not only the relationship between the deponent and her counsel but also the deponent's position in the case.

Analysis Of *Hall* And Its Progeny

Hall is an important decision because it attempts to restore order and purpose to the deposition process. As the *Acri* court

points out, however, there are numerous problems with the restrictions *Hall* imposes. For example, *Hall* may unlawfully infringe on the deponent's right to counsel or due process rights. Moreover, the conduct *Hall* seeks to prohibit is already addressed in the Texas Disciplinary Rules of Professional Conduct[26] and may be remedied under the Texas Rules of Civil Procedure.[27]

Moreover, there are serious gaps in the *Hall* rulings. Because *Hall* does not limit pre-deposition preparation, unethical attorneys could simply do an "end-run" around *Hall* by spending more time in preparation working with the deponent to generate key "prepackaged" testimony. Likewise, unethical attorneys could still use lunch and overnight breaks to coach the witness. In reality, such behavior is impossible to police, and unethical attorneys will always find a way to "cheat." In short, in some places *Hall* is like putting a Band-Aid on a bullet wound and in other places it is like putting stitches on a paper cut.

As the *Acri* court recognized, *Hall,* in effect, handicaps ethical attorneys who represent their clients in depositions taken by unethical attorneys. Accordingly, whether the *Hall* rules are a good or bad thing completely depends upon which side of the conference room table the overreaching attorney sits. Although the Hall decision can be beneficial, are its benefits are outweighed by the damage its restrictions can do when an unethical attorney is not defending the deposition but instead is taking it?

Conclusion

A lawyer must prepare her clients for a deposition. During preparation, a lawyer should explain the process to the witness so that the witness understands how to conduct herself during the deposition, and so the witness understands basic strategy. The lawyer should also go over the key issues, documents and other evidence in the case. During preparation, however, a lawyer cannot provide the witness with prepackaged responses to questions. Lawyers and clients must learn to live with truthful testimony.

During the deposition, a lawyer should strive to follow *Hall.* A lawyer should not coach through objections or take breaks to discuss testimony. Interruptions should be limited to objections and necessary instructions to the witness, such as instructions to not divulge privileged information. During breaks, especially noon or evening breaks, when the deposition is not being delayed, a lawyer should be able to work with the witness in the same way the lawyer is allowed to do during preparation.

As the *Acri* court pointed out, lawyers must point out to their clients that depositions are only one part of the pretrial process. Lawyers should emphasize that if all play by the rules, then depositions will assist in discovering all the facts and the system will work as it is designed. Lawyers can comfort their clients by noting that if all do not play by the rules, then the court can intervene to ensure that the process works as designed. ■

ENDNOTES

1. In fact, many "how-to" trial books do little to discourage such tactics. For example, one such practitioner's guide says that a witness and her lawyer are free to speak during lunch and recesses during a deposition. Dennis R. Suplee and Diana S. Donaldson, The Deposition Handbook, at §§7.12, 11.7 (2nd ed. 1992). In fact, this particular guide goes