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Front Page Feature

Privilege is not waived in depo

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A Superior Court judge's decision in a slip and fall case sheds new light on what a deposing lawyer can do when a witness changes key portions of his testimony after conferring with counsel midway through a deposition.

The plaintiffs in *Chesbrough, et al. v. Life Care Centers of America, et al.* argued that the witness — an employee of the defendant nursing home — waived any privilege claim he otherwise could have asserted when he dramatically changed his story after talking with his lawyer during a two-minute deposition break.

Although Judge Robert B. Gordon disagreed, he held in an issue of first impression that when a deposing lawyer has a good-faith basis to believe witness coaching has occurred, he may ask questions about the seemingly protected consultation and require any privilege claim be set forth on the record.

"The Court believes that the availability of such recourse will in most circumstances deter bad behavior by lawyers defending client depositions," Gordon wrote. "In all events, though, it will yield deposing counsel both the information needed to test the legitimacy of the asserted privilege, and the grounds to argue that the credibility of the deposed witness's testimony has been compromised by attorney coaching."

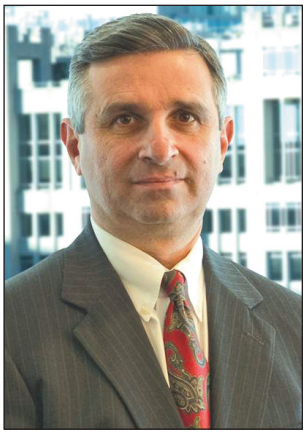
The 19-page decision is Lawyers Weekly No. 12-042-14. The full text of the ruling can be ordered at masslawyersweekly.com.

No coaching

The nursing home's Boston lawyer, James A. Bello of Morrison Mahoney, said one of the firm's associates, Stephanie M. Simmons, represented the witness at the deposition.

While Gordon found she did nothing wrong, Bello said he was concerned about the broader scope of the dicta in the ruling.

"It's a slippery slope to allow lawyers on either side to seek this kind of information when they deem there to be a 'good-faith basis' as to what was discussed during the context of an attorney-client conversation," Bello said. "It's fraught with danger because, as far as I'm concerned, you shouldn't be invading that given that this is the ultimate privilege we have."



Vincent Pisegna

Harold Jacobi III of Jacobi & Chamberlain in Lexington represents the plaintiffs. He did not return calls for comment.

Daniel I. Small of Holland & Knight, who lectures across the country on the ethics of witness preparation, said a number of jurisdictions are ahead of Massachusetts in addressing the issues presented in *Life Care Centers*.

"It's a positive step just to have the Massachusetts courts deal with this very serious issue relating to attorney conduct," Small said. "It's something every lawyer who does depositions has observed to some degree."

The Boston lawyer, who is not involved in the case, said courts that have dealt with the permissibility of similar attorney-client consultations have reached opposite conclusions. Some judges have taken an "anything goes" approach in which all consultations are permissible, while others have held that no communications of any kind may occur once a deposition begins. The majority of decisions generally prohibits talking between questions and answers but otherwise relies on the integrity of attorneys to not break the rules when conferring with clients, Small said.

"The good news is that Judge Gordon engages in a very useful analysis of this issue. But the bad news is that I'm not sure whether we've really moved the ball forward, because what he comes out with in the end is basically that we have to rely on the attorney rules of ethics largely to control this," he said. "That works 90-something percent of the time, but there continue to be problem areas. And the struggle here is how far do you go to address this problem?"

Anthony L. DeProspo Jr. of Sherin & Lodgen in Boston said the guidelines Gordon laid out in *Life Care Centers* make it more difficult for lawyers to offer legal advice to witnesses.

Gordon's holding that no conferring can occur while a question is pending is consistent with prior precedent, he said. But the judge went on to bar lawyers and witnesses from requesting a break to confer in the middle of a line of questioning on an "identifiable subject matter."

"That's a pretty subjective set of factors, and

you're talking about something that's going to be very difficult to police," DeProspo said. "What it does is leave open the possibility that the parties will have a disagreement over the interpretation of when an identifiable subject matter has concluded."

DeProspo said the decision also holds that if a deposing lawyer thinks opposing counsel has coached a witness, the deposing lawyer has the right to ask questions about the conversation and require the subject matter of the consultation be put on the record.

It would then be the defending lawyer's burden to somehow prove no coaching took place, he said.

"Having to discuss what was said during a break is something, as a practitioner, that you don't normally see," he said. "Giving away the subject matter of a communication can be tantamount to giving away the substance of it."

Boston lawyer Vincent J. Pisegna said if a decision like *Life Care Centers* were to become binding precedent, it could lead to an unwelcome spike in motion practice over lawyer conduct in depositions.

"It would be a very difficult set of guidelines to apply," he said. "It could lead to more issues, not less, that need court involvement to resolve, and that's not a good thing for anyone."

Pisegna, a litigator at Krokidas & Bluestein, said it is unrealistic to think that a lawyer would not talk to a client during a recess for fear of being examined about the content of the communication.

The decision also leaves unclear exactly what type of conduct would constitute a good-faith basis for concluding that a witness had been coached, he said.

"For example, if you're in a break and you see the deponent and his lawyer speaking, is that enough?" Pisegna asked. "Are we going to have a situation where, during breaks, the paralegal for the deposing attorney is going to follow the lawyer and client throughout the office to find out if they're conferring?"

CASE: *Chesbrough, et al. v. Life Care Centers, et al.,* Lawyers Weekly No. 12-042-14

COURT: Superior Court

ISSUE: Was the attorney-client privilege waived merely because a witness changed his story after conferring with his counsel during a short break in a deposition?

DECISION: No

Break in the action

Plaintiff Janeece Chesbrough filed suit in 2012 after slipping on a patch of ice in the parking lot of defendant Life Care Centers.

BELLO
Lawyer sees slippery slope

Life Care Centers defended the suit in part by arguing that its staff diligently monitored the lot on the date of the accident. However, a maintenance technician employed by the company testified at a January 2013 deposition that third-party co-defendant contractor Glen Hines had total responsibility for clearing the parking lot.

Shortly after the technician testified that the Life Care Centers staff was not responsible for snow and ice removal, counsel for the contractor received an unexpected phone call and requested a short recess.

At that point, the technician and Simmons — the Morrison Mahoney associate — stepped outside and conferred in private.

When the deposition resumed two minutes later, plaintiffs' counsel asked the technician what he had discussed with Simmons.

Citing attorney-client privilege, the technician and Simmons refused to answer.

The witness then proceeded to diverge from his prior testimony by stating that he and his co-workers were responsible for inspecting the lot and clearing it of snow and ice.

Lawyers for the plaintiffs did not ask any other questions on the subject and instead moved for an emergency order compelling the technician to answer questions about what he and Simmons had discussed.

'Untenable and impractical'

In denying the plaintiffs' request, the judge said there was "very little" support for the contention that the witness's lawyer had improperly coached him during the break.

Gordon said there was no evidence of any lawyer-created disruptions like lengthy speaking objections, requests for clarifications, or artfully timed break requests that typically lead to sanctions. He called the two-minute break "unscheduled" and noted it was not requested by the witness's lawyer.

Gordon cited to a 1993 Pennsylvania case, *Hall v. Clifton Precision*, in which the court announced that once a witness takes an oath, all conferences between witnesses and lawyers are prohibited during depositions and recesses. Although the judge said a modest number of courts across the country have followed *Hall*'s reasoning, most have not.

He went on to say that the attorney-client privilege is simply too important to the adversarial system of justice to be sacrificed by upholding the discovery principles *Hall* sought to defend.

"[T]he greater weight and better reasoned authority that has evolved in the area of lawyer and client conferences during depositions has come to reject *Hall* as an untenable and impractical interference with the attorney-client privilege and right to counsel," Gordon said. "In its zeal to root out witness coaching from civil deposition practice, *Hall* prescribes a remedy now widely recognized as more destructive than the ill it seeks to cure."

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