

The Texas Lawbook

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Best Practices to Preserve the Integrity of Remote Testimony

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Mediation While lawyers continue to adjust to practice during the pandemic, it is increasingly clear that certain new ways of doing things will become standard when we return to working in person. This includes remote witness testimony.

Remote practice has exposed a heightened risk of unethical behavior, including undisclosed communications between the witness and counsel mid-testimony in violation of controlling federal and Texas law. Because it is harder to uncover such misconduct in a remote setting, counsel should take necessary steps to manage these risks effectively and efficiently.

The Ground Rules

First, a refresher: Under no circumstances can counsel coach witness testimony. The only private communication counsel may have with the witness while a question is pending is whether to assert a privilege. For example, Western District of Texas Rule CV-30(b) states, “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.” And according to Texas Rule of Civil Procedure 199.5(d), “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.”

What counsel and the witness can discuss during breaks, however, varies by jurisdiction. This is usually where concern about witness coaching comes into play. Per *Hall v. Clifton Precision*, a widely cited case on this issue from the Eastern District of Pennsylvania, “private conferences between deponents and their attorneys during the taking of a deposition are

improper unless the conferences are for the purpose of determining whether a privilege should be asserted.”

The Eastern and Northern Districts of Texas seem to endorse this view. In *VirnetX Inc. v. Cisco Systems, Inc.*, an Eastern District court citing *Hall* held that “The underlying purpose of a deposition is to find out what a witness saw, heard, or did—what the witness thinks ... [t]here is no proper need for the witness’s own lawyer to act as intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers.” *ReedHycalog UK, Ltd. v. Diamond Innovations Inc.*, another Eastern District opinion, found “litigation misconduct” when counsel conferred with a deponent during a break, “which led [the deponent] to change his answer to an important question....” In *Bucher v. Richardson Hospital Authority*, a Northern District court cited *Hall* when holding that conversations between a witness and counsel during breaks may not be protected by the attorney-client privilege and are “fair game” for investigation by the questioning attorney.

Other jurisdictions, however, fully protect attorney-client conferences pursuant to the applicable privilege (with, of course, the exception for coaching the witness by telling the witness what to say or how to answer a specific question). This is true for Texas state courts per Texas Rule of Civil Procedure 199.5(d). The Fifth Circuit has likewise held in *Potashnick v. Port City Construction Co.* that it is a violation of a civil litigant’s right to counsel to prohibit him or her from consulting counsel during breaks in trial testimony. It seems this rationale should extend to consulting one’s counsel during a break in a deposition or other out-of-court testimony, but *VirnetX*, *ReedHycalog UK* and *Bucher* suggested otherwise while not addressing *Potashnick* at all. In fact, none of the Texas federal district

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courts have directly addressed this holding, so it is unclear how a federal district court would treat a mid-deposition conference relying on Potashnick, especially in the Eastern or Northern Districts in Texas.

In both federal and Texas state courts—per Federal Rule of Evidence 612 and Texas Rule of Evidence 612, respectively—witnesses are obligated to produce writings that refresh their memory prior to testimony—including during breaks. However, according to the Fifth Circuit in *Burns v. Exxon Corp.*, this is only the case if the court decides justice requires it. Of course, as a final resort, an attorney can seek sanctions for the most egregious and obvious witness coaching.

Remote Witness Coaching

While ethical breaches are always a potential concern, they can be more prevalent (and/or perhaps more apparent) during remote practice. This includes during depositions and other witness testimony. Over the past year, there have been situations where opposing counsel appeared to take advantage of the remote environment to violate ethical obligations and rules discussed above. For example, there are accounts of defense counsel having co-counsel in the same room with the witness without disclosing that fact until mid-deposition and then refusing to be on screen during the deposition even after disclosed. In a more egregious instance, the witness appeared to be reading messages from his attorney on his phone during his deposition. While the witness denied contacting his attorney in the latter instance, some of these suspicions have been confirmed in certain cases.

For example, in *Shimkus v. Scranton Quincy Clinic Co.*, a medical malpractice case where the plaintiff's attorney was remotely deposing one of the nurses, the nurse's counsel—on eight separate occasions—whispered answers to her. Unfortunately for the nurse and her counsel, the deposition recording caught the whispers. Because the nurse's testimony was favorable to the plaintiff, the hospital moved for dismissal. The trial court had “no doubt” the nurse's counsel had been feeding answers in violation of his ethical responsibilities. Because the hospital did not allege the plaintiff had coordinated with the nurse, the court punished the nurse and her counsel by barring the nurse's testimony and requiring the nurse and her counsel to pay the other parties' attorneys' fees. The court also referred the attorney to Pennsylvania's disciplinary board.

In another stunning case, *Florida Bar v. James*, an attorney was actively coaching his client in the middle of her deposition, giving her “specific directions on how to respond to ... questions.” The questioning attorney heard typing sounds and asked if the attorney and

witness were texting. The witness's attorney assured her that he was only receiving a text from his daughter. Yet, shortly thereafter, the questioning attorney received direct advice on how to answer her question from the witness's attorney, warning her of “a trap.” By mistake (and revealing the truth), the witness' attorney had inadvertently selected the wrong recipient. The judge (a “referee”) in the subsequent disciplinary hearing found the attorney was telling the witness to do things “contrary to honesty” and recommended a 30-day suspension. The referee's report and recommendation are pending before the Florida Supreme Court.

Precautionary Measures

While it is harder to prevent witness coaching in remote settings, we recommend taking the following steps to minimize opportunities for misconduct:

Confer with opposing counsel in advance. Agree in advance with the witness's counsel on the following items:

- **Location:** Confirm where the witness, counsel, and any other participants will be physically located during the testimony; and
- **Mid-testimony breaks:** Confirm break-out logistics, including specifically whether opposing counsel will meet with the witness in person or remotely during breaks, if they will not be in the same room for the witness's testimony.
- **Witness documents:**
 - Confirm what documents the witness will have at the start of his or her testimony—electronically or in hard copy;
 - Confirm opposing counsel will provide or otherwise specifically identify all such documents in advance of the witness's testimony; and
 - Confirm opposing counsel will immediately send or identify any documents used or accessed by the witness after the start of his or her testimony (including any documents used during the break to refresh his or her recollection) as the testimony proceeds.
- **Devices:** Obtain a list of what communication devices the witness owns or will have access to at the time of his or her testimony, including, specifically, which device(s) will be used for providing the testimony.

Make the record clear at the start of the testimony.

- Confirm on the record whether anyone else is in the room with the witness, including in any adjacent room or hallway.
- Confirm the location of the witness's attorney, including any co-counsel or other attorney not

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defending the witness orally on the record. Require that all counsel participating in the testimony will be on camera at all times during questioning.

- Explain to the witness that it is a violation of law for the witness to communicate with an attorney or any other person while a question is pending, other than when he or she needs to discuss whether to assert a privilege. Further instruct the witness that this means he or she may not text, chat, receive hand signals or have any other form of communication with other persons. Violation of this rule can result in the witness being sanctioned, among other penalties.
- Pursuant to the previous instruction, ask the witness to confirm on the record that he or she will not to chat, text, message or otherwise communicate with counsel or anyone else while being questioned.
- Confirm with the witness what communication applications are open on his or her computer, phone or tablet being used for the remote testimony. If any chat functions are open, ask and confirm that such applications are closed before continuing with the introduction and line of questioning.
- Go through the list of the witness's devices and ask the witness to show you on camera that all devices not being used for the remote deposition or testimony are off or otherwise identify where they are located.
- Have the witness confirm on the record that he or she has turned off all devices other than the one being used for the remote testimony.
- Have the witness show any papers or binders they have in front of him or her on screen. Have the witness take a picture and send it to you of any hard-copy documents being used or referred to during the testimony. Ask for copies or a screen shot of electronic documents used or referenced.

Safeguard the testimony after a break.

- Just as you would do in person, confirm whether the witness met with or otherwise spoke with his or her attorney during the break.
- *If in a jurisdiction permitting it:* Assuming the witness spoke with his or her attorney, investigate the general contents of the conversation, including any changes to the prior testimony.

Conclusion

Attorneys must come prepared, as always, to confront new challenges with forethought and diligence. While remote testimony presents unique challenges, the recommendations

above should mitigate the risk of unethical witness coaching and related conduct.

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