U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: **08-04215-hb**
Adversary Proceeding Number: **09-80052-hb**

Order

The relief set forth on the following pages, for a total of 22 pages including this page, is hereby ORDERED.

FILED BY THE COURT
09/15/2010

Entered: 09/15/2010

US Bankruptcy Judge
District of South Carolina

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

In re, Joe Gibson's Auto World, Inc., Debtor(s).	C/A No. 08-04215-HB Adv. Pro. No. 09-80052-HB Chapter 11
Joe Gibson's Auto World, Inc., Plaintiff(s), v. Zurich American Insurance Company and Universal Underwriters Insurance Company, Defendant(s).	**ORDER**

This discovery matter came before the Court for hearing on August 25, 2010, pursuant to Defendants' Motion and supporting documents (Docket # 164, 182, 184) requesting that the Court order sanctions against Plaintiff and its counsel, Daryl G. Hawkins and his law firm, pursuant to Fed. R. Civ. P. 37(b)(2) (Fed. R. Bankr. P. 7037(b)(2)) and Bankr. D.S.C. R. 7030-1(j)[1]. Defendants contend that Plaintiff and its counsel improperly disrupted the deposition of Paul Michael ("Joe") Gibson commenced on July 16, 2010. Defendants also ask the Court to order counsel for Plaintiff to refrain from engaging in private, off-the-record conferences with Mr. Gibson during recesses or breaks of the suspended deposition. Plaintiff filed a response and supporting documents. (Docket # 180, 185).

[1] After the initial reference all rules will be referred to by number only unless additional information is necessary for clarification.

The Bankruptcy Case

This lawsuit arises out of a Chapter 11 bankruptcy, Case No. 08-04215. Mr. Gibson signed the bankruptcy schedules in that case on July 15, 2008, as president of Joe Gibson's Auto World, Inc., the Debtor. The Court confirmed the Debtor's *Second Amended Plan of Liquidation* on June 29, 2009, which stated that at the time that document was filed Mr. Gibson was the principal of the Debtor. At the hearing on this matter, Mr. Hawkins represented to the Court that the Debtor is still an active corporation in good standing with the South Carolina Secretary of State and licensed to conduct business in the State of South Carolina.

However, as the Debtor's confirmed plan states, Debtor ceased active operations on or about August 1, 2008. The plan provided that Mr. Gibson would contribute certain assets toward payment of certain debts covered by the plan and provided that he would subordinate his equity interest to all other claims of the estate. The plan provided that "[a]s of the Effective Date, all Equity Interests shall be deemed only to represent the right to receive distributions hereunder . . ." The effective date as defined therein passed shortly after the plan was confirmed. The plan explains: "The Debtor's Plan proposes liquidation of the Estate. The Debtor has no intentions or hopes of reorganizing its business . . ." The plan further provided that this lawsuit would be pursued on behalf of creditors of the bankruptcy estate.

On August 24, 2010, the Court entered an Order closing the bankruptcy case but provided that it will retain jurisdiction as necessary to complete certain matters, including litigation of the issues pending in this adversary case. Prior to that time, the Debtor filed monthly operating reports with the Court. Those reports indicated that there were no

ongoing business operations and they were signed by an accountant appointed by the Court, not Mr. Gibson.

The Adversary Proceeding

On December 5, 2008, prior to confirmation of the plan, Mr. Hawkins and his firm were appointed as special counsel to pursue the matters raised in this adversary proceeding.[2] The appointment resulted from the Debtor's Application to Employ pursuant to 11 U.S.C. § 327 and Mr. Hawkins' Affidavit of Disinterestedness. That affidavit, filed on November 24, 2008, did not disclose any relationship that Mr. Hawkins or his firm had with Mr. Gibson. Without objection the Debtor submitted and the Court signed an Order authorizing appointment pursuant to the compensation terms allowed by 11 U.S.C. § 330(a).

This lawsuit was filed on April 1, 2009. Since that time Plaintiff and Defendants have served and responded to discovery and raised various associated disputes that required resolution by this Court.

Events Prior to Mr. Gibson's Deposition

Defendants served notice of Mr. Gibson's deposition on April 1, 2010. The deposition *was not* noticed pursuant to 7030(b)(6).[3] Mr. Hawkins and his firm represented

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[2] Debtor is represented by different counsel in the Chapter 11 case. Special counsel was appointed only to pursue this adversary proceeding.

[3] Plaintiff's Memorandum in this matter acknowledges that the notice did not indicate that the deposition was being taken pursuant to Fed. R. Bankr. P. 7030(b)(6) or Fed. R. Civ. P. 30(b)(6), that it did not specify the subject matter of the examination and that it did not require Plaintiff to designate a witness to testify on its behalf. (*See* Docket #180 at 3). Fed. R. Bankr. P. 7030 states that Fed. R. Civ. P. 30 applies in adversary proceedings. Fed. R. Civ. P. 30(b)(6) provides:

> ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated

to Defendants that they did not represent Mr. Gibson and he was represented by other counsel. In an email dated April 24, 2010, Mr. Hawkins wrote: "As you know, he is represented by [attorney] Randy Skinner. They have not raised any objection to me to the deposition as noticed and I understand Randy does not plan to attend." (Docket # 164 at 15) Defendants thereafter served Mr. Skinner and Mr. Hawkins with an amended notice of deposition and subpoena *duces tecum* on April 26, 2010. The documents were personally served on Mr. Gibson on April 29, 2010. The subpoena required Mr. Gibson to produce nineteen (19) enumerated categories of documents. On May 4, 2010, Mr. Hawkins filed a Motion to quash (Docket # 112) or limit the subpoena listing the following grounds: (1) Mr. Gibson did not have a reasonable amount of time to comply; (2) the subpoena seeks privileged information; (3) the subpoena imposes an undue burden; (4) the subpoena is overly broad; and (5) the subpoena seeks information that is irrelevant. That hearing resulted in an Order Denying Plaintiff's Motion and instructed the parties to proceed with the deposition on a date to be determined.[4] From the transcript of the hearing on that matter it is clear that Mr. Hawkins understood and in fact represented the following to the Court and Defendants: that his firm did not represent the subpoenaed party, Mr. Gibson; that Mr. Gibson was represented by other counsel; and that Mr. Hawkins was aware that Mr. Gibson's counsel did not plan to attend Mr. Gibson's deposition. (*See* Docket # 138). Mr.

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must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

[4] Plaintiff claimed that the subpoena may require Mr. Gibson to produce information in which Plaintiff may assert a privilege and argued that at his deposition Defendants may produce documents that that were withheld by Defendants due to Defendants' claims of privilege. However, Plaintiffs did not identify any such documents or categories of requested documents with specificity. Therefore, the Court found that no protection should be afforded to Plaintiff at that time on that record. (*See* Docket # 138).

Since that time, both parties have claimed privileges in numerous specific documents and the Court has issued orders on those matters. Should any issues arise in the future regarding application of the attorney-client privilege in the context of Mr. Gibson's testimony or otherwise, the Court will address matters raised by appropriate motion at the appropriate time.

Hawkins stated, after affirming that Mr. Gibson was not his client: "He's a witness. He is a witness that, depending on, I presume, the actual status of the corporation, may or may not be able to bind it to, to whatever it is that he might say." (Docket # 138 at 107). The parties also discussed various facts relating to the status of the corporation and whether it would be appropriate for Mr. Hawkins to represent Mr. Gibson after his appointment as special counsel for Plaintiff.

Defendants again noticed Mr. Gibson's deposition on June 29, 2010, to be held on July 16, 2010.

The Deposition

Defendants' Motion (Docket # 164) attached portions of the July 16 deposition transcript. Bradford N. Martin, counsel for Defendants, questioned Mr. Gibson. Mr. Gibson testified that he was the president of the Plaintiff corporation and affirmed that he was not represented by counsel. The deposition continued for some time, and Defendants' counsel questioned Mr. Gibson about certain documents. From the transcript and from the events leading up to the deposition, it is clear that at the commencement of the deposition Mr. Hawkins did not represent Mr. Gibson.[5] Furthermore, it is not reasonable to believe that Mr. Hawkins, Mr. Gibson, Plaintiff or Defendants had any reason to believe that Mr. Hawkins or his firm represented Mr. Gibson.

It is also undisputed that Defendants did not provide certain documents to opposing counsel (Plaintiff's counsel) prior to the deposition, but rather elected to show them to opposing counsel and the witness during the deposition. Mr. Hawkins' Memorandum states

[5] During the deposition Mr. Martin specifically asked Mr. Gibson if he was represented by counsel in the matter and Mr. Gibson replied "No, sir." (Docket # 164 at 13).

that Mr. Martin advised Mr. Hawkins during a deposition recess that he intentionally did not identify and provide the documents in advance. (Docket # 180 at 5).

Central to this lawsuit is an insurance policy, which is a contract between Plaintiff and one or both of these Defendants. It appears that Mr. Gibson was an officer of the Plaintiff corporation and an equity holder at the time the insurance policy was executed and effective and at the time this adversary case was filed. At the deposition Mr. Martin produced the insurance policy and questioned Mr. Gibson about certain parts of it. Problems arose when Mr. Martin began questioning Mr. Gibson about Coverage Part 980 of that policy, which is alleged to be the relevant coverage part in a multi-part insurance policy and likely the most important document in this contract lawsuit. Plaintiff's Amended Complaint, specifically identifies the contract in question: "The section of the insurance contract entitled 'Umbrella Unicover Coverage Part 980' provides coverage . . ." and the Complaint further alleges that this contract has been breached. (*See* Docket # 109 at ¶ 10).

After a significant amount of testimony by Mr. Gibson including testimony about other portions of the policy, on page 76 of the deposition transcript the following exchange between Mr. Hawkins and Mr. Martin occurred:

VIDEOGRAPHER:

This is the end of Tape 1 of the videotaped deposition of Joe Gibson. We are off the record at 10:55:27.

(OFF VIDEO RECORD)

(BRIEF RECESS)

MR. HAWKINS:

We'd like to consult with the witness unless you concede, of course. Unless the defense agrees that nothing Mr. Gibson says is binding on the Plaintiff in this case, then we wish to exercise our rights under local Rule 30.04 to discuss this document with the witness prior to questions being asked because it was not identified to us at least seven days prior to the deposition as a document about which the witness was going to be asked questions.

MR. MARTIN:

And in response to that, Rule 30.04 of the U.S. District Court Rules, which I'm not sure how it applies in an Adversary Proceeding in Bankruptcy Court, but assuming that it does, but not waiving my

right to say that it doesn't, it says under subparagraph capital H, "If the documents are provided or otherwise identified at least seven days before the deposition, then the witness and the witness's counsel do not have a right to discuss the documents privately during the deposition. If the documents have not been so provided or identified, then counsel and the witness may have a reasonable amount of time to discuss the documents."

And it is my position that this rule is meant for the counsel for the witness and not a lawyer who is representing someone else, and I think it's been clear on the record, Mr. Hawkins, that you are not counsel for the witness. And, therefore, this rule does not apply to you.

MR. HAWKINS:

Well, I believe that it depends on whether you contend that his statements are binding on Gibson's Auto World. If you believe that they are, then he is a witness tied to that client whom we do represent and, accordingly, we would be the witness's counsel under the law.

MR. MARTIN:

Well, again I would think that if he is the president of Joe Gibson Auto World and at the time of these

events was that president, his comments, obviously, would be binding. But due to the fact that you are not his counsel, I think that you cannot in one instance tell the court that you're not his counsel and then another instance say you are. So we would object, and if you'd like, we can call the judge and see if she can resolve it.

MR. HAWKINS:

I'd be happy to have her see if she can comment on it for us.

MR. MARTIN:

Well, let's do that then. Let me get my office to get her on the phone if we can.

MR. HAWKINS:

If you get her, let us know.

(SHORT PAUSE)

MR. MARTIN:

We're working on trying to get her.

MR. HAWKINS:

You can decide.

MR. MARTIN:

So we'll just find the next convenient time that fits our schedules and start this back up.

And just on the record, Joe, this is a deposition under the Federal Rules and the Bankruptcy Rules that

apply. You can't discuss this with anyone. You can't discuss it with me or with anybody --

Events After the Deposition was Recessed

Defendants' Motion attaches a copy of an email from Hawkins dated July 19, 2010, three days after the deposition commenced and recessed, that states: "This is to advise that Mr. Gibson has requested me to represent him for purposes of his deposition and I have agreed to do so." (Docket # 164). The deposition has not yet resumed.

On August 19, 2010, counsel for the Debtor in the bankruptcy case filed a Supplemental Affidavit of the Law Office of Daryl G. Hawkins, LLC, including and disclosing the following information from Mr. Hawkins relating to the appointment of his firm under 11 U.S.C. § 327[6]:

> By filing this Supplemental Affidavit, the Undersigned attorney discloses to the Court that the Firm will be extending its representation to include the Debtor's President and principal Paul Michael Gibson, in his role as an officer of the debtor corporation. The representation of Paul Michael Gibson in this role is limited to discovery matters related to the ongoing adversary proceeding before the Court, Adversary Case No. 09-80052-hb.

At the hearing on this motion the Court asked Mr. Hawkins why he did not take the opportunity to talk with Mr. Gibson prior to the deposition about any documents he provided pursuant to the subpoena or any other matter, and assist him in preparing for his testimony whether he represented him or not—noting that certainly they could expect that issues involving the insurance policy in question could come up at the deposition. He frankly stated that he tried to get in touch with Mr. Gibson but had no luck. When the Court asked Mr. Hawkins who he consults with on behalf of his client, Plaintiff, he stated that his instructions in this case come from a number of people, including counsel for the Debtor in the bankruptcy case and potential beneficiaries of this lawsuit per the confirmed plan. At a

[6] 11 U.S.C. § 327(a) provides that with court approval professionals may be appointed to represent the estate "that do not hold or represent an interest adverse to the estate, and that are disinterested persons.…" Appointment by the Court requires the applicant to disclose any interest he or she has in the matter, including relationships with or representation of other parties. This disclosure is a continuing obligation.

hearing held on May 24, 2010, Mr. Hawkins stated that he previously had difficulty communicating with Mr. Gibson and in obtaining his active participation. (*See* Docket # 138).

Defendants' Motion

Defendants ask that the Court enter an order pursuant to Bankr. D.S.C. R. 7030-1(e), prohibiting counsel for Plaintiff from engaging in private, off-the-record conferences with Mr. Gibson during recesses or breaks of the suspended deposition regarding the substance of his testimony before or when the deposition resumes. Defendants also demand sanctions for costs and fees incurred as a result of the disruption of the deposition. Defendants ask that the Court find Mr. Hawkins' request to discuss documents privately with the witness on July 16 after the deposition commenced was not appropriate because he did not represent Mr. Gibson. Further, Defendants ask the Court to order that Mr. Hawkins and Mr. Gibson not discuss the substance of Mr. Gibson's deposition testimony, even if they establish an attorney-client relationship after the deposition commenced. Defendants assert that this prohibition would include any discussions regarding any documents to be shown to the witness when the deposition resumes that were not provided prior to the deposition.

Mr. Hawkins and Plaintiff respond that Mr. Hawkins had the right to discuss documents privately with Mr. Gibson at the deposition held on July 16 because opposing counsel can discuss documents with a witness, if the documents were not provided in advance, per the language of 7030-1(h), even if that counsel does not represent the witness. He further argues that he qualified as counsel for the witness on that date because Mr. Gibson can bind his client (Plaintiff) by his testimony. Finally, he argues that if he is Mr. Gibson's counsel when the deposition resumes he can discuss documents with Mr. Gibson

and otherwise proceed as Mr. Gibson's counsel. (*See* Docket # 180). Mr. Hawkins represented to the Court, however, that he has not yet discussed the substance of Mr. Gibson's testimony with Mr. Gibson at any time since the deposition commenced.

Applicable Discovery Rule

The applicable discovery rule is Bankr. D.S.C. R. 7030-1[7]:

[7] The correct discovery rule that the parties reference in the deposition transcript is Bankr. D.S.C. R. 7030-1, which incorporates provisions of D.S.C. Civ. R. 30.04. It was adopted by the judges of this Court and incorporated into the Local Rules in 2010. The rule dictates the appropriate conduct during a deposition in a matter pending in this Court.

LOCAL RULE 7030-1: DEPOSITIONS AND EXAMINATIONS

(a) At the beginning of each deposition or Rule 2004 examination, deposing counsel shall instruct the witness to ask deposing counsel, rather than the witness's own counsel, for clarifications, definitions, or explanations of any words, questions, or documents presented during the course of the deposition. The witness shall abide by these instructions.

(b) All objections, except those which would be waived if not made at the deposition under Fed. R. Civ. P. 32(d)(3), and those necessary to assert a privilege, to enforce a limitation directed by the Court, or to present a motion pursuant to Fed. R. Civ. P. 30(d), shall be preserved.

(c) Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the Court or unless that counsel intends to present a motion under Fed. R. Civ. P. 30(d)(1). In addition, counsel shall have an affirmative duty to inform their clients that unless such an objection is made, the question must be answered. Counsel directing that a witness not answer a question on those grounds or allowing their clients to refuse to answer a question on those grounds shall move the Court for a protective order under SC LBR 7026-1 within five (5) business days of the suspension or termination of the deposition or examination. Failure to timely file such a motion will constitute waiver of the objection, and the deposition or examination may be reconvened.

(d) Counsel shall not make objections or statements which might suggest an answer to a witness. Counsel's objections shall be stated concisely and in a non-argumentative and non-suggestive manner, stating the basis of the objection and nothing more.

(e) Counsel and witnesses shall not engage in private, "off the record" conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition or examination, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order.

(f) Any conferences which occur pursuant to, or in violation of, paragraph (e) are proper subjects for inquiry by deposing counsel to ascertain whether there has been any witness coaching and, if so, to what extent and nature.

(g) Any conferences which occur pursuant to, or in violation of, paragraph (e) shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall be noted on the record.

(h) Deposing counsel shall provide to opposing counsel a copy of all documents to be shown to the witness during the deposition or examination, either before the deposition or examination begins or contemporaneously with the showing of each document to the witness. If the documents are provided (or otherwise identified) at least three (3) business days before the deposition, then the witness and the witness's counsel do not have the right to discuss the documents privately during the deposition or examination. If the documents have not been so provided or identified, then counsel and the witness may have a reasonable amount of time to discuss the documents before the witness answers questions concerning the document.

(i) If an objecting party or deponent demands, after good faith consultation, that the deposition be suspended pursuant to Fed. R. Civ. P. 30(d), the assigned judge's office shall be contacted to allow that judge to resolve the matter telephonically, if possible. If the assigned judge is not available, that judge's standing instructions for resolution of such matters, which may include referral to a another judge, shall be followed. These instructions shall be available from the judge's chambers and the Courtroom deputy clerk.

(j) Violation of this Local Rule shall be deemed to be a violation of a court order and shall subject the violator to sanctions under Fed. R. Civ. P. 37(b)(2).

Applicable Law

The Federal Rules of Civil Procedure allow a party seeking the testimony of a corporation to utilize Rule 30(b)(6) (Rule 7030(b)(6)) to identify the nature of the deposition testimony and require the corporation or organization to identify the person who is best situated to answer the questions on that matter. Wright and Miller, 8A Fed. Prac. & Proc. Civ. § 2103 (3d Ed.).

> …Rule 30(b)(6) does not preclude a party from deposing a corporation through specified corporate officers or directors under Rule 30(b)(1). The mechanism for deposing a corporation set forth in Rule 30(b)(6) is in addition to the mechanism provided in Rule 30(b)(1).

(Docket # 180 at 8-9 (citations omitted)).

"An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6)or 31(a)(4)." Fed. R. Bankr. P. 7032(a)(3). "'If the corporation is to be accountable… for what was said [in a deposition], the person examined must have been an officer, director, or managing agent at the time the deposition was taken…'" (Docket # 185 at 4 (citation omitted)).

> [O]fficers and directors of a corporation have the power to assert the attorney-client privilege on behalf of a corporation. *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332, 351 (1992) ("The privilege belongs to the corporation, but the corporation can only assert the privilege through agents, namely, its officers and directors."); *Duplan v. Deering Milliken Inc.*, 397 F.Supp. 1146, 1163-1164 (D.S.C. 1974) (recognizing that a corporation must necessarily communicate through an agent and holding that persons within the corporation's "control group" have the power to assert the privilege)…
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> [T]he party "asserting the privilege must show that the relationship between the parties was that of attorney and client and that the communications were confidential in nature." *Crawford v. Henderson*, 589 S.E.2d 204, 20 (Ct. App. 2003). "[T]he privilege must be tailored to protect only those confidences disclosed within the relationship." *Id.*; *State v. Doster*, 284 S.E.2d 218, 219 (1981).

(Docket # 180 at 12-13).

> [T]he fact that an attorney represents a corporation does not make that attorney counsel to the corporation's officers, directors, employees or shareholders . . . "[A]ny privilege that attaches to the communications on corporate matters between corporate employees and corporate counsel belongs to the corporation, not to the individual employee" . . . "[T]he fact that an attorney represents a corporation does not thereby make that attorney counsel to the individual officers and directors thereof." Likewise, in cases of closely-held corporations, a law firm's representation of a corporation does not create an attorney-client relationship between the law firm and any of the corporation's shareholders.

(Docket # 182 at 4 (citing *MacKenzie-Childs, LLC v. Victoria Mackenzie-Childs, et. al.*, 262 F.R.D. 241, 253 (W.D.N.Y. 2009)).

Discussion and Conclusions

The Motion, response and arguments raise many procedural questions on these unusual facts that the Court will address separately:

On July 16, 2010, was Mr. Hawkins "witness's counsel" for the purpose of 7030-1(h)?

At the deposition the conversation focused on whether Mr. Gibson's testimony "binds" Plaintiff, as it is an organization that can speak only through individuals including officers and those in control of the organization. Mr. Gibson was not deposed under 7030(b)(6). A party that wishes to depose a corporate officer, or any person, may do so under 7030(b)(1) as an alternative to, or in addition to, issuing a subpoena to an organization under 7030(b)(6). Mr. Hawkins argues that Mr. Gibson's testimony may bind the corporation and/or be used pursuant to 7032(a)(3) and he is therefore "witness's counsel." The Debtor/Plaintiff ceased operations long ago and the only evidence before the Court indicates that the business has no intention or means to operate in the future. The confirmed and consummated plan liquidates the Debtor's assets and leaves Mr. Gibson, who was

president and an equity holder at the time this case was filed, as a claimant of this estate post-confirmation. Recovery on his claim will only be realized in the event that all other creditors are paid in full and funds remain thereafter for distribution. Other than his statement at the deposition that he is the president of Plaintiff, there is no evidence to indicate that he is currently acting as an officer, director, managing agent or even person in control of the Plaintiff corporation. Further, the representations made to the Court indicate that he has, at times, failed to assist with this ongoing litigation on behalf of the corporation.[8] From this record it appears that Mr. Gibson is merely the former president and former equity holder of the Plaintiff, and currently a claimant and witness in this case, and Defendants did not seek to depose the Plaintiff organization through Mr. Gibson pursuant to 7030(b)(6). On this record it does not appear that 7032(a)(3) is applicable to his deposition testimony. Therefore, even if the Court were to accept the assertion that an organization's attorney can also qualify as "witness's counsel" for the purpose of 7030-1(h) if the witness's testimony is subject to 7032(a)(3), Mr. Gibson cannot be "witness's counsel" as contemplated by that rule on these facts.[9]

Did Mr. Hawkins and Mr. Gibson have the right to utilize 7030-1(h) at the deposition on July 16, 2010, to discuss any document presented to the witness before the witness testified?

Mr. Hawkins asks the Court to read 7030-1(h) to allow opposing counsel, not just counsel for the witness, to discuss documents (presumably any type of discussion) with the witness if they were not previously provided to opposing counsel. After many attempts to

[8] The Court does not make a finding at this time as to whether Mr. Gibson has in fact been uncooperative in any way, but rather the only information before the Court regarding his participation in the ongoing matters are the representations made by Mr. Hawkins. For the purposes of this Motion those representations are accepted as binding on Mr. Hawkins and Plaintiff.

[9] This finding does not speak to the evidentiary effect that any testimony by Mr. Gibson as a witness to the facts may have on Plaintiff's case, only the application of 7032(a)(3).

read the text in the manner asserted by Mr. Hawkins in his pleadings and arguments, the Court cannot agree. 7030-1 and applicable case law cited by the parties in their memoranda, strictly limit any attorney's communications with a witness regarding the substance of his testimony after a deposition commences, even if the attorney represents the witness. Exceptions are provided only in 7030-1(e) and in the limited exception found in 7030-1(h). Pursuant to its plain language, subsection (h) only applies to counsel for the witness.[10] Therefore, in this case that exception to the general rule (that limits communication with a witness) did not apply on July 16 to allow Mr. Hawkins to discuss documents with Mr. Gibson because he was not witness's counsel on that date.

Did Defendants act improperly by failing to provide to opposing counsel a copy of all documents to be shown to the witness at least three days prior to the commencement of the deposition?

Rule 7030-1(h) clearly answers this question. Defendants could provide the documents to opposing counsel "*either* before the deposition or examination begins *or* contemporaneously with the showing of each document to the witness." SC LBR 7030-1(h). Defendants did nothing wrong in electing to wait until the deposition to provide the documents. The answer to this question is the same regardless of whether the witness is represented by counsel (Mr. Hawkins or otherwise) or not.

Can Mr. Hawkins and his law firm discuss with Mr. Gibson the substance of Mr. Gibson's deposition testimony before or after the deposition resumes?

This question is clearly answered by 7030-1(e), which provides that "counsel and witnesses shall not engage in private, 'off-the-record' conferences during depositions or

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[10] SC LBR 7030-1(h):
If the documents are provided . . . then the witness and the witness's counsel do not have the right to discuss the documents privately . . . if the documents have not been so provided . . . then counsel and the witness may have a reasonable amount of time to discuss the documents before the witness answers questions concerning the document.

during breaks or recesses regarding the substances of the testimony at the deposition or examination, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order." SC LBR 7030-1(e). Currently the deposition in question has commenced and is in recess; therefore, even if Mr. Gibson now has an attorney-client relationship with Mr. Hawkins or any other attorney, he can only discuss the substance of his testimony if the conversations fall within the exceptions found in 7030-1(e) or (h). Regarding subsection (e), an attorney can engage in private or off-the-record discussions with Mr. Gibson only as is necessary to determine if the attorney should assert a privilege on behalf of his or her client, make an objection or move for a protective order. SC LBR 7030-1(e). That rule does not limit such discussions to those between only a witness and his or her counsel.[11] If such discussions occur, however, attention of all counsel is directed to 7030-1(e), (f), (g) and (h) and strict compliance is expected.

If Mr. Gibson is represented by counsel when the deposition resumes, can he and his counsel use 7030-1(h) to privately discuss documents not provided to opposing counsel (Mr. Hawkins and his firm) at least three days before the deposition commenced on July 16?

Rule 7030-1(h) states that if documents are not provided to opposing counsel three days before the deposition then the witness and witness's counsel may "have a reasonable amount of time to discuss the documents before the witness answers questions concerning the document." SC LBR 7030-1(h). 7030-1(h) does not require that the documents be provided in advance to the witness or to the witness's counsel, only opposing counsel. Mr. Hawkins, as counsel for Plaintiff, has at all times been "opposing counsel" as contemplated by 7030-1(h) regardless of his relationship with the witness. Therefore, Defendants had the

[11] There is no evidence in the deposition transcript that would lead the Court to believe that Mr. Hawkins was attempting to discuss the documents with the witness pursuant to the exceptions set forth in 7030-1(e) and if that was his intention he should have clearly stated so on the record. Instead, he referenced the content of 7030-1(h).

opportunity to provide documents to him before the deposition. Failing to do so, they are on notice that the consequences of that decision found in 7030-1(h) may result.

The Court has been unable to locate any controlling authority from the parties' pleadings or from its own research indicating that a witness cannot employ or utilize counsel later than three days before the deposition, after the commencement of a deposition and/or before it is concluded.[12] Resulting disruptions may need to be addressed by the Court and Defendants have moved for sanctions to give the Court an opportunity to address those matters. However, as Defendants elected not to provide the documents to opposing counsel sufficiently in advance of the deposition, the Court can find no applicable authority that would deprive Mr. Hawkins, or any attorney that may represent Mr. Gibson when the deposition resumes, from exercising the rights set forth in 7030-1(h).

Are discussions pursuant to 7030-1(e) and (h) protected by the attorney client privilege?

Rule 7030-1(e) states that counsel and the witness shall not engage in "private 'off-the-record' conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition or examination, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective

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[12] Defendants' Reply Memorandum states that "[i]t has been found that where an attorney can represent an agent of a corporation at a deposition but does not put the other party on notice that they intend to act in that capacity before the deposition that the attorney has waived the right to be witness's counsel at the deposition." (Docket # 182 at 5 (citing *Olson v. Accessory Controls & Equipment Corp.*, 1994 WL 51048 (Conn. Super. Ct.)). However, assuming that case is applicable authority (unreported Connecticut case), it merely mentions in dicta that a deposition witness (current or former corporate officer) who states that he is not represented by counsel cannot later benefit from a claim that he was represented by corporate counsel as a defense to failure to produce subpoenaed documents. It does not address a witness's ability to gain counsel for ongoing or future events. (*See Author's Comments*, 1 Conn. Prac., Super. Ct. Civ. Rules § 13-28(d) (2009 ed.) (discussing the significance of this case: "…an objection … to a subpoena for documents addressed to a former employee of the corporate defendant should have been made by that employee and not the corporate defendant. However, since the former employee was unrepresented the court allowed an argument on the merits.")).

order." SC LBR 7030-1(e). The terms "off-the-record" and "private" as used here and in 7030-1(h) do not appear to always indicate a "privileged" conversation. A reading of this subsection together with subsections (f) and (g) (which provide for an inquiry into the nature of the 7030-1(e) conversations on the record after they are held) and (c) (which requires a party to bring any matters of questionable privilege before the Court for a decision) lead the Court to this conclusion. This procedural rule directs that a deponent shall not discuss his or her testimony once the deposition commences except as provided in the exceptions therein. The exceptions do not expand any rights a party may have to claim that the conversations are privileged, they merely provide that such "private" or "off-the-record" conversations may occur. Whether the content of a conversation allowed by the exceptions found in 7030-1(e) or (h) will ultimately be subject to a privilege from disclosure depends on the nature of the conversation, the relationship between the parties to the conversation (past or present relationships may be considered), and application of substantive authorities governing legal privileges set forth above and in other applicable authorities.

The conclusions set forth above resolve all time-sensitive matters raised in Defendants' Motion and should assist the parties in continuing with discovery and moving this adversary proceeding forward. However, one question remains: *Should sanctions be imposed?* Mr. Hawkins improperly asserted that he had the right to speak privately with the witness in a manner that is not allowed pursuant to 7030-1, failed to thoroughly research the nature of Mr. Gibson's current relationship with the Plaintiff and its affect on these matters and his actions, and now he and Mr. Gibson attempt to form a belated attorney-client relationship. These actions have clearly delayed the deposition and this proceeding and have

likely caused Defendants to incur additional costs and fees. The sanctions issue remains under advisement and a separate order will be issued at a later date.

IT IS THEREFORE, ORDERED:

That Plaintiff, Defendants, Mr. Gibson and their counsel are directed to resume the deposition of Mr. Gibson at their earliest convenience according to the terms of this Order.

AND IT IS SO ORDERED.