

Don't Let Opposing Counsel Coach Witnesses During Recess

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You've completed your cross-examination of an adverse witness feeling good that you've scored some points. A recess is called and now it's time for opposing counsel to take the witness to the conference room for some rehab prep, right? Not necessarily if you make the proper motion or have already secured the appropriate order through a motion *in limine*.

As one trial judge put it: A witness called to the stand becomes "in a sense a ward of the Court. He was not entitled to be cured or assisted or helped approaching his cross-examination." *Perry v. Leeke*, 488 U.S. 272, 274 (1989).

In *Perry*, the witness was the defendant in a criminal case and, therefore, entitled to the assistance of counsel under the Sixth Amendment of the U.S. Constitution. But the trial court refused to let him consult with counsel during a 15-minute recess while he was still on the stand. The Supreme Court upheld the conviction, holding "that when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." The *Perry* court noted that "[t]he reason for the rule is one that applies to all witnesses - not just defendants. It is common practice for a judge to instruct a witness not to discuss his or her testimony with third parties until the trial is completed."

However, not every imposition on the right to assistance of counsel is permissible. When a trial court forbade contact between a lawyer and his client during a 16-hour overnight break, while the client was still on the stand, it was found to be problematic and the case was remanded for findings with respect to whether actual prejudice had resulted from the denial of access by the lawyer to his client. *Geders v. United States*, 425 U.S. 80 (1976).

DON'T LET OPPOSING COUNSEL COACH WITNESSES DURING RECESS

Both the U.S. Supreme Court and the California Supreme Court have recognized cross-examination as the "greatest legal engine ever invented for the discovery of truth." *In re Miguel L.*, 32 Cal. 3d 100, 107 (1982); *Perry* at 283 n.7. Trial courts routinely order witnesses to remain outside the courtroom until called to the stand in an effort to facilitate the truth finding mission. Similarly, leading questions on substantive matters are not permitted during direct examination. And speaking objections or other efforts by counsel to coach a witness are prohibited. It follows that permitting counsel to consult with a witness - whether he or she is a party, independent witness or retained expert - during the time the witness is still testifying is an intrusion into that mission.

The trial court has wide discretion over the examination and cross-examination of witnesses. See *Kadelbach v. Amaral*, 31 Cal. App. 3rd 814, 823-24 (1973) (approving the trial court's order prohibiting defense counsel from consulting with his witness who was under cross-examination when proceedings were interrupted by a juror's coughing spell).

Given the wide discretion invested in the trial judge, and consistent with the concept that once any witness is called to the stand he or she becomes a "ward of the court," access to counsel should be prohibited until the witness is excused. The only exceptions should be where there is an extended break or interruption in the witness's testimony requiring some discussion with counsel for scheduling or other nontestimonial issues. Even a party witness should be admonished to refrain from discussing testimony with his or her attorney during such interruptions.

Motions *in limine* should request an order that, regardless of the length of the interruption in a witness's testimony, the witness and counsel should be admonished to refrain from discussing testimonial issues.

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