Can You Communicate with Your Witness after Cross-Examination Has Begun?

By Sanket J. Bulsara and Ian Coghill

It is conventional wisdom that after cross-examination has begun, lawyers should not meet with their witnesses to discuss their testimony and all substantive preparation should cease. Lawyers follow this path out of fear that the court will permit opposing counsel to inquire about the conversations. Many lawyers assume that their adversaries will also not meet with their witnesses, and therefore ask to begin their cross-examination before an overnight or lunch break.

But what is the source of this "wisdom"? And how should lawyers approach witness preparation during breaks in testimony?

It turns out that while the practice is almost universal, there are few rules or cases discussing the issue. The Model Rules on Professional Responsibility only generally say that lawyers may not "unlawfully obstruct another party's access to evidence" or from "counsel or assist a witness to testify falsely . . ." There is nothing in the Federal Rules of Evidence either. Rule 615 addresses sequestration and allows a court to take steps so witnesses "cannot hear other witnesses' testimony," but it does not address breaks in testimony. And while the Supreme Court has determined that a judge may restrict communication between attorneys and their witnesses during breaks, there is no default prohibition on such communications absent a court ruling. *Perry v. Leeke*, 488 U.S. 272, 283–4 (1989) ("Thus, just as a trial judge has the unquestioned power to refuse to declare a recess at the close of direct testimony—or at any other point in the examination of a witness—we think the judge must also have the power to maintain the status quo during a brief recess in which there is a virtual certainty that any conversation between the witness and the lawyer would relate to the ongoing testimony.").

In *Perry* a criminal defendant appealed the denial of his motion for a mistrial after the trial judge ordered defense counsel not to confer with the defendant during a 15-minute recess between the defendant’s direct examination and cross-examination. *Id.* at 274. The Supreme Court rejected the defendant's argument, reasoning that a witness does not have "a right to have the testimony interrupted in order to give him the benefit of counsel's advice," and it is

entirely appropriate for a trial judge to decide, after listening to the direct examination of any witness, whether the defendant or a non-defendant, that cross-examination is more likely to elicit truthful responses if it goes forward without allowing the witness an opportunity to consult with third parties, including his or her lawyer.

*Id.* at 281–82.
Confusing the issue even more some state courts have concluded that a trial court's restriction on conferring during breaks is legal error. For example, the Kentucky Supreme Court held a trial judge's order barring counsel from conferring with an expert witness during a break in his testimony to be an abuse of discretion. *Reams v. Stutler*, 642 S.W.2d 586 (1982) ("The [sequestration] rule clearly does not restrict trial counsel's freedom to confer with his own witness during trial.").

It appears, as with many "rules" of trial, the prohibition against speaking to witnesses during a break appears to be one borne out of tradition and practice. *See, e.g., Yoskowitz v. Yazdanfar*, 900 A.2d 900, 902 (Pa. Super. Ct. 2006) ("More as a matter of custom than as a matter of recognized legal procedure, courts frequently instruct the witness not to discuss his testimony if he is in the course of cross-examination when the recess occurs but refuse to impose the limitation of the witness if he is in the course of direct examination.") (quoting Pennsylvania Trial Guide).

Given the absence of a consistent agreed-upon rule, what should a lawyer do? The reason for the practice is sound—to ensure the integrity of the trial by denying a witness the chance to alter testimony during a break. It is, therefore, likely to be in a lawyer's interest to avoid having an adversary preparing witnesses during a break in testimony. Of course, it works both ways—insisting that the other side not work with witnesses after cross-examination has begun means that you will not be able to do so either.

To make sure that all parties, and the court, agree on what practices should govern the trial, the best practice is to raise the issue openly with the trial judge—preferably at the same time as any request for witness sequestration. At a minimum, counsel should raise the issue at any break in a witnesses' testimony. The greatest danger lies when the issue has not be raised with the court. Ambiguity leaves open the possibility of potential sanction from the court, should you decide to discuss substantive issues with your witness, or even worse, an order permitting opposing counsel to inquire about the discussions you have had with a witness.

One federal court offered a valuable model you should consider. *See Reynolds v. Alabama Dept. of Transp.*, 4 F. Supp. 2d 1055, 1067–68 (M.D. Ala. 1998). The court entered a general order “prohibiting attorneys from talking to witnesses during breaks in testimony” with the following exceptions:

- If a witness is testifying on multiple topics on different occasions, the rule applies only while testifying on individual topics.
- Upon a request made to the court, attorneys will be allowed to consult with witnesses about non-testimonial matters during evenings and weekends.
- The court will consider requests to consult with witnesses about even their testimony if the request warrants such.

*Id.* This kind of order provides the clarity for the parties while remaining flexible enough to allow witness meetings during breaks when necessary. Importantly, this will eliminate ambiguity that can lead to potentially disastrous results.

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