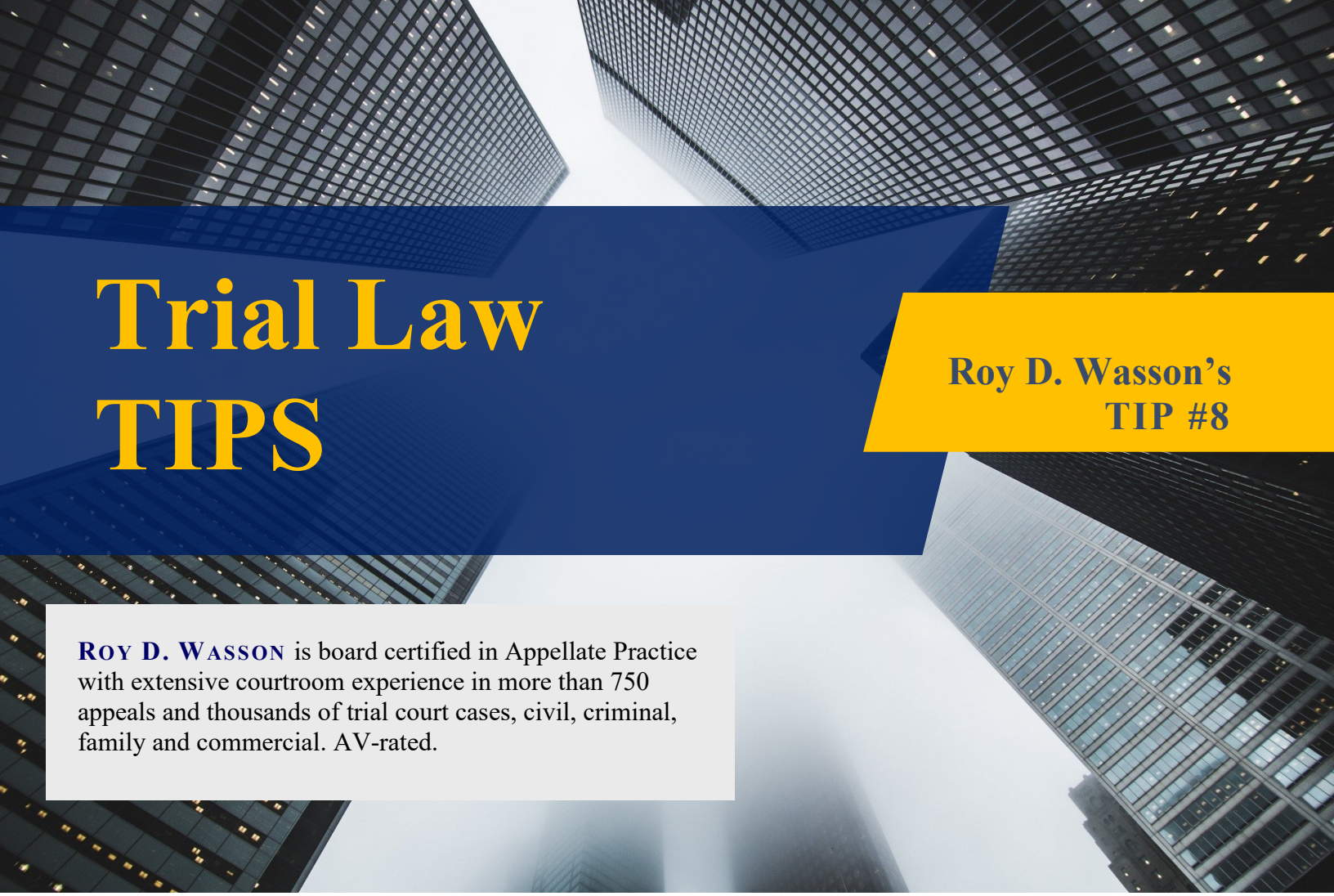

Trial Law TIPS

Roy D. Wasson's TIP #8

ROY D. WASSON is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Mid-Testimony Conferences with Clients About Their Testimony During Recesses in the Trial or Deposition (Debunking a Courthouse Legend)

Introduction

"Urban Legend" is the label given to modern day rumors which spread like wildfireCusually without support in fact, and often without support in common sense or logicCabout rules for daily living which should never be violated. From foods to avoid, to cures for dread disease, and on to things like ways to make scads of money fast, such "urban legends" often go largely unchallenged. Instead of questioning them, those who hear them spread them far and wide.

We lawyers have our own form of mythological "rules" or legends which we pass along as the collective wisdom of

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our profession to others of our kind. Let's call this brand of untrue or half-true rumors "Courthouse Legends."

Many Courthouse Legends have been handed-down during generation-after-generation of attorneys without question or analysis. Some spring from gratuitous *dictum* in cases which is mistaken for controlling law. From our personalized format for pleadings we inherited from a senior partner, to a belief about a nuance of evidence law or procedure not to be found in the rule books, we cling to our Courthouse Legends because older and wiser mentors once told us how things should be done in a given area. And the legends continue because we feel duty-bound to pass such wisdom down to the next "class" of advocates, right?

One popular Courthouse Legend is the mistaken belief that there is something improper about speaking with your client during a recess in his or her testimony. The source of this Courthouse Legend most likely was a combination of the unilateral pronouncement by a strong-willed trial judge in an active jurisdiction, fed by a misunderstanding of constitutional law on the right to counsel in civil cases expressed many years ago in *dicta* by the Florida Supreme Court. Some tough trial judge somewhere forbade mid-testimony client conferences, or sanctioned those participating in such a conference, and the word soon spread that lawyers had no right to meet with their clients about the case during breaks in the trial.

As I will demonstrate, absent a prior express ruling from the judge based on unusual circumstances, there is nothing improper about speaking with your client during breaks in his or her testimony, even if your conference is about that testimony. Your client has a constitutional right in the usual case to speak with you confidentially about her past and future testimony during breaks and longer recesses, even though he or she is still on the stand. That rule is especially true during overnight recesses and other long breaks. If they are made aware of your conference, the judge or the defense attorney cannot ask your client what he or she discussed with you, for the substance of what you discussed is privileged. And the judge cannot sanction you or your client unless there was a prior ground rule laid down specifically instructing you not to discuss the case. Such ground rules should not be imposed

routinely, except during very short breaks of a few minutes or less, and in the nearly unheard-of circumstances where a lawyer may have indicated an inclination to coach his or her client what to say.

Right to Confer with Counsel During Breaks in Criminal Cases

Without going into detail, a quick overview of the law in this area pertaining to criminal cases will be useful. In Florida courts, a criminal defendant has a Sixth Amendment right to confer with counsel during any recess in his or her testimony, even a short break for lunch or other purposes as short as thirty minutes. *See Amos v. State,* 618 So. 2d 157 (Fla. 1993). The federal courts hold that judges may not prevent attorney-client conferences during long breaks, such as overnight recesses, but have the discretion to preclude such conferences during fifteen-minute recesses in the testimony "in which it is appropriate to presume that nothing but the testimony will be discussed." *Perry v. Leeke*, 488 U.S. 272, 284 (1989).

The state and federal courts recognize that the risk of improperly influencing a client's testimony must be balanced against the fact that a lawyer and client in a criminal case always have a right during recesses to discuss aspects of the defense other than the defendant's ongoing testimony, and that there is no way to police what is said because of the privilege between attorney and client. Therefore, during any break of more than a few minutes in length, the defendant's right to assistance of counsel under the Sixth Amendment greatly restricts trial judges' power to forbid mid-testimony conferences in criminal cases.

Similar Right to Assistance of Counsel in Civil Cases

Although the Sixth Amendment does not protect the rights of civil litigants, our clients have a right to the assistance of counsel they retain privately under the Due Process Clause of the Fifth Amendment. The leading case which recognizes the interplay between that right and the right to confer during recesses in a party's testimony is Judge Peter Fay's decision in *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101 (5th Cir. 1980). Judge Fay in the *Potashnick* case held:

> The second ground for reversal stems from the application of the trial court judge's rule prohibiting each witness from conferring with his or her attorney during breaks and recesses in the witness' testimony. One of the attorneys in the case violated this rule by talking to his client, a party to the action, during an overnight recess in the party-witness' testimony. The judge granted opposing counsel's motion to exclude further testimony by the party-witness, but the party-witness then agreed to waive trial by jury in lieu of excluding his testimony.
>
> Our analysis of the fifth amendment to the United States Constitution establishes that ***a civil litigant has a constitutional right to retain hired counsel. Because the prohibiting of communication between a testifying party-witness and his attorney during an overnight recess in the party-witness' testimony impinges on that constitutional right, we are compelled to reverse.***

609 F.2d at 1104(emphasis added).

The Fifth Circuit in *Potashnick* examined the historical basis for a due process right under the constitution to counsel in a civil case, which includes the right to confer with counsel during breaks, as follows:

> Although there do not appear to be any civil cases on this point, the Supreme Court has indicated in its criminal decisions that ***the right to retain counsel in civil litigation is implicit in the concept of fifth amendment due process.*** *See, e. g., Powell v. Alabama*, 287 U.S. 45, 69, 53 S. Ct. 55, 77 L. Ed. 158 (1932); *Cooke v. United States*, 267 U.S. 517, 537, 45 S. Ct. 390, 69 L. Ed. 767 (1925). . . Historically and in practice, ***the right to a hearing has always included the right to the aid of counsel when desired and provided by the party asserting the right***. *Powell v. Alabama*, 287 U.S. 45, 68, 53 S. Ct. 55, 77 L. Ed. 158 (1932). . . .

> Recognizing that ***a civil litigant has a constitutional right to retain hired counsel, we hold that Judge Hand's rule prohibiting a litigant from consulting with his attorney during breaks and recesses in the litigant's testimony impinges upon that right***.

609 F.2d at 1117-18 (emphasis added).

The leading Florida case on the subject cites *Potashnick* as authority for reversing a trial judge's ruling striking the testimony of a party who met with her attorney during recesses and discussed the subject matter of her testimony, and debunks the Courthouse Legend that there is an "unwritten rule" forbidding counsel from conferring with his or her client during breaks in the testimony. While stopping short of holding that trial judges can never instruct the parties and counsel to refrain from speaking during short recesses, the Third District has held that there is nothing improper about counsel and his or her client discussing the client's testimony during recesses, in the absence of express ruling at the start of trial or prior to the break that there can be no such discussions. In *Brake v. Murphy*, 749 So. 2d 1278 (Fla. 3d DCA 2000), the court held:

> The trial court's remarks indicate, however, that the court believed there to be an unwritten rule which prohibits a party from speaking with his or her counsel during a recess in a civil case. Thus, the trial court appears to have proceeded on the premise that there is a generally understood rule on this point, and that the Brakes had violated it.
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> The question in this case involves the right of ***party*** to consult with counsel during a recess, as opposed to the rules which may apply in the case of a nonparty witness. With deference to the trial court we think that in civil cases, the practice actually varies from courtroom to courtroom. If the court or the opposing litigant desires to limit or prohibit discussion between a party and his or her counsel during a recess in testimony, ***then those ground rules***

> ***should be established at the start of trial or at the time the recess is taken***.

Id. at 1282(emphasis added).

Another useful case which reveals the falsity of this Courthouse Legend is *The Haskell Co. v. Georgia Pacific Corp.*, 684 So. 2d 297 (Fla. 5th DCA 1996). That case held that a party who sees another party conferring with counsel during a recess in the party's deposition may not ask the witness what was discussed with his attorney. The court held as follows:

> Petitioner, The Haskell Company, seeks certiorari review of an order reopening the deposition of one of its corporate employees. The deponent admitted that during a recess he discussed his testimony with counsel. The trial court granted respondents' motion to reopen the deposition, so that respondents could examine the deponent regarding his discussion with counsel. The court found that this discussion was not protected by the attorney-client privilege.
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> * * *
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> ***There is no recognized exception to the privilege for a communication between an attorney and client which occurs during a break in deposition.*** If a deponent changes his testimony after consulting with his attorney, the fact of the consultation may be brought out, but ***the substance of the communication generally is protected***.

Id. (emphasis added). If the defense attorney asks you or your client what you discussed during a break, object on the ground of privilege and do not reveal even the subject matter without being ordered to do so by the court, which should not happen.

There is one case which approves of an order of the Judge of Compensation Claims under specific circumstances that forbade the claimant's counsel from discussing the facts of the accident with

his client during an interval between portions of the claimant's deposition. However, that case is greatly distinguishable on its facts from the normal recess in testimony, and the decision employs flawed legal analysis.

McDermott v. Miami-Dade County, 753 So. 2d 729 (Fla. 1st DCA 2000) involved an improper instruction by the claimant's attorney that his client refuse to answer relevant questions about the flooring where she fell, which indicated to the JCC that the attorney sensed that his client was going to testify unfavorably to her position. After that deposition was adjourned, the employer filed a motion to compel which sought a continuation of the deposition with instructions that the claimant's attorney should not discuss the facts of the accident with his client. That was granted.

In approving that ruling on appeal, the First District relied heavily on that suspicious instruction from Plaintiff's counsel to his client not to answer the questions when they were asked at the first deposition. The court noted:

> The employer subsequently filed a Motion to Compel, seeking to have McDermott reappear for a deposition to answer questions regarding the circumstances of her accident. The employer also filed a Motion to Preclude Claimant's Counsel from Discussing Circumstances of Accident until Plaintiff Reappears at Deposition. This motion contains the following paragraph:
>
> In view of Claimant's counsel improperly directing his client to refuse to answer questions, ***it appears that Claimant's counsel was concerned that the Plaintiff in fact would testify that there was nothing wrong on the flooring in which she fell.*** As a result, undersigned counsel asked that there be an Order precluding Claimant's counsel from discussing the circumstances of her fall as he would not have been able to do so if he acted properly. In other words, Claimant's counsel did not have the right to stop the deposition, discuss with his client the circumstances

> of the fall, prior to Claimant answering such questions.
>
> Following a hearing, the JCC granted the employer's motion to compel and directed McDermott to "reappear for deposition and answer any and all questions that the Employer has concerning how the accident occurred." The JCC also granted the employer's Motion to Preclude Claimant's Counsel from Discussing Circumstances of Accident.
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> * * *
>
> [G]iven that a judge in a criminal case can prohibit consultation between a criminal defendant and his attorney during a [15-minute] recess [as in *Perry*], it follows that a JCC can prohibit a workers' compensation attorney from communicating with the claimant (his client) about the circumstances of the accident giving rise to the alleged injury until the claimant appears for the continuation of her deposition, ***particularly where the deposition was interrupted improperly by the claimant's attorney***.

Id. at 730-31(emphasis added). Thus, in the absence of improprieties or other grounds to believe that you are coaching your client, the court should not preclude you from mid-testimony conferences.

The legal flaw in the *McDermott* court's analysis is its reliance on the Florida Supreme Court's *dicta* in *Bova v. State*, 410 So. 2d 1343 (Fla. 1982). That decision from many years ago mistakenly overlooked a civil litigant's right under the Fifth Amendment due process clause to the assistance of retained counsel, recognized by the Fifth Circuit in *Potashnick*. Focusing instead on the absence of a Sixth Amendment right in civil cases, the *Bova* court overbroadly stated as follows:

> We stress that a defendant in a criminal proceeding is in a different posture than a party in a civil proceeding or a witness in a civil or criminal proceeding. Right-to-counsel protections do not

> extend to civil parties or witnesses and the trial judge's actions in the instant case would have been proper if a civil party or witness had been involved.

410 So. 2d at 1345.

That *dicta* which overlooked an established principle of federal constitutional law cannot support extension of *McDermott* to other cases, in light of clear federal precedent directly on point, such as this: AWhile right to counsel in the criminal and civil context are not identical, ***a civil litigant does have a constitutional right***, deriving from due process, to retain hired ***counsel in a civil case.***" *Gray v. New England T. & T. Co.,* 792 F.2d 251, 257 (1st Cir. 1986). That right is impinged by broad prohibitions on mid-testimony conferences.

The federal constitutional right of civil litigants to due process recognized in *Potashnick* as protecting mid-testimony conferences was noted in *Odone v. Croda Int'l, PLC*, 170 F.R.D. 66 (D.D.C. 1997). The court in that case denied defendant's motion for sanctions based on the plaintiff's mid-deposition conference about his testimony with his attorney during a five-minute break, and denied defendant leave to redepose the plaintiff and ask him about his conference with counsel.

Of significance, the court in *Odone* specifically noted the absence of suspicious circumstances such as those present in *McDermott*. The plaintiff's attorney in *Odone*, prior to the recess during which the conference was held, Amade no attempt to obstruct the deposition nor to object in a manner as to suggest answers to the plaintiff." 170 F.R.D. at 68. Absent some cause to suspect that you will improperly coach your client made apparent during the trial or deposition, you should be free to confer with your client at any time, before, during or after his or her testimony. In the absence of a direct order to avoid such communications, you are free to engage in them.

Conclusion

Let go of your Courthouse Legend that it is improper to confer with your client about his or her testimony during breaks in trial or a deposition. Absent an express limitation by the judge

under unusual circumstances, like during a very short break you requested in the midst of some tough questioning by the defense attorney, or after you already have obviously coached your witness how to answer, your client's due process right to retain counsel permit you to discuss the case without fear of breaches of the attorney-client privilege. "An attorney has an ethical duty to prepare a witness." *Odone, supra* at 69. Do your duty.

Keep Tryin!

Roy

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