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Coaching a testifying witness is, without a flinch, contemptuous

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Usually, it happens well into a key deposition.

After hours of grueling questioning, the witness starts to wear down, his loss of confidence becoming palpable, but the interrogator doesn't let up. Picture a rickety sailboat trying to navigate with a failing rudder as storm clouds settle in.

Each of the predicate questions was quickly answered with a "Yes." Then, moving in for the kill, the attorney notices the vulnerable witness' eyes nervously shift to the right in the direction of his lawyer. Subtly, but not subtly enough, she slowly shakes her head. Sure enough, the witness obediently stiffens up. "I'm afraid I can't recall."

The transcript reflects only that response, of course, enabling the improper coaching of a testifying witness to escape scrutiny. Court reporting technology is improving dramatically, but it cannot yet replace the supervising role of a judge.

But what if a judge is present to observe such misconduct? In other words, what happens if the improper communicating with a witness on the witness stand occurs during court proceedings and is observed by an attentive judge?

John Hayes sued SkyWest Airlines for violating his employment rights, and to cut to the chase, his lawsuit proceeded to a jury trial in the Denver federal court. On the fourth day of trial, during cross-examination of an airline witness, Hayes' attorney turned to a particular exhibit.

Legal secretary Ann Rutledge, who had been sitting with the SkyWest legal team at counsel table, gestured to the witness not to address the selected exhibit. Unlike in deposition practice, the presiding judge immediately saw the gesture and reacted, summoning counsel and Rutledge for a bench conference.

The judge excused the jury and asked Rutledge about her gesture. "It was just a flinch reaction," she offered. However, she also admitted her intent to communicate to the witness not to answer questions about the exhibit.

Bringing down the hammer, U.S. District Judge Robert E. Blackburn found Rutledge in criminal contempt of court. He stated he observed her "communicating or attempting to communicate with the witness, through both words and body language," not to answer the pending question and evicted her from the courtroom.

The judge then inquired of the witness and the jury about the gesture, and once all denied seeing it, he resumed the trial. He later entered a written order punishing the "criminal contempt committed in the presence of the court," which he found was committed "beyond a reasonable doubt," and beyond mere contempt, "actually obstructed the administration of justice."

Blackburn wrote that Rutledge "did not merely 'flinch,' she purposefully and deliberately directed the witness not to answer questions about an exhibit which had been admitted to evidence."

The court later held a hearing on the entry of punitive sanctions and learned that Rutledge was terminated from her job in connection with the incident. Deeming her job loss "a form of punishment," Blackburn imposed no fine or imprisonment.

Rutledge still appealed the contempt finding.

Before the 10th U.S. Circuit Court of Appeals, she again contended her action was merely a "flinch" and "impulsive" or, at worst, negligent, not willful, meaning she lacked the requisite mental state for criminal contempt. *Hayes v. SkyWest Airlines Inc.*, No. 17-1417 (10th Cir., Oct. 22, 2019).

In response, the federal appellate court didn't flinch.

Noting Rutledge didn't claim her actions "were nonvolitional, as a true flinch or reflex might be," the court referenced how "reflexes" commonly refer to knee jerks or eye blinks, not signaling a trial witness to remain silent, even if done "impulsively."

The court affirmed the finding that Rutledge intentionally directed the witness not to answer questions, amounting to much more than merely flinching. Even if the result of a "momentary lapse of judgment" that was quickly regretted, "the mere fact that conduct is spur-of-the-moment does not mean it cannot also be willful."

As the court noted, were impulsiveness a defense to contempt, courts would be hard-pressed to punish such conduct as profane outbursts in court or insults hurled at a judge.

Consideration of the degree that Rutledge's conduct interfered with or "obstructed" justice raised an apparent issue of first impression in the 10th Circuit.

The issue involved the district court's finding that obstruction occurred when he "was required to immediately stop the examination, commission a bench conference, excuse the jury, question Rutledge," the witness, counsel and the jury about the incident.

Affirming this ruling too, the appellate court held that "Any attempt by a person in the courtroom to communicate with the witness on the stand for the purpose of influencing her testimony will inevitably require" the trial court to launch an inquiry about whether the conduct was observed by the witness or members of the jury. Thus, an obstruction of the judicial proceedings.

Though far more common in depositions than during trials, coaching a witness once under oath is equally improper in either proceeding.

Perhaps the remorseful and unemployed Ann Rutledge did lawyers an odd favor by setting an example that such coaching is not just reckless, but leaves the interfering party potentially subject to criminal contempt and obstruction of justice.
