Legal Authorities cited by AMD in *Advanced Micro Devices, Inc. et al. v. Intel Corporation, et al., C.A. No. 05-441-JJF; In re Intel Corporation, C.A. No. 05-MD-1717-JJF; and Phil Paul, et al. v. Intel Corporation, C.A. 05-485-JJF-DM*___

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ROBERT M. DEUTSCHMAN, Plaintiff, v. BENEFICIAL CORPORATION, FINN M. W. CASPERSEN, and ANDREW C. HALVORSEN Defendants.	)	Civil Action No. 86-595 MMS

Robert D. Goldberg, Esq., of Biggs & Battaglia, Wilmington, Delaware; Of Counsel: Richard B. Dannenberg, Esq., of Lowey, Dannenberg, Bemporad, Brachtl & Selinger, P.C., New York, New York; attorneys for plaintiff.

Charles F. Richards, Jr., Esq., Kevin G. Abrams, Esq., and William P. Bowden, Esq., of Richards, Layton & Finger, Wilmington, Delaware; Of Counsel: Dewey, Ballantine, Bushby, Palmer & Wood, New York, New York; attorneys for defendants.

MEMORANDUM OPINION

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Dated: February 20, 1990
Wilmington, Delaware

SCHWARTZ, Senior District Judge

This is a motion to compel discovery filed by defendants Beneficial Corporation, Finn M.W. Caspersen and Andrew C. Halvorsen (hereinafter referred to collectively as "Beneficial" or "defendants") on January 16, 1990. The parties have briefed these discovery issues and have agreed that oral argument is not necessary. For the reasons set forth in this opinion, defendants' motion will be granted in part and denied in part. Each issue will be addressed in turn.

Production of Documents

Defendants move that the court order plaintiffs to produce the following documents:

> 15. All documents which support or relate to the allegations contained in ¶ 17 of the amended complaint that "[p]laintiff's claims are typical of the claims of the members of the class . . . ."
>
> 16. All documents which support or relate to the allegations contained in ¶ 18 of the amended complaint that plaintiff "will fairly and adequately protect the interests of the members of the Class . . . ."

Documents Requested to Be Produced Nos. 15 & 16, Notice of Deposition of Robert M. Deutschman (Dkt. 53). Although information as to typicality and adequacy of representation is discoverable in a class action such as this, these requests are overly broad and vague. As the requests are now worded, they seek any document related to any issue relevant to the typicality of plaintiff's claim or to the adequacy of his proposed representation of the class. Defendants' motion will be denied. Defendants will

be granted leave, however, to amend the requests to specify further the types of documents they seek.[1]

Consultation With Counsel During Deposition

Defendants complain of two instances during plaintiff's deposition in which plaintiff was "coached" by his attorney during a recess. Immediately after the luncheon recess plaintiff requested that he be allowed to clarify his final response prior to the break. He then gave a clarified answer. Plaintiff's Deposition at 123 (Dkt. 66A) (hereinafter cited as "Dep. at __"). Plaintiff's counsel allowed him to respond to questioning concerning whether he and his attorney had discussed his testimony during the lunch recess. Dep. at 123-30. At a later point in the deposition, plaintiff's attorney requested a recess just as defendants' attorney was reformulating a question. Dep. at 189-

1. Plaintiff's original objection to these requests for production was based upon the qualified privilege for attorney work product. In the event plaintiff seeks to raise this objection to any amended request made by defendants, plaintiff must do more than assure the court of the validity of his work product assertion. At minimum, the plaintiff must identify any documents as to which the privilege is claimed sufficiently to allow the court to determine for itself whether his assertion of the privilege is well-founded. Willemijn Houdstermaatschaapij BV v. Apollo Computer Inc., 707 F. Supp. 1429, 1439 (D. Del. 1989); International Paper Co. v. Fibreboard Corp., 63 F.R.D. 88, 94 (D. Del. 1974). In the event defendant requests documents plaintiff considers privileged, plaintiff should at minimum supply the following information so as to enable the court to make a determination: (i) the nature of the privilege claimed; (ii) the type of document; (iii) the general subject matter of the document; (iv) the date of the document; (v) the author of the document; (vi) the addressee of the document; and (vii) if not apparent, the relationship of the author and the addressee. See Sloan v. Collings & Co., C.A. No. 85-3315, slip op. at 5 (E.D. Pa. July 22, 1986).

90. Upon resumption of the deposition, plaintiff testified that he and his attorney had discussed the subject matter of his testimony during the break. Dep. at 190. Asserting the attorney-client privilege, plaintiff's attorney instructed him not to answer questions concerning the substance of their conversation. Dep. at 190-191 (the "Recess Questions"). It is improper for counsel during a recess to "coach" a deponent off the record regarding deposition testimony already given or anticipated. Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp., C.A. No. 79-182 (D. Del. Dec. 12, 1980) (order directing counsel to refrain during a deposition from communicating with deponent or directly or indirectly suggesting an answer); Cascella v. GDV, Inc., C.A. No. 5899, slip op. at 2-3 (Del. Ch. Jan. 15, 1981) (Brown, V.C.) (same; also stating counsel cannot discuss an answer or assist in giving an answer to the deponent off the record); In re Asbestos Litigation, 492 A.2d 256 (Del. Super. 1985) (entering an order prohibiting attorney-client consultation regarding client's deposition testimony during the course of the deposition and providing a procedure for questioning the deponent subsequent to a recess as to any consultation with his attorney concerning his testimony or anticipated testimony). Although a client certainly has a right to consult with his or her counsel on other matters during a recess, the client does not have the right to advice or assistance concerning his or her ongoing testimony. The usefulness of depositions as a way to discover facts would be impaired if counsel were allowed to suggest an answer

off the record to a question anticipated or already asked. Further, Rule 30(c) provides that during a deposition "[e]xamination and cross-examination of witnesses may proceed as permitted at trial . . . ." (emphasis added). A judge may instruct a trial witness not to discuss testimony with his counsel until the trial is complete, see Perry v. Leeke, ___ U.S. ___, ___, 109 S. Ct. 594, 600 (1989), and certainly a blatant request for a recess at trial so that counsel may assist the witness off the record would be improper. Therefore, a deposition witness should not be permitted to consult with his attorney regarding his testimony until it is completed.

That is not to say, however, that the deponent should be barred from consulting with his attorney at all during a recess. The court should balance the need for a client to consult with his attorney on various other aspects of the litigation with the need to protect against coaching deposition witnesses. Consequently, I will order plaintiff's deposition to be reconvened. Defendant's counsel will be allowed to ask the following questions upon resumption of the plaintiff's deposition and after every recess during the plaintiff's deposition testimony:

A. Did you consult with your attorney, an employee of your attorney and/or agent of your attorney (hereinafter "said person") during the recess and/or continuance?

--If answer is "no," end questioning.

--If answer is "yes," identify the person by name and proceed to question B.

B. Did you consult with said person regarding to your deposition testimony either already given and/or expected or which may be anticipated to be given?

--If answer is "no," end questioning.

--If answer is "yes," proceed to question C.

C. Did you consult with said person, and/or did said person give you any instruction and/or advice, regarding how you should answer questions during the remainder of the deposition? (This question does not require deponent to reveal the substance of the conversation.)

--If answer is "no," end questioning.

--If answer is "yes," proceed to question D.

D. About what areas of your testimony already given and/or expected or which may be anticipated to be given did you consult with said person? (Deponent need only reveal the areas discussed, not the substance of the conversation.)[2]

This approach takes into account the interests protected by the attorney-client privilege because the substance of the conversations between attorney and client are never revealed, merely the fact that they took place. At the same time, the approach allows defendant a full opportunity to get on the record any instances of improper coaching. Upon resumption of the deposition, defendant's counsel may invoke the procedure set forth above in lieu of the "Recess Questions" to determine whether the recess was requested so that plaintiff's attorney could assist his client in giving answers. I will not at this time issue an order prohibiting plaintiff's counsel from discussing with plaintiff the anticipated subject matter of his deposition prior to

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2. See generally In re Asbestos Litigation, 492 A.2d 256, 260 (Del. Super. 1985).

its resumption. However, defendant's attorney will be allowed to follow the procedure set out above upon the resumption of the deposition and after any recess taken during the reconvened deposition to determine whether such a discussion has taken place.

Plaintiff's clarified answer, Dep. at 123, and all questioning regarding the clarified answer, Dep. at 123-130, will be ordered stricken. His original answer, Dep. at 122, will remain on the record. Plaintiff's argument that Federal Rule of Civil Procedure 30(e) allows him to clarify his response does not fly. Rule 30(e) clearly contemplates clarification only after completion of the deposition: "When the testimony is fully transcribed the deposition shall be submitted to the witness . . . ." The Rule does not provide for clarification during the deposition of a response previously given. I note the copy of plaintiff's deposition lodged with the court is unsigned. If it is in fact the case that plaintiff has not yet signed the deposition, nothing prevents him from clarifying his response pursuant to Rule 30(e). In the event plaintiff has signed the deposition, he will be given leave to clarify his response in accordance with the procedures set forth in Rule 30(e).

The Reserve Addition Question

Defendants next move that the court compel plaintiff to respond to the following question:

> Q. Mr. Deutschman, if Beneficial had disclosed in August 1986 that the proposed $250 million reserve addition would be insufficient to deal with the problem and the price of Beneficial stock had moved upwards

during the fall of 1986 in the manner that it did, would you have purchased any securities in Beneficial?

Dep. at 256 (the "Reserve Addition Question"). Defendants' motion to compel Mr. Deutschman to answer the Reserve Addition Question as it is presently worded will be denied. Although under certain circumstances a deponent may be asked what he would have done, the question as it is now phrased calls for too much speculation. Leave will be granted, however, for defendants' attorney to rephrase the question.[3] When plaintiff's deposition is reconvened, defendant's attorney may rephrase the question along the following lines:

> Mr. Deutschman, if you had possessed information in August 1986 that the proposed $250 million reserve addition would be insufficient to deal with the problem and the price of Beneficial stock had moved upwards during the fall of 1986 in the manner that it did, would you have purchased any securities in Beneficial?
>
> -- or --
>
> Mr. Deutschman, if you had possessed information in August 1986 that the proposed $250 million reserve addition would be insufficient to deal with the problem, would you have believed that the price of Beneficial stock during the fall of 1986 was an accurate reflection of the company's value?

The Class Allegation Questions

The parties next dispute whether plaintiff should be compelled to answer the following questions (numbered for convenient

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3. I note that defendants' attorney had the opportunity to rephrase the question during the deposition and failed to do so. Rephrasing a question is preferred over resorting to the court.

reference) which defendants refer to collectively as the "Class Allegation Questions":

> [1] Do you contend that each member of the class relied in the same manner on the misrepresentations or omissions of Beneficial in making their decisions to purchase or sell Beneficial securities during the class period? Dep. at 221.
>
> [2] Mr. Deutschman, do you contend that any member of the class relied on any statement of Beneficial in determining to purchase or sell securities? Dep. at 222.
>
> [3] Speaking generally, what would be the measure of damages for a member of the class? Dep. at 224.
>
> [4] How do you compute the measure of damages for a stockholder of Beneficial who bought securities during the class period? Dep. at 225.
>
> [5] What criteria do you use to define whether a person is a member of the purported class? Dep. at 225.
>
> [6] What issues of fact in this case are common to the members of the class? Dep. at 226.

Defendant's motion to compel answers to questions 3, 4 and 5 will be granted. Defendants' motion to compel responses to questions 1 and 6 will be denied because, insofar as I can tell, they relate to the legal rebuttable presumption of reliance based upon plaintiff's fraud on the market theory. Defendants' motion to compel a response to question 2 will also be denied; however, defendant's attorney will be granted leave to rephrase the question so as to limit its scope to Mr. Deutschman's personal knowledge.

The Expense Agreement Questions

The parties fifth and final dispute involves whether plaintiff should be compelled to answer certain questions (the "Expense Agreement Questions") regarding payment of litigation costs:

> Q. Have your attorneys given you any indication as to whether they expect to be reimbursed for their expenses in connection with this case? Dep. at 234.
>
> Q. What was [the substance of your communications with your attorneys concerning your obligation to be responsible for the payment of expenses in this case]?
>
> Dep. at 235.

Although these questions may be repetitive in light of plaintiff's extensive testimony regarding his financial arrangements with his attorneys, Dep. at 228-40, and his amended answer to Interrogatory 6, Answering Brief at A-3, plaintiff will be compelled to answer them. Deutschman's arrangement with his attorney may be relevant to certification of the class.[4] As such, it is discoverable. Such agreements are not generally subject to the attorney-client privilege. In re Semel, 411 F.2d 195, 197 (3d Cir.), cert. denied, 396 U.S. 905 (1969) ("In the absence of unusual circumstances, the fact of a retainer, . . . the conditions of employment and the amount of the fee do not come within the privilege of the attorney-client relationship"); Ferraro v. General Motors Corp., 105 F.R.D. 429, 433 & n.3

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4. I decline to decide whether the agreement between Deutschman and his counsel is relevant prior to briefing and argument on the class certification issue. Rather, I decide only that the agreement may be relevant under Rule 26's broad relevancy standard.

(D.N.J. 1984) (citing Semel and holding agreement whereby attorney will advance costs of litigation is discoverable if relevant). I will order plaintiff to respond.

Sanctions

Plaintiff has requested leave to file for Rule 11 sanctions. In light of the behavior of plaintiff's attorney during the deposition, leave will be denied. Not only did plaintiff's attorney improperly coach his client, see supra, he frequently interrupted the deposition to make comments completely unrelated to any legitimate objection. I will not condone this sort of behavior by granting leave to file for sanctions.

Conclusion

Defendants' motion to compel production of documents in response to their Request for Production paragraphs 15 and 16 will be denied. Defendants will be granted leave to amend their Request for Production to better specify the documents they seek.

Plaintiff's deposition will be ordered reconvened. Since the parties agree that the deposition may be reconvened by telephone, they should so stipulate in writing in accordance with Federal Rule of Civil Procedure 30(b)(7). I note only that I see no necessity for plaintiff's counsel to be physically present in the offices of defendants' counsel if he chooses to participate by conference call.

Defendants' motion to compel plaintiff to answer the "Reserve Addition Question" will be denied. Defendants will be granted leave to rephrase the question. Defendants' motion to compel plaintiff to answer "Class Allegation" questions 1, 2 and 6 will be denied. Defendants' motion will be granted as to questions 3, 4 and 5. Defendants will be granted leave to rephrase question 2 so as to limit the scope of the question to plaintiff's personal knowledge. Defendants' motion to compel plaintiff to answer the "Expense Agreement Questions" will be granted.

Plaintiff's clarified response on page 123 of his deposition and all questions and answers regarding plaintiff's consultation with his counsel during the lunch recess will be ordered stricken. Plaintiff will be granted leave to clarify his response in accordance with the procedures of Federal Rule of Civil Procedure 30(e) in the event that he has already signed the deposition. Upon resumption of plaintiff's deposition and after any recess, defendants' counsel will be granted leave to question plaintiff as to any consultation with his counsel in accordance with the procedure set forth in this opinion.

An order will be entered in conformity with this opinion.

In re Asbestos Litigation
Del.Super.,1985.

Superior Court of Delaware,New Castle County.
In re ASBESTOS LITIGATION.
Submitted: March 11, 1985.
Decided: March 29, 1985.

Members of State Bar applied for standing order to address **deposition** problems in asbestos litigation. The Superior Court, New Castle County, **Poppiti**, J., held that taking of testimony of party deponents in asbestos litigation cases should be governed by same rules as taking of testimony at trial and ordered that attorney-client **consultations** regarding clients' **deposition** testimony during course of **deposition** in asbestos litigation is prohibited.

Ordered accordingly.

West Headnotes

[1] Pretrial Procedure 307A 151

307A Pretrial Procedure
307AII**Depositions** and Discovery
307AII(C) Discovery **Depositions**
307AII(C)3 Examination in General
307Ak151 k. In General. Most Cited Cases
Taking of testimony of party deponents in asbestos litigation cases should be governed by same rules as taking of testimony at trial because nature of the **deposition** testimony takes on the character of de bene esse testimony in such cases.

[2] Trial 388 43

388 Trial
388IV Reception of Evidence
388IV(A) Introduction, Offer, and Admission of Evidence in General
388k43 k. Admission of Evidence in General. Most Cited Cases
Attorney-client **consultation** during cross-examination regarding client's testimony is prohibited.

[3] Constitutional Law 92 3954

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3954 k. Course and Conduct of Proceedings in General. Most Cited Cases
(Formerly 92k305(3))
Prohibition of attorney-client **consultation** during cross-examination of client in civil action or during **deposition** is not a per se violation of client's due process right of access to assistance of counsel under Fourteenth Amendment. U.S.C.A. Const.Amend. 14.

[4] Pretrial Procedure 307A 151

307A Pretrial Procedure
307AII**Depositions** and Discovery
307AII(C) Discovery **Depositions**
307AII(C)3 Examination in General
307Ak151 k. In General. Most Cited Cases
Attorney-client **consultations** during course of **deposition** regarding client's **deposition** testimony is prohibited in asbestos litigation.

POPPITI, Judge.
The matter is presently before the Court upon the application of some members of the defense bar in the asbestos litigation for a standing order designed to address asserted problems experienced during the course of party **depositions**. The expressed problems center around the issue of attorney and client **consultations** during recesses ***257** in **deposition** testimony of the client deponent and the related issue of what if anything opposing counsel may do to develop a record regarding the attorney and client recess **consultation**. In this regard, the Court has considered counsel's arguments heard on

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March 11, 1985 as well as letter memoranda submitted by counsel.[FN1] This is the Court's opinion and Standing Order # 5 on the issue.

FN1. Before the Court are the following:

November 30, 1984 letter from Mr. Semple to Mr. Jacobs;

December 6, 1984 letter from Mr. Jacobs to Mr. Semple;

February 22, 1985 letter to the Court from Mr. Crumplar;

March 4, 1985 letter and proposed order to the Court from Mr. Crumplar;

March 5, 1985 letter and proposed order to the Court from Mr. Phillips;

March 7, 1985 letter to the Court from Mr. Crumplar;

March 8, 1985 letter to the Court from Mr. Paul.

It is interesting to note that the positions expressed by counsel with regard to this issue are not aligned with their status as plaintiffs' or defense counsel. Further, it is also noteworthy that those of the defense bar who articulate similar problems do not speak with one voice concerning a proposed remedy. It would appear that positions presented are as follows:

1) The Court may not interfere with the unlimited **consultation** of an attorney and client even while the client is in recess during the course of **deposition** testimony. It is argued that such **consultation** is protected by the attorney-client privilege.

2) The Court should completely foreclose a client deponent from **consulting** with his attorney about his **deposition** testimony until the close of his testimony. It is argued that such prohibition is in the interest of protecting the integrity of the fact-finding process.

3) Where **consultation** between an attorney and a client deponent has occurred during the course of a recess in the client's **deposition** testimony, the attorney should be permitted to develop a record regarding the deponent's credibility insofar as it relates to the issue of a "coached witness."

[1] In the context of asbestos litigation where the protracted and complex nature of the litigation is coupled with the fact that plaintiff deponents may be sufferers of life-consuming asbestos-related diseases, the nature of the **deposition** testimony, of necessity, takes on the character of *de bene esse* testimony. *See generally Woolley on Delaware Practice* § 583 (1906). Given these factors, I am satisfied that the taking of testimony of party deponents in the asbestos litigation cases should be governed by the same rules as the taking of testimony at trial. *See Woolley on Delaware Practice* § 609 (1906).FN2 *See also* 4A *Moore's Federal Practice* § 30.58 (1984). I am also satisfied that the trial court has the inherent authority to regulate the conduct of proceedings before it to the end that the administration of justice is both fair and efficient. *See Delaware*Rules of Evidence 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence ..."). *See also Eustice v. Rupert*, Del.Supr., 460 A.2d 507 (1983).

FN2. Woolley states: "Upon oral examination before a commissioner, testimony may be taken under the same commission against the party on whose behalf the commission issued, for the purpose of impeaching the testimony of any witness who has been examined for such party, by proving the bad character of the witness for veracity, or contradictory statements made by him; such proof to be according to the rules applicable in courts of law."

Finally, I am satisfied that in the context of the present issue, ethical considerations concerning the trial conduct of members of the Delaware Bar are equally applicable during the taking of **deposition**

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testimony. In this regard, The Code of Professional Responsibility directs in pertinent part as follows: "a lawyer shall not ... [f]ail to comply with known local customs of courtesy or practice of the bar or a particular tribunal...." DR 7-106(C)(5). Any order ***258** entered with a design to regulate the orderly discovery and/or ultimate presentation of *de bene esse* testimony should, therefore, be constructed against the backdrop of current Delaware practice.

[2] I hereby find that it is the long-standing practice in this jurisdiction to honor a prohibition of attorney-client **consultation** regarding the client's testimony during cross-examination. *See Bailey v. State,* Del.Supr., 422 A.2d 956 (1980) (defendant witness in criminal trial instructed, upon leaving the stand during cross-examination, not to discuss his testimony with anybody during overnight recess); *Aiello v. City of Wilmington, Delaware,* 623 F.2d 845 (3d Cir.1980) (in district court civil trial, plaintiff's counsel was directed not to communicate with plaintiff during **breaks** in his cross-examination for lunch and overnight); *Cascella v. GDV, Inc.,* Del.Ch., C.A. No. 5899, Brown, Ch. (January 15, 1981) (the Court ruled that there be no attorney-client **consultations** regarding the client's **deposition** testimony during said **deposition,** although the attorney could object to questions or, in limited circumstances, instruct the client not to answer); *Rose Hall Ltd. v. Chase Manhattan Overseas Banking Corp.,* 494 F.Supp. 1139 (D.Del.1980) (the district court entered an order regarding **deposition** testimony which formed the basis for Chancellor Brown's ruling in *Cascella*).[FN3]

FN3. In light of the finding regarding Delaware practice, *supra,* the Court need not consider *The New Jersey Express Co. v. Nichols,* 33 N.J.Law 434 (1867), offered as authority supporting the position of plaintiffs' counsel.

It is also noted parenthetically that another case relied upon by plaintiffs' counsel, *Thompson v. The Atlantic Building Corp.,* D.C.Mun.App., 107 A.2d 784 (1954), is inapposite to the present inquiry as it deals with attorney-client **consultations** during direct testimony.

[3] Furthermore, I am of the opinion that since it is the settled law of this jurisdiction that such a limitation of attorney-client **consultation** does not constitute a *per se* violation of a criminal defendant's right to the assistance of counsel under the Sixth Amendment to the United States Constitution, *see Bailey v. State, supra* at 960; *a fortiori* a similar prohibition in a civil action cannot be a *per se* violation of the civil litigant's due process right of access to the assistance of counsel under the Fourteenth Amendment to the United States Constitution.

In *Bailey v. State, supra,* the Delaware Supreme Court distinguished a limitation of attorney-client **consultation** regarding the client's testimony from a blanket sequestration order. A blanket sequestration order was held to be a violation of a criminal defendant's Sixth Amendment right to the assistance of counsel in *Geders v. U.S.,* 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), and has also been held to be a violation of a civil litigant's Fourteenth Amendment due process right to the assistance of counsel in *Potashnick v. Port City Construction Co.,* 609 F.2d 1101 (5th Cir.), *cert. denied,*449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980). In discussing the *Geders* decision, the Delaware Supreme Court concluded that:

> *Geders* clearly does not hold that any instructional limitation upon a criminal defendant's access to counsel constitutes plain or reversible error regardless of the nature of the limitation.... *Bailey v. State, supra* at 961.

The Court goes on to note that:

> The discretion accorded a trial judge with regard to the examination of witnesses clearly implies that there is not a constitutional right to the aid of counsel about one's testimony while under cross-examination. *Bailey v. State, id.* at n. 13.

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There is additional support for the Delaware Supreme Court's holding in *Bailey v. State, supra,* in the case of *Bailey v. Redman,* 502 F.Supp. 313 (D.Del.1980), *aff'd*657 F.2d 21 (3d Cir.1981), which denied Bailey's petition for a *Writ of Habeas Corpus* grounded on the issue of denial of his Sixth Amendment right to the assistance of counsel. The district court, in holding that the right of a criminal defendant ***259** to **consult** with counsel once he has begun to testify may be foreclosed until the close of his testimony, discussed the *Geders v. United States* decision, *supra,* stating in pertinent part as follows:

> In *Geders*... the Supreme Court held "that an order preventing [the] petitioner from **consulting** his counsel 'about anything' during a seventeen hour overnight recess between his direct and cross-examination infringed upon his right to the assistance of counsel guaranteed by the Sixth Amendment." The Court so held in the face of a contention that the trial court's order was justified in the interest of avoiding the risk of unethical coaching of the defendant. While the Court concluded that this interest would not justify a complete bar on defendant-attorney communications over an extended period during which they would normally work together, a majority of the Court indicated that this was a legitimate interest which would justify some restrictions of defendant's right to **consult** with his counsel.... The necessary implication of this suggestion by the majority of the Court is that a trial judge, in the interest of the integrity of the factfinding process, can foreclose a defendant from **consulting** with his attorney until the close of his testimony so long as he does not do so in a way that unnecessarily interferes with other collaboration between defendant and his counsel." *Bailey v. Redman,* 502 F.Supp. at 315.

[4] Having stated the above, I am convinced that a Court-ordered prohibition against attorney-client **consultations** regarding a client's **deposition** testimony during the course of taking a **deposition** in the asbestos litigation should be entered since the order would comport with Delaware practice and further would not violate the litigant deponent's Fourteenth Amendment right to the assistance of counsel. *See also Cartin v. Continental Homes of N.H.,* Vt.Supr., 134 Vt. 362, 360 A.2d 96 (1976), and *Stocker Hinge Manu. Co. v. Darnel Industries, Inc.,* Ill.App., 61 Ill.App.3d 636, 18 Ill.Dec. 489, 377 N.E.2d 1125 (1978).

Additionally, I am convinced that a Court-ordered procedure should be established which will protect a party's right to a full and fair opportunity to learn and present the facts of the case. In this regard the extent of any questions directed to the deponent subsequent to any attorney-client **consultation** during **deposition** testimony must reflect a balance between the interest of preventing coaching and the interest of the attorney-client privilege. The United States Supreme Court in *Geders, supra,* 425 U.S. at 89-90, 96 S.Ct. at 1336, alluded to some latitude in questioning of this nature stating that:

> The opposing counsel in the adversary system is not without weapons to cope with "coached" witnesses. A prosecutor *may cross-examine a defendant as to the extent of any "coaching" during a recess, subject, of course, to the control of the court.* Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination. In addition the trial judge, if he doubts that defense counsel will observe the ethical limits on guiding witnesses, may direct that the examination of the witness continue without interruption until completed. (Emphasis added).

For reasons articulated hereinabove, the following shall constitute Standing Order # 5 in the Delaware asbestos litigation, said order to have full force and effect in all matters relating to pending Delaware asbestos cases.

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IT IS THEREFORE HEREBY ORDERED:

1. Unless a specific written or oral (on record) agreement to the contrary exists among all counsel of record in a particular case, during the course of any recess and/or continuance of a **deposition** of a *260 party deponent, or any employee, officer, director and/or agent of a party deponent, said deponent and said deponent's attorney, employee of attorney and/or agent of said attorney (hereinafter "said person") are prohibited from **consulting** with each other concerning the deponent's testimony (already given and/or expected or which may be anticipated to be given) until the close of the deponent's testimony. "**Consultation**" means communication in any form whatsoever, either directly or indirectly, between said deponent and said person.

2. Following any recess and/or continuance of said deponent's **deposition** any attorney of record participating in the **deposition** may make a record concerning what if any attorney/client **consultation** may have occurred during the course of the recess and/or continuance by asking the following series of questions of said deponent:

A. Did you **consult** with your attorney, employee of your attorney and/or agent of your attorney (hereinafter "said person") during the recess and/or continuance?

-If answer is "no," end questioning.

-If answer is "yes," identify the person by name and proceed to question B.

B. Did you **consult** with said person with regard to your **deposition** testimony either already given and/or expected or which may be anticipated to be given?

-If answer is "no," end questioning.

-If answer is "yes," proceed to question C.

C. Did you **consult** with said person, and/or did said person give you any instruction and/or advice regarding how you should answer questions during the remainder of the **deposition**? (Note-not what was said.)

-If answer is "no," end questioning.

-If answer is "yes," proceed to question D.

D. About what areas of your testimony already given and/or expected or which may be anticipated to be given did you **consult** with said person? (Note-not what was said.)

3. Any violation of the provisions of this Standing Order may upon application or *sua sponte*, result in appropriate sanctions and may be referred to the Board of Professional Responsibility of the Delaware State Bar.

Del.Super.,1985.
In re Asbestos Litigation
492 A.2d 256

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JOSEPH A. C. WEBB, JR., Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.

No. 46, 1994

SUPREME COURT OF DELAWARE

663 A.2d 452; *1995 Del. LEXIS 250*

June 13, 1995, Submitted
July 12, 1995, Decided

SUBSEQUENT HISTORY: [**1] Rehearing Denied August 16, 1995.
Released For Publication September 19, 1995.

PRIOR HISTORY: Court Below: Superior Court of the State of Delaware in and for New Castle County. Cr. A. No. IN86-03-1502.

DISPOSITION: Reversed and Remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant sought review of a decision of the Superior Court of the State of Delaware in and for New Castle County, which convicted him of first degree rape and sentenced him to 25 years incarceration.

OVERVIEW: Defendant allegedly raped the minor daughter of his girlfriend over a period of four years. Defendant was charged and convicted of one count of first degree rape, but the trial court granted defendant's post-conviction motion and vacated his conviction. Defendant was retried, convicted of one count of first degree rape, and sentenced to 25 years incarceration. On appeal, the court reversed and held that: (1) the trial court's restriction of communications between defendant and his lawyer in the overnight recess that occurred between defendant's testimony and his cross-examination was overbroad and violative of defendant's Sixth Amendment right to effective assistance of counsel, and this restriction was not harmless error; (2) the trial court abused its discretion in excluding impeachment evidence of a criminal conviction of one of the state's witnesses, and, in view of the importance of the testimony of this witness, the error could not have been found harmless; (3) defendant's hearsay claims were without merit; (4) there was no error in refusing to charge the jury with the lesser included offense of sexual assault; and (5) the prosecutor's closing argument was not improper.

OUTCOME: The court found that the trial court committed reversible error in two respects: (1) its imprecise order limiting defendant's access to his counsel was overbroad and, thus, violated the Sixth Amendment; and (2) its exclusion of defendant's proffered impeachment evidence of a material state witness constituted legal error. Therefore, the court reversed defendant's conviction for first degree rape and remanded for a new trial.

LexisNexis(R) Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview
[HN1] *U.S. Const. amend. VI* provides that in all criminal prosecutions, the accused must enjoy the right to have the assistance of counsel for his defence.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
[HN2] In a short recess, in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview
[HN3] It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial related matters that is controlling in the context of a long recess. The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > General Overview
[HN4] A testimonial limitation does not constitute a per se Sixth Amendment infringement of a defendant's right of access to counsel. Because a testimonial limitation may not be distinguishable from a blanket sequestration in the sense that each may impinge in varying degrees on access to counsel, abstract propositions should be discounted, and a decision rests on evaluation of the record in the trial court for prejudice resulting from the imposed limitation concerning the defendant's ongoing testimony.

Criminal Law & Procedure > Guilty Pleas > General Overview
Evidence > Testimony > Examination > Cross-Examination > General Overview
Governments > Legislation > Overbreadth
[HN5] A defendant-witness may not be denied access to his or her counsel or restricted from discussing any subject with counsel during an overnight recess except that, in most circumstances, a narrowly tailored limitation on discussion of the defendant's testimony with counsel may be imposed during a brief recess while the defendant is on cross-examination. During such a recess, the defendant may discuss with counsel matters relating to the availability of other witnesses, the progression of the trial, the day's events, legal issues, strategic considerations such as whether to offer or accept a plea bargain, and other matters.

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination
[HN6] It is vital in the search for truth that cross-examination should be a cornerstone of the adversary system. It is antithetical to the process of truth-seeking that any witness be permitted to consult with counsel during cross-examination to be "coached" on what to say, or not say, or how-to-say-it, or how to control or "put a better face on" testimonial damage already done. This rule normally applies to a defendant in a criminal case during a short recess when the defendant elects to take the stand in his or her own defense and thereby becomes a witness. The fortuitous intervention of an overnight recess during the cross-examination of a defendant should not be an occasion for coaching which could not otherwise occur.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Counsel > Constitutional Right
Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination
Evidence > Testimony > Examination > Cross-Examination > General Overview
[HN7] If it is unavoidable that an evening recess interrupt the defendant's cross-examination, trial judges should be especially vigilant in giving unmistakably clear and limited instructions that the defendant-witness may not discuss his or her testimony with counsel, but that instruction should not permit any inference that the defendant and counsel may not discuss other matters.

Criminal Law & Procedure > Witnesses > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Evidence
Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor
[HN8] Del. R. Evid. 609 states: General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime must be admitted but only if the crime (1) constituted a felony under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect or (2) involved dishonesty or false statement, regardless of punishment. Del. R. Evid. 609(a). A crime involving "dishonesty or false statement" includes, inter alia, crimes involving dishonest conduct or stealing.

Criminal Law & Procedure > Trials > Examination of

Witnesses > General Overview
Evidence > Testimony > Credibility > Impeachment > Convictions > General Overview
Evidence > Testimony > Credibility > Impeachment > Prior Conduct
[HN9] Where the conviction in question falls within the definition of Del. R. Evid. 609(a)(2), the inquiry ends: the conviction is admissible against the testifying witness for purposes of impeachment. Del. R. Evid. 609(a)(2).

Evidence > Hearsay > Rule Components > Truth of Matter Asserted
Evidence > Testimony > Lay Witnesses > Personal Knowledge
[HN10] Del. R. Evid. 602 provides that a witness may testify to a matter where evidence is introduced sufficient to support a finding that she has personal knowledge of the matter.

Evidence > Hearsay > Rule Components > Declarants
[HN11] Del. R. Evid. 801(c) provides that "hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Evidence > Hearsay > Exceptions > Medical Diagnosis & Treatment
Evidence > Hearsay > Exceptions > State of Mind > General Overview
[HN12] Del. R. Evid. 803(3) provides that the following is not excluded by the hearsay rule: a statement of the declarant's then existing physical condition.

Evidence > Hearsay > Exceptions > General Overview
Evidence > Hearsay > Exemptions > Statements by Party Opponents > Extrajudicial Statements
Evidence > Hearsay > Rule Components > Statements
[HN13] Del. R. Evid. 801(d)(2)(A) provides that a statement is not hearsay and is an admission if the statement is offered against a party and is his own statement.

Public Health & Welfare Law > Healthcare > Communicable Diseases
[HN14] The State Board of Health has the responsibility of receiving reports, investigating, and treating sexually transmitted diseases. *Del. Code Ann. tit. 16, §§ 702 & 703.*

Evidence > Authentication > Self-Authentication
[HN15] Del. R. Evid. 902(4) provides that extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to a copy of an official record or report or entry therein, or of a document authorized by law and actually recorded in a public office.

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Lesser Included Offenses
[HN16] A lesser included offense is appropriate only when there is a rational basis in the evidence for a verdict acquitting a defendant of the offense charged and convicting him of the included offense. *Del. Code Ann. tit. 11 § 206(c).* This standard applies even where the defendant denies any involvement in the charged offense. Where the evidence supportive of a requested lesser included offense is such that no reasonable jury could convict the defendant of the lesser rather than indicted charge, however, the trial court need not charge the lesser included.

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Lesser Included Offenses
Criminal Law & Procedure > Verdicts > Unanimity
[HN17] The defendant is not entitled to a lesser included instruction in order to facilitate rendering of a compromise verdict-where jurors surrender their conscientious convictions in order to reach an unanimous decision-for such verdicts are invalid.

COUNSEL: Bernard J. O'Donnell, Esquire, Assistant Public Defender, Wilmington, for Appellant.

Rosemary K. Killian, Esquire, Deputy Attorney General, Department of Justice, Wilmington, for Appellee.

JUDGES: Before VEASEY, Chief Justice, WALSH, HOLLAND, HARTNETT and BERGER, Justices, constituting the Court en Banc.

OPINION BY: Veasey

OPINION

[*454] Veasey, Chief Justice:

In this appeal, we consider the contentions of defendant below-appellant, Joseph A. C. Webb ("Webb"), that the Superior Court erred by: (i) improperly limiting access to his counsel, in an order overbroad under the circumstances, during an overnight recess while the defendant was on cross-examination as a witness in his own defense; (ii) denying admission of impeachment evidence of a criminal conviction of a State witness during defense counsel's cross-examination of that witness; (iii) overruling objections to admission of purported hearsay evidence; (iv) refusing [**2] to instruct the jury on a lesser included offense; and (v) overruling an objection to the prosecutor's alleged improper remarks during closing argument.

We hold that the Superior Court committed reversible error by restricting Webb's access to his counsel in violation of the Sixth Amendment right of the defendant under the United States Constitution to have the effective assistance of counsel. We also hold that the trial court improperly excluded the proffered impeachment evidence of the criminal conviction in the defendant's cross-examination of the State's witness in violation of Delaware Rule of Evidence ("D.R.E.") 609(a)(2). In all other respects, we find that the Superior Court committed no error. Accordingly, we reverse and remand for a new trial.

[*455] I. FACTS

Webb was accused of raping the daughter (the "victim") of his girlfriend (the "mother") from 1981, when the victim was seven years old, repeatedly until October 1985, when the victim was eleven years. In October 1985, Riverside Hospital diagnosed the victim as having trichomoniasis and genital herpes, both sexually transmitted diseases. The hospital likewise diagnosed the victim's mother with trichomoniasis. During questioning [**3] by medical personnel, the victim related that Webb had been engaging in sexual acts with her for several years.

In March 1986, Webb was arrested and charged with two counts of first degree rape. [1] In June 1987, a Superior Court jury found Webb guilty of one count of first degree rape and not guilty of the other. The trial judge sentenced him to life imprisonment. Webb moved for post-conviction relief, claiming ineffective assistance of counsel. The Superior Court granted Webb's post-conviction motion and vacated his conviction.

1 *11 Del. C. § 764 revised by 65 Del. Laws* c. 494 (eff. July 9, 1986). The conduct serving as a basis for Webb's conviction occurred before the effective date of the 1986 revision and, thus, the old statutory scheme applies in this case.

In November 1993, Webb was retried before another jury in the Superior Court. The State presented the testimony of several witnesses, including the victim. The victim testified that Webb began to touch her in a sexual way in the beginning, and [**4] as time passed, this activity increased in both frequency and intensity. During the last two years of the attacks, Webb engaged in full sexual intercourse with the victim several times each week. Most often these attacks occurred during the evening hours while the mother worked two jobs and he was alone in the house with the victim and her brother. The victim testified that Webb would take her into the mother's bedroom or her own bedroom and rape her. When Webb would finish, he would warn the victim not to tell anyone or he would "get mad" at her. The State also offered a medical examination document promulgated by the Porter Center which indicated that Webb too had trichomoniasis.

Webb took the stand in his own defense. His testimony reflected a blanket denial of the victim's claims. He informed the jury that he had never touched the victim in any improper or sexual manner. After deliberating for two days, the jury was deadlocked. The Superior Court gave an *Allen* charge. [2] Soon thereafter, the jury returned a guilty verdict on the first degree rape charge. The judge sentenced Webb to 25 years incarceration. This is Webb's direct appeal of his conviction.

2 See *Allen v. United States, 164 U.S. 492, 501-02, 41 L. Ed. 528, 17 S. Ct. 154 (1896).*

[**5] II. DENIAL OF THE EFFECTIVE ASSISTANCE OF COUNSEL

At the conclusion of Webb's direct testimony, the trial judge ordered an overnight recess. Webb's cross-examination was scheduled for the next day. After the jury was dismissed for the day, the following colloquy took place (emphasis supplied):

[THE PROSECUTOR]:

Could the witness [Webb] be instructed

by the Court not to discuss his testimony with anyone and be advised he is on cross-examination and that also limits his access to his attorney?

THE COURT:

Very well.

You understand that you are not to discuss your testimony with anyone. You are still subject to your oath, and the cross-examination will start tomorrow.

THE DEFENDANT:

Yes.

[THE PROSECUTOR]:

As I understand the case law, the access to his attorney is somewhat limited, too, because he is on cross.

[DEFENSE COUNSEL]:

I have got a problem with that because it's-it's not just a black letter rule. I always try to be very careful about not taking unfair advantage of situations. Recent testimony is one of them, in trying to suggest some type of change, or [*456] whatever. But if there are other matters concerning [**6] trial strategy or questions which come up from the defendant, I think the defendant has a right to be able to ask his attorney certain questions. It just shouldn't be a closure because of that relationship. He -

THE COURT:

Well, certainly, I think the defense attorney understands his ethical obligations. The Court expects him to understand the difference between what he can and what he cannot talk to the defendant about.

[DEFENSE COUNSEL]:

Thank you.

[THE PROSECUTOR]:

I think, perhaps, I'm also directing it at the defendant to understand he doesn't have the same degree of access that he had to question his attorney and prepare responses.

THE COURT:

The defendant is to understand he is not to discuss his testimony this morning with his attorney.

I trust the defense attorney will, if he should attempt to, indicate the ethical restrictions that are placed upon him. Other than that, I'll leave it at that.

(Emphasis added). Later that same day, the following exchange occurred:

[DEFENSE COUNSEL]:

If we could, concerning the ruling, I realize Your Honor made the ruling about contact with my client. I still have a [**7] problem with that. I will check on the case. I'll abide by the ruling, but just as an illustration I thought of, I can't-I can't tell the guy, under the rule, don't say that tomorrow on cross-examination.

THE COURT:

I think that's appropriate. You would not have a chance, but for the fact there is a recess at this point, to do that. She [the prosecutor] would have immediately went into cross.

[THE PROSECUTOR]:

That is exactly what I'm talking about.

Based on the above, Webb argues that the Superior Court's order was overbroad, thus violating his right to effective assistance of counsel under the *Sixth Amendment of the United States Constitution* (the "Sixth Amendment"). [3] The State characterizes the Superior Court's order as restricting only defense counsel's ability to render advice regarding Webb's ongoing testimony, a limitation which the State contends is constitutionally sanctioned. The trial judge's instruction was not clearly limited to discussions of defendant's testimony, however. Because of the pressure from the prosecutor for an instruction limiting defendant's "access" to his lawyer and the trial judge's vague reference to the lawyer's ethical [**8] responsibilities in response to that pressure, the ruling became imprecise and unconstitutionally overbroad.

> 3 [HN1] *U.S. CONST. amend. VI* ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.").

The seminal case with which we begin analysis of Webb's claim is *Geders v. United States, 425 U.S. 80, 47 L. Ed. 2d 592, 96 S. Ct. 1330 (1976)*. In that case, the United States Supreme Court addressed the issue of whether a blanket prohibition of lawyer-defendant contact during an overnight (seventeen-hour) recess violated a defendant's Sixth Amendment right to counsel. *Geders, 425 U.S. at 82*. In determining that this type of broad prohibition impinged on the defendant's rights, the Court stated:

> [A] sequestration order affects a defendant in quite a different way from the way it affects a nonparty witness who presumably has no stake in the outcome of the trial. A nonparty witness ordinarily has little, other than his own testimony, to discuss with trial counsel; a defendant in a criminal case must often consult with his attorney during the trial. Moreover, "the rule" *[i.e.,* that allows sequestration of witnesses] accomplishes less when it is applied to the defendant rather than a nonparty witness, because the defendant as a matter of right can be and usually is present for all testimony [**9] and has the opportunity [*457] to discuss his testimony with his attorney up to the time he takes the witness stand.

Id. at 88. The Court recognized that "it is common practice during such recesses for an accused and counsel to discuss the events of the day's trial." *Id.* These discussions often include considerations such as trial strategy, tactical decisions, testimony of other witnesses, and the possibility of a plea bargain. *Id.*

Thirteen years later, the United States Supreme Court revisited the issue of whether a testifying defendant and his or her counsel may discuss non-testimonial matters during a trial recess. *Perry v. Leeke, 488 U.S. 272, 284, 102 L. Ed. 2d 624, 109 S. Ct. 594 (1989). Perry* involved a trial judge's absolute ban on consultation between a testifying defendant and his lawyer during a fifteen-minute recess. *488 U.S. at 274*. On appeal, the Court affirmed the [**10] ban, reasoning:

> When a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying. He has an absolute right to such consultation before he begins to testify, but neither he nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel's advice.
>
> The reason for the rule is one that applies to all witnesses--not just defendants. It is a common practice for a judge to instruct a witness not to discuss his or her testimony with third parties until the trial is completed. [] Such nondiscussion orders are a corollary of the broader rule that witnesses may be sequestered to lessen the danger that their testimony will be influenced by hearing what other witnesses have to say, and to increase the likelihood that they will confine themselves to truthful statements based on their own recollections. [] The

defendant's constitutional right to confront the witnesses against him immunizes him from such physical sequestration. [] Nevertheless, when he assumes the role of a witness, the rules that generally apply to other witnesses-rules that serve the truth-seeking function of the trial--are [**11] generally applicable to him as well. Accordingly, it is entirely appropriate for a trial judge to decide, after listening to the direct examination of any witness, whether the defendant or a nondefendant, 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.

* * *

Permitting a witness, including a criminal defendant, to consult with counsel after direct examination but before cross-examination grants the witness an opportunity to regroup and regain a poise and sense of strategy that the unaided witness would not possess. This is true even if we assume no deceit on the part of the witness; it is simply an empirical predicate of our system of adversary rather than inquisitorial justice that cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney. . . .

Id. at 281-82 (footnotes omitted). The Court's holding was limited: [HN2] "In a short recess, in which [**12] it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice." *Id.* The *Perry* court distinguished *Geders* on the basis of time: *Geders* involved an overnight (seventeen-hour) recess; *Perry* involved a fifteen-minute break. As to discussion of non-testimonial matters, however, the *Perry* court affirmed the holding in *Geders:*

[HN3] It is the defendant's right to unrestricted access to his lawyer for advice on a variety of trial related matters that is controlling in the context of a long recess. *See Geders v. United States, 425 U.S. at 88, 96 S. Ct. [1330,] 1335.* The fact that such discussions will inevitably include some consideration of the defendant's ongoing testimony does not compromise that basic right.

Id. at 284. Although *Perry* and *Geders* establish the parameters for our analysis, neither addressed the factual scenario [*458] in the instant case-namely, a limitation on contact short of an absolute ban but for a period of time longer than a few minutes.

This Court addressed that factual scenario in *Bailey v. State, Del. Supr., 422 A.2d 956 (1980).* [**13] In that case, the trial judge imposed a testimonial limitation on a defendant during an overnight trial recess. *Id. at 958.* In a postconviction proceeding, the defendant argued, inter alia, that the following order violated the Sixth Amendment: "'Mr. Bailey, during the evening recess, I caution you and instruct you that you are not to discuss your testimony with anybody until you have completed your testimony in this case. . . .'" Id. (quoting trial court's oral order). Construing the "anybody" as referring to defense counsel, we stated: "The instruction was precisely and simply stated." [4] *Id. at 959.*

4 Nonetheless, in affirming the trial court's ruling rejecting the Sixth Amendment claim, we noted, however, that our decision was not based "on the limiting nature of the instruction given." *422 A.2d at 959 n.7.*

Distinguishing *Geders* on the basis that the limitation in that case was an absolute ban on lawyer-defendant contact. *id. at 959,* we continued: "In our view, [HN4] a testimonial limitation [**14] does not constitute a *per se* Sixth Amendment infringement of a defendant's right of access to counsel," *id. at 960.* We found that because "a testimonial limitation may not be distinguishable from a blanket sequestration in the sense that each may impinge in varying degrees on access to counsel," *id.,* abstract propositions should be discounted, and a decision rests on evaluation of the record in the trial court for prejudice resulting from the imposed limitation

concerning the defendant's ongoing testimony, *id. at 960-61, 963-64*. In *Bailey*, unlike the instant case, the defendant was incarcerated and made no showing that he sought to confer with his attorney.

Explicit in *Perry, 488 U.S. at 281-82*, and implicit in both *Geders, see 425 U.S. at 88*, and *Bailey, see 422 A.2d at 959-60*, is a recognition that the criminal defendant who decides to become a witness in his or her own defense assumes two separate but concurrent roles-that of a "defendant" and that of a "defendant-witness." The first role requires that the defendant not be forced to sacrifice unfairly the appurtenant constitutional guarantees accorded to an accused. Among these constitutional guarantees [**15] is the right of a defendant in a criminal case to consult with counsel at any time during the proceedings. See, e.g., *Geders, 425 U.S. at 91*. Thus, [HN5] a defendant-witness may not be denied access to his or her counsel or restricted from discussing any subject with counsel during an overnight recess except that, in most circumstances, a narrowly tailored limitation on discussion of the defendant's testimony with counsel may be imposed during a brief recess while the defendant is on cross-examination. During such a recess, the defendant may discuss with counsel matters relating to the availability of other witnesses, the progression of the trial, the day's events, legal issues, strategic considerations such as whether to offer or accept a plea bargain, and other matters. *See Perry, 488 U.S. at 284*; *Geders, 425 U.S. at 88*; *Bailey, 422 A.2d at 959-60*. As noted in *Geders*, where the instruction against discussion with counsel during an overnight (seventeen hour) recess was overbroad ("about anything"), the court noted the tension between the Sixth Amendment right to access and the prevention of improper coaching:

> To the extent that conflict remains between the defendant's right [**16] to consult with his attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of improper "coaching," the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel. *Brooks v. Tennessee, 406 U.S. 605, 32 L. Ed. 2d 358, 92 S. Ct. 1891 (1972)*.

Geders, 425 U.S. at 91.

In the instant case, where Webb had finished his direct testimony but had yet to be cross-examined, we are required to review the limitation imposed by the trial court on communications between Webb and his counsel [*459] during the overnight trial recess. *See Bailey, 422 A.2d at 960* (requiring case-by-case analysis). Standing alone, the Superior Court's initial admonition to Webb that he was "not to discuss [his] testimony with anyone" because he was "still subject to [his] oath[] and the cross-examination will start tomorrow" would have been proper as within the trial court's discretion. See *Perry, 488 U.S. at 285 n.8* (noting that "[a] judge may permit consultation between counsel and defendant during [a trial] recess. but forbid discussion [**17] of ongoing testimony[]"); *Geders, 425 U.S. at 88*; *Bailey, 422 A.2d at 959* (noting that a similar instruction was "precisely and simply stated"). But that is not the case before us for review because of what followed that initial admonition.

The trial court, at the behest of the State, committed error when it elaborated imprecisely on the testimonial limitation. The prosecutor had sought and received an instruction that the defendant not discuss his testimony with counsel. Not satisfied with that, the prosecutor pressed: "the access to [Webb's] attorney is somewhat limited, too, because he is on cross." [5] After defense counsel objected to this proposed broader denial of access, the trial court ambiguously responded: "Well, certainly, I think the defense attorney understands his ethical obligations. The Court expects him to understand the difference between what he can and cannot talk to the defendant about." [6] Anything short of an unequivocal denial by the trial court of the State's request to limit further Webb's "access" to counsel was erroneous. The court's response to the State's request could have been construed as an admonition that Webb and his counsel were prohibited [**18] from discussing not only Webb's ongoing testimony, but also other trial-related matters. Thus, the restriction was overbroad and violative of Webb's Sixth Amendment right to effective assistance of counsel.

5 The State in fact persisted in attempting to restrict Webb's access: "I think, perhaps, I'm also directing it at the defendant to understand he doesn't have the same degree of access that he had to question his attorney and prepare responses. The imprecise and overbroad portions of the

limitation are more fully emphasized *supra* in the quotations from the trial court record. During oral argument, the State argued that the other 'access" to which it was referring still related to discussions regarding Webb's ongoing testimony. We find this reconstruction implausible, given that the trial court had already imposed an unequivocal testimonial limitation before the State's additional requests.

6 The prosecutor further pressed after this exchange, noting that the defendant should "understand he doesn't have the same degree of access that he had to question his attorney and prepare responses." The court then instructed defendant again not to discuss his testimony with counsel, but the court regrettably reintroduced the earlier ambiguity by adding: "I trust the defense attorney will, if he should attempt to, indicate the ethical restrictions that are placed upon him. Other than that, I'll leave it at that." The further colloquy following this exchange correctly made it clear that the fortuitous recess did not permit counsel to "tell the guy ... don't say that tomorrow on cross-examination," but unfortunately, the ambiguity relating generally to "access" to counsel was not dispelled and remained in the record. Thus, the exchange as a whole was ambiguous and the limitation on access to counsel was overbroad.

[**19] [HN6] It is vital in the search for truth that cross-examination should be a cornerstone of the adversary system. It is antithetical to the process of truth-seeking that any witness be permitted to consult with counsel during cross-examination to be "coached" on what to say, or not say, or how-to-say-it, or how to control or "put a better face on" testimonial damage already done. [7] This rule normally [*460] applies to a defendant in a criminal case during a short recess when the defendant elects to take the stand in his or her own defense and thereby becomes a witness. The fortuitous intervention of an overnight recess during the cross-examination of a defendant should not be an occasion for coaching which could not otherwise occur.

7 This policy, which has historically been a firm Delaware policy, has recently been strengthened in the deposition context in civil litigation by making it unmistakably clear that there should be no on-the-record or off-the-record consultation concerning testimony between witness and counsel, even during recesses up to five days in duration. *See* Super. Ct. Civ. R. and Ch. Ct. R. 30(d)(1):

> (1) From the commencement until the conclusion of a deposition, including any recesses or continuances thereof of less than five calendar days, the attorney(s) for the deponent shall not: (A) consult or confer with the deponent regarding the substance of the testimony already given or anticipated to be given except for the purpose of conferring on whether to assert a privilege against testifying or on how to comply with a court order, or (B) suggest to the deponent the manner in which any question should be answered. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the Court, or to present a motion under paragraph (d)(3).

See also Paramount Communications, Inc. v. QVC Network, Inc., Del. Supr.. 637 A.2d 34, 51 (1993) (Addendum).

[**20] The subject of limiting a defendant's access to his counsel is dangerous and problematic. It is an area where precision is clearly called for in order that Sixth Amendment rights not be violated. [HN7] If it is unavoidable that an evening recess interrupt the defendant's cross-examination, [8] trial judges should be especially vigilant in giving unmistakably clear and limited instructions that the defendant-witness may not discuss his or her testimony with counsel, but that instruction should not permit any inference that the defendant and counsel may not discuss other matters. *See Geders, 425 U.S. at 91.*

8 Trial judges should consider managing the scheduling of testimony so as to avoid, if feasible, such interruptions of the testimony of a defendant-witness, perhaps even if extending the cross-examination into an evening may be

required.

It is the nature of the judicial process that we decide only the case before us. *Paramount Communications, Inc. v. QVC Network, Inc., Del. Supr., 637 A.2d 34, 51 (1993).* [**21] Accordingly, we cannot and do not prescribe a "one size fits all" rule to be applied in future criminal cases involving limitations on discussions between a defendant-witness and counsel during trial recesses of varying lengths. Our holding here is narrowly circumscribed to the facts of this case. [9] For example, we express no opinion on the breadth of a recent ruling of the United States Court of Appeals for the Fourth Circuit that, when a weekend recess is involved, the trial judge may not circumscribe the defendant-witness' contact with his lawyer even if the instruction is confined to the defendant's testimony. *United States v. Cobb, 4th Cir., 905 F.2d 784, 792 (1990)* (holding that such a limitation violates the right to effective assistance of counsel on the ground that it "effectively eviscerates [the defendant's] ability to discuss and plan trial strategy[]"), *cert. denied, 498 U.S. 1049 (1991).* Such a case is not before us and may not come before us, particularly if trial judges will, when feasible, manage the scheduling of trial testimony so that long recesses are avoided. *See supra* note 8.

9 There can be no hard and fast rule governing every contingency. Coaching during a recess to shape the testimony of a defendant-witness when cross-examination is resumed is clearly improper and defense counsel should know that ethical violations are involved. There may be circumstances where it is not clear to defense counsel how to handle a problem which arises surprisingly during cross. Perjury is one example. See *Shockley v. State, Del. Supr., 565 A.2d 1373, 1378 (1989)* ("Under the Model Rules, adopted in Delaware in 1985, a lawyer's first duty when he learns his client is going to commit perjury is to seek to persuade the client not to do so. If the client has already presented the testimony, the attorney must rectify any damage.") In such a case defense counsel has an ethical obligation which may require a forthright application to the court for a special ruling permitting limited consultation.

[**22] The remaining issue in analyzing Webb's Sixth Amendment claim is whether the trial court's error was harmless. *See Bailey, 422 A.2d at 963* (holding that such claims are subject to harmless error analysis). Where defense counsel objects to the limitation order at trial, the *Geders* court implied that actual prejudice need not be demonstrated. *See 425 U.S. at 82*; *Bailey, 422 A.2d at 963* (interpreting *Geders). This* case is unlike *Bailey* where we found that the defendant's claim of prejudice was suspect, given the fact that he did not object to the testimonial limitation until nearly three years after trial, *id. at 964.* In the instant case, Webb objected contemporaneously at trial to the limitation order and diligently attempted to have the trial judge narrow or withdraw the order. The resulting instruction was ambiguous, leaving the defendant and his counsel in a sea of uncertainty regarding the propriety of any communication. Under such circumstances, we cannot [*461] say that the error was harmless beyond a reasonable doubt.

III. EXCLUSION OF IMPEACHMENT EVIDENCE

As part of its case-in-chief, the State presented the testimony of a young friend of the victim. [**23] The witness testified that *the* victim confided in her regarding Webb's sexual overtures. This testimony was consistent with the testimony of the witness during Webb's first trial.

In the period between Webb's two trials, the witness had been convicted in the Superior Court of the misdemeanor of shoplifting. Webb's counsel attempted on cross-examination to impeach her with this conviction. The State objected, arguing that Webb had failed to lay a foundation--namely, that he had not proffered proof of a judgment of conviction. The Superior Court sustained the objection in the "interest of justice" based on three reasons: First, Webb had failed to lay a foundation; second, the conviction occurred after the event about which the witness was testifying; and third, per the State's assurance, the testimony of the witness was entirely consistent with that provided in the first trial. [10]

10 After Webb completed his testimony, the State offered to have a certified copy of the witness' conviction entered into the record, accompanied by a standard credibility charge read to the jury. Webb rejected the State's offer, arguing that (i) he was initially entitled to have the State produce the certificate of conviction under *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*, and (ii) the tardy introduction of the impeachment evidence did not

cure the error of exclusion.

[**24] The Superior Court abused its discretion in excluding the impeachment evidence proffered by Webb. [HN8] D.R.E. 609 states:

> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted but only if the crime (1) constituted a felony under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect or (2) involved dishonesty or false statement, regardless of punishment.

D.R.E. 609(a). In *Gregory v. State, Del. Supr., 616 A.2d 1198 (1992)*, we defined a crime involving "dishonesty or false statement" as including, *inter alia*, crimes involving dishonest conduct or stealing, *616 A.2d at 1204*. [HN9] Where the conviction in question falls within the definition of D.R.E. 609(a)(2), the inquiry ends: the conviction is admissible against the testifying witness for purposes of impeachment. D.R.E. 609 (a)(2); *Gregory, 616 A.2d at 1204*.

In the instant case, the witness had been convicted of the misdemeanor of shoplifting. In the Superior Court, the State obliquely conceded that this conviction [**25] was for a crime involving dishonesty. Thus, the Superior Court erred in undertaking the D.R.E. 609(a)(1) balancing test. That is, because the misdemeanor of shoplifting is a crime involving dishonesty, admission of the conviction for impeachment purposes was mandatory. 11 *See Gregory, 616 A.2d at 1204*.

> 11 The Court need not decide the exact nature of the foundation that Webb should have established before seeking introduction of the impeachment evidence. The State is not in a position to insist that Webb should have produced a certificate of conviction since the State appears to have conceded (albeit belatedly) in the trial court that it might have had a duty to disclose to Webb the certificate under Superior Court Criminal Procedure Rule 16 (a)(1)(C) & (c). *See Lilly v. State, Del. Supr., 649 A.2d 1055, 1059 (1994)*.

The trial court's error with regard to this ruling cannot be found to be harmless in view of the importance of the testimony of this witness (and thus her credibility). In this case, [**26] witness credibility was crucial. The jury was faced with two versions of the facts: the victim's account (involving extensive sexual contact between herself and Webb) and Webb's rendition (involving no such contact). The State's witness corroborated the victim's story. Under these circumstances, Webb was prejudiced by the trial court's ruling eliminating his opportunity to attempt to cast doubt on the testimony of the witness through use of the impeachment evidence.

[*462] IV. OVERRULING OF HEARSAY OBJECTIONS

Webb claims that the Superior Court erred in admitting over objection evidence relating to the mother's suffering from trichomoniasis, as testified to at trial by the mother and Detective Edward Hazewski ("Hazewski"). Although admitted without objection, Webb also challenges Hazewski's testimony that Webb informed him of his suffering from the same ailment.

Webb's hearsay claims are without merit. The Superior Court did not abuse its discretion in admitting the mother's statements as to her trichomoniasis infection in that the thrust of the questions addressed to her related to matters within her personal knowledge. [12] See [HN10] D.R.E. 602 ("A witness may [] testify to a matter [where] [**27] . . . evidence is introduced sufficient to support a finding that she has personal knowledge of the matter. . . ."), not to hearsay expert matters; *cf McLain v. General Motors Corp., Del. Supr., 569 A.2d 579, 584 (1990)* ("When a witness testifies based on their own experience, knowledge and observation about the *facts in the case, they* are not giving "expert testimony," as that term is defined by the rules of evidence.[]") (footnote omitted). Hazewski's statement regarding the mother's condition is hearsay. *See* [HN11] D.R.E. 801(c) ("'hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). The statement falls within an exception, however, and thus is admissible. *See* [HN12] D.R.E. 803(3) ("The following [is] not excluded by the hearsay rule . . . [a] statement of the declarant's then existing . . . physical condition . . . ."). Webb's prior statement to Hazewski is a nonhearsay party-admission. *See* [HN13] D.R.E. 801(d)(2)(A) ("A statement is not hearsay [and is an admission] if . . . the statement is offered against a party and is [] his own

statement . . . ."). [**28] Thus, the trial court acted properly within its discretion with regard to its hearsay rulings. [13]

12 The pertinent exchange was as follows:

BY [THE PROSECUTOR]:

Q. After [the victim] was at the hospital was she diagnosed with any kind of illness?A. Trichomoniasis, which I had the same thing. Q. How did you know you had it?

A. Because I had-I went and got tested. They told me to go get tested.

13 Webb's challenge to admission of a documentary record of his treatment for trichomoniasis, promulgated by the Porter Center (a State public health facility), is without merit. [HN14] The State Board of Health has the responsibility of receiving reports, investigating, and treating sexually transmitted diseases. *See 16 Del. C. §§ 702 & 703.* Thus, the Porter Center document did not require authentication. *See* [HN15] D.R.E. 902(4) ("Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to . . . [a] copy of an official record or report or entry therein, or of a document authorized by law . . . and actually recorded . . . in a public office.").

[**29] V. DENIAL OF INSTRUCTION ON LESSER INCLUDED OFFENSE

Webb argues that there was sufficient evidence in the record to justify having the trial court charge the jury on sexual assault, [14] a lesser included offense of first degree rape. In support, he relies on some statements in the victim's testimony that Webb "fondled" her, which he argues supported conviction for sexual assault.

14 *11 Del. C. § 761*, revised by 65 *Del. Laws* c. 494 (eff. July 9, 1986).

Webb's contention fails for deficiency of proof. [HN16] A lesser included offense is appropriate only when "there is a rational basis in the evidence for a verdict acquitting [a] defendant of the offense charged and convicting him of the included offense[]." *11 Del. C. § 206(c).* This standard applies even where the defendant denies any involvement in the charged offense. *Miller v. State, Del. Supr., 426 A.2d 842, 845 (1981).* Where the evidence supportive of a requested lesser included offense is such that no reasonable jury could convict the defendant [**30] of the lesser rather than indicted charge, however, the trial court need not charge the lesser included offense. [15] *Slater v. State, Del. Supr., 606 A.2d 1334, 1338* [*463] *(1992)*; *Ward v. State, Del. Supr., 575 A.2d 1156, 1159 (1990).*

15 [HN17] The defendant is not entitled to a lesser included instruction in order to facilitate rendering of a compromise verdict-where jurors surrender their conscientious convictions in order to reach an unanimous decision-for such verdicts are invalid. *Wilson v. State, Del. Supr., 305 A.2d 312, 317 (1973).*

In the instant case, some parts of the victim's testimony would have supported a conviction for sexual assault. That same evidence was also supportive of the charged offense, however. The evidence supportive of sexual assault overlapped, rather than being mutually exclusive of, the evidence for first degree rape. Having failed to highlight any evidence in the record that provides a rational basis for acquittal of first degree rape and conviction for sexual assault, Webb's [**31] argument must fail.

VI. OVERRULING OF OBJECTION TO PROSECUTOR'S REMARKS DURING CLOSING ARGUMENT

Webb's final argument relates in part to the following comments by the prosecutor during her closing argument: "What bias did Detective Hazewski have? Is he suspect because of the-because he is a cop? Would he lie to you because he is a cop?" This argument was made in response to Webb's earlier suggestion to the jury during his testimony that Hazewski was lying. On appeal, Webb claims the above comments improperly forced the jury to choose between Hazewski's version of the facts and his own. This characterization of the comments is patently incorrect. *Compare Fensterer v. State, Del. Supr., 509 A.2d 1106, 1111-1112 (1986)* (finding improper a prosecutor's statement that necessarily implied that a defendant could be acquitted only if the jury found that certain police officers committed perjury).

Webb also argues that the prosecutor acted in an inflammatory manner by telling the jury that, if "after listening to the instructions and conscientiously applying

them . . . you will restore to [the victim] the dignity that was taken from her so many years ago. [Objection raised.] . . . [**32] And then you will bring back a verdict of guilty." Although this type of argument is of questionable propriety, in this particular case we find that "the prejudicial weight of this comment is not so great as to warrant a reversal." *See Mason v. State, Del. Supr., 658 A.2d 994, 998*, Veasey, C.J. (1995) (holding that defendant's right to a fair trial was not violated by prosecutor's statement that "the victim 'deserves the justice of our system'"); *accord Diaz v. State, Del. Supr., 508 A.2d 861, 866 (1986)* (finding no abuse of discretion in trial court's refusal to declare mistrial, where prosecutor in closing argument asked jury to "'remember that this is [the victim's] only shot at achieving justice as well[]'"). The instructions in the jury charge that the jurors should not treat counsel's remarks as evidence and should not decide the case based on passion, prejudice, sympathy, *the* consequences of the verdict, or any other improper motive support this conclusion.

VII. CONCLUSION

This case, which involves alleged heinous acts occurring almost a decade ago, has already required two jury trials. It is most regrettable [**33] that this ugly case has to be sent back now for yet another trial due to prejudicial violations of the defendant's rights. Constitutional protections, including the one at issue here, are guaranteed to all our citizens in the bill of rights of the state and federal constitutions, however. It is the duty of the independent judiciary in a free society to enforce those protections regardless of the atrocious nature of the allegations of any case. [16]

16 The late Chief Justice Warren E. Burger said: "We know that a nation or a community which has no rules and no laws is not a society but an anarchy in which no rights, either individual or collective, can survive." Warren E. Burger, *Delivery of Justice*, 303 (1990). Woodrow Wilson said, "So far as the individual is concerned, a constitutional government is as good as its courts. No better. No worse." Woodrow Wilson, Constitutional Government in the United States, 17 (1908).

We hold that the Superior Court committed reversible error in two respects: (i) its imprecise [**34] order limiting Webb's access to his counsel was overbroad and thus violated the Sixth Amendment; and (ii) its exclusion of Webb's proffered impeachment evidence of a material State witness constituted legal error. In all other respects, we find that the trial court committed no error. As to the findings of error, we REVERSE Webb's conviction for first degree rape and REMAND [*464] FOR A NEW TRIAL. Jurisdiction is not retained.