

## Witness Coaching – A Prohibited Practice That Carries Significant Consequences for Both Attorney and Client

Litigation Law Alert

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While some litigants expect that their attorney will coach them during depositions or trial proceedings, the NJ Appellate Decision recently reinforced the prohibition against such practice. In Hernandez v. La Fortaleza, Inc., 2024 N.J. Super. Unpub. LEXIS 22 (App. Div. Jan. 5, 2024), a decision that serves as a cautionary tale, where the Appellate Court affirmed the lower court's dismissal of a complaint *with prejudice* following the court's declaration of a mistrial and affirmed an award of legal fees and costs to the defendant. The dismissal – deemed to be the “ultimate sanction” by the Appellate Court – was granted after the plaintiff's attorney was recorded coaching the plaintiff witness during a virtual trial, in blatant contravention of express directives from the trial Judge.

The NJ Court in Hernandez confirmed that severe consequence may result to litigants and their attorneys who ignore or fail to comply with directives not to coach or instruct a witness during breaks in testimony at trial or a deposition. Notably, at the outset of the trial, the plaintiff's attorney represented that he would not speak to his client about her testimony, even during the lunch break. As the trial progressed, the judge instructed the plaintiff's husband, who was in the room with her, to remain silent on multiple occasions. The trial went into recess because of computer problems, at which time the Judge gave clear directives against coaching the witness, who was in the middle of testimony at the time of the break. During the break, the court's back-up recording system was still on, and recorded plaintiff's attorney coaching the plaintiff on the location of her slip-and-fall. Following an objection by Defendant's counsel against coaching, the trial Judge listened to the recording and declared a mistrial. The Trial Judge then went on to grant the defendant's motion to dismiss with prejudice, a drastic remedy, and to award attorney's fees and costs to Defendant.

By affirming the trial court's dismissal and award of fees and costs, the Appellate Division signaled that improper witness

coaching will not be tolerated. Significantly, the Appellate Division found that the actions of the attorney and his client amounted to a fraud on the court that poisoned the judicial process. The Appellate Division affirmed and also held that the public interest was served by the dismissal, stating that the attorney's misrepresentation to the court constituted "a most serious breach of ethics," sending a clear message to attorneys regarding the severe consequences of witness coaching.

Notably, Rule 30(c)(1) of the Federal Rules of civil procedure also prohibit "coaching" during a witness's deposition testimony or testimony at trial, which is often ignored by litigants and their attorneys.

The two "takeaways" from this decision are first, witness coaching between breaks at trial or depositions should be avoided. Proper preparation of a witness prior to trial should prevent any need to later "coach" a witness during the proceeding. Second, an attorney should never communicate about his/her case in the courtroom during a court break, as the back-up system typically remains on, even when the parties are off the record.

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