

Ethical Preparation of Witnesses for Deposition and Trial | Trial Practice

By Erin C. Asborno – December 13, 2011

James Fenimore Cooper originated the phrase "horse-shedding the witness," referring to attorneys who lingered in carriage sheds near the old courthouse in White Plains, New York, to rehearse their witnesses. James W. McElhane, *McElhane's Trial Notebook* at 99 (4th Ed. 2005). The term "horse-shedding," or "wood-shedding," describes conduct that may come close to ethical boundaries, while the term "witness preparation" is generally understood to be a professional obligation. *Id.* at 100; see also Model Rules of Prof'l Conduct R. 1.1. The central question is how to determine the ethical line between "developing testimony so it will be effective and suborning perjury by telling the witness what to say." *McElhane's Trial Notebook, supra*, at 108. In England, it is generally improper for barristers to talk directly to clients or witnesses, thus alleviating the problem for the barrister and placing the responsibility on the solicitor. Here in the United States, we act as both barristers and solicitors; therefore, we must balance our duty to clients with our ethical obligations to the court. *Id.*

Model Rules of Professional Conduct

The American Bar Association's Model Rules of Professional Conduct provide general ethical prohibitions. Model Rule 1.2(d) provides that :

[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

See Model Rules of Prof'l Conduct R. 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer).

Model Rule 3.3(a)(3) requires that a lawyer not knowingly "offer evidence that the lawyer knows to be false." See Model Rules of Prof'l Conduct R. 3.3 (Candor Toward the Tribunal). Model Rule 3.4(b) states that a lawyer must not "counsel or assist a witness to testify falsely." See Model Rules of Prof'l Conduct R. 3.4 (Fairness to Opposing Party and Counsel); Restatement (Third) of the Law Governing Lawyers § 120(1) (2000) (lawyer may not knowingly counsel or assist a witness to testify falsely). It is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." See Model Rules of Prof'l Conduct R. 8.4(c) (Misconduct). A lawyer must balance these professional responsibilities against the obligation to competently represent his or her client. "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." See Model Rules of Prof'l Conduct R. 1.1 (Competence).

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and . . . adequate preparation. The required attention and preparation are determined in part

by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.

See Model Rules of Prof'l Conduct R. 1.1 cmt. 5 (Thoroughness and Preparation).

While the Model Rules set forth general ethical prohibitions, their meaning in the context of witness preparation is unclear. The comment to Model Rule 3.4 states that "[f]air competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, *improperly coaching witnesses*, obstructive tactics in discovery procedure, and the like." See Model Rules of Prof'l Conduct R. 3.4 cmt. 1 (emphasis added).

Witness preparation is typically protected from discovery under the work-product doctrine or the attorney-client privilege. Moreover, beyond the obvious precept that it is improper to instruct a witness to testify falsely, neither the Model Rules nor the comments specify what is allowed or prohibited in preparing a witness. Thus, the boundaries of proper witness preparation are largely "controlled by a lawyer's own informed conscience."

Richard C. Wydick, *The Ethics of Witness Coaching*, 17 *Cardozo L. Rev.* 1, 3 (1995–96).

The Lecture: Crossing the Line

The delicate balance between our duty to clients and our ethical obligations to the court is plainly evident in Robert Traver's 1958 book *Anatomy of a Murder*, which is the story of defense attorney Paul Biegler and his client, Army Lieutenant Frederic Manion, who is charged with murdering Barney Quill, after Quill raped his wife. While initially meeting with his client, Biegler discovers that "a few wrong answers to a few right questions would leave [Biegler] with a client . . . whose cause was legally defenseless." *Id.* at 32. Biegler decides to deliver "The Lecture," described as "an ancient device that lawyers use to coach their clients so that the client won't quite know he has been coached and his lawyer can still preserve the face-saving illusion that he hasn't done any coaching." While "coaching clients, like robbing them" was "not only frowned upon" but "downright unethical and bad, very bad," The Lecture was purportedly designed to allow "some of the nicest and most ethical lawyers in the land" to engage in woodshedding but still claim, "Who, me? I didn't tell him what to say," and later comfort themselves with the thought, "I merely explained the law, see." *Id.* at 35.

Delivering The Lecture while interviewing his client, Biegler first describes the various legal defenses to murder, discounting each in turn until he arrives at the final defense of insanity, which in his opinion "was the best, if not the only, legal defense the man had." *Id.* at 36–46.

"Then finally there's the defense of insanity." I paused and spoke abruptly, airily: "Well, that just about winds it up." I arose as though making ready to leave. "Tell me more." "There is no more." I slowly paced up and down the room. "I mean about this insanity." "Oh, insanity," I said, elaborately surprised. It was like luring a trained seal with a herring. "Well, insanity, where proven, is a complete defense to murder. It does not legally justify the killing, like self defense, say, but rather excuses it." The lecturer was hitting his stride. He was also on the home stretch. . . .

"Maybe," [the client] said, "maybe I was insane." Very casually: "Maybe you were insane when?" I said. . . . "You know what I mean. When I shot Barney Quill." . . . "You mean—you don't remember shooting him?" I shook my head in wonderment. . . . "You don't even remember threatening Barney's bartender when he followed you outside after the shooting—as the newspaper says you did? . . ." I paused and held my breath.

"You don't remember telling him, 'Do you want some too Buster?'" The smoldering dark eyes flickered ever so little. "No, not a thing."

Id. Biegler leads Manion through some crucial questions about why he confessed to the murder and, when satisfied that Manion has answered consistently with the insanity defense, decides that Manion has passed with flying colors and concludes *The Lecture*. *Id.* at 46–49. He comforts himself that "[d]efining the line between preparing witnesses by informing them of a legal theory and improper coaching is a nuanced legal issue." *Nunn v. Noodles & Co.*, 2010 WL 4867591 *6 (D. Minn. 2010).

Restatement of the Law Governing Lawyers

Section 116 of the Restatement (Third) of the Law Governing Lawyers confirms that there is "relatively sparse authority" on witness preparation. Restatement (Third) of the Law Governing Lawyers § 116, reporter's note to cmt. b (2000) (collecting cases). The Restatement provides some guidance, however:

In preparing a witness to testify, a lawyer may invite the witness to provide truthful testimony favorable to the lawyer's client. Preparation consistent with the rule of this Section may include the following:

1. discussing the role of the witness and effective courtroom demeanor;
2. discussing the witness's recollection and probable testimony;
3. revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light;
4. discussing the applicability of law to the events in issue;
5. reviewing the factual context into which the witness's observations or opinions will fit;
6. reviewing documents or other physical evidence that may be introduced; and
7. discussing probable lines of cross-examination that the witness should be prepared to meet.

Witness preparation may include rehearsal of testimony. A lawyer may suggest [a] choice of words that might be employed to make the witness's meaning clear. However, a lawyer may not assist the witness to testify falsely as to a material fact.

See id.

Witness Preparation Generally

A lawyer has a duty to prepare a witness to testify. This preparation may include discussion concerning the application of law to the events in issue. But "[a]n attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it." *Geders v. United States*, 425 U.S. 80, 90 n.3 (1976); *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993). Thus, the prohibition of counseling or assisting a witness to testify falsely also applies to the influence that an attorney may have on the substance of a witness's testimony in the preparation process. "An attorney enjoys extensive leeway in preparing a witness to testify truthfully, but the attorney crosses a line when she influences the witness to alter testimony in a false or misleading way." *Ibarra v. Baker*, 338 F. App'x 457, 465 (5th Cir. 2009) (citing John S. Applegate, *Witness Preparation*, 68 Tex. L. Rev. 277 (1989)). A lawyer may inform the witness of questions to be asked on direct examination, advise the witness of potential questions to be asked on cross-examination, describe the deposition and trial process, and caution against loquaciousness or excessively long narratives. Steven Lubet, *Expert Witnesses: Ethics and Professionalism*, 12 Geo. J. Legal Ethics 465, 471 (1999). A lawyer may tell a

witness that his or her responses during a preparation session are misleading, confusing, unclear, or likely to be misinterpreted or misconstrued; may advise a witness to use powerful language and to avoid jargon; and may suggest other means to help the witness convey his or her meaning.

Preparing a witness to give a rehearsed answer is improper if the purpose for doing so is to mislead the finder of fact or frustrate the inquiring party from obtaining legitimate discovery. A prime example is the document known as the "Script Memo," which was inadvertently disclosed by a novice lawyer to defense counsel, and has been the topic of extensive discussion and debate on the issue of witness coaching. See, e.g., *Abner v. Elliot*, 706 N.E.2d 765, 767 (Ohio 1999); S. Rep. No. 108-118 (July 21, 1993), *Fairness in Asbestos Injury Resolution Act*, at 85–95 (Script Memo reprinted at 109–31); see also "Witness Preparation Memos Raise Questions about Ethical Limits," 14 *Laws. Man. On Prof'l Conduct* (ABA/BNA) 48 (1998) (discussing numerous examples, including *In re Eldridge*, 82 N.Y. 161 (1880) (A lawyer's duty is to "extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know."); *EEOC v. Mitsubishi Motor Mfg. of Am. Inc.*, No. 96-1192 (C.D. Ill. Oct. 23, 1997) ("[T]he 'memory joggers' that Mitsubishi finds so objectionable are probably, in most cases, no more suggestive than Mitsubishi's own communications with its people before a deposition."); Joseph D. Piorkowski Jr., Note, *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of Coaching*, 1 *Geo. J. Legal Ethics* 397, 401 (1987) (surveying the law concerning the practice of suggesting particular words, indicating that lawyers are prohibited only from attempting to influence the intended meaning of a witness's testimony on a material issue)).

The 20-page script memo, entitled "Preparing for Your Deposition," instructs all clients (without regard to truth):

You will be asked if you ever saw any WARNING labels on containers of asbestos. It is important to maintain that you NEVER saw any labels on asbestos products that said WARNING or DANGER. . . . Do NOT mention product names that are not listed on your Work History Sheets. The defense attorneys will jump at a chance to blame your asbestos exposure on companies that were not sued in your case. Do NOT say you saw more of one brand than another, or that one brand was more commonly used than another. . . . Keep in mind that these [defense] attorneys are very young and WERE NOT PRESENT at the jobsites you worked at. They have NO RECORDS to tell them what products were used on a particular job, even if they act like they do. . . . The only documents you should ever refer to in your deposition are your Social Security Print Out, your Work History Sheets and photographs of products you were shown, but ONLY IF YOU ARE ASKED ABOUT THEM AND ONLY IF YOUR BARON & BUDD ATTORNEY INSTRUCTS YOU TO ANSWER! Any other notes, such as what you are reading right now, are "privileged" and should never be mentioned.

S. Rep. No. 108-118 (July 21, 1993), *Fairness in Asbestos Injury Resolution Act*, at 85–95 (Script Memo reprinted at 109–31).

While a lawyer may suggest particular words to a witness, the lawyer may not suggest wording that would cause the resulting testimony to be false. See generally Piorkowski, *supra*, at 401–4; Restatement (Third) of the Law Governing Lawyers § 116, reporter's note to cmt. b (2000). A lawyer may suggest a choice of words to improve the clarity and accuracy of the witness's testimony. See District of Columbia Bar Legal Ethics Comm., Op. 79 (1979) (a lawyer's suggestion of a choice of words that might be employed to make the witness's meaning clear is permissible if the substance of the ultimate testimony, as far as the lawyer knows or ought to know, remains truthful and is not misleading); see also Restatement (Third) of the Law Governing Lawyers §

116 cmt. b (2000). However, a lawyer may not suggest particular words, even though not literally false, that are calculated to convey a misleading impression. See D.C. Ethics Op. 79; Restatement (Third) of the Law Governing Lawyers § 116 cmt. b (2000). A lawyer's word choice when interviewing a witness (for example, the question "Did you see a warning label?" as opposed to the more influential "Did you see the warning label?") can also improperly influence witness testimony. Nicole LeGrande & Kathleen E. Mierau, *Witness Preparation and the Trial Preparation Industry*, 17 Geo. J. Legal Ethics 947, 954 (Summer 2004). If a lawyer's preparation were designed to fabricate a recollection that does not actually exist, rather than to facilitate an actual recollection, the lawyer would likely cross the ethical boundary from permissible preparation into improper coaching; however, it may be appropriate for a lawyer to challenge a witness's apparent recollection if it is inconsistent with other evidence or is illogical or incoherent. *Id.* at 955. Whatever the mode of preparation, it is important that the lawyer avoid suppressing, distorting, or falsifying the testimony given by the witness. D.C. Ethics Op. 79, at 140 (1979). A lawyer must also be guided by ethical principles when reviewing the facts with a witness and refreshing the witness's recollection so as to avoid false testimony. *Id.* at 130–40.

Preparing Corporate Witnesses for Deposition

Most of the general guidelines for witness preparation apply to corporate witnesses. Additional considerations include the type of deposition, the scope of representation, corporate witnesses with inconsistent memories of an event, and the company's litigation position. When testimony pursuant to Federal Rule of Civil Procedure 30(b)(6) is given, a lawyer's preparation of the designated witness may require the lawyer to investigate and supply facts to the witness for the witness to testify concerning those facts. See, e.g., *Black Horse Lane Assocs., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 304 (3d Cir. 2000) ("[W]hen a witness is designated by a corporate party to speak on its behalf pursuant to Rule 30(b)(6), "producing an unprepared witness is tantamount to a failure to appear" that is sanctionable."). Counsel should be aware of the rules in their jurisdiction concerning the scope of questioning. In a recent decision, a magistrate judge held that the questioning of a Rule 30(b)(6) deponent is not limited to those subjects identified in the Rule 30(b)(6) notice. *Am. Gen. Life Ins. Co v. Billard*, 2010 U.S. Dist LEXIS 114961 (N.D. Iowa Oct. 28, 2010). The scope of preparation for a 30(b)(6) deposition requires attention to detail as the scope of inquiry may be very broad.

With regard to the scope of representation, "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." See Model Rules of Prof'l Conduct R. 1.13(a) (Organization as Client). Therefore, when a lawyer speaks to corporate witnesses, he or she is not speaking to his or her clients, but rather to agents of the organizational client. Stephen M. Goldman & Douglas A. Winegardner, *The Anti-False Testimony Principle and the Fundamentals of Ethical Preparation of Deposition Witnesses*, 59 Cath. U. L. Rev. 1, 55 (Fall 2009). The term "corporate witness" generally includes directors, officers, employees, members, shareholders, or other constituents whose testimony will be sought in cases in which their corporate employer is a party. *Id.*; Model Rules of Prof'l Conduct R. 1.13 (Organization as Client). Conflict of interest problems can arise when corporate witnesses testifying on behalf of the organizational client disagree. If a conflict of interest exists between the organization and the individual, the lawyer owes a duty to the organization. See Model Rules of Prof'l Conduct R. 1.13 (Organization as Client). A lawyer who prepares an unrepresented employee of an organizational client for deposition has a duty to advise the employee as to whom the lawyer does and does not represent, as to the lawyer's obligation to the organizational client, and as to the fact that the lawyer will not provide legal advice to the individual other than advice to obtain separate counsel. Lawrence J. Fox, *Defending a Deposition of Your Organizational Client's Employee: An Ethical*

Minefield Everyone Ignores, 44 S. Tex. L. Rev. 185, 189 (2002–2003); Restatement (Third) of the Law Governing Lawyers § 103 cmt. e (2000) ("An adequate clarification may in some instances be required to protect the interest of the organization client in unencumbered representation. Failing to clarify the lawyer's role and the client's interests may redound to the disadvantage of the organization if the lawyer, even if unwittingly, thereby undertakes concurrent representation of both the organization and the constituent.").

Commentators Stephen M. Goldman and Douglas A. Winegardner, in an article on ethical preparation of deposition witnesses, discuss two common issues in corporate witness preparation: (1) reconciling the testimony of corporate witnesses concerning the historical record, and (2) lawyer involvement in the creation of corporate understandings. Goldman & Winegardner, *supra*, at 56. Where corporate employees have inconsistent memories of a historical event, a lawyer may refresh a witness's recollection of the facts and familiarize the witness with relevant documents to ensure that the witness's memory is accurate—but a lawyer must not influence a witness to testify falsely or intimate that it would be in the company's best interest to adopt a particular position. Although the company has hired the lawyer to construct and advance its litigation position, if a corporate witness honestly believes that he or she is correct and his or her testimony is contrary to the company's position, the lawyer must construct the company's position around the damaging contradictory testimony. A similar situation arises when a case presents the historical question of a company's understanding of a contract term at the time the contract was signed, for example. A nonnatural person such as a corporation cannot literally have an understanding. For purposes of a deposition pursuant to Federal Rule of Civil Procedure 30(b)(6), the understanding of the corporation's designated officer, director, or managing agent is attributed to the corporation.

When part of a case involves the client's current understanding of a legal provision, safety action, explanation of past conduct, or other similar issue, a lawyer may work with the client to formulate the position the company will take in litigation. *Id.* at 57. This strategy is contingent on the standard that, when testifying in deposition or at trial as to this understanding, corporate representatives believe that the testimony is true.

The difference between an individual client case and a corporate case is the possibility in the latter that "the differing views from the organization's agents must be reconciled to create a coherent litigation position." *Id.* at 58. A corporation frequently will wait to articulate its litigation position until after it has retained counsel. A coherent litigation position can be created only "to the extent that the accounts of various corporate officials whose opinions matter can be rendered in a coherent and consistent form." The crucial difference between the historical record and present understandings, according to Goldman and Winegardner, is that the lawyer preparing the part of the case involving explanations or justifications need not begin with what his or her clients tell the lawyer, as is required with the historical record.

Particularly in complex commercial litigation, corporations retain lawyers "to create a legally sound and factually plausible case." *Id.* The difficulty is that opposing counsel will attempt to use the depositions of company employees to expose inconsistent individual understandings and explanations, thereby creating an inconsistency in the organization's position. *Id.* at 58–59. When preparing corporate witnesses to testify, lawyers may properly work with their corporate client to formulate the corporation's litigation position—for example, a corporation's present understanding of why it is entitled to damages in a contract dispute. *Id.* at 59.

Preparing Witnesses for Trial

"The pretrial preparation of witnesses will in large measure determine the extent to which the triers of fact are persuaded of the reality of the client's drama and are transported into the circumstances that led to the conflict at the heart of the trial." R. Aron & J. Rosner, *How to Prepare Witnesses for Trial* 4 (1985). In their treatise, Aron and Rosner list the following primary objectives for this preparation:

- help the witness tell the truth
- make sure the witness includes all the relevant facts
- eliminate the irrelevant facts
- organize the facts in a credible and understandable sequence
- permit the attorney to compare the witness's story with the client's story
- introduce the witness to the legal process
- instill the witness with self-confidence
- establish a good working relationship with the witness
- refresh, but not direct, the witness's memory
- eliminate opinion and conjecture from the testimony
- focus the witness's attention on the important areas of testimony
- make the witness understand the importance of his or her testimony
- teach the witness to fight anxiety, and particularly to defend himself or herself during cross-examination

Id. at 82–83.

Lawyers should be aware that the retention of a trial consultant to prepare witnesses does not absolve a lawyer from his or her ethical responsibilities. Model Rules 5.3 and 8.4 expressly state that lawyers are responsible for the acts of others under their control, including non-lawyers. Model Rule 5.3 details those responsibilities as follows: "[A] lawyer shall be responsible for conduct of [a non-lawyer employed or retained by or associated with a lawyer] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if . . . the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved." See Model Rules of Prof'l Conduct R. 5.3(c)(1).

The decision in *Ibarra v. Baker*, 338 F. App'x 457 (5th Cir. 2009), provides a good example of how Model Rule 5.3 can be violated in the expert witness context. In this civil case filed against police officers after the plaintiffs were acquitted of criminal charges, attorneys improperly influenced, through their interaction with a retained expert, fact witnesses' testimony concerning the terms of art "retaliation" and "high crime area." With the attorneys' approval, the expert provided a witness with a highlighted, marked-up copy of the trial transcript in the underlying criminal matter. One witness arrived at his deposition with a page of notes that closely tracked the expert report, including reference to a "high crime area." The witnesses began using these terms as part of their deposition testimony. The court upheld sanctions against the attorneys for improperly influencing a witness to testify in conformity with a novel theory, previously unsupported by fact, which was advanced in the expert's preliminary report.

A lawyer may be held responsible if a retained trial consultant violates Model Rule 3.4(b). A lawyer may also be held responsible for the methods employed by a trial consultant in preparing a lawyer's witness for deposition or

trial. Nicole LeGrande and Kathleen E. Mierau, *Witness Preparation and the Trial Preparation Industry*, 17 Geo. J. Legal Ethics 947, 951 (Summer 2004).

Conclusion

Ethical witness preparation is an essential part of preparing for deposition or trial. The crucial issue is that the lawyer does not falsify, distort, improperly influence, or suppress the substance of the testimony to be given by the witness. When preparing corporate witnesses for deposition and trial, it is important to focus on additional considerations for ethical preparation, such as the type of deposition, the scope of the lawyer's representation, how to address corporate witnesses with inconsistent memories of an event, and how to present corporate understandings. By keeping ethical considerations in mind when preparing witnesses, a lawyer intelligently ensures that his or her client's case will be properly presented.

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