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## The ethics of witness preparation

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Any attorney who handles litigation will encounter a witness who says, "What do you want me to say?" or "Tell me what to say."

This is the beginning of a potential pitfall the lawyer must recognize so that the lines of ethical conduct are not breached. There is a very real difference between adequately preparing a witness and coaching the witness about what to say.

Witness preparation helps a lawyer fulfill several of the roles outlined in the ABA Preamble to the Model Rules.

This includes the ability to act as an advisor, evaluator and advocate.

Witness preparation helps the attorney evaluate the witness and the testimony. The lawyer is then better equipped to advise the client of the intended testimony and the witnesses' ability to convey the information and advocate the strengths of the testimony.

It is also important for the attorney to inform the unsophisticated witness regarding what to expect, how to act properly and the procedures that will be encountered for smooth and effective communication during the testimony. This will assist the witness by providing a reasonable expectation as to what will be encountered and should provide some security during the stressful and unaccustomed experience of testifying.

But even virtuous attorneys may inadvertently cross the line between ethical preparation and unethical coaching, unless they are careful.

### **Preparation v. coaching**

Witness preparation is properly done when the attorney is helping the witness communicate the truth. Witness coaching, on the other hand, is perceived as obfuscating the truth or instructing the witness to lie. Preparing witnesses helps put them at ease and allows them to understand the parameters of their testimony and the proper procedures. Coaching an unsophisticated witness may make the testimony appear contrived, rehearsed, and unreliable.

Witness preparation should occur before the testimony and counsel should not coach the witness during a deposition or during a break in sworn testimony. Everyone who litigates has encountered opposing counsel who did not spend enough time preparing the witness before a deposition and then feels obligated to coach the witness by using rambling objections and utilizing multiple unnecessary breaks. Most jurisdictions look unkindly at this aggressive tactic, which reduces or precludes the likelihood of gaining meaningful information.

Instead, counsel should utilize time during the cross or re-direct examination to help clarify responses which may be misunderstood or misinterpreted and attempt to ethically rehabilitate the testimony.

The following is a real example of an attorney trying to coach a witness who was being challenged when his testimony differed from his signed and verified statement. The dialogue is part of the public court record:

ATTORNEY ONE: Did you read this verification when you signed it?

ATTORNEY TWO: Hold on. I read it to him and explained it during an attorney/client privileged conversation?

ATTORNEY ONE: That's great. Did you read it, this page?

ATTORNEY TWO: He read it in connection with – I read it to him.

ATTORNEY ONE: I'm not sure if you understand this, but you're not the one giving testimony here. My

question is to the doctor, and I want to get the doctor's testimony. I don't want to get your testimony.

ATTORNEY TWO: And I'm telling him not to answer questions regarding this issue because I explained it to him.

ATTORNEY ONE: Doctor, did you read this page before you signed it?

ATTORNEY TWO: I'm instructing you not to answer, Doctor.

Clearly, the question asked by Attorney One did not pertain to a communication between the attorney and his client, but Attorney Two was trying to get his client to indicate it was based on their conversation and thereby protect the client from making an incriminating admission. This was brought to the court's attention and Attorney Two was sanctioned for this conduct.

The way to alleviate this type of unethical coaching is to ask the witness to leave the room while the attorney makes a record. In this case, Attorney Two wanted to coach his client regarding a "medical record" which appeared for the first time during litigation but was not part of the patient's medical chart. Removing the witness stopped the improper coaching from occurring and the testimony given was contrary to the avowal of Attorney Two. The exchange was as follows:

ATTORNEY ONE: So you have no idea how this document got into this lawsuit, other than it would be part of his medical records. Is that fair?

WITNESS: I have no idea how it got in there or didn't get in there.

ATTORNEY TWO: I want to clear this up so –

ATTORNEY ONE: I don't want you to testify at all.

ATTORNEY TWO: I'm stating, I'm stating –

ATTORNEY ONE: I'm going to ask that the witness leave the room if you're going to make commentary on this document.

(WITNESS LEAVES THE ROOM)

ATTORNEY TWO: You're confusing him when you say "produced." He gave me a copy when I met with him. He had a copy. That's what I want – I'm encouraging you to ask him. He'll tell you that he gave me a copy of it.

ATTORNEY ONE: Fine. Bring him back in.

ATTORNEY TWO: See, pretty sinister, isn't it?

(WITNESS ENTERS THE ROOM)

ATTORNEY ONE: Doctor, did you produce this record to your counsel?

DOCTOR: I don't recall. I remember writing it, and I'm reasonably sure I remember putting it in the chart.

This testimony was devastating to the physician's case because it was evidence he tried to manufacture a medical record during litigation which did not exist when the patient was treated.

### **No false testimony**

The ABA Model Rules of Professional Conduct expressly state that a lawyer cannot, "counsel a client to engage, or assist a client, in conduct the lawyer knows is criminal or fraudulent" or "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

If an attorney believes a client or witness called by the lawyer has testified falsely, the lawyer must "take reasonable remedial measures, including, if necessary, disclosure to the tribunal." This means the attorney must encourage the witness tell the truth to the tribunal, and if this does not occur, to inform the court of the false testimony. "A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."

Attorneys owe a duty to the opposing party and counsel as well. The ABA Model Rules state that a lawyer cannot obstruct, alter, destroy or conceal evidence from opposing counsel – or assist another person in doing so.

### **Proper preparation**

There are a number of practical ways an attorney can ethically prepare a witness.

One thing to be aware of is that any information given to a non-client witness will most likely be discoverable by the opposing party. Counsel may elect to show the witness documents during testimony preparation – to help the witness refresh a recollection, for example – but should do so knowing the document may become discoverable even if it is otherwise privileged.

The attorney may want to pose difficult questions to witnesses that they are likely to be confronted with during their testimony. If the case and testimony warrant such attention, a mock examination and cross-examination may help put the witness at ease.

But counsel should not tell the witness what must be stated in order for a successful resolution. This may put an undue influence on the witness to provide false, fraudulent or misleading testimony.

Counsel should also be careful to prepare witnesses separately. This practice will eliminate the risk of collusion or that the witnesses will inadvertently modify their testimony to bolster that of other witnesses. Most jurisdictions do not allow attorneys to communicate one witness' testimony to another witness once the exclusion or sequestration rule is invoked by a party or the court.

Some jurisdictions allow for the reasonable payment of lay witnesses as well as expert witnesses. However, any payment to lay witnesses cannot be predicated on the content of the testimony. As a practical matter, paying a lay witness would most likely be a cause of concern for the jury as well as the judge.

*Paul D. Friedman is a nationally recognized speaker and consultant regarding ethics issues. In addition to his law degree, Dr. Friedman has a master's in bioethics and a doctorate in the comparative ethics of business, law and medicine.*

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