PROGRAM MATERIALS
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Ethics of Witness Preparation: Best Practices for All Lawyers

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Ethical Witness Preparation

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Presenter Background

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Disclaimers

- The views expressed are solely those of the presenter, and should not be attributed to the presenter’s firm or its clients.
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Agenda

- Goals of preparation
- Preparation versus coaching
- Protection of privilege
- Payment for testimony
- Corporate witnesses
- Questions

Goals Of Preparation

Duty To Prepare

In re Stratosphere Corp. Sec. Litig., 182 F.R.D. 614 (D. Nev. 1998):

Lawyer has an "ethical duty to prepare a witness" for testimony.

United States v. Johnson, 487 F.2d 1318 (5th Cir. 1973): "Not improper" to prepare witness, to prevent unexpected responses and to ensure accurate testimony, "so long as the testimony actually given is truthful."

Hamdi & Ibrahim Mango Co. v. Fire Assoc. of Phil., 20 F.R.D. 181 (S.D.N.Y. 1957): "usual and legitimate practice" to confer with witness before testimony.

Witnesses Need Help

ABA Model Rule 1.1 (competence includes “adequate preparation”): Lawyer should be familiar with:

- Case/claims/facts
- Deposition/trial testimony process
- Ethics of preparation (and ethics of testimony)

Beware: the “old hand” witness or the witness who asks no questions.

Beware: last-minute preparation (may be worse than nothing).

Truth, Always

ABA Model Rule 1.2(d) (counseling against crime or fraud); 3.3 (prohibition against offering evidence known to be false); 8.4 (prohibition against conduct involving dishonesty). **But**, make sure the witness:

- Understands each question
- Does not guess/invent facts
- Does not agree to unfair/incorrect statements
- Does not ramble, answering questions not asked
- Does not improperly reveal privileged information

Preparation Versus Coaching

Legitimate Preparation

Restatement of Law Governing Lawyers, Sec. 116 (2000)

- Lawyer may “interview” witness for purposes of preparing witness to testify.
- May discuss context into which observations and opinions of witness may fit.
- May discuss application of law to “events in issue.”
- May discuss “recollections” of the witness.
- May reveal “other testimony or evidence” and ask witness to consider recollections “in that light.”
- May discuss “probable lines of hostile cross-examination.”
- May discuss “effective courtroom demeanor.”
- May suggest choice of words “to make the witness’ meaning clear.”
- May include “rehearsal” of testimony.

Duty To Instruct Witness On How To Comply With Court Orders

Fuery v. City of Chicago, 900 F.3d 450 (7th Cir. 2018):

- Lawyer (among other things) fails to inform client of *in limine* rulings on the boundaries of permissible testimony at trial
- Lawyer appears to adopt strategy that any violations of *in limine* rulings would (at worst) cause testimony to be stricken, but the "bell cannot be unrung" with the jury
- Held: tactic was "unethical" and "extremely prejudicial" to the defendant
- District court properly overturned jury verdict for plaintiff, and entered judgment for defendant

Suggestions Of Words

Hayworth v. State, 840 P.2d 912 (Wisc. 1992):

- Lawyer suggests that witness say he “cut” rather than “stabbed” the victim.
- Permissible: “[A]dvising the witness about the most credible way to present that content—and rehearsing that presentation—have been held not to raise any ethical problems.”

Refreshed Recollection

In re Otero Cty. Hosp. Assoc., Inc., 584 B.R. 746 (Bankr. D. N.M. 2018):

- Lawyer's attempt to refresh witness recollection, despite witness' prior testimony to the contrary
- Held: Permissible, so long as counsel did not do "anything to suggest or encourage [the witness] to testify falsely"
- "An attorney refreshing a witness' recollection in an effort to have the witness recall events more favorably to the attorney's client is not misconduct so long as counsel does not assist the witness to testify falsely"

Confrontation With Contrary Evidence

RTC v. Bright, 6 F.3d 336 (5th Cir. 1993):

- Government lawyers challenge bank VP's story and provide her with a proposed affidavit, including "new facts" learned from other witnesses.
- Lawyers threaten to name witness as co-defendant if she does not tell the "whole truth."
- Witness agrees to some new facts, but denies others; signs affidavit (as modified).
- Held: permissible. If witness were confronted at deposition/trial, lawyers could challenge testimony with other evidence and "attempt to persuade her to change it."
- "[I]n an arms-length interview with a witness" [it is proper] for an attorney to attempt to persuade her, even aggressively, that her initial version of a certain fact situation is not complete or accurate," assuming a good faith basis for doing so.
- Noting: importance of removal of "new facts" to which witness did not agree.

False/Misleading Statements Prohibited

Restatement of Law Governing Lawyers, Sec. 116 (2000):

- Lawyer may not "assist the witness to testify falsely as to a material fact."

Restatement, Sec. 120, Comment (d):

- False testimony includes statements where the lawyer knows that the witness is "only guessing or reciting what the witness has been instructed to say."

D.C. Bar Ethics Op. 79:

- May not "plant testimony" that does not "genuinely reflect the witness' true memory."
- May not "suggest answers that are calculated to mislead."
- Must ensure that testimony is "something the witness can truthfully and properly" give.

Impermissible Coaching

- Influencing witness to "alter testimony in a false or misleading way." Ibarra v. Baker, 338 Fed. App. 457 (5th Cir. 2009).
- Cannot "pour the facts" into a witness, to "teach him what he ought to know" to affect the case outcome. In re Eldridge, 82 N.Y. 161 (1880).

Coaching To Be More “Definitive”

People v. Chandler, 2017 WL 3613947 (Mich. Ct. App. 2017):

- No valid claim of ineffective assistance of counsel where alibi witness could not “state definitively” that defendant was with her at time of crime
- Witness was prepared to testify truthfully (and admitted that she could not be sure): anything more “amounts to coaching at best, and presenting a witness to commit perjury at worst”

Coaching Around The Evidence

People v. Owens, 2018 WL 6422094 (Mich. Ct. App. 2018):

- No ineffective assistance of counsel where lawyer did not show witness surveillance video prior to testimony, in order to prepare witness to "testify in accordance with the video evidence"
- Held: Lawyer properly prepared witness, and had "no obligation to attempt to distort the witness' purportedly honest testimony or to encourage her to present false testimony"

Baron & Budd Memo

S. Rep. No. 108-118 (July 21, 2003), re Fairness In Asbestos Injury Resolution Act; Expert Report of Lester Brickman, In re Garlock Sealing Tech., LLC, No. 10-BK-31607 (Bankr. W.D.N.C.):

- 20-page script on “Preparing for your deposition,” provides instructions to all witnesses (without regard to truth).
- “How well you know the name of each product . . . Will determine whether that defendant will want to offer you a settlement.”
- “Remember to say you saw the NAMES on the BAGS.”
- “It is important to emphasize that you had NO IDEA asbestos was dangerous.”
- “It is important to maintain that you NEVR saw any labels that said WARNING or DANGER.”

Coaching During Deposition

National Bank of Sioux City v. Abbott Labs., Inc., 299 F.R.D. 595 (N.D. Iowa 2014):

- *Sua sponte* sanctions; court "shocked" by reading transcript
- Counsel "repeatedly objected and interjected in ways that coached the witness to give a particular answer or to quibble with the examiner."
- Deposition became a "tag-team match," where the witness gave "Pavlonian responses," whenever attorney objected.
- "You can answer, but only if you know;" "you're not a production person, so don't feel like you have to guess" about an answer.

Coaching During Trial

Golden v. Commonwealth, 2017 WL 1536253 (Ky. Sup. Ct. 2017):

- "[I]t should go without saying that no one in the courtroom during a trial, especially the attorneys trying the case, may signal or otherwise communicate answers to a testifying witness, whether it be for the purpose of guiding the testimony or lending encouragement and moral support."

Yoskowitz v. Yazdanfar, 2005 WL 3441216 (Pa. Ct. Common Pleas 2005):

- Contempt finding where counsel, during a break in direct testimony, spoke with witness about his testimony
- "[U]nder no circumstances should counsel . . . engage in ex parte communications with any witness, especially his own, after he has been sworn in and during the course of his testimony."
- If counsel needed to address the witness after he had been sworn in, "counsel was required to do so in at least the presence of the Court and other counsel"

Consultation During Deposition

Hall v. Clifton Precision Co., 150 F.R.D. 525 (D. Pa. 1993):

- "No support" for view that attorneys may "confer at their pleasure" with witnesses during course of deposition.
- Deposition is meant to be "question and answer conversation," without the need for a "lawyer to act as an intermediary."
- Lawyer improperly insisted that he had a right to review each exhibit with his client before the witness was required to answer questions.
- But see In re Stratosphere Corp., 182 F.R.D. 614 (D. Nev. 1998) (consultation permitted on breaks in testimony, so long as no question is pending).

Inquiry As To Discussions With Counsel During Deposition

- "Nothing improper" about inquiring whether witness met with attorney during break. Daisey v. Keene Corp., 268 N.J. Super. 325 (App. Div. 1993).
- Questions regarding whether testimony was discussed (versus the specific contents of the discussion) may be proper.
- Questions regarding whether discussion concerned privilege issues proper (to ascertain whether privilege properly being invoked). In re Arthur Treacher Franch. Litig., 92 F.R.D. 429 (E.D. Pa. 1981).
- "Note passing" text messages, during the course of a deposition, subject to discovery (over claim of attorney-client privilege). Wei Ngai v. Old Navy, 2009 U.S. Dist. LEXIS 67117 (D.N.J. July 31, 2009).

“Speaking” Objections

- FRCP 30(d)(1): “Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner.”
- Advisory Committee Notes: Objections should be limited to those that might be waived if not made at the time, i.e., “objections on grounds that might be immediately obviated, removed, or cured, such as to the form of a question or the responsiveness of an answer.”
- “Speaking” and “coaching” objections are “simply not permitted.” McDonough v. Keniston, 188 F.R.D. 22 (D.N.H. 1998).
- Prohibition against objections that have “the barely concealed purpose of communicating to the witness how she should answer.” Heller v. Wofsey, Certilman, Haft, Lebow & Balin, 1989 WL79386 (S.D.N.Y. July 11, 1989).
- Objections suggesting that questions are unclear, improper (where witness understands the question). Wright v. Firestone Tire & Rubber Co., 93 F.R.D. 491 (W.D. Ky. 1982).
- Sanctions (additional deposition, at cost of adverse party) appropriate for “blatant obstructionist behavior” during testimony. Vestin Realty Mortg. II Inc. v. Klaas, 2010 WL 4259946 (S.D. Cal. Oct. 25, 2010).

Sequestered Witnesses

- Fed. R. Evid. 615: Judge may sequester witnesses so that they cannot hear the testimony of other witnesses.
- United States v. Moussaoui: Government lawyer “coached” witnesses by providing them with information regarding the conduct of the trial; witnesses barred from testifying; government lawyer referred for disciplinary proceedings.

Supervisory Responsibility

Model Rule 5.1 (Responsibilities of a Partner or Supervisory Lawyer)

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistance)

Same rule with respect to “nonlawyer employed or retained by or associated with a lawyer.”

Duty To Correct False Testimony

ABA Model Rule 1.2, Comments (10)-(11):

- Lawyer's "proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence."
- "If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing."
- "The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court."

Preservation Of Privilege

Attorney Notes Of Witness Interview

United States v. Dico, Inc., 2017 WL 9049852 (S.D. Iowa 2017):

- General rule: "work product privilege extends to notes and memoranda from witness interviews prepared by an attorney or an attorney's agent."
- Here: counsel "interviews" third-party witness through e-mail correspondence, aimed at preparation of a declaration (which was never finalized)
- Is the correspondence between lawyer and third-party witness protected, as work product?
- Held: Yes, the email correspondence is "comparable to participation by a witness in a recorded oral interview"
- "If such investigative correspondence were subject to discovery on demand to opposing parties without any demonstration of need, much of what is not put down in writing would remain unwritten." 30(c): Depositions proceed "as permitted at the trial," under the provisions of the Federal Rules of Evidence.

Refreshed Recollection

- Fed. R. Evid. 612: if a witness uses a writing to refresh memory for the purposes of testimony, a court, in its discretion, may determine that the adverse party is entitled to "inspect" the writing.
- FRCP 30(c): Depositions proceed "as permitted at the trial," under the provisions of the Federal Rules of Evidence.
- Lawyer should not permit witness to review privileged materials in preparation for deposition unless lawyer is prepared to produce the materials.
- However: Insufficient merely to ask witness whether she reviewed documents before the deposition. Waiver should only apply where the witness reviews documents and testifies that the review caused a refreshed recollection. Sporck v. Peil, 759 F.2d 312 (3rd Cir.), cert denied, 474 U.S. 904 (1985); Baker v. CNA Ins. Co., 123 F.R.D. 322 (D. Mont. 1988).

Lawyer Selection Of Documents

- "In selecting and ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case." Sporck v. Peil, 759 F.2d 312 (3rd Cir.), cert denied, 474 U.S. 904 (1985).
- Documents that reveal "mental impressions" of counsel protected. Shelton v. Am. Motors Corp., 805 F.2d 1323 (8th Cir. 1986).
- But see: James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138 (D. Del. 1982): where counsel made decision to educate witnesses by supplying them with work product, adverse party entitled to know the content of that education.
- But see: Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977): notebooks assembled by counsel and furnished to experts to "fill in the details" ordered produced, where otherwise-privileged documents "deliberately employed" to prepare and thus "very possibly to influence and shape testimony."

Documents Shown To Expert

- Fed. R. Evid. 705: Expert may be required to disclose “facts or data” that underlie opinion.
- FRCP 26(b)(4): Communications between attorney and testifying expert subject to disclosure where they reveal “facts or data” that the attorney provided to the expert and “that the expert considered in forming the opinions to be expressed” OR that “identify assumptions” that the attorney provided “that the expert relied on in forming the opinions to be expressed.”
- Boring v. Keller, 97 F.R.D. 404 (D. Colo. 1983): foundations of expert’s opinion not protected by work product.

Documents Provided To Expert Discoverable

- Documents provided to expert are subject to discovery. In re Omeprazole Patent Lit., 2005 WL 818821 (S.D.N.Y. 2005)
- Define by subject matter of report. See American S.S. Owners v. Alcoa S.S. Co., 2006 WL 212376 (S.D.N.Y. 2006)
- Must bear some "probative relationship" to expert's opinion. See Oneida, Ltd. V. United States, 43 Fed. Cl. 611 (Fed. Cl. 1999)

Instructions Not To Answer

- FRCP 30(d)(1): “A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion [for a protective order].”
- Instructions not to answer may be appropriate if counsel believes deposition is being conducted in bad faith, but only for purposes of obtaining a protective order. Quantachrome Corp. v. Micromeritics Instr. Corp., 189 F.R.D. 697 (S.D. Fla. 1999).
- Instructions not to answer, based on lack of relevance, clearly inappropriate. Hearst/ABC-Viacom v. Goodway Mktg., Inc., 145 F.R.D. 59 (E.D. Pa. 1992).

Payment Of Witnesses

Fairness Standard

Model Rule 3.4 (Fairness To Opposing Party And Counsel). Lawyer shall not:

- “unlawfully obstruct another party' s access to evidence”
- “counsel or assist another person to do any such act”
- “falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law”
- Comment: ”not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law”
- Comment: “The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.”

Balance Of Interests

Trial Practices, Inc. v. Hahn Loeser & Parks, 260 So.3d 167 (Fla. Sup. Ct. 2018):

- Concern for “purchasing testimony and offering testimony to color testimony”
- Recognize “the value of a witness’ time” providing “an incentive for witnesses to carry out their duty to assist in the truth-seeking function”
- Fact (not expert) witness may be paid for: (1) reasonable expenses incurred” in attending or testifying at proceedings; and (2) “reasonable compensation to reimburse” for “loss of compensation by reason of preparing for, attending, or testifying” at proceedings.
- Held: Fact witness may be paid for “assistance with case and discovery preparation,” but only if it is “directly related to the witness preparing for, attending or testifying at proceedings.”
- Examples of “unequivocally permitted” assistance include: “time spent in pretrial interviews” of the witness; and “time spent in reviewing and researching records that are germane to his or her testimony.”
- Broader view (permitting payment of fact witnesses for any form of pretrial preparation) “could open the door to purchasing testimony under the pretext of assistance” in case preparation.

Permissible Payments

- Reimbursement of expenses. NYSBA Ethics Op. 962 (2013): "reasonable" travel expenses, "as long as the reimbursement does not exceed the witness' actual out of pocket expenses."
- See ABA Ethics Op. 96-402: Reasonable compensation for time ("direct loss of income" or "the reasonable value of the witness' time"); may include "reviewing and researching records."
- See ABA Ethics Op. 96-402: "The amount of such compensation must be reasonable so as to avoid affecting, even unintentionally, the content of a witness' testimony."
- Former employee: May be paid as a fact witness; may be hired to help attorney understand the client's documents; so long as consulting arrangement is not related to substance of testimony as a fact witness. See N.Y.S.B.A. Ethics Op. 668 (1994).

Impermissible Payments

- Payment to prevent testimony
- Payment based on content of testimony (e.g., change of statement)
- Payment as a contingency of outcome
- State of N.Y. v. Solvent Chem Co., 166 F.R.D. 284 (W.D.N.Y. 1996): prohibition against payment "to testify in a particular way," to "prevent a witness' attendance at trial" or to make the witness "sympathetic" with the party expecting to call him.
- See NYSBA Ethics Op. 547 (1982): Prohibiting payment that "in the slightest degree tends to induce witnesses to testify in favor of" lawyer's clients.

Corporate Witnesses

FRCP 30(b)(6)

- Party may name as deponent a corporation, partnership, association, government agency or other entity.
- Named organization must designate one or more officers, directors or managing agents, or “designate other persons who consent to testify on its behalf.”
- Response to subpoena/notice of deposition may “set out the matters on which each person designated will testify.”
- Person designated must testify as to information “known or reasonably available” to the organization.

Goals of FRCP 30(b)(6)

- Avoid “bandying” requesting party with stream of witnesses with lack of sufficient knowledge.
- Burden on requesting party: specify topics for deposition with “reasonable particularity.”
- Burden on responding party: (object) or produce witness(es) with knowledge of topics.

“Reasonable Particularity”

- “Detail” sufficient to focus on “discrete subject matters” that are “substantively and temporally relevant” to claims at issue. Prokoch v. Catalina Lighting, Inc., 193 F.R.D. 633 (D. Minn. 2000).
- Does not mean “including but not limited to,” which defeats the purpose of the Rule. Tri-State Hosp. Supply Corp. v. United States, 226 F.R.D. 118 (D.D.C. 2005).
- Does not mean broad phrases, such as “any relevant matters.” Alexander v. FBI, 188 F.R.D. 111 (D.D.C. 1998).
- Some “outer limits” of areas for inquiry must be apparent from notice. Reed v. Nellcor Puritan, 193 F.R.D. 689 (D. Kan. 2000).
- But: Courts have sustained notices with multiple topics (where relevant).
- Notice may be the “minimum, not the maximum,” about which deponent may be asked to speak. Detoy v. City of San Fran., 196 F.R.D. 362 (N.D. Cal. 2000).
- Questions “off topic” may not be binding on institution.

Unique Preparation Obligations

- Institution must prepare witness(es) to testify not only on matters known to the deponent, but on matters that reasonably should be known by party associated with deponent. See Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633 (D. Minn. 2000) (witness must be prepared to answer "fully, completely [and] unevasively" on "relevant subject matters").
- Even if institution no longer has a person with knowledge on designated topics, a witness must be provided. See Great Am. Ins. Co. of NY v. Vegas Constr. Co., 2008 WL 818947 (D. Nev. Mar. 24, 2008) (witness must be prepared to testify "on matters not only within his or her personal knowledge, but also on matters reasonably known by the responding entity").
- Witness must be prepared (including with sources beyond the witness' personal knowledge) to answer on behalf of the institution.
- Answers are binding on the institution.

Potential Preparation Sources

- Prior document production
- Prior depositions/testimony
- Interview of co-workers/former employees
- Beware: Use of confidential/privileged materials (which may constitute waiver)

Consequences Of Failure To Prepare

- Not a "corporate memory test." EEOC v. AIG, Inc., 1994 WL 376052 (S.D.N.Y. July 18, 1994).
- Cannot demand that witness address contentions and legal theories "under the guise of requesting facts." JPMorgan Chase Bank v. Liberty Mut. Ins. Co., 2002 WL 31082958 (S.D.N.Y. Sept. 16, 2002).
- But beware: Risk that party claiming lack of institutional knowledge may be precluded from offering evidence on same subject matter at trial. United States v. Taylor, 166 F.R.D. 356 (M.D.N.C. 1996).

Lawyer Witness

- If lawyer is only person available to testify, must be offered. Int'l Woodworkers Local 5-346 v. Chesapeak Bay Plywood Corp., 659 F.2d 1259 (4th Cir. 1980).
- No claim of privilege available, where lawyer is aware of facts responsive to notice. Penk v. Oregon State Bd. Of Higher Educ., 99 F.R.D. 511 (D. Ore. 1983).
- Work product protection not available regarding corporation's positions on issues in litigation. Nutmeg Ins. Co. v. Atwell, Vogel & Sterling, 120 F.R.D. 504 (W.D. La. 1988).

Risks Of “Apex” Depositions

- Goal of deposition often not admissible evidence, but “sound bites.”
- Risk of harassment (for settlement).
- Senior executives often poor deponents (little time to prepare; lack of experience with hostile questioning).
- Do not designate for 30(b)(6) purposes; object if noticed (especially where more “granular” witness is available).

Questions?

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