Witness preparation and counseling: What's ethical – and what crosses the line

Nancy Ripperger

Careful and thorough witness preparation is a necessity for a lawyer who wants to put his or her best case before the trier of fact.

This is because truth told badly can quickly lose a case. The list is endless as to the ways an unprepared witness can harm a case. For example:

1. An unprepared witness may make mistakes because the witness is nervous and is not thinking or listening carefully;
2. Poor behavior upon the part of the witness, such as being argumentative or evasive, may affect the witness' credibility;
3. An inappropriately dressed witness may make a poor impression on the trier of fact; and
4. An unprepared witness may have trouble handling cross examination.

Typical witness preparation will often include the following:

1. Discussing deposition or courtroom procedures, such as who will be attending, where the witness will sit, what the witness should bring with them, who will be questioning the witness, how the witness's testimony will be recorded, etc.;
2. Advising the witness that he or she is under oath and must testify truthfully;
3. Discussing what the witness should do if there is an objection by opposing counsel;
4. Discussing with the witness how he or she should respond if he or she does not understand the question, does not know the answer to a question, or does not recall what occurred;
5. Suggesting proper attire, demeanor, and decorum for the witness;
6. Discussing the witness' recollection of events;
7. Explaining how the law applies to the events in question;
8. Reviewing relevant documents and physical evidence with the witness;
9. Rehearsing the witness' possible testimony; and
10. Discussing how the witness should handle cross examination questions.

"...truth told badly can quickly lose a case."

None of the above activities are inherently wrong or unethical. In fact, in order to provide competent representation, a lawyer must perform most, if not all, of these activities.[1] However, witness preparation, if not done carefully, can lead to ethical violations for the lawyer preparing the witness. The same holds true for certain tactics by the lawyer while the witness is testifying.

Improperly influencing a witness while preparing the witness to testify

One of the major ethical concerns involving witness preparation is improperly influencing a witness' testimony. Rule 4-3.4(b) provides that a lawyer shall not counsel or assist a witness to testify falsely. Similarly, Rule 4-3.3(a)(3) provides that a lawyer shall not knowingly offer evidence that the lawyer knows is false. Obviously these rules address the situations where a lawyer directly advises the witness to fabricate testimony or the lawyer knows the witness intends to testify falsely. It also includes more subtle conduct upon the part of the lawyer and often creates a tension between the lawyer's duty as an advocate to present the best case possible and the truth finding function of the legal system. Below are some examples of witness preparation activities where a lawyer needs to be especially cautious.

Providing the witness with the lawyer's theory of the case is often done with key witnesses. It can help the witness understand what facts are important and relevant and streamline the witness's testimony. However, the lawyer must avoid using this tactic, either intentionally or unintentionally, as a way to influence the witness's testimony. For example, in *In re Rios*, the lawyer was representing the client in a slip and fall case.[2] The client initially advised the lawyer that she had fallen on a church's sidewalk. The lawyer visited the accident site and noticed that the church's sidewalk was in good repair but the sidewalk across the street was badly cracked and uneven. At their next meeting, the lawyer explained to the client that the condition of the sidewalk where the fall occurred was critical to her having a viable cause of action. The lawyer then showed the client pictures of the undamaged church sidewalk and the cracked and uneven sidewalk across the street. The client then advised the lawyer that she had initially

misspoken and she "had really fallen" on the sidewalk across the street. The court found that the lawyer's actions were designed to exert undue influence upon the part of the client to testify falsely.

How can a lawyer avoid this but still adequately prepare the witness to testify? There are several ways. First, the lawyer must emphasize to the witness the duty to tell the truth, including what responsibilities the lawyer has if he or she knows the witness is providing false testimony.[3] Second, the lawyer should delay discussing the theory of the case until after the lawyer has discussed the witness's recollection of the event.[4]

Preparing witnesses in a group setting can be a time saver for the lawyer and can also allow the witnesses to get a complete picture of what occurred. Generally, a lawyer should avoid discussing facts and the legal theories in a group setting.[5] Even when the lawyer emphasizes to the witnesses that they must testify truthfully, the pressure to conform testimony to other witnesses' stories can be overwhelming and may to lead to distorted testimony.[6]

Rehearsing testimony with a witness has many benefits. It allows the lawyer to present evidence in an orderly manner and allows the lawyer to focus the witness on the key facts so that testimony does not wander off into extraneous matters. It also may make the witness feel more comfortable and confident about testifying. Often when rehearsing testimony with a witness, the witness will state things in a manner that the lawyer may not think best advances his or her case. Suggesting that a witness change his or her words when testifying may be permissible providing the lawyer is merely clarifying what the witness has expressed or "cleaning up the image" of the witness. For example, if a witness answers a question with technical terminology, it is permissible for the lawyer to suggest that the witness answer the question using layperson's terms instead. It is also permissible that the lawyer suggest that the witness refrain from swearing or using other impolite words on the stand. Neither suggested modification changes the witness' underlying testimony as to what occurred. This is in contrast to the situation where the lawyer suggests the use of certain words as a means of distorting the witness' substantive testimony. Take, for example, a situation where an EMT is describing the condition of an accident victim. If the EMT states that the victim was exhibiting tachycardia it is permissible to suggest that the witness state that the victim was exhibiting a heart rate over 100 beats per minute. This does not change the substance of the witness's testimony but makes it easier for a layperson to understand. Contrast this with the situation where the lawyer asks the witness if he has ever seen the defendant drive while intoxicated. The witness advises that he has never seen the defendant "appear intoxicated" while driving but has seen the defendant have four or five drinks and then drive. The lawyer should not suggest that the witness answer the question by stating "No, I have never seen the defendant drive while intoxicated." This changes the substance of the witness's testimony.

Often when preparing a witness, a lawyer will find that the witness's memory is fuzzy or even inaccurate about what occurred, especially if the lawyer is asking the witness to testify about events that occurred months or years earlier. It is permissible to refresh a witness's memory by showing the witness relevant documents or by telling the witness about another witness's recollection **as long as the lawyer does not insist or suggest that the witness testify falsely to a material fact.**[7] Stated in a slightly different manner, a lawyer may attempt to persuade a witness that the witness's initial version of the facts is incomplete or inaccurate if, and only if, the lawyer has a good faith basis for believing it and does not coerce the witness into changing his or her testimony.

If a witness's memory is unclear on a topic and is not refreshed by viewing other evidence, it is permissible to advise the witness to answer a question by stating he or she does not recall. However, a lawyer should never suggest or instruct a witness to answer a question with "I do not recall" as a way to avoid harmful information surfacing.

Improperly influencing a witness while the witness is testifying

The problem of improper witness influence is not confined to conduct in preparing the witness to testify. There are numerous ways a lawyer can improperly influence a witness while the witness is testifying. These ways include, but are not limited to, making improper objections, improperly instructing a witness not to answer a question, improperly requesting a break, improper use of errata sheets, and the often joked about situation where the lawyer kicks the witness under the table. The rise in remote testimony has increased the possible ways in which a lawyer can improperly influence a witness and has made the detection of such more difficult.

"These improper tactics are seen more often during depositions as there is no judge present to stop the improper behavior."

These improper tactics are seen more often during depositions as there is no judge present to stop the improper behavior. Often opposing counsel will not seek a protective order or file an ethics complaint unless the lawyer's behavior is especially egregious. As a result, the unethical behavior often goes unchecked.

Improper objections can be used to influence a witness's testimony. Many objections during a deposition are appropriate and necessary to preserve the issue at trial.[8] However, objections can be used in an abusive manner to "mold" a witness' testimony. A "speaking objection" is "one in which a lawyer objects to a question during deposition or trial in order to instruct, coach, or otherwise transmit information to the witness or factfinder."[9] A typical (and often used) example of this occurs when, after the witness is asked a question, counsel for the witness interjects "if you recall." This statement clearly indicates to the witness that the witness should respond with some statement indicating that he or she does not remember. Contrast that with the situation where the lawyer is certain the witness misspoke or obviously did not understand the question. In these situations, the lawyer can openly ask the witness to correct the answer.[10] Similarly,

it is permissible for a lawyer to object when opposing counsel misstates the witness's prior testimony.

Kicking the witness under the table or making obvious facial expressions at the witness when the lawyer dislikes the witness's answer are just as problematic as "speaking objections." The lawyer's actions improperly alert the witness that he or she should change their testimony.

While it should be obvious, it is worth mentioning that while remote testimony is being taken, a lawyer should not surreptitiously communicate with the witness via texts or other means.

Instructing a witness to refuse to answer a question is impermissible influence on a witness unless the instruction is given on the basis of privilege or the question posed is abusive to the witness. If either of these is applicable, the objecting lawyer should state such when instructing the witness not to answer the question.[11]

Requesting a break during a deposition is generally permissible as long as the purpose of the break is not to improperly provide answers to the deponent or to disrupt the flow of the proceedings.[12] Requesting a break after a question has been asked but before the witness answers is very suspect.[13] During a hearing, a lawyer would not be allowed to confer with his or her witness before the witness answers a question. In similar fashion, a lawyer should not use this tactic during a deposition to coach the witness on the answer to the question.

Deposition errata sheets also can pose a problem. Some deponents, at the request of their lawyer, use errata sheets as a means of changing unfavorable testimony. As the court stated in *Greenway v. International Paper Co.*, a deposition is not a "take home examination" and errata sheets should not be used to alter what a witness said under oath.[14] Otherwise, "if that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses."[15] Suggesting that a witness make substantive changes to their testimony via the errata sheet is improper.[16]

Conclusion

Witness preparation and counseling can be fraught with ethical perils if a lawyer is not careful. However, taking the following advice to heart will go a long way in ensuring a lawyer does not cross any ethical line.

> While a discreet and prudent lawyer may very properly ascertain from witnesses in advance of the trial what they in fact do know, and the extent and limitations of their memory, as a guide to his own examinations, he has no right, legal or moral, to go further. **His 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.**[17]

Nancy Ripperger is staff counsel for the Office of Chief Disciplinary Counsel, where she has worked since 2003. As staff counsel, she investigates and prosecutes complaints brought against lawyers. Ripperger is a graduate of the University of Missouri School of Law. Prior to attending law school, she worked as a bank examiner for the Federal Deposit Insurance Corporation. After completing law school, Ripperger clerked for Hon. Ann K. Covington of the Supreme Court of Missouri and she also practiced law with a large firm for several years and handled commercial litigation.

Endnotes

1 Cmt. 5 to Rule 4-1.1 provides that competent handling of a matter includes inquiry into and analysis of the factual and legal elements of the problem and the use of the methods and procedures meeting the standards of competent practitioners.

2 109 A.D.3d 64 (N.Y. Sup. Ct. 2013).

3 The remedial actions include: (1) not letting the witness testify (in civil cases), (2) limiting the examination of the witness to subjects that the lawyer believes the witness will testify truthfully, and (3) advising the court of the false testimony if the witness refuses to correct the false testimony. If the witness is the lawyer's client, the lawyer may need to seek leave to withdraw from the case. See Cmt. 10 to Rule 4-3.3 and ABA Comm. On Ethics and Prof'l Responsibility, Formal Opinion 87-353 (1987).

4 Vianei Lopez Braun, Jo Ann Merica, Philip W. Spencer, & Jordan P. Woody, *The Ethics Of Preparing A Witness*, 39 Corp. Couns. Rev. 23 (May 2020).

5 Discussing general trial or deposition procedures in a group setting should not create a problem.

6 Roberta K. Flowers, *Witness Preparation: Regulating The Profession's "Dirty Little Secret"*, 38 Hastings Const. L.Q. 1007, 1020-021 (2007).

7 See *In re Otero County Hospital Assoc. Inc*, 584 B.R. 746, 780 (Bankr. N.M. 2018), and the Third Restatement of the Law Governing Lawyers, Section 116 (2000).

8 The following are generally considered appropriate objections during a deposition: (1) argumentative; (2) vague and ambiguous; (3) asked and answered; (4) assumes facts not in evidence; (5) compound or misleading question; (6) confusing question; (7) misuse of a hypothetical question; (8) calls for an opinion by a fact witness; and (9) misstates evidence, or mischaracterizes a witness' testimony. Deposition Ethics, Winter 2004 ATLA-CLE 67.

9 Paul W. Grimm, *Typical Problems and Recommended Solutions*, Depo MD-CLE 163 (1990).

10 ABA Comm. On Ethics and Prof'l Responsibility, Formal Opinion 508 (2023).

11 Paul W. Grimm, *supra* note 9.

12 *Ethical Issues in Depositions*, Ann. 2004 ATLA-CLE 1461.

13 ABA Formal Opinion 508, *supra* note 10.

14 144 F.R.D. 322 (W.D. La.1992).

15 *Id.*

16 This tactic usually will not help the lawyer's case anyway. A witness who makes substantive changes to his or her deposition testimony must give reasons for the changes and will be subject to cross examination and impeachment regarding the changes. See Rule 57.03(f).

17 *In re Eldridge*, 82 N.Y. 161, 171 (N.Y. Ct. App. 1880) (bolding added).