Drawing the line on ethical witness preparation

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Earlier this year, a former Fox News employee filed an employment lawsuit against Fox.[1] I was interested in this lawsuit due to its allegations regarding improper witness coaching before a deposition. In fact, the alleged actions of counsel had their own section of the complaint with this heading: To Thrust Exposure for Its Wrongdoing Away from Fox Corp and onto Others, Fox News's Legal Team Coerces Ms. Grossberg to Distort the Truth and Shade Her Deposition Testimony Against Her Personal and Professional Best Interest in the *Dominion* Litigation.[2] What was alleged against both in-house and outside counsel?

The complaint alleged, among other things, that Ms. Grossberg (1) was discouraged from mentioning understaffing or workplace stress and how it interfered with her ability to stay current on tasks; (2) understood she was to respond with "I do not recall" whenever she had the opportunity; and (3) counsel "scowled" or shook their head "no" when she answered hypothetical questions in ways that were truthful but implicated others or put information in context.

My first thought was, who hasn't made a face on occasion when prepping a witness? Sometimes you cannot help cringing when you listen to a witness, not because you want the witness to testify untruthfully but because you know how the witness's words would be misconstrued. My second thought was, telling a witness to truthfully answer "I don't know" is not problematic, but I also found it fascinating what the complainant heard the lawyers to be communicating based upon the allegations. Effectively preparing witnesses to provide testimony is an essential litigation skill. To do so competently and ethically requires a lot of work and forethought, because you must not only understand where the ethical lines lie but also keep in mind how the nonlawyer witness is hearing what you are saying.

With this backdrop, I was pleased to see a recent ethics opinion by the ABA.[3]

Permissible witness preparation

The opinion provides a helpful list of preparatory conduct that is ethical. That list includes:

- reminding the witness that they are under oath;
- emphasizing the importance of telling the truth;
- explaining that telling the truth can include a truthful answer of "I do not recall;"
- explaining case strategy and procedures, including the nature of the testimonial process or the purpose of the deposition;
- suggesting proper attire and appropriate demeanor and decorum;
- providing context for the witness's testimony;
- inquiring into the witness's probable testimony and recollection;
- identifying other testimony that is expected to be presented and exploring the witness's version of events in light of that testimony;
- reviewing documents or physical evidence with the witness, including the use of documents to refresh a witness's recollection of the facts;
- identifying lines of questioning and potential cross-examination;
- suggesting choice of words that might be employed to make the witness's meaning clear;
- telling the witness not to answer a question until it has been completely asked;
- emphasizing the importance of remaining calm and not arguing with the questioning lawyer;
- telling the witness to testify only about what they know and remember and not to guess or speculate; and
- familiarizing the witness with the idea of focusing on answering the question, i.e., not volunteering information.

This list not only delineates ethical witness preparation but also provides a good roadmap for how to competently prepare a witness to be deposed or to testify. Diligence and competent representation of your client generally requires that you approach witness preparation by covering the above topics and doing so in the manner described.

Impermissible witness preparation

The opinion also outlines unethical efforts to improperly influence witness testimony (described in the opinion by various phrases such as coaching, horseshedding, woodshedding, or sandpapering). This list includes:

- counseling a witness to give false testimony;
- assisting a witness in offering false testimony;
- advising a client or witness to disobey a court order regulating discovery or trial process;
- offering an unlawful inducement to a witness; or
- procuring a witness's absence from a proceeding.

Obvious, right? But what about gray areas?

The opinion provides the following guidance regarding "I don't recall." It is appropriate to tell a witness that "I don't recall," when true, is an acceptable answer. The opinion contrasts this with impermissibly telling a witness, "The less you recall, the better." The former is permissible, while the latter encourages a witness to lie under oath about what is remembered.[4] Turning to the allegation in the Fox lawsuit, encouraging a witness to respond "I don't recall" when true is permissible; it may cross the line if the guidance is to respond that way even if it's not true or to respond that way categorically to certain types of questions, regardless of the truth. A nuance to keep in mind here is thinking about your guidance from the perspective of the witness. Are you being clear in your guidance by reiterating that "I don't recall" is acceptable only if true, without suggesting that is a preferable answer notwithstanding its accuracy? Judicial proceedings (which include deposition testimony) are truth-seeking exercises, and it is generally true that the facts are the facts, as they say. Similarly, take care in suggesting word choice. Is your focus on making the witness's testimony clear, or are you assisting a witness in providing false or misleading testimony? The former is permissible, the latter is not. Are you clear with your witness on the distinction?

The ABA opinion discusses examples in which lawyers are implicitly and impermissibly encouraging false testimony, such as telling a witness to "downplay" the number of times prep sessions occurred, encouraging a client to misrepresent the location of a slip-and-fall accident to have a viable claim, or "programming a witness's testimony."

The opinion is somewhat equivocal on scripting testimony.[5] The opinion calls "programming" witness testimony unacceptable but suggests question-and-answer scripts may be permissible, and provides an analogy to drafting witness affidavits. The Restatement has long taken the position that witness preparation can include rehearsal of testimony.[6] The key is that the testimony must be truthful. I've never known anyone to script questions and answers (and it seems like a bad idea and extremely difficult to do), but I have seen witnesses perform poorly because they try to testify the way they think the lawyer wants them to answer questions instead of speaking clearly about how they recall and understand the facts. Again, the bullet-point list of permissible witness preparation actions not only provides good guidance for staying on the right side of the ethical line but also shows the best way to assist the witness in authentically and accurately sharing the information they possess.

Remote proceedings

An important focus of the recent opinion is impermissible coaching during testimony, particularly given the prevalence of remote proceedings, where it is possible to attempt to influence testimony mid-deposition or trial. The opinion starts with the obvious prohibitions—winking at a witness during trial testimony, kicking a deponent under the table, passing notes or whispering to the witness mid-testimony—and then progresses to other forms of signaling that are often impermissible, such as spoken objections that suggest the answer. Basically the opinion provides that what doesn't fly in person does not fly remotely, just because it is easier to do and harder to prevent. And there is very little tolerance for such coaching even if the "coached" testimony is true, given how often it runs afoul of procedural rules and the myriad ways it undermines the credibility of the witness and the proceedings.

The opinion does note one caveat relating to deposition testimony, namely, "openly asking a witness to correct an inadvertent misstatement when the witness obviously misunderstood a question or simply misspoke." The opinion notes this is not impermissible coaching, and in some instances, may be an appropriate remedial measure to correct false testimony.[7] The best way to handle this is in real time, or through limited re-direct at the end of the deposition.

Conclusion

Effectively preparing a witness to offer testimony is a required litigation skill and I hope that newer lawyers are getting the training they need to do so competently and ethically. Becoming proficient is more challenging than it may appear. Actions that interfere with the opposing party's ability to gather information relating to the matter are generally not consistent with the ethics rules and add to the stress of an already stressful situation and practice. I hear from so many that lawyers are losing the ability to be adversarial in a professional manner, and I see that in the complaints that we receive. Further, more courts are sanctioning such conduct, which is often in violation of the court's procedural rules but can also run afoul of several ethics rules. No matter your level of experience, a review of the recent ABA opinion is a helpful reminder of the ethics of witness preparation. ▲

NOTES

[1] Complaint, *Grossberg v. Fox Corp, et. al.*, No. 1:23-cv-02368 (SDNY 3/20/2023), ECF No. 1.

[2] Para. 132-171, at 31-39.

[3] ABA Formal Opinion 508, "The Ethics of Witness Preparation" dated 8/5/2023.

[4] *Id.*, fn. 10.

[5] *Id.*, fn. 19.

[6] The Restatement (Third) of the Law Governing Lawyers, §116 (2000).

[7] Opinion 508, fn. 29.