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FEATURE ARTICLE

Preparing Witnesses Ethically: Considering ABA Formal Opinion 508

Witness preparation is a critical step in litigation, but it can be one of the hardest skills for new lawyers to master. Failure to adequately prepare one's witnesses can violate Rule 1.1 regarding competence, while providing *too much* guidance may violate other *Rules of Professional Responsibility*, such as Rule 3.4 on counseling a witness to provide false testimony to a court.

On August 5, 2023, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 508 to provide guidance on this important issue. The Opinion begins with a warning:

> The distinction between legitimate witness preparation and guidance versus unethical efforts to influence witness testimony, a practice sometimes known as coaching, horseshedding, woodshedding, or sandpapering, can be ambiguous owing in large part to the concurrent ethical duties to diligently and competently represent the client and to refrain from improperly influencing witnesses. For purposes of this opinion, the term coach is used to signify unethical or ethically questionable conduct. The task of delineating what is necessary and proper and what is ethically prohibited during witness preparation has become more urgent with the advent of commonly used remote technologies, some of which can be used to surreptitiously "coach" witnesses in new and ethically problematic ways.

According to the Opinion, certain preparation methods are commonly accepted as ethical. A lawyer may, for instance:

- remind a witness that he or she will be under oath
- emphasize the importance of telling the truth
- explain that telling the truth can include a truthful answer of "I do not recall"
- explain case strategy and procedure, including the nature of the testimonial process or the purpose of the deposition
- suggest appropriate attire, demeanor, and decorum
- provide context for a witness's testimony
- inquire into a witness's probable testimony and recollection
- identify other testimony they expect to be presented, and explore a witness's version of events in light of that testimony

- review documents or physical evidence with a witness, including using documents to refresh the witness's recollection of the facts
- identify lines of questioning and potential cross-examination
- suggest word choices that might be employed to make a witness's meaning clear
- advise a witness not to answer a question until it has been completely asked
- emphasize the importance of remaining calm and not arguing with the questioning lawyer
- advise the witness to testify only about what they're sure about and not to guess or speculate
- coach the witness to focus on answering the question and avoid volunteering information.

Indeed, the Opinion says that lawyers have "a fair amount of latitude" as to how they prepare a witness. Yet it is critical to recognize that the *Rules of Professional Conduct* establish limits to how far a lawyer may go in these preparations.

The Opinion goes on to discuss some of the principal ethical dangers in witness preparation, including a lengthy discussion on special dangers in remote practice. Among the normal ethical pitfalls involving witness preparation, the Opinion divides them into two categories: pre-testimony preparation and witness "coaching" during testimony. As to the first category, the Opinion focuses on Rule 3.4(b). Kansas Rule 3.4(b) states that a lawyer may not:

> (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law…

Examples the Opinion offers of actions that could violate Rule 3.4(b) include:

> [I]t is unethical to tell a witness to "downplay" the number of times a witness and a lawyer met to prepare for trial or to encourage a client to misrepresent a location of a slip and fall accident to have a viable claim. Other representative examples of unacceptable witness coaching and influencing behaviors include programming a witness's testimony, knowingly violating sequestration orders, and encouraging a witness to present fabricated testimony.

Most lawyers will find nothing surprising in this advice.

Nor should most lawyers be surprised at the Opinion's advice on coaching a witness in court or other proceedings:

> Overtly attempting to manipulate testimony-in-progress would

> in most situations constitute at least conduct prejudicial to the administration of justice in violation of Model Rule 8.4(d). Violation of a court rule or order restricting such coaching behaviors would be knowing disobedience of the rules of a tribunal in violation of Model Rule 3.4(c).

Indeed, some of the concrete examples of such prohibited behavior seem almost comical: kicking a witness under the table, passing notes to a witness while the witness is testifying, etc. Nevertheless, issues concerning the coaching of witnesses while they are giving remote testimony are far from amusing.

When proceedings are being carried on remotely, remote parties are unable to see or hear much that they would see and hear in a live proceeding:

> The logistics of trials and depositions using remote meeting technologies are such that a lawyer and a witness may be in one location, with the opposing lawyer at another location, and, in trial situations, an adjudicative officer in yet another. In these circumstances, many things can happen that cannot readily be monitored by participants in the other remote locations. It would be relatively easy for an off-camera lawyer or someone acting at the lawyer's behest to signal a witness with undetectable winks, nods, thumbs up or down, passed notes, or the like. Surreptitious off-camera activities such as texting the witness or other real-time electronic messaging are possible and easily done.

The Opinion specifically cites cases in which lawyers have unethically coached witnesses during testimony using text messages as well as off-camera communications in real time.

What is, perhaps, most interesting about Opinion 508 is that it offers more than a simple list of ethical and unethical activities, suggesting instead that lawyers and judges adopt "systemic" precautions that reduce their likelihood of stumbling into unethical territory. The Opinion offers suggestions that are not ethically required, but might help to avoid behavior that would violate the Rules, such as:

- Skillful cross-examination
- Court orders directing uninterrupted testimony
- Motions to terminate or limit a deposition or for sanctions
- Inclusion of protocols in remote deposition orders, scheduling orders, and proposed discovery plans
- Administrative orders governing the conduct of remote depositions
- Inclusion of remote protocols in trial plans and pretrial orders

These methods of reducing the incidence of unethical coaching of witnesses make good sense, particularly the suggestions regarding the inclusion of protocols in remote deposition orders.

It seems unlikely that we will ever return to 100% in-person depositions and trials. Opinion 508 not only explains some of the dangers involved in remote proceedings, but also provides concrete suggestions to mitigate these problems.

NEW AUTHORITY

When to Go?

One of the most difficult things a person can face as they age is recognizing that one's physical and mental abilities decline over time. For highly motivated professionals, like lawyers, it is often extremely difficult to know when the time has come to step back from active practice. For judges, it may be even more difficult, since they hold positions of even greater responsibility in our profession and in our society.

There are few things sadder than seeing a judge's cognitive faculties declining while he or she refuses to recognize what is happening. It may be possible to hide these changes for a while, but eventually others will notice. Judges, in particular, are surrounded by clerks, court staff, lawyers, and others.

On September 20, 2023, the Judicial Council of the Federal District issued an order suspending a 96-year-old federal judge, Pauline Newman. Judge Newman had served for decades on the United States Court of Appeals for the Federal Circuit, one of the most important courts in the nation. There is no question that Judge Newman served with distinction throughout those decades. However, in recent years, a number of co-workers and other judges had raised questions regarding her continuing mental fitness to serve.

According to the order, every attempt was made to avoid this situation:

> From the out-set, the Chief Judge and other members of the Court approached Judge Newman in a respectful manner to attempt to address a difficult situation with concern for a valued colleague hoping for an informal resolution that would have avoided this process. See March 24 Order at 2; Ex. 1 (emails between Chief Judge Moore and Judge New- man). Multiple colleagues attempted to speak to Judge Newman about her fitness. She refused to speak to them at all or quickly terminated an attempt to discuss the issue. The Chief Judge shared a draft complaint with Judge Newman detailing some of the concerns that had been raised and sought to meet with her. Ex. 1. Judge Newman refused multiple requests for a meeting.

Ultimately, the Council determined that they could not delay action any longer:

> Unfortunately, earlier this year mounting evidence raised increasing doubts about whether Judge Newman is still fit to perform the duties of her office. When such evidence is brought to the attention of the Chief Judge and the Judicial Council, there is an obligation to investigate the matter under the procedures established by the Judicial Conduct and Disability Act of 1980 (Act)—the self-policing mechanism Congress created to address (among other things) judges who may no longer be fit for judicial office. Failing to act under the circumstances here would breach our obligations under the Act, display disregard for the rights of litigants bringing their cases before this Court, ignore the rights of court staff to be free from increasingly dysfunctional behavior in the workplace, and undermine public confidence in the judiciary.

The tone of the order clearly betrays the Council's sadness over the situation.

Judge Newman, a long-serving and distinguished judge, endured a humiliating experience. Her fellow judges and her co-workers have been forced to act in formal proceedings they never wished to initiate. And the judicial system has once again publicly endured a distressing set of events. The underlying facts and their order have all the elements of a Greek tragedy.

Could all of this have been avoided? Clearly, they could have. It may well be that Judge Newman was unable to see the situation clearly, but what of her lawyers? Did they provide her the independent counsel that Rule 2.1 requires? Should we give credence to Judge Newman's allegations that the proceedings against her were ill-motivated? Or is this simply a tragic instance of a human being's unwillingness

to accept the limitations imposed on all us mortals?

Years ago, when I first became dean at the University of Kansas School of Law, a senior colleague came to me and asked a favor: He asked that, when the time came that he was not performing his duties as he would want to, I would tell him so that he could retire. I promised that I would. When the time came, I did, and he retired. He retired at a high point and received all the praise he deserved for a wonderful career.

In contrast, Judge Newman's tragic situation serves as a warning to us all. As the Bible says, "there is a time to every season." Let us all be so fortunate as to know when our season has passed.

ETHICS & MALPRACTICE RESEARCH TIP

New Articles from *The Current Index to Legal Periodicals*

1. Jessica De Perio Wittman & Kathleen Brown, *Taking on the Ethical Obligation of Technology Competency in the Academy: An Empirical Analysis of Practice-Based Technology Training Today*, 36 Geo. J. Legal Ethics 1 (2023).
2. Justine Rogers, *Legal Ethics Education: Seeking—and Creating—a Stronger Community of Practice*, 36 Geo. J. Legal Ethics 61 (2023).

These are two useful articles on how law schools can strengthen legal ethics at the Bar.

A BLAST FROM THE PAST

A Lie, Acted or Spoken

A man may argue for any conclusion without asserting his belief; but when he adds to his argument gesticulations and expressions of emotion, he tells us of a conviction so pervading as to have extended from the region of the intellect to that of affections. We know now no difference between a lie acted and a lie spoken.

— David Mellinkopf, *The Conscience of a Lawyer* 225 (1973) (quoting The Jurist, No. 675—Vol. XIII, Dec.15, 1849, at 498).

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