

THE ETHICS OF PREPARING A WITNESS

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I. Preparing a Witness for Deposition or Trial:

While depositions may be familiar to many lawyers, direct and cross examination of a witness during trial may be less familiar. And understandably, a non-lawyer witness may be downright intimidated by the prospect of testifying at either a deposition or trial. Because of potential lack of familiarity by both the lawyer and the witness, lawyers have a duty to diligently prepare a witness before a deposition or trial.

The most important thing to remember when preparing a witness is to schedule plenty of time with the witness before the deposition or trial. The preparation session(s) have several different purposes and should not be rushed.

The following should be covered by the lawyer during the preparation session(s) with the witness:

1. Familiarize the witness with the deposition and/or trial process. If the witness has never been deposed or testified before, this is an especially important task. Don't forget what may seem like minute details like time and place. If you have an exceptionally nervous witness or a juvenile witness, it may be worth meeting at the court house beforehand so that they can see where they will be sitting and where you will be standing when you are asking questions. If it is an important witness, you will want to videotape some of the questioning, and let the witness see how he or she is coming across on camera.

2. Most importantly, the witness' purpose is to tell a story. Whether it is during a deposition or at trial, the witness needs to convey in a calm and professional manner what happened that brought about this law suit. It is not the lawyer's job to change the witness' story. *See below for Ethical Considerations for Preparing the Witness for Deposition and Trial.* However, it is the lawyer's job to help the witness find an effective way to communicate that story. When preparing a witness, it is especially important to break down the witness' testimony into sections. Begin with introducing the witness (include what is appropriate for your case and situation, i.e., name, address, education, employer, etc.). Then move to discussing how they are affiliated with the suit, and what action they took that involves them in the suit. It is important to go over this part repeatedly. If the case involves a highly technical industry, help the witness find ways to talk about their industry in a way that a high school student can understand. Help the witness talk about what happened in a way that is easily accessible to someone who does not know anything about their industry.

3. Discuss cross examination or questioning by opposing counsel. Explore with the witness what to expect during questioning. Spend time playing the role of opposing counsel and questioning the witness. Think about whether you have seen opposing counsel in trial or in a deposition before. If you are unsure, ask other attorneys before meeting with the witness to get an idea of the questioning style of opposing counsel. Try to mimic their style when practicing with the witness. It is important for a novice witness to not be surprised by an overly aggressive opposing counsel during deposition and especially in front of a jury at trial. Let the practice session

be the opportunity for the witness to experience different styles of questioning. Explain to the witness that there may be objections, and how you would like them to handle those objections. During a deposition, you may want them to wait for your okay before answering after an objection has been made. Rather than trying to explain the difference between “overruled” and “sustained,” you may want to tell them to ask the judge whether to answer the question or not.

4. Go over the key documents that will likely be presented to the witness, and discuss the lines of questioning that are likely to arise. Try to think “outside the box” and imagine unexpected ways that opposing counsel might try to use the documents that have been produced to attack the witness. If preparing the witness for trial, do not forget to prepare the witness for the predicate that must be laid before the document can be admitted into evidence. Make sure the witness understands the purpose of the predicate, and what you are trying to establish.

5. Talk to the witness about how he or she feels about the case. Try to get the witness to open up and talk about whether he or she feels responsible for the lawsuit, wishes things had been done differently, or is scared about testifying regarding certain topics. This is the time to be empathetic and supportive. You want the witness to go into the deposition or trial feeling calm and confident. If there are problem areas in the expected testimony (and there usually are), talk about how to frame the answers, and help the witness develop a unifying theme for his or her testimony. Talking to the witness can also help you better understand and frame your case. This is your opportunity to talk to live people that actually made the decisions in the case. Use this opportunity to better understand exactly what happened in this case, and understand whether you are actually prepared for the deposition or trial.

The following are examples to better explain how to prepare a witness for a deposition or trial:

Scenario #1: A department director had to select someone in her department to be laid off. The employee selected was over 40, and no severance was offered in exchange for a release of claims. The employee sued for age discrimination.

Witness Preparation Tips: The department director will likely be a key witness for your case in this scenario. When preparing the director for deposition and/ or trial, it will be very important to begin by exploring the department director’s feelings and reasoning behind the decision. If the director agonized over the layoff decision and almost laid off a younger employee, talk about the reasoning behind picking the older employee. Counsel the director to take ownership of the decision and clearly articulate the objective factor (seniority with the company, disciplinary history, etc.) that made the difference.

Conversely, if the department director thinks the laid off employee was clearly the worst employee in the department and is offended that the lawsuit was even filed, work on perfecting the tone and presentation of the testimony. Perfect the director’s presentation so that there is not a tone of animus toward the employee. Given the director’s frustration with the implication of discrimination, make sure that they are prepared to remain calm and professional in demeanor throughout questioning, regardless of the style of cross examination.

Work with the witness on telling his/her story. Make sure that the director presents the facts calmly and objectively. Make sure the witness is prepared to explain clearly why they made the decision

they did, and why the employee's job performance was assessed fairly and objectively.

Scenario #2: An HR director investigated a harassment allegation, but found no support for the allegation. The alleged victim later resigns. Later, the HR director responded to the alleged victim's unemployment claim and EEOC charge. The alleged victim now files a constructive discharge case, and the HR director is scheduled to be deposed in that case.

Witness Preparation Tips: Given that the HR director rejected the initial complaint and handled the unemployment claim and EEOC charge, it is likely that he/she is feeling defensive and nervous about this lawsuit. This should be the first issue discussed with the director at the preparation meeting. It will be important to build up the director's confidence in the decisions they made from the outset.

Explain to the director that the law does not require a perfect investigation. The investigation will always be attacked by opposing counsel, and questioning about how the investigation was conducted is a routine and common line of questioning. Work with the witness on his/her demeanor for the deposition. For this kind of a case, videotaping preparation may be a key component to adequately preparing. Filming the witness' responses to hard questions may allow the witness to see that they are responding in a defensive or angry manner to the questions. Make sure that the witness knows that it is okay to pause and think for a second before answering a question, and that it is okay to ask to take a break if he/she is losing their cool.

This scenario also stresses the importance of listening to the witness and fully understanding what happened in the case. If after listening to the witness, you come to understand that the investigation was less than ideal, you may need to re-frame your case and the witness testimony. Again, do not tell the witness to change their testimony. Instead, frame the witness' testimony in a way that suggests that the witness made the best decision with the information available at the time. Tell the witness not to speculate as to what could have been done differently and not to get lost in opposing counsel's "if-then" scenarios. Stick to the actual facts at hand. Again, this scenario shows how witness preparation can have broader implications for your entire case. In this case, maybe the entire theme of your entire case shifts to being "hindsight is 20/20, but the director (and company) made the best decision given the information available." However, you only get the knowledge that you need to shift your trial strategy based on a thorough witness preparation in this case.

Finally, after a long day of preparation, most witnesses will feel overwhelmed with information. We like to provide the witness with a one or two page summary of important points to take home. A sample summary is attached as Exhibit A.

II. Ethical Considerations in Preparing a Witness for Deposition and Trial:

"An attorney enjoys extensive leeway in preparing a witness to testify truthfully, but the attorney crosses a line when she influences the witness to alter testimony in a false or misleading way." *Ibarra v. Baker*, 338 F. App'x. 457, 465 (5th Cir. 2009). "An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it." *Geders v. United States*, 425 U.S. 80, 90 n.3 (1976).

Selected excerpts from the Texas Disciplinary Rules of Professional Conduct are attached as Exhibit B. The Rules state that a lawyer should zealously pursue a client's interests, while also remaining within the bounds of the law. See Preamble, Section 3. In Section 7 of the Preamble, it is acknowledged that conflicting responsibilities may be encountered when there is tension between the lawyer's responsibilities to a client and the lawyer's responsibilities to the legal system.

It is clear that a lawyer may not assist or counsel a client to engage in conduct that the lawyer knows is criminal (e.g. perjury) or fraudulent. See Rule 1.02. Likewise, a lawyer shall not counsel or assist a witness to testify falsely. See Rule 3.04. A lawyer owes a duty of candor to the tribunal, and may not offer or use evidence that the lawyer knows to be false. See Rule 3.03 (5). However, the Rules of Professional Conduct make a distinction between statements the lawyer knows are false and statements the lawyer finds untrustworthy. If a lawyer only believes that a witness' testimony or evidence is untrustworthy, the lawyer should "allow the fact finder to assess its probative value." See Rule 3.03, Comment 15.

As both the U.S. Supreme Court and the 5th Circuit Court of Appeals state, lawyers must balance those ethical considerations with their responsibility and duty to use the technical and legal tactics that would best achieve the client's objectives. See Rule 1.02, Comment 1. A lawyer has a duty to and may provide advice and guide a client when the client's course of action may lead to adverse legal consequences and would be in the client's best interest. See Rule 2.01, Comment 5. Therefore, lawyers have a duty to make decisions about the tactics that should be used during depositions and at trial. But most importantly, lawyers have a duty to advise and prepare witnesses so long as it is in the best interest of the client.

As advocates, we often seek to mold lay individuals, with no legal experience, into smooth-talking story tellers. However, a primary step in preparing a witness for deposition or trial should be to lay a foundation of truth. A witness needs to understand that their testimony must be beyond reproach because the case depends on it, and also because you are ethically bound to present the truth as a lawyer. If a witness is shown to lack credibility, even on a minor point, the judge or jury may lose faith in that witness and completely disregard their testimony. If a witness lacks credibility during deposition, opposing counsel may dig deeper during discovery or not be open to settling, which could ultimately cost the client more money. Maintaining the credibility of key witnesses is a crucial task.

In addition, lawyers must always be aware of our role in preparing the witness. A lawyer's role is not to change the witness' story or alter the truth. There are many ethical ways to help a witness prepare for a deposition or trial including: helping the witness choose more precise or persuasive words, making the witness aware of their demeanor, going over the chronology of events in order to establish exactly when important events happened, discussing and conducting training on deposition and trial "traps," and rehearsing testimony and watching the practice sessions.

As is the case with all ethical considerations, it is important to keep in mind that The Texas Disciplinary Rules of Professional Conduct are "minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action." See Preamble, Section 7. However all lawyers should set their aspirations much higher.

The following are examples to better explain the ethical considerations in preparing a witness for a deposition or trial:

Scenario #1 (*see above for original facts*):

While preparing the department director for trial, you (the lawyer) conduct a mock cross examination. You ask the director if he/she knew that the employee was over 40 at the time of the layoff. The director responds, “No.” Having gone through all the documents that your client sent you, you know that the department threw the employee a 50th birthday party, and that the director signed the birthday card “Happy 50th.” However, this birthday card was never disclosed to opposing counsel, and you’re not sure that the director ever made it to the actual birthday party. It really helps your case for the director to not know that laid off employee was over 40 at the time of the layoff. What should you do?

Witness Preparation Tip: As outlined in the Texas Disciplinary Rules of Professional Conduct, Rule 1.02, Comment 1, the lawyer has a duty to give advice when a client’s course of action may lead to adverse legal consequences. Even though the birthday card was not turned over during discovery, opposing counsel may have the actual birthday card or the Plaintiff may remember the director being at the birthday party. Both are evidence that could be called on rebuttal, and both could hurt the director’s credibility at trial. You must take action.

Do not be quick to assume that the director has nefarious motives. Maybe the director simply forgot about the birthday party. Simply ask the director about the birthday card and the information that you know. Maybe it will “jog” the director’s memory about the correct answer to your question. However, if you feel that the director was lying or intentionally being misleading with his/her answers, this may be a good time to have a discussion about the importance of telling the truth not only for the case but also for you as a lawyer. If your client is a corporate client, this may also necessitate a conversation with your corporate contact about potentially not using the director as a witness, and what that means for the case as a whole.

Remember (1) a lawyer may not assist in conduct that the lawyer knows is perjury or fraudulent; (2) a lawyer owes a duty of candor to the tribunal, and may not offer or use evidence that the lawyer knows to be false. See Rules 1.02 and 3.03.

Scenario #2 (*see above for original facts*):

While preparing for the deposition, you ask the HR director what he/she did to investigate the harassment allegation. You ask questions as opposing counsel. After listening fully to everything that the HR director did, you ask yourself whether the HR director actually did anything to investigate the allegations. You start to get nervous that there will not be any way to defend against the claims being made in the constructive discharge case. The HR director asks you what they should say during the deposition since they did not actually do much investigation. What should you do?

Witness Preparation Tip: These kinds of situations are exactly what the U.S. Supreme Court and the 5th Circuit were talking about in *Geders v. United States* and *Ibarra v. Baker*. However, the courts and the Texas Disciplinary Rules of Professional Conduct make the lawyers role in this scenario very clear. The lawyer can help the HR director present their investigation in the best way possible. The HR director’s investigation method, including who was spoken to, should be

clearly laid out during the deposition, and how the HR director came to their conclusions should be clearly stated. However, there is no way for the lawyer to fix the fact that the HR director did not really do an investigation. The Rules of Professional Conduct are clear on the fact that there is not a way for the lawyer to invent an investigation that did not happen.

Instead in this scenario, the lawyer has another ethical duty to the client under Rule 2.01 of the Texas Disciplinary Rules of Professional Conduct. The lawyer should disclose to the corporate client what happened with the investigation, and advise the client of the likely outcome of this case given those facts.

III. Guidelines to What is Ethical and What is Not:

Beyond the general precept that it is improper to instruct a witness to testify falsely, neither the Texas Disciplinary Rules of Professional Conduct nor the comments specify what is allowed and what is not in preparing a witness. There is a fine line between preparing testimony so it will be effective and improperly coaching a witness as to what to say.

What a Lawyer CAN do:

- A lawyer may suggest a choice of words to make the witness' meaning clear, provided that the change is consistent with the witness' genuine memory of the facts.
- A lawyer may tell a witness that her responses are misleading or unclear or likely to be misinterpreted, and may explore with the witness other means to help the witness convey her meaning.
- When witnesses, particularly in a corporate employee setting, have inconsistent memories of an historical event, a lawyer may familiarize a witness with relevant documents and refresh a witness's recollection of the facts to ensure that the witness' memory is accurate.
- An attorney may attempt to persuade a witness that her initial version of a fact situation is incomplete or inaccurate if the lawyer has a good faith basis for believing it is so.

What a Lawyer CANNOT do:

- A lawyer cannot prepare a witness in a manner designed to fabricate a recollection that does not actually exist, versus facilitating an actual recollection.
- A lawyer may not present testimony in a civil matter when she knows it is (even unwittingly) false.
- A lawyer may not intentionally attempt to cause the witness, whether knowingly or unwittingly, to mislead the factfinder.
- A lawyer may not engage in conduct that she knows or believes creates a substantial risk of being perceived by a witness as an invitation to testify falsely.
- A lawyer cannot influence a witness to testify falsely or intimate it is in a corporation's best interest to adopt a particular position if the witness honestly believes she is correct. If the witness' testimony is contrary to the company's position, the lawyer must construct a strategy around the damaging testimony.

EXHIBIT A

Sample Take-Home Summary

Deposition of Jane Smith, HR Director

Patty Plaintiff v. Big Bank – Sexual Harassment Case

A. General Deposition Hints:

1. Be as truthful and precise as you can.
2. Court reporter will give you an oath and then take everything down verbatim.
3. Be prepared for repetitive, offensive or invasive questions.
4. Be prepared for irrelevant issues.
5. Aside from communications with Big Bank’s attorneys, all else is fair game.
6. I will instruct you not to answer if the question involved privileged information.
7. Otherwise I can only say “objection, form” or “objection, nonresponsive.”
8. Really listen to the question, go slowly, and answer ONLY that question.
9. “Do you know what time it is?” – “Yes” (don’t volunteer “10 am”).
10. Short answers are best.
11. Stay calm and polite and ask to take a break as needed.
12. Do not try to persuade or argue - you can’t “win” a deposition.
13. If the attorney will not let you finish an answer, it is fine to say “may I finish?”
14. “May I explain?” is another option.
15. If more clarification is needed I will deal with it at the end of the deposition.
16. Otherwise I will “reserve my questions until the time of trial.”
17. Avoid estimates or guesses. “I don’t know” and “I don’t recall” are good answers.
18. Other good answers are “yes,” “no” and “Would you rephrase your question.”

B. Likely areas of questioning:

1. What you remember about Patty's complaint
2. Whether you took Patty's complaint seriously
3. Whether you considered it to be a sexual harassment complaint
4. Whether she said anything about unwanted touching
5. Why you acted as the investigator and why you were qualified to do so
6. Who you interviewed and why
7. When and how you did the interviews
8. What your conclusions were
9. What the notes in your file mean
10. Whether you told her supervisor not to retaliate
11. Whether you told Patty to report any perceived retaliation
12. Whether you scheduled follow-ups with Patty
13. What Big Bank's policies are regarding harassment / discrimination / retaliation
14. How Big Bank employees are trained on those policies

C. Overall themes for your testimony:

1. I followed Big Bank policies and relied on my training, expertise and judgment as an HR professional.
2. I stand behind the investigation and believe I reached the right conclusion.

EXHIBIT B

EXCERPTS FROM THE TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Preamble: A Lawyer's Responsibilities

3. In all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law. In doing so, a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Texas Disciplinary Rules of Professional Conduct or other law.

7. In the nature of law practice, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from apparent conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interests. The Texas Disciplinary Rules of Professional Conduct prescribe terms for resolving such tensions. They do so by stating minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of these Rules many difficult issues of professional discretion can arise. The Rules and their Comments constitute a body of principles upon which the lawyer can rely for guidance in resolving such issues through the exercise of sensitive professional and moral judgment. In applying these rules, lawyers may find interpretive guidance in the principles developed in the Comments.

Rule 1.02 Scope and Objectives of Representation

(c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.

(f) When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Rule 3.03 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;
- (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;
- (3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;
- 4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (5) offer or use evidence that the lawyer knows to be false.

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

(c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

Comments:

1. The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal.
2. An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer... The obligation prescribed in Rule 1.02(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation.
5. On occasion a lawyer may be asked to place into evidence testimony or other material that the lawyer knows to be false. Initially in such situations, a lawyer should urge the client or other person involved to not offer false or fabricated evidence. However, whether such evidence is provided by the client or by another person, the lawyer must refuse to offer it, regardless of the client's wishes. As to a lawyer's right to refuse to offer testimony or other evidence that the lawyer believes is false, see paragraph 15 of this Comment.
15. A lawyer may refuse to offer evidence that the lawyer reasonably believes is untrustworthy, even if the lawyer does not know that the evidence is false. That discretion should be exercised cautiously, however, in order not to impair the legitimate interests of the client. Where a client wishes to have such suspect evidence introduced, generally the lawyer should do so and allow the finder of fact to assess its probative value. A lawyer's obligations under paragraphs (a)(2), (a)(5) and (b) of this Rule are not triggered by the introduction of testimony or other evidence that is believed by the lawyer to be false, but not known to be so.

Rule 3.04. Fairness in Adjudicatory Proceedings

A lawyer shall not:

(b) falsify evidence, counsel or assist a witness to testify falsely, or pay, offer to pay, or acquiesce in the offer or payment of compensation to a witness or other entity contingent upon the content of the testimony of the witness or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

- (1) expenses reasonably incurred by a witness in attending or testifying;
- (2) reasonable compensation to a witness for his loss of time in attending or testifying; or
- (3) a reasonable fee for the professional services of an expert witness.