From Witness Prep to Dep: Temper Your Inner Coach

By Brian A. Zemil, Litigation News Associate Editor

There is a coach in all of us. Despite this fact, courts require lawyers to suppress their coaching voices to prevent improper witness influencing that changes the facts. There are fine contours of the coaching threshold that all lawyers must toe when preparing witnesses, making deposition objections, and consulting deponents during breaks.

Witness preparation is the first coaching crossroad for lawyers. Although every lawyer has a duty to prepare a witness to testify, the Supreme Court tells us to "respect the important ethical distinction between discussing testimony and seeking improperly to influence it." A lawyer must, therefore, "extract the facts from the witness, not pour them into him," says a New York appellate court. ABA Model Rule of Professional Conduct 3.4(b) also forbids assisting a witness to testify falsely, and comment 1 to Model Rule 3.4 emphasizes how the prohibition on "improperly coaching witnesses" secures "[f]air competition in the adversary system."

Based on these settled principles, courts typically draw a bright-line distinction between helping witnesses provide accurate testimony and facilitating false or misleading testimony. Nevertheless, we all prepare our witnesses *to* influence their testimony. The critical question then is whether that influence changes the facts or just the *presentation* of the facts. Collaboration with witnesses to educate, inform, shape, and rehearse their testimony to support their *credibility* increases our odds of answering that question properly.

The opportunity to coach must end once a deposition begins. Courts uniformly prohibit the use of objections as coaching opportunities, but some courts differ on exactly what is included in "coaching." Federal Rule of Civil Procedure 30(c)(1) requires that "[t]he examination and cross-examination of a deponent proceed as they would at trial." In addition, Rule 30(c)(2) mandates concise, non-argumentative, and non-suggestive objections. Lengthy speaking objections and interjections of "if you know" constitute the type of obstructive conduct that improperly signals how a witness should answer questions. Courts also criticize coaching through objections that elicit a pattern of similar mechanical responses that indicate "coached" answers.

Another coaching prohibition triggers when consulting with the witness during deposition breaks. As a general matter, while a question remains pending, an attorney may request a break *only* to confer with a deponent to determine whether a privilege applies. Beyond that situation, courts have split on whether the attorney-client privilege applies during breaks, including meals. Two landmark decisions set forth the opposing approaches.

The first decision, *Hall v. Clifton Precision*, drew a bright-line prohibition on consultation during breaks. Relying on Rule 30(c)(1), the court reasoned that the same rules apply during trial and depositions. The court held that during breaks, a witness and an attorney should not discuss matters other than privilege, and if they do, the contents of those discussions are discoverable. Consultations about privilege during breaks should also end with an attorney placing the subject of the consultation on the record and the decision about whether to assert a privilege.

The court in *Hall* sought to prohibit the use of deposition breaks to coach deponents about the substance of their testimony. While acknowledging the lawyer's duty to prepare a client for deposition, the court concluded that, once the witness is sworn, the right to counsel gives way to an unimpeded examination for the truth.

The *In re Stratosphere Corp. Securities Litigation* decision exemplifies the opposing viewpoint. There, the court rejected *Hall*'s strict requirements, which did not differentiate between improper witness coaching and deponents' right to counsel. The *Stratosphere* court found that, "to fulfill their ethical duty to prepare a witness" or to determine whether to assert a privilege, attorneys may consult with their client during a scheduled recess to ensure that the "client did not misunderstand or misinterpret questions or documents." The court further held that the attorney-client privilege protects the substance of such conferences.

The case law and rules all agree that from witness prep to dep, we cannot coach. So, set your intention not to coach and analyze whether your conduct with your witness conforms to your intention. Also, consider these practice tips:

- Prepare your witness well; this will reduce answers that tempt you to coach after the testimony begins.
- Before the deposition, contact opposing counsel to discuss conference break rules.
- Do not take a break while a question is pending.
- During a deposition, confer during a break with a witness on any non-privileged matter when there appears confusion over a question, apparent testimonial mistakes, or instances of false or misleading answers, and consider if worthy to rehabilitate the witness. If you have these discussions, however, you should assume they are discoverable.
- Make appropriate one- or two-word objections.

From prep to dep, champion your client's cause through a supporting role by educating, informing, and shaping the testimony to present a credible set of facts that advances your legal theories and the likelihood of success.

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Published in *Litigation News* Volume 44, Number 1, Fall 2018.