



“Hired Gun” or “Shooting Blanks”? Balance Between the Two and Other Ethical Considerations in Preparing Expert Witnesses to Testify at Deposition and Trial

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I. Introduction

The following materials and our seminar presentation focus on the practical and ethical considerations that an attorney must navigate in working with expert witnesses in an insurance coverage case – both in preparing the expert witness for deposition and at trial.

II. Preparing an Expert Witness to Provide a Deposition

A successful expert deposition is key to the successful resolution of a case whether by way of settlement or judgment. It can support a successful summary judgment motion, prompt a favorable settlement, or make trial easier for a client. However, an unsuccessful expert deposition can be problematic or even fatal to a case. The most common cause for an ineffective or disastrous expert deposition is a poorly prepared witness. In many cases, the expert has not been educated on the potential questions he or she will face or the overall case story. The result is a shaky witness who is more easily discredited by the other side, and may offer off-the-cuff opinions harmful to the case.

A. Preparing Yourself

Hopefully, the formal deposition preparation session is not the first (or second or third) time the attorney has met with the expert. Over weeks or months, the attorney likely has worked in-depth with the expert to discuss the case and help prepare his opinions. This shared history provides a distinct advantage over many fact witness preparation sessions, where the attorney may not be intimately familiar with the witness's strengths and weaknesses or may not have previously been focused on the subject of the witness's testimony.

To prepare himself or herself for the expert deposition, the attorney should familiarize himself with the expert's opinions and the bases for such opinions. Additionally—and perhaps more importantly—the attorney should spend ample time considering the potential weaknesses of these opinions and the contrary view that the opposition will offer. Typically, in doing so, the attorney will have the benefit of the opposition's expert report or at least an expert designation. If the attorney is fortunate, he has already had the opportunity to depose the opposing expert. Whatever the extent of the available information, it should be studied as closely as possible (and, of course, made available to the expert).

In focusing on the substance of the case, the attorney should not forget to focus attention to issues of qualification. At the deposition, the opposing party may well attempt to set up a challenge to an expert's qualifications, arguing that the expert is not qualified to serve as an expert on the designated subject. The defending attorney must identify potential weaknesses in his or her own expert's resume and prepare his witness for such attacks. The same holds true of potential bias. Especially where the witness is not retained, but instead works for one of the parties or otherwise knows them, the attorney should think about potential challenges to the witness' credibility.

B. Ethical Considerations to Guide the Preparation Process

Now the attorney is ready to prepare his witness. Before preparing an expert witness, an attorney must be familiar with the general ethical constraints on such preparation. In terms of ethical considerations, many aspects of expert witness preparation mirror those of fact witness preparation. For instance, in preparing *any* witness, an attorney may:

- Invite the witness to provide truthful testimony favorable to the attorney's client;
- Discuss the role of the witness and effective demeanor;
- Discuss the witness' probable testimony;
- Reveal to the witness other testimony or evidence that will be presented and ask the witness to reconsider his or her recounting in that light;
- Discuss the applicability of law to the events in issue;
- Review the factual context into which the witness' observations or opinions will fit;
- Review documents or other physical evidence that may be introduced;
- Discuss probable lines of hostile cross-examination that the witness should be prepared to meet;
- Rehearse testimony; and
- Suggest choice of words that might be employed to make the witness' meaning clear.¹

Unsurprisingly, an attorney may not assist the witness to testify falsely.² These rules give an attorney wide latitude to assist his or her expert in preparing for deposition.

C. Know your Witness

When it comes to preparing experts, this may be the most important aspect to keep in mind. Every expert is different – a different personality, a different ego, and a different level of experience with litigation. Consequently, their perspectives and reactions to questioning will vary dramatically. Generally, there are three basic types of experts: (1) an experienced, retained expert testifier; (2) an inexperienced, retained testifier; and (3) an inexperienced, non-retained testifier with first-hand knowledge of the underlying events. Each of these types of witnesses will have his own strengths and weaknesses.

The first type—the experienced “hired gun”—can be difficult to prepare because he considers himself in complete command both of the topic at hand and testifying. In some cases, this may be true. Many experts have testified hundreds of times and have the technical knowledge, communication skills, and discipline to be extremely effective witnesses. However, a hired expert—even an experienced testifier—is not necessarily an expert at testifying. Therefore, a good attorney must expend significant effort to help them learn how to craft a clear message, stay on message, use simple language, and answer only the questions asked. These types of experts frequently succumb to wanting

¹ Section 116 of the Restatement of the Law Third, The Law Governing Attorneys, Comment (b) to Section 116.

² *Id.*

to “teach” or “lecture” the questioner, even on issues for which they have not been designated as an expert. The result can be rambling testimony, straying from the topic, offering opinions that may not be helpful, and otherwise feeding the opposition too much information.

The second type—the inexperienced expert—also may exhibit some of these issues. In particular, given that such experts have not had practice speaking to laymen, they may find it especially difficult to convey complex ideas in a simple manner. They also may be more easily ruffled by the questioner challenging their position. In preparing such experts, the lawyer must be mindful to carefully explain the deposition process and how the expert’s testimony fits into the larger picture of the case.

The third type—the non-retained expert—is usually less confident and more nervous. If the expert works for (or closely with) the attorney’s client, he may feel that his job is in jeopardy if he does not perform well. These witnesses therefore require a different kind of preparation, involving more positive emotional re-enforcement than the average retained expert. They will need to be particularly well-informed as to the deposition process. They also will need to completely understand—in detail—what they are and are not expected to know. While these witnesses may be less inclined to offer up random opinions completely outside their designations, they may also be more reluctant to confidently assert and defend their expertise and knowledge regarding the very topics on which the attorney needs their testimony.

D. Practical Considerations in Preparing an Expert

While it is important to understand and cater to your witness’s strengths and weaknesses, there are a few key steps to preparing any expert:

- **Familiarize the expert with deposition procedures** in your particular jurisdiction. Just as an attorney would with a fact witness, he or she should advise the expert about the deposition ground rules such as understanding the questions, not volunteering, waiting until the question is finished prior to responding, etc. Also advise the expert not to bring any materials into the deposition, as he may be asked about these.
- **Tell the expert your story.** Unfortunately, many experts give a deposition not truly understanding what the case is about and how their piece fits into the case’s broader narrative. While attorneys cannot tell an expert exactly what to say, witnesses can better think through their answers if they understand the point of their testimony and what may or may not be helpful. It is not unusual for a witness to guess what answers you want in the middle of a deposition and begin to testify to those guesses. Unfortunately, the guesswork often turns out to be wrong, and the testimony creates problems down the road.
- **Make sure the expert knows what he should know and what he should not do.** When experts get nervous, they typically react in one of two ways: (1) sloppily offering opinions about issues they were not

hired to opine on, or (2) evading questions or disclaiming knowledge on the precise issues with which they should be familiar. With respect to the first issue, make sure that the expert understands that he has a discrete role and should not offer opinions outside of his designation. The second issue is a bit trickier. If a witness says too little, he may appear ignorant and/or incompetent. So in dealing with an evasive witness, an attorney may need to remind the expert that he is an expert on these issues and should fully answer questions within his designation. Unlike many fact witnesses, “I don’t recall” does not let an expert off the hook; it damages their credibility.

- **Provide the expert with information regarding your style** of defending a deposition. Warn him or her that you may object and what those objections mean. Also warn him that you may ask questions at the end of the deposition if prior testimony needs to be corrected.
- **In a multi-party case, make sure the expert is familiar with the players** and who he or she can expect to be attending and/or asking questions. The expert should know who the allies of your client are and who are the foes as his or her cooperation level may be different depending on who is asking the questions and under certain circumstances.
- **Assume that the expert will be videotaped** and prepare the expert accordingly. While depositions were historically videotaped only when the witness would or could not be called at trial, this is no longer the case. While there are different rules in different jurisdictions, videotaped testimony typically can be used to impeach a witness at trial. Needless to say, watching a witness contradict himself or herself is much more compelling than simply reading words on a page or hearing them recited by an attorney. Therefore, when preparing an expert for deposition, due attention must be paid to the “whole” person: his attire, body language, and general demeanor.
- **Provide the expert with a “heads up” on the questioning style of opposing counsel** and what he or she should expect regarding that counsel’s habits, style, and idiosyncrasies. Counsel use varying tactics from charm to intimidation in an attempt to get a witness to “lower his guard.” When it comes to experts, many attorneys will feign admiration or a need to be educated in order to draw the expert out of his “comfort zone.” Expert witnesses should be prepared for this type of tactic.
- **Instruct the expert witness to not argue with opposing counsel.** Counsel should explain that an emotional or combative witness is not usually a credible or effective witness. Experts must also work not to appear defensive when their qualifications or opinions are questioned. Any expert should be warned ahead of time that the questioner may question their expertise and will certainly try to cast doubt on his or

her opinions. The expert should not take them as personal attacks, but must calmly and rationally defend their position.

- **Make sure the expert is closely familiar with both his opinions and that of the other side's experts.** If the opponent's expert has issued a report or sat for deposition, ensure that your expert has read and re-read whatever report, transcript, or other information is available.
- **Make sure that the expert has recently re-acquainted himself with his own resume.** Many experts have impressive CVs going back decades. If the questioner wants to cast doubt on the expert's qualifications, he may try to find the holes in the expert's experience by asking if the expert has ever spoken or published on a discrete topic or whether he has ever worked on a project involving some precise issue. The expert must be ready to address these questions through a working knowledge of all of the relevant work he has done in the past.
- **Make sure your expert doesn't get "closed off."** The goal in taking an expert deposition is making sure that the expert discloses every single opinion he or she has, every basis therefor, and every document reviewed. Conversely, when defending an expert deposition, an attorney should make sure that his or her expert is prepared for efforts to "close off" the opinions and to resist them. When asked whether the expert has disclosed all of his opinions, he should limit his affirmative response to "what I can remember sitting here today," and further reserve his right to review additional information that may become available.
- **Practice, practice, practice.** While mock questioning can be a useful tool in fact witness preparation, it is especially important in expert preparation. Going in to the preparation session, a good attorney will have crafted some questions that hit at the biggest weaknesses in the expert's opinion. Practice these on the expert and fix what needs fixing, be it the expert's demeanor or the answers to certain questions.

III. Preparing Your Expert Witness for Trial Testimony

As the scheduled trial date nears, one of the most important aspects of trial preparation is preparing your expert witness to testify. This is not an undertaking to put off until the last minute because it can take a considerable amount of time, even if your expert has previously provided trial testimony on a number of occasions. To ensure your expert is confident to deliver testimony that will support your claim or defense on the day of trial, you must maintain an open line of communication and fully inform your expert about what to expect when he or she testifies.

A. Pretrial Considerations

First, as you begin to prepare your expert for trial, consider whether you have a duty to supplement your expert's disclosures before the trial date arrives. Some experts continue their investigation of the case well after they have supplied a written report or

provided deposition testimony. Your failure to timely supplement could eliminate your ability to use the supplemental information, or even negate any need to prepare your expert for trial at all, as sanctions under Rule 37 of the Federal Rules of Civil Procedure could include exclusion of portions or all of your expert's testimony at trial.

You are also responsible for ensuring your expert witness arrives on time at the trial. As soon as you learn of the trial date and any trial related deadlines relevant to the expert, notify your expert. It is no revelation that many cases settle before trial and, once it becomes clear the case is going to proceed to trial, clearly communicate that to your witness. This will help prevent last minute preparation on part of your expert. Also ensure your expert witness is informed about the logistics of the trial. Assist your expert with any necessary travel arrangements and accommodations and let him or her know exactly when to arrive at court. Avoiding added stress over transportation or logistical matters can be accomplished simply by planning in advance.

Further, always discuss the appropriate courtroom decorum, demeanor, and dress with your expert. This is particularly true if the expert exhibited any poor habits during his or her deposition or if your expert has little to no experience testifying. Certain mannerisms can be distracting or prohibitive to effective testimony. For example, if your expert tends to fidget or is soft spoken, let them know. Your goal should be to provide your expert with as much information as possible about what to expect at trial and to take the mystery out of the process. Inform him or her of the identity and roles of those who will be present in the courtroom. If you know the judge has particular practices or procedures or likes to ask questions from the bench, share that information. Remind your expert to be polite and considerate of the judge's questions and to make eye contact with both the judge and jurors. Also discuss the more common sense aspects of testifying, such as the fact that the expert needs to be truthful and accurate in all of his or her testimony. Some experts tend to become advocates for the side by whom they were hired. As a result, it is necessary to remind your expert witness of the appropriate role of an expert, namely, to help the jury understand the evidence or to determine an issue of fact.³ These reminders may seem trivial but, if overlooked, can lead to disastrous results on the day of trial.

B. Direct Examination at Trial

When you first sit down with your expert witness to discuss the presentation of his or her expert opinion at trial, make it clear to your witness how his or her testimony fits into the case as a whole. Although the content of the expert's testimony should largely be known by the time of trial, forthright exchanges with your expert will ensure there are no surprises and that the testimony is still consistent with your theory of the case. As you and your expert prepare, your expert will need to review his or her expert report, deposition transcript, and all other pertinent materials, including any opposing expert's testimony. The expert's familiarity with all relevant documents and evidence will allow for clearer and more cohesive testimony.

It will take extensive preparation on your part, but let your witness know specifically the questions you plan to ask at trial, as well as the overall scope and topics on which you plan to focus. For example, tell the witness you will start with questions

³ FED. R. CIV. P. 702.

about his or her educational background, training, and professional experience⁴; then, you will ask about the facts or evidence used to form his or her opinion; and, finally, you will ask questions to elicit the details of the expert's opinion. Be as specific as possible about the questions you plan to ask. This will provide you with an idea of the responses to expect and will also ease the expert's nerves so that he or she can provide more streamlined testimony. This process will also allow the expert to assist you with appropriately framing questions to elicit accurate answers.

In addition, talk with your expert about the use of overly technical language. While it is important that your expert be qualified and knowledgeable about the particular subject, it is also important that your expert be perceived as trustworthy and credible to the jurors. This is not accomplished by demeaning the jurors or making them feel less intelligent. If your expert prefers to use technical terms, an effective way to help the jury better understand the testimony is to have the expert provide examples or analogies. Let your expert know it is okay to elaborate on a point if it will provide further clarification for the jury. Your expert should be comfortable teaching the jury. This style will be much better received than lecturing to the jurors.

If you plan to have your expert testify using demonstrative evidence, present that evidence to the expert well in advance of trial so he or she is prepared to discuss it. If possible and practical, also visit the courtroom with your expert to view the layout. If you plan to use technology, make arrangements with the court staff to try it out beforehand. Having your expert practice explaining any known demonstrative exhibits will make the expert's testimony more uniform and help prevent the evidence from being a distraction, rather than an aid, to the jury.

It is also critical to anticipate potential problems that may arise with your expert's testimony and areas where you think opposing counsel may object. Determine whether you wish to discuss these points on direct as a way to remove the possibility of opposing counsel emphasizing them on cross-examination. For example, if the expert is receiving significant compensation for his or her testimony, consider having the expert explain all aspects of the expert services provided. This could take the sting away from opposing counsel's attempts to undermine the expert's credibility. Other areas to address might include the number of times or cases in which the expert has testified for the attorney; whether the expert was previously employed by one of the parties; or what percentage of the expert's income is derived from serving as an expert witness. Prepare your witness for any line of attack you believe may come up and determine whether, in your case, it makes sense to raise it first on direct so as to minimize its impact on cross-examination.

Last in relation to preparing your expert for direct examination, let your expert know what to do if and when opposing counsel objects. The expert should immediately stop talking if he or she has already started to answer a question. A witness who rushes to respond will not only risk losing credibility with the jury, but may also irritate the judge.

⁴ When questioning the expert witness about his or her background, also consider asking questions that will make the expert more "human" and relatable to the jury (e.g., whether the expert is married with children or has any hobbies). Doing so will help the jury gain trust in the expert witness. Of course, always know the expert's response in advance of asking any personal questions.

C. Cross-Examination at Trial

Emphasize to your expert that it is vital to listen to each question posed and to be very attentive during cross-examination. Caution your expert to answer only the question asked by opposing counsel—not the question the expert desires to answer. Your expert should also be aware that opposing counsel will use leading questions to rush the expert into answering. Tell your expert it is okay to answer at his or her own pace.

Moreover, when preparing your expert for cross-examination, be sure to identify areas of the expert's testimony that are likely to be attacked. Opposing counsel will almost always attempt to use any of the expert's prior inconsistent statements for impeachment purposes. These statements could have been made in the expert's report, during depositions, or even in the expert's prior publications. This is why it is important for you and the expert to go over all materials in advance so the expert is prepared to offer a complete and credible explanation for any change.

If at all possible, conduct a mock cross-examination of your expert by inviting an attorney whom you respect to question the expert. The most effective way to teach your expert how to successfully navigate cross-examination is to provide realistic practice. Mock questioning will help your expert avoid becoming flustered during questioning and will also stave off any chance opposing counsel may have to lead your witness astray.

Although it is important for your witness not to be led down a wayward path during cross, it is equally important for your expert to be responsive to opposing counsel's questions and seem forthright to the jury. If your expert is evasive or argumentative, he or she will likely lose favor with the jury. Tell the expert that, if in doubt about how to respond to a question on cross-examination, to pause, avoid looking at you for help, and to politely ask for clarification or for opposing counsel to rephrase the question. Let your witness know you will provide the opportunity to clear up any issues arising from cross-examination during his re-direct examination.

Again, practice and thorough preparation of your witness before trial will lead to successful expert testimony on the day of the trial. Avoid last minute preparation at all costs. The more comfortable the expert witness is with the lines of questioning and what to anticipate from opposing counsel on cross, the more effective and persuasive the expert's testimony will be for the jury; which, in turn, should lead to a more favorable view of your client's position.

IV. Ethical Rules and Challenges in Preparing and Working with Expert Witnesses at Deposition and Trial

Ethical considerations are a crucial factor when preparing an expert for a deposition or trial. While the style of witness preparation may vary from lawyer to lawyer, the ethical standard that lawyers follow should not differ. The lawyer should ensure that the expert is equipped to truthfully and clearly explain his/her theories and how they are important to the case at hand. If model ethical standards are not adhered to, the lawyer runs the risk of jeopardizing his or her chances for success at trial, discrediting the expert witness or worse, possibly having to answer an uncomfortable phone call from the local or state Disciplinary Counsel Office.

A. Applicable ABA Rules of Model Conduct and Professional Responsibility to Consider When Preparing An Expert Witness for Deposition and Trial

The American Bar Association's Model Rules of Professional Conduct and Code of Professional Responsibility provide general ethical guidelines lawyers should consider when preparing a witness for trial or a deposition. There are no specific rules as it relates to expert witness preparation. However, the issue of witness influence is more commonly addressed in the comments of the Model Rules rather than specifically in the Model Rules itself. For instance, in the comment to Rule 3.4, it provides, in part that “Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, *improperly influencing witnesses*, obstructive tactics in discovery procedure, and the like.” (Emphasis Added.)

1. Model Rule 1.3 Diligence

ABA Model Rule 1.3, Diligence, provides that “A lawyer shall act with reasonable diligence and promptness in representing a client.”

The comments to Rule 1.3 also provide general guidance as to the lengths a lawyer may go to represent their clients:

“[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”

2. ABA Model Rule of Professional Conduct 3.3, Candor Toward the Tribunal

Additionally, ABA Model Rule 3.3 sets the truthfulness standard that is applicable in witness preparation as well:

“(a) A lawyer shall not knowingly:

(1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal 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

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if

necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

3. ABA Model Code of Professional Responsibility DR 7-102 Representing a Client Within the Bounds of the Law

Professional Responsibility Model Code DR 7-102, in pertinent part, provides:

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

B. How to walk the “Ethical Line” when preparing an expert witness for trial or deposition

The compelling issue when preparing an expert witness for a deposition or trial is “how to determine the ethical line between developing testimony so it will be effective

and suborning perjury by telling the witness what to say.”⁵ The Model Rules of Conduct and Code of Professional Responsibility provide guidance for lawyers to use alongside the lawyer’s good judgment and reason. The following are a few helpful tips to help you avoid crossing the ethical line when preparing your expert witness for a deposition or trial.

1. Encourage your Expert Witness to tell their truth and not your version of the truth.

While asking your expert witness to tell the truth during a deposition or trial may seem like a no brainer, often “the truth” can be a relative term depending on whether ethical preparation is imposed in the process. The lawyer has a professional responsibility to ensure that the expert is prepared to testify and that the information relied on by the expert is truthful and has a sound foundation. Let the expert focus on providing accurate information to the Court rather than advocacy at trial. Too much advocacy for your position may suggest that the expert has been coached. Avoid the temptation to provide written answers to potential questions for your expert witness to memorize. This may be seen as “horse shedding” the witness. Remember that this information may be discoverable if it does not contain genuine mental impressions, opinions, conclusions or legal theories prepared in anticipation of litigation or for trial, depending on your jurisdiction.

Pursuant to ABA Model Rule 1.3, you are obligated to conduct due diligence on behalf of your client and “take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.”⁶ A thorough review of the expert’s testimony, supporting evidence issues and potential questions that may be posed should be a part of your preparation. Be mindful that your ethical duties are not relaxed with the use of a trial consultant. The ABA Rules extend by way of principal-agent relationship and the rules against attorney misconduct extend to non-lawyers retained by or under the direct supervisory control of the attorney.⁷ Being a zealous advocate does not allow the lawyer to manipulate the truth to their convenience. The short-term effect of this unethical behavior could have major and lasting implications on your litigation. Other considerations to keep in mind to ensure that the expert testifies truthfully include:

- A lawyer may not suggest wording that would cause the resulting testimony to be false. *See generally* Piorkowski, *supra*, at 401–4; Restatement (Third) of the Law Governing Lawyers § 116, reporter's note to cmt. b (2000).⁸
- A lawyer may suggest a choice of words to improve the clarity and accuracy of the witness's testimony. *See* District of Columbia Bar Legal Ethics Comm., Op. 79 (1979).⁹

⁵ James W. McElhaney, *McElhaney's Trial Notebook* at 99 (4th Ed. 2005)

⁶ Model Rule 1.1, Competence, Comment (a) Model Rules of Professional Conduct

⁷ Out and Proud: Ethical and Legal Considerations in Retaining a Trial Consultant to Assist with Witness Preparation DAVID A. PERROTT, LLB, PH.D. FROM KROLL ONTRACK|TRIAL GRAPHIX AND DANIEL WOLFE, J.D., PH.D. FROM KROLL ONTRACK|TRIAL GRAPHIX – JANUARY 1, 2010, The Jury Expert

⁸ Ethical Preparation of Witnesses for Deposition and Trial, Erin C. Asborno, December 13, 2011, American Bar Association

⁹ *Id.*

- A lawyer may not suggest particular words, even though not literally false, that are calculated to convey a misleading impression. *See* D.C. Ethics Op. 79; Restatement (Third) of the Law Governing Lawyers § 116 cmt. b (2000).¹⁰
- Avoid suggesting words that can improperly influence witness testimony or plant false recollections. Nicole LeGrande & Kathleen E. Mierau, *Witness Preparation and the Trial Preparation Industry*, 17 *Geo. J. Legal Ethics* 947, 954 (Summer 2004).¹¹

2. Prepare your Expert Witness in the Right and Ethical Fashion.

A rehearsed answer is never proper if the lawyer is trying to impede the discovery process or mislead the Court. However, it is important to review all relevant facts and evidence that the expert may be asked to testify about at trial or a deposition. Also, do not be afraid to let your witness know if his or her answers are vague, incomplete, confusing and how the jury may react to their testimony. This is a part of representing your client in a diligent matter, pursuant to Rule 1.3.

Ethical preparation of an expert witness also includes the following steps:

1. Discuss the role of the witness and effective courtroom demeanor;
2. Discuss the witness's recollection and probable testimony;
3. Reveal to the witness other testimony or evidence that will be presented and ask the witness to reconsider the witness's recollection or recounting of events in that light;
4. Discuss the applicability of law to the events in issue;
5. Review the factual context into which the witness's observations or opinions will fit;
6. Review documents or other physical evidence that may be introduced; and
7. Discuss probable lines of cross-examination that the witness should be prepared to meet.¹²

C. Walking the Line: “Preparing” versus “Coaching” An Expert Witness

To coach is generally defined as instructing and training someone to do something.¹³ To prepare is generally defined as to make (someone or something) ready for some activity, purpose, use, etc.¹⁴ However, in the legal arena, coaching has a negative connotation and suggests that the expert is being untruthful and that his/her

¹⁰ *Id.*

¹¹ *Id.*

¹² Section 116 of the Restatement of the Law Third, The Law Governing Attorneys, Comment (b) to Section 116

¹³ Merriam-Webster Dictionary (2016)

¹⁴ *Id.*

testimony is fabricated. As lawyers, we should stay away from any behavior or litigation strategies that would coach a witness in order to preserve the integrity of our case.

Preparing your expert adequately for a deposition or trial without crossing an ethical line takes focus and determination. When preparing for a deposition, the lawyer must prepare the expert to testify regarding a broader scope of questions than at trial. Depending on the level of experience testifying by the expert, several days or weeks may be necessary to prepare the expert. The time you spend with your expert will give you valuable time to discuss the case, the expert's theory and build a relationship with the expert. However, do not abuse this time with your expert witness by trying to coach him/her with false or misleading information. Be mindful of Model Rule 3.3, which mandates that the lawyer should never "offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or *a witness called by the lawyer*, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."¹⁵ Likewise, DR 7-102 warns that a lawyer should not knowingly use perjured testimony, false evidence or make a false statement of law or fact. If you are telling the expert exactly what to say in his testimony or to make a false statement, it is likely that you have crossed an ethical line. The following ethical checklist is good start to determine if you have already crossed an ethical line or when you are very close to it.

**ETHICAL CHECKLIST WHEN
PREPARING AN EXPERT WITNESS FOR A DEPOSITION OR TRIAL**

	Yes	No
1. Did I provide the expert with my version of correct answers to potential questions?	<input type="checkbox"/>	<input type="checkbox"/>
2. Did I reshape the expert's testimony in a way that suggests facts or evidence that does not exist?	<input type="checkbox"/>	<input type="checkbox"/>
3. Did I encourage the expert to provide truthful testimony at all times?	<input type="checkbox"/>	<input type="checkbox"/>
4. Did I spend an adequate or reasonable amount with the expert in preparation for their testimony deposition and trial?	<input type="checkbox"/>	<input type="checkbox"/>
5. Did I confirm whether the methodology relied on by the expert in his/her report is accurate?	<input type="checkbox"/>	<input type="checkbox"/>
6. Did I encourage the expert to elaborate on the strengths of my legal theory rather than its weaknesses?	<input type="checkbox"/>	<input type="checkbox"/>
7. Did I ask the expert to leave out important facts in his testimony?	<input type="checkbox"/>	<input type="checkbox"/>
8. Did I assist the expert how to explaining his report and methodology in a clear and organized fashion?	<input type="checkbox"/>	<input type="checkbox"/>

¹⁵ Model Rule 3.4, Candor Toward the Tribunal, Model Rules of Professional Conduct

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|---|--------------------------|--------------------------|
| 9. Did I offer a reward to the expert in exchange for favorable testimony at trial? | <input type="checkbox"/> | <input type="checkbox"/> |
| 10. Did I discuss the applicable law and how it applies to the facts of my case with the witness? | <input type="checkbox"/> | <input type="checkbox"/> |
| 11. Did I recommend the use of powerful words or phrases by the expert rather than verbiage that may be confusing to a jury? | <input type="checkbox"/> | <input type="checkbox"/> |
| 12. Did I divulge privileged information to the expert witness? | <input type="checkbox"/> | <input type="checkbox"/> |
| 13. Did I have any face-to-face time with the expert witness before the deposition or trial? Is telephone and/or video conferencing sufficient in my case? | <input type="checkbox"/> | <input type="checkbox"/> |
| 14. Did I engage in conduct involving dishonesty, fraud, deceit or misrepresentation? | <input type="checkbox"/> | <input type="checkbox"/> |
| 15. Did I ask the trial consultant to make suggestions to the expert that I know may be unethical or questionable in preparation for the deposition or trial? | <input type="checkbox"/> | <input type="checkbox"/> |
| 16. Does the expert have a track record filled with pitfalls such as poor trial performance, disqualification, inconsistent testimony or bias? | <input type="checkbox"/> | <input type="checkbox"/> |
| 17. Do I agree with how the expert conducted research in my case? | <input type="checkbox"/> | <input type="checkbox"/> |
| 18. Does my retainer agreement with the expert outline what the expert must testify to at trial or his deposition that may seem biased by a third party? | <input type="checkbox"/> | <input type="checkbox"/> |

V. Conclusion

The integrity of our profession and the litigation process requires that lawyers adhere to the American Bar Association's Model Rules of Professional Conduct and Code of Professional Responsibility when preparing an expert witness for a deposition or trial. By doing so, lawyers ensure that the discovery and trial process is fair, judicial economy is preserved and that the truth, favorable or not, is provided to the Court and all parties throughout the entire process.