Prepping an Expert: How Far Is Too Far?

By Robert Ambrogi

At what point does preparing an expert to testify cross over into coaching? And at what point does coaching cross the line into unethical activity? One legal scholar called witness coaching the dirty secret of the U.S. adversary system. But because lawyers prepare witnesses in private, only a handful of the most egregious cases have resulted in ethics charges.

Witness coaching is a topic whose parameters have not been widely debated within the legal profession. That is true for lay witnesses and even more so for expert witnesses.

The ABA Model Rules of Professional Conduct seem clear enough. A lawyer cannot offer evidence that the lawyer knows to be false or assist a witness to testify falsely. If a witness called by the lawyer testifies falsely, the lawyer is obligated to respond appropriately, including, if necessary, by notifying the court.

But is the line between truth and falsity always clear-cut? Is it wrong, for example, for a lawyer to help a witness skew facts towards the perspective most favorable to his or her case? Is it improper to advise a witness to remain silent about facts that may favor an opponent's position?

Without doubt, a lawyer would be remiss *not* to prepare a witness for a deposition or trial. Instructing the witness on demeanor, language, truthfulness and the like is common practice. Equally without doubt is that preparation can go too far. The difficultly comes in drawing the line without crossing it.

"Witness preparation is properly done when the attorney is helping the witness communicate the truth," explained Paul D. Friedman, an Arizona lawyer who is a nationally recognized consultant on ethics issues. "Witness coaching, on the other hand, is perceived as obfuscating the truth or instructing the witness to lie."

"But even virtuous attorneys may inadvertently cross the line between ethical preparation and unethical coaching, unless they are careful," he wrote in an article published earlier this year in the newspaper *Lawyers USA*.

Crossing the Line?

Perhaps the best-publicized example of drawing the line involved the high-profile Texas personal injury firm Baron & Budd and its representation of plaintiffs in asbestos litigation a decade ago. In advance of their depositions, the firm's clients received a memorandum with a list of instructions on what to say, such as to "maintain that you NEVER saw any labels on asbestos products that said WARNING or DANGER.''

When the memo inadvertently came to light, firm founder Frederick M. Baron insisted that a paralegal had sent it without authorization from any of the firm's lawyers. The memo generated widespread criticism in the press and various calls for inquiries, but the storm eventually blew over without definitive findings on the ethical issues.

At the time, one prominent legal ethicist who came to the firm's defense was W. William Hodes, a professor at the Indiana University School of Law and coauthor with Prof. Geoffrey C. Hazard Jr. of the preeminent ethics treatise, *The Law of Lawyering*.

Hodes submitted an affidavit saying the firm had done "nothing improper or unethical." Central to his conclusion, he wrote at the time, was that the firm also showed clients another document, one that stressed the importance of telling the truth and that gave multiple examples of what it meant to testify truthfully and accurately.

In a recent interview, Hodes – who has since returned to law practice and himself serves as an expert witness – said that he believes a lawyer's obligation to be a zealous advocate requires the lawyer to get as close to the line as possible without crossing over it.

"I've heard lots of people say that what you should do is figure out where the line is and stay as far away from it as you can," explained Hodes. "I reject that completely. I think you should go as close to the line as you can. If you only go X number of units away from the line – if you say I won't go right up to the line – then those X units belong to your client and you've given them up."

Preparing a client to testify includes tutoring the client in the issues and law involved, Hodes said, while also making it absolutely clear that testimony must be truthful.

"I'm comfortable to draw the line exactly there. If I'm comfortable that what I'm doing is preparing the client with information that the client is not likely to appreciate but that I know as a lawyer, I'm willing to take the risk that some clients will misuse this information. If there comes a point when I *know* the client is being untruthful, then I'm going to stop and do something about it. I will withdraw or report it to the court."

Hodes offers a rule of thumb for taking experts to the line that he derives from his own first time serving as an expert witness. When he initially met the lawyers and they began to discuss his testimony, they described the process this way: "We're going to push you as hard as we can in a certain direction and as soon as you tell us to stop, we'll stop. As soon as you're uncomfortable going further, we won't go further."

Experts Not Advocates

In a similar vein, Arizona lawyer and ethics expert Paul Friedman sees proper preparation and control as the way for an attorney to toe the line with an expert.

"I tell my experts straight up front, 'You're not an advocate. I want you to just answer the questions. If I think there's material that needs to come out, you'll have to trust me to bring that out."

But he sees different roles for experts depending on whether they are testifying in a deposition or in court. "Depositions of experts are not about finding out what their opinions are, they're about finding ways to discredit them. Experts don't like that, but they need to roll with it, whatever way it goes."

In front of a judge or jury, on the other hand, the expert's role is to teach, and therefore to provide the full story, Friedman believes, drawing on his own experience as a testifying expert in ethics cases.

"If the adverse attorney wants to depose me, I'll answer only the questions they ask, because that's not my opportunity to teach. But on the stand, that is my opportunity to teach."

New York lawyer Louis Schepp sees the line not as finely drawn but as grey. Schepp recently returned to private practice after nearly three decades litigating cases on behalf of insurer Liberty Mutual.

He recalled having a well-known medical expert testify in a case where an earlier injury was in issue. After the expert testified that an MRI showed soft-tissue injuries and herniated disks, the plaintiff's lawyer asked why the person who originally examined the MRI had said it appeared perfectly normal. The expert replied, "I don't know what he looked at."

In a subsequent case with the same expert, Schepp's used that exchange in preparing the expert to show him how he could have used that moment as an opportunity to educate the jury about differing readings of MRIs involving soft-tissue injuries.

"Was I telling him what to say? Yes. Was I telling him to lie? No."

Similarly, Schepp has no concerns about a witness omitting facts, provided the expert has not based his or her opinion on the omission. "I have no obligation to have my expert put everything in. As long as you're not asking the witness to lie or misrepresent, you're OK."

Or as William Hodes put it, if a lawyer does not go as close to the line as possible, "you're selling your client short."

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