Ethical Witness Preparation and Payment of Fact Witnesses under the Model Rules of Professional Conduct

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INTRODUCTION

Witness preparation is generally understood to be a professional obligation under the Model Rules of Professional Conduct ("Model Rules"). However, attorneys often confront ethical dilemmas during the course of witness preparation: When does an attorney cross the ethical line between developing testimony so it will be effective—as an attorney is obligated to do—and suborning perjury? When a key witness is no longer employed by a corporation, such as when they have retired or moved on to other employment, is it ethical to compensate the witness for the time spent preparing them to testify or is such a payment an improper inducement for false testimony? The following written materials discuss these and other considerations that attorneys should keep in mind when preparing witnesses, with a focus on the relevant Model Rules.

“Coaching” vs. “Preparing”

The American Bar Association has promulgated the Model Rules, which outlines the ethical obligations of attorneys. Nearly all of the states have adopted a version of the Model Rules or its forerunner, the Model Code of Professional Responsibility. According to the Model Rules, “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” The line between “witness preparation” and “coaching” a witness on what to say, however, can be hazy.

1 Model Rules of Prof’l Conduct R. 1.1.
2 Id. See also id. at R. 1.1 cmt. 5 (“Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and . . . adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.”).
Prohibitions on Knowingly Counseling a Witness to Offer False Testimony or False Evidence

The Model Rules contain only a few provisions generally applicable to witness preparation. Model Rule 1.2(d) states that in scope of representation of a client, a “lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.” Model Rule 3.3(a)(3) states that a lawyer may not “knowingly . . . offer evidence that the lawyer knows to be false.” Model Rule 3.4(b) states that a lawyer shall not “falsely evidence, counsel or assist a witness to testify false, or offer an inducement to a witness that is prohibited by law.” And Model Rule 8.4 states that it is professional misconduct for a lawyer “to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

The Restatement (Third) of the Law Governing Lawyers contains similar prohibitions on the offering of false testimony. Section 120 addresses false testimony or evidence, and states that a lawyer may not “knowingly counsel or assist a witness to testify falsely or otherwise to offer false evidence.” The comments to this section note that attempting to induce a witness to testify falsely as to material facts could lead to criminal liability for the lawyer (for subordination of perjury) and could be grounds for professional discipline or other remedies as well. In addition, attempts to induce a witness to testify falsely as to material facts may also constitute fraud, which could lead to denial of the attorney-client privilege to client-lawyer communications relating to witness preparation.

From the language of these rules, it is clear that an attorney cannot engage in subordination of perjury or the creation of false evidence. However, neither the Model Rules nor the Restatement provide any specific guidance regarding when witness preparation crosses the ethical line. One gray area arises when the lawyer knows, under the applicable law, what testimony would be best from a witness, and must make a determination regarding how best to explain the law to the witness—can an explanation of the applicable law constitute counseling a witness to testify falsely? This dilemma, which attorneys frequently confront in fulfilling their professional obligation to prepare witnesses, but which is seldom discussed in case law because the details of witness preparation are generally not discussed publicly, is addressed in the next section.

“The Lecture”: Explaining Applicable Law to the Client

Robert Traver’s 1958 book *Anatomy of a Murder* describes “the lecture” as “an ancient device that lawyers use to coach their clients so that the client won’t quite know he has been coached and his lawyer can still preserve the face-saving illusion that he hasn’t done any coaching.” Jimmy Stewart, portraying defense attorney Paul Biegler in the movie version of the book, famously bestows “the lecture” upon his client when educating him as possible defenses for killing a man. Without first asking the client the facts of the event, Biegler recites to the client the categories of justification and excuse, ruling out each possible defense as soon as he raises it. After Biegler narrows down the possible defenses to excuse, the client states “I must have been mad.” Biegler clarifies that “bad temper’s no excuse.” The client replies, “No, I must have been crazy.” As Biegler leaves the room, he says, “Well, Lieutenant, in the meantime, see if you can remember just how crazy you were.” Whether or not Biegler crossed the line from witness preparation into coaching his client has been debated by attorneys countless times.

The above-cited Model Rules make it clear that it is improper to persuade the witness to falsify facts. Of course, it is perfectly acceptable for an attorney to explain the law to a witness. Model Rule 1.2(d) states that “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.” However, as is made clear in “the lecture” scene described above, a shrewd attorney could convey to his witness an implicit message regarding the desirability of specific testimony—without ever coming out and telling the witness what to say.

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3 Id. at R. 1.29.
4 Id. at R. 3.3(a)(3).
5 Id. at R. 3.4(b).
6 Id. at R. 8.4.
8 Id. § 120, cmt. 1.
9 Id. § 82.
10 MODEL RULES OF PROF’L CONDUCT R. 1.2(d).
Compensating a Fact Witness

Another common ethical dilemma is whether it is appropriate to compensate a fact witness. This issue frequently arises where a key witness has retired, moved on to another employer, or where the client is no longer an operating company. Under such circumstances, the witness may have little incentive to allow an attorney to prepare them to testify at a deposition or trial and may request compensation for doing so. The general rule is that witnesses are entitled to an attendance fee and travel expenses under 28 U.S.C. § 1821 for testifying at a trial, hearing, or deposition. In addition, many state and model ethical rules allow compensation of a fact witness for time and expenses incurred by the witness in the preparation of his or her testimony (although some jurisdictions consider this type of payment improper). Some states have gone so far as to allow no payments to a fact witness, because such payments raise the risk of perjury. The ABA has stated in a formal opinion that “[t]he amount of such compensation must be reasonable so as to avoid affecting, even unintentionally, the content of a witness’s testimony.”

Model Rule 3.4(b) on Compensation of a Fact Witness

Rule 3.4(b) of the Model Rules states that a lawyer shall not “falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.” Comment 3 to Rule 3.4 clarifies that “it is not improper to pay a witness’s expenses or to compensate an expert witness,” but notes that the rule in most jurisdictions is that “it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.”

The ABA has interpreted Rule 3.4(b) broadly, allowing for payment of expenses “[a]s long as it is made clear to the witness that the payment is not being made for the substance or efficacy of the witness’s testimony, and is being made solely for the purpose of compensating the witness for the time the witness has lost in order to give testimony in litigation in which the witness is not a party.” Of course, “the amount of such compensation must be reasonable, so as to avoid affecting, even unintentionally, the content of a witness’s testimony.”

What is a “Reasonable” Payment for a Fact Witness?

The ABA has clarified factors to consider in determining whether a payment to a fact witness is reasonable: if a witness has sustained a “direct loss of income” in the form of hourly wages or professional fees, the lawyer can be compensated for that loss, and in situations where the witness has not sustained a direct loss of income, an attorney must determine “the reasonable value of the witness’s time based on all relevant circumstances.” Courts have held that although payment of a reasonable fee, and even the payment of incidental expenses, is proper, “the payment of a sum of money to a witness to testify in a particular way; the payment of money to prevent a witness’ attendance at a trial; the payment of money to a witness to make him ‘sympathetic’ with the party expecting to call him; these are all payments which are absolutely indefensible and which are really included in the general definition of subornation of perjury.”

One issue that is often raised with respect to the reasonableness of a payment is whether or not fact witnesses can be paid for time spent in preparation for testimony. The federal statute addressing compensation of fact witnesses does not mention compensating a fact witness for his or her time in preparing to testify, but does explicitly state that

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11 Another gray area is when an attorney refreshes the witness’s recollection with “helpful” facts or where the attorney suggests approaches for responding to questions regarding “harmful” facts. There are few cases addressing this issue, but whether such conduct is unethical under the Model Rules likely turns on whether the attorney is preparing the witness to best present the actual facts, which is clearly appropriate, or is attempting to create a false rendition of the facts, which is not.


13 MODEL RULES OF PROF’L CONDUCT R. 3.4(b).

14 Id. at R. 3.4(b), cmt. 3.


16 Id.

17 Id.

an expert witness can be compensated for his or her time in preparing his or her opinion.\textsuperscript{19} The ABA has stated the view that “the witness may also be compensated for time spent in reviewing and researching records that are germane to his or her testimony, provided, of course, that such compensation is not barred by local law.”\textsuperscript{20}

\textit{Payment of Former Employees as Fact Witnesses}

The question of whether payment to a fact witness is acceptable most routinely arises in the context of payment of former employees who know valuable information that may be relevant to a lawsuit. In this circumstance, may the former employer pay the witness for his or her testimony? In addition, can the former employee be hired pursuant to a consultant agreement to help the attorney reconstruct the facts and understand documents in the former employer’s files?

The majority view is that former employees may be paid as fact witnesses, following the general guideline that payment must be “reasonable” under Model Rule 3.4(b) as outlined above; i.e., payment should only be for expenses and lost wages. The same former employee may also be hired to help the attorney understand the client’s documents or other facts regarding the former employer; however, it should be made clear that the payment under the consulting agreement is not related to the former employee’s testimony as a fact witness.\textsuperscript{21} Of course, counsel should research the law in their particular jurisdiction because, as set forth above, there is variation and some jurisdictions do not allow compensation of fact witnesses at all or significantly restrict what compensation is allowed.

\textbf{Conclusion}

Witness preparation is one of our primary obligations as litigators, but can pose challenging ethical dilemmas. While an attorney will want to meet his or her obligation to appropriately prepare a witness for testimony, he or she should be careful not to cross a line into witness coaching. Attorneys must decide for themselves what is appropriate based on the particular circumstances they are confronted with, but under the guidelines established by the Model Rules, clearly explaining the law and encouraging the witness to always be truthful will generally not lead to allegations of impropriety in witness preparation. Similarly, although payment of fact witnesses could lead to allegations that payment is being made for false testimony, in most jurisdictions, attorneys can avoid such charges by laying out any fee agreements in writing, and ensuring that all payments are reasonable and not for the purpose of procuring testimony. Transparency and reasonableness should guide attorneys attempting to navigate the ethical rules applicable to witness preparation and payment of fact witnesses.

\textsuperscript{19} 18 U.S.C. § 201(d).
\textsuperscript{21} New York State Ethics Op. 668 (1994).