Truth or Consequences: Exploring the Ethical Boundaries of Witness Preparation

Kenneth R. Berman
Nutter McClennen & Fish LLP
Boston, Massachusetts
© 2018 Kenneth R. Berman

Kenneth R. Berman is the author of the ABA best-selling book Reinventing Witness Preparation: Unlocking the Secrets to Testimonial Success. A portion of this article is taken from his book.

INTRODUCTION
The idea of a practice Q&A before testifying is not remarkable. But lawyers can trip up if they don’t know how to calibrate what they can say to the witness in the practice session. Lawyers have some sense that it is wrong to “coach” the witness, to “rehearse” the testimony, or to give the witness particular words and sentences to say at trial. Comments to the Model Rules of Professional Conduct state that a lawyer may not “improperly influence[e] witnesses.” To avoid ethical issues, many lawyers go through a practice Q&A probably less robust than it should be, feeling that the less guidance they give the witness, the more genuine the answers will be and the more immune the lawyer will be from a charge of improper coaching or rehearsing.

The practice session To have an effective practice session, lawyers should understand what’s acceptable and what’s not. The first basic rule is that the lawyer cannot assist the witness to offer testimony that the lawyer knows to be false. So at the outset, whatever happens during the practice Q&A, falsehoods and lies are off-limits. The witness must be cautioned about the meaning of the witness’s oath and the importance of adhering to it.

But that still leaves much room in how the witness tells the story. If the question were “Why did you leave your job at Amalgamated Industries?” the witness’s first response might be “Because my boss was overbearing and I was terribly unhappy.” While true, that answer might not be as helpful as another truthful response, such as “I got a better offer.” One issue, then, is whether, in the practice Q&A, the lawyer can counsel the witness to give the more helpful answer as long as it’s truthful, even though it was not the witness’s first or spontaneous reply. Or would such a suggestion influence the witness improperly?
The Restatement

As with many ethical dilemmas, the answer can depend on ethics opinions that vary from state to state or on perspectives that vary from judge to judge. But some understandings can be distilled from fairly reliable sources. For instance, a well-respected authority—the Restatement of the Law (Third): The Law Governing Lawyers—states that a lawyer may:

- invite the witness to provide truthful testimony favorable to the lawyer’s client [and that permissible witness preparation may include] discussing the witness’s recollection and probable testimony;
- revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness’s recollection or recounting of events in that light; discussing the applicability of law to the events in issue;
- reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross examination that the witness should be prepared to meet.

The Restatement also states that “witness preparation may include rehearsal of testimony” and that a lawyer may suggest choice of words that might be employed to make the witness’s meaning clear. However, a lawyer may not assist the witness to testify falsely as to a material fact.”

The Restatement does not quite answer whether a lawyer can suggest a different, but truthful, answer from the one the witness originally provided during preparation. While suggesting word choices is permissible to make the witness’s meaning clear and while suggesting false answers is prohibited, suggesting a different answer simply because it is more helpful seems to fall into neither bucket.

Ethics Opinions

More than forty years ago, the American Bar Association issued an ethics opinion that sheds some light: “A lawyer should . . . present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured” (Ethical Consideration 7-26 of the American Bar Association Code of Professional Responsibility [1975]). While discussing “improper coaching” in Geders v. United States (1976), the U.S. Supreme Court cited this ethics opinion favorably, but arguably neither this ethics opinion nor the Supreme Court’s approval of it resolves the dilemma either. They only tee it up: Does suggesting a different, but truthful, answer from the one the witness originally provided during preparation result in presenting evidence that “the client desires to have presented” or only evidence that the lawyer desires? Is the lawyer’s desire synonymous with the client’s for this purpose?

A 1979 ethics opinion from the District of Columbia Bar offers a useful perspective. According to District of Columbia Bar Legal Ethics Committee, Opinion No. 79 (December 18, 1979), the dividing line between appropriate and inappropriate suggestions—whether as to a fact that should be included in an answer or as to a particular phrasing or word choice—turns on whether “the substance of the testimony is something the witness can truthfully and properly testify to” and whether “the substance of the testimony is not, so far as the lawyer knows or ought to know, false or misleading.” In this respect, the D.C. Bar opinion seems to depart from an often heard but difficult-to-apply admonition: that the lawyer may counsel a witness on how to answer a question but not on what to say.
APPLYING THE ETHICAL STANDARDS IN PRACTICE

Despite the lack of clear, universally accepted guidance, a strong argument can be made that during preparation, a lawyer can ethically suggest not simply facts to include in an answer but also words and phrases to express them in the most memorable and persuasive way, as long as the answer is not false or misleading. This argument is based on rules of ethics, rules of evidence, and standards of professional responsibility.

Discussion

Rules of ethics in most jurisdictions require lawyers either to provide zealous representation or to act with reasonable diligence in the representation of a client. Rules of evidence prevent lawyers from leading their own witnesses, confining them to asking open questions on direct examination on all material matters. And standards of professional responsibility bid lawyers to represent clients competently and reasonably, with reference to prevailing professional norms.

Strangely, no one seems to find any ethical problem when lawyers draft affidavits or interrogatory answers for their clients to review, edit, and sign. Those documents are the written equivalent of testimony and carry the same consequences for falsehoods. In those documents, lawyers do not merely suggest facts to include or words and phrases to use. They often compose the content from stem to stern based on information from the client, subject only to a client’s correction or revision. And these documents, when used in summary judgment motions, can be just as powerful and consequential as oral testimony in adjudicating rights and resolving lawsuits. Yet there seems to be little history of anyone accusing a lawyer of “improper composing,” certainly nothing that rivals accusations of “improper coaching.” The idea that lawyers must locate and stay on the correct side of the hard-to-find line between proper suggestions on phrasing and word choice on one hand and improper influencing of testimony on the other seems to exist only in the world of oral testimony, despite the utter absence of such a line in the world of written evidence.

Still, one can make a strong case for why lawyers have a wide ethical range for advising clients on what they should say and how they should say it on direct examination. For example, one reason lawyers may not lead their witnesses on direct is that lawyers have the chance to meet with their clients and friendly witnesses beforehand and prepare them to testify. During preparation, clients would be at a material disadvantage if lawyers could not identify the relevant truthful information that lawyers believe the fact finder should hear, or if lawyers could not identify and counsel against offering extraneous, irrelevant, immaterial, or misleading information that would ill serve the effective presentation of the client’s case. Because giving testimony has legal consequences, clients need a lawyer’s help in understanding how to deliver the testimony, and lawyers may well be underserving their clients by failing to advise them how to do that, including what information the lawyer is expecting to hear in response to an open question. Without guidance from the lawyer, the client is left to guess at what information to include, what to omit, and how to say it in an appropriate way.

While lawyers might struggle with trying to find the dividing line between ethical preparation and improper coaching, they need not struggle with this if they can simply modify their preparation technique.
In a practice Q&A, most lawyers come to the task by asking the client a question approximating one that the client might hear in the deposition or at trial, either from the client’s own lawyer or from opposing counsel. Typically, the client gives a spontaneous answer, shaped in part by the contours of the question, by the client’s own thinking about the best truthful answer to give, and by the client’s thinking about what her lawyer might want to hear. Conversations with the lawyer up to that point might have conditioned the client to imagine a direction in which the testimony ought to go, and the practice answer will likely take that into account. The client might think the practice answer is a pretty good one.

The lawyer might think differently. There’s more than one truthful way to answer a question, and some of the information in the client’s practice answer might create misleading impressions or allow the fact finder’s imagination to wander in the wrong direction. Or the lawyer might believe it important for the client, when hearing that question, to use it as a door opener for making one or two particular points that the lawyer believes would be helpful.

This is where the ethical dilemma arises and the art of preparing witnesses comes into sharp focus. Here is what the inartful lawyer would do: The lawyer would first identify everything in the practice answer that the client should avoid saying, identify facts the lawyer would want to hear in the answer, and explain why the bad parts should be omitted and the unspoken facts should be spoken. The lawyer might then offer a proposed ideal answer, ask the client whether such an answer would be truthful and whether the client would feel comfortable stating it, and, if the answer to both questions is yes, ask the client to repeat the answer that the lawyer just offered. The lawyer and the client would then practice that answer several times until the client gets it right. This is the classic case of the “coached” or “rehearsed” witness, the type of interchange that raises questions about whether the lawyer has unethically poured words into the client’s mouth.

Contrast that to how the artful lawyer would handle it: The artful lawyer would thank the client for the practice answer but, if that answer were heading in the wrong direction, the lawyer would need to step back and talk to the client at a more macro level about the theme of the case and the sorts of things the fact finder will need to consider to reach a decision favorable to the client. The lawyer would then ask the client a broad open question that speaks to the case theme and the factors that would be important to the fact finder. If phrased properly, this practice question should then get the client to start telling a story, a narrative that speaks to the topics that the lawyer knows will be important for the fact finder to hear. When the client’s narrative hits on important information, the lawyer can identify it, call the client’s attention to it, and reinforce the importance of including it in the testimony. The lawyer might say something like “That’s great. I love that story. When you get a question about your work on the V project, I’m going to want you to tell that story. That’s an important part of what we’re trying to prove. Now what were some of the other challenges you encountered and how did you deal with them?”

This type of dialogue reminds the client about the theme of the case, not by telling the client what to say but by telling the client what the important parts of the case are that help tell the client’s story. Theme reinforcement during witness preparation stimulates the client into thinking about her own experiences that support the theme. It also, appropriately, reminds the client about the legal standard so that she is mindful of what is relevant for the fact finder’s consideration. Then, by asking her to identify things or events that support the theme and speak to the legal standard, the lawyer is having the client create a menu of items that the lawyer and client can consider offering in evidence.
At the end of this back-and-forth, the artful lawyer should recap the most salient points and explain the questions the client will hear that will invite her to talk about them. During this part of the preparation, the lawyer can explain why and how different parts of what the client has just said will contribute to the case and should be included.

This, then, can lead into a new practice Q&A, during which the lawyer is listening for both form and content. If the client omits some information that the lawyer wants the fact finder to hear or includes some information that is irrelevant or distracts from the theme or would create a misleading impression, the lawyer can point it out. If the client phrases an answer in a way that obscures rather than illuminates, the lawyer can suggest better ways to express the point to help bring clarity to the client’s testimony. If the client shows some discomfort, the lawyer and client can explore the cause of it and find another pathway to the truth. Through this process, the client will become an enlightened witness, without the lawyer having to cross ethical lines. The testimony won’t be the lawyer’s. It will be the client’s.

CONCLUSION

One previously unmentioned point merits some attention: How should the lawyer prepare the client to answer questions about whether the lawyer “coached” or “rehearsed” the client? The lawyer should of course cover the subject during preparation. It might go something like this:

When the opposing attorney is asking you questions, he might ask you whether I’ve coached you or rehearsed you for your testimony. Some lawyers, although not many these days, like to ask this question, and if it comes up, I don’t want you to be surprised by it.

You should understand that there is nothing improper in the conversations you and I have had to prepare you for your testimony. Meeting with your lawyer to prepare for testimony is your right as a client and my responsibility as your attorney. What we have done to get you ready to testify is perfectly appropriate, and judges and juries expect that a witness will have met with her lawyer to prepare for giving testimony.

But if the question is whether you’ve been “coached” or “rehearsed,” that’s one of those cross-examination questions that, if not answered correctly, can leave a misleading impression because words like coached and rehearsed can carry a connotation of being trained to answer certain questions in a certain way for an improper purpose. I often have difficulty understanding what someone means when they ask about coaching or rehearsing. So like other questions you might get that use words that might be different from words that you would use, you should put the answer in your own words and answer as truthfully as you can without leaving a misleading impression. For example, it would be perfectly appropriate for you to say that you met with me to discuss the case, to discuss your expected testimony, and to prepare for the deposition (or trial). But you shouldn’t reveal what we said to each other during our meetings because that information is confidential and protected by the attorney-client privilege. If the lawyer asks you about what we said to each other, I’ll object to that question and I suspect the judge won’t require you to answer it.

In her final debate against Donald Trump, Hillary Clinton responded to the implied suggestion that her debate performance was over-prepared. “I think Donald just criticized me for preparing for this debate.
And yes, I did. And you know what else I prepared for? I prepared to be president. And I think that’s a good thing.” There is likewise no sin in preparing to testify. Preparing is a good thing.
ABOUT THE AUTHOR

Kenneth R. Berman

Kenneth R. Berman is a partner in the Litigation Department of the Boston law firm Nutter McClennen & Fish LLP. His practice focuses on complex business and commercial disputes, intellectual property litigation, land use litigation, and public law disputes.

Mr. Berman is the author of the American Bar Association best-selling book Reinventing Witness Preparation: Unlocking the Secrets to Testimonial Success.

Mr. Berman is admitted to practice in Massachusetts and before the United States Supreme Court, the United States Court of Appeals for the First, Fourth, and Federal Circuits, and the United States District Courts for the District of Massachusetts and the Eastern District of Michigan.

Mr. Berman often writes and lectures for local and national audiences on topics of current legal interest, legal ethics, high profile litigation, and advanced litigation techniques. He served as a legal commentator for WBZ-TV in Boston and on the Board of Editors of the Boston Bar Journal. Mr. Berman’s articles have appeared in Litigation (the Journal of the Litigation Section of the American Bar Association), the National Law Journal, and the Boston Globe, among other publications. He currently co-chairs the Book Publishing Board of the ABA Section of Litigation.

Mr. Berman is an active member of the American Bar Association and Boston Bar Associations. In the American Bar Association, he is a member of the Litigation Section, where he is a former member of its governing Council, a former Co-Chair of the Corporate Counsel Committee, member and former Co-Chair of the of the Business Torts Committee, and a member of the Intellectual Property and Trial Practice Committees. He is a former member of the Boston Bar Association’s Council and Executive Committee, and a former chair of the Boston Bar Association’s Litigation Section and Torts Committee. Mr. Berman is also former chair of the Massachusetts Joint Bar Committee on Judicial Nominations, which reviews, evaluates, and makes recommendations on the qualifications of individuals under consideration for judicial appointments in Massachusetts.

Kenneth Berman received a J.D. degree with high honors, from the University of Connecticut School of Law, where he was an editor of the Connecticut Law Review. He received a B.A. from Yale University.

Kenneth R. Berman
Nutter McClennen & Fish LLP
World Trade Center West
155 Seaport Boulevard
Boston, Massachusetts 02210
(617) 439-2542 kberman@nutter.com