DISCOVERY

Witness Coaching: A Good Thing

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Our last column lamented that witness coaching has been given an undeservedly bad name. We argued that you have an obligation to coach prior to deposition. But if you thought we were drawing a distinction that coaching during a deposition is the work of the devil, you thought wrong. You should, you must, coach during the deposition as well — so long as you do it within the rules.

We cannot say it often or loudly enough. Coaching in violation of the rules or coaching a witness to violate the rules is not proper and cannot be condoned. Dirty coaching is bad. Good coaching is good. And where the rules permit you to coach your witness, your failure to take advantage of those rules is an abrogation of your duty to zealously represent your client.

This is not about trying to figure out how far you can go over the line without getting caught. The speed limit is 55. But you know you can go 60 without getting into any serious trouble. Is it permissible, then, to advocate that you go 60? No, of course not. Your adversary can get away with improper coaching. And if you do it within the rules.

Speaking Objections Are Not Proper

We all know that speaking objections are improper. Yet they are as common as speeders. Why? Why do lawyers do it? There really are only three arguably rational reasons to make a speaking objection. One, to rattle the other side. “Objection. That’s the dumbest question I ever heard. Did you go to an accredited law school? Does your law firm know that you’re an incompetent idiot?” Two, to impress your client. “Objection. As you would have known if you had taken the time, as I did, to carefully compare the two drafts that your question assumes are identical, you would see that they are indeed different because the second version is in Arial typeface whereas the first is in Arrus.” Three, to suggest an answer. “Objection. As you well know from deposing this witness’ co-workers, the meeting did not, as your question improperly implies, occur in April but rather in March.”

But if those are the reasons, there is no sensible reason to ever make a speaking objection. You want to rattle the other side? Go into professional wrestling, you’re in the wrong profession. We concede that you can get some momentary self-satisfaction from shaking up an opponent (especially when the other SOB started it); we can even envision the rare case when you can successfully bully an opposing lawyer into taking an incomplete or ineffective deposition. But such gains are rare and ephemeral. You will be called on such conduct someday, and you have no hope of convincing a judge that your conduct is permissible. Don’t do it.

You want to impress your client? Don’t do it with improper objections. Impress her by winning the case, not the moment. Ah, but you say, the third reason is legitimate. If you don’t make the objection, the witness may say the wrong thing. You can get away with a speaking objection and save the day. So it’s okay, right? No, it’s wrong. But more important, it is unnecessary. The effective coach will find a legitimate way to coach without committing a foul.

You Don’t Need Speaking Objections To Be Effective

Speaking objections are unnecessary if a witness has been properly prepared. Typically, a lawyer feels compelled to make a speaking objection where the witness has already testified to a false premise that is contrary to a previous answer or previous testimony from other witnesses. For example, the key issue in your case is when senior executives of your client became aware of a critical document. Some deponents have said March; some have said April; some have said they don’t recall. For your purposes, the earlier the better. Earlier in the deposition, your witness has said “I saw the memorandum sometime in the March-April time frame.” Your opponent, sneaky devil that she is, later asks “Let’s return to that memo. When you first saw it in April, what was your reaction?”

You are not a potted plant. You pounce with “Objection! The witness has already told you that he first saw the memo sometime in March or April. Your question is totally misleading by assuming that he actually did not see the memo until April, contrary to his prior testimony. This is a blatant attempt to trick the witness; I caution you to stop these outrageous tactics.”

Not surprisingly, your witness is likely, when he finally answers the question, to recall that he first saw the memo as early as March.

But you have made a speaking objection. And if you are taken to task on it, you will lose; you will be sanctioned. A number of district courts have specific local rules which prohibit any suggestive or speaking objections. See, e.g., S.D. Ind. LR30.1(d); N.D. Ohio LR30.1(4). And we are aware of no court ever confronted with a speaking objection that gave an attaboy for doing it.

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But did you need to make a speaking objection? Probably not. First of all, if you had properly prepared your witness, he knows how important this issue is; you don’t need to be over-protective of a properly prepared witness. The speaking objection might have made you feel good, but if you had done your job, it was unnecessary. The witness would see the trap in the question on his own and would reaffirm his earlier, correct testimony. And even if you do not have sufficient confidence in your witness or your ability to prepare him, there is still an affirmative step you can take which does not go over the limit.

The catcher does not walk out to the mound before every pitch to tell the pitcher what to throw. They have prearranged signals. There is no reason why you cannot have prearranged signals with your witness to warn of potential traps in a question. Your witness should be told that anytime you say “Objection. Asked and answered,” the witness should search her memory to recall what she has already said on the same subject. Your objection should serve as a reminder that the subject matter has already been covered, and the witness should be careful to repeat her prior truthful testimony. “Objection, foundation” should be a warning signal to the witness to carefully listen to the question and make sure that the factual predicate is not misleading. Often, that gentle nudge will remind the witness that the facts are different than stated in the question, and the witness can say so before providing an answer.

But where the witness and the lawyer are not in tune, and the witness does not understand why the lawyer thinks there is something wrong with the question, the witness can nevertheless be prepared to save the day by prefacing an answer, after hearing that objection, with a phrase such as “Well, assuming that you have stated the facts correctly, then I guess my answer is . . .”

It is improper for you, before or during a deposition, to suggest an answer to the witness that is not within the witness’s knowledge. It would be improper during preparation to tell a witness who recalls that the light was green to say that the light was red. It would be equally improper, by way of a speaking objection, to suggest to the witness during a deposition that he should say the light was red. And it would be improper to have a prearranged signal that the words “Objection, foundation.” should be interpreted as a signal to blurt out “The light was red.” The trap on speaking objections is that they suggest an actual answer. But there is nothing improper about an objection that suggests caution.

Can You Confer With Your Witness? It Depends

The trouble with signals, of course, is that they are sometimes missed. If the catcher really wants the curve, the safest way to be sure the pitcher knows that is to walk out to him and say so. But catchers and pitchers use signals because, while there is no formal rule about the number of times they can confer on the mound, the umpires will not tolerate too many. The same is true at depositions. And the location of the district court that governs your deposition will make an enormous difference as to whether and to what extent you may confer.

It is always proper to have a conference to explore whether the answer to a question might invade a privilege; if it were not so, the privilege would be lost once the answer was given. But after that basic rule, there is huge variance among the district courts as to when you and your client may confer. In the Southern District of Indiana, for example, an attorney may not initiate a conference while a question is pending (except, of course, to determine whether or not a privilege should be asserted). S.D. Ind. LR30.1(c). By the very specificity of that limitation, it appears there is no prohibition against the client initiating the conference or against conferences when a question is not pending. Other districts draw the line more snugly. In the Southern and Eastern Districts of New York, an attorney cannot initiate a conference at any time during the taking of a deposition, whether or not a question is pending. S.D.N.Y. LR30.6. Presumably, then, conferences initiated by the client are always permitted in New York.

But in the Northern District of Ohio, there can be no conference once a question is pending, no matter who initiates it. N.D. Ohio LR30.1(f). And in Alabama, no conference is permitted at any time during the deposition except at normal breaks. M.D. Ala. Guidelines for the Conduct of Discovery, IIG. So it is permissible, in Alabama, Indiana, Ohio and New York to talk to your client during breaks. But not in North Carolina. There, the local rule prohibits any conference (other, again, than to ascertain a privilege) at any time while the deposition proceeding is in session. M.D.N.C. LR26.1.

A state away in South Carolina, the same absolute prohibition against conferences is imposed. D.S.C. LR30.04(E). But wait. The South Carolina local rule gives attorneys taking depositions the option of providing copies of documents to be shown to witnesses either before the deposition begins or contemporaneously with the showing of each document to the witness. Most lawyers would choose the latter, of course, to deprive their adversaries of the opportunity for a road map into the interrogation. But under LR30.04(H), if the documents are not provided at least two business days in advance, then the witness and the witness’ counsel are permitted a reasonable amount of time to confer and discuss the documents before the deponent answers any questions about them.

Many districts have no local rule specifically addressing the subject of conferences. For example, in the Northern District of Illinois, a rule was proposed but never adopted. Individual district judges, therefore, are left to follow their own judgment, on a case-by-case basis.

In some districts, not only are conferences forbidden, but lawyers who engage in conferences may find that they have waived the attorney-client privilege. See Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993). Other courts have questioned whether prohibitions against conferences, at least during breaks and recesses, may be an unconstitutional infringement on the right to counsel. See Odone v. Croda Int’l PLC, 170 F.R.D. 66 (D.D.C. 1997).

Take Advantage Of The Latitude The Rules Give You To Coach

From all of this, we tell you what you must already know: The rules differ from jurisdiction to jurisdiction, and courts disagree on what is acceptable — or even constitutional. But your job is to make sure that you know the rules applicable to your deposition and do as much as you can to coach and prepare your witness consonant with those rules. You can make objections designed to help your witness; you can at times confer. You can coach. There is nothing wrong with good coaching. Just do it right, observing the rules. And remember — the better job of coaching you have done in advance of the deposition, the more likely you will be able to sit quietly in the coach’s box as you watch your player perform.