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Ethical Challenges in Preparing and Presenting Witnesses

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ETHICAL CHALLENGES IN PREPARING AND PRESENTING WITNESSES

Preparing and presenting witnesses is arguably the most important tasks a trial lawyer performs. These tasks also present a number of complicated ethical issues. This paper identifies some of the more common issues and explains how ethical witness preparation and presentation is consistent with effective witness presentation.

I. Ethical Challenges in Preparing Witnesses

As trial lawyers, we tell our clients' stories through witnesses. Effective witness testimony is coherent, credible, and concise. Most lay witnesses, however, are not equipped to provide such testimony without a lot of preparation. For starters, witnesses are often asked to testify about events and circumstances that occurred months and years prior to their testimony. This is difficult without review of contemporaneous documents and comparison with the recollections of others. Even with sufficient recollection of the facts, the question-and-answer format of the witness examination—where the witness must engage in a conversation in the presence of a passive jury—is unfamiliar an uncomfortable to lay witnesses. And cross-examination can be confusing, frustrating, and downright intimidating.

For all of these reasons, many view properly preparing witnesses as an ethical obligation.[1] Although neither the Texas Rules of Disciplinary Conduct nor the ABA Model Rules of Professional Conduct specifically require lawyers to prepare witnesses, both sets of rules do impose duties of competent and diligent representation. The ABA Rules expressly require "preparation reasonably necessary for the representation,"[2] and at least one court has interpreted this rule to impose "an ethical duty to prepare a witness."[3] Although the Texas Rules stop short of expressly requiring adequate preparation and thoroughness as a component of competent representation, they do state that a lawyer may not "neglect a legal matter entrusted to the lawyer" or "frequently fail to carry out completely the obligations that the lawyer owes to a client."[4] In certain circumstances, "a lawyer who fails to . . . prepare adequately" may violate this provision of the Texas Rules.[5] In any event, even if the failure to prepare witnesses does not rise to the level of an ethical violation under the Texas Rules, it can, in some circumstances, constitute malpractice.[6]

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[1] *See* John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 286–88 (1989).
[2] MODEL RULES PROF'L CONDUCT r. 1.01 (AM. BAR ASS'N 1983).
[3] *Christy v. Pennsylvania Tpk. Comm'n*, 160 F.R.D. 51, 53 (E.D. Pa. 1995) ("[A] lawyer has an ethical duty to prepare a witness under Pennsylvania Rule of Professional Conduct 1.1.").
[4] TEX. DISCIPLINARY RULES PROF'L CONDUCT r. 1.01(b).
[5] 48A ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, TEXAS PRACTICE SERIES: HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 8:3 n.17 (2016 ed.).
[6] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 116 cmt. b (AM. LAW INST. 2000) (citing *id.* § 52(1)).

Of course, although lawyers are well-advised and, in some circumstances, duty-bound to prepare witnesses to testify, there are limits on the extent to which a lawyer may attempt to influence how a witness testifies. Unfortunately, neither the ethical rules nor ethics opinions provide much guidance on what witness-preparation techniques lawyers may ethically employ. The Restatement (Third) of the Law Governing Lawyers, however, identifies several witness-preparation activities that, in the view of the American Law Institute, are permitted:

- discussing the role of the witness and effective courtroom demeanor
- 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 the factual context into which the witness's observations or opinions will fit
- reviewing documents or other physical evidence that may be introduced
- discussing probable lines of hostile cross-examination that the witness should be prepared to meet
- rehearsing testimony and even suggesting choice of words that might be employed to make the witness's meaning clear[7]

Although "[a]n attorney enjoys extensive leeway in preparing a witness to testify truthfully, . . . the attorney crosses a line when she influences the witness to alter testimony in a false or misleading way." *Ibarra v. Baker*, 338 F. App'x 457, 466 (5th Cir. 2009). As stated in the Texas Rules, a lawyer "shall not . . . counsel or assist a witness to testify falsely."[8] But this does not prohibit a lawyer from attempting to persuade a witness to provide testimony for which a factual basis exists, even if that testimony is inconsistent with the witness's initial recollection of the facts. For instance, in *Resolution Trust Corp. v. Bright*,[9] the Fifth Circuit held that the plaintiff's attorneys did not run afoul of the Texas Rules when they presented a witness with a draft affidavit that contained

[7] *Id.* § 116 cmt. b.
[8] TEX. DISCIPLINARY RULES PROF'L CONDUCT r. 3.04(b).
[9] 6 F.3d 336 (5th Cir. 1993).

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