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Preparing Difficult Witnesses for Trial

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For your client to win at trial, the trial lawyer in you must tell a human story, one that moves people to decide in your client's favor. Flesh-and-blood witnesses fill essential roles in the drama. So-so ones will turn the story to mush, and bad ones will allow your friend on the other side to beat you and your client about the head and neck with it. Difficult witnesses – DWs – therefore pose a risk you must use all your talents and powers to manage.

How can you prepare DWs for their potentially pivotal turn on the courtroom stage? Below I offer thoughts from 33 years of trying cases.

I. Prologue.

Let's start with some basics. I'll begin by briefly sketching the identifying traits of the groups that essentially all witnesses – including DWs – fall into and some of the more significant ethical considerations that govern your dealings with each category. Then we'll take a short and non-exhaustive look at the protective scope of the two major privileges that trial lawyers deal with: the lawyer-client privilege and the lawyer work-product doctrine.

Witness types and some ethical rules.

A civil case generally involves four categories of witnesses:

- your client and representatives of your client,
- non-parties who don't have legal counsel,
- the clients and client representatives of other lawyers, and
- experts.

Note the emphasis on who has a lawyer and who doesn't. It matters for several reasons.

First, the lawyer-client privilege normally protects your interactions with witnesses who are clients – whether individual clients or the representatives of an organizational client such as a corporation.¹

Second, your dealings with non-client witnesses, including experts, generally do not fall within the protection of the lawyer-client privilege, although the work-product doctrine may still apply.

¹ In Texas, an organizational client typically includes not only higher-ups but also employees whose communications with you take place within the scope of their employment. *See* Tex. R. Evid. 503(a); *In re Texas Health Resources*, 472 S.W.3d 895, 901-02 (Tex. App. – Dallas 2015, orig. proceeding) (discussing definition of “client’s representative” in Tex. R. Evid. 503(a)(2)).

Third, although communications with your client’s employees may fall within the protection of a privilege, you don’t necessarily represent them as individuals and need to make clear to them any limitations on your role. Many times, that will mean advising them that your client is their employer, not them, and that your first loyalty runs to their employer, not them.

Fourth, you generally can’t communicate with people who you don’t represent but who have counsel. You must normally ask for the other lawyer’s consent first. Most times you won’t get it.

Finally, witnesses who don’t have any counsel at all have some important protections. You generally mustn’t imply to them that you are disinterested, should accurately describe your role in the matter, and should avoid offering legal advice (other than the advice to secure counsel) if the witness’s interests may conflict with your client’s. *See, e.g.*, Tex. Disc. R. Prof. Conduct 4.3; ABA Mod. R. Prof. Conduct 4.3.

Privilege.

“An attorney enjoys extensive leeway in preparing a witness to testify truthfully, but the attorney crosses a line when she influences the witness to alter testimony in a false or misleading way.” *Ibarra v. Baker*, 338 Fed. Appx. 457, 465 (5th Cir. 2009). “Experienced trial counsel are expected to do no less than to provide support, direction and assistance to witnesses, provided only that a direction of what may be said is not suggested or required.” *Haworth v. State*, 840 P.2d 912, 914 n.3 (Wyo. 1992). Stating the point even more obviously, lawyers may not coach a witness “to modify or completely change his testimony in material ways.” *Anderson v. Nat’l Union Fire Ins. Co.*, 88 Mass. App. Ct. 1117 (2015), *vacated on other grounds*, 67 N.E.3d 1232 (Mass. 2017).

“The attorney-client privilege protects most of the preparation activities directly involving the client; the work-product privilege protects the lawyer’s own efforts, including research, investigation, and contacts with other witnesses.” John S. Applegate, *Witness Preparation*, 68 Tex. L. Rev. 277, 292 (1989). But the “protection afforded opinion or core work product may be breached when there is a charge of falsified testimony.” *In re Cendant Corp. Securities Litig.*, 343 F.3d 658, 666 n.8 (3d Cir. 2003).

In general, work product “protection also extends to non-attorneys who assist in preparation of litigation”, and “the litigation consultant’s advice to a witness is an ‘opinion’ that is protected under the work-product doctrine.” *Hynix Semiconductor Inc. v. Rambus Inc.*, No. CV-00-20905, 2008 WL 397350, at *2 (N.D. Cal. Feb. 10, 2008) (citing *Cendant*, 343 F.3d at 665-66).

“Litigation consultants retained to aid in witness preparation may qualify as non-attorneys who are protected by the work product doctrine.” *Cendant*, 343 F.3d at 665 (holding that work product doctrine protected communications among trial consultant Dr. Phil McGraw, a witness, and the witness’s counsel).

“The work-product protection continues to adhere where the non-client shares a financial or legal interest, for example, as parties to a joint defense agreement.” *Hynix*, 2008 WL 397350, at *2.

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