By Timothy J. Miller and Matthew J. Singer

Defining the Boundaries

Ethical Limits on Witness Preparation
For American litigators, witness preparation is an important part of the job. Before deposition, trial, or hearing, lawyers typically meet with witnesses to discuss their recollections, go over key documents, rehearse testimony, and explain appropriate attire, demeanor and potential pitfalls. See generally John S. Applegate, Witness Preparation, 68 Tex. L. Rev. 277, 298-324 (1989). Although these are everyday activities for litigators, there are surprisingly few authorities—in Illinois and nationwide—addressing the ethical boundaries governing such activity. Which tactics cross the line from acceptable witness preparation to unacceptable witness coaching? Is it permissible for lawyers to suggest that witnesses use certain words, instead of others, to describe their recollections? To recommend that witnesses adopt a confident demeanor in the courtroom? To aggressively challenge a witness’s initial recollection of certain facts, in hopes of securing more favorable testimony?

Drawing the Line Between Ethical and Unethical Witness Preparation


This article will examine existing authorities and attempt to distill some of the key takeaways for litigators seeking to effectively represent their clients without running afoul of ethical and legal prohibitions.

Illinois Rules of Professional Conduct

The Illinois Rules of Professional Conduct provide only slight guidance to Illinois attorneys about the ethics of witness preparation. Rule 3.4(b) states what should be obvious: lawyers may not “counsel or assist a witness to testify falsely.” Ill. R. Prof. C. 3.4(b). Illinois lawyers also are barred from offering “evidence that the lawyer knows to be false.” Ill. R. Prof. C. 3.3(a)(3). When the lawyer “reasonably believes” that a witness’s planned testimony is false, however, the lawyer has the option to refuse to offer the testimony (unless the testimony is of a criminal defendant). Ill. R. Prof. C. 3.3(a)(3). Because this rule gives an attorney the choice to refuse to offer the testimony, it suggests by implication that a lawyer is ethically permitted to offer testimony that he reasonably believes (but does not know) is false; indeed, in the case of a criminal defendant’s testimony, the lawyer may be obligated to offer such testimony. See People v. Calhoun, 351 Ill. App. 3d 1072, 1081-82 (4th Dist. 2004) (criminal defense attorney who refused to present his client’s testimony provided ineffective assistance of counsel where he did not have good-faith basis for believing client would commit perjury); Gerald L. Shargel, Federal Evidence Rule 608(b): Gateway to the Mindfield of Witness Preparation, 76 Fordham L. Rev. 1263, 1285-88 (2007). In addition, Rule 8.4(c) establishes that it is professional misconduct to “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” Ill. R. Prof. C. 8.4(c). Yet, apart from directly encouraging a witness to lie, it is not readily apparent which witness preparation tactics could be deemed to involve “dishonesty, fraud, deceit, or misrepresentation.”

Significantly, the Rules of Professional Conduct also establish that a lawyer has a duty of competence. Ill. R. Prof. C. 1.1. This duty certainly includes a responsibility to adequately prepare witnesses. See, e.g., United States v. Rhymes, 218 F.3d 310, 319 (4th Cir. 2000). Thus, a lawyer cannot avoid the ambiguities involved in witness preparation by refusing to prepare witnesses.

Scholarly Articles

Illinois’ lack of ethical guidance on witness preparation is typical of jurisdictions across the nation. Given the dearth of authority, scholars and practitioners have weighed in and attempted to provide guidelines for proper witness preparation. These sources reflect a fundamental tension between a lawyer’s responsibility to provide the best possible representation and the justice system’s truth-seeking function. Indeed, the very tactics identified by some as best practices for effective witness preparation are criticized by others as potentially unethical. Illustrative examples include:

Appearance and Demeanor. Lawyers preparing witnesses typically instruct witnesses about appropriate courtroom attire and behavior and encourage witnesses to adopt a calm, confident demeanor. See Restatement (Third) of Law Governing Lawyers §116, cmt.

CBA RECORD 25
n.b: Applegate, supra, at 298-300; Brian Haynes, Preparing Your Witness for Deposition, 28 The Advoc. (Texas) 6, 10 (2004). Yet, some criticize these practices because they may mislead the fact-finder by inaccurately portraying the witness and exaggerating the witness’s level of confidence in the testimony. See Roberta K. Flowers, Witness Preparation: Regulating the Profession’s “Dirty Little Secret”, 38 Hastings Const. L.Q. 1007, 1020-21 (2011); Liisa Renée Salmi, Don’t Walk The Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial, 18 Rev. Litig. 135, 163-65 (1999); Joseph D. Piorkowski, Jr., Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of “Coaching,” 1 Geo. J. Legal Ethics 389, 404-09 (1987).

Suggesting Word Choice. Witnesses can be sloppy with their word choice or imprecise in their recounting of events. So, according to the Restatement of the Law Governing Lawyers, a “lawyer may suggest choice of words that might be employed to make the witness’s meaning clear.” Restatement (Third) of Law Governing Lawyers § 116, cmt. n.b. But, some believe that this tactic can amount to encouraging false testimony because the witness is using the lawyer’s words rather than the witness’s own. See Salmi, supra, at 160-63; Piorkowski, supra, at 402.

Reviewing Relevant Documents. In a witness preparation session, a witness often will review relevant documents. This exercise both refreshes a witness’s recollection of events and ensures that a witness is not blindsided by an unexpected document during cross-examination. See Restatement (Third) of Law Governing Lawyers § 116, cmt. n.b; Applegate, supra, at 304-07; Haynes, supra, at 8; John M. Maciejczyk, Effective Deposition Witness Preparation, 39-Mar Res Gestae 28, 30-31 (1996). Critics note that this approach risks that a witness will testify based on the documents and not an independent recollection of the events at issue. See Salmi, supra, at 144-45.

The bottom line is that virtually all witness preparation tactics—even those routinely utilized by lawyers—can raise ethical questions. But, as discussed above, simply punting the issue by refusing to engage in serious witness preparation is not an option either; such behavior would violate an attorney’s duty to provide competent representation.

Key Case Law
Despite the concerns raised in the scholarly literature, the few cases to directly address the issue of witness preparation generally set a high bar for what constitutes improper witness coaching. Because there are no Illinois authorities directly on point, this article will examine relevant cases from other jurisdictions.

The prototypical example of improper witness preparation is directly encouraging or enabling the witness to offer false testimony. Knox v. Hejes, 933 F. Supp. 1573 (S.D. Ga. 1995), illustrates this kind of misconduct. In Knox, the estate of a bicyclist killed in a collision with a truck filed a civil suit against the truck driver. Knox, 933 F. Supp. at 1575. The truck driver’s attorney prepared an affidavit for a witness to the accident that included a statement averring that the bicycle had attempted to pass the truck. When the witness reviewed the affidavit, he told the attorney that he had never seen the bicycle. In response, the attorney told the witness that “we can change [the statement] now, or we can just leave [it] like that.” The witness did not object to leaving the statement as it was, but told the attorney that if he was later asked about whether he saw the bicycle attempting to pass the truck, he would deny that he saw the bicycle. Nonetheless, the attorney said it was appropriate to leave the statement in the affidavit, the witness signed it, and it was notarized.

The court sanctioned the attorney, ordered him to pay plaintiff’s fees and costs spent litigating the false affidavit issue, and disqualified the attorney and his law firm from further representing defendants in the case. Although the attorney argued that the affidavit relied on the witness’s “impressions” of the scene of the accident, and therefore was not false, the court determined that the affidavit was worded as “the testimony of a person who witnessed an event” and concluded that the attorney “knew that [the witness] witnessed no such thing, but drafted [the affidavit] as if he had.” The court concluded that the affidavit contained “a blatant falsehood of which” the attorney was aware. The court emphasized that the lawyer’s interaction with the witness after the witness disputed the statement in the affidavit was especially inappropriate. Once the witness pointed out that the statement was false, the attorney “had a professional obligation to prevent [the witness] from signing the affidavit” that included the false statement. Instead, the lawyer inappropriately “helped the process along” by giving the witness a choice between changing the affidavit or leaving it as is.

Two Fifth Circuit cases emphasize
the ambiguous line between proper and improper witness preparation. In *Ibarra v. Baker*, 338 F. App’x 457 (5th Cir. 2009) (unpublished), an attorney was sanctioned for improperly coaching a witness even though the attorney never directly met with the witness. The plaintiffs in *Ibarra* were arrested after recording and photographing the execution of a search warrant at a neighboring home. After they were acquitted of resisting arrest they brought a false arrest suit against the arresting officers. *Ibarra*, 338 F. App’x at 461. The attorneys for the officers hired an expert witness who prepared a preliminary report opining, among other theories, that the officers had reasonable suspicion because the arrests occurred in a “high-crime area.” Significantly, this theory was unsupported by any prior testimony in the suit or the criminal case against plaintiffs.

The expert met one-on-one with a defendant officer the day before the officer’s deposition. The officer then showed up at his deposition with a set of notes prepared during his meeting with the expert that tracked the expert’s preliminary report, point-by-point, including the “high crime area” theory. The officer’s deposition testimony about his meeting with the expert was evasive, and he claimed not to remember details of the meeting that occurred just one day prior. Moreover, although the officer testified that he had been briefed before the arrest that the relevant neighborhood was a “high crime area,” he “was unable to provide even a single detail” about that briefing.

After the deposition, the plaintiffs moved for sanctions, and they later discovered billing records indicating that defendants’ attorneys had met with the expert the day before he met with the officer. After holding two hearings, the district court concluded that the purpose of the meeting between the expert and the officer was to “coach” the officer to testify consistently with the expert’s report. Based on the attorneys’ meeting with the expert the previous day, the court also concluded that the attorneys were involved in the witness-coaching scheme, sanctioned them $10,000, and disqualified them.

The Fifth Circuit affirmed the district court’s decision to sanction the attorneys for improper witness coaching. The court emphasized that there was no factual support for the “high crime area” theory prior to the officer’s deposition testimony; that theory first appeared in the expert’s report, and then the officer—with the aid of the notes from his meeting with the expert—mentioned it for the first time in his deposition. The court held that the sudden appearance of this theory in the officer’s deposition testimony, based on a purported briefing of which the officer could not recall “a single detail,” supported the district court’s conclusion that the expert had improperly coached the officer to falsely testify consistently with his expert report. The court acknowledged that the evidence of the attorneys’ involvement was a “bit scant,” but emphasized that the attorneys met with the expert the day before his meeting with the officer.

Applying a deferential standard of review, the court refused to overturn the district court’s ruling that the attorneys, “acting through [the expert], improperly” coached the officer to testify consistently with the expert’s report.

In contrast, another Fifth Circuit case, *Resolution Trust Corp. v. Bright*, 6 F.3d 336 (5th Cir. 1993), determined that attorneys had not crossed the line into improper witness coaching. Plaintiff’s
KEY TAKEAWAYS

Although the above authorities hardly provide comprehensive guidance for attorneys who are preparing witnesses, there are some key lessons to be gleaned:

- An attorney should never encourage a witness to provide testimony that the witness says, or the attorney knows, is false. This is the golden rule of witness preparation and one that even the vague ethical rules make clear.

- An attorney should emphasize repeatedly that the witness must tell the truth. Attorneys who are interviewing and preparing witnesses should emphasize explicitly and repeatedly that the witness should tell the truth and then act in accordance with that instruction. By doing so, the risk that ordinary witness preparation techniques could lead to false testimony can be minimized. See Haynes, supra, at 8; Maciejczyk, supra, at 33. And this is a key distinction between Knox and Resolution Trust. In Knox, after the witness identified an untrue statement in the draft affidavit, the attorney gave the witness the option of signing the affidavit containing the untrue statement or changing it. Meanwhile, in Resolution Trust, the lawyers repeatedly emphasized that the witness must tell the truth, even while aggressively challenging the witness’s perception of events and asking her to change the substance of her affidavit. The lawyers’ emphasis on candor—even as they attempted to persuade the witness to make changes to her affidavit—was a key consideration in the court’s decision to overturn sanctions against the lawyers.

- An attorney should work to ensure that witnesses are well prepared to testify. An attorney must not encourage a witness to lie, but an attorney generally “enjoys extensive leeway in preparing a witness to testify truthfully.” Ibarra, 338 F. App’x at 465. Thus, for example, an attorney can, and should, critically examine a witness’s testimony, discuss with the witness other relevant evidence, work to refresh the witness’s recollection, and prepare the witness for questioning on direct and cross-examination. Moreover, it is appropriate to prepare a witness to testify by emphasizing appropriate demeanor and behavior in the courtroom, working with the witness to choose words that accurately reflect the witness’s intended meaning, and reviewing key documents so the witness can give thoughtful and informed testimony. The ethical concerns that some scholars have raised about these tactics—or the possibility for abuse in the hands of an unscrupulous lawyer—can be reduced by emphasizing to the witness the need to testify truthfully. Moreover, these concerns should not prevent an attorney from doing what is necessary to effectively prepare a witness. Indeed, a lawyer would not be providing competent representation if the lawyer did not fully prepare witnesses to testify.

attorneys conducted a series of interviews with a witness, and after the last interview, they prepared an affidavit for the witness to sign. The attorneys specifically told the witness that the affidavit contained a few assertions that the witness had not previously made, but that the attorneys believed to be true; they also instructed the witness to “very carefully” review the affidavit. The witness made several changes to the draft affidavit, and deleted certain facts of which she believed she did not have personal knowledge. The attorneys aggressively attempted to persuade her to include the facts in her affidavit by describing their understanding of the course of events and showing the witness independent evidence supporting their theories. After the witness refused to alter her revisions to the affidavit, the attorneys prepared a final affidavit incorporating the witness’s changes. When defense counsel became aware of the situation, they moved for sanctions. The district court granted the motion based on its conclusion that plaintiff’s attorneys had improperly attempted to tamper with or manufacture evidence against defendants.

The Fifth Circuit reversed, concluding that plaintiff’s attorneys did not engage in sanctionable misconduct. The court emphasized that plaintiff’s attorneys did not ask the witness to make statements that they knew were false; instead, they attempted to convince her to adopt statements that they believed were true. Given the attorneys’ good faith basis for believing in the truth of the statements, the court determined that the attorneys’ conduct could not accurately be described as manufacturing evidence or encouraging false testimony. Moreover, although the attorneys were “persistent and aggressive in presenting their theory of the case to [the witness],” they “nevertheless made sure that [the witness] signed the affidavit only if she agreed with its contents.” In fact, the court emphasized, the attorneys specifically brought to the witness’s attention that their draft affidavit contained some new statements, and instructed her to read them carefully. Ultimately, the court concluded that the attorney’s actions were permissible advocacy and it reversed the district court’s sanctions order.

Timothy J. Miller, General Counsel at Novack and Macy, is experienced in matters concerning attorneys’ and other professionals’ liability. Matthew J. Singer is an Associate at Novack and Macy, concentrating in commercial litigation.