



### **ABA Issues First Guidance on Witness Preparation Since COVID-19**

The ABA Standing Committee on Ethics and Professional Responsibility recently released [Formal Opinion 508](#), which opines on “The Ethics of Witness Preparation.” The new opinion provides guidance to attorneys to stay within the Rules of Professional Conduct when preparing a witness to testify. There is a line to be walked, which the Committee acknowledges:

[T]he failure adequately to prepare a witness would in many situations be classified as an ethical violation. But, in some witness-preparation situations, a lawyer clearly steps over the line of what is ethically permissible. Counseling a witness to give false testimony or assisting a witness in offering false testimony, for example, is a violation of at least Model Rule 3.4(b). The task of delineating what is necessary and proper and what is ethically prohibited during witness preparation has become more urgent with the advent of commonly used remote technologies, some of which can be used to surreptitiously “coach” witnesses in new and ethically problematic ways.

The Opinion addresses not just witness preparation and related ethical issues, but also covers speaking, or suggestive, objections.

The Committee lists acceptable lawyer preparatory conduct:

- remind the witness that they will be under oath
- emphasize the importance of telling the truth
- explain that telling the truth can include a truthful answer of “I do not recall”
- explain case strategy and procedure, including the nature of the testimonial process or the purpose of the deposition
- suggest proper attire and appropriate demeanor and decorum
- provide context for the witness’s testimony
- inquire into the witness’s probable testimony and recollection
- identify other testimony that is expected to be presented and explore the witness’s version of events in light of that testimony
- review documents or physical evidence with the witness, including using documents to refresh a witness’s recollection of the facts

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- identify lines of questioning and potential cross-examination
- suggest choice of words that might be employed to make the witness's meaning clear
- tell the witness not to answer a question until it has been completely asked
- emphasize the importance of remaining calm and not arguing with the questioning lawyer
- tell the witness to testify only about what they know and remember and not to guess or speculate
- familiarize the witness with the idea of focusing on answering the question, i.e., not volunteering information.

(Internal footnotes omitted).

Notably, this is also the first guidance regarding witness preparation since COVID-19. The Opinion urges lawyers to consider "prophylactic measures designed for use in remote proceedings to prevent and detect incidences of unethical coaching conduct," and gives useful examples.

If you're a litigator, this is a must-read.

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