Ethics and Privilege Issues: Witnesses

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Agenda
Ethics and Privilege Issues: Witnesses

- Witnesses, Generally
- Experts
- 30(b)(6) Witnesses
- Current and Former Employees

Witnesses, Generally

Witnesses, Generally

- What are your rights and responsibilities to your clients and to the witnesses?
- Ethics and privilege
- Some situations to consider:
  - What is the difference between preparing your witness and improper coaching?
  - Can you communicate with your witness during deposition breaks?
  - Can you instruct your witness not to communicate with other side's counsel?
  - What do you do if your witness wants to lie?
  - What do you do if opposing counsel acts outrageously during a deposition?
  - What do you need to consider if you represent the company?
  - Can you talk to former employees? Should you?

Your Witness

- You have an ethical obligation to prepare your witness.
- Model Rule of Professional Conduct 1.3
  - A lawyer shall act with reasonable diligence and promptness in representing a client.
- Consequences
  - Sanctions
  - Bad testimony

Preparing v. Coaching
Let Your Conscience Be Your Guide

- Ask different lawyers, get different answers.
- Model Rules.
  - **1.2(d):Scope of Representation and Allocation of Authority Between Client and Lawyer**
    - [a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
  - **3.3(a)(3): Candor Toward the Tribunal**
    - Don't offer evidence you know to be false
  - **3.4(b): Fairness to Opposing Party & Counsel**
    - Don't falsify evidence, counsel/assist witness to testify falsely, or offer illegal inducement
  - **8.4: Maintaining the Integrity of the Profession**
    - Covers all sorts of bad conduct: dishonesty, deceit, misrepresentation
- **Rest. 3d of Law Governing Lawyers s. 120(1)**
  - Lawyer may not knowingly counsel or assist a witness to testify falsely

Preparing v. Coaching

"See if you can remember just how crazy you were…"

- *Anatomy of a Murder*
- **Model Rule 1.2(d)**
  - You can help the witness understand the law.
- **Rest. 3d of Law Governing Lawyers s. 120(1)**
  - Lawyer may interview a witness in preparation for testimony, which may include:
    - Discussing the role of the witness and effective courtroom demeanor
    - Discussing the witness's recollection, probable testimony
    - Revealing to the witness other testimony or evidence that will be presented
    - Asking the witness to reconsider recollection or recounting of events in that light
    - Discussing the application of the law to the events at issue
    - Discussing probable lines of hostile cross examination (and documents or other evidence)
    - **Might suggest a choice of words to make the witness's meaning clear…but may not assist the witness to testify falsely to a material fact.**

Preparation v. Coaching

- **DC ethics opinion**
  - No misleading testimony
  - Suggesting language and substance of the testimony is OK
  - Lawyer should…even must…do whatever is feasible to prepare the witness
- **MD Case**
- **Bottom Line**
  - Tell the truth
  - Facts are facts; lawyer's job is to make them make sense to the claims or defenses
  - Practicing should help them be precise in testimony; not to put words in their mouth
  - Use documents and such to help witness feel comfortable with their testimony

Preparation v. Coaching
The Script Memo

…You will be asked if you ever saw any Warning labels on containers of asbestos. It is important to maintain that you NEVER saw any labels on asbestos products that said warning or danger. Do not mention product names that are not listed on your work history sheets. The defense attorneys will jump at a chance to blame your asbestos exposure on companies that were not sued in your case. …The only documents you should ever refer to in your deposition are your SS print out, your work history sheets and photographs of products you were shown…any other notes, such as what you are reading right now, are "privileged" and should never be mentioned…

Uncomfortable Situations

- What should you do if your witness misbehaves during a deposition?
  - Uncooperative or insulting?
    - Obligation to stop the behavior?
      - *GMAC v. HFC Corp.*, Sanctions to attorney and witness, joint and several for nearly $30K.
- What if the your client is being harassed by opposing counsel (or party)?
  - Get examples on the record
  - Can instruct not to answer if the questions violate privilege or court ordered limitation
  - Can suspend the deposition and bring a motion to terminate or limit the deposition if it is being conducted in bad faith

Uncomfortable Situations
The Lying Witness

- **The Rules**
  - Rule of Prof. Resp. 1.6 (confidentiality) and 3.3 (duty owed the tribunal)
  - Revealing confidential information is last resort.
    - Duty to rectify the fraud
    - What does it mean to know it is false?
- **Steps to Take**
    - Persuade the client to rectify
    - Take reasonable remedial measures
    - Disclosure
- Applies in a deposition?
- Applies in a settlement letter?

Coaching During Depositions

- Speaking Objections
  - Black's Law Dictionary: Objection that contains more information (in the form of an argument or suggestion) than needed by a judge to sustain or overrule it.
  - FRCP 30(c)(2)
    - An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the **deposition—must be noted on the record, but the examination still proceeds**; the testimony is taken subject to any objection. **An objection must be stated concisely in a nonargumentative and nonsuggestive manner.** A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

Coaching During Depositions

- Speaking Objections
  - No
    - If you remember
    - If you know
    - Document speaks for itself
    - Don't guess
    - Asked and answered
    - Mischaracterizes his testimony (especially if you then try to restate the prior testimony)
    - Assumes facts not in evidence because there is no proof he beat his wife
  - OK
    - Vague
    - Ambiguous
    - Assumes facts not in evidence (sometimes)
- Non-Verbal Cues

Coaching During Depositions: *"But, we were on a break"*

- **Two Opposing Approaches**
  - *Hall v. Clifton Precision*
  - *In re Stratosphere Corp. Sec. Litig.*
  - And a whole lot of in-between
- **State law examples**
  - Texas
  - New Jersey
  - Delaware
- **Takeaways**
  - OK to discuss privilege
  - Don't interrupt a question or line of questioning to take a break
  - Consulting during a break is dangerous territory…proceed with caution

Privilege Issues During Depositions

- **Attorney-Client Privilege: Objections**
- **What about legal positions/facts supporting them?**
  - Courts are…split
  - Generally, facts are fair game
- **Best Practice**
  - Prepare/Anticipate
  - Ask Opposing Counsel
  - Get instructions from the court

Work Product in Witness Preparation

- Work Product
  - Inconsistent treatment in federal courts
    - Selection and arrangement of already produced materials protected?
    - *Sporck v. Peil*, 759 F.2d 312 (3d Cir.): selection and compilation of documents is protected
    - *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007 (1st Cir. 1988): no protection to the arrangement of documents otherwise not privileged
    - Caution: *Wheeling-Pittsburgh Steel* and *Redvanly*
  - Assume that anything used to prepare will be discoverable

Experts

Experts: Whose Report Is It Anyway?

- Bottom line: Experts are supposed to be independent.
- Rule 3.4(b): Lawyer can't counsel or assist a witness to testify falsely
- What can the lawyer do?
  - Assist in the preparation of the report
  - Provide factual basis
  - Suggest word choice and other edits
  - HOWEVER
    - The expert must freely authorize and adopt the changes as his/her own.
- Work product may not protect communications between counsel and expert

Experts: What is Privileged?

- What is protected by privilege?
  - FRCP 26
    - "Facts and data"
    - Communications regarding assumptions to be made may be discoverable
  - May not be required to disclose drafts
    - Do need to disclose facts and data *considered*
    - What is a draft? Not every document is a draft.
    - What is lawyer's obligation to review expert's file?
      - *Gerke v. Travelers*

Compensation of Witnesses

- Rule 3.4 A lawyer shall not…
  - (b) falsify evidence, counsel or assist a witness to testify falsely, ***or offer an inducement to a witness that is prohibited by law***.
- Considerations: What is reasonable?
- Consequences: What will happen if unreasonable?
- Consulting Agreements

30(b)(6) Witnesses

The 30(b)(6) Witness

- Ethical duty to prepare the witness
- Rule of Prof. Conduct 1.13 (Organization as Client)
- Preparation is intense.
  - Role of the 30(b)(6) witness
  - Proper designation is key
  - What questions can be asked
  - “I don’t know”

The 30(b)(6) Witness

- Rule 37: “Failure to appear”
  - Sanctions
- Coaching
  - Suggesting responses is (generally) ok
  - Testifying falsely to a material fact is not
- Preparation should focus on:
  - Truth
  - Organize the facts
  - Compare witness’s recollection and corporation’s
  - Refresh recollection
  - Show important documents, evidence
  - Explain the role of a 30(b)(6) witness
  - Talk about the topics covered by the notice and what to do if there are questions outside the scope

The 30(b)(6) Witness

- What if questions go beyond the scope of the notice?
- Different Approaches
  - *King v. Pratt Whitney* and *Paparelli v. Prudential Ins.*
- If you are not sure
  - Suspend the deposition and seek a protective order
  - Allow the deponent to answer the question
    - Instruct the witness to make it clear if they are answering for the organization or on personal knowledge
    - State on the record that this is outside the scope of the notice.
- A word on drafting notices

The 30(b)(6) Witness:
Guidance from *QBE Ins. Corp. v. Jorda Enterprises, Inc.*

- Court decision granting sanction of excluding testimony for failure to cooperate with 30(b)(6) notice.
- *De facto* Bible governing corporate depositions. Nearly 40 tips. Worth the read. Highlights:
  - Curb desire to present deponents who each disclaim knowledge of facts known to someone in the corporation.
  - Burdens on both the discovering party and the designating party. The party seeking discovery must describe the matters with reasonable particularity and the responding corporation or entity must produce one or more witnesses who can testify about the corporation's knowledge of the noticed topics.
  - A Rule 30(b)(6) W need not have personal knowledge of the designated subject matter.
  - The rule does not expressly or implicitly require the corporation or entity to produce the "person most knowledgeable"…Not only does the rule not provide for this type of discovery demand…As noted, the witness/designee need not have any personal knowledge…
  - Although the rule is not designed to be a memory contest, the corporation has a duty to make a good faith, conscientious effort to designate appropriate persons and to prepare them to testify.
  - In other words, a corporation is expected to create an appropriate witness or witnesses from information reasonably available to it if necessary.
  - As a corollary to the corporation's duty to designate and prepare a witness, it must perform a reasonable inquiry for information that is reasonably available to it.
  - A corporate designee must provide responsive answers even if the information was transmitted through the corporation's lawyers.
  - The designee must also testify about the corporation's position, beliefs and opinions.
  - The rule provides for a variety of sanctions for a party's failure to comply with its Rule 30(b)(6) obligations, ranging from the imposition of costs to preclusion of testimony and even entry of default.
  - Despite the potentially difficult burdens which sometimes are generated by Rule 30(b)(6) depositions, the corporation is not without some protection, as it may timely seek a protective order or other relief.
  - A corporation which expects its designee to be unprepared to testify on any relevant, listed topic at the corporate representative deposition should advise the requesting party of the designee's limitations before the deposition begins.

Current and Former Employees

Internal Investigations: Employee Interviews

- *Upjohn* warning
  - Privilege applies if communications:
    - To corporation counsel
    - Acting as counsel
    - At the direction of superior for purpose of seeking legal advice
    - Made with understanding that interview's purpose is to obtain legal advice
    - Concerning matters related to the employee's duties
  - Privilege belongs to employer; not employee!

Former Employees

- Before you meet with a former employee
- Most courts apply *Upjohn* to former employees to some extent
- Work product
- Do you need company consent to speak with a former employee of opposing party?
- What if the former employee wants to "join the team"?
- Can you tell a former employee not to speak with opposing counsel?
- Can you ask to be at the interview of former employee by opposing counsel?

Conclusion

- Know how you are going to handle situations that may arise:
  - Difficult witnesses
  - Lying witnesses
    - or…mistaken witnesses
  - Difficult opposing counsel
- What privilege issues may arise?
  - Know the law in your jurisdiction…and in the jurisdiction where you are taking the deposition or interviewing a witness
  - Address issues before the deposition if you can, with opposing counsel
- Consider issues that arise with corporate witnesses
  - 30(b)(6)
  - Former Employees
- Be prepared
- Tell the truth