

CHICAGO LAWYER

CLIFFORD'S NOTES

LAYING THE GROUNDWORK

ABA opinion provides guidance for witness prep for tough situations

By **BOB CLIFFORD**

It's 2 p.m. on Tuesday and the lawyers representing parties in a car accident case are in front of their computers, waiting for the defendant to join them for her deposition. After several minutes pass, the defense counsel calls the witness on her cellphone. Turns out, the witness had forgotten about the deposition. The attorneys decide to proceed with the deposition while the witness continues shopping at a local liquor store.

This is a true story that demonstrates a failure to prepare a witness. But during the pandemic and its aftermath, lawyers have complained that witness preparation has somewhat moved in the opposite direction and that witnesses are being prepared with undue influence. Remote hearings have made it easier for attorneys to use unethical means to coach a witness by sending them signals not seen on camera.

The American Bar Association (ABA) tried to address this issue with its Formal Opinion 508 (Aug. 5, 2023). It provides further guidance for preparing witnesses for depositions and trial testimony without overstepping the boundaries of the Model Rules of Professional Conduct. The opinion balances an attorney's duty to zealously represent clients with a duty to refrain from improperly coaching or influencing a witness. In particular, it addresses these issues in remote settings.

The ABA's ethics opinion pointed out: "Winking at a witness during trial testimony, kicking a deponent under the table, or passing notes or whispering to a witness mid-testimony are classic examples of efforts to improperly influence a witness's in-progress testimony."

Coaching is often the result of insufficient preparation. If proper steps are taken to prepare a witness before the deposition, there would be no need to interrupt, send signals or even bully witnesses into saying what you want them to say. The truth should suffice, and

Formal Opinion 508, explains that a party's access to evidence cannot be obstructed.

Formal Opinion 508 notes that clear ethical violations include counseling a witness to give false testimony or procuring a witness' absence from a proceeding. Model Rule 3.4(b) that bars lawyers from advising or assisting a witness to give false testimony applies. Other Rules that apply include Rule 1.2 (Scope of Representation and Allocation of Authority between Client and Lawyer), Rule 3.3 (Candor Toward the Tribunal), Rule 3.4 (Fairness to Opposing Party and Counsel), Rule 4.4 (Respect for Rights of Third Persons) and Rule 8.4 (Misconduct).

Formal Opinion 508 mentions the increased opportunities for covert coaching during remote proceedings, offering an example of a lawyer disciplined for sending texts to a witness during a deposition that included directions on how to respond to questions and another lawyer disciplined for providing answers to questions while off camera.

It also provides a list of acceptable witness preparation techniques that include reminding a witness they are under oath. It explains that "I don't recall" qualifies as the truth, that case strategy and the purpose of the deposition, asking the witness about their probable testimony and recollection, identifying other testimony that is expected to be presented, suggesting choice words to make the witness' testimony more clear, telling the witness to testify only about what they know and telling the witness to answer only the question and not volunteer additional information.

If an attorney practices long enough, it is almost certain that lawyer will come across an opponent who is insulting, condescending, unprofessional or obstructive. When the unwarranted behavior arises to the level of disrupting the deposition and where the truth is unable to be uncovered, lawyers know to stop the proceedings and immediately contact the judge who can get involved before the



deposition ends. Depending upon the severity of the language and conduct, a lawyer may be sanctioned for unprofessional behavior.

A better tactic is to know the rules. When an opponent tries to derail a deposition by criticizing a question or consistently interrupting, citing ambiguity, asking compound questions or making argumentative objections, the questioning lawyer should not go down the rabbit hole with an opponent and make unprofessional comments that lead to a breakdown of civility. If the question is improper, admissibility of the answer can be taken up in motions later.

Formal Opinion 508 suggests some proactive measures including:

- Adopting systemic precautions before the deposition including scheduling case management orders;
- Understanding relevant technology and how to enable or disable certain options;
- Incorporating questions about witness preparation into one's line of questioning.

Many lawyers confuse the evidentiary rules at trial with those at a deposition, which are limited. Nonetheless, one must not lose sight of the goal to uphold the integrity of the process to get the truth to achieve justice for one's client. [CL](#)

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