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WITNESS PREPARATION: THE KEY TO CREDIBILITY

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I. THE BASICS AND IMPORTANCE OF WITNESS PREPARATION

Underestimating the importance of credibility is an unforgiving mistake that an attorney cannot afford to make. The jury will place a high priority on credibility when deciding whose version of the truth to believe. Honesty by itself is not credibility, and even a completely honest person still does not have credibility about a subject the person knows little about.¹ An attorney must strive to know more about the case than anyone else in the courtroom to create credibility.² Achieving credibility requires intense work and one area includes witness preparation. In preparing witnesses, attorneys are caught in a conflict between the duty to proffer only truthful evidence and the duty to represent the client zealously.³ Zealously advocating for the client sometimes may cause damage to the truth,⁴ and attorneys coaching a witness can subtly effect or distort a witness's testimony affecting the truth.⁵

Many attorneys simply create more fear and anxiety in the witness during preparation.⁶ By giving lists of "do's and don'ts," reciting the substantive and legal facts of the case that even the attorney cannot remember, the witness is left alone in the sea of law to fend for him or herself.⁷ The attorney must remember that the witness is not accustomed to the practice of law or the intimidating process of a deposition or testifying

in trial. Anxiety prevents the witness from focusing and will create nervousness which can lead to less desirable testimony.⁸ In order to portray truthful and credible testimony to the jury, the witness needs to remain calm and confident, therefore the primary goal of the attorney is to help the witness during preparation sessions to relieve anxiety and stress created while testifying.⁹

The basics of preparing a witness include instructing the person to avoid speculation and listen carefully to the questions asked.¹⁰ Although the witness should be instructed to not volunteer information which has not been asked for,¹¹ the attorney must make sure the witness always tells the truth.¹² The attorney should repeat this point again and again to the witness and when preparing the witness make sure that the person does not give tricky or evasive answers.¹³ Simple coaching involves instructing the witness to dress neatly, speak clearly and distinctly, avoid distracting behavior and if testifying at trial to look at the jury when answering questions.¹⁴ Inform the witness that jurors will see right through deceptive or evasive answers and ruin his or her credibility, which is the main technique in persuading the jury to believe your client's side.¹⁵ Regardless of opposing counsel's tactics, the witness can establish confidence by remaining completely truthful.¹⁶ When preparing a witness, the attorney can alleviate stress by informing the witness that they will not get into trouble by telling the truth, in fact, by giving deceitful testimony the witness can create a world of injuries to the case.¹⁷ These dangers and borderline unethical attorney behavior when

¹ Stephen D Easton, *The Power of the Truth: An Honest Attorney's Guide to Winning Jury Trials in a Dishonest World*, 62 Tex. B. J 234, 237 (March 1999).

² *Id.* at 237.

³ See Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. Davis L. Rev. 95, 117 (1996).

⁴ See Liisa Renee Salmi, *Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial* 18 Rev. Litig. 135, 137 (Winter 1999).

⁵ See Strier, *supra* note 3 at 10.

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⁷ See *Id.* at 156.

⁸ See *Id.* at 156-57.

⁹ See *Id.* at 156.

¹⁰ See Richard C. Wydick, *The Ethics of Witness Coaching*, 17 Cardozo L. Rev. 1, 14-15 (1995).

¹¹ *Id.* at 14-15.

¹² Easton, *supra* note 1 at 238.

¹³ *Id.* at 238.

¹⁴ See John S. Applegate, *Witness Preparation*, 68 Tex. L. Rev. 277, 298-299 (1989).

¹⁵ See Easton, *supra* note 1 at 238 -239.

¹⁶ *Id.* at 239.

¹⁷ *Id.* at 239.

preparing witnesses is this article's focus and is discussed at length in later segments.

The ideal situation in preparing a witness is to have separate witness interview and preparation sessions.¹⁸ By having a separate interview session the attorney can assess the witness's personality and determine the best way to conduct the preparation session. Then, during the preparation session, the attorney can calm the witness's anxiety, inform them to just tell the truth and let them know that mistakes will happen and they are understandable.¹⁹ The more the witness can relax and not become unsettled when a mistake occurs the better the witness will handle testifying and cross-examination. When a witness is calm and relaxed the witness will assert the truth confidently rather than in a nervous manner creating credibility.

II. THE RULES GOVERNING WITNESS PREPARATION

The American Bar Association has set forth rules governing attorney conduct, however they are broad and provide little guidance when preparing witnesses. The Model Rules of Professional Conduct broadly state that an attorney "shall not counsel a client to engage in, or assist a client in conduct the attorney knows is criminal or fraudulent."²⁰ Further, an attorney "shall not assist a witness to testify falsely,"²¹ and the lawyer shall not engage in dishonesty, fraud, deceit or misrepresentation.²² The Model Code of Professional Responsibility forbids the attorney to knowingly participate in conduct that is illegal, fraudulent, or to participate in the creation or preservation of evidence when the attorney knows the evidence is false.²³ The most obvious violations occurring during witness preparation is improper influencing of the truth and subornation of perjury.

¹⁸ Malone, *supra* note 6 at 156.

¹⁹ *See Id.* at 157-58.

²⁰ Model Rules of Professional Conduct Rule 1.2(d), http://www.abanet.org/cpr/mrpc/mrpc_toc.html.

²¹ *Id.* at 3.4(b).

²² *Id.* at 8.4(c).

²³ Model Code of Professional Responsibility DR 7-102(A), <http://www.abanet.org/cpr/mrpc/mcpr.pdf>.

A. A U.S. Supreme Court Discussion

The U.S. Supreme Court discussed the Model Code of Professional Responsibility stressing that cross examination is the primary tactic to uncover improper witness coaching.²⁴ In *Geders v. United States*, a case appealed from the Fifth Circuit, involved a criminal prosecution and the narrow scope of attorney witness coaching during a recess in court.²⁵ The trial court ordered witnesses sequestered from attorneys during court recesses of their testimony.²⁶ In addition, the defendant was prevented from meeting with his attorney during a 17 hour overnight recess between his direct and cross examination.²⁷

The Supreme Court held that the adversary system could reveal, through skillful cross-examination, improper witness coaching.²⁸ The opposing counsel may use the witness coaching to then impeach the witness's credibility.²⁹ An attorney must respect the important ethical distinction between discussing testimony and seeking to improperly influence it.³⁰ If a trial judge believes that an attorney may be unethical in guidance of the witness during recesses, then the judge may direct the examination to continue without recess until finished.³¹ The court, further, may arrange the sequence of the testimony so that examinations are not interrupted.³² Implicit in the Court's reasoning is that the trial court's sequestration of witnesses and clients would not be acceptable under any circumstances. The Court placed faith in the adversary system and directed focus on cross-examination to uncover improper witness coaching. The opinion reveals that the Court regards witness preparation important and that it is the duty of the attorney to abide by ethical guidelines when preparing witnesses.

²⁴ *Geders v. United States*, 425 U.S. 80, 90 (U.S. 1976).

²⁵ *Id.*

²⁶ *Id.* at 81.

²⁷ *Id.* at 87-88.

²⁸ *Id.* at 90.

²⁹ *Id.*

³⁰ *Id.* at 91.

³¹ *Id.* at 90.

³² *Id.*

B. Texas Disciplinary Rules of Professional Conduct

In Texas, lawyers are guided by the Texas Disciplinary Rules of Professional Conduct, one of the principal sources of professional obligations for Texas lawyers.³³ The Rules state that attorneys have an obligation to maintain the highest standards of ethical conduct.³⁴ Further, a lawyer should zealously pursue clients' interests "within the bounds of the law."³⁵ Zealous advocacy creates the already mentioned conflict of tempting the attorney to walk the line on unethical witness preparation. However, the Texas Rules modify this zealotry by adding "within the bounds of the law," thus ensuring that attorneys must not confuse winning at all costs with zealous advocacy.³⁶ Texas Disciplinary Rules of Professional Conduct states that a lawyer shall not falsify evidence, and shall not counsel or assist a witness to testify falsely.³⁷ In fact, a win at all cost mentality tempts even the witness to conform their testimony to attain a desired result.³⁸ It is the attorney's duty to take all reasonable steps to ensure that false testimony is not presented.³⁹

The Rules provide minimum standards of conduct for attorneys to abide.⁴⁰ However, the Rules give disciplinary standards and not standards for civil liability.⁴¹ Violations of these Rules does not give rise to private causes of actions or presumptions that legal duties have been breached,⁴² but the courts often look to the Disciplinary Rules when deciding disqualification issues.⁴³ The rules are not dispositive on issues of disciplinary conduct,

³³ 1-3 Dorsaneo, Texas Litigation Guide § 3.01(2)(a).

³⁴ Tex. Disciplinary R. Prof'l Conduct, reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 1998) (Tex. State Bar R. art. X, § 9). Preamble

³⁵ *Id.* at preamble

³⁶ *Id.*

³⁷ Tex. Disciplinary R. Prof'l Conduct 3.04.

³⁸ Patricia J. Kerrigan, *Witness Preparation*, 30 Tex. Tech L. Rev. 1367, 1371 (1999).

³⁹ *See Id.* at 1371.

⁴⁰ Dorsaneo, *supra* note 33 at § 3.01(2)(b).

⁴¹ *Id.*

⁴² *Wright v. Sydow*, 173 S.W.3d 534, 549 (Tex. App.-Houston [14th Dist.] 2004, pet. denied)

⁴³ *In re Nitla S.A. de C.V.*, 92 S.W.3d 419 (Tex. 2002)

however they provide guidelines for whether an attorney should be reprimanded.⁴⁴

III. ETHICAL WITNESS PREPARATION AND DANGEROUS PITFALLS

Attorneys many times blur the distinction between proper education of a witness and improper coaching.⁴⁵ If the attorney sets truthful testimony as the primary goal of the preparation session, the attorney immensely helps her cause for staying on the ethical side of witness preparation.⁴⁶ The attorney can firmly impress the seriousness of telling the truth upon the witness by instructing a few clear points: (1) Opposing counsel would like nothing more than to catch the witness in a lie, (2) it is probable that opposing counsel will discover the lie because the adversarial process allows the development of evidence from many sources, (3) opposing counsel may portray the witness as a liar to the jury, (4) the witness may be prosecuted for perjury, (5) the entire case may need to be retried if the witness commits perjury and (6) if the witness is a client, the lawyer should advise the client that the lawyer will withdraw if the client persists on the intention to present false testimony.⁴⁷

A. The Witness Preparation Session

In preparing for the witness preparation session the attorney must have superior knowledge and be aware of all ethical

⁴⁴ *National Medical Enters. v. Godbey*, 924 S.W.2d 123, 132 (Tex. 1996); *Henderson v. Floyd*, 891 S.W.2d 252, 253-254 (Tex. 1995) ; *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex. 1990) ; *see also In re Meador*, 968 S.W.2d 346, 350-351 (Tex. 1998) (court may disqualify attorney who has not violated disciplinary rule).

⁴⁵ Kerrigan, *supra* note 38 at 1372.

⁴⁶ *See* Joseph D. Piorkowski, Note, *Professional Conduct in the Preparation of Witnesses for Trial; Defining the Acceptable Limitations of "Coaching,"* 1 Geo. J. Legal Ethics 389, 390-91 (1987).

⁴⁷ *See generally* Brian N. Smiley, *The Law and Ethics of Witness Preparation*, 1061 Practicing L. Inst. Corp. Prac. Course Handbook Series 659, 662-72 (1998) (discussing the line between improper perjury and the subornation of perjury, and proper witness preparation).

considerations.⁴⁸ Further, the attorney must be prepared for any applicable procedural rules, aware of direct and cross examination techniques, the jury's perspective and the role of the judge.⁴⁹ The importance of the preparation not only helps the attorney with the case, but these preparation factors need to be explained to the witness as well.⁵⁰ Clients who are unfamiliar with the litigation process should receive basic explanation of procedure.⁵¹ A prospective witness, also needs to understand guidelines; for example, the witness needs to know how to answer simple questions such as whether he or she met with counsel to prepare for the deposition.⁵² Besides telling the truth, the witness must know how these factors are significant and how they will interplay.⁵³

During the witness preparation session the attorney too often delivers a lengthy lecture of the facts of the case and of what will happen during the deposition or witness examination.⁵⁴ The lecture concludes with a simple "any questions" closing and the witness is sent home.⁵⁵ The problem with such an approach is that the witness is likely to not remember anything.⁵⁶ Adding to the misery, the witness is overwhelmed with information that only increases anxiety, the very emotion the session is meant to dispel. Therefore, the key to making the session not only productive, but also remembered by the witness is interaction.⁵⁷ Rather than a one-sided lecture, the attorney should make the session a discussion with a give and take interaction between the witness and the attorney.⁵⁸ The information discussed has a higher probability of retention when the witness is engaged.⁵⁹ Other considerations during the preparation session are confirming that the

witness understands the discussion, repeating key instructions and illustrating primary points and instructions gives the witness a reference point for comparison.⁶⁰

(1) ***Unethical Conduct***

An attorney violates the rules when she knowingly encourages a witness to testify falsely.⁶¹ If the attorney incites, instigates or persuades the witness to testify falsely, the attorney suborns perjury.⁶² Moreover, persuading the witness to falsify testimony or even instructing the witness to claim a lack of memory or knowledge to any question the witness does not want to answer suborns perjury.⁶³ Attorneys instructing a witness to provide evasive answers encourage a witness to falsify testimony without the witness even knowing that the testimony is illegal.⁶⁴ The attorney must carefully instruct the witness and not tempt the person to distort the facts. For example, the attorney may state to the witness that justice will be done if the litigation turns out successful and it is the witness's duty to assist in a successful litigation outcome.⁶⁵ The witness then may change the facts to a more favorable testimony and therefore falsify it.⁶⁶ By straying from the guideline of always instructing the witness to tell the truth, the attorney, maybe inadvertently, is suborning perjury.

(a) ***"Zealous Advocacy" & Resolution Trust Corporation v. Bright***

In an effort to win the case, attorneys may sometimes provide better answers for witnesses, or try and shape the answers provided. The following case illustrates how far attorneys may push the ethical line. The Fifth Circuit Court of Appeals reversed a finding by the district court that disbarred attorneys and disqualified the law firm from the proceedings, when the attorneys

⁴⁸ Kerrigan, *supra* note 38 at 1367.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Dorsaneo, *supra* note 33 at § 94.01(6)(b).

⁵² *Id.*

⁵³ Kerrigan, *supra* note 38.

⁵⁴ *See* Malone, *supra* note 6 at 160-61.

⁵⁵ *See Id.*

⁵⁶ *See Id.*

⁵⁷ *See Id.* at 161.

⁵⁸ *See Id.*

⁵⁹ *See Id.*

⁶⁰ *See Id.*

⁶¹ Tex. Disciplinary R. Prof'l Conduct 3.04; *see also* Salmi, *supra* note 4 at 148.

⁶² Monroe H. Freedman, *Understanding Lawyers' Ethics* 122 (1990).

⁶³ *See* Christopher T. Lutz, *Fudging and Forgetting*, *Litig.*, 10 (Spring 1993),

⁶⁴ Salmi, *supra* note 4 at 152.

⁶⁵ *See* Piorkowski, *supra* note 46 at 402-03.

⁶⁶ *Id.*

impermissibly attempted to persuade a witness to sign an affidavit containing statements which the witness had not previously told the attorneys.⁶⁷ The Resolution Trust Corporation filed suit against H.R. Bright and James Reeder, as shareholders, directors and officers of Bright Banc Savings Association for fraud, negligence and breach of fiduciary duty.⁶⁸ Attorneys for the defendants interviewed Barbara Erhart, Senior Vice President of Finance Support at Bright Banc.⁶⁹ The focus of the interview was on the method used for calculation of non-cash assets converted to cash.⁷⁰ The next day after the interview the attorneys asked Erhart to come back to their office to sign an affidavit summarizing what she had said in the interviews.⁷¹

When Erhart returned the next day she was again questioned and then presented with the affidavit.⁷² The attorney warned Erhart that the affidavit “contained a couple of things that the attorneys had not discussed with her, nevertheless believed to be true.”⁷³ Erhart was instructed to read the affidavit “very carefully.”⁷⁴ Erhart disagreed with some of the statements in the affidavit, however the attorneys tried to persuade Erhart that the statements were true and aggressively challenged Erhart’s assumptions about the defendants. Erhart left unconvinced and never signed the affidavit.⁷⁵ Eventually, Erhart approved and signed a revised affidavit.⁷⁶

In an *ex parte* statement to plaintiff’s attorneys, Erhart described her meeting with the defendants’ attorneys.⁷⁷ Erhart, in this statement, stated that defendants’ attorneys were particularly aggressive in attempting to persuade her in agreeing with their version of the facts and

that it was “almost like a brow beating.”⁷⁸ Erhart did indicate that defendants’ attorneys were not trying to make her change the facts; instead they were attempting to persuade her to agree with a different “interpretation” or “slant” from the facts.⁷⁹

In reversing the district court’s finding, the Fifth Circuit stated that federal courts may hold attorneys accountable to the state code of professional conduct, therefore the Texas Disciplinary Rules of Professional Conduct may apply.⁸⁰ The sanctionable conduct found by the district court was the attempts of the defendants’ attorneys to persuade Erhart to agree to the inclusion of statements in the affidavit she had not previously discussed.⁸¹ However, the attorney’s inclusion of new statements in the affidavit not previously discussed by the witness does not automatically constitute bad faith.⁸² When analyzing Texas Disciplinary Rules of Professional Conduct 3.04(b) and 4.01(a), the court made the distinction between asking a witness to swear to facts which are knowingly false and an attorney in an arms-length interview with a witness to aggressively persuade the person that their initial version of a certain fact situation is not complete or accurate.⁸³ The court held that the Rules are concerned with the former circumstance and that the defendants’ attorneys did not try and persuade Erhart to make statements they knew to be false, therefore the district court’s decision was reversed.⁸⁴ The district court stated that the attorneys manufactured evidence and were urging Erhart to falsify statements, however there was not any evidence indicating that the attorney’s did not have a factual basis for the additional

⁶⁷ *Resolution Trust Corp. v. Bright*, 6 F.3d 336, 338 (5th Cir. Tex. 1993).

⁶⁸ *Id.* at 338.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 339.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 341; *See In re Snyder*, 472 U.S. 634, 645 (1985); *In re Finkelstein*, 901 F.2d 1560, 1564 (11th Cir.1990).

⁸¹ *Resolution Trust Corp.*, *supra* note 67 at 341.

⁸² *Id.* at 341; citing *U.S. v. Brand*, 775 F.2d 1460, 1469 (11th Cir. 1985) (giving witness affidavit with statements not previously discussed not obstruction of justice).

⁸³ *Id.* at 341.

⁸⁴ *Id.*

statements.⁸⁵ The court stressed the fact that the attorneys never made Erhart sign an affidavit she did not agree to.⁸⁶ The court concluded by pointing out that the attorneys were upfront with who they represented and disclosed the additional statements while warning her to read the affidavit carefully.⁸⁷

In *Resolution Trust Corp.*, a line was drawn between zealous advocacy and unethical falsifying of testimony. When applying the *Resolution Trust Corp* principle, it is important to realize that the case does not stand for pushing the ethical line in witness preparation and testimony. The case does not support an attorney's attempts to distort, alter or slant the facts of a witness by aggressive attempts to force favorable testimony for the attorney's client. Instead, the court is clear that although zealous advocacy includes persuading a witness to adopt an attorney's version of the facts, there should be a factual basis for the attorney's version, the attorney should be upfront with the tactic they are employing and the attorney can only use versions of testimony that are agreed upon by the witness. One final caveat is that the case only involved an affidavit and does not specifically mention witness preparation; therefore the danger still exists and is unresolved as to how far an attorney may proceed in coaching a witness before their advice falsifies testimony. The safe harbor still remains to instruct the witness to tell the truth and only the truth. The attorney's primary goal should simply entail alleviating anxiety for the witness and creating a calm confident witness.

(2) *Refreshing a Witness's Memory*

Properly preparing for a witness preparation session also includes the attorney anticipating cross-examination of the witness.⁸⁸ A witness's credibility will depend on how well the person can handle cross examination. Therefore, an attorney must prepare the witness for confrontation by opposing counsel with documents that may be inconsistent with prior

testimony of the witness.⁸⁹ The witness must have the ability to address the document in a manner that does not impeach their credibility.⁹⁰ Impeaching instances by opposing counsel show the attorney how valuable a preparation session with the witness is because by removing the witness's anxiety he or she is better able to handle aggressive cross-examination. If a witness studies the document during a preparation session then he or she will have a higher probability of maintaining credibility in front of the jury or during a deposition.⁹¹ Thus, the attorney's preparation for the session with the witness is vital for a productive and successful witness session.

In a smaller case there will be a few crucial documents that the attorney needs to review with the witness during a preparation session.⁹² Prior to the new rule in Texas, during a deposition a witness who was confronted with an unanticipated document was able to have a brief conference with counsel.⁹³ However under the newer Texas Rules of Civil Procedure it is unlikely that a witness will be able to confer with the attorney during the actual deposition unless it is to determine whether a privilege should be asserted.⁹⁴ Therefore, it is essential that an attorney reviews crucial documents during the witness preparation session helping avoid credibility damaging experiences during witness examination.

Regardless of whether the document is impeachment material, many times witnesses are faced with documents they have not seen in months or possibly years.⁹⁵ A witness's remembrance of an event erodes and becomes distorted over time.⁹⁶ The area of refreshing a

⁸⁵ *Id.*

⁸⁶ *Id.* at 342.

⁸⁷ *Id.*

⁸⁸ Kerrigan, *supra* note 38 at 1368.

⁸⁹ *Id.* at 1367.

⁹⁰ *Id.*

⁹¹ *Id.* at 1368.

⁹² Malone, *supra* note 6 at 167-168.

⁹³ See Kerrigan, *supra* note 38 at 1367.

⁹⁴ Tex. R. Civ. P. 199.5(d) ("Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted.").

⁹⁵ Malone, *supra* note 6 at 168.

⁹⁶ Salmi, *supra* note 4 at 157.

witness's memory is fragile and a lawyer must be careful to not affect the truth when assisting in refreshing the witness's memory.⁹⁷ The attorney must carefully craft her questions during the preparation session so as to not prompt the witness to commit perjury.⁹⁸ The safest choice in refreshing a witness's memory is by showing them documents that bear on their testimony.⁹⁹ Also, reviewing these documents during the preparation session helps to relieve anxiety when the witness is shown these documents, thus maintaining consistent and credible testimony.

For larger cases the documentation may involve boxes and boxes of crucial documents.¹⁰⁰ The burden falls on the attorney to give the witness only key documents relating to the witness's testimony and perhaps summaries of what other witness's have testified to during deposition.¹⁰¹ The task of putting together a large case preparation session is time consuming, however it pays great dividends by producing a calm credible witness.¹⁰²

(a) ***Caveats for Refreshing a Witness's Memory with Documents***

A caveat for attorneys using documents during preparation sessions is that evidence rules may require production of otherwise privileged matters if the documents were used to refresh a witness's memory.¹⁰³ The last situation a lawyer needs to explain to their client is that they inadvertently waived their client's privilege. Further, a writing that is used to refresh a witness's recollection while testifying may be discoverable.¹⁰⁴ The attorney must be aware of a distinction that serves to save certain documents from opposing counsel's hands.¹⁰⁵ Opposing counsel is entitled to know when a witness has used documents at or before trial to refresh her

recollection, however there is a difference between reviewing documents and refreshing one's recollection.¹⁰⁶ Invariably, opposing counsel will ask the deponent, "Have you reviewed any documents in preparation for this deposition?"¹⁰⁷ If the documents were reviewed and the witness found them consistent with her recollection or did not have any recollection at all, then the documents did not refresh her recollection and remain privileged work product.¹⁰⁸ Thus, in this situation, the attorney should instruct a witness to answer this question by stating, "Yes, I have reviewed documents with my attorney in preparation for this deposition," placing the burden on opposing counsel to establish that some document did refresh her memory on a relevant point before any documents have to be identified.¹⁰⁹

(b) ***Production of Witness Preparation Documents, City of Denison v. Grisham***

The Texas Dallas Court of Appeals addressed the issue of whether opposing counsel can inspect documents used to refresh a witness's memory, even when they are claimed privileged and attorney work product.¹¹⁰ In *City of Denison v. Grisham*, Donald Medford and Dixie Medford refreshed their memories by examining notes prepared by themselves and their attorneys while testifying at a deposition.¹¹¹ When opposing counsel asked to review the documents counsel for the Medfords refused at both depositions on the grounds of work product.¹¹² The City of Denton filed a motion to compel the Medfords to permit inspection of and cross-examination regarding the notes.¹¹³ The trial court denied the request for production of the documents, however the court of appeals reversed.¹¹⁴

The court relied on Texas Rule of Evidence 611 (currently rule 612) which states:

⁹⁷ *Id.* at 158.

⁹⁸ See Monroe H. Freedman, *Counseling the Client: Refreshing Recollection or Prompting Perjury?*, Litig., Spring 1976, at 35, 46.

⁹⁹ See Applegate, *supra* note 14 at 305.

¹⁰⁰ Malone, *supra* note 6 at 168.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Dorsaneo, *supra* note... at § 94.01(6)(b).

¹⁰⁴ *Id.*

¹⁰⁵ Malone, *supra* note... at 169.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 168.

¹⁰⁸ *Id.* at 169.

¹⁰⁹ *Id.*

¹¹⁰ *City of Denison v. Grisham*, 716 S.W.2d 121 (Tex.Civ.App.-Dallas 1986)

¹¹¹ *Id.* at 122.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

If a witness uses a writing to refresh his memory for the purpose of testifying either –

- (1) while testifying, or
- (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. . .¹¹⁵

The court held that because the situation involved 611(1) (current rule 612(1)), the court did not have any discretion to deny opposing counsel the right to inspect writings used to refresh the memory of a witness while testifying.¹¹⁶ Further, the court held that

¹¹⁵ See “current rule”: Tex. R. Evid. 612 (If a witness uses a writing to refresh memory for the purpose of testifying either

- (1) while testifying;
- (2) before testifying, in civil cases, if the court in its discretion determines it is necessary in the interests of justice; or

- (3) before testifying, in criminal cases; an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portion not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.) (2008).

¹¹⁶ *Denison*, *supra* note 110 at 123.

documents used to refresh the memory of a witness while testifying waives both the attorney-client privilege and the attorney work product protection of the document.¹¹⁷ The court’s decision was narrow and only addressed 611(1) (current rule 612(1)), therefore the ramifications of 611(2) (current rule 612(2)) and whether privileges and work product protection are waived for documents used to refresh a witness’s memory is unclear. Moreover, the standard for whether the production of the documents is necessary in the interests of justice remains unclear as well. The logical guideline for an attorney is to try and avoid the witness’s use of documents to refresh her memory while testifying and to only use documents during the preparation session for review to re-affirm a witness’s memory and not to refresh it.

(3) *Other Privilege Concerns*

Before a witness preparation session the attorney should determine whether the witness is covered by the attorney client privilege.¹¹⁸ If the witness is covered by the privilege, then the attorney should counsel the witness by assuring that whatever is said during the session in preparing the witness to testify is confidential.¹¹⁹ The witness should understand that the other side is not entitled to the information.¹²⁰ Therefore, the privilege presents an additional luxury helping the witness to feel comfortable.¹²¹ However, if the witness is not covered, the attorney should explain that whatever is said during the preparation session can be asked about by the opposing counsel and that the witness will have to answer.¹²² The lawyer should inform the witness not to discuss anything the witness or the attorney would not want the other side to hear.¹²³ More importantly, in a non-privileged setting, the attorney should not say anything that is better left confidential.¹²⁴ Finally, the preparation session should involve a discussion concerning questions during examination involving privileged matters

¹¹⁷ *Id.*

¹¹⁸ *Malone*, *supra* note 6 at 161.

¹¹⁹ *Id.* at 162.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

and how to handle them.¹²⁵ A strategy dealing with how to avoid inadvertently losing privileges and how to handle objections should be formulated to assist the witness while testifying.

Because of the dramatic effect a deposition or a trial can have on a witness, preparation sessions are crucial to presenting a credible witness. Increasingly, attorneys are videotaping their witness's to teach the witness better verbal and nonverbal communication skills.¹²⁶ Some witnesses need help in preventing speech habits or mannerisms from hindering their credibility.¹²⁷ Many witnesses, by human nature, may not believe the attorney when the witness's flaws are pointed out.¹²⁸ However, videotaping the witness gives the person no choice but to see for themselves what they are doing wrong.¹²⁹ While videotaping, the attorney can aggressively cross examine the witness allowing he or she to become comfortable with an opposing counsel who may try and intimidate or make the witness angry.¹³⁰

The videotape should not be discoverable and likely will constitute attorney work product.¹³¹ Opposing counsel, however, may ask the witness whether he or she was videotaped.¹³² This line of questioning may lead the jury to disappointment and give the impression that they are watching a staged event.¹³³ Thus, the attorney should consider whether witness assistance that only videotape may provide outweighs the effects from possible disclosure at trial. Finally, coaching the witness to handle cross examination concerning videotaping may help preserve the witness's credibility. Therefore, instructing the witness to answer that he or she was nervous to speak in public and that he or she did not want to alter the truth while testifying. A thoughtful answer to videotape

questioning might alleviate any damage done during cross examination.¹³⁴

(4) ***Lecturing the Witness on the Law and Explaining the Issues***

The timing of when to explain the law of the case to a witness is critical because if the attorney lectures about the law to the witness before the witness explains their version of the facts, the attorney runs the risk of altering the facts and suggesting to the witness what the facts should be.¹³⁵ Even if the attorney unintentionally alters the testimony, the danger is still real that the witness's version of the facts is distorted or falsified.¹³⁶ Witnesses with an interest in the case will invariably want to phrase their answers in the most helpful way.¹³⁷ The danger is that the witness may not fully grasp the law and actually emphasize facts that are helpful to the opposing side and harm the attorney's own case.¹³⁸ The attorney must take time explaining the issues in the case and each side's position on a basic and understandable level.¹³⁹ While explaining each issue separately, the attorney should keep explanations brief, understandable and less complex.¹⁴⁰ Thus the attorney should be aware of the timing of when to explain the law behind the case before getting the facts from a witness. After a witness gives their version of the facts to the attorney, then the attorney should proceed to prepare the witness for testifying by explaining the issues and law of the case.

IV. CONCLUSION

Many times witness preparation is overlooked; however successful preparation sessions with witnesses are essential to presenting a credible trial. Because a session will cover many angles concerning a trial, attorneys must prepare vigorously for the case before attempting to prepare a witness. Further, while zealously advocating for their client, attorneys should be aware of suborning perjury and

¹²⁵ *Id.* at 166.

¹²⁶ Kerrigan, *supra* note 6 at 1372.

¹²⁷ Malone, *supra* note ... at 173

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 172.

¹³¹ *Id.* at 174.

¹³² *Id.*

¹³³ *Id.* at 175.

¹³⁴ *Id.*

¹³⁵ See Applegate, *supra* note 14 at 301-02.

¹³⁶ Salmi, *supra* note 4 at 154-55.

¹³⁷ See Malone *supra* note 6 at 165.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

inadvertently falsifying or encouraging a witness to falsify testimony. The attorney at all times should encourage the witness to tell the truth and try to alleviate the witness's anxiety and stress caused by the thought of testifying. By staying on the right side of the ethical line the attorney can still maximally prepare a witness. Lastly, the attorney should avoid inadvertently waiving privileges or work product protections, yet extensively review with the witness the legal issues, key documents and strategies for dealing with an aggressive opposing counsel.