AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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The Ethics of Witness Preparation

A lawyer's role in preparing a witness to testify and providing testimonial guidance is not only an accepted professional function; it is considered an essential tactical component of a lawyer's advocacy in a matter in which a client or witness will provide testimony. Under the Model Rules of Professional Conduct[1] *governing the client-lawyer relationship and a lawyer's duties as an advisor, the 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.*

Introduction

> **Jack McCall:** Well, I'm a hard case for you, counselor. And no mistake, everyone in there saw me shoot him.
> **Lawyer:** If you'll let me set our strategy, I don't think we'll dispute what people saw.
> **Jack:** Now, I guess you're here to break me out.
> (*Lawyer chuckles*)
> **Lawyer:** Son, did James Butler Hickok ever kill a -- relative of yours?
> **Jack:** James Butler Hickok?
> **Lawyer:** Wild Bill Hickok. Did he ever kill a brother of yours or -- or the like?
> **Jack**: A brother?
> **Lawyer:** I'm asking you if what happened in that saloon was vengeance, for the death of a family member? Possibly a brother in Abilene. Or the like.
> **Jack:** (*Jack smirks, cocks head pensively*) A brother in Abilene . . . .
> (*Lawyer smiles, pats Jack twice on the knee, and exits*).[2]

Preparing a witness or a client to testify in advance of a deposition or adjudicative proceeding – or in some situations providing a client or witness with midstream guidance during the testimonial process – is such a familiar component of a lawyer's trial-advocacy repertoire that it

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through 2023. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.
[2] THE TRIAL OF JACK MCCALL, DEADWOOD, season 1, episode 5 (Home Box Office, Inc. 2010).

needs little introduction or explanation. Many would condemn a lawyer's failure to prepare a client or witness.[3] Failure to do so competently and diligently can constitute an ethics violation.[4] But, in some witness-preparation situations, a lawyer clearly steps over the line of what is ethically permissible. Certain categories of lawyer activity are firmly established as unethically interfering with the integrity of the justice system and unethically obstructing another party's access to evidence. Among the rules applicable to such conduct are 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).

The distinction between legitimate witness preparation and guidance versus unethical efforts to influence witness testimony, a practice sometimes known as coaching, horseshedding, woodshedding, or sandpapering,[5] can be ambiguous owing in large part to the concurrent ethical duties to diligently and competently represent the client and to refrain from improperly influencing witnesses.[6] For purposes of this opinion, the term coach is used to signify unethical or ethically questionable conduct. 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.

Analysis

Some quantum of client and witness preparation is appropriate and an affirmative ethical responsibility. But lawyers "must respect the important ethical distinction between discussing

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[3] William Hodes, *The Professional Duty to Horseshed Witnesses Zealously Within the Bounds of the Law*, 30 TEXAS TECH. L. REV. 1343 (1999) ("Journey not far enough, and a lawyer deserves sanction for failing to carry out the most basic duties encompassed by the client-lawyer relationship.") (footnote omitted); Roberta K. Flowers, *Witness Preparation: Regulation of the Profession's Dirty Little Secret*, 38 HASTINGS CONST. L.Q. 1007, 1009 (2011) ("Witness preparation is considered by most criminal attorneys—prosecutors and criminal defense attorneys alike—to be an essential part of trial advocacy.") (footnote omitted); Adam Liptak, *Crossing a Fine Line on Witness Coaching*, N.Y. TIMES (Mar. 16, 2006) ("[L]awyers often spend hours preparing witnesses to testify, a practice that is not only accepted but also generally considered necessary. Lawyers have been punished for incompetent representation for failing to interview and prepare witnesses.").

[4] *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (Competence) & cmt. [5]; MODEL RULES OF PROF'L CONDUCT R. 1.3 (Diligence).

[5] BLACK'S LAW DICTIONARY 885 (11th ed. 2019) (defining horseshedding as "The instruction of a witness favorable to one's case (esp. a client) about the proper method of responding to questions while giving testimony."). To be sure, a witness can be coached to tell the truth, which would not ordinarily be unethical. The practice of emphasizing continuously the importance of telling the truth, and that truthfully and accurately recounting facts is ultimately the witness's responsibility, is a useful guardrail to avoid coaching. *See* Resolution Tr. Corp. v. Bright, 6 F.3d 336, 341 (5th Cir. 1993) (district court's disbarment of two lawyers for aggressively pushing witness regarding choice of words was an abuse of discretion where there was no evidence that conduct was in bad faith or testimony was false; evidence that lawyers told witness to read the affidavit carefully before signing it undermined allegation that lawyers' conduct was an attempt to cause witness testify falsely under oath).

[6] Many commentators have underscored this tension. *See, e.g.*, Tom Barber, *Restrictions on Lawyers Communicating with Witnesses During Testimony: Law, Lore, Opinions, and the Rule*, 83 FLA. BAR JOURNAL 58 (July-Aug. 2009) (noting that "there is considerable disagreement as to the definition of 'coaching' as opposed to legitimate preparation").

testimony and seeking improperly to influence it."[7] There is, in general, a distinction between manipulative conduct during client/witness preparation and active interference with or attempts to influence testimony while a witness is testifying. This opinion addresses both, because either can implicate a lawyer's ethical duties.

With remote proceedings having become commonplace, the sense that brazen witness-coaching behaviors are occurring or could easily occur has been validated by a number of reported instances of misconduct.[8] This development should guide the manner in which courts and lawyers are superintending the use of remote technology.

A. What Preparatory Conduct is Ethical?

Providing a witness with effective preparatory guidance is undoubtedly a component of the "thoroughness and preparation" element of Model Rule 1.1.[9] It is accepted that lawyers can engage in, for example, the following activities:

- 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"[10]
- explain case strategy and procedure, including the nature of the testimonial process or the purpose of the deposition
- suggest proper attire[11] 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

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[7] *See* Geders v. United States, 425 U.S. 80, 90 n.3 (1976) (citing Ethical Consideration 7-26 of the ABA Code of Professional Responsibility (1975)); *see also* Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993) ("The goal of obtaining the facts of a case is defeated when the lawyer and not the witness is answering questions or influencing the answers to them.").

[8] The risk of witness-preparation misconduct is not particularly augmented in a remote environment because such interactions still occur "behind closed doors," so to speak. Technology-driven efforts to influence in-progress witness testimony—signaling or messaging a witness testifying remotely, out of the sight of opposing counsel and the adjudicative officer—has generated increased scrutiny.

[9] *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (Competence) & cmt. [5]. Other germane rules include MODEL RULES OF PROF'L CONDUCT R. 1.3 (Diligence), 1.4 (Communication), and 2.1 (Advisor). *See, e.g.*, Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993) (an attorney has right and duty to prepare a client for deposition); Maryland v. Earp, 571 A.2d 1227, 1234 (Md. 1990) ("[a]ttorneys have not only the right but also the duty to fully investigate the case and to interview persons who may be witnesses."); John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 287-88 (1989), ("The practical literature uniformly views the failure to interview witnesses prior to testimony as a combination of strategic lunacy and gross negligence.").

[10] Telling a witness that a truthful answer of "I do not recall" is an acceptable response and ethically distinguishable from telling a witness, "The less you recall the better." The latter is a statement that affirmatively encourages a witness to "forget" information, i.e., to lie under oath about what is remembered. It is the ethical equivalent of telling a witness affirmatively to testify to something that is contrary to fact. *See* MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (a lawyer shall not counsel or assist a witness to testify falsely).

[11] Vanessa Friedman, *Caroll, Clothes and Credibility*, N.Y. TIMES (May 9, 2023) (noting that witness's attire and demeanor were so effective that people wondered if someone was stage-managing the style: "Well, her lawyers, duh. It has long been understood that appearance is part of any courtroom drama.").

- review documents or physical evidence with the witness, including using documents to refresh a witness's recollection of the facts
- identify lines of questioning and potential cross-examination
- suggest choice of words that might be employed to make the witness's meaning clear[12]
- 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.[13]

When it comes to preparation of a client or witness for a testimonial event such as a trial or deposition, there is a fair amount of latitude in the types of lawyer-orchestrated preparatory activities that are recognized as permissible.[14]

B. Unethical Pre-Testimony Coaching

Within the broad class of lawyer conduct directed at a client's or witness's future testimony, certain categories of lawyer activity are firmly established as unethically interfering with the integrity of the justice system and unethically obstructing another party's access to evidence. A lawyer violates ethical obligations by counseling a witness to give false testimony, assisting a witness in offering false testimony, advising a client or witness to disobey a court order regulating discovery or trial process, offering an unlawful inducement to a witness, or procuring a witness's absence from a proceeding.[15]

Prominent among the ethics rules in this area is Model Rule 3.4(b), which prohibits a lawyer from advising or assisting a witness—whether a client or not—to give false testimony.[16]

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[12] THE RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 116, cmt. b (2000), emphasizes that in suggesting choice of words "a lawyer may not assist the witness to testify falsely as to a material fact," which would constitute knowingly counseling or assisting a witness to testify falsely or otherwise to offer false evidence. *Id*. (citing RESTATEMENT § 120(1)(a)).

[13] Many of these techniques are expressly referenced in the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §116, cmt. b.

[14] *See generally* JONATHAN L. ROSNER, PREPARING WITNESSES (2022-23 ed.); DANIEL I. SMALL, PREPARING WITNESSES: A PRACTICAL GUIDE FOR LAWYERS AND THEIR CLIENTS (5th ed. 2020); Video: Jan Mills Spaeth, *Become a Strong and Credible Witness: Witness Preparation for Deposition and Trial* (2019) (streaming HD video); JAMES M. MILLER, FROM THE TRENCHES II: MASTERING THE ART OF PREPARING WITNESSES (2019); KENNETH R. BERMAN, REINVENTING WITNESS PREPARATION: UNLOCKING THE SECRETS TO TESTIMONIAL SUCCESS (2018).

[15] *See, e.g.*, *In re* Stroh, 97 Wash. 2d 289, 300, 644 P.2d 1161, 1167 (1982) (disbarring lawyer following conviction for tampering with a witness; "Under no circumstances may false testimony knowingly be introduced into a hearing by an officer of the court.").

[16] MODEL RULES OF PROF'L CONDUCT R. 3.4(b). Such conduct might also constitute assisting the client to engage in conduct that the lawyer knows is criminal, i.e., perjury, in violation of Model Rule 1.2(d), as well as offering false evidence in violation of Model Rule 3.3(a)(3). MODEL RULES OF PROF'L CONDUCT R. 1.2(d) & 3.3(a)(3). For examples of discipline for transgressing these rules, *see, e.g.*, *In re* Peasley, 90 P. 3d 764 (Ariz. 2004) (lawyer who coached witness to lie disbarred); *In re* Paul Storment, 873 S.W.2d 227 (Mo. 1994) (lawyer disbarred in Missouri and reciprocally suspended for two-years in Illinois for advising client during recess to deny material facts of

Instigating a witness to lie can occur in ways beyond an outright instruction to fabricate testimony. For example, it is unethical to tell a witness to "downplay" the number of times a witness and a lawyer met to prepare for trial[17] or to encourage a client to misrepresent a location of a slip and fall accident to have a viable claim.[18] Other representative examples of unacceptable witness coaching and influencing behaviors include programming a witness's testimony,[19] knowingly violating sequestration orders,[20] and encouraging a witness to present fabricated testimony.[21]

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another witness's testimony that lawyer knew were true and prompting client on redirect to testify to known false testimony); *see also In re* Attorney Discipline Matter, 98 F.3d 1082 (8th Cir. 1996) (affirming reciprocal disbarment of same Missouri lawyer); *In re* Mitchell, 244 Ga. 766, 262 S.E.2d 89 (1979) (disbarring lawyer who had instructed six witnesses to say that a fictitious man by the name of "David Thompson" was the real father of a child whose paternity was disputed); *In re* Oberhellmann, 873 S.W.2d 851, 852 (Mo. 1994) (disbarring lawyer who, during client's deposition, instructed client to lie about a number of things, including client's place of residence).

[17] *In re* Meltzer, 21 N.Y.S.3d 63, 64 (2015) (accepting lawyer's resignation and ordering disbarment in matter arising from lawyer's instructions that witness "downplay" the number of times they met to discuss testimony to prepare for trial in the event witness was asked such a question on cross-examination).

[18] *In re* Rios, 965 N.Y.S.2d 418, 421, 423-24 (2013) (lawyer disciplined for violation of New York RPC 8.4(c)).

[19] *In re* Brooke P. Halsey, Jr., Case No. 02-O-10195-PEM (State Bar of California Hearing Dep't, Aug. 1, 2006) (prosecutor's secret pre-trial coaching of forensic pathologist who had performed autopsy of victim was so intrusive and extensive that it "tampered with the heart of [the witness's] testimony"). Except in extreme cases of witness programming such as *Halsey*, the extent to which a lawyer can "script" or "prefabricate" otherwise truthful witness testimony has not been definitively resolved. Compare United States v. Welton, 2009 U.S. Dist. Lexis 138113 (C.D. Cal. 2009) ("While directing a witness to use (or avoid using) particular words when phrasing an answer is unacceptable conduct, particularly for a prosecutor . . . there is no evidence that [the witness] testified falsely . . . as a result of the advice she received from the [prosecuting attorney]") with Resolution Tr. Corp. v. Bright, 6 F.3d 336 (5th Cir. 1993) (drawing distinction between asking witness to swear to facts which are knowingly false and placing statements in draft affidavit that have not been previously discussed with witness). *See generally* Matthew Hector, *The Beau Brindley Case: Witness Preparation v. Coaching*, 103 ILL. BAR JOURNAL 11, 11 (2015) (analyzing federal district court for the Northern District of Illinois's decision that use of question-and-answer scripts to prepare witnesses for trial was not prohibited coaching, and noting that there is "no bright line" between rigorous witness preparation and improper witness coaching).

[20] Transcript of Evidentiary Hearing Before the Honorable Leonie M. Brinkema, U.S. District Court Judge, United States v. Zacarias Moussaoui, No. 01-692 (E.D. Va. Mar. 14, 2006) (lawyer representing Transportation Security Administration emailed trial transcripts to a group of potential witnesses who were under a sequestration order; the court barred the government from introducing that evidence, and the lawyer was referred to the Pennsylvania Disciplinary Board). *See also* Miller v. Universal City Studios, Inc., 650 F.2d 1365 (5th Cir. 1981) (court ordered exclusion of witness testimony *where* lawyer violated sequestration order by allowing an expert witness to view the transcripts of other witness contrary to an order based on Fed. R. Evid. 615). *But see* State v. Blakeney, 137 Vt. 495, 408 A.2d 636 (1979) (sequestration order excluding witnesses from courtroom in no way restricted the right of counsel to confer with their clients or witnesses; purpose of the order was not to segregate witnesses from counsel who called them, although issuance of such an order would be within the sound discretion of the trial judge in an appropriate case).

[21] *In re* Edson, 108 N.J. 464, 471-73 (1987) (lawyer disbarred after providing an undercover detective posing as a client with a memo fabricating facts to be used as the detectives' testimony, in violation of New Jersey RPC 1.2(d), RPC 8.4(a), (b), (c), and (d)). Even merely permitting a client to testify to fabricated evidence is sanctionable as offering false evidence. *See* Attorney Griev. Comm'n v. Elmendorf, 404 Md. 353, 946 A.2d 542 (2006) (leaving person with the impression that they could mislead the court in a divorce action by attesting to compliance with 6-month waiting period violated Rule 8.4(d)); Patsy's Brand, Inc. v. I.O.B. Realty, Inc., No.98 CIV 10175(JSM), 2002 WL 59434 (S.D.N.Y. Jan 16, 2002) (citing Rule 3.3(a)(3), court sua sponte sanctioned law firm for permitting client to submit false affidavit; although client insisted affidavit was true, where "no reasonable lawyer would believe it" in light of other evidence known to law firm).

It is also unethical to compensate a lay witness for the substance of their testimony or to condition such payment on the content of the witness's testimony,[22] even if that payment is for "truthful" testimony.[23] Other types of unlawful inducements are similarly unethical.[24] For example, donating money to a witness's favorite charity was held to be an improper attempt to influence testimony.[25] In addition, offering a witness money or other incentives *not* to testify is a species of witness tampering and flatly prohibited by the Model Rules.[26]

C. Unethical Conduct During Witness Testimony

While the methods of advance witness preparation are variable and there is a broad range of acceptable methods, the equation changes when a lawyer's efforts to refine witness testimony happen during a trial or deposition. Overtly attempting to manipulate testimony-in-progress would in most situations constitute at least conduct prejudicial to the administration of justice in violation of Model Rule 8.4(d). Violation of a court rule or order restricting such coaching behaviors would be knowing disobedience of the rules of a tribunal in violation of Model Rule 3.4(c).[27]

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.[28] Other more subtle types of signaling also implicate ethical

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[22] MODEL RULES OF PROF'L CONDUCT R. 3.4, Comment [3] ("The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee."). Most states permit "reasonable" compensation to occurrence witnesses for time and expenses in preparing to testify, although some jurisdictions place restrictions on testimony for actual courtroom time. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-402 (1996) (nonexpert witness may be compensated for time spent attending trial or deposition or preparing for testimony if payment is not conditioned upon the content of testimony and does not violate any law). *See generally* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.4, at 425-27 (10th ed. 2023) (discussion of Witness Fees).

[23] *In re* Discipline of Callister, No. 70901 (Nev. 2017) (lawyer suspended for offering to pay a witness $7,000 for his "honest testimony" in support of certain facts and threatening the witness with personal liability and "the legal implications of perjury" if he testified the other way).

[24] *E.g.*, People v. Gifford, 76 P.3d 519 (Colo. O.P.D.J. 2003) (advising client to offer ex-wife real estate in exchange for favorable testimony in criminal case). *See generally* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.4, at 424 (10th ed. 2023) (discussion of Offering Illegal Inducement to Witness).

[25] Christopher v. DePuy Orthopaedics, Inc., 888 F.3d 753 (5th Cir. 2018) (granting relief from judgment under FED. R. CIV. P. 60(b) where lawyer had represented that experts were non-retained and serving "pro bono," but lawyer had secretly donated $10,000 to one expert's private school alma mater before trial and collectively paid the two experts $65,000 after trial).

[26] *See, e.g.*, *In re* Discipline of Kronenberg, 155 Wash.2d 184, 198 (2005) (disbarment appropriate for lawyer who gave victim-witness $3,000 and a one-way bus ticket to Oklahoma so witness would not testify against defendant in a criminal case, in violation of Washington State RPC 8.4(a)-(d) bribing and tampering with a witness and 8.4(c) for deceiving prosecutors about procuring the witness's absence; lawyer also deemed unfit to practice law).

[27] In some cases, such conduct may also be a violation of MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (unlawfully obstructing another party's access to evidence). *See generally* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.4, at 422 & 427-29 (10th ed. 2023) (discussions of Obstructing Another Party's Access to Evidence and Obeying Obligation to Tribunal).

[28] *See, e.g.*, Vnuk v. Berwick Hospital Co., No. 3:14-CV-01432, 2016 WL 907714, at *4 (M.D. Pa. Mar. 2, 2016) (finding lawyer violated court rules by conferring with witness over break, passing notes and whispering during deposition). One commentator likened lawyer-to-witness gesturing to the catcher's signal to the pitcher in a baseball

obligations and at times result in court-ordered sanctions. A familiar type of covert coaching is the so-called "speaking objection," or "suggestive objection." These are "statements that go beyond just stating the objection or the basis for the objection and are intended—or at least suspected of being intended—to coach the witness and impede the deposing attorney's discovery."[29] The rules in many state and federal jurisdictions prohibit objections that have the effect of coaching a witness, and may also prohibit lawyers from instructing a witness not to answer a question unless specifically authorized to do so.[30] Some jurisdictions have enacted rules for the conduct of depositions that expressly restrict speaking objections.[31]

Relatedly, when a witness's testimony is underway, lawyers sometimes attempt to exercise midcourse testimonial influence and undertake damage control during a break or recess and may even seek or insist upon such breaks while a question is pending for the apparent purpose of coaching the witness in a private conference. Although there is no express ethical prohibition on communications between witness and counsel during a break in testimony, adjudicative officers have, at times, exercised control over these circumstances, including entering specific orders and imposing deposition guidelines and/or sanctions.[32]

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game advising what pitch to throw. Holland & Hart, *Witnesses: Don't Rely on 'Catcher Signals'*, JDSUPRA (Apr. 26, 2021), available at https://www.jdsupra.com/legalnews/witnesses-don-t-rely-on-catcher-signals-5364552/.

[29] Michael Roundy, *Speaking Objections Risk Sanctions*, ABA LITIGATION SECTION PRACTICE POINTS, *available at* https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2019/speaking-objections-risk-sanctions/?login (May 31, 2019). Openly asking a witness to correct an inadvertent misstatement when the witness obviously misunderstood a question or simply misspoke is not a coaching concern. In some circumstances involving false witness testimony, a lawyer may have an ethical duty to take reasonable remedial measures to correct the testimony. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3, cmt. [10]. *See generally* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.3, at 412-13 (10th ed. 2023) (discussion of Remedial Measures).

[30] *E.g.*, FED. R. CIV. P. 30(c)(2) ("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)."); Sec. Nat. Bank of Sioux City, Iowa v. Day, 800 F.3d 936, 942 (8th Cir. 2015) (lawyers should not use an objection to instruct the witnesses how to answer or not answer a question); Deville v. Givaudan Fragrances Corp., 419 F. App'x 201, 209 (3d Cir. 2011) (affirming imposition of sanctions upon finding that attorney "testified on behalf of witness by way of suggestive speaking objections"); Goode v. Ramsaur, No. 20-cv-00947-DDD-KLM, 2023 U.S. Dist. LEXIS 80236 *13-24 (D. Colo. May 8, 2023) (finding sanctionable counsel's conduct involving countless speaking objections during deposition); Sec. Nat. Bank of Sioux City, Iowa v. Abbott Laboratories, 299 F.R.D. 595, 604 (N.D. Iowa 2014) (objections must be stated in a non-suggestive manner).

[31] Brightman v. Corizon, Inc., 2021 NY Slip Op 50735(U), ¶ 2, 72 Misc. 3d 1213(A), 150 N.Y.S.3d 233 (Sup. Ct. 2021) (referencing New York's Uniform Rules for the Conduct of Depositions, which expressly limit speaking objections: "Speaking objections are thus singled out as undesirable: they are not necessary to preserve an objection to form, they disrupt and impede the conduct of the deposition, and they risk coaching the deponent on how to answer a pending question.").

[32] *See, e.g.*, Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993) (holding that a lawyer and client "do not have an absolute right to confer during the course of the client's deposition"; noting that deposition guidelines restricting private conferences would be undermined "by a lawyer's making of lengthy objections which contain information suggestive of an answer to a pending question," i.e., speaking objections); Brightman v. Corizon, Inc., 2021 NY Slip Op 50735(U), ¶ 2, 72 Misc. 3d 1213(A), 150 N.Y.S.3d 233 (Sup. Ct. 2021) (discussing prohibition in Uniform Rules for the Conduct of Deposition on a lawyer interrupting the deposition for the purpose of communicating with the deponent, as well as the trial court's discretion to bar consultation between a party and counsel while the party is testifying to the extent consistent with the party's constitutional rights). *See also Deville v. Givaudan Fragrances Corp.*, 419 F. Appx. 201, 207 (3rd Cir. 2011) (upholding sanctions for abusive, unprofessional and obstructive conduct during deposition); *Specht v. Google, Inc.*, 268 F.R.D. 596, 598-599, 603 (N.D. Ill. 2010)

Lawyers should both refrain from efforts to physically signal witnesses when testimony is in progress and attend closely to the strictures imposed by court rule, local rule, or court order.

1. Misconduct in Remote Settings

The use of remote communications platforms and other technologies in adjudicative proceedings and depositions, provides opportunities and temptations for lawyers to surreptitiously tell or signal witnesses what to say or not say in the proceedings of a tribunal.

This is not a novel phenomenon. When the ubiquity of cell phone technology made it convenient to communicate with another person covertly, some lawyers began to abuse it. In a troubling example of text-message-based coaching, a Florida lawyer, in a worker's compensation case, was disciplined for sending text messages to a witness regarding the witness's testimony while a deposition was in progress, which texts included coaching and specific directions on how to respond to questions.[33] Similarly, it is improper for a lawyer to text a witness who is testifying at trial.[34]

The logistics of trials and depositions using remote meeting technologies are such that a lawyer and a witness may be in one location, with the opposing lawyer at another location, and, in trial situations, an adjudicative officer in yet another. In these circumstances, many things can happen that cannot readily be monitored by participants in the other remote locations.[35] It would be relatively easy for an off-camera lawyer or someone acting at the lawyer's behest to signal a witness with undetectable winks, nods, thumbs up or down, passed notes, or the like. Surreptitious off-camera activities such as texting the witness or other real-time electronic messaging are possible and easily done.

Allegations of misconduct in remote proceedings have been addressed by regulators and the judiciary. A lawyer has been disciplined for providing a client with answers to questions while

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(imposing sanctions for speaking objections that obstructed deposition); *BNSF Ry. Co. v. San Joaquin Valley RR Co.*, 2009 WL 3872043, *3 (E.D. Cal. Nov. 17, 2009) (imposing sanctions for inappropriate and burdensome objections).

[33] When confronted about the text messages by counsel taking the deposition, the lawyer falsely denied texting the witness and stated he was only receiving a text from his daughter. Then, after agreeing to put his cellphone away, the lawyer continued sending texts, and inadvertently sent text messages intended for the witness to deposing counsel. The Florida Bar v. James, 329 So.3d 108, 109-112 (Fla. 2021) (finding violation of Florida Bar Rules 3-4.3 (commission of any act that is unlawful or contrary to honesty and justice), 4-3.4(a) (obstructing another party's access to evidence), Rule 4-8.4(d) (conduct prejudicial to the administration of justice)).

[34] *See* Sky Dev. Inc v. Vistaview Dev. Inc., 41 So. 3d 918 (Fla. Dist. Ct. App. 2010) (lawyer who texted witness while witness was testifying at trial constituted a "blatant showing of fraud, pretense, collusion or other similar wrongdoing"); Wei Ngai v. Old Navy, No. 07-5653 (KSH) (PS), 2009 U.S. Dist. LEXIS 67117, at 4 (D.N.J. July 31, 2009) (during remote video-conference deposition with lawyer in one state while deponent was in another, lawyer and deponent exchanged five text messages; because lawyer also accidentally sent a text meant for deponent to opposing counsel, the texting came to light; in ordering production of the text messages, court rejected assertion of attorney-client privilege for the texts, which violated FED. R. CIV. P. 30(c) ("depositions are to be conducted in the same manner as trial examination") because texts were equivalent to passing notes to client with the intent "to influence the fact finding goal of the deposition process").

[35] *See* Wei Ngai v. Old Navy, Civil Action No. 07-5653 (KSH) (PS), 2009 U.S. Dist. LEXIS 67117, at *2 (D.N.J. July 31, 2009) (in dispute over defense counsel's sending of text messages to witness during remote deposition, plaintiff's counsel noted that the deponent and defense counsel were only visible from the "chest up" and that she was unable to observe defense counsel's hands during the deposition).

off camera during a remote proceeding.[36] Another example involved a lawyer representing the defendant in a federal lawsuit, who, during a remote deposition, was overheard by opposing counsel providing the client with an answer to a question, after which the client repeated the answer as the client's own. After reviewing the deposition footage, opposing counsel found 50 additional circumstances where the lawyer had provided the client with answers to questions while off-camera during the remote deposition.[37]

Lawyers have a duty to comply with the rules of professional conduct and rules of court that prohibit witness coaching, in all testimonial contexts regardless of the format of the deposition, hearing, or trial. Remote coaching, like its historical antecedents, puts the perpetrating lawyer at risk of adjudicative rebukes and court-ordered sanctions,[38] as well as disciplinary sanctions.[39]

2. Systemic Precautions for Addressing Such Misconduct

All lawyers have an ethical obligation to understand how relevant technology works.[40] Some degree of sophistication regarding the nature of the technology used in remote proceedings will help avoid inadvertent missteps.[41] An understanding of the coaching-related risks of remote technology will also enable lawyers and adjudicative officers concerned about potential surreptitious coaching to structure remote proceedings in ways that will deter its occurrence and enhance the ability to detect it.

What systemic precautions will prove useful in helping to prevent and detect incidences of problematic remote coaching and empower adjudicators to intervene as appropriate to control questionable lawyer conduct during remote trials and depositions? The following suggested

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[36] *In re* Claridge, PDJ 2021-9088 (Ariz. Jan. 21, 2022) (suspending lawyer for 60 days by consent where lawyer used chat feature to instruct client during cross-examination at trial using GoToMeeting platform, in violation of Arizona Ethics Rule 3.4(a) ER 8.4(c), and ER 8.4(d)).

[37] Barksdale School Portraits, LLC v. Williams, 339 F.R.D. 341 (D. Mass. 2021) (disqualifying lawyer from case, ordering that jurors be allowed to hear both the deposition witness's testimony and the lawyer's coaching and draw their own conclusions regarding the credibility of the testimony, and referring matter to another federal district court judge to evaluate potential discipline); *see also In re* Jeffrey Rosin, No. 21-mc-91571-LTS (U.S. Dist. Ct. for the Dist. of Mass., Jan. 19, 2022) (ordering lawyer in *Barksdale School Portraits* case to contact a group called Lawyers Concerned for Lawyers "for the limited purpose of receiving and completing counseling on better management of emotions and judgment in the face of adversity").

[38] *See, e.g.*, *Barksdale School Portraits*, *supra* note 37; Johnson v. Statewide Investigative Services Inc., No. 20-C-114 (N.D. Ill., March 4, 2021) (magistrate judge accepted lawyer's explanations of questionable conduct during Zoom deposition, finding that what happened during deposition was the result of a lack of professionalism and collegiality rather than an unethical attempt to coach witness).

[39] The most severe sanctions to date were the disciplinary suspensions in the *James* and *Claridge* cases, discussed *supra* at notes 33 & 36. *See* Zack Needles, *Ethics Authorities Go Relatively Easy on Virtual Witness Coaching—For Now*, LAW.COM (Feb. 2, 2022) (noting that "ethics authorities have shown a fair amount of mercy to the offending lawyers, perhaps in recognition of the fact that virtual litigation is still pretty weird for everyone involved.").

[40] MODEL RULES OF PROF'L CONDUCT R. 1.1, cmt. [8].

[41] In Johnson v. Statewide Investigative Services Inc., No. 20-C-114 (N.D. Ill., March 4, 2021), a dispute over what appeared to be remote coaching, the trial judge firmly rejected a lawyer's proffered explanation that the problems occurred because he was not "technologically savvy," noting that at the time of the deposition, lawyers across the country had been primarily conducting their practices using technology for ten months: "This has included a host of different videoconferencing platforms for court hearings, depositions, and appellate arguments. Thus, while [a lawyer's] lack of technology expertise may have sufficed as an explanation at one point in time, it is no longer valid or credible."

approaches—though not ethically required under the Model Rules—provide a starting point:

- Skillful cross-examination[42]
- Court orders directing uninterrupted testimony[43]
- Motions to terminate or limit a deposition or for sanctions[44]
- Inclusion of protocols in remote deposition orders, scheduling orders, and proposed discovery plans[45]
- Administrative orders governing the conduct of remote depositions[46]
- Inclusion of remote protocols in trial plans and pretrial orders[47]

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[42] This remedy was recommended by the United States Supreme Court. *See* Geders v. United States, 425 U.S. 80, 89-90 (1976) ("The opposing counsel in the adversary system is not without weapons to cope with 'coached' witnesses. A prosecutor may cross-examine a defendant as to the extent of any 'coaching' during a recess, subject, of course, to the control of the court. Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination.").

[43] This remedy also was recommended by the United States Supreme Court as a component of the judge's power to control the progress and shape of the trial. *See* Geders v. United States, 425 U.S. 80, 90 (1976) ("[T]he trial judge, if he doubts that defense counsel will observe the ethical limits on guiding witnesses, may direct that the examination of the witness continue without interruption until completed. If the judge considers the risk high he may arrange the sequence of testimony so that direct- and cross-examination of a witness will be completed without interruption. That this would not be feasible in some cases due to the length of direct- and cross-examination does not alter the availability, in most cases, of a solution that does not cut off communication for so long a period as presented by this record. Inconvenience to the parties, witnesses, counsel, and court personnel may occasionally result if a luncheon or other recess is postponed or if a court continues in session several hours beyond the normal adjournment hour. In this day of crowded dockets, courts must frequently sit through and beyond normal recess; convenience occasionally must yield to concern for the integrity of the trial itself.").

[44] *See* FED. R. CIV. P. 30(d); STEVEN BAIKER-MCKEE & WILLIAM M. JANSSEN, FEDERAL CIVIL RULES HANDBOOK 871 (2022 ed.) (a party may move to terminate a deposition if it is being conducted in bad faith or in an unreasonably annoying, embarrassing, or oppressive manner; a court may impose an "appropriate sanction" on a person engaging in obstructive behavior). *See* ADVISORY COMMITTEE NOTES TO THE FEDERAL RULES OF CIVIL PROCEDURE, 1980 AMENDMENT TO FED. R. CIV. P. 26, Subdivision (f) (1980) ("In the judgment of the Committee abuse can best be prevented by intervention by the court as soon as abuse is threatened.").

[45] Such protocols can be agreed to as part of a stipulation to a deposition by remote means or ordered by the court when authorizing that a deposition be taken by remote means. *See* FED. R. CIV. P. 30(b)(4). Protocols could also be included in a proposed discovery plan. *See* FED. R. CIV. P. 26(f). A number of courts routinely require that depositions be conducted in accordance with the stringent procedures set forth in *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993). *E.g.*, Kelleher v. Wells Fargo Ins. Servs., No. 10-6247-NLH-KMW, 2011 U.S. Dist. LEXIS 13074, at *2 (D.N.J. Feb. 10, 2011). For an example of a remote deposition protocol, see Uniform Civil Rules for New York State Trial Courts, Rule 202.70(g), Appendix G, STIPULATION AND PROPOSED ORDER CONCERNING PROTOCOL FOR CONDUCTING REMOTE DEPOSITIONS, *available at* https://www.nycourts.gov/LegacyPDFS/RULES/trialcourts/202.70(g)%20-%20Rule%2037-Appendix%20G.pdf (last visited Aug. 25, 2023).

[46] *See, e.g.*, SUPREME JUDICIAL COURT OF MASSACHUSETTS UPDATED ORDER REGARDING REMOTE DEPOSITIONS (Oct. 23, 2020), *available at* https://www.mass.gov/supreme-judicial-court-rules/supreme-judicial-court-updated-order-regarding-remote-depositions.

[47] *See* FED. R. CIV. P. 16(c) & (e). *See, e.g.*, STATE OF NEW YORK UNIFIED COURT SYSTEM, VIRTUAL BENCH TRIAL PROTOCOLS AND PROCEDURES (including Proposed Stipulation and Order for Virtual Bench Trial Protocols and Procedures), *available at* https://www.nycourts.gov/whatsnew/pdf/VirtualBenchTrial-Protocols-2112021.pdf (last visited Aug. 25, 2023).

- Development of guidelines and best practices for conduct in remote proceedings[48]
- Professionalism/Civility/Courtesy Codes[49]

Structuring remote proceedings in advance by way of agreement, court order, or collectively adopted behavioral norms will create greater transparency and provide helpful guardrails to guide lawyers away from unethical conduct.

Conclusion

Under the Model Rules of Professional Conduct, a lawyer's failure to prepare and guide a witness would in many situations violate the ethical duties of competence and diligence. Witness preparation becomes unethical when the conduct transgresses Model Rules governing prohibiting interference with the integrity of the justice system and obstructing another party's access to evidence. The use of technology in the profession, particularly remote-meeting technologies, presents distinct opportunities for surreptitious witness coaching. But the Model Rules that constrain unethical witness coaching extend to all testimonial contexts, regardless of format. It is prudent for lawyers and adjudicators to consider prophylactic measures designed for use in remote proceedings to prevent and detect incidences of unethical coaching conduct.

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[48] *See* NATIONAL CENTER FOR STATE COURTS, REMOTE PROCEEDINGS TOOLKIT 47-50 (Proceedings Conduct) (2002), *available at* https://www.ncsc.org/__data/assets/pdf_file/0027/82377/Remote-Proceeding-Toolkit-Final.pdf; WASHINGTON STATE SUPREME COURT, REMOTE JURY TRIALS WORK GROUP BEST PRACTICES IN RESPONSE TO FREQUENTLY ASKED QUESTIONS (FAQ) (June 2021) (including links to resources such as sample orders for remote/virtual jury trials), *available at* https://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.remotejurytrialsworkgroup.

[49] *See, e.g.*, COLORADO PRINCIPLES OF PROFESSIONALISM, PRINCIPLE 7.2.5 (2011) ("We will refrain from coaching deponents by objecting, commenting, or acting in any other manner that suggests a particular answer to a question."), *available at* https://www.cobar.org/For-Members/Committees/Professionalism-Coordinating-Council/Principles-of-Professionalism#9712573-colorado-principles-of-professionalism (2011). A compilation of Professionalism Codes from around the United States can be found on the ABA Center for Professional Responsibility Resources page of the ABA website, *available at* https://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes/.