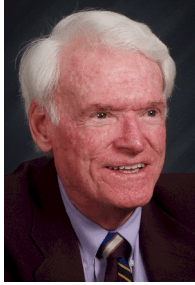


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#WIT5101 Legally Permissible Witness Preparation: short version.

§ 1 Preparing your witness to testify.

It is ethically and legally proper for a lawyer to interview a witness and prepare the witness to testify. Comment (b) to Section 116 of the *Restatement of the Law Governing Lawyers* lists a wide range of permissible witness preparation activities. Read the following list over. You can:

- Invite the witness to provide truthful testimony favorable to the lawyer's client.
- Discuss the role of the witness and effective courtroom demeanor.
- Discuss the witness's recollection and probable testimony.
- Tell the witness other testimony or evidence that will be presented, and ask the witness to reconsider the witness's recollection or recounting of events in that light.
- Discuss the applicability of law to the events in issue.
- Review the factual context into which the witness's observations or opinions will fit.
- Review documents or other physical evidence that may be introduced.
- Discuss probable lines of hostile cross-examination that the witness should be prepared to meet.
- Rehearse the witness's testimony.
- Suggest a choice of words that might be employed to make the witness's meaning clearer.

Read the last item above carefully. For example, technically you can ask a witness who says he saw the “accident” if his/her meaning would be clearer if he tells the jury he saw the “the red car run the stop light and smash the side of the blue car.” But you do not want the witness testifying on cross-exam that you told him to say he saw the red car run the stop light!

Confusion in what you told witnesses, or an understanding by the witness that you “told him” to say something, can translate into an ugly charge of soliciting perjury or obstruction of justice, a chance for the witness receiving an ugly cross-examination at trial, or a media charge of a cover-up.

At all times, you must take care not to give advice which may be construed as substantive coaching. Otherwise you risk an ethics violation, a visit from the grievance committee, a spoliation of evidence motion, or a criminal obstruction of justice charge. There is a fine line between (a) ethically giving help to the witness so that all the facts favorable to your side are presented, and are presented in a way which makes the jury want to accept the testimony, and (b) improperly coaching the witness into a less-than-truthful presentation. See, e.g., *Genders v. United States*, 425 U.S. 80, 90 n.3

(1976) ("An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it").

§ 2 Telling all your witnesses not to talk to the other side.

There are four main legal points in the ethics of witness preparation. See the *Restatement of the Law Governing Lawyers*, Section 116, for that list. The first of those main points is what we discussed, shortly, in § 1 of this law report. The last of those main points, the fourth, is what we will discuss in the remainder of this law report.

(Read the Restatement for the other second and third of those points, if you want to delve further into the subject of the law and ethics of witness preparation.)

Here is what we want to discuss with you now: the legal and ethics point too many lawyers forget.

A lawyer may not request a person to refrain from voluntarily giving relevant testimony or information to another party, unless:

- a. The person is the lawyer's client in the matter; **or**
- b. The person is . . . is a relative or employee . . . of the lawyer or the lawyer's client . . . ”

After we have discussed this negatively phrased main rule, and its exceptions, we'll talk about what you properly can do — with all witnesses — to accomplish the object of your witness not volunteering information to the other side.

Your client's relatives and your client's employees.

Let's start with the exceptions to the rule: item (a) above is a no-brainer, and you know that. As to item (b) above — in theory — there is no reason not to make a request to your client's relatives and your client's employees that they not talk voluntarily to the other side. It is ethically and legally proper to do so. For example, if there is an external and adverse investigation, the company legally can advise employees of the investigation's existence, and you legally can "request" employees not to talk to anyone except you about the case. Likewise, if there is a lawsuit against your client company, you legally can "request" employees not to talk to anyone except you about the case.

Indeed, if your client is a business, the owner or officers probably expect you to tell the employees not to talk to the other side. You can do it, so be proactive and tell the owner and officer of the company you are doing that with every employee you interview. You can proactively sell your legal services to devise an employee information letter on the point of not talking to the adverse party. (Use our legal form to form the basis of that employee letter.)

However, there are two practical problems in telling employees not to talk. The first practical problem arises because government or private investigators deliberately say things and create situations in which an employee feels pressured to talk. Some employees in such situations think they just cannot keep silence in such a pressure situation, and they react by thinking it would be all right to talk as long as they make up a story of events, i.e., lie, to help the company. Such untruths create a real mess for you.

So if you request employees not to talk, you must also tell employees that if they do choose to talk with adverse investigators, they must be truthful.

The second practical problem involves how “strongly” worded your request to employees is phrased. All you can do is make a “request” to employees. You cannot intimidate them or tell them they will get a bad employment review if they talk to the other side. That is a felony¹ or “obstruction of justice.”

Your state probably has a statute on “obstruction of justice,” but you will find statutory definitions vague. Obstruction of justice is a broad concept that extends to any effort to prevent justice in either a criminal or civil matter. Obstruction may include the destruction of evidence, the intimidation of potential witnesses or retaliation against actual witnesses, the preparation of false testimony, or simply what a jury determines is action to prevent your adversary from getting the truth!

This sanction looms when you are talking to employees of your client, lawfully “requesting” them not to talk to the company’s adversary. Employees sometimes interpret that as a company treat of punishment if they talk to the company’s adversary. Crossing the line from “request” to “direction” can be a felony! E.g., see, 18 U.S.C. §1512 (felony to tamper with a witness, victim, or informant); section 1513 (felony to retaliate against a witness)

In these cases, lawyers are usually charged as the principal in an obstruction of justice, with the company witnesses charged with conspiracy to hide evidence.

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Witnesses who are not employees or relatives of the lawyer or client.

Now let’s move on to examine the main body of the rule that “A lawyer may not request a person to refrain from voluntarily giving relevant testimony or information to another party, unless....”

*The stark fact is that most lawyers forget the legal and ethics rule for lawyers that — **in regard to witnesses who are not employees or relatives of the lawyer or client** — you “may not request a person to refrain from voluntarily giving relevant testimony or information to another party.”*

Lawyers tend to forget this rule of ethics, which parallels the civil and criminal legal theories of obstruction of justice. Lawyers commonly tell (not ask or request) all of their own witnesses not to talk or give witness statements to the other side of the case. Yet, it is clearly unethical to do so if the witness is not a relative or employee of the lawyer or the client.

¹ E.g., see, 18 U.S.C. §1512 (felony to tamper with a witness, victim, or informant); section 1513 (felony to retaliate against a witness, victim, or informant). Lawyers are usually charged with obstruction of justice, and witnesses are more often charged with the conspiracy to hide evidence, with the lawyer named as the leader of the conspiracy.

Beyond the ethics rule — there is another, practical, problem. Both the jury and the judge may be less friendly to you if cross-examination of the witness reveals what appears to be an affirmative instruction to hide evidence.

The work around.

Here's the work around: the way to stay out of trouble with all witnesses other than your client: tell the witness three things and hand them a form of information.

1. Tell the witness you are not their attorney, but,
2. Tell the witness you and your client prefer they not talk to the other side without you around; and
3. Tell the witness (a) you are not advising or ordering them that they should not talk to the other side, but (b) you are telling them of their ability to not to talk to the other side. In other words, substitute "information" for "advice;" and
4. Hand the witness a document that states what you are doing – and states it in a way you would want the jury to see.

Quite often friendly witnesses affirmatively ask you, or wonder to themselves, what they should do if "the other side" wants to talk to them. Again, your response should be to tell the witness not what they should do, but rather what they can do. Admittedly, there is a fine line between "should do" and "can do", which a witness may not appreciate in a conversation. So, again, it is best that you give the knowledge of "can do" through a document that shows you were on the correct side of the ethics and legal lines.



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