

Vinson & Elkins

Raising the Right Hand

Practical and Ethical Considerations
When Preparing for Testimony



March 5, 2026

When Testimony Goes Awry: Beyond Litigation Consequences

- Poorly prepared testimony—whether speculative, uninformed, or overly confident—can lead to:
 - Sanctions
 - Loss of credibility
 - Regulatory scrutiny
 - Reputational and financial fallout

Forms of Sworn Testimony in Corporate Litigation

- Depositions (FRCP 30, 30(b)(6)): strategic and factual risks
- Trial testimony: preparation for direct and cross
- Affidavits & declarations: risk of over-drafting or ghostwriting
- Subpoenas (FRCP 45): obligations to respond, protect privilege



Roadmap

- Ethical Guardrails
- Declarations & Affidavits
- Depositions
- Corporate Representatives
- Former Employees
- Fallout from Misstatements
- Other Considerations at Trial
- Key Take-Aways and Questions

Ethical Guardrails

ABA Model Rules of Professional Conduct

- **Competence and Diligence**

- **Rule 1.1 – Competence**

- Lawyers must thoroughly prepare witnesses as part of competent representation.

- **Rule 1.3 – Diligence**

- Adequate preparation is part of diligent representation.

- **Candor and Fairness**

- **Rule 3.3 – Candor Toward the Tribunal**

- Prohibits knowingly offering false testimony.
- Also prohibits failing to correct false statements made by a witness.

- **Rule 3.4 – Fairness to Opposing Party and Counsel**

- Prohibits falsifying evidence or assisting a witness to testify falsely.
- Also prohibits destroying or altering potential evidence or otherwise obstructing another party's access to evidence.

ABA Model Rules of Professional Conduct

- **Communications with Represented and Unrepresented Parties**
 - **Rule 4.2 – Communication with Person Represented by Counsel**
 - Prohibits lawyer from communicating about subject of representation with a person the lawyer knows is represented by another lawyer in the matter, unless have consent of the other lawyer.
 - **Rule 4.3 – Dealing with Unrepresented Person**
 - Prohibits lawyer from implying that the lawyer is disinterested in the matter.
 - Prohibits giving legal advice to an unrepresented person, other than the advice to secure counsel, if conflict of interest.

- **Organization as Client**
 - **Rule 1.13 – Organization as Client**
 - Lawyers employed by an organization represents the organization, not individual employees.

Guidance from ABA Formal Opinion 508

- **Permitted:**
 - Reminding witnesses that they will be under oath
 - Emphasizing the importance of truthfulness
 - Reviewing documents to refresh memory
 - Discussing case strategy and expected questions
 - Advising on demeanor, decorum, and presentation
 - Clarifying that “I don’t recall” is acceptable—if truthful
 - Helping witnesses express themselves clearly and accurately

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 508

August 5, 2023

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 Conduct¹ 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).

Guidance from ABA Formal Opinion 508

- **Prohibited:**
 - Coaching witnesses to lie or mislead
 - Suggesting they “downplay” prep sessions
 - Offering unlawful inducements
 - Influencing testimony midstream (e.g., winking, signaling)

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 508

August 5, 2023

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 Conduct¹ 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).

Declarations & Affidavits

Declarations & Affidavits

Truth in Writing: Drafting Ethical Statements

- Avoid shaping testimony to fit narrative
- Risks of ghostwriting or overly lawyered declarations
- Witness must understand and own the statement



Depositions

Witness Prep: Best Practices

Teach, Don't Script

- “Only liars need a good memory” – focus on understanding of facts and case themes, not memorizing a script
- “Storms and safe harbors” – teach thematic points, not scripted answers
- Use analogies to avoid volunteering information: restaurant example
- Avoid speculation, over-answering, or volunteering
- Practice answering hard questions with poise and honesty

“What was I supposed to say again?”



“I understand what happened and why it matters.”

Privilege Issues in Depositions

Conferences During the Deposition

- Prior to the deposition, determine whether conferences with your client are allowed during breaks in the relevant jurisdiction.
 - **Delaware Chancery Court** prohibits counsel from conferring with the witness during breaks or continuances that are less than 5 calendar days, except to discuss privilege. Ct. Ch. R. 30(d)(1).
 - **District of Delaware** similarly prohibits counsel from conferring with the witness, except as it concerns privilege. D. Del. L.R. 30.6.
 - **Texas** allows for private conferences with a client “during agreed recesses and adjournments,” such as lunch breaks. See Tex. R. Civ. Proc. 199.5(d); *Eckels v. Davis*, 111 S.W.3d 687, 698 fn.5 (Tex. App.—Fort Worth 2003, pet. denied). Otherwise, private conferences are improper, except for purposes of determining whether privilege should be asserted.
 - **New York (S.D.N.Y. and E.D.N.Y.)** prohibit an attorney from initiating “a private conference with the deponent while a deposition question is pending, except for the purpose of determining whether a privilege should be asserted.” L.R. 30.4.

Corporate Representatives

Preparing the Corporate Representative

The 30(b)(6) Witness: Speaking for the Company

- Duty to educate the witness on company's knowledge (not just personal knowledge)
- Considerations in selecting the right witness or witnesses



Step-by-Step Framework for Preparing a Corporate Rep

- **1. Understand the Scope of the Deposition Notice**
 - Carefully review the Rule 30(b)(6) notice: Note topics, definitions, instructions, and time frames.
 - Clarify vague or overly broad topics with opposing counsel early to avoid disputes or motions to compel.

- **2. Select the Right Representative(s) Matching Knowledge to Topics**
 - Choose individuals with relevant knowledge or access to it.
 - Use multiple designees if no single person can address all topics.
 - Avoid unnecessary exposure: Don't default to executives unless their testimony is essential.

Step-by-Step Framework for Preparing a Corporate Rep

- **3. Educate the Witness on Their Role**

- Explain their legal duty: They testify on behalf of the organization, not in a personal capacity.
- Clarify the scope: They must speak to all reasonably available information, including that held by former employees or in records.
- Discuss risks: Inadequate preparation can result in binding admissions or sanctions.

- **4. Prepare the Witness Thoroughly**

- Provide relevant materials: Internal documents, emails, reports, and prior discovery responses.
- Not a memory test: Consider providing witness with document to address certain topics.
- Conduct mock Q&A sessions: Practice answering clearly and confidently.

Former Employees

Former Employees as Witnesses

- **Ethical issues with scope of representation:**
 - Clarify representation boundaries (ABA Rule 4.3)
 - *Upjohn* warning: Who is the client?
- **Privilege issues:**
 - Majority of jurisdictions hold that communications with former employees regarding the former employee's actions and involvement **while employed** will be protected.
 - Any communications or documents beyond the scope of the former employee's employment with the corporation may **not** be privileged—i.e., litigation strategy and any new facts.
 - Make determinations about potential privilege issues before preparation begins.
 - Consider taking additional steps to better ensure communications with former employees are privileged.

Fallout from Misstatements

Situation #1 – False Testimony in Depositions

- **Facts:**

- Client admitted to texting during a crash.
- Later lied in deposition, denying phone use.
- Attorney urged correction during a break; client refused.

- **What should the attorney do?**

Texas Ethics Opinion 692 – False Testimony in Depositions

- **Conclusion:**

- No duty to correct the lie if the attorney didn't elicit or use it
- Must urge client to fix it
- Cannot rely on false testimony later
- Lawyer may seek to withdraw

E

- **But ethics opinions in other jurisdictions may differ.**

- Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-376 at 5 (1993) (“The Lawyer’s Obligation Where a Client Lies in Response to Discovery Requests”) (concluding that, even though the lawyer was not aware of her client’s perjury until after the perjury occurred, once the lawyer learned of the perjury, her “[c]ontinued participation . . . in the matter without rectification or disclosure would assist the client in committing a crime or fraud” in violation of ABA Model Rule 3.3(a)(2) that was in effect at the time)

Situation #2 – False Testimony in Arbitration

- **Facts:**
 - Client gave sworn testimony at an arbitration concerning a document.
 - Document was admitted into evidence based on the testimony.
 - Client later told lawyer the document was forged.

- **What should the attorney do?**

New York Ethics Opinion 837 – False Testimony in Arbitration

- **Conclusion:**
 - Seek client’s cooperation in correcting the falsehood.
 - If the client refuses, the lawyer must take additional remedial steps.
 - Withdraw the false evidence and testimony, if possible, without commenting on its truth or falsity.
 - If withdrawal isn’t possible, the lawyer may have to disclose the falsehood to the tribunal, even if it requires revealing otherwise confidential information.

What If They Lie?

- **Step 1: Assess the Falsehood**
- **Step 2: Ethical & Legal Duties**
 - Model Rule 3.3: Duty of candor to the tribunal.
- **Step 3: Reporting Obligations**
 - Consider: Sarbanes-Oxley; SEC rules; State bar mandates
- **Step 4: Correcting the Record**
 - For depositions: Reopen or submit errata/corrective affidavit.
 - For affidavits: File correction.
- **Step 5: Protect the Record & Yourself**
 - Document your response. Avoid complicity. Seek ethics counsel if needed.

Other Considerations at Trial

Human Factors in Testimony

Stepping into the Courtroom

- Jurors react to appearance, tone, and body language
- Examples: slicked-back hair = “slick”; pearls = “elitist”
- Authenticity and humility matter
- Judges are less swayed but still human
- Consider tailoring prep for bench vs. jury trials

Final Takeaways

Raising the Right Hand - The Right Way

- Preparation is about clarity, not choreography.
- Ethics are foundational, not optional.
- The goal in preparing witnesses: Truthful, credible, and aligned testimony.

Questions?

Michael C. Holmes

Partner, Vice Chair – Shareholder Litigation & Enforcement

Dallas | +1.214.220.7814 | mholmes@velaw.com



Michael is the Head of Vinson & Elkins' Litigation Department. He is Vice Chair of the firm and a member of the firm's Management Committee.

Michael focuses on business litigation. He is a seasoned trial lawyer with particular expertise in securities and corporate governance matters, including fiduciary duty cases, litigation arising from M&A transactions, securities class actions, corporate governance matter and alternative entity litigation, among other areas. He has appeared as lead counsel in numerous cases pending in federal and state courts around the country, including the Delaware Court of Chancery, as well as arbitral tribunals.

Michael got his first taste for being a lead trial lawyer in a Justice of the Peace Court in Atlanta, Texas shortly after joining the firm in 1997. Since then, he has litigated and tried several significant cases, including some of the largest, most high-profile cases. As examples: In 2009, Michael was on the trial team that won a judgment ordering Hexion to close its merger with Huntsman. In 2016, Michael led a trial team that won a judgment allowing Energy Transfer to terminate its transaction with The Williams Companies, and in 2019 he led a trial team that won a take-nothing judgment for a publicly-traded company against a \$1.6 billion entire fairness claim. A full list of Michael's matters is available upon request.

Michael has earned the praise and respect of trial lawyers on both sides of the bar.

“As trial lawyers, we accept that we will win some and we will lose some. Of course winning is always better. And I have to tip my hat to Michael, since he finds a way to win cases that I thought he'd surely lose.”

- *Lawdragon Profile* (2021) (quoting a former adversary)

“Michael Holmes is a rock star with a good strategic mind and who often handles matters in Delaware.”

- *Legal 500 US* (2019) (quoting anonymous market commentary)

Michael received his undergraduate and law degrees from The University of Texas at Austin in 1994 and 1997, respectively.

Michelle Arishita

Counsel – Commercial & Business Litigation

Austin | +1.512.542.8436 | marishita@velaw.com



Michelle Arishita is a skilled litigator with extensive experience representing clients in complex commercial disputes across both federal and state courts. Her practice spans a wide range of industries and legal issues, including contract, antitrust, oil and gas, construction, and trade secret law. In addition to her commercial litigation work, Michelle maintains an active pro bono practice, advocating for individuals in need of legal support. Michelle has successfully handled high-stakes matters, including:

AAA Arbitration: Secured a complete victory, including attorneys' fees, for a private equity investor in a dispute with an oil and gas operator over joint operations mismanagement.

W.D. Tex.: Represented a multi-state amenity management company in a trade secret and contract dispute, obtaining multiple temporary restraining orders and a favorable settlement.

AAA Arbitration: Achieved a full damages award for an international construction contractor in a fraud and breach of contract case involving turbine equipment for a major power plant.

Tex. Dist. – Harris County: Negotiated a favorable settlement for a self-storage business developer in a contract dispute.

W.D. Tex.: Defended a Fortune 500 life sciences company against federal and state antitrust claims in the allergy testing and immunotherapy markets.

THANK YOU



www.velaw.com



[@vinson-and-elkins](https://www.linkedin.com/company/vinson-and-elkins)



[@vinsonelkins](https://www.instagram.com/vinsonelkins)



[@vinsonelkins](https://twitter.com/vinsonelkins)



[@vinsonandelkins](https://twitter.com/vinsonandelkins)



[@vinsonelkinslp7840](https://www.youtube.com/channel/UCv840...)



Austin



1.512.542.8436



marishita@velaw.com

Austin Dallas Denver Dubai Dublin Houston London Los Angeles New York Richmond San Francisco Tokyo Washington