

ASTC Professional Code
PRACTICE AREA B
WITNESS PREPARATION

Trial consultants recognize witness preparation involves the art and science of interpersonal communication, and therefore our professional approaches will take many different forms. ASTC recognizes the diversity of practice by its members within this area.

For the purposes of these Professional Standards and Practice Guidelines, witness preparation refers to the assistance trial consultants provide attorneys or other clients in their effort to increase witnesses' understanding, comfort and confidence in the process of testifying for deposition or in court, and to improve witnesses' ability to truthfully present testimony in a clear and effective manner.¹

Techniques and methods employed by trial consultants, as well as the structure of the preparation sessions, are based on the goals of the attorney or other client, the assessed needs of the witness, and the training, experience and expertise of the consultant.² When preparing witnesses, ASTC members do not attempt to alter or conceal the truth of witness testimony, nor do they condone such attempts by others.

WITNESS PREPARATION: PROFESSIONAL STANDARDS

I. Compliance with Laws and Rules

- A. Trial consultants shall advocate that a witness tell the truth.
- B. Trial consultants shall familiarize themselves with applicable law and rules which may apply to witness preparation services.
- C. Trial consultants shall provide witness preparation services within the boundaries of their competence based upon education, training, or other appropriate professional experience.

II. Duty to Clients

- A. Trial consultants shall clarify with the client the goals for witness preparation and the role of the trial consultant.
- B. Trial consultants shall describe the witness preparation process including techniques and their limitations.
- C. Trial consultants shall discuss with the client limitations on confidentiality in the provision of witness preparation services including but not limited to discovery requests.¹

III. Duty to Witnesses

- A. Trial consultants shall treat witnesses with respect and consideration at all times.

WITNESS PREPARATION: PRACTICE GUIDELINES

I. Compliance with Laws and Rules

- A. Trial consultants do not script specific answers or censor appropriate and relevant answers based solely on the expected harmful effect on case outcome.¹

II. Duty to Clients

- A. Clarify goals of the attorney and trial consultant for each witness preparation session. Practices can include, but are not limited to:
 - 1. Discuss the possible limits on confidentiality of the work.
 - 2. Clarify reasonable expectations for preparation assistance, and discourage unrealistic expectations of a witness' capacities or the impact of any one witness' testimony.
 - 3. Review case material provided by the attorney or other client.
 - 4. Confirm the attorney's or other client's role in the session(s), likely including preparing mock direct and cross examinations.
 - 5. Agree how the trial consultant will be introduced in a manner appropriate to both the goal of witness credibility and the consultant's skill and training.
 - 6. Agree to review and revise goals for the witness preparation as necessary.

III. Methods

- A. Methods used with the attorney or other client to meet the agreed upon goals for a witness preparation session can include, but are not limited to:
 - 1. Assess and address communication issues between the witness and the attorney.
 - 2. Where beneficial in assisting the witness, plan for the use of video-recorded mock examinations which will allow for attorney and consultant feedback. If video is used, agree with the attorney how video recordings and other materials will be handled afterwards.
 - 3. Agree that the attorney, if present, shall make a statement on any video or audio recording used indicating it is covered by the work-product doctrine.²
 - 4. Where beneficial in assisting the witness, plan for the use of demonstrative aids or other exhibits with the witness during mock examinations.
 - 5. When working with an attorney, agree the attorney will be present for the session, or confirm that no substantive testimony will be addressed outside the attorney's presence.³
 - 6. Agree with the attorney on an appropriate approach to prepare the witness to answer questions by opposing counsel about the

WITNESS PREPARATION: PRACTICE GUIDELINES

preparation session(s), should such questions be permitted.

- B. Methods used with the witness to meet the agreed upon goals for a witness preparation session can include, but are not limited to:
1. Assess and address verbal and nonverbal communication strengths and limitations.
 2. Identify witness concerns about testimony and goals for preparation.
 3. Work to increase witness comfort and confidence in testimony.
 4. Work to strengthen and help develop witness communication skills.
 5. Whenever helpful, educate the witness on significant aspects of the process and procedures for testimony in deposition or in other forums.
 6. Clarify the consultant's role in the preparation process and address the possible limits of the confidentiality of the work.
 7. Address any issues with the physical appearance of the witness.
 8. Discuss assessment with witness.
 9. Discomfort or anxiety may be addressed by behavioral techniques, including, but not limited to: breathing exercises; relaxation or visualization techniques; reframing anxious reactions, fears or misperceptions; actual or facsimile courtroom visits; reviewing video recorded mock testimony.
 10. Work to improve witness' listening skills.
 11. Whenever possible, conduct and review a sufficient number of mock examinations to encourage the greatest improvement.

WITNESS PREPARATION: COMMENTARY

Preamble

¹ The ABA's model rules for maintaining ethical behavior by attorneys require that a lawyer never present a witness without knowing what his or her testimony will be. Witness preparation is an important tool to meet this duty. A decision in *State v. McCormick*, 259 S.E.2nd 880, 882 (N.C. 1979,) goes on to suggest "it is not improper" to prepare witnesses so they will be ready, be more at ease knowing what to expect, and to "give his testimony in the most effective manner that he can. Such preparation...is to be commended." Some general goals for proper areas to address in witness preparation can be found in a 1995 article in the *Cardozo Law Review* by Richard Wydick, (The Ethics of Witness Coaching, 17 *Cardozo Law Rev.* 1, 12-13, 1995) including to, "obtain information, clarify important points, expose or resolve misperceptions, and organize the presentation of the case".

² For an overview on assessing witness communication, methods for improving witness communication skills and witness preparation techniques, see "Witness Preparation", chapter 15, in *Jurywork*, Will Roundtree, associate editor and Elissa Krauss, general editor, West Publishing, 2nd Ed., St. Paul, MN, 2002). For additional resources, please refer to the Depository at www.astcweb.org.

Standards

¹ For an overview on the subject of discovery of trial consultant work, see *Discovering Trial Consultant Work Product: A New Way to Borrow an Adversary's Wits?* by Stanley Davis and Tom Beisecker (*American Journal of Trial Advocacy*, 17:581, 581-636, 1994). This article was referenced heavily in the decision of the United States 3rd District Court (In re: Cendant Corporation Securities Litigation, 343 F.3d 658) which upheld the work product protections established in the *Hickman v. Taylor* decision as applying to trial consultants' work, and, under certain circumstances, also extending the attorney-client privilege. (Note practice guidelines suggesting attorneys be present for the witness preparation sessions.) However, in most jurisdictions the ability to petition a court to discover trial consultant work product as it relates to witness preparation is not yet resolved. Cases such as U.S. 3rd Circuit, in re: Cendant Corporation, No. 02-4386, Sept. 16, 2003, 343 F.3d 658; *Adkins v. Elliot King County*, WA Cause NO. 02-2-15703-3; *Farmer v. Aoyama* case King County, WA Cause NO. 02-2-25720-8, among others should alert consultants to the need to fully understand and comply with best practices regarding the protection of confidentiality in their work with witnesses.

Guidelines

¹ Preparing or orchestrating a witness's answers has been called "scripting", along the lines of *State ex rel. Abner v. Elliott*, 85 Ohio St.3d 11, 1999-Ohio-199.

² Work-product doctrine is also commonly referred to as work-product privilege.

³ The Federal Rules of Civil procedure provide that documents and tangible things prepared in anticipation of litigation or for trial are protected from discoverability under the "work product" doctrine. In some venues, this work product doctrine has been extended to non-tangible things such as the work of trial consultants preparing

WITNESS PREPARATION: COMMENTARY

witnesses for deposition testimony or to testify at trial (see *In re Cendant*, above.) However, not all courts may agree that the work of trial consultants in preparing witnesses to testify is protected under the work product doctrine. Thus, working with a witness only in the presence of an attorney may provide an extra layer of protection under the attorney-client privilege. However, many consultants have handled items like reviews of concerns, education on the preparation and testimonial process, and various forms of assessing a witness' capacities out of the presence of the attorney. Certainly, at a minimum, any possible added risk to confidentiality of the work product should be addressed with the client.