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**PREPARING YOUR WITNESS
FOR DEPOSITION AND TRIAL**

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I. SCOPE OF ARTICLE

This article focuses on strategies and tactics for preparing your witness for deposition or trial testimony, and will also address relevant portions of the Texas Rules of Civil Procedure and the Texas Rules of Disciplinary Procedure, as necessary, to fully develop the discussion.

I. PREPARING YOUR WITNESS FOR DEPOSITION

There are several steps to be taken during the process of preparing a witness to give a deposition. Several of these steps will vary depending on who the witness is that is being deposed.

A. Your Client

Make no mistake about it: Your client's deposition is the most important deposition to your case, particularly if you represent a plaintiff. As the plaintiff, you have the burden of proof at trial. Moreover, many times the Plaintiff is the only witness to affirmatively support your claims. In other words, your client must be credible to a jury before you will prevail. In these days where summary judgment motions are filed in increasing numbers, and in an increasing variety of cases, the Plaintiff's deposition testimony will be critical to even get to a jury. Finally, one of the most important factors for a lawyer in evaluating settlement is assessing the presentation and credibility of the opposing party. For all of these reasons, it is critical that you thoroughly prepare your client for the deposition.

8. Relieve the Anxiety of Giving a Deposition

In most occasions, your client will be experiencing anxiety about giving a deposition. In many situations, your client will have never given a deposition before. Accordingly, the anxiety may result from a lack of information about the legal process, the importance of the case to him and recognizing that he will be under oath and recorded during the deposition.

Moreover, if your client is the plaintiff in the suit, you may have additional factors to address. In most occasions, the Plaintiff is the first witness in the case to be deposed. This fact alone will create anxieties that other witnesses will not have. For example, because the Plaintiff is usually the first witness to give a deposition, your client will not have had the opportunity to first experience a deposition. The anxiety may also stem from limited knowledge about various aspects of the case. For example, your client will be giving a deposition without having heard any other version of the events at issue in the case. For this reason, it is important to conduct extensive written discovery prior to the deposition, and review all of the information available with your client prior to the deposition. If you want to adequately prepare your client for a deposition, all of this must be addressed while preparing your witness for the deposition.

8. Conduct Extensive Written Discovery Prior to the Plaintiff's Deposition

Prior to ever meeting with your client, you will need to complete several tasks in order to adequately prepare your client for the deposition. First, the most valuable commodity you can have as a litigant is information. If you represent the plaintiff, your client will undoubtedly be asked what evidence he has to support the claims being asserted. Because it is likely that no other witnesses will have been deposed, discovery will be substantially incomplete at the time of the plaintiff's deposition. As a result, it will be necessary to conduct extensive written discovery prior to the deposition. Prior to presenting your client for his deposition, you should always send out interrogatories and a request for production sufficiently far in advance to be able to review the

answers prior to the deposition. This will prevent opposing counsel from framing questions for the deposition based upon documents that you and your client have never seen. Upon receipt of the opposing party's discovery responses, have your client review them prior to scheduling a meeting to prepare for the deposition.

8. **Explain the Deposition Process**

a) Address any concerns your client has

At the outset of your meeting with your client, you must put your client at ease. This will require you to first address any concerns that your client may have going into the deposition. To do this effectively, do not rely on your client to willingly express his or her concerns to you. Rather, you must ask your client about any concerns that he or she may have, and respond accordingly.

In many circumstances, your client may ask who will be present during the deposition. The answer to this question will depend on whether your case is pending in federal court or in state court. In federal court, it is clear that the exclusionary rule of Rule 615 does not apply to depositions. *See* Fed. R. Civ. P. 30(c). *See also In re Terra Int'l, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998). Therefore, in federal court, a common tactic is to arrange for certain witnesses, such as a plaintiff's former supervisor, to attend the deposition in an attempt to intimidate the deponent. You must prepare your client for this possibility.

In state court, however, there is no corresponding provision excluding rule of sequestration found in Rule 614 from deposition examinations. Rather, a deposition examination is required to be conducted in the same manner as if the testimony was taken in court at trial. *See* Tex. R. Civ. P. 199.5(d). Moreover, the Texas Rules specifically require the party noticing the deposition to state in the notice if the party intends to have persons other than the party, or a party's spouse, attend the deposition. *See* Tex. R. Civ. P. 199.5(a)(3). Therefore, as soon as you receive a deposition notice, you should always discuss the notice with your client, and determine whether you should seek to exclude a person listed on the deposition notice from attending the deposition.

b) Cover the logistics first

Next, cover the logistics of the deposition at the beginning of the meeting. Explain to your client what to wear for the deposition, where and when to meet, what to bring with them, who will be present, and the seating arrangement. If the deposition will be held in your offices, show your client the conference room where the deposition will be held, so that he may become familiar with the surroundings. If you anticipate that the deposition will be video taped, then inform your client of that fact. You do not want any surprises for your client immediately prior to the beginning of his deposition.

c) Review the objectives of a deposition

You should also review the objectives of a deposition. Explain to your client that the primary purposes are to learn information about the case, to assess the credibility and likeability of the witness, to obtain necessary admissions and information to support an anticipated summary judgment motion, and to pin the witness down on his or her story so that they can prepare for trial. Each of these purposes should be discussed with the client so that they can consider each in preparing for the deposition.

d) Talk about the lawyer conducting the deposition

You should also talk about the lawyer who will be conducting the deposition. Talk about the various roles that the lawyer may assume: solicitous, skeptical, aggressive and sometimes, straightforward. Let your client know that the opposing counsel may try to test him by trying to

make him upset or angry. Tell your client that it is important to remain calm and not to get angry or feel intimidated by the lawyer's conduct. The more assured your client is of himself, and of you, the more likely your client will defeat opposing counsel's effort to trip your client up, or lure him into making a critical admission.

e) Discuss any past experience you have had with opposing counsel

Of course, if you have personal experience with a particular lawyer, talk to your client about your experience, with the caveat, of course, that the lawyer may adjust his personality due to that past experience in order to trip up the client in the deposition.

8. **Review the Pleadings**

During your meeting, review the petition with your client. Most of the time, opposing counsel will use the latest petition as a roadmap for the deposition.

a) Take an interactive approach

In reviewing the petition, be sure to involve your client in an interactive discussion of the factual allegations, rather than simply having your client review the allegations in the Petition. This will allow your client to actively recall the events at issue in the case, rather than simply rely on and adopt the allegations as worded in the Petition.

b) Use the opportunity to discuss litigation strategy

Moreover, you should take this time as an opportunity to discuss any tasks that will need to be completed. The meeting should give you and your client a valuable opportunity to discuss the case, any strategy for litigating, and to determine whether any amendments to the pleading may be necessary.

8. **Explain the Nature of the Claims Being Asserted**

In addition to reviewing the pleadings filed in the case, it will also be necessary to fully explain the nature of the allegations to your client. When reviewing the statement of legal claims, ask your client what he thinks the claim refers to. The answers that your client gives will help you evaluate your client's understanding of the case. Regardless of whether you represent a plaintiff or a defendant, it is critical that your client know the elements that must be proven to prevail both on the claims asserted, and any potential defenses to those claims. This will allow your client to understand how his knowledge of the case fits into the big picture of proving either the claim or the defense, and articulate that knowledge adequately during the deposition. On the other hand, if your client does not have a thorough understanding of the elements of each claim and defense, he may be lulled into making a critical admission that is fatal to your claim or defense.

8. **Review the Discovery Responses**

After having discussed the pleadings with your client, you should review the answers to interrogatories and documents produced by the other side.

a) Review documents prior to your meeting

In preparing for your meeting with your client, both you and your client should have already reviewed the documents relevant to the case, including the documents which your client has provided to you, as well as those that were produced by the other side. Your client should not be reviewing documents for the first time during your meeting to prepare for his deposition. Moreover,

prior to the meeting, you should select the documents that are essential to your client's case and have your client refresh his or her recollection of those documents.

Keep in mind, however, that while oral communications between you and your client are privileged, documents reviewed by your client to refresh his recollection may not retain work product protection. *See* TEX. R. EVID. 612. In order to obtain documents used by a witness to prepare for his testimony, a party must demonstrate three elements: (1) the witness must use the writing to refresh his or her memory; (2) the witness must use the writing for the purpose of testifying; and (3) the court must determine that production is necessary in the interests of justice. *See Butler Manufacturing Co. v. Americold Corp.*, 148 F.R.D. 275, 278 (D. Kan. 1993). For example, if during your meeting, your client cannot recall certain events and his recollection of events is refreshed by reviewing a document protected by work-product, the document may need to be produced. *See, e.g., Aniero v. New York City Sch. Contr. Auth.*, 2002 WL 257685 (S.D.N.Y. 2002) (documents used to refresh recollection of a witness must be produced).

On the other hand, some courts have held that if the document used to refresh recollection of a witness is protected by work-product, then production of the document is not automatic. *See Butler Manufacturing Co. v. Americold Corp.*, 148 F.R.D. 275 (D. Kan. 1993) (party seeking production of document failed to make an adequate showing that the document actually influenced the witness's testimony). *See also Nutramax Laboratories, Inc. v. Twin Laboratories Inc.*, 183 F.R.D. 458, 468 (D. Md 1998) (discussing a balancing test, which weighs the policies underlying the work product doctrine against the need for disclosure to promote effective cross-examination and impeachment to determine whether documents should be produced).

Other courts take a third approach, holding that the document must be produced, but may be redacted to disclose only the portion actually used to refresh the recollection of the witness. *See Hiskett v. Wal-Mart Stores, Inc.*, 180 F.R.D. 403 (D. Kan. 1998).

Another issue arises if the witness reviews a document protected by work product, but the document has no effect on his recollection of events. Some courts hold that because protection of work product is strong, the protection should not be lost if the document had no impact on the testimony. *See Butler Manufacturing Co. v. Americold Corp.*, 148 F.R.D. 275 (D. Kan. 1993); *Bank Hapoalim v. American Home Assurance Co.*, 1994 WL 119575 (S.D.N.Y. 1994). On the other hand, some courts hold that actual refreshment is immaterial if the document was used to attempt to refresh the recollection of the witness. *See Audiotext Communications Network Inc. v. U.S. Telecom, Inc.*, 164 F.R.D. 250, 254 (D. Kan. 1996).

b) Explain your client's role in the case

At this point, remind your client that he probably has knowledge of limited aspects of the case. Explain that for this reason, it is appropriate to tell opposing counsel during the deposition that he does not have knowledge about a particular topic when he does not have an answer to the question being asked. Explain to your client that he will not be expected to know every answer to every element of the case.

c) Your client should not speculate

In many cases, evidence on particular elements of the case may necessarily have to come from opposing witnesses. You should talk to your client about the need not to guess or speculate in order to respond to some of the questions. This may lead to critical admissions being made that are based purely on speculation. Of course, your client may obtain some of the information through reviewing documents produced by the opposing party, that he otherwise would not have. Therefore, a review of the documents produced may allow your client to give more complete responses to the opposing counsel's questions.

7. Review Any Protective Orders

Moreover, if a protective order has been entered in the case, you should review the protective order with your client prior to the deposition. Explain to your client what issues are covered by the protective order that may arise during the deposition, and that you may instruct him or her not to answer if the attorney's questions are improper, or are subject to a protective order.

8. Explain the Guidelines for the Deposition

After reviewing the facts underlying the case, talk to your client about the ground rules for a deposition. The general rule to a witness is "Tell the truth and keep it short."

Explain to your client that he is to answer only the question that is asked. To accomplish this, explain to your client the importance of listening carefully to each question asked. Explain that he is to think about each word used and be sensitive to ambiguous terms used. Also explain to your client the importance of taking ample time to respond to each question. It is perfectly acceptable to pause before responding to each question, in order to fully understand precisely what is asked. Next, you should explain that he is to answer only the question asked. At first, this may appear to be counter-intuitive to someone who has never given a deposition. To help illustrate this concept, use examples from every day life.

a) "Do you know what time it is?"

For example, ask your client the question "Do you know what time it is?" Undoubtedly, your client will look at his watch, and give you the time. Of course, the question did not ask for the time. The question simply asked whether he knew the time, the answer to which is either a "yes" or a "no."

b) "Go Fish."

Another popular example used by several trial experts is the card game of "Go Fish."

If you are asked by your opponent during a game of Go Fish, "Do you have any jacks?" and you don't, what do you say? "No." That's all you say; because you've answered your opponent's question. You don't proceed to tell your opponent that while you don't have any jacks, you do have two 6's. This same approach applies in answering questions in a deposition.

Examples such as these will help train your client to listen carefully to the question that is being asked, and to frame the appropriate response in his mind prior to uttering any words in response.

9. Do Not Joke During the Deposition

You should also caution your client against joking during the deposition. Explain that once the deposition is transcribed, the context of a joke may not be apparent on a cold transcript. Note that this rule also applies to video taped depositions. Remind your client that even though that the video may capture the context of a joke, that if that portion is played for the jury, it may nevertheless reflect poorly upon your client.

10. Do Not Argue With Opposing Counsel

Finally, caution your client not to lose his temper during the deposition. Under no circumstances should your client argue with opposing counsel. Rather, your client should maintain his position, and should not play into the hands of opposing counsel by arguing with him back and forth. Explain that if he engages in an argument with opposing counsel, this may create a negative impression in the minds of the jury, and may also cause your client to take an unreasonable position,

which could cause your client to lose credibility.

11. Mistakes Should Be Corrected Promptly

Explain to your client what to do if he realizes that he gave an erroneous answer during the deposition. If this happens, your client should correct the mistake as soon as he realizes the error. Explain that, while he will have the opportunity to review the transcript, he should not wait until that time to correct the mistake.

12. Explain Objections and Privileges

You should also explain the role of objections and privileges during a deposition. Tell your client that there may be times when opposing counsel asks a question to which you will need to state a legal objection. You should also inform your client that making objections is simply part of the legal process for the record, and that, unless the client is instructed otherwise, that he will still have to answer the questions after the objection has been made.

Also, be sure to explain objections that the lawyer may make to the responsiveness of the question. Witnesses sometimes tend to be intimidated by objections to the responsiveness of questions. In order to ensure that your client maintains his confidence during the deposition and is not intimidated by opposing counsel, explain to him the nature of this objection, and not to be influenced by opposing counsel's conduct.

a) Assure your client that you will protect them

You should assure your client that you will not allow him or her to answer questions that the other side has no right to ask, and that in those instances, you will instruct your client not to answer the question. *See* Tex. R. Civ. P. 199.5(f) and Rule 199, cmt. 4. You should also explain that upon an instruction not to answer the question, that the lawyer conducting the deposition may continue to ask the question, in an attempt to get the witness to answer in spite of counsel's instruction. Your client should not be swayed by such tactics.

b) Your client may consult with you concerning privileges

You should also review privileges that may apply, such as the attorney-client privilege, marital communications, physician-patient privilege, and pastor-penitent privilege. After explaining these privileges, make clear to your client prior to the deposition that if there is any concern about whether a question calls for privileged information, the client should consult with you during the deposition before answering the question to ensure that a privileged communication is not disclosed.

13. Conduct a Role Play

Finally, after fully reviewing the facts of the case and explaining the ground rules for a deposition, conduct a brief role play. You should begin your role play with the common introductory instructions given by most lawyers at the beginning of a deposition. Therefore, during the deposition, your client will be assured that he was adequately prepared if opposing counsel runs through the same guidelines. Of course, if opposing counsel does not go through the preliminary instructions, it will make it look like you are the more experienced lawyer. Moreover, if opposing counsel does not explain the ground rules, your client will already be familiar with them.

a) Start with the basics

After explaining the ground rules, begin with some basic questions that will allow your client to feel comfortable answering questions in a deposition format. You should then follow up those

questions with inquiries about the critical facts which form the basis of the lawsuit. Be sure to ask both open-ended and closed-ended questions, to expose your client to the various types of questions that he will face.

b) Observe your client's mannerisms

During the role-play, observe your client's mannerisms and gestures and determine whether they are distracting or telling. You should offer suggestions on how to minimize any distracting habits that your client may have. Keep in mind, however, that you cannot change your client's personality overnight. Nevertheless, you should point out such habits to your client and have him practice eliminating the habit.

c) Do not improperly coach your client

Do not put words in your client's mouth. Your client may already be susceptible to your suggestions, so do not suggest inaccurate testimony. It is unethical. See Rule 3.04 of the Texas Disciplinary Rules of Professional Conduct. However, if your client's answer is confusing or unclear during your role play, it is permissible to suggest a more clear way of stating the information. Nevertheless, you should always make sure that the facts contained in the answer are truthful.

d) Have a colleague conduct a cross-examination

You may find it difficult to conduct an effective cross-examination of your client because of the relationship you have already established with him. You may find that the client is not intimidated by you, or may get confused by your questions because up to then, he has only viewed your role as being his advocate. Therefore, if possible, you should ask one of your colleagues to conduct a short cross-examination of some of the critical points of the testimony.

e) Use objections to duplicate the experience of a deposition

Moreover, having another lawyer in the room may help to duplicate the experience of a deposition more effectively. To that end, during the examination, try to assert some objections, to allow your client to further understand what will take place during the deposition.

e) Give positive reinforcement

Following the examination, talk to your client about both the good points of the examination, and the areas that need work. Keep in mind that it is very important to give your client confidence going into the deposition. Therefore, be sure to focus not only on the areas that need improvement, but also what he is doing well.

14. Explain To Your Client That You May Also Ask Questions

Also, you should alert your client to the fact that you may need to examine him as well. Explain to your client why you might need to ask questions, so that he may be prepared, and is not caught off guard. Also, explain to your client the types of follow-up questions that may be asked, which will obviously vary, depending on the type of case involved.

15. Review the Logistics

You should conclude your deposition preparation meeting by summarizing the procedure of the deposition with your client. Review the points such as what to where, what to bring, where to meet, etc., so that they are fresh in your clients mind before he leaves your office.

B. Lay Witnesses Supportive To Your Case

There will also be occasions in which you will present and prepare lay witnesses for a deposition. Many of the techniques used in preparing your client for a deposition will apply to witnesses supportive to your case. Generally, these witnesses will agree to meet with you in preparation for his or her deposition. However, the first rule to keep in mind is that a third-party witness is not your client. Therefore, at the outset, be sure that it is permissible to interview and meet with the witness. *See* Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct.

1. Explain That There Is No Confidential Relationship

At the beginning of your meeting, explain to the witness that what is said in your conversation is not confidential between you, and that if the other side's lawyer asks about the conversation, the witness must disclose what was said.

2. Be Careful Not To Divulge Privileged Information

It is also important to continually keep in mind that there is no privilege in your communications with third-party witnesses so as not to disclose confidential information to that witness.

3. Inquire Into Previous Deposition Experience

As with your client, your initial task will be to relieve any anxiety about the deposition process. Ask the witness whether he or she has ever given a deposition before. Ask whether the witness has any concerns about giving a deposition, and address those concerns prior to discussing the deposition.

4. Explain Where the Witness Fits Into the Case

It is important that the witness has a basic level of understanding about the case. Without disclosing your litigation strategy, you should be able to articulate a general description of the Plaintiff's claims, the Defendant's defenses and where this witness fits into the case. If there are documents that you plan to use during the witness's deposition, you should review those documents with the witness to ensure that the witness has read them and recalls the content. However, as explained above, keep in mind that documents used to refresh the witness's recollection of events may not retain work product protection. *See* TEX. R. EVID. 612.

5. Do Not Improperly Coach the Witness

As with your client, it is important that you do not tell the witness what to say, or in any fashion, alter the testimony. *See* Rule 3.04 of the Texas Disciplinary Rules of Professional Conduct. You should clearly set aside any perceived notion that the witness has any responsibility besides telling the truth about what he or she personally knows.

6. Encourage the Witness To Be Honest

Be sure to tell the witness that if he or she remembers nothing else, the witness needs to remember to tell the truth. You should also encourage the witness not to guess or speculate. Rather, listen carefully to the question, and answer the question asked.

C. Expert Witnesses

The key to a successful expert deposition and trial testimony is preparation beginning long before the expert's deposition is taken.

1. Investigate the Expert Before Retaining Them

Prior to even hiring your expert, you should conduct an initial investigation. You can accomplish this by checking internet databases which reference your expert in published decisions, professional publications, journal articles, or news articles.

2. Meet With Your Expert Early in the Litigation

After hiring your expert, meet with your expert early on in the litigation, and find out what information he needs that is in the possession of the other side, so that you may request it well before the expert's report is due.

3. Conduct the Necessary Discovery

You should always complete the necessary discovery before your expert's deposition is taken to ensure that he or she has the information necessary to formulate his or her opinions. If necessary, you may need to consider any motions to compel to ensure that your expert's opinion is not compromised at the time the deposition is to be taken.

4. Review the Expert's Report With the Expert

In preparation for the expert's deposition, you should review the expert's report in detail with the expert to ensure that you understand all of the opinions expressed in the report. You should carefully review the basis for the expert's opinions to ensure that they are well-grounded.

5. Review the Legal Foundation for Expert Testimony

Oftentimes, opposing counsel is taking your expert's deposition not just to prepare for trial. Rather, opposing counsel may take the deposition in preparation for filing a *Robinson* or *Daubert* challenge. Accordingly, when meeting with your expert and reviewing your expert's opinions, keep in mind the legal framework for expert witnesses set forth in *E.I. du Pont de Nemours and Co., Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See also* Tex. R. Evid. 702. You should also explain these concepts to the expert to ensure that the expert knows the pitfalls, and how to avoid them.

6. Review the Expert's Curriculum Vitae

You should also review your expert's curriculum vitae. Also, obtain and read your expert's writings and any prior testimony that is available, to ensure that your expert has not previously taken a position inconsistent with the position taken in your case. You should fully review your expert's qualifications, as well as his deposition and trial experience, to familiarize yourself with any areas for possible impeachment, and discuss this with your expert.

D. Treating Health Care Providers

If the opposing party notices the deposition of your client's health care provider, you should always schedule a meeting with the health care provider prior to the deposition.

1. Generally Explain the Claims in the Case

In preparing the treatise for the deposition, you should discuss generally the claims and issues in the case. Explain to the expert how his testimony fits with your theory of damages, and the important areas to be covered at trial.

2. Review the Medical Records With the Treater

You should review the medical records, including chart notes, to ensure that the physician or counselor can read his or her notes and is familiar with them. Also, you should review the treater's curriculum vitae and professional history.

3. Inquire Into Previous Deposition Experience

In some instances, the treater may not be familiar with the discovery process. You should ask whether the treater has ever given a deposition before. If not, you should address any concerns that the treater may have in giving a deposition, and should attempt to alleviate any anxiety the treater may have prior to the deposition.

4. Review the Questions To Be Asked

You should also ask some of the questions that the defendant's counsel is likely to ask during the deposition. Keep in mind that there is no privilege that exists between you and the treater. Moreover, the physician-patient or psychologist-patient privilege may have been waived if your client is claiming emotional distress damages in the lawsuit.

5. Explain Privileges That May Apply

Nevertheless, you should protect any other privileges that may not have been waived, such as the spousal communications privilege. When your client's spouse is not a witness in the litigation and the privilege has not been waived, be sure to inform the treater that your client, as holder of the spousal communications privilege, has not waived it. You should tell the treater to be alert to any questions that call for disclosing such privileged communications.

6. Review Any Protective Orders Entered in the Case

If there is a protective order in place that limits the scope of discovery relating to your client's medical history, provide a copy to the treating physician. In many instances, you can obtain a protective order that excludes highly personal medical information from discovery. The physician will need to know about any such protective order prior to the deposition.

III. YOUR CONDUCT DURING THE DEPOSITION

There are several rules that both you and your client should follow during the course of the deposition.

A. Never Leave Your Client Alone

You should never leave your client alone in a room where opposing counsel may come in. Opposing counsel may enter the room and engage in conversation with your client. As a result, your client may obtain a false impression about the lawyer as being his friend. This may cause your client to let his guard down during the deposition and volunteer information. It is important that an arm's length relationship always be maintained between your client or witness and opposing counsel.

B. Remain Alert

Second, you must always remain alert throughout the deposition so that objections can be made appropriately and timely. Moreover, in addition to listening for objections, you need to listen carefully to the testimony to determine if any follow-up questions will need to be asked following opposing counsel's examination.

C. Be Professional

Third, you should always maintain a professional demeanor during the deposition. Your conduct and posture during the deposition will convey messages to your client, as well as to opposing counsel and his client about your enthusiasm and impression of the case, which play important roles during settlement negotiations.

D. Conducting An Examination of the Friendly Witness

The general practice is that an attorney does not exam one's client or a friendly witness as part of the deposition. The rationale is that there is no reason to share information with the other side when there is no requirement that one do so.

There are, of course, exceptions: 1) when you need to correct testimony on the record given earlier in the deposition; 2) when the witness has refused to cooperate and to be interviewed informally or when you fear that the witness may change his or her mind to cooperate; and 3) when you suspect that the witness might change his or her story and opposing counsel has not asked about relevant facts that are helpful to your case.

IV. ETHICAL ISSUES

Several ethical issues may arise in the context of preparing a witness for a deposition.

A. Rule 3.04

Rule 3.04 of the Texas Disciplinary Rules of Professional Conduct governs several ethical issues that may arise during preparation of a witness for a deposition or trial testimony.

Rule 3.04 provides:

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do such an act.
- (b) falsify evidence, counsel or assist a witness to testify falsely, or pay, offer to pay, or acquiesce in the offer of payment or compensation to a witness or other entity contingent upon the content of the testimony of the witness or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in a payment of:
 - 1) expenses reasonably incurred by a witness in attending or testifying;
 - 2) reasonable compensation to a witness for his loss of time in attending or testifying;
 - 3) a reasonable fee for the professional services of an expert witness.
- (c) except as stated in paragraph (d), in representing a client before a tribunal:
 - 1) habitually violate an established rule of procedure or of evidence;
 - 2) state or allude to any matter that the lawyer does not reasonably believe is

relevant to such proceeding or that will not be supported by admissible evidence, or assert personal knowledge of facts in issue except when testifying as a witness;

- 3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused, except that a lawyer may argue on his analysis of the evidence and other permissible considerations for any position or conclusion with respect to the matters stated herein;
 - 4) ask any question intended to degrade a witness or other person except where the lawyer reasonably believes that the question will lead to relevant and admissible evidence; or
 - 5) engage in conduct intended to disrupt the proceedings.
- d) knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or the client's willingness to accept any sanctions arising from such disobedience.
- e) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
- 1) the person is a relative or an employee or other agent of a client; and
 - 2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

B. Suborning Perjury

Most cases involving charges of suborning perjury arise in the context of the Sixth Amendment. In *Nix v. Whiteside*, 475 U.S. 157 (1986), the United States Supreme Court held that the duty of an advocate to represent the defendant's cause is limited by the ethical rules:

Plainly that duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for the truth. Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law.

Id. at 166.

Although *Nix* was decided in the Sixth Amendment context, the same standards apply to all counsel in defining an attorney's representation of a client.

Texas courts have also addressed the issue of perjury and suborning perjury on behalf of counsel. See, e.g., *Weisinger v. State of Texas*, 775 S.W.2d 424 (Tex. App.—Houston [14th Dist.] 1989, writ ref'd) (attorney's belief of perjury is insufficient grounds to withdraw from representation); *Tice v. City of Pasadena*, 767 S.W.2d 700 (Tex. 1989) (holding that conspiracy to suborn perjury constitutes intrinsic fraud and will not support a bill of review).

C. Ethical Issues Arising From the Baron & Budd Deposition Memo

One of the most highly publicized incidents concerning the ethical implications of preparing a

client for their deposition involved a memorandum prepared by a paralegal for the law firm of Baron & Budd entitled “Preparing for Your Deposition.” In the memo, the plaintiffs in an asbestos exposure case were instructed on how to prepare for their deposition. Part of the instructions to the Plaintiffs were as follows:

It is important to emphasize that you had no idea asbestos was dangerous when you were working around it.

It is important to maintain that you never saw any labels on asbestos products that said Warning or Danger.

Do not mention product names that are not listed on your Work History Sheets.

Do not say you saw more of one brand than another, or that one brand was more commonly used than another.

It is very important to say that there were lots of other brands. You just cannot recall all the names.

Unless your Baron & Budd attorney tells you otherwise, testify only about installation of new asbestos material, not tear out of the old stuff. This is because it is almost impossible to prove what brand of materials was being torn out.

You want to be perfectly clear on the record that you did not expose yourself to asbestos once you learned it was dangerous.

You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself. The more you thought about it, the more you remembered! If the defense attorney asks you if you were shown pictures of the products . . . say that a girl from Baron & Budd showed you pictures of many products, and you picked out the ones you remembered.

If there is a mistake on your Work History Sheets, explain that the girl from Baron & Budd must have misunderstood what you told her when she wrote it down.

The difference between your exposure to asbestos and your exposure to cigarettes is this: Cigarettes are addictive and you would quit if you could! You didn’t know asbestos was harmful when you worked around it.

A first-year lawyer for Baron & Budd inadvertently produced the memo to the defense in response to a request for production in litigation pending in Nueces County. Defense counsel in other cases quickly learned about the contents of the memo and requested its production in those cases. The Baron & Budd memo raises a couple of issues.

1. Is the Memo Unethical?

First, does the memo constitute improper coaching of a witness? Most agree that the memo is improper. However, there has never been a finding that it violates Rule 3.04. While the memo was forwarded to the State Bar Grievance Committee, the Committee dismissed the grievance. Because the State Bar did not issue a written opinion on the subject, it is unclear whether the State Bar believes that the memo was permissible, or whether there was insufficient evidence to connect Baron & Budd’s lawyers to the actions of the paralegal.

2. Is the Memo Privileged?

Another issue raised by the memo is whether it is protected by the attorney-client privilege, or whether the crime-fraud exception applies to the memo. The Texas Court of Appeals has held that the memo is protected by the attorney-client privilege. The Court held that the crime-fraud exception does not apply because there was no showing that the client was “contemplating the commission of a fraud or crime.” *See In re Brown*, 1998 WL 207793 (Tex.App.–Austin 1998).

V. PREPARING YOUR WITNESS FOR TRIAL

Preparing your witness for trial will require a wholly different method of preparation than was done for his deposition. At trial, you will need to work with your witness on presentation of the testimony, as well as giving full and complete answers to your questions.

A. Explain the Trial Process

The first thing that you must do is fully explain what will take place at trial. Most of the time, this will be your witness’s first appearance in court. Accordingly, you must set your witness at ease by fully explaining what will happen at trial.

B. Practice the Testimony

Next, you must explain the difference between trial testimony and deposition testimony. On direct examination, this is your client’s opportunity to present the evidence he has to support his claims or defenses. This is not the time to hold anything back, and wait for the right questions to be asked in order to give information. Rather, the witness should fully elaborate on all of your questions, which is why the testimony should be reviewed prior to his appearance in court.

C. Meet With Your Client Early

If at all possible, avoid meeting with your client only on the day before trial. Rather, you should meet with your client about one week prior to his anticipated testimony. During that meeting, fully go through the questions that will be asked, and allow him to practice the answers. After meeting with your client, give him some time to think about the testimony. Then, meet with your witness the day before his testimony for a final review.

D. Prepare Your Witness for Cross-Examination

Finally, you must prepare your witness for cross-examination. At this stage, discovery will be complete, and you should have a complete understanding of the strengths and weaknesses in the case. You must convey each of these to your witnesses. Explain to your witness where the areas for attack will be, and explain how to best handle the questions.

Also, explain to your witness that unlike you, opposing counsel is generally allowed to ask leading questions that attempt to suggest the answer. Therefore, it is critical that the witness listen carefully to the question. At the same time, the witness should not take too much time to think of the answer before the response. You do not want your client to give the jury the impression that he is contriving his answer.

Finally, talk to your witnesses about the following suggestions, which will help to prevent him from giving an answer or impression that he does not intend to give:

1. Do Not Fight With Opposing Counsel

Explain to your witness not to fight with opposing counsel. He does not want to appear argumentative before the jury. The appearance, demeanor, and mannerisms of a witness are critical in convincing the jury that the witness is candid and honest.

2. Trial Testimony is Different from Deposition Testimony

Explain to the witness that in preparation for a deposition, you instructed them not to volunteer information, not to argue the case and to answer only "yes" or "no" to questions that could be answered that way. Trial will be different. The trial is the witness's opportunity in Court to tell the story. Accordingly, explain to the witness that he should feel free to add explanations, if appropriate. Even if the question calls for a "yes" or "no" answer, the witness is entitled to add an explanation. Therefore, explain that if a brief explanation can be made then go ahead provide the quick explanation. Caution the witness not to appear argumentative. Note, however, that there is a difference between explaining a responsive answer and insisting on making an unresponsive argument. Point out to your witness that when his is being cross-examined, he will usually have the jury's sympathy. The jury understands that the cross-examiner is in a position of power and control. Of course, if the witness insists on quibbling about words or being too literal, the jury's sympathy may switch from the witness to the lawyer.

Where a lengthy explanation is required, tell the witness to ask permission of opposing counsel to explain the answer. If the opposing attorney denies the request, explain to the witness not to become upset, and that you will cover the explanation during your re-direct examination.

3. Always be Truthful

Tell your witnesses to always be truthful. Explain that a small lie, about even a non-consequential fact can destroy the witness's credibility with the jury. Of course, explain that if the witness really does not know or cannot remember, then it is permissible to say so. But caution the witness that a jury usually infers an adverse answer from "I don't recall."

4. Never Refuse to Answer a Question

Explain to your witness that he is on his own when they are on the witness stand at trial. Make clear to your witnesses that they should never ask to consult with you or ask for a recess during the cross-examination. Similarly, the witness should not look at you during the cross-examination. Rather, they should answer the opposing attorney directly and candidly, and should also talk to the jury from time to time.

Explain to the witness to never refuse to answer a question. Explain that you will assert an objection if the question is improper. You should also instruct your witnesses that whenever either lawyer stands up to make an objection, they should wait for the Court to rule before they answer the question.

Also, explain that during cross-examination, it is fair for the cross-examiner to ask for an opinion, to ask hypothetical questions, even to ask the witness to speculate. The witness should not refuse to answer, but simply make clear that they are guessing or speculating if indeed that is what he is doing.

Finally, explain to the witness that if they are asked about a document, the witness should never rely on his memory concerning the contents of the document. Rather, the witness should always ask the lawyer to show it to him, and he should review the relevant parts prior to answering questions about such a document.