

C. "Coaching" Witnesses

There appear no reported decisions in Virginia state court discussing the coaching of witnesses, although there are reported decisions from federal courts in Virginia, as well as from other jurisdiction.

But first, a clarification in terminology. Used pejoratively, "coaching" a witness means the witness is saying what the attorney wants said, rather than the truth, or what the witness actually remembers. As counsel, you have an obligation to prepare your client and trial witnesses, including experts, to rehearse them and listen to their answers, and to assist them to choose words which most effectively convey the theme of the case. It is also proper to anticipate cross-examination and assist the client and witnesses with responses. This is not improper coaching; it is your duty as a trial attorney. However, there is a line which one does not want to cross and that is coaching a witness to offer false testimony, including testimony the witness cannot recall. It is never acceptable to condone untruthful testimony and if you detect your client is considering such testimony, you must advise the client that as an officer of the court, you cannot continue as counsel if the client persists. If the client persists you should probably seek to withdraw as counsel.

A plaintiff's improper conference with an expert witness, during a break in a deposition, resulting in the witness changing his answer, constitutes improper coaching and is sanctionable. Depositions are to be conducted as if the witness were testifying at trial. Courts have ruled that once a deposition begins, counsel should not confer with the witness except to determine whether a privilege should be asserted. To confer and have the expert change his answer is sanctionable. Medicinova, Inc. v. Genzyme Corp., 2021 U.S. Dist. LEXIS 135060 (S.D. Cal. July 20, 2021) In Medicinova, the Plaintiff argued its expert misspoke during his deposition. Rather than approach the expert during a break and suggest a new answer, the court stated that a proper way for Plaintiff to remedy the issue would have been for Plaintiff's counsel to question Dr. Burger at the conclusion of the deposition.

Sanctions have been awarded when counsel engaged in a pattern of disruptive and abusive speaking objections during depositions. This includes objections designed to slow down the deposition and allow counsel time to coach his witnesses. Martinez v. Coloplast Corp., No. 2:18-cv-220, 2021 U.S. Dist. LEXIS 111818 (N.D. Ind. June 15, 2021)

Courts generally prohibit objections which suggest answers to or otherwise coach the witness, commonly called "speaking objections". Objections are to be brief, and are not contain any information that may serve to coach the witness. United States v. Santoso, 2018 U.S. Dist. LEXIS 136889 (D. Md. Aug. 14, 2018); Marksberry v. FCA, US LLC, 2021 U.S. Dist. LEXIS 99423 (D. Kan. May 26, 2021).

The plaintiff corporation designated its in-house patent counsel to testify at a 30(b)(6) deposition relating to Plaintiff's allegations of patent infringement. It was improper and sanctionable for counsel defending a deposition to engage in numerous obstreperous speaking objections which were thinly veiled attempts to coach his witness. Masco Corp. v. Price Pfister, Inc., 1994 U.S. Dist. LEXIS 20597 (E.D. Va. Oct. 7, 1994)