|  |  |
| --- | --- |
| **Improper Deposition Prep:** | **Applicable Rule/Citation** |
| Disclose information to testifying expert witness, and advise him that the information will always be confidential. | Prior rule: the disclosure of confidential information to a testifying expert witness generally waived the attorney-client privilege as to any information shared. *In re Pioneer Hi-Bred International*, 238 F.3d 1370, 1375 (Fed. Cir. 2001) — rule modified by new Rule 26(b)(4)(C); see *Pact XXP Technologies v. Xilinx*, 2012 WL 1205855 (E.D. Tex. 2012) |
| Advise witness that he is free to confer privately with attorney during deposition at any time. | It’s improper for an attorney to confer with a witness during deposition, except to decide whether to assert a privilege. *Hall v. Clifton*, 150 FRD 525 (E.D. Pa. 1993) [citing Federal Rule 30(c)] |
| Advise witness not to worry if he gives an incorrect answer during deposition, because he can always change his answers after the deposition has been transcribed. | If material changes are later made to a deposition, both the original testimony and changes are part of the record – the deponent may be impeached with his original answers. *SEC v. Parkerburg Wireless LLC*, 156 FRD 529, 536 (D.D.C. 1994). Alternatively, the deposition can be re-opened. *US ex rel Burch v. Piqua Engineering*, 152 FRD 565. 567 (S.D. Ohio 1993). Alternatively, court may refuse to allow changes. *Greenway v. International Paper Co.*, 144 FRD 322, 325 (W.D. La. 1992). See *Devon Energy Corp. v. Westacott*, 2011 WL 1157334 (S.D. Tex. 2011) [Lee Rosenthal] |

**Law Review Articles and Other Sources**:

*Witness Preparation*, 68 Tex. L. Rev. 277 (1989)

*Defending a Deposition of Your Organizational Client’s Employee: An Ethical Landmine Everyone Ignores*, 44 South Tex. L. Rev. 185 (2002)

*Deposition Dilemmas: Vexation Scheduling and Errata Sheets*, 17 Geo. J. Legal Ethics 1 (2004)

*Rambo Depositions Revisited: Controlling Attorney-Client Consultations During Depositions*, 17 Geo. J. Legal Ethics 367 (2004)

*Professional Conduct and the Preparation of Witnesses for Trial; Defining the Acceptable Limitations of “Coaching”*, 17 Geo. J. Legal Ethics 367 (2004)

*Expert* *Witnesses: Ethics and Professionalism*, 17 Geo. J. Legal Ethics 465 (2004)

*Aren’t you Really Telling Me …? Ethics and Preparing Witness Testimony*, 44 Arizona Attorney 15 (2008)

*Rewriting the Record: Federal Court Split on the Scope of Permissible Changes to a Deposition Transcript,* 3 Federal Courts Law Review 1 (2009)

*Ethical Preparation of Witnesses for Deposition and Trial*, by Erin C. Asborno, Summer 2011, Verdict 25:3, p. 12. © American Bar Association; available on-line at http://apps.americanbar.org/litigation/committees/trialpractice/articles/121311-ethics-preparation-witnesses-deposition-trial.html