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The Ethics of Witness Preparation

by

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THE APPLICABLE ETHICAL RULES

Forty-nine states have adopted some form of the ABA Model Rules of Professional Conduct. There are three categories of rules in Arizona that apply to the general subject of witness preparation.

Witness preparation for ethical trial lawyers involves obligations to the client, candor toward the tribunal and fairness to the witness, the opposing party and opposing counsel. The applicable Ethical Rules are:

Ethical Rule 1.6 Confidentiality of Information.

Ethical Rule 3.3 Candor Toward the Tribunal.

Ethical Rule 3.4 Fairness to Opposing Party and Counsel.

Ethical Rule 4.1 Truthfulness in Statements to Others.

Ethical Rule 4.4 Respect for Rights of Third Persons.

COACHING, SANDPAPERING & SMOOTHING

Trials are rarely won or lost on the law. Rather, it is the factual testimony that tips the balance one way or the other. In the same vein, trials are more often won on direct examination than on cross. So, preparation of your witness for direct examination may be the pivotal issue in success at trial.

The ethical issues revolve around the extent to which it is permissible to "assist" a witness to prepare or enhance his or her testimony.

First, the easy issues:

- (1) It is ethical to employ "reflective" questioning and preparation in order to make events seem as though they occurred quickly or slowly. "Reflective" questions help witnesses communicate accurately; they do not alter the truth.
- (2) It is ethical to employ "clarifying" techniques to insure the witnesses' testimony is easy to follow, appears confident and is simple. "Clarifying" the facts does not alter the truth.

- (3) It is ethical to employ "body language" instruction to give the witness a chance to present testimony that is not distracting or debatable because of "how" it was presented. Making the witness sit up straight or look at the jury when testifying does not alter the truth.
- (4) It is ethical to refresh a witness' memory, to assist him or her to testify in a straightforward and effective manner and to help the witness be prepared to meet improper or suggestive lines of hostile examination.

Second, the harder issues:

- (1) It is ethically questionable to assist or allow a witness to color testimony so that the shades of gray in it become black and white.
- (2) It is ethically questionable to fill in gaps in the story from debatable sources. And you may suggest alternative theories based on the lawyers own view of the facts.
- (3) It is ethically questionable to emphasize the importance of style over substance. For example, if the witness honestly believes the product malfunctioned, one ought not to bury that fact by emphasizing that the sale really never occurred so why worry about the malfunction.
- (4) It is ethically questionable to advise a client or a witness about the law or about desired testimony before seeking the witness' own version of the events. This, in some situations, can come dangerously close to subornation of perjury if the witness changes the facts to fit the law or the desired testimony. The "what do you want me to say" syndrome is ethical quicksand for the preparing lawyer.

Third, the easiest issues:

- (1) It is absolutely unethical to participate in the creation of false testimony.
Trial lawyers are the heart of the adversary system of justice. We act as guardians of the system to prevent the offer of perjured evidence. Without this safeguard, the very justification of adversary litigation would be destroyed.
- (2) Lawyers must not ever collude or conspire with clients or witnesses to invent untrue facts.

There are a few reported cases dealing with the ethical issues inherent in coaching trial witnesses to give testimony in a particular way. One of the few Arizona cases is

State v. *Cornell*, 179 Ariz. 314, 878 P.2d 1352 (1994). Cornell was convicted of first-degree murder and sentenced to death. The defendant represented himself at the trial but did have advisory counsel. His advisory counsel retained an expert medical witness who testified on direct that the defendant suffered from temporal lobe epilepsy. On cross, the prosecutor asked a series of questions implying that the defendant's advisory counsel had coached his client to feign symptoms of epilepsy.

The defendant's advisory counsel asked the court for permission to withdraw from the case so he could testify to rebut the insinuation that he had coached the defendant to feign having had an olfactory hallucination after the killing. The trial judge agreed that this was the prosecutor's intended insinuation. The prosecutor did not deny this. The trial judge denied the motion to withdraw but ruled that the prosecutor would be precluded from making the coaching argument to the jury.

On appeal the defendant argued that the prosecutor's misconduct denied him a fair trial and due process of law as guaranteed by the Constitution. The Arizona Supreme Court noted its agreement with the trial judge's finding that the prosecutor undoubtedly intended his question to place in the juror's mind the idea that advisory counsel coached defendant on how to feign the symptom of temporal lobe epilepsy.

The Court restated the well-settled law that a prosecutor must not make prejudicial insinuations without being prepared to prove them. The court also criticized the prosecutor's questions as they "unfairly cast aspersions on advisory counsel's integrity. While noting its "strong disapproval of such conduct," the court found that the misconduct in this instance did not rise to the level of fundamental error.

One of the best cases on witness coaching at the deposition level is *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pennsylvania, 1993). The court held that: (1) witness being deposed and his or her attorney may not confer during course of deposition unless conference is for purpose of determining whether privilege should be asserted, and (2) witness and counsel are not entitled to confer about document shown to witness during deposition before witness answers question about it.

In *Aiello v. City of Washington*, 623 F.2d 845 (3rd Cir. 1980) the district court, because of its concern over "witness coaching" ordered the plaintiff and his counsel not to communicate during breaks in plaintiff's cross-examination.

There are two excellent law review articles on this issue. I highly recommend Prof. Janeen Kerper's thoughtful approach set forth in the ABA Litigation magazine entitled "*Preparing a Witness for Deposition.*" Volume 24, Number, page 11, Summer 1998. For the most comprehensive treatment of the subject see Prof. Wydick's 52 page tome entitled "*The Ethics of Witness Coaching*" in the Cardozo Law Review, Vol. 17:1 at page 1. Prof. Wydick divides witness coaching into three grades, as follows:

GRADE ONE witness coaching is where the lawyer knowingly and overtly induces

a witness to testify to something the lawyer knows is false.

GRADE TWO witness coaching is the same as Grade One except that the lawyer acts covertly. Covertly means that the lawyer's inducement is masked. It is transmitted by implication.

GRADE THREE witness coaching is where the lawyer does not knowingly induce the witness to testify to something the lawyer knows is false, but the lawyer's conversation with the witness nevertheless alters the witness's story. Given the malleable nature of human memory, Grade Three witness coaching is very hard to avoid. It lacks the element of corruption that Grades One and Two have, but it does alter a witness's story and can thus interfere with the court's truth-seeking function.

WHAT LAWYERS KNOW

Before inquiring into the duty of a trial lawyer who is confronted with client or witness perjury, it is critical to define the precise circumstances that trigger the obligation to react to perjury.

Reasonable suspicions are not sufficient. At the other extreme the lawyer does not have to have knowledge beyond doubt. The correct standard is that of "certain knowledge."

The 1969 ABA Code and the 1982 ABA Rules state that a lawyer shall not "knowingly" use perjury. The terminology section of the Rules states that such a level of knowledge "denotes actual knowledge of the fact in question." Arizona is consistent with the ABA position and that of most other states.

Where the trial lawyer's knowledge does not rise to the level of "certain knowledge" he or she has professional discretion. That is to say that the lawyer may (but does not have a duty to) refuse to offer evidence that he "reasonably believes" to be false.

In my experience, the most difficult ethical dilemma ever faced by a trial lawyer comes when the client's recollection of a fact during a "pretrial" discussion turns out to be different than his recollection during your preparation session before the "actual" testimony is given. There are several possible explanations:

- (a) Perhaps the timing makes the client's recollection sharper.
- (b) Perhaps the importance of accurate recollection is brought home just before testifying.

- (c) Perhaps the client has had enough time to be truly reflective of the truth.

It is here that it is hardest to remember the soul of fiduciary obligation to clients. You cannot allow them to lie but you must give them the benefit of some reasonable doubts.

You do not have to insist that the first "version" of the story is true just because it was first.

You do not have to assume that the second "version" is false just because the client now knows of its importance. Unless one version or the other is patently false, an ethical trial lawyer may act in a fiduciary capacity by letting him tell his story.

CLIENT PERJURY

Client perjury may well be the most difficult dilemma presented to trial lawyers in every state. The various ethical codes address the prohibitions against client perjury and the remedial measures available to rectify perjured testimony.

The evolution of the law regarding client perjury is fascinating (at least to me). Arizona's approach is as follows:

- (a) In 1974 we had an obligation to reveal a client's perjury, if it occurred during the trial but no opinion was offered on how to reveal it or how to deal with the problem if the trial judge denied withdrawal.
- (b) In 1978, we were told that our obligation was to discuss the perjured testimony with the client and if he failed to recant, then we were to withdraw and reveal it to the court.
- (c) In 1980, it was resolved that there was no ethical duty to inform the court of probable perjured testimony if you learned of it solely by communication with the client following the trial.
- (d) In 1984, the ABA Model Rules were passed and the duty of candor to the court was expressly held to trump the duty of confidentiality to the client.

Despite the centrality and difficulty of the perjury problem, the professional regulations spoke in barely detectable whispers about it until the adoption of the ABA Model Rules in 1983. Broadly stated, those rules take a strong position against a lawyer's participation, even if unwillingly, in the presentation of perjury.

PROSPECTIVE PERJURY IN CRIMINAL CASES

The trial lawyer's ethical dilemma regarding the client who wants to commit perjury in a criminal case is created by two constitutional considerations:

First, if the lawyer prohibits the client from taking the stand, the lawyer may infringe on the client's right to testify.

Second, by prohibiting client testimony or attempting to rectify prospective perjury, the lawyer may deny the client effective assistance of counsel protected by the Fifth Amendment.

In *Nix v. Whiteside*, 475 U.S. 157 (1986), the Supreme Court held that threats to withdraw or to reveal perjury do not prejudice a client's constitutional rights to testify and have effective counsel.

There is little agreement over whether withdrawal is mandatory and whether a trial lawyer may disclose the reasons for the withdrawal. If a request for withdrawal is denied there are four different approaches that a lawyer may take:

- (1) The trial lawyer may disclose the proposed perjury to the trial judge. This is the Whiteside approach.
- (2) The trial lawyer may deal with the prospective client perjury via the "narrative approach." When faced with the threat of perjury, the lawyer asks the defendant to testify in narrative fashion without the aid of direct examination.
- (3) The third approach to combating client perjury when withdrawal is denied calls for the lawyer to "fully" represent the defendant. The trial lawyer makes no explicit or implicit reference to the perjury. At least one California court seems to endorse this approach: *People v. Blye*, 43 Cal. Rptr. 231, (1965).
- (4) The final approach is that endorsed by the ABA and the Arizona Supreme Court. Under this approach the lawyer can refuse to place the defendant on the stand and, if forced to do so by the trial judge, can reveal the perjury. This view is the same as the "prospective perjury instances" in civil cases.

COUNSELING WITNESS FALSEHOODS

Closely related to paying witnesses for particular testimony is the prohibition against improperly coloring a witness's testimony. The trial lawyer is prohibited from counseling a witness to testify a certain way, to stonewall the opposition, or to otherwise remain unavailable for testimony.

The ABA Rules expressly prohibit lawyers from counseling or assisting a witness to testify falsely or from offering evidence the lawyer knows to be false. The ABA Rules specifically prohibit lawyers from engaging in fraudulent conduct and the case law uniformly defines fraudulent conduct to include perjury.

COUNSELING CLIENT FALSEHOODS

In preparing a case for trial, the trial lawyer must acquire many facts from the client. It seems natural for trial lawyers to have much zeal and enthusiasm at the early stages of representation. On occasion, trial lawyers are tempted to "structure" facts as they are elicited during client interviews.

Giving in to such temptations not only constitutes poor lawyering and mediocre advocacy but also triggers various ethical violations.

In Arizona and most other states, the obligation to maintain client confidentiality is trumped by the obligation of candor to the court.

Arizona Ethical Rule 1.6 "requires" lawyers to reveal information acquired from clients that is necessary to prevent clients from committing a criminal act that is likely to result in death or substantial bodily harm. Our rule also "allows" lawyers to reveal the intention of clients to commit any crime and any information necessary to prevent the crime.

As previously noted, the obligation to keep the client's information confidential under E.R. 1.6 is expressly overruled by the obligation to be candid with the court under E.R. 3.3.

REACTING TO PERJURED TESTIMONY

What must be done when testimony is about to be offered that is untruthful or has actually been given is dependent on two things:

- (a) The context in which the problem arises, and;

- (b) The jurisdiction in which the problem arises.

It is settled law in civil cases that trial lawyers are prohibited from participation in perjury. Correction by the lawyer, including disclosure of it may be necessary in some jurisdictions or permissive in others. The context in which perjury occurs controls the corrective action required. It must be an ad hoc approach. No one rule can apply.

"Remonstrance" is clearly required. The extent and timing of what you have to do may include some or all of the following:

- (a) Recanting false testimony.
- (b) Withdrawal as counsel.
- (c) Declining to call witnesses.
- (d) Eliciting contrary testimony or impeaching the testimony.
- (e) Arguing (or declining) to the fact finder.
- (f) Disclosure.

"Remonstrance" means that you must attempt to persuade a client not to present or, if it has been presented, to correct false testimony. In "remonstrating," you have to tell your client about perjury, its penalties, the risks of its detection, the importance of truthful testimony, your duty to withdraw, and, most importantly your duty to disclose (if applicable).

Sometimes we forget that the trial lawyer controls access to the witness stand, not the client. In the instance of a witness or client who will testify truthfully to some questions but falsely to others, a lawyer may not put a question knowing that the answer is likely to be false.

The distressing problem of surprise perjury can sometimes be dealt with by not arguing in summation that the fact finder should accept, as credible, evidence that the lawyer believes to be false.

The client's right to testify occasionally collides with the lawyer's obligation to be candid with the court under E.R. 3.3. Under this rule lawyers are prohibited from offering evidence that the lawyer knows to be false. There is a stated exception for criminal cases (couched in the ambiguous language of the rule; "except as required by applicable law").

Arizona clearly requires the lawyer to take reasonable remedial measures if false evidence has been offered but does not offer very clear direction as to what is "reasonable."

It is clear that the duty to take reasonable remedial measures continue "to the conclusion of the proceeding". It is often argued that this means that the lawyer has no duty to correct false testimony after the trial is over. This argument has been rejected by the best of the trial bar but continues to plague us. It is most often articulated by the "over-zealous" trial lawyer for whom winning is everything.

CONCLUSION

Of all the things we do as trial lawyers, nothing is as important as preparation and nothing as vital as truth. So, it is in preparing our witnesses' to tell the truth that we perform at the highest professional level.

This little monograph cites cases and rules from the 80's and 90's. That is the 1980's and 1990's. Lest anyone think that this is new subject I will refer you to Judge Francis Finch who got it right when he wrote:

While a discrete and prudent attorney may very properly ascertain from witnesses in advance of the trial what they in fact do know, and the extent and limitations of their memory, as a guide for his own examinations, he has no right, legal or moral to go further. His duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does not know, not to teach him what he ought to know.

Judge Finch was a senior member of the New York Judiciary when he wrote that in the rarely cited case of *In Re Eldridge*, 37 N.Y. 171 in the year 1880.

Lawyer bashing is an age-old tradition in free societies like ours. It will go on no matter how much we protest. However, we can at least give them less to go on if we strive for honest testimony in open court and denounce those who manufacture the evidence just to win. While witness coaching is suspect, cognitive interviewing of witness is admirable. That is what ethical lawyers do when they want to coach less and learn more from their witnesses.

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